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# Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session (Vienna, 20-24 October 2014)

## Contents



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# I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions. [1] The Commission decided inter alia at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.[2]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible. [3] It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.[4] The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[5]

4. At its forty-sixth[6] and forty-seventh[7] sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

# II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its thirtieth session in Vienna, from 20 to 24 October 2014. The session was attended by representatives of the following

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[2] Ibid., para. 218.

[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

[4] Ibid.

[5] Ibid.

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 140.

States members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Ecuador, France, Germany, Greece, Honduras, Hungary, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Angola, Belgium, Bolivia (Plurinational State of), Chile, Czech Republic, Dominican Republic, Ghana, Libya, Netherlands, Peru, Qatar, Romania and Viet Nam.

8. The session was also attended by observers from the European Union (EU).

9. The session was also attended by observers from the following intergovernmental organizations: Asian Clearing Union (ACU).

10. The session was also attended by observers from the following non-governmental organizations: Centre de Recherche en Droit Public (CRDP), Chartered Institute 0f Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Institute of Law and Technology (Masaryk University), Milan Club of Arbitrators (MCA) and Wuhan University Institute of International Law.

11. The Working Group elected the following officers:

*Chairman*: Mr. Jeffrey Wah-Teck CHAN (Singapore)

*Rapporteur*: Ms. Laura JAMSCHON MAC GARRY (Argentina)

12. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.129);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II) (A/CN.9/WG.III/WP.130 and Add.1); and

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I) (A/CN.9/WG.III/WP.131).

13. The Working Group adopted the following agenda:

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

# III. Deliberations and decisions

14. The Working Group based its deliberations on the direction of the Commission, made at its forty-seventh session,[8] that the Working Group should address the text of Track I of the Rules and should report back on the issues set out in paragraph 222 of the report of the Commission's forty-sixth session (see, further, paragraph 17 below). The Working Group resumed its work on agenda item 4 also on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.130 and its addendum; A/CN.9/WG.III/WP.131).

15. The Working Group accordingly considered Track I of the draft Rules for resolution of online disputes, and also took into consideration the importance of different outcomes and enforcement mechanisms particularly for developing countries and those facing post-conflict situations, including arbitration, and issues of consumer protection. Progress was made on the draft text of this Track of the Rules, also on the basis of proposals submitted during the session. However, fundamental differences remained between States that allowed binding pre-dispute agreements to arbitrate and those that did not, despite the Working Group's strenuous efforts to come to consensus. It was observed that further progress would require the draft Rules to reflect the Working Group's conclusions on this matter.

16. The deliberations and decisions of the Working Group with respect to this item are reflected in more detail in Chapter IV below.

# IV. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

## A. General remarks

17. The Working Group took note of the Commission's instruction referred to in paragraph 14 above, i.e. that the Working Group should: (a) address the needs of developing countries and those facing post-conflict situations, in particular regarding an arbitration phase as part of the process; (b) include in its deliberations the effects of online dispute resolution on consumer protection in all States, including in cases where the consumer was the respondent party in an online dispute resolution process; (c) explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration. It was noted that some of these issues had been further addressed in a proposal by the Governments of Colombia, Kenya, Honduras and the United States.[9]

18. The Working Group agreed to address these matters in order to report back to the Commission on the same.

19. The need to make progress in crafting an effective and efficient way to resolve cross-border disputes, which would function in the real world, was affirmed. The importance of such an ODR system for supporting the growth in e-commerce,

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[8] A/69/17, paras. 137 and 138.

[9] See document A/CN.9/WG.III/WP.125.

cross-border investment and access of micro and SMEs to international markets was recalled.

20. It was said that different jurisdictions had different approaches in relation to the binding nature or otherwise of pre-dispute agreements to arbitrate (differences, it was agreed, that the Rules should respect), but that despite such differences, there were many points of commonality in relation to the resolution of disputes up to the final stage. It was added that the Working Group should not try to use the Rules to resolve major policy differences that might in any event evolve over time.

21. A view was expressed that, in view of lack of access to courts and the need for efficient resolution of low-value, cross-border disputes, particularly in relation to developing countries and those in post-conflict situations, making arbitration available was important for those constituents that might wish and be able to undertake arbitration. It was, moreover, noted in support of that view that the Rules would not override national mandatory law and rules.

22. It was further stated that a proposal requiring vendors to put consumers on one or another track based on their geography would be impractical, and concerns were expressed as to the suggestion that UNCITRAL or the UNCITRAL Secretariat maintain a list of States in which pre-dispute agreements to arbitration were not, according to the law of those States, binding or enforceable.

