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Centre for Trade Facilitation and Electronic Business (UN/CEFACT)

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**REPORT OF THE UN/CEFACT JOINT LEGAL LIAISON RAPPORTEUR  
TO THE UN/CEFACT PLENARY AND REPORT ON THE WORK  
OF THE UN/CEFACT LEGAL GROUP (LG) DURING  
THE PERIOD APRIL 2002 TO MARCH 2003**

Submitted by the UN/CEFACT Joint Legal Liaison Rapporteur and Chair of the Legal Group \*

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\* This report is submitted to the Plenary for discussion and noting.

## **1. Introduction**

This paper consists of the report of the Legal Group (LG) concerning the activities of the Group during the year between April 2002 and March 2003. It also constitutes the Joint Legal Liaison Rapporteur's report to the Plenary for the same period.

## **2. Reporting Procedures**

In order to facilitate the liaison and reporting procedures between the Legal Group, the UN/CEFACT Steering Group (CSG) and the UN/CEFACT Forum, the Joint Legal Liaison Rapporteur attended all meetings of the Legal Group during the year, initially in the capacity of Vice Chair of that group and subsequently in the capacity as its Chairman. The Joint Legal Liaison Rapporteur also attended some of the meetings of the CSG which were held during the course of the year and participated in a number of the Forum meetings held both in person and by teleconference during the same period.

The Legal Group met on four occasions during the year in Cologne, Geneva, Copenhagen and Tunis. When the group met in Cologne the meeting was hosted by the law firm of Graf von Westphalen. The Danish Standards Authority hosted the meeting in Copenhagen and the Tunis Center for Conciliation and Arbitration hosted the Tunis meeting. These bodies also sponsored the cost of secretarial support from the permanent secretariat staff of UN/CEFACT and the Legal Group is most grateful to all three bodies for this very practical form of support for its work programme.

## **3. Mandate**

In accordance with the provisions of TRADE/CEFACT/2002/8/Rev.1 the Legal Group came into being as the successor to the previous Legal Working Group and it is required to support all UN/CEFACT groups as well as developing its own projects as defined by the Plenary. It has responsibility for issuing, publishing and presenting analyses of existing legal processes and procedures, reports on constraints to more effective legal processes, and proposals to UN/CEFACT and other organisations for more effective legal processes and procedures in the fields of electronic business and international trade. This includes publishing guidelines for better business practice within the area of the mandate and involves liaison with other groups and organisations as required. The membership of the UN/CEFACT Legal Group is, in accordance with the rules of UN/CEFACT, based upon experts who are nominated to the group by their Head of Delegation. Members are expected to make contributions based on their expert views on issues under discussion rather than representing any sectarian, national or political position.

## **4. Methodology**

During the course of the last year the Legal Group has proceeded, in accordance with its mandate and terms of reference, to focus on practical measures to facilitate international electronic commerce trade transactions. Previous work has identified the areas considered to be important to be addressed; these being contractual solutions, legislative solutions, voluntary processes such as codes of conduct and other work including the development of appropriate model legislation and the possibility of the development of international conventions. The latter two areas are primarily the responsibility of other bodies within the United Nations such as the Commission on International Trade Law (UNCITRAL) and the Legal Group continues to work to support such activities.

## **5. Membership**

It is necessary to report that in December 2002 the Chair of the Legal Group, Professor Dr. Rob van Esch had to resign because of his appointment to a more senior position and his resulting lack of available time to contribute to the process. Professor Dr. van Esch had been the Chair of the Legal Group since 1997 and has made a very significant contribution to the group's work during his term of office. His expertise and patient guidance will be sadly missed. At the December meeting of the Legal Group the Joint Legal Liaison Rapporteur, Mr David Marsh, who was then the Vice Chair of the Legal Group, was elected to the position of Chair and Mr Klaus Brisch of Germany was elected as Vice Chair to the group.

