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Report of Working Group III (Online Dispute Resolution) on the work of its twenty-eighth session (Vienna, 18-22 November 2013)

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 ("online dispute resolution" or "ODR") 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] At its forty-sixth session, the Commission unanimously confirmed the decisions made at its forty-fifth session.[6]

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.122, paragraphs 5-15.

II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-eighth session in Vienna, from 18 to 22 November 2013. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria,

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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., para. 79.

[5] Ibid.

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

Brazil, Bulgaria, Canada, China, Colombia, Croatia, El Salvador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Pakistan, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Burkina Faso, Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Lithuania, Netherlands, Peru, Portugal, Qatar, Romania, Saudi Arabia and Togo.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) Inter-governmental organizations: Organisation of Islamic Cooperation (OIC) and Permanent Court of Arbitration (PCA);

(b) Invited non-governmental organizations: Centre for Commercial Law Studies (Queen Mary University of London), Center for International Legal Education (CILE), CISG Advisory Council, European Multi-channel and Online Trade Association (EMOTA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of Law and Technology (Masaryk University), Instituto Latinoamericano de Comercio Electrónico (ILCE), and Internet Bar Organization (IBO).

9. The Working Group elected the following officers:

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

Rapporteur: Ms. Cecilia Ines SILBERBERG (Argentina)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.122);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.123 and Add.1);

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms (A/CN.9/WG.III/WP.124);

(d) A proposal by the European Union observer delegation (A/CN.9/WG.III/WP.121);

(e) 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

(f) A proposal by the Governments of Colombia, Honduras, Kenya and the United States (A/CN.9/WG.III/WP.125).

11. 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 transactions: draft procedural rules.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.123 and its addendum; A/CN.9/WG.III/WP.124). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

13. At the closing of its deliberations, the Working Group requested the Secretariat (i) to prepare a revised draft of procedural rules on online dispute resolution (the "Rules") based on deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the Rules; (ii) to draft preliminary guidelines that would indicate elements of the Rules that might better be directed toward ODR providers and platforms rather than contained in procedural rules; and (iii) resources permitting, to prepare a report in relation to current practices in the online dispute resolution market for a future session.

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

A. General remarks

14. The Working Group recalled the progress it had made to date and addressed the need to frame its work within the broader context of the online dispute resolution system it was considering.

15. It was suggested that a key conceptual issue that ought to be considered was that of the intended "audience" of the Rules; and in particular, that because the Rules envisaged that an ODR provider would administer disputes, it was possible that ODR providers would offer the ODR Rules, or a modified version of the ODR Rules, to merchants. Consequently the Rules might be seen as a set of model rules for ODR providers, forming a basis on which a provider might create its own rules (A/CN.9/WG.III/WP.123, paras. 5-7). Consequential issues that might arise out of this type of analysis were said to be, for example, the need to consider further the relationship between a merchant and an ODR provider, and in terms of the content of the Rules, how, when and by which entity a streaming mechanism might be effected.

16. It was also stated in relation to both tracks of a two-track system, but especially in relation to Track II of the Rules, that private enforcement mechanisms comprised an important means by which ODR might be successfully implemented in practice.

17. It was proposed to proceed by considering Track II of the Rules, as contained in document A/CN.9/WG.III/WP.123/Add.1, followed by a consideration of private enforcement mechanisms in the context of the system being devised by the Working Group, and then by a consideration of Track I of the Rules and document A/CN.9/WG.II/WP.125.

18. A proposal was further made that the Secretariat ought to prepare a report for a future session in relation to current practices in the online dispute resolution market. It was agreed that the Secretariat would prepare that report for a future session, resources permitting.

19. Document A/CN.9/WG.III/WP.125 (a proposal by Colombia, Honduras, Kenya and the United States) was introduced, which related to the decision of the Commission that the Working Group ought to consider and report back at a future session in relation to how the 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 (see A/68/17, para. 222). It was said that document A/CN.9/WG.III/WP.125 should be discussed first as this would effectively determine whether the Working Group would adopt the Track I or Track II process. It was requested by delegations introducing the proposal set out in document A/CN.9/WG.III/WP.125 that the Working Group address the proposal at its twenty-eighth session consistent with the mandate given by the Commission at its forty-sixth session in relation to how the 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, as set out above.[7]

20. In response, it was observed that the Working Group had agreed to consider ODR in terms of a two-track system at its twenty-sixth and twenty-seventh sessions, and that the Commission had endorsed the progress made by the Working Group and made a reference to that compromise approach. It was clarified that a two-track approach did recognize arbitration as one potential outcome of the ODR process. It was also observed that a clear and simple process for online dispute resolution could empower small businesses.

21. There was general support for the proposal set out in paragraph 17 above, and the Working Group proceeded to consider Track II of the Rules as contained in document A/CN.9/WG.III/WP.123/Add.1. It was said that as a background consideration, delegations might wish to keep in mind whether Track II provisions could be streamlined or simplified given the absence of a final arbitration stage of proceedings.