23. Another view was expressed that the Working Group had made good technical progress on Track II at its twenty-ninth session, and that the implementation mechanism of an Annex (proposed at its twenty-seventh session) could provide a means to accommodate States in which pre-dispute agreements to arbitrate were binding on consumers, and those in which they were not. It was added that the implementation proposal had been suggested as a compromise to accommodate States that sought arbitration in ODR in their jurisdictions.

24. It was said that arbitration was not a necessary component of ODR, and that Track II could provide for an efficient way of dispute resolution. It was further said that Track II could offer a good modality for dispute resolution in particular for any State that might not dispose of a functional judicial system for enforcing arbitral awards. It was added that the design of ODR systems should not prejudice the effective development of such judicial systems.

25. The context for the Working Group's deliberations — low-value disputes — was emphasized, and it was recalled that the average online purchase was in the range of US$ 60. It was suggested, therefore, that the Working Group should focus on developing a set of rules and an ODR system that were easily understandable to both consumers as well as micro and SMEs, and was likewise cost-effective (as some existing systems were said to be). It was added that the Working Group could, in that vein, focus both on simplifying the draft text and eliminating any unnecessary prescription. In this regard, the Working Group recalled the outcome of the consultation of the Secretariat with experts as recorded in paragraph 28 of document A/CN.9/801.

26. It was suggested that one area on which the Working Group could focus would be the draft guidance document for ODR providers, including issues such as transparency and qualifications of neutrals (see also document A/CN.9/WG.III/WP.128).

27. Another view was expressed that, in light of the evidently low-value nature of transactions that were intended to be the subject of the Rules, consumers would be implicated and that some jurisdictions did not permit arbitration agreements made prior to a dispute arising to be binding on consumers. It was proposed that the proposed Annex referred to in paragraph 23 above should be further considered before other options were tabled.

28. A different view was expressed that the proposed Annex was too reminiscent of a binding international legal instrument (such as a treaty) to which States parties could opt in or opt out, and that a compromise could better encompass all the different options.

29. It was underscored that efficiency in the resolution of low-value online disputes should be considered paramount, given the very high volume of online disputes. In this regard, the very small fraction of those disputes in which alternative dispute resolution online was available and that in practice culminated in litigation before the courts was also highlighted.

30. It was stated that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and UNCITRAL Model Law on International Commercial Arbitration provided safeguards for consumers, for example in that consumers could object to the validity of the arbitration agreement or award at the stage of enforcement.

31. It was said that simplified arbitration rules for low-value disputes such as those envisaged in Track I of the Rules raised the risk of weakening the traditional arbitration procedure, which was an indispensable instrument for international trade.

32. Another view was expressed that it was not possible to give a clear legal answer in relation to the validity of an arbitration agreement made online and involving cross-border transactions to which consumers were parties.

## B. Reporting on the questions raised by the Commission (see, paras. 17 and 18 above)

33. Several delegations addressed the questions raised by the Commission, as recalled in paragraphs 17 and 18 above. In relation to question (a), a number of delegations suggested that an arbitration track within ODR proceedings was not necessary, for the reasons set out in paragraph 24 above, and moreover because of the ability of a non-arbitration system to accommodate all jurisdictions. It was furthermore asserted that arbitration awards would be unlikely to be enforced in practice for reasons of cost, and therefore did not add value to a non-arbitration system. In response, other delegations observed that a binding arbitration track of the Rules was critical to developing countries and would contribute to an enabling legal environment by providing a seamless system for cross-border trade — for both business-to-business and business-to-consumer disputes.

34. In relation to question (b), some delegations suggested that including an arbitration track would be unable to provide sufficient consumer protection where the consumer was a respondent in the proceedings. In response, the view was expressed that binding arbitration was the only practical method of providing an

effective alternative to traditional dispute resolution mechanisms for consumers in developing and post-conflict countries.

### 1. Two-track system

35. The Working Group considered whether a two-track system remained the most viable way to resolve the differences between jurisdictions with different legal conceptions of pre-dispute binding arbitration agreements on consumers.

36. One suggestion made was that the Working Group could work on the current Track II of the Rules, leaving the current Track I for separate consideration.

37. After discussion, it was agreed that the earlier consensus in favour of the two-track system remained. It was noted that the precise nature of the two-track system would be clarified, and notably whether it was envisaged that it would comprise two sets of Rules, or a single set of Rules with different tracks contained within them, and with the proposed Annex or another mechanism to operate as a bridge between them.

### 2. Res judicata

38. A view was expressed that the major difference between the two tracks was the issue of res judicata, in other words whether a process should end in an outcome that was final and binding (and so precluded access to the courts).