## 6. Detailed work items

### 6.1 Interchange Agreements and Trading Partner Agreements

Recommendations 26 and 31 of UN/CEFACT are practical solutions for the regulation and security of e-commerce transactions using contractual procedures. Over the last two years the Legal Group has worked closely with the EDIFICE organisation which has been responsible with RosettaNet for the development for its membership of an additional approved form of trading partner agreement. This work complements the principles developed in Recommendations 26 and 31 although it does not, of course, replace these Recommendations. Representatives from EDIFICE have been active in Legal Group meetings and the Legal Group has now completed its review of the excellent work carried out by EDIFICE. A copy of the EDIFICE trading partner agreement is distributed as a separate UN/CEFACT Plenary document (TRADE/CEFACT/2003/19), and the Plenary is invited formally to endorse the EDIFICE trading partner agreement as one example of a suitable form of precedent for appropriate application and use.

### 6.2 Work with UNCITRAL

As indicated above, the Legal Group continues to be committed to the work programme which encourages all types of solutions to resolve legal barriers to the development of electronic commerce in support of international trade. The second Joint Legal Rapporteur to the Legal Group is also the Legal Rapporteur and Legal Secretary of UNCITRAL and through this connection there is a close awareness of the model law solutions to electronic commerce legal frameworks being developed by that body.

### 6.3 Model Certification Authority terms

The Legal Group has paused its work on this topic because of the current perception that the function of certification authorities in the context of electronic signatures is presently undergoing review in a number of relevant jurisdictions. Developments in this area are being regularly monitored and, when it is considered appropriate, the intention would be to re-open this work item with a view to considering the possibility of a draft Recommendation on Model Certification Authority terms.

### 6.4 Online Dispute Resolution

Drafting work continues regarding the development of a Recommendation concerning online dispute resolution of electronic commerce disputes between trading partners engaged in international transactions. Very useful input has been received during the process of an extensive consultation programme and attached to this report is a copy of the current draft. The Plenary is merely invited to note this draft at this point as it is anticipated, with the assistance of very useful contributions from the International Chamber of Commerce, UNCITRAL and other parties which are presently under consideration, it will be possible to develop the present draft, hopefully to the point where it can be in a final form for submission to the Plenary as a Recommendation at its 2004 meeting.

### 6.5 Road Map on Legal Aspects of Trade Facilitation

At its December 2002 meeting the Legal Group accepted in principle a proposal to pursue a new work item concerning the production of a roadmap designed to assist developing and transitional economies in creating legal infrastructures to facilitate international trade and electronic business. This work would be proposed as a joint project with the International Trade and Business Processes Group of UN/CEFACT and it would be resourced with research assistance very kindly offered by the Wharton Business School, University of Pennsylvania, Philadelphia, USA. Steps are currently in hand to prepare a formal proposal for a new joint TBG/LG project concerning this possible new deliverable.

#### 6.6 Unified Business Agreements and Contracts (UBAC proposal)

This is a proposed new joint project between the LG and the TMG and relates to the deliverable of a legally enforceable electronic business relationship linked to the UN/CEFACT Modelling Methodology (UMM) within an eb/XML environment. This work would be based upon the principles already established in Recommendations 26 and 31.

### 7. **External Relations**

During the year, the Joint Legal Liaison Rapporteur attended a number of conferences and made presentations in various jurisdictions regarding the UN/CEFACT Legal Group's activities. In particular, a presentation was given to the American Bar Association at its annual meeting in August 2002 in Washington and the Joint Legal Liaison Rapporteur also made a presentation to a combined UNCTAD/ESCAP conference on the development of electronic business in developing economies held in Bangkok in November 2002.

### 8. **Meetings participation**

In previous reports the Joint Legal Liaison Rapporteur has stressed the need for delegations to the UN/CEFACT Plenary continually to encourage further participation by electronic business legal experts. Delegates are again politely reminded of the need to seek to identify expert participants to the process in order to widen the pool of expertise, the resources and the geographical mix of the group. It is the policy of the Legal Group that, as far as is possible, the understandable difficulties associated with the cost and security of international travel should not discourage potential attendees. To assist with such problems, every effort is made to ensure that all Legal Group members are kept fully informed of the development work programme via the Legal Group list server and that as much work can be done over the internet and by e-mail. In addition, the policy of encouraging associated sub-groups continues. At present the AFACT Legal Working Group functions as a sub-group of the Legal Group and a number of potential members involved in the American Bar Association have been identified as a possible nucleus of a North American Group. It will be noted that the Legal Group meeting held in December 2002 was hosted by the Tunisian Centre for Arbitration on the continent of Africa and, through this connection, efforts are in progress under the leadership of Dr. Abdelwahab El-Bahi of Tunisia to establish the nexus of an African continent sub-group. Similarly, colleagues in Brazil are working on the development of a Latin American sub-group.