B. Notes on draft procedural rules

1. Draft preamble

22. The Working Group considered the draft preamble as contained in paragraph 4 of document A/CN.9/WG.III/WP.123/Add.1.

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[7] Ibid.

Paragraph (1)

"Low-value, high-volume"

23. It was queried whether the term "low-value, high-volume" was sufficiently clear. It was said that the meaning of that term was fundamental to the application of the Rules.

24. In relation to the term "high-volume", it was said that for a user of the Rules, the fact of whether or not the dispute arising out of that individual's transaction was one of a number of disputes would not be relevant (see A/CN.9/WG.III/WP.123, para. 12). Some delegations opposed deleting the term "high-volume". Following discussion it was decided to delete the words "high-volume" from the preamble.

25. In relation to the term "low-value" (see also paragraphs 31-32 below) in the preamble, diverging views were expressed in relation to whether that term ought to be defined. On the one hand, it was said that providing a definition would increase clarity as to when the Rules applied, and was said to be particularly relevant in that context from a consumer-protection standpoint. It was also said that any abuse of the use of the Rules would be limited if its scope was indeed limited to low-value transactions. On the other hand, it was said that creating a definition would be exceedingly difficult, not least because the definition of "low-value" could change over time and across borders; in that respect, the Working Group recalled its agreement at its twenty-fourth session that such a definition ought not to be included in the Rules, but indicative information set out in guidelines (A/CN.9/739, para. 16).

26. It was also clarified that the likelihood in practice would be that an ODR provider would in fact set the threshold of what constituted low-value transactions and that guidelines or guidance might thus be the most realistic means of regulating that concept.

27. Delegations in support of the inclusion of a definition of "low-value" were invited to provide specific proposals in that respect.

Paragraph (2)

28. The Working Group considered whether to remove the square brackets from the list of documents referred to in paragraph (2) of the draft preamble. It was said that it might be premature to remove the brackets at this stage of deliberations, since the existence or nature of those documents had not yet been determined.

Paragraph (3)

29. It was suggested that paragraph (3) might create confusion in terms of the hierarchy of applicable rules, and moreover that it was in any event redundant. After discussion, the Working Group agreed to delete paragraph (3).

2. Draft article 1 (Scope of application)

30. The Working Group considered draft article 1 as contained in paragraph 5 of document A/CN.9/WG.III/WP.123/Add.1.

General

"low-value" (see also paras. 25-27 above)

31. It was said that, as drafted, paragraph (1) of draft article 1 made the Rules applicable to any transaction conducted by use of electronic communications, not just low-value, high-volume transactions, and that such a meaning was contrary to the mandate of the Working Group.

32. It was suggested to include a definition for "low-value" in draft article 1, in addition to, or in lieu of, the use of that term in the preamble. Another suggestion was made not to include the phrase "low-value" in draft article 1, but rather to replace the words "intended for use" in the preamble with "shall be used" in order to clarify the scope of application there. It was agreed to consider those suggestions further subject to proposals put forward in relation to the term "low-value" in the context of the preamble.

Paragraph (1)

33. It was said that the inclusion of the words "at the time of the transaction" was unnecessary as parties ought to be able to agree at any time to resort to ODR under Track II. After discussion, it was agreed to delete that phrase.

Paragraph (1)(bis)

34. It was suggested that paragraph (1)(bis) might relate more appropriately to Track I proceedings than to simplified Track II proceedings, where such formality might not be required.

35. It was furthermore stated that the drafting of paragraph (1)(bis) might not be entirely consistent with the nature of mediation, in which it was said parties could withdraw at any time. In that respect, it was suggested to delete the word "exclusively". That proposal received support and the Working Group consequently agreed that that word would be deleted.

36. It was said in other respects that the square brackets in that paragraph ought to be retained and its contents considered further at a later stage of proceedings.

Paragraph (2)

Exhaustive list

37. It was suggested that there ought to be an exhaustive list of the types of claims that may be brought. That suggestion was accepted.

38. Consequently a suggestion was made that the listing of the types of claims that may be brought cannot be finally determined until there has been discussion on the substantive legal principles relating to those claims. Another suggestion was made to place square brackets around the word "only" in the chapeau, on the grounds that the sole issue for future discussion in relation to this paragraph was whether other types of claims could be contemplated.

39. After discussion, it was agreed to move the opening exterior square bracket and place it in front of subparagraph (a), thus leaving the entire paragraph except the chapeau within square brackets.

Goods and services

40. It was suggested that the square-bracketed text within subparagraphs (a) and (b) respectively should remain and the square brackets removed, on the grounds that claims should include services as well as goods. That suggestion was accepted.

"At the time of the transaction"

41. It was suggested that the words "at the time of the transaction" be deleted from subparagraph (a) because they restricted excessively the basis on which a claim may be brought by excluding agreements or arrangements that may be relevant but have been concluded other than at the time of the transaction. That suggestion was accepted and it was agreed to delete that phrase.