39. Another view was expressed that res judicata was not the primary issue at stake, given that the two tracks expressed different options for the final outcome of the Rules.

### 3. Enforcement

40. A question was raised as to whether the New York Convention would in practice be invoked in the context of low-value online disputes.

41. Views were expressed that the cost of enforcing an award under the New York Convention were too high to make that instrument viable in relation to the low-value disputes the subject of the Rules. In addition, it was noted that consumers from jurisdictions where pre-dispute arbitration agreements are considered not to be binding on them when subject to enforcement of an arbitral award made against them under the New York Convention might in practice be compelled to comply with the award, and that this as a consequence would have reduced confidence and willingness to use e-commerce — the opposite of the goal of an ODR system.

42. The view was expressed that, while it was unlikely that the parties would in fact seek enforcement of awards under the New York Convention for low-value claims, it was important to preserve the enforceability under that Convention for Track I in order to support respect of awards and to address the needs of business-to-business and business-to-consumer parties in ODR.

43. Another view was expressed that the Working Group was not the appropriate forum to address the complex legal issues surrounding enforcement of online awards under the New York Convention.

### 4. Simplicity and efficiency (see also paras. 25 and 29 above)

44. A number of delegations emphasised the need for simplicity and efficiency of the Rules, in order that they would be used and adopted by providers, purchasers and merchants in the online environment.

45. It was furthermore suggested that arbitration, as set out in the Rules, needed to be adapted for the digital space, and in particular simplified and streamlined to reflect an "Internet way of thinking".

### 5. Low-value claims

46. It was suggested that, as the system would address low-value claims only, the Rules should state clearly that they apply only to those claims (the nature of which would need to be considered). In this regard, it was noted that some concerns about the impact on consumers might thereby be mitigated.

### 6. Implementation of two tracks

47. Support was expressed for discussing the Annex proposal further (see above, paras. 27-28).

48. Another proposal was made to clarify the operation of Track I to ensure that it was clear that it would produce a binding result, discussed in paragraphs 51 and 63 below under the heading the "second proposal".

49. It was clarified that there was a difference in opinion in relation to the implementation mechanism by which the Rules would be offered to consumers. One suggestion that had been proposed was that the parties themselves could determine which Rules would apply to their dispute, acknowledging that such offer would typically be made by the merchant by way of a model clause. A different proposal, that of the Annex, was that a mechanism would be built into the Rules themselves that would prevent consumers in jurisdictions listed in the Annex from undertaking ODR proceedings pursuant to Track I of the Rules before the dispute had arisen.

50. Another suggestion was made that there ought to be a single set of Rules, with at least two outcomes — arbitration and non-binding recommendation among them — from which the consumer could select one, at a designated point in proceedings. It was said that whether the consumer's selection should take place at the time of transaction or the time of dispute could be further considered in that proposal. In support of that approach, it was said that a single, unified set of Rules would be clearer for consumers than two separate sets of Rules would, and moreover that it better reflected commercial practice, where most disputes were settled prior to an arbitration stage arising.

### 7. Arbitration and enforcement

51. A suggestion was made that arbitration was more consumer protective than a non-binding outcome, not least because permitting resort to courts would require in practice a much higher level of legal knowledge and result in much higher costs than a low-cost online resolution system. In response it was said that consumers should not be bound from the outset by a process that they might not be aware was binding on them.

### 8. New York Convention

52. It was queried whether the arbitration track envisaged by the Working Group, and examples of other arbitration-like systems referred to in the Working Group — which did not necessarily fulfil the provisions of the UNCITRAL Model Law on International Commercial Arbitration or reflect the procedural safeguards of the UNCITRAL Arbitration Rules — would comply in practice with the requirements of the New York Convention. It was said that referring to that Convention as a theoretical tool for low-value disputes might not be desirable.

53. A suggestion was made to reconsider the private enforcement mechanisms outlined in document A/CN.9/WG.III/WP.124.

### 9. Use of Rules in practice

54. It was said as a general matter that the Working Group had tried to come up with a very high and detailed standard, but that it should be acknowledged in practice that the Rules would not necessarily be implemented word for word by ODR administrators, but rather that they would be adapted, customized and improved upon by the private sector, similarly to practice in relation to the UNCITRAL Arbitration Rules (see also A/CN.9/WG.III/WP.123, para. 6).

55. In that respect, it was said that the Working Group could recall that it was not working on a treaty with reciprocal obligations, but rather a high level model for procedural rules that should be exhaustive and take into account all jurisdictions' laws.