### 9. **UN/CEFACT Structure**

As delegates will be well aware, as a consequence of the restructuring which was approved by the Plenary at its May 2002 meeting, a twice yearly Forum takes place at which all of the UN/CEFACT Groups are expected to attend. At the first Forum meeting in September 2002, which was held in Geneva, the Legal Group held a meeting and was pleased to participate in the process. Unfortunately, however, the subsequent meeting held in San Diego in March 2003 was not attended by Legal Group members, primarily because of the practical difficulties associated with the cost of travel to North America and the associated lack of resources to permit attendance. It will be recognised that the majority of currently active members of the Legal Group are based outside the USA and although, as indicated above, efforts are being made to improve North American participation, it does mean that the participation of the Legal Group in the overall UN/CEFACT Forum process is patchy. It is also likely to be difficult to ensure adequate representation from the Legal Group at the next Forum meeting which is scheduled to take place in September 2003 in Seoul.

### 10. **Secretariat Support**

Over the year, the Legal Group has continued to receive dedicated support from the UN/CEFACT secretariat. In particular, the efforts of Mr Mario Apostolov have been greatly appreciated. The organisational and administrative efficiency and support provided to the Legal Group continues to increase the level of activity and the potential for the delivery of work items in accordance with the Legal Group's mandate.

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## **ANNEX**

# **DRAFT RECOMMENDATION ON ONLINE ALTERNATIVE DISPUTE RESOLUTION (ODR)**

### Executive Summary

The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) proposes this Recommendation, because it sees the need of guidance regarding the development of Online Dispute Resolution (ODR). The intention of this Recommendation is to encourage all members of UN/CEFACT, particularly national Governments, to promote the development of ODR. In this sense, Governments should refrain from adopting any rules hindering ODR in their future legislation. This Recommendation consists of this executive summary, an analysis of the issues, and specific recommendations to be considered by the UN/CEFACT membership.

### **1. Introduction**

This Recommendation addresses the question of how conflicts involving trading partners can be more easily resolved. E-commerce is capable of increasing the frequency of cross border transactions; therefore, it is also capable of increasing the frequency of cross-border disputes concerning commercial transactions. The process of online alternative dispute resolution is potentially more easily available to both business and consumers, who engage in international trade using either e-commerce or traditional trading patterns. Central to UN/CEFACT's mandate is the need to contribute to the facilitation of international trade in the electronic environment. This Recommendation suggests that members of UN/CEFACT should consider ways in which ODR solutions can be further facilitated in national jurisdictions.

The increasing activity on the Internet in both the Business-to-Business (B2B) and the Business-to-Consumer (B2C) sectors inevitably results in a growing number of conflicts in the electronic business environment.

Characteristics of transactions on the Internet are the absence of concrete obstacles making it easy for parties to create legally binding contracts involving participants in different jurisdictions. This is coupled with the dematerialisation of the medium used for the exchange of messages and, thus, contract conclusion. Parties negotiating on the Internet are able to attempt to achieve consensus by a mouse-click. Click-wrap and click-through contracts are already widespread. This new way of communication and contracting has raised the need for special dispute resolution mechanisms.

One of the main reasons why ODR is useful for online transactions is that the Internet facilitates small-value transactions between businesses and consumers globally and the remedy of court proceedings is often commercially unrealistic because of the cost. In addition, in many instances, consumers face unique difficulties in resolving problems arising from online transactions. Examples of the problems include language and cultural differences, and the inconvenience and expense that may result from the fact that the consumer and seller may be in entirely different localities, possibly very far apart. Where resort to litigation becomes necessary, consumers may also encounter difficulties in establishing jurisdiction, determining the applicable law, and enforcing judgments. Further, businesses face burdens in determining the territories where they could be subject to jurisdiction and which laws might apply to them. Complying with the laws of numerous jurisdictions and being vulnerable to lawsuits in multiple courts could significantly increase the cost of doing business online.

