

UNCITRAL

Working Group III:
Online Dispute Resolution

20-24th May 2013, New York, United States

ELSA Delegation Report



elsa

The European Law Students' Association

Introduction from the Head of Delegation

Dear reader,

Firstly, this delegation would like to express its gratitude for being honoured to represent ELSA at the Headquarters of the United Nations in New York, United States.

Working Group III is one of the six Working Groups of UNCITRAL. Working Group III and its' development throughout the years is as follows: In 2010, the Commission had agreed to form a Working Group that will undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions. In 2011, the mandate of this Working Group, named Working Group III was reaffirmed. Furthermore, in 2012, the mandate was reaffirmed in terms of focusing on low-value high-volume cross-border electronic transactions. Finally, Working Group III held its twenty-seventh session from 20th to 24th May 2013 in New York, United States.

The session was attended by the following States members of the Working Group: Algeria, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Czech Republic, Egypt, El Salvador, France, Germany, Greece, Honduras, India, Israel, Italy, Japan, Malta, Mexico, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America, Venezuela (Bolivarian Republic of).

The observer countries were as follows: Belarus, Hungary, Indonesia, Ireland, Netherlands, Oman, Panama, Qatar, Somalia, and Tunisia.

Observers from the following international non-governmental organisations: American Bar Association (ABA), American National Standards Institute (ANSI), Asia Pacific Regional Arbitration Group (APRAG), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRPD), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of International Commercial Law (IICL), Instituto Latinoamericano de Comercio Electronico (ILCE), Internet Bar Organization (IBO), Maritime Organisation of West and Central Africa (MOWCA), Moot Alumni Association (MAA), New York State Bar Association (NYSBA), Regional Centre for International Commercial Arbitration – Lagos (RCICA), National Center for Technology and Dispute Resolution (NCTDR), Union Internationale des Avocats (UIA).

The following documents were available:

Annotated provisional agenda (A/CN.9/WG.III/WP.118); A note by the secretariat on ODR for cross-border transactions: draft procedural rules (A/CN.9/WG.III/WP.119 and Add 1.)¹; A note by the Secretariat on ODR for cross-border electronic commerce transactions: timelines

¹ [UNCITRAL Working Group III Documents](#)

(A/CN.9/WG.III/WP.120);² A note by the Secretariat on ODR for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.113); A proposal by the Government of Canada on principles applicable to Online Dispute Resolution providers and neutrals (A/CN.9/WG.III/WP.114) and Note submitted by the Center for International Legal Education (CILE) on Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules (A/CN.9/WG.III/WP.115).

This report is to serve as a general overview of all sessions and is divided into 5 parts equalling 5 days of sessions. Furthermore, the report will contain contacts of the distinguished delegates we have had established contact with. Lastly, the report will contain logistical advice for saving time, as found by this delegations' composition, aimed at future delegations.

As aforementioned, ELSA was present at the session as an observer and the delegation was consisted of:

Dena Dervanović, ELSA International acting as Head of Delegation (denadjcg@yahoo.com);
Corinna Mückenheim, ELSA International (corinna.mueckenheim@gmail.com);
Nadja Maria Brachwitz, ELSA Germany (nadjabrachwitz@gmx.de);
Julia Constanze Elser, ELSA Germany (juliac.elser@gmail.com);
Laura Lassila, ELSA Finland (llassila13@gmail.com).

It has been a general observation of mine that ELSA was very well-known and respected amongst the distinguished delegates attending the session. We were well received and all of our delegates conversed with different distinguished delegates of other countries as well as observers such as ELSA. ELSA has, once more, managed to maintain a fully professional image, being on time and being clearly attentive during sessions and taking notes. This was perceived by many distinguished delegates.

I sincerely hope this report will introduce you to this Working Group and the topics discussed during the twenty-seventh session. Please note that it is highly recommended to download the full, official report from the official website of UNCITRAL.

Enjoy your read,

Dena Dervanović
Head of Delegation



² [UNCITRAL Working Group III Documents, Timelines.](#)

Day 1: 20th May 2013

The Working Group elected the following officers:

Chairman: Mr. Soo-geun OH (Republic of Korea)

Rapporteur: Ms. Rosario Elena A. LABORTE-CUEVAS (Philippines)

The following agenda³ was adopted:

1. Opening of the session;
2. Election of officers;
3. Adoption of the agenda;
4. Consideration of online dispute resolution for cross-border electronic transactions: draft procedural rules;
5. Other business;
6. Adoption of the report.

The Group then proceeded with a recollection of the previous deliberations and progress of the Group, as well as its mandate. In relation to that, the proposal to develop a “two-track system” was specifically mentioned – that meaning, one track of which proceeds in arbitration and the other one does not. A major discussion was on the mandate of business to business (“B2B”) disputes and business to consumer (“B2C”) low-value high-volume disputes and it consists of finding different ways of approaching the aforementioned. Several proposals were laid out, e.g. a two-track system that would generate two types of ODR clauses, depending on the jurisdiction and status of the purchaser. This presumes two groups: one where pre-dispute arbitration agreements are not binding (Group I) and the other where they are (Group II). The discussion was clearly marked by a diversity of legal systems and this is an element that will be threaded throughout the whole twenty-seventh session. Furthermore, the group discussed on whether there should or should not a definition of the “consumer” be created. The issue raised several other issues in respect to it, thus it was concluded that it would be a problematic definition to create and to maintain. The conclusion of the first day was that the Working Group should keep in mind that most low-value high-volume transactions will include the consumer, thus, limiting the Rules to a B2B-only approach would not address the majority of transactions that these Rules should be addressed to.