"In accordance with the agreement"

42. After discussion, it was agreed to reconsider whether the phrase "in accordance with the agreement" in subparagraph (a) adequately addressed a situation in which goods, while having been received by a purchaser, did not in fact function or perform properly. In that respect it was agreed that the Secretariat would suggest possible alternatives to that phrase, for consideration of the Working Group at a future session.

Paragraph (3)

43. It was suggested to remove the square brackets and retain the text of paragraph (3). It was said in support of that suggestion that paragraph (3) reflected a key provision contained in article 1(3) of the UNCITRAL Conciliation Rules.

44. In response to a question in relation to how the applicable law from which the parties could not derogate would be determined in an online environment, it was clarified that in relation to a party's invocation of applicable law, no difference existed as between an online and an offline environment.

45. After discussion, it was agreed to retain the contents of paragraph (3) and remove the square brackets.

3. Draft article 2 (Definitions)

46. The Working Group considered draft article 2 as contained in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1.

Paragraph (1) — "ODR"

47. There was no objection to the definition of "ODR" as contained in paragraph (1), and it was consequently agreed to retain the language therein.

Paragraphs (2) and (3) — "ODR platform" and "ODR provider" respectively

48. With respect to "ODR platform" and "ODR provider", a concern was raised that the definition of these terms in Rules did not fully reflect the contemporary practice of online dispute resolution. Specifically it was said that the practice of online dispute resolution has evolved, such that in many instances, the platform is identified first and the provider specified only after a dispute arises.

49. A proposal was made (the "first proposal") to reflect that concern by replacing paragraphs (2) and (3) as follows: Paragraph (2): "'ODR platform' means the entity specified in the dispute resolution clause that supplies a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR." Paragraph (3): "'ODR provider' means the entity that administers ODR proceedings agreed upon by the parties; and should be specified in the dispute resolution clause if the specific ODR provider is known at the time of the transaction."

50. It was clarified that because the phrase "at the time of a transaction" had been deleted from paragraph (1) of draft article 1 (see above paragraph 33) that the inclusion of that phrase at the end of the first proposal might also require further consideration.

51. By way of further background to the first proposal, it was said that such proposal was intended to capture — and to enable, rather than prescribe — all variations of ODR agreements that currently exist and that are implemented in practice. In that respect it was said that there were three existing methods of resolving an online dispute: first, where the ODR provider was the first point of contact with parties and appointed an ODR platform (a "provider-led" model, in relation to which Better Business Bureau in the United States was cited as an example); second, where the ODR platform was the first point of contact with parties and appointed an ODR provider depending on various considerations including the needs of the parties (a "platform-led" model, in relation to which Modria was given as an example); and third, where the ODR provider and platform were the same entity (in relation to which Ali Baba, a Chinese website, was given as an example).

52. In response to the first proposal, a concern was raised that such a proposal gave an enhanced function to an ODR platform, which had previously been envisaged in the Rules as a technological tool. It was said that such an approach would necessarily require additional guidance or requirements for ODR platforms, in addition to that proposed for ODR providers in the preamble to the Rules. It was furthermore said that to instil confidence in a cross-border dispute resolution process, purchasers ought to have transparent access to information in relation to the ODR process as well as the identity of the ODR provider. Specifically, it was said that key to the decision of purchasers to enter into a certain online dispute resolution process would be trust in the independence and impartiality of the ODR provider. It was said to be particularly important that since ODR was not an ad hoc process, that the parties must know the identity of the ODR provider, as the entity administering their dispute.

53. It was also suggested that because of the two major components of the ODR process manifest in the different roles of ODR platform and an ODR provider — a technical component, to be provided by the former, and a legal or substantive element, to be dealt with by the latter — that it was important to be clear in the Rules which entity was responsible to whom, and for what. A concern was expressed that should the ODR platform be designated before the ODR provider, a data exchange would necessarily take place between those two entities following a dispute, which might give rise to data protection issues.

54. It was said by way of an alternative proposal (the "second proposal") that the language in paragraphs (2) and (3) as set out in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1, be retained in square brackets for further consideration alongside the first proposal.

55. A third proposal (the "third proposal") was made on the basis that from the perspective of claimants, and particularly consumers, it was not necessary to specify in the Rules the difference between ODR providers and ODR platforms. It was said that from a claimant perspective, what mattered was that the Rules were efficient and transparent, and that the first and second proposals contained language that might be better contained in guidelines for the various actors in the dispute resolution process. It was suggested that only one "ODR entity" or "administrator" be referred to in the Rules, and that the Secretariat be requested to draft preliminary guidelines that would indicate elements of the current set of Rules that might better be directed toward ODR providers and platforms rather than contained in procedural rules.

56. In response, it was suggested that, rather than defining a single entity that would maintain full claimant-facing contact and responsibility for the administration of the dispute, that such a "centralized" entity ought to be defined separately and in addition to the defined terms of ODR provider and ODR platform.