Consequently, rapid, adequate and inexpensive instruments for conflict resolution, as an alternative to national litigation, need to be in place in order to create confidence and trust in electronic business. Because

of the specificity of the electronic business environment, these alternative methods for dispute resolution are also increasingly being carried out by electronic means. Many virtual forums for dispute resolution already offer services on the Internet thus making Online Dispute Resolution (ODR) a reality. In some, though not all, cases this raises issues concerning the compatibility of ODR with contemporary national and international legal frameworks and the appropriate regulation of ODR. However, in many jurisdictions ODR is compatible with existing legal frameworks.

There are four types of rules governing ODR. These are:

- a. National legislation;
- b. International legal instruments, such as conventions, treaties and directives;
- c. Private contractual solutions. These contracts could include provisions such as those suggested by UN/CEFACT Recommendation 26: [Commercial Use of Interchange Agreements for EDI](#), and Recommendation 31: [Electronic Commerce Agreement](#).
- d. Self-regulatory instruments, such as Codes of Conduct (as suggested in UN/CEFACT Recommendation 32). A Code of Conduct is not legally binding but, in some legal environments, the non-compliance with voluntary Codes of Conduct may also give rise to legal remedies available to an injured party. This primarily self-regulatory instrument can work in tandem with other means of facilitating e-commerce. Recommendation 32 proposes the use of self-regulatory instruments, such as Codes of Conduct and deals with the issue of enforceability of these instruments. In addition, it points to ODR mechanisms as a means of re-enforcing Codes of Conduct and strengthening trust in the online environment.<sup>1</sup>

All the legal mechanisms mentioned above are relevant for dispute resolution in the electronic environment.

- Some **national laws** already contain regulations concerning issues related to the resolution of conflicts arising from e-commerce transactions. Such regulations could be found for instance in the German<sup>2</sup> and Italian<sup>3</sup> Codes of Civil Procedure. The Spanish bill on the information society services and e-commerce also provides the possibility for dispute resolution carried out by electronic means<sup>4</sup>. Moreover, the Spanish Law on Civil Procedure<sup>5</sup>, the Italian Law<sup>6</sup> and the German Code of Civil Procedure<sup>7</sup> allow the application of modern electronic means to civil procedure.<sup>8</sup> Regulations in national legislation are generally related to consumer protection in e-commerce.
- The ICANN Uniform Domain Name Dispute Resolution Policy is a good example of a form of **self-regulatory mechanism** in the area of domain name disputes.<sup>9</sup>

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<sup>1</sup> See para. IV of UN/CEFACT Recommendation 32 (<http://www.unece.org/cefact/rec/rec32en.htm>)

<sup>2</sup> Para. 1031 (V) of the German Code of Civil Procedure permits the conclusion of arbitral clauses by electronic means.

<sup>3</sup> An electronic form of an arbitration clause is permissible according to *Legge Bassanini Nr. 59/1997* G.U. Nr. 63 S.O. 56/L of 17.3.1997 and the Art. 4 Abs. I des *Decreto del Presidente della Repubblica, n. 513 of 10.11.1997*, G.U.60/I from 13.03.1998 Regarding the procedure and deliberation of the arbitration award by electronic means s. Art. 837 of Italian Code of Civil Procedure.

<sup>4</sup> See Art. 32 Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio

electrónico, B.O.E. 166/2002, I, 25388 <http://www.boe.es/boe/dias/2002-07-12/pdfs/A25388-25403.pdf>

<sup>5</sup> Ley 1/2000 de Enjuiciamiento Civil (LEC), of 7th January 2000, last amended on 28.07.2001.

<sup>6</sup> *Regolamento, recante disciplina sull'uso di strumenti informatici e telematici nel processo civile, nel processo amministrativo e nel processo dinanzi alle sezioni giurisdizionali della Corte dei conti (RUSIT)*, adopted by presidential decree Nr. 123 from February 13 2001, G.U. Nr. 89, 17.04.2001.