### 10. Practical elements of ODR Rules

56. It was suggested that a primary focus of the debate should be on considering the type of mechanisms that merchants and ODR administrators should have in place in order to ensure consumers were streamed down a track appropriate to them, bearing in mind that no mechanism would be fool-proof. The need for the provision of simple information to consumers to ensure they were aware of the content and implications of the track was highlighted.

### 11. Conclusions in response to questions of Commission

57. After discussion, it was agreed that the Working Group had discussed a range of responses to the questions of the Commissions set out in paragraph 17 above, as reported to the Commission in the preceding subsections of this Report.

## C. Proposals in relation to the applicable track of the Rules

### 1. First and second proposals

58. Two proposals were put forward in relation to the means by which parties to a dispute would select the applicable track of the Rules. There was general support for the constructive approach that the submission of these proposals represented.

### 2. The first proposal

59. The first proposal, initially made at the twenty-seventh session of the Working Group (see A/CN.9/769), would insert a statement in draft article 1(a) of Track I of the Rules to the effect that consumers in jurisdictions in an Annex thereto would be prevented from undertaking ODR proceedings pursuant to using Track I before the dispute had arisen (the "first proposal"). The first proposal would consequently require jurisdictions to elect to be included in such an Annex. It was suggested that the mechanism of that choice would be through an invitation or request to all United Nations Member States to opt in or out of the Annex, and would be made at the annual session of the United Nations General Assembly. The first invitation would be made, it was added, at the session at which the ODR Rules after adoption by the Commission were presented to that body; annual confirmations would be made thereafter.

60. In support of the first proposal, it was said that the proposal envisaged a very simple technological solution for putting buyers on the right track, to be included by the merchant on its website. The technology would automatically generate a dispute resolution clause for Track I or Track II of the Rules, based on a piece of information from the purchaser that it would normally provide during the course of the transaction, such as a billing or shipping address. It was added that the list of jurisdictions in the Annex would be updated every year at the United Nations General Assembly session, based on the decision of States to opt in or opt out at that time, and that under the first proposal the list of jurisdictions opting to be included in the Annex should be maintained by the UNCITRAL Secretariat. Proponents of the first proposal did not believe it raised issues of liability for merchants or for the United Nations in relation to the list of States to be included in the Annex, and that a State's decision on whether to opt in or out of the list was a political one, informed by local legal considerations.

61. A concern was raised in relation to the first proposal, and specifically, that it required countries to make a choice as to how to categorize their national consumer protection law in terms of the implications of the Annex, but more importantly, to inform businesses and small and medium-sized enterprises of the implications of the Annex.

62. In relation to various queries raised in connection with the first proposal, it was said that the proposal would not require United Nations Member States to submit a declaration as to their inclusion or not in the Annex; but that, should they wish to make such a declaration, they could do so formally in any way acceptable as a matter of United Nations procedure. It was clarified that if a time lapse existed between a State changing its laws in relation to pre-dispute binding arbitration and its declaration relating to its inclusion or non-inclusion in the Annex at the session of the General Assembly, then the law in force at the time a consumer from that jurisdiction embarked on an ODR track would prevail.

### 3. The second proposal

63. A second proposal would provide, as regards the scope of application of Track I of the Rules, that the process would end in binding arbitration. Paragraph 1(a) would be annotated by a footnote indicating that pre-dispute arbitration agreements with certain buyers might not be considered valid under

applicable national law in some jurisdictions, and consequently, awards arising out of such agreements might not be enforceable against a purchaser in those jurisdictions (the "second proposal"). That proposal also included revisions to paragraph 1(a) as follows: "For buyers who are located in certain States at the time of the transaction, a binding arbitration agreement capable of resulting in an enforceable award requires that the agreement to use the Track I Rules take place after the dispute has arisen." It was said that that component of the proposal might be regarded as a functional equivalent to a "second click", in other words, a post-dispute agreement by the consumer to arbitrate. The second proposal would also provide for amendments in the scope of application provisions in Track II of the Rules consistent with those proposed in Track I.

64. The second proposal also included two model clauses, one for Track I, as follows: "Subject to the provisions of Article 1(a) of the UNCITRAL ODR Track I Rules, any dispute, controversy or claim arising hereunder and within the scope of the UNCITRAL ODR Track I Rules providing for a dispute resolution process ending in a binding arbitration, shall be settled by arbitration in accordance with the UNCITRAL ODR Track I Rules presently in force"; and a second for Track II as follows: "Where, in the event of a dispute arising hereunder and within the scope of the UNCITRAL ODR Track II Rules providing for a dispute resolution process ending in a non-binding recommendation, the parties wish to seek an amicable settlement of that dispute, the dispute shall be referred for negotiation, and in the event that negotiation fails, facilitated settlement, in accordance with the UNCITRAL ODR Track II Rules presently in force."