Decision

57. After discussion, it was agreed that the first proposal would be inserted in the Rules in square brackets. It was further agreed that the language in paragraphs (2) and (3) would be retained in square brackets as an alternative to the first proposal. In relation to the third proposal, the Secretariat was requested to prepare language that would define a single ODR entity for the purpose of the Rules, and mandated to prepare draft guidelines for the various actors involved in facilitating or undertaking the Rules. Thus those three proposals would form alternatives for the discussion of the Working Group at a future time.

Paragraphs (4) and (5) — "claimant" and "respondent" respectively

58. With respect to the definitions of "claimant" and "respondent", a concern was raised that these terms did not reflect the provisions of the UNCITRAL Model Law on International Commercial Conciliation (2002) nor the UNCITRAL Conciliation Rules (1980), neither of which defined such terms. Consequently it was proposed that the terms "claimant" and "respondent" need not be defined in the Rules.

59. In response, it was said that notwithstanding the importance of consistency with other UNCITRAL instruments, the purpose of defining the terms "claimant" and "respondent" in the Rules was to make clear which party was initiating the ODR proceedings. After discussion, it was agreed to retain the terms "claimant" and "respondent" and the definitions of those terms set out in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1.

Paragraph (6) — "neutral"

60. It was queried whether a neutral could also be a legal person. It was clarified that a neutral could only be a physical person. A suggestion was made to replace the term "individual" in paragraph (6) with the term "persons" in order to reflect that

approach. After discussion, it was agreed to retain the provision as contained in paragraph 7 of document A/CN.9/WG.III/WP.123/Add.1, including the word "individual".

Paragraph (7) — "communication"

61. There were no objections to the wording in paragraph (7) and it was consequently agreed to retain the definition therein.

Paragraph (8) — "electronic communication"

62. In relation to the definition of "electronic communication", it was said that such a definition could result in, for example, the use of short message services in the conduct of ODR proceedings. A proposal was made to bracket the phrase "including but not limited to … microblogging" in order to simplify the definition.

63. That proposal was accepted, and in all other respects it was agreed to retain the language of paragraph (8) as contained in document A/CN.9/WG.III/WP.123/Add.1.

Subheadings

64. A suggestion was made to delete the subheadings "ODR", "Parties", and "[TBD]" in draft article 2. This suggestion did not receive support.

65. After discussion, it was agreed to replace the placeholder "[TBD]" with the heading "Neutral", which, it was said, would distinguish a neutral from claimants and respondents, which were grouped under the subheading "Parties".

4. Draft article 3 (Communications)

66. The Working Group considered draft article 3 as contained in paragraph 8 of document A/CN.9/WG.III/WP.123/Add.1.

Paragraph (1)

67. A concern was raised that the term "electronic address" in paragraph (1) was not sufficiently clear in the context of an ODR provider, and in particular whether it referred to a website, a link, or otherwise. In that respect, a suggestion was made to replace the phrase "the electronic address" with the phrase "the electronic address or electronic contact information which identifies the ODR provider". It was said that such a definition would ensure ODR providers were properly identified.

68. Another proposal was made to replace the entire second sentence of paragraph (1) as follows: "Electronic address means contact information by which electronic communication can be made."

69. It was agreed to consider paragraph (1), and the remainder of draft article 3, at a later stage.

5. Draft article 4A (Notice)

Paragraphs (1) and (2)

70. It was suggested that discussion on paragraphs (1) and (2) of draft article 4A should take place after further discussion on ODR platforms and ODR providers. This suggestion was accepted.

Paragraph (3)

71. After discussion, broad agreement was expressed regarding the need for a provision setting out a clear commencement stage of proceedings. It was said both that other provisions relied on commencement as a starting point, and moreover that various legal implications, including issues relating to prescription, might derive from the date of commencement.

72. It was asked whether the square-bracketed language "to be deemed", in relation to the receipt of notice, was necessary. On the one hand, it was said that parties ought to be aware that proceedings had been initiated against them. On the other hand, it was said that the deeming language may result in ODR proceedings being commenced even when the respondent has not received the notice. It was said by way of clarification that draft article 7(5) gave the neutral the power to redress any difficulties in the receipt of a notice.

73. A suggestion was made to amend paragraph (3) in order that proceedings would only start once a respondent had submitted a response to the notice, which was said to reflect article 2 of the UNCITRAL Conciliation Rules. Specific language to that effect was proposed as follows: "ODR proceedings shall commence when the respondent submits a response pursuant to article 4B accepting the [mediation/conciliation]."

74. In response, it was said that the proposal in paragraph 73 above would mean in practice that although the parties had agreed to submit disputes to ODR, a claimant would not be able to commence a Track II procedure unless the respondent so agreed a second time. The requirement of such a second agreement was said to make Track II ineffective and therefore requiring such a second agreement was not desirable.

75. A view was expressed that Track II led only to a recommendation and was therefore non-binding and, as such, the parties could withdraw from that process at any time consistent with the UNCITRAL Model Law on International Commercial Conciliation and the UNCITRAL Conciliation Rules.