<sup>7</sup> Zivilprozessordnung (ZPO), 12.9.1950, BGBl. I S. 533, last amended 23.7.2002, BGBl. I S. 2850, 4410.

<sup>8</sup> See Art. 162 sec. 1 and Art. 135 sec. 5, Art. 152 sec. 2 subsec. 2a. LEC, and Art. 10, 12 RUSIT, §§128a, 292a, ZPO

<sup>9</sup> See <http://www.icann.org/dndr/udrp/policy.htm>

- Examples of **regulation beyond the national level** include: the Directive 2000/31/EC on Electronic Commerce adopted by the European Communities, which expressly encourages the creation of out-of-court dispute settlement mechanisms in EU member states,<sup>10</sup> the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)<sup>11</sup>, the Inter-American Convention on the Enforcement of Arbitral Awards<sup>12</sup>, and the European Convention on International Commercial Arbitration<sup>13</sup>. All these instruments could provide guidance to help to create structures that could apply to ODR involving arbitration.

## 2. Definition

The term “alternative dispute resolution” (ADR) is a generic one and encompasses all the different forms of out-of-court dispute resolution - in particular arbitration, mediation, negotiation and conciliation. The term “Online Dispute Resolution (ODR)” is already commonly used. ODR is a special kind of ADR and can be defined as alternative dispute resolution implemented over computer networks.

ODR processes are influenced by the question of whether the parties have entered into a preliminary agreement or whether there is no such preliminary agreement in place. The operation of ODR can be greatly facilitated by the existence of such preliminary agreements.

At present there are four major types of ODR systems:

- Online automated settlement systems;
- Online arbitration;
- Online Ombudsman services for complaints, including consumer complaints;
- Online mediation.

ODR is a useful way to resolve disputes arising from activities over the Internet (so called *online disputes* or *e-disputes*). Some ODR methods, however, are also applicable to traditional conflicts (offline conflicts).<sup>14</sup> Both online and offline disputes can further usefully be subdivided into conflicts occurring in the business-to-business and the business-to-consumer sector. The term *online dispute resolution*, however, does not refer to the type of conflict but rather to the means by which the procedure is carried out, thus making the term potentially misleading. Furthermore, neither all forms of dispute resolution nor all stages of the respective proceedings are carried out entirely online.

In addition, one has to distinguish between two types of conflict resolution on the Internet – binding and non-binding. Non-binding ODR refers to the type of ODR that allows both parties to retain their right to go to court if they are not satisfied with the result. Binding ODR refers to ODR that is final on both parties, and the parties generally cannot challenge the ODR result in court.

At the international level, many initiatives related to ODR have been already launched. Most of them deal with consumer protection in electronic commerce. In addition to those already specifically referred to above, the most significant of them are:

- *Guidelines for Consumer Protection in the Context of Electronic Commerce*<sup>15</sup> adopted by **The Organisation for Economic Cooperation and Development (OECD)**;

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<sup>10</sup> O.J. EC 2000 Nr. L/1.

<sup>11</sup> <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>

<sup>12</sup> <http://www.oas.org/juridico/english/treaties/b-35.htm>

<sup>13</sup> [http://www.jurisint.org/pub/01/en/doc/153\\_1.htm](http://www.jurisint.org/pub/01/en/doc/153_1.htm)

<sup>14</sup> See for example <http://www.arbitrators.org/drs/onlineapps.htm>, [www.intellicourt.com](http://www.intellicourt.com),

<http://www.clicknsettle.com/>, <http://www.cybersettle.com/>, <http://www.onlinemediators.com> <http://www.i-courthouse.com> <http://www.settleonline.com> <http://www.resolutionforum.org/>

<sup>15</sup> <http://www.oecd.org/dsti/sti/it/consumer/prod/CPGguidelines.htm>



- *The 2000 Miami Recommendations for ADR16 and The 2001 Tokyo Recommendationos for ADR17* adopted by **The Global Business Dialogue on electronic Commerce**;
- The US - EU Joint Statement on building consumer confidence in electronic commerce, including through ADR18
- The EU Recommendation on Non-Binding ADR19
- The *Creation of ADR mechanisms at the Community level* was demanded by **The Lisbon European Council in March 2000** in order to create confidence in electronic commerce within the EU;
- *The need of specific and technical requirements for online dispute resolution* was pointed out by **The Stockholm European Council in March 2001**. The Council also invited the Commission to set a Community policy framework for such initiatives.<sup>20</sup>