65. It was said that this second proposal would also include, separate from the Rules, guidance for ODR administrators that would suggest the ODR administrator might check the purchaser's location, relying on mailing address or billing address, and advise vendors that they should consider the appropriateness of pursuing binding arbitration accordingly.

66. In support of the second proposal, it was said that it provided more broadly applicable procedural rules, that could work for both business-to-business and business-to-consumer transactions. It was further said that it avoided perceived complexity with an approach that touched on legal issues such as nuanced national consumer laws, in determining the residence of purchasers and a list procedure that was not practicable. In response, it was said that the phrase in paragraph 1(a) of the second proposal to "buyers who are located in certain States" might in reality require a list of such States to be maintained in any event.

67. A query as to whether the UNCITRAL Secretariat could maintain such a list, or whether the United Nations General Assembly could serve the function as envisaged under the first proposal, was deferred.

68. A further proposal to amend the language of draft article 1(3) of Track I of the Rules as follows, was made: "These Rules shall govern the ODR proceedings except where any of the Rules is in conflict with a provision of applicable law from which either of the parties cannot derogate". It was suggested that that proposal did not provide sufficient guidance as to how parties to a dispute would change track if applicable law so required.

69. The Working Group was invited to consider approaches that would bridge the diverging views expressed in relation to the first and second proposals.

### 4. The third proposal

70. In that respect, a third compromise proposal was put forward, which would modify articles 1, 6 and 7 of Track I of the Rules. It was said that this proposal would in essence create a single set of Rules providing for different outcomes, and would take account of existing ODR practices as well as the requirements of different legal systems.

71. It was said that this third proposal would also take into account consumer protection issues. It was also noted that under the proposal, paragraph 1(a) of article 1 of Track I of the Rules would be deleted.

72. That proposal read as follows:

"The Purpose and Principles of Drafting

The purpose of drafting the Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

(1) The Rules should provide an easy, fast, cost-effective procedure for dispute resolution in low-value, high-volume electronic commerce transactions.

(2) The Rules should create a safe, predictable legal environment for transactions, to ensure traders' confidence in the online market.

(3) The Rules should be able to facilitate micro, small and medium-sized enterprises' access to international markets through electronic commerce and mobile electronic commerce.

Principles for drafting the Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

(1) Drafting of the Rules should be based on an Internet way of thinking, making clear the differences between traditional transaction disputes and online transaction disputes, and providing a resolution mechanism that conforms to the Internet environment of online transaction disputes.

(2) Drafting of the Rules should take into account of the current practice in dispute resolution for electronic commerce, as well as the enforceability of the ODR procedure, in order to avoid inconformity of the design of the Rules to e-commerce practice.

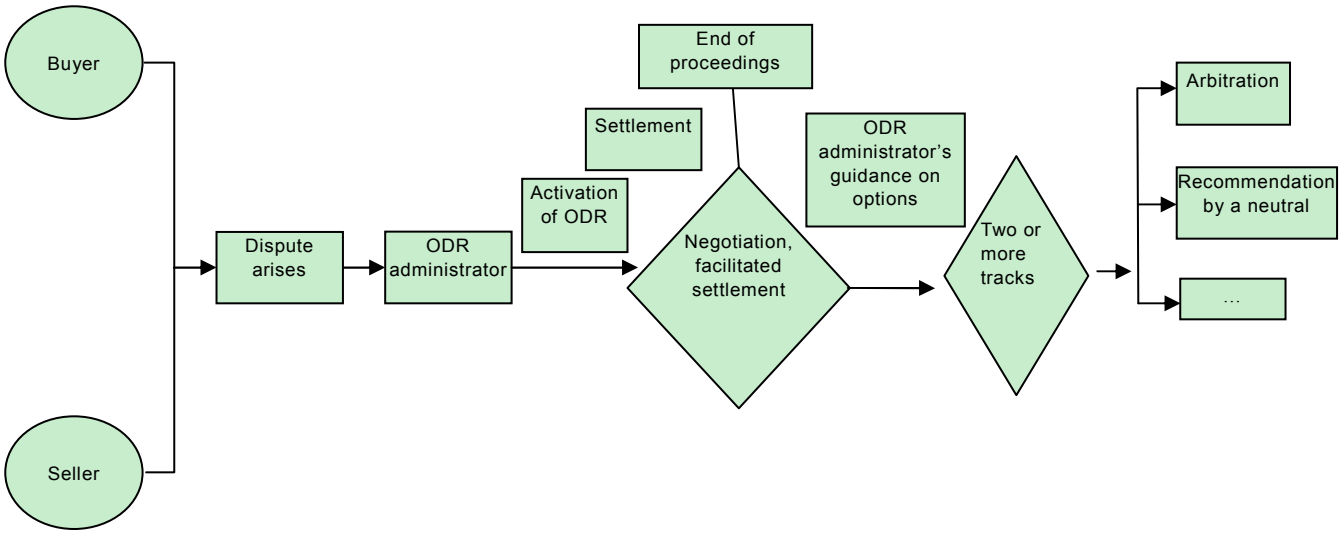
(3) The design of the Rules should take into consideration of differences of legal systems of different States, minimizing the inconformity of the ODR mechanism to the legal system in which it operates, in order that the Rules can be implemented in as many jurisdictions as possible.