76. In response, it was said by a number of delegations that Track II was not a mediation process, but a three-stage process consisting of direct negotiation, facilitated settlement, and then a final stage, the procedural outcome of which was termed "recommendation". It was said that the merchant could commit beforehand to be bound by the outcome of the third stage. The term "recommendation" was intended to encompass a broad range of procedural outcomes that, unlike arbitral awards, did not produce res judicata effect but could be coupled with mechanisms that could ensure their effective implementation. Although a recommendation was not intended to be "final and binding" in the same sense as an arbitration award enforceable by the courts, it could still be binding by way of a panoply of different,

legally relevant actions, including private enforcement mechanisms. EBay was mentioned as an example of such a system.

77. It was also said that a distinction ought to be made between binding nature of an agreement to submit disputes to an online dispute resolution process, and binding nature of a recommendation.

78. The question was raised whether it was intended under Track II that the Rules could not be used by parties who wish to agree to a purely voluntary process such as mediation and arbitration and do not wish to engage in a recommendation process.

79. It was said that the Rules as contained in document A/CN.9/WG.III/WP.123/Add.1 provided for a three-stage process including a procedural stage resulting in a recommendation. The view was further expressed that, as the Rules are contractual in nature, parties may agree to use them in a form that did not include a recommendation process, but that would be a modification of the Rules.

Conclusion

80. After discussion, it was agreed to retain the language in paragraph (3) as contained in A/CN.9/WG.III/WP.123/Add.1, but to place that language in square brackets, and furthermore to add the language proposed in paragraph 73 above in square brackets as an alternative.

Paragraph (4)

Subparagraphs (a) and (b)

81. A question was raised as to the meaning of the term "electronic address" in subparagraphs (a) and (b). It was clarified that once that term had been settled in relation to draft article 3 (see paras. 67-69) where it was used in relation to an ODR provider, its use could be reconsidered in paragraph (4).

Subparagraphs (c) and (d)

82. No objection was made to the text of subparagraphs (c) and (d) and consequently it was agreed to retain the language therein.

Subparagraph (e)

83. A question was raised as to the legal effect of subparagraph (e), and whether the inclusion of such a provision in the Rules would have a res judicata effect, or an effect in relation to limitation periods. In that respect, reference was had to article 13 of the UNCITRAL Model Law on International Commercial Conciliation, and article 16 of the UNCITRAL Conciliation Rules, both of which addressed resort to arbitral or judicial proceedings.

Subparagraph (f)

84. A question was raised in relation to the precise meaning of "location" in subparagraph (f). It was said that that meaning had not been precisely defined as a matter of physical location, relevant legal jurisdiction or otherwise. It was also pointed out that the definition of "location" had been discussed at the twenty-fourth

session of the Working Group (A/CN.9/739, paras. 78-80). The Working Group decided to leave the matter open for further consideration.

Subparagraph (h)

85. It was said that the language in subparagraph (h) could be problematic insofar as the "signature" described was not clearly expressed to be an "electronic signature" in line with other UNCITRAL instruments, and specifically the UNCITRAL Model Law on Electronic Signatures. It was said that replacing the language "the signature of the claimant and/or the claimant's representative in electronic form" with wording more aligned to that Model Law, would be more concise and create greater legal certainty.

86. A separate proposal was made in relation to that subparagraph, namely to delete the phrase "including any other identification and authentication methods". It was said in response that that wording provided a helpful expansion of the means by which a claimant might identify itself beyond an electronic signature. After discussion, it was agreed to retain that language.

Conclusion — subparagraphs (e)-(h)

87. After discussion, it was agreed to place square brackets around subparagraph (e), in order to consider that subparagraph further at a later stage.

88. It was also agreed to remove the square brackets and retain the text in relation to subparagraphs (f), (g) and (h), notwithstanding that some ambiguity remained in relation to the content of these subparagraphs, and that they ought to be further considered at a later stage.

89. In relation to subparagraph (h), it was further agreed that the Secretariat would provide alternative proposals for wording in relation to "electronic signature" that might be more appropriate.

Ellipses following subparagraph (h)/Further information to be included in the notice

90. A suggestion was made to include as a new subparagraph the words "other relevant information, if any", which, it was said, would permit parties to be able to introduce other information relevant to their claim that may not be provided for in the other headings at the time of issuing the notice.

91. It was recalled that the chapeau of draft article 4A, paragraph (4), provided for the mandatory provision of information in the subheadings, as indicated by the word "shall". It was said that the proposal in paragraph 90 above was intended to make it possible, but not mandatory, for parties to introduce other relevant information.

Conclusion on ellipses/Further information to be included in the notice

92. After discussion, it was agreed that it was desirable to encourage claimants to submit all relevant information to the extent possible at the time of notice, but that the provision of such information ought not to be mandatory. The Secretariat was requested to draft wording to that effect and to include it either in a separate provision, or in draft article 4A, in square brackets, for the further consideration of the Working Group.

93. It was clarified that the final ellipses in square brackets following subparagraph (h) would also be deleted.

94. In relation to the conclusions set out in paragraphs 92 and 93 above, it was agreed that parallel changes would be made as appropriate to the next iteration of draft article 4B.