The most important initiatives within the EU are the:

- *European Extra Judicial Network (EEJ-Net)*<sup>21</sup>;
- *Financial Services Complaint Network (FIN-NET)*;
- *OnlineConfidence by Eurochambres*<sup>22</sup>;
- *eEurope*<sup>23</sup>.

All of them were launched by the **Commission of the European Union**. The **Commission** has also adopted some *recommendations* concerning the principles for out-of-court bodies involved in the resolution of consumer disputes.<sup>24</sup>

- *There are also self-regulatory initiatives dealing with ODR. These include, for example, the work of the Global Trust Alliance*<sup>25</sup>

### 3. Scope

This recommendation deals with online dispute resolution mechanisms that are applicable to both business-to-consumer and business-to-business disputes. It is addressed to both national Governments and the business community. The purpose is to foster the compatibility of ODR mechanisms with national and international legal regulations by promoting and stimulating the development of ODR services. In particular, the recommendation aims at eliminating existing and preventing future legal impediments concerning ODR, given the growing number of disputes arising from Internet activities and the lack of specific regulations relating to ODR.

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16 <http://consumerconfidence.gbde.org/adrmiami2000.pdf>.

17 <http://consumerconfidence.gbde.org/adrtokyo2001.pdf>

18 [http://consumerconfidence.gbde.org/us\\_eu\\_statement.html](http://consumerconfidence.gbde.org/us_eu_statement.html)

19 [http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/acce\\_just12\\_en.pdf](http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just12_en.pdf)

20 [http://europa.eu.int/comm/stockholm\\_council/factsheets/fiche39a\\_en.htm](http://europa.eu.int/comm/stockholm_council/factsheets/fiche39a_en.htm)

21 See [http://europa.eu.int/comm/comm/consumers/policy/developments/a.../acce\\_just07\\_greg\\_en.htm](http://europa.eu.int/comm/comm/consumers/policy/developments/a.../acce_just07_greg_en.htm)

22 See [www.eurochambres.be](http://www.eurochambres.be)

23 [http://europa.eu.int/comm/stockholm\\_council/eeurope\\_en.htm](http://europa.eu.int/comm/stockholm_council/eeurope_en.htm)

24 Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes available at:

[http://europa.eu.int/consumers/policy/developments/acce\\_just02\\_en.htm](http://europa.eu.int/consumers/policy/developments/acce_just02_en.htm) and Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for Out-of-court Bodies Involved in the Consensual Resolution of Consumer Disputes (notified under document number C (2001/1016) available under:

[http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/acce\\_just12\\_en.pdf](http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just12_en.pdf).

25 See description of the Global Trust alliance at <http://www.bbonline.org/about/press/2002/022702.asp>. See also <http://www.law.washington.edu/ABA-eADR/aboutus/background.html>

One of the main barriers to the enforceability of ODR solutions is the degree to which there are often no methods for encouraging the parties to a transaction to agree to suitable dispute resolution mechanisms, including online solutions, in advance of contract formation. However, any legislative encouragement of such solutions would need to be consistent with existing national policies, particularly concerning consumer protection laws and the potentially unequal contracting power of the parties to any transaction.

#### **4. Advantages of ODR**

##### **4.1. Accessible and User-Friendly Procedure**

Easy access to dispute resolution mechanisms, the convenience of the procedure and its potential for being relatively inexpensive are among the potential main advantages of ODR. It should be able to reduce the complexity typical of national litigation and ADR instruments that use a definition of “jurisdiction” and competence by offering an easy world-wide access to dispute resolution mechanisms. Contrary to traditional dispute resolution mechanisms, the case submission to an ODR forum is capable of being more simple because there can be a small number of requirements with which to comply.