A comparative analysis of advantages and disadvantages of Track I and Track II

| | Track I | Track II |
|---|---|---|
| Binding or non-binding | Binding | Non-binding |
| Application | Subject to consumer protection regulations | Not subject to consumer protection regulations |
| Degree of settlement | Complete settlement | In case of unsuccessful mediation, an unbinding recommendation |
| Cost and time of dispute resolution | Requires certain cost and time | In case of unsuccessful mediation, cost and time cannot be estimated, often higher and longer than in arbitration, as shown by current situation |

Rationale of the design of Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

The analysis in the above section shows that Track I and Track II each has its advantages and disadvantages. The new design should maintain their advantages and reasonably integrate them (see the figure below)."




Proposed articles of the Procedural Rules for Online Dispute Resolution for Cross-Border Electronic Commerce Transactions

Draft article 1 (Scope of application)

"1. The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

"1 bis. Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be exclusively resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the 'dispute resolution clause')."

"2. These Rules shall only apply to claims:

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the sales or service contract referred to in paragraph 1; or

(b) That full payment was not received for goods or services provided.

"3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail."

Draft article 6 (Facilitated settlement)

"1. Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)].

"2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.

"3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) the ODR proceedings shall move to the next stage of proceedings pursuant to draft article 7 (Guidance of ODR Administrator)."

Draft Article 7 (Guidance of ODR Administrator)

"If the Neutral has not succeeded in facilitating a settlement at the expiry of the facilitated settlement stage，the ODR administrator shall, on the basis of information submitted by the parties, present to the parties the following options, and ensure that they are aware of the legal consequences of the choice of each track:

(1) Arbitration (as referred to in draft article 7 of Track I);

(2) The Neutral's recommendation (as referred to in Track II);

(3) ..."

73. The third proposal was generally welcomed by the Working Group. It was suggested that certain elements might be modified, for example instead of consent by the parties to undertake the final stage of a dispute resolution process, that a streaming function such as that provided for by the Annex (in the first proposal) might be used. Alternatively, parties might be offered the opportunity to consent to arbitrate immediately after a dispute had arisen instead of at the end of the facilitated settlement stage.

74. A question was also raised as to whether the third proposal shifted the function of the proposed Annex to the ODR administrator. Consequently, a concern was raised that the ODR administrator would need to be in possession of up-to-date and sufficient information on relevant jurisdictional considerations to be able to advise the parties accordingly, and in any event, whether administrators would be willing in practical terms to undertake that responsibility.

### 5. The fourth proposal

75. A fourth proposal was made, to replace paragraph 1(a) of article 1 as set out in A/CN.9/WG.III/WP.131, as follows: "Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer (a) that disputes relating to the transaction and falling within the scope of the Rules, will be exclusively resolved through ODR proceedings under these Rules and whether track I or track II of the Rules apply to that dispute ('the dispute resolution clause') and (b) for buyers whose billing address is in a State listed in the designated website, that in certain states, including the State of the buyer's billing address, a binding arbitration agreement capable of resulting in an enforceable award, requires that the agreement to use Track I take place after the dispute has arisen." It was said that in addition, a footnote identical to that proposed in the second proposal (see CRP.1/Add.1[para. 62 above]) would be inserted at the end of that phrase.

76. That proposal would also insert a new article after article 6, which it was said would provide for additional safeguards to consumers. It was said that that provision would include two paragraphs, as follows: "1. If the dispute resolution clause provides that Track I of the Rules applies and the buyer's billing address is not in a State listed in the designated website, or if it provides that Track II of the Rules applies, then the proceedings shall move to the applicable track pursuant to articles […]. 2. If the dispute resolution clause provides that Track I of the Rules applies, and the buyer's billing address is in a State listed in the designated website, the ODR administrator may suggest measures to address the situation."