6. Draft article 4B (Response)

Paragraph (1)

95. There was no objection to the language in paragraph (1) and consequently it was agreed to retain the text therein.

Paragraph (2)

96. A proposal was made in relation to language addressing counterclaims as follows: "The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise from the same transaction as the initial claim. A counterclaim must include the information in article 4A, paragraphs (4)(c) and (d)." It was said that that proposal would simplify the existing draft, would not require a definition of counterclaim, and would furthermore require a counterclaim to be submitted at the same time as a respondent's response.

97. That proposal received broad support.

98. A view was expressed that insufficient consideration had been given to the response to a counterclaim by a claimant. It was said that for the sake of due process, provision ought to be made in the Rules for a claimant to provide its defence were a counterclaim to be issued.

99. A different view was expressed to the effect that a specific provision need not be made for a response to a counterclaim in the Rules, both because such a provision might complicate the Rules and lead to inefficiencies in the ODR process, and because in any event a claimant could provide its response in the negotiation stage of proceedings.

100. After discussion, it was agreed that in principle, there was consensus that each party ought to have the opportunity to set forth its case. As a practical matter, it was agreed to consider a separate provision, tentatively a new article 4C, inclusive of both the proposal set out in paragraph 96 above in relation to counterclaims, as well as a new paragraph providing for a response by a claimant within a certain time frame.

Paragraph (3)

101. After discussion, it was agreed to add square brackets around subparagraph (d) to reflect the changes made to the similar provision in draft article 4A, paragraph (4)(e).

102. It was further agreed to delete the square brackets around subparagraphs (e) to (g), and to reflect any consequential drafting provisions required by wording proposed in draft article 4A, paragraph (4).

103. In all other respects, it was agreed that paragraph (3) would remain in the form set out in paragraph 12 of document A/CN.9/WG.III/WP.123/Add.1.

7. Draft article 5 (Negotiation and settlement)

104. The Working Group considered draft article 5 as contained in paragraph 13 of document A/CN.9/WG.III/WP.123/Add.1.

General

105. In response to a suggestion that the words "ODR provider" throughout the article be placed in square brackets, it was clarified that, further to the outcome of the deliberations of the Working Group in relation to this matter in paragraphs 48-57, the appropriate phrase would be incorporated throughout the draft Rules.

Paragraph (1)

106. A question was raised in relation to the meaning of communication in paragraph (1), and a suggestion made to replace that with "receipt". It was agreed to return to that matter after consideration of draft article 3 of Track II of the Rules.

107. It was observed that, following the decision to insert a new provision in relation to counterclaims (see paras. 98-100), consequential amendments would be required in paragraph (1).

108. A suggestion was made to remove the square brackets around the term "and notification … to the claimant", which it was said would cater to the need for ensuring that the claimant had received the relevant communication. After discussion, it was agreed to remove those brackets and retain the text therein.

109. A further suggestion was made to remove the square brackets around the entire text of paragraph (1), on the basis that a clear commencement provision was necessary. There was support for that suggestion, and consequently it was agreed to remove those square brackets.

110. A general suggestion was made to consider that in practice, an ODR administrator (whether that be a provider or a platform), would communicate specific timelines to parties for the proceedings, and that the Working Group might wish to take comfort from the fact that parties would thus be notified of relevant deadlines in the context of proceedings. It was suggested that an indication as to that role of a provider or platform could be addressed in the guidelines.

Paragraph (2)

"Presumed ..."

111. A proposal was made to delete the phrase "presumed to have refused to negotiate and", which was said to create unnecessary complexity and indeed a negative connotation where one need not exist. A second proposal was made to replace that language with the phrase "or a party elects not to engage in direct negotiations, then". Both proposals received support, and after discussion, it was agreed to adopt the second proposal, such that paragraph (2) would read: "If the respondent does not communicate to the ODR provider a response to the notice … within seven [7] calendar days of commencement of the ODR proceedings, or a

party elects not to engage in direct negotiations, then the ODR proceedings shall automatically move ...".

"In accordance with the form contained in article 4B ..."

112. Another proposal was made to delete the words "in accordance with the form contained in article 4B, paragraph (3)", as it was said that requiring a respondent to respond in a certain form might hinder negotiations or the freedom of parties to negotiate, if, for example, the form had not been properly adhered to. In response, it was said inter alia that: (i) permitting a respondent to respond in any form would in fact require a second notice to be submitted in accordance with the proper form at a later stage in order for proceedings to continue within the system envisaged by the Rules; (ii) that pursuant to draft article 7(5), the neutral had the ability to overcome difficulties in relation to receipt of notices; (iii) parties could always negotiate outside the parameters of the ODR system, but that it was necessary to have clear wording that allowed proceedings to continue to the next stage automatically.

113. Two proposals were made to try to address the concerns raised in relation to that language. The first would include language indicating the respondent was to communicate "an article 4B response"; and the second would modify the words "a response" with the words "referred to in article 4B".

114. After discussion, it was agreed to retain the language as drafted in paragraph 13 of document A/CN.9/WG.III/WP.123/Add.1, bearing in mind the suggestions set out in paragraph 113 and the concerns raised in paragraph 112, for future consideration.