The entire ODR procedure or at least its essential parts can be carried out online. In addition, the participation in an ODR procedure sometimes entails no special skills or knowledge. The technical communication equipment required for participation in an ODR procedure is available to the parties before the dispute in question arises.

##### **4.2. Prompt and Inexpensive Procedure**

Given the availability of rapid communication over the Internet and the elimination of in-person hearings, ODR procedures can be concluded within a short period. As a consequence, the cost of the process is significantly reduced and the efficiency is concomitantly increased.

##### **4.3. Intelligibility**

Some ODR forums on the Internet have already adopted their detailed rules of procedure, which are available online. This can allow parties in a dispute to become aware of the way in which the ODR procedure is carried out. In addition, awards, decisions and statistics about disputes can be published on the website of the ODR provider thus allowing the public access to information about the current activities of the dispute resolution body in question.

#### **5. Problems related to ODR**

##### **5.1. Trustworthiness**

An essential aspect of ADR applied to disputes arising both from traditional business and from Internet activities is the trustworthiness and impartiality of the dispute resolution procedure itself. Trust in the dispute resolution body is essential for the successful resolution of the conflict. In face-to-face out-of-court dispute resolution procedures, trust can be established during the in-person hearings.

In a business-to-business (B2B) environment, alternative dispute resolution (ADR) often takes place between parties who have a continuing business relationship. In case of conflict, the common goal of the dispute parties is to reach a solution, acceptable to both, in order to save their business relations. In a business-to-consumer (B2C) environment, however, parties often do not know each other and do not have any continuous virtual or real-time business relationship. They are likely to be involved in a one off electronic commerce transaction. Typically, these parties do not have a record of dealing with each other before a dispute arises. Consequently, it will be more difficult to establish and maintain trust in an ODR setting, when there is no face-to-face contact.

## 5.2. Data Security, Confidentiality and Privacy

Providing appropriate security of data exchange, confidentiality as well as privacy protection is essential for the legitimacy and legal effectiveness of ODR.

Parties should be aware of the privacy protection mechanisms as well as of the methods of data use and storage applied by the ODR provider. At the same time, the right to privacy of businesses and the consumer must be respected.

## 5.3. Accreditation

It is well recognised that the area of ODR accreditation is one in which there is at present no international consensus. Where a satisfactory regulatory environment exists, this may encourage confidence in an ODR process, especially with consumer protection issues. However, it is suggested that ODR development should not necessarily await the creation of an accreditation or other procedural framework, because the primary need is to establish ODR systems as soon as possible. Parties who consider that they have not received an acceptable level of service or a miscarriage of justice are likely to be able to seek recourse to existing legal mechanisms in their national legal system if they can demonstrate that a breach of the principles of natural justice has occurred.

## 5.4. Procedure rules and principles of due process

The parties participating in an alternative dispute resolution process are commonly free to choose the rules applicable to the procedure and can thus design the different stages of the procedure. These may include response times available to the parties, provisions concerning evidence collection and concerning the entitlement to face-to-face hearings. There may well be certain limits to these freedoms imposed by laws, which set forth some fundamental principles warranting due process to the parties. Most of these principles are already incorporated in national legislation.

For small value disputes, it could be argued that fewer procedural rules would be appropriate in many jurisdictions. Moreover, a mandatory dispute resolution process would require more detailed disclosure provisions than a purely voluntary process. Similarly, ODR and offline ADR may involve different issues which necessitate divergent rules. For example, online ADR often involves written, as opposed to oral, communication, which raises different issues and concerns. ODR also raises issues of the expense of distant communication. These differences suggest that different “due process” considerations may be appropriate for ODR and offline ADR.

## 5.5. Applicable law

The regulation of choice of applicable law in ADR procedures is based on the principle of freedom of contract. This principle finds almost general application in business-to-business disputes. In this regard, any formal mandatory national regulation, which is over-detailed, should be avoided.<sup>26</sup> In consumer conflicts, however, particular regulations relating to consumer protection may well need to be applied.