Dena Dervanović

Day 2: 21st May 2013

The 2nd day of the UNCITRAL deliberations was about going into detail of Article 8 and 8bis of the draft ODR rules. It was agreed to delete “automatically” in Art. 8. Instead the parties should be given notice that they are moved from the facilitated settlement to the arbitration

³ [UNCITRAL, Working Group III Documents, Annotated provisional agenda.](#)

stage. In paragraph 2 the delegates chose the 2nd option which will render a non-binding decision if no settlement has been reached. Concerning Article 8bis the Secretariat was asked to provide a document on existing private enforcement mechanisms. In paragraph 1 it was agreed to change “decision” into “recommendation” since it is a more appropriate. In paragraph 2 the square brackets were deleted, the content retained and clarified that the recording of the recommendation will not be automatically published. Concerning paragraph 4, the delegates added that the recommendation should indeed be binding on the parties where they have agreed so. However, the timing of it is not settled.

Corinna Mückenheim

Day 3: 22 May 2013

On Wednesday, day 3, the Working Group considered draft article 9. It was discussed if the neutral could continue his/her appointment after the ODR stage to the arbitration stage. It was agreed continue discussion later on. Clear notification from moving one stage to other was also seen important for parties. Proposal was made for wording that “the award shall be rendered promptly [...]” and it was widely agreed that promptness is an important aspect of ODR. The Working Group discussed the principle *ex aequo et bono* which was seen as a good principle but complicated for consumers to understand. It was agreed that the discussion of replacing the term with other language will continue in future sessions. The proposal was made to add Annex including list of countries where Track 1 rules shall not apply. The proposal also included a definition of the consumer. It was agreed that the proposal can be used as a basis of discussion in the future sessions. At the lunch break, the distinguished delegates from Colombia gave a presentation of online arbitration. During the presentation it was noticed that Colombia - as a first state - has taken a step forward to provide the whole arbitration process online.

Laura Lassila

Day 4: 23rd May 2013

At Day 4 the Working Group was concerned with the question whether the same neutral could act in the facilitated settlement stage, as well as in an arbitration stage of proceedings. The rules should provide for a fast, efficient and low-cost means of resolving disputes in relation to low-value, high-volume disputes. Regarding the neutral there were three suggestions made. First: A different neutral shall be appointed at an arbitration stage. A mediator shouldn't act as an arbitrator in the same proceedings. Second: The same neutral shall be appointed, unless (i) parties agreed otherwise; or (ii) neither party objected. Third: To subsume the facilitated settlement stage into the arbitration stage of proceedings, as a subset of that stage. That would have the benefit of putting parties on notice that they were in the arbitration stage, and that the matter of a neutral's impartiality at two different stages of the proceedings would therefore become moot. Furthermore it was suggested that the identity of the neutrals should be made known to the parties such that the parties could reasonably object to an appointment. Next there

was a broad support for an obligation for a neutral to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence was an ongoing one. It was observed that the provision may not be sufficiently clear with regard to the need for the neutral to disclose such circumstances existing at the same time of his or her appointment.

Nadja Maria Brachwitz

Day 5: 24th May 2013

The fifth day of the UNCITRAL session on ODR was split into two parts: in the morning, some remaining Draft Articles were discussed, and in the afternoon, the text of the UNCITRAL draft report of the entire session was reviewed.

As to the merits, the delegates expressed their view on how the removal of the neutral should be drafted: whether there should be an automatic removal upon request of one of the parties or whether this should be up to the ODR provider's discretion. Further, the delegates deliberated on the question of preemptory challenges versus justified dismissal of the neutral. With regard to this issue, once again, one could observe the different legal cultures' influence on the delegates' view on the best practice of procedure. At the end of the session, the Chair led the delegates through the review of the draft report, which had been disseminated each morning and was to reflect what was agreed in the session of the respective previous day. You can download the final Report from the Official Documents System of the UN⁴.

Julia Constanze Elser

Logistical advice from the Delegation

- Before attending the first session, delegates are advised to arrive to the UN Plaza earlier, preferably at 9a.m. when the Registration Office opens. There is always a queue, so come as early as possible. The Registration Office is located across the road from the United Nations. The Head of Delegation shall have a letter from ELSA printed out, and all delegates must have their passports with them. Address: 804, 1st Avenue. After the registration is completed, delegates enter the visitors' tent in the lane of NGOs for a security scan. This procedure of security checks will continue every day.
- Delegates can get confused about carrying liquids being forbidden – this rule is only applicable to visitors. Holders of the UN Pass, such as ELSA Delegates, are allowed to bring food/drinks on the premises of the UN.
- The premises of the UN have Wi-Fi throughout.
- The UN pass allows delegates to enter MoMA (Museum of Modern Art) for free.

⁴ http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.

- Meals at the UN Cafeteria are slightly overpriced and the quality is not equal to the price. Delegates are advised to eat in the neighbourhood since there are many options nearby.
- Delegates are advised to look for accommodation in the proximity of the UN HQ.

Conclusion

This delegation unanimously recommends the ELSA Delegations experience as a means towards an enrichment of one's Curriculum Vitae. It gives an insight in the real work done by the biggest international organisations and it provides with first-hand knowledge on the matter of the session. Lastly, it is an honour to represent ELSA at these institutions.

Sincerely,

Dena Dervanović
ELSA International

Nadja Maria Brachwitz
ELSA Germany

Laura Lassila
ELSA Finland

Corinna Mückenheim
ELSA International

Julia Constanze Elser
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