Paragraph (3)

115. A proposal was made to delete the words "in accordance with article 3(8)" as that language was repetitive with the provision of draft article 3(8) itself. Another view was expressed that draft article 5 ought to retain the entire flow of the negotiation stage of proceedings, and that a cross-reference to draft article 3(8) was helpful in that respect. After discussion, it was agreed to delete the words "in accordance with article 3(8)" and to revisit paragraph (3) of draft article 5 after consideration of draft article 3.

116. A proposal was made to replace the phrase "submission of the response to the ODR platform" with "and notification of the response to the claimant", which it was said would increase clarity and also obviate the need for the following language "[and notification thereof to the claimant], then". After discussion, that proposal was accepted and the square bracketed language followed by the word "then", deleted.

117. It was suggested that parties ought, at any time, to be able to elect to move to a facilitated settlement stage, without waiting for the ten days required under paragraph (3). In relation to whether parties ought to have to agree to move to the next stage, or whether one party ought to be able to do so unilaterally, it was said that the latter was more in line with current practice. In support of that view, it was said that it was not possible to impose a negotiation stage on parties and that if one party wanted to move to the next stage, it ought to be permitted to do so.

118. In that respect, a proposal was made to add a sentence at the end of paragraph (3) as follows: “At any point in time prior to the expiration of the 10 day period, a party may request that the process move to the facilitated settlement stage, in which case the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6.” That proposal received support. A suggestion to replace the phrase “a party” with “one or both parties” also received support, on the basis that it would also allow parties to agree to move proceedings forward. After discussion, the two proposals were accepted.

Paragraph (4)

119. It was proposed to delete the text “[for the filing of the response]” and to remove the square brackets from “[for reaching settlement]” and retain the text therein. After discussion, that proposal was accepted.

Paragraph (5)

Form of settlement agreement and entity responsible for recording that agreement

120. A query was raised as to the form of a settlement agreement to be recorded on the platform, and which entity was intended to record that agreement. It was said that while in a traditional mediation, the mediator would draw up the terms of an agreement in some jurisdictions, the Rules permitted a settlement to take place during the negotiation stage, when a neutral would not have been appointed yet.

Stage of negotiations

121. It was suggested to delete the square bracketed language “[during the negotiation stage]” as well as words “and/or” in the second set of square brackets, and to retain, and remove the square brackets around, the words “at any other stage of the ODR proceedings”. Paragraph (5) would thus read: “If settlement is reached at any stage of ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.” It was said that proposal would ensure that settlement could be achieved at any stage of proceedings.

122. That proposal received broad support and was consequently accepted. Furthermore, it was agreed that the Secretariat would place that paragraph in a separate article, at a more appropriate location in the text, to reflect the principle that settlement could be achieved not only during a negotiation stage, but at any point of the proceedings.

Confidentiality

123. It was said that recording a settlement on the platform would raise issues of confidentiality and data preservation. In that respect, a suggestion was made to include the phrase “the information should be preserved in a secure manner” in the text. After discussion, it was agreed that such language, and its applicability to ODR platforms, providers or other actors in the ODR process, could be considered in the future for inclusion in the guidelines.

8. Draft article 6 (Appointment of neutral)

124. The Working Group considered draft article 6 as contained in paragraph 14 of document A/CN.9/WG.III/WP.123/Add.1.

Subheadings

125. After discussion, it was agreed to relocate the subheading "Objections to the appointment of a neutral" from its current location between paragraphs 4 and 5, to between paragraphs 3 and 4.

Paragraph (1)

"By selection from a list …"

126. It was suggested to delete the square bracketed language "[by selection from a list of qualified neutrals maintained by the ODR provider]", which was said to be overly prescriptive. It was said that ODR administrators did often maintain lists or rosters in practice, and that the guidelines might wish to address such lists. After discussion, it was agreed to delete the language in square brackets.

Notification of "the name of the neutral appointed"

127. A view was expressed that notifying only the name of the neutral was insufficient insofar as it would not meaningfully allow parties to challenge a neutral or determine if a conflict of interest existed. A number of suggestions were made to redress that concern, including: requesting ODR providers to publish online a list of names of available neutrals; providing for the curriculum vitae of neutrals to be sent to the parties; and providing information similar to that provided by appointing authorities under the UNCITRAL Arbitration Rules 1976 (full name, address, nationality and a description of the relevant qualifications).

128. After discussion, it was agreed that some basic information in relation to a neutral ought to be provided to the parties, but that that information ought not unduly to burden the ODR provider. It was agreed that the Secretariat would prepare appropriate language to reflect the principle that additional relevant information regarding the neutral that in addition to a neutral's name ought to be provided as well as his or her name.

Paragraph (2)

"Sufficient time"

129. A suggestion was made to replace the phrase "to make available sufficient time" with the phrase "to apply appropriate diligence to enable ODR proceedings".