77. It was explained that the fourth proposal incorporated elements of the first proposal in that it would envisage a list of jurisdictions, similar to that in the proposed Annex, and that the list would be informational, non-exhaustive and non-binding in nature. Thus a State would take a policy decision on whether or not to request inclusion on the list, and that decision would not necessarily represent an exhaustive position of its domestic law. It was added that while the first proposal sought to place the consumer on the relevant Track through an automated selection mechanism, the fourth proposal was based on the understanding that it was impossible to guarantee that consumers would never agree to pre-dispute agreements to arbitrate disputes in jurisdictions in which such decisions were not binding.

78. The fourth proposal, it was noted, also included elements of the second proposal. Accordingly, the fourth proposal would place the responsibility upon vendors to notify buyers with billing addresses based in listed jurisdictions that pre-dispute agreements to arbitrate might not be binding in those jurisdictions. A vendor would not, however, be precluded from offering a binding arbitration track to purchasers with billing addresses in those jurisdictions. It was noted for example that there might be cases in which, even though a buyer's billing address was

located in one of those jurisdictions, there could nonetheless be justifications for offering binding arbitration.

79. It was also agreed that the fourth proposal would differ from the second proposal by providing that, when moving to an arbitration phase, the ODR administrator (or, conceivably, the neutral) could take such action as might be appropriate, such as to notify parties that the purchaser's billing address was from a listed jurisdiction.

80. The fourth proposal was also generally welcomed by the Working Group. It was acknowledged that the fourth proposal was not yet complete in all respects — for example, that the entity that would maintain such a list was yet to be determined.

### 6. Proposal for an Annex or list of countries under the first and fourth proposals

81. In relation to the list of countries proposed in an Annex (first proposal) or website (fourth proposal), it was clarified that the UNCITRAL Secretariat was not at this stage able to provide information in relation to whether the General Assembly or its Secretariat would be willing or able to accept proposals to maintain such a list. It was noted that the Vienna Convention on the Law of Treaties (1969) provided specific treaty-based provisions on the authority of governments to enter into binding treaty obligations, and to try to adapt such procedures for a non-binding instrument such as a list or Annex to the Rules raised questions of public international law, as well as practical questions, which needed to be carefully considered. It was underscored that the Working Group might wish to bear in mind that the question of whether the United Nations General Assembly would maintain any such list or Annex needed to be clarified further with the relevant services within the United Nations; a task that the UNCITRAL Secretariat could undertake, as it was a part of the United Nations Secretariat.

### 7. Further discussion of the third proposal

82. It was noted that draft article 7 of the third proposal provided that an ODR administrator would present options to the parties should they fail to reach a facilitated settlement. Those options consisted of (1) binding arbitration; or (2) a neutral's recommendation; and (3) the possibility of a third, yet to be determined outcome of proceedings. Three issues were raised in relation to that draft article 7. First, it was suggested that the first two options were sufficient (as they reflected the two Tracks under the draft Rules) and retaining them alone would enable better implementation of the Rules. Guidance was also sought on what a third option might entail. After discussion, there was broad support for the proposition that only two options should be provided to the parties, namely arbitration and a recommendation by the neutral, and the possibility for a third option should be deleted.

83. Second, a suggestion was raised that parties that had agreed to use the ODR Rules should not be able to opt out of a final determination (whether that be a recommendation or an arbitral award) part-way through the process.

84. Third, clarity was sought on the consequences that would ensue if parties failed to agree on the proposed track. One suggestion made was to avoid this situation arising by applying a default rule to the effect that only the consumer would be presented with the option to determine the procedure to be followed.

Alternative suggestions were that the term “buyer” could be used, as most buyers were consumers in practice, or that options should be offered to all parties so as to avoid favouring one side or another in a transaction.

85. Another suggestion was that only consumers from jurisdictions in which pre-dispute agreements to arbitrate were not binding should be permitted the right to exercise an option to determine the nature of the final stage, and that all other parties would be bound by their initial agreement made at the time of transaction. Such a proposal, it was noted, would also require an Annex or list to identify the consumers that would be given an option to decide the option for the final stage. It was also recalled that business-to-business parties and consumers from some other jurisdictions would not be precluded from agreeing to pre-dispute binding arbitration.

86. It was further suggested that the election of an outcome for the final stage could be made earlier in the process, such as when a dispute arose. In response, it was noted that the overwhelming majority of claims were settled before the end of a facilitated negotiation stage, and so the proposal in its current form would reduce the burden on both the ODR administrator and on the parties.