The choice of applicable law is not important if the respective ODR regulations already set up substantive rules for dispute resolution. A good example of such regulations can be found in the UDRP of ICANN. It regulates abusive domain name registration (“cybersquatting”) and contains certain pre-ordained rules for the resolution of domain name conflicts.<sup>27</sup> In order to resolve the conflict, the complainant has to prove only that the use in question constitutes an abusive domain name registration according to the substantive rules of UDRP.

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<sup>26</sup> See A Global Action Plan Prepared by Business with Recommendations to Governments p. 32 at: <http://www.giic.org/focus/ecommerce/agbecplan.pdf> as well as ICC Policy Statement “*Jurisdiction and Applicable Law in Electronic Commerce*”, p. 1.

<sup>27</sup> See Art. 4 b) and c) UDRP at: <http://www.icann.org/dndr/udrp/policy.htm>

#### 5.6. Enforceability

At present, this is the weakest point of ODR procedure. ODR procedures often cannot be finally binding because of the implications of international treaties and conventions. [Note: We do not understand this sentence. If an arbitration is conducted on line, the resulting award is enforceable if it complies with the requirements of the New York Convention, i.e. agreement in writing. If a mediation is conducted online, any settlement reached will be unenforceable as a contract under the applicable law.] Among the ODR methods only ICANN UDRP provides for its own mechanism for enforcement of panels' decisions.<sup>28</sup> This enforceability is uniquely achievable because the parties wish to register the domain name and cannot do so without accepting the UDRP. Given the character and the subject of domain name disputes, possible solutions of a conflict could be rejection of the complaint or the transfer or cancellation of the respective domain name. Both these decisions can be enforced quite easily. Although the UDRP does not preclude access to national courts, challenges to UDRP decisions occur rarely in practice.

In the business-to-business e-commerce environment the results of ODR procedures might be enforced in accordance with the established practices of the particular business community. Some Governments may wish to consider adopting legislation, or amending existing legislation or regulations, with the objective of facilitating the enforcement of ODR binding decisions.

There is growing interest in ODR in the business community. Bearing in mind the high level of activity on the Internet and the growing number of cross-border conflicts in e-commerce, the practical importance of ODR as a form of alternative dispute resolution can be expected to increase. For this reason, it is important to ensure that there will not be technical and legal obstacles to its further development.

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<sup>28</sup> See Art. 4 k) UDRP.

## RECOMMENDATIONS

The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) agrees to recommend that:

1. Governments should promote and facilitate the development of Online Alternative Dispute Resolution in both the business-to-business and business-to-consumer sectors. In particular, Governments should refrain from adopting any rules hindering ODR in their future legislation, such as accreditation requirements for dispute resolution providers. The promotion and implementation of ODR can be done in combination with self-regulatory instruments for electronic business such as codes of conduct and trust-mark schemes.
2. Governments should ensure that, in the case of a disagreement between a service provider and the recipient of a service, their legislation encourages and facilitates the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means so as to support the development of international trade. Governments should refrain from creating rules that prevent private parties from voluntarily submitting to the online resolution of disputes. This is because many of the benefits of ODR are best realized through a preliminary agreement entered into when the parties create their contractual relationship.
3. Governments, national, international and non-governmental organizations developing ODR should encourage the bodies responsible for out-of-court settlement (in particular of consumer disputes) to operate in a way which provides adequate procedural safeguards for the parties concerned.
4. Subject to compliance with the principles of participant privacy, Governments should encourage bodies responsible for out-of-court dispute settlement to inform all relevant institutions of significant decisions they take regarding information society services.
5. Subject to national legal principles, Governments should encourage ODR providers to make available to appropriate law enforcement authorities relevant information about parties who do not comply with ODR decisions and parties committing fraud or deception, or who engage in patterns of abuse.

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## **Appendix I**

The initial version of this Recommendation was prepared by the Electronic Commerce Platform Netherlands (ECP.NL) and presented to the Legal Group of UN/CEFACT in September 2001. Substantive input in the drafting process was later made from Japan, the United States, the European Commission, Germany, Tunisia, Poland, Bulgaria, the International Telecommunication Union, the World Intellectual Property Organization and the International Chamber of Commerce.

At the session representatives attended from:

*(list of member States represented at the meeting of the UN/CEFACT to be added after approval).*

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