130. It was said that as the Rules applied by way of agreement between the parties to the dispute, they could not bind other persons such as the neutral. Consequently, a proposal was made to replace paragraph (2) with the following language: "The neutral, by accepting appointment, shall confirm that he or she has sufficient available time to enable the ODR proceedings to be conducted in accordance with the Rules." It was said that although that formulation still would not serve to bind the neutral, it would emphasize the importance of expediting proceedings.

131. The Working Group also recalled the language in the second model statement to article 11 set out in the Annex to the UNCITRAL Arbitration Rules 2010, which reflected a similar principle.

132. After discussion, it was decided to include the proposal set out in paragraph 130 above, and a mandate was given to the Secretariat to amend the proposed language slightly as appropriate.

Paragraph (3)

133. A suggestion was made to add the words "or impartiality" after the first use of the word "independence" in paragraph (3), to maintain internal consistency within that paragraph. That suggestion was accepted.

Paragraph (4)

134. A suggestion was made to delete the first subparagraph (i) of paragraph (4), as it was said that general principles of mediation and arbitration required reasons for challenging a mediator or arbitrator. Another view was expressed that that language ought to be retained, on the assumption that parties would have good faith reasons to challenge, whilst allowing at the time of appointment expeditious challenges to be made without giving reasons. After discussion, it was agreed that there had not been a preponderance of views to delete that subparagraph, and hence it would be retained.

Paragraph (5)

135. There was no objection to the wording of paragraph (5) and it was consequently agreed to retain the text therein.

Paragraph (6)

136. It was said that paragraph (6) did not address the principle, which was said to be industry practice, that where both parties objected to the appointment of a neutral, that that neutral ought to be replaced without any discretion by a third party such as a provider. It was agreed that the Secretariat would include wording to that effect in the next iteration of the Rules, or alternatively in the Guidelines, as appropriate.

Paragraph (7) and (8)

137. There were no objections to the wording in paragraphs (7) and (8) and it was consequently agreed to retain the text therein.

9. Draft article 6(bis) (Resignation or replacement of neutral)

138. The Working Group considered draft article 6(bis) as contained in paragraph 17 of document A/CN.9/WG.III/WP.123/Add.1.

139. There were no objections to the wording of draft article 6(bis) and it was consequently agreed to retain the text therein.

10. Draft Article 7 (Power of the neutral)

Paragraph (1)

140. A proposal was made to delete the square bracketed language as it was previously mentioned in the draft preamble. Another concern was raised whether the phrase "as he or she considers appropriate" ought to be reconsidered due to concerns of granting too wide an authority to the neutral. After discussion, it was agreed that paragraph (1) would be retained in the form set out in paragraph 19 of document A/CN.9/WG.III/WP.123/Add.1, pending discussion at a future session.

Paragraph (1)(bis)

141. There was no objection to the language in paragraph (1)(bis) and consequently it was agreed to retain the text.

Paragraph (2)

142. A proposal was made to delete the square bracketed language as well as the words "the relevance of which shall be determined by the neutral" at the end of the first sentence as it was overly prescriptive. That proposal received wide support and was consequently accepted.

143. It was said that the Rules which apply by way of agreement between parties to the online sales transaction could not bind the ODR provider or the neutral as they are not parties to this agreement. In that light, it was suggested that the Rules would need to be restructured to ensure that those obligations are complied with by those third parties. A suggestion was made to set out those obligations in guidelines addressed to ODR providers and neutrals rather than in the Rules. In response, it was said that such obligations are frequently seen in arbitration rules and thus there is no reason why the Rules cannot provide for those obligations as obligations on such third parties. It was also recalled that at the outset of the discussion, the Working Group was invited to consider whether the Rules ought to be seen as designed for ODR providers to offer to buyers and sellers. A suggestion was made to refer to that possibility in the draft preamble. After discussion, it was decided to revisit that matter at a later stage.

Paragraph (3)

144. A proposal was made to remove the square brackets around and retain the word "request", and to delete the square bracketed word "require". This proposal received broad support and was accepted.

Paragraph (4)

145. It was suggested that the phrase "the dispute resolution clause that forms part of a contract" was seemingly contradictory to the phrase "agreement separate from the transaction" in draft article 1, paragraph 1(bis). The Secretariat was requested to formulate clearer language in the next iteration of the Rules. The text in paragraph (4) was otherwise retained in the form set out in document A/CN.9/WG.III/WP.123/Add.1.

Paragraph (5)

146. It was suggested that the square bracketed language was not necessary and that the entire provision should be simplified, such that it would read: “The neutral may, at any time after inviting the parties to express their views, extend any period of time prescribed under these Rules.” For the sake of further simplification, another proposal was made as follows: “the neutral may extend any period of time prescribed under these Rules.” In response, a concern was raised that the provision, as drafted, reflects a long deliberation of the Working Group and that if amended as proposed, would exclude a situation where one party did not receive notice. After discussion, it was decided that the provision would be retained in the form set out in paragraph 19(5) of A/CN.9/WG.III/WP.123/Add.1, including the square brackets, and that that matter would be revisited at a later stage.