87. A concern was raised that the third proposal did not permit pre-dispute agreements to arbitrate. Such agreements, it was said, would provide certainty for parties, especially in business-to-business disputes, and were a cornerstone of relevant dispute resolution systems in some jurisdictions.

88. In response, it was suggested that the market would itself provide the incentive for merchants to use a certain track, because merchants would be more inclined to choose an effective resolution mechanism to enhance their market share, and that the law in such jurisdictions might anyway not exclude post-dispute agreements to arbitrate.

89. Another suggestion was made to the effect that the third proposal did in fact permit pre-dispute agreements to arbitrate. It was said that the third proposal did not contradict applicable law and respected party autonomy. It was also said that more clarity might be needed on these aspects.

90. Another view was expressed that the final stage of the proceedings under the third proposal would be agreed only after the dispute had arisen, consequently excluding a binding pre-dispute agreement to arbitrate.

91. It was observed that differences in the understanding of the third proposal remained, notably as to whether or not the proposal contemplated pre-dispute agreements to arbitrate. It was stated that the proposed article 7 provided that two options would be offered to the parties for the final stage of the proceedings if facilitated settlement failed — i.e. arbitration or a recommendation by a neutral. There were two different interpretations of the consequences that would ensue should the parties fail to agree on the option to be applied. It was therefore observed that article 7 should include a default option for the final stage of the proceedings, but views differed as to whether that default option should be a recommendation by a neutral or an arbitration. A third suggestion was that only the buyer should be given a choice at the time of failure of the facilitated settlement stage as to how to proceed.

92. It was identified that this difference of interpretation as to the default position indicated that there remained different understandings as to whether the third proposal contemplated a binding pre-dispute agreement to arbitrate.

93. Noting that an issue remained as to whether the arbitration phase proposed under article 7 was intended to have res judicata effect, it was recalled that the recommendation stage of proceedings under Track II of the Rules was intended to include a private enforcement component to ensure compliance with its outcome.

94. Noting these outstanding issues, the Working Group agreed to continue its deliberations on the basis of the third proposal, and the Secretariat was requested to prepare a draft for the thirty-first session of the Working Group on the basis of that proposal, also taking other proposals proffered at the session into account.

95. It was added (see para. 53 above) that the Working Group should consider further the matter of private enforcement mechanisms in the context of the various proposals made. In that respect, one delegation stated that it would submit a proposal for the next session of the Working Group regarding chargebacks, which, it was said, offered a practical and effective private enforcement mechanism. The Working Group requested the Secretariat to prepare such additional materials on chargebacks for consideration at a future session of the Working Group as resources permitted.

### 8. Further discussion of the second proposal

96. It was suggested that the legal effect of second proposal (see para. 62 above) was to offer a functional equivalent to a "second click", whereby a buyer, when submitting a claim, would effectively consent to binding arbitration by bringing the claim. It was added that an ODR administrator could advise both parties under that proposal as to whether it would be appropriate to arbitrate at the final stage of a dispute in a situation where the award might not be enforceable in the jurisdiction of the consumer. It was said that such an approach permitted the Rules to be contained in a single document, but at the same time, bridged the two tracks proposed at the twenty-seventh to twenty-ninth sessions of the Working Group.

97. It was asked in response whether there was any real difference between the second and third proposals, both of which included an advisory function on the part of the ODR administrator; and the notion that a buyer (in the second proposal) and both parties (in the third proposal) consented to the final stage of proceedings.

98. In addition, it was queried whether the fact of consent at that stage would be sufficient to ensure that consumers in relevant jurisdictions were not subject to an arbitration track of proceedings.

### 9. Further discussion of the fourth proposal

99. Two questions were raised in relation to the fourth proposal. First, it was asked whether the reference to a purchaser's billing address to determine which guidance was given to that purchaser was intended to supplant a conflict of laws analysis in respect of the governing law of the transaction or the dispute, and if so, whether that was inconsistent with existing conflict of law rules. In response, it was said that the proposals were not intended to have any implications regarding applicable law, but

rather that the billing address was simply intended to indicate which notification was to be provided to the buyer.

100. Second, clarity was sought as to the possible consequences where vendors failed correctly to notify buyers of their options as regards a final outcome of the process. In response, it was said that the likely result would be that the notice was not valid (as would be the case in other defaults in notice provision under the Rules).

101. It was suggested that the term "appropriate measures" in proposed paragraph 6 bis (2) of the fourth proposal required further consideration. However, it was said that the proposal envisaged that ODR administrators would have the benefit of reasonable flexibility under the Rules to determine which dispute resolution track would be offered at the final stage.

## 10. Summary of deliberations and decisions

102. A summary of the Working Group deliberations and decisions is found in Chapter III above.