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

Addendum

Note by the Secretariat

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4. Neutral

1. Draft article 6 (Appointment of neutral)

“1. The ODR provider through the ODR platform shall appoint the neutral by selection from a list of qualified neutrals maintained by the ODR provider.

“2. The neutral shall declare his or her independence and shall disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.

“3. Either party may object to the neutral’s appointment within [two (2)] calendar days of the notice of appointment. Where a party objects to the appointment of a neutral, that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] such challenges to the appointment of a neutral, following which the appointment of a neutral by the ODR provider will be final.

“4. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment and shall provide the neutral all communications and documents regarding the dispute received from the parties. Either party may object, within [three (3)] calendar days from receiving the notice of appointment of the neutral, to providing the neutral with information generated during the negotiation stage.

“5. If the neutral has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform will appoint a neutral to replace him or her and will inform the parties [promptly][without delay]. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.

“[6. The number of neutrals shall be one unless the parties otherwise agree.]”

Remarks

Paragraph (3)

2. The Working Group may wish to consider including the words “the receipt of” between “calendar days of” and “the notice of appointment” to clarify when the time period begins to run.

Paragraph (4)

3. The Working Group may wish to clarify whether “all communications and documents regarding the dispute received from the parties” should include the communications exchanged at the negotiation stage, since the claimant, upon filing, is required to submit relevant evidence and documents.

4. The Working Group may also wish to consider retaining the square bracketed phrase that gives the parties the option to object to providing the neutral with information generated during the negotiation stage.

Paragraph (6)

5. At its twenty-second session, the Working Group agreed that, in the absence of agreement otherwise by the parties, there should be a sole neutral (A/CN.9/716, para. 62).

6. **Draft article 7 (Power of the neutral)**

“1. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the ODR proceeding to be conducted and completed expeditiously in accordance with the Rules.

“2. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate, [subject to safeguards to preserve impartiality of the neutral and the integrity of the process,] provided that the parties are treated equally. The neutral, in exercising his or her discretion, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall act fairly and shall remain at all times wholly independent and impartial.

“3. The neutral shall conduct the ODR proceedings on the basis of documents filed by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.

“4. At any time during the proceedings the neutral may require or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine. [Each party shall have the burden of proving the facts relied on to support its claim or defence.]

“5. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, a dispute settlement clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A [decision] [award] by the neutral that the contract is null shall not automatically entail the invalidity of the dispute settlement clause.

“[6. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice [or any other communication] under the Rules, the neutral may make such inquiries or take such steps as he deems necessary to satisfy himself with regard to such receipt, and in doing so he may where necessary extend any time period provided for in the Rules.]”

*Remarks**Paragraph (1)*

7. Draft article 6, paragraph (6) has been moved to draft article 7, paragraph (1) to reflect the determination that the availability of the neutral to undertake ODR

cases is more suitably identified as an obligation of the neutral rather than a precondition to his appointment (A/CN.9/739, para. 123).

Paragraph (4)

8. The Working Group may wish to move the square bracketed sentence, which raises issues of proof, to another place in the Rules (A/CN.9/739, para. 127).

Paragraph (6)

9. Draft article 7, paragraph (6) reflects the Working Group's agreement to include a provision to allow for the neutral to decide on issues related to non-receipt of communications by a respondent (A/CN.9/739, para. 101). The Working Group may wish to consider whether the proposed provision is suitable in draft article 7 or as part of draft article 4.

5. [Facilitated settlement and arbitration]

10. Draft article 8 (Facilitated settlement)

"1. The neutral shall evaluate the dispute based on the information submitted and shall communicate with the parties to attempt to reach an agreement. If the parties reach an agreement, then the ODR proceeding is automatically terminated. If the parties do not reach an agreement within ten (10) calendar days, [the parties shall have the option to move to the next [stage[s]] of the ODR proceeding] [the neutral shall render a [decision] [award] pursuant to Article 9].

"[2. If, as a consequence of his or her involvement in the facilitation of settlement, any neutral develops doubts as to his or her ability to remain impartial or independent in the future course of the ODR proceedings under Article 9, that neutral shall resign and inform the parties and the ODR provider accordingly.]"

Remarks

Paragraph (2)

11. The Working Group may wish to consider whether paragraph (2) is suitable to be included in draft article 8 or in draft article 6, paragraph (2). The Working Group may also wish to consider including an equivalent provision in draft article 9 in the event the neutral at the arbitration stage is different from that in the facilitated settlement stage.

12. The Working Group may also wish to consider whether a facilitated settlement should terminate by way of a settlement agreement either in all cases or where requested by a party.

6. Decision by the neutral

13. Draft article 9 ([Issuing of] [Communication of] [decision] [award])

"1. The neutral shall render a [decision] [award] [promptly][without delay] and in any event within seven (7) calendar days [with possible extension of additional seven (7) calendar days] after the parties make their final

submissions to the neutral. The ODR provider shall communicate the [decision] [award] to the parties. Failure to adhere to this time limit shall not constitute a basis for challenging the [decision] [award].

“2. The [decision] [award] shall be made in writing and signed by the neutral, and shall contain the date on which it was made [and brief grounds for the [decision] [award]].”

“[3. The [decision] [award] shall be final and binding on the parties. The parties shall [promptly] carry out the [decision] [award] without delay].”

“4. Within [five (5)] calendar days after the receipt of the [decision] [award], a party, with notice to the other party, may request the neutral to correct in the [decision] [award] any error in computation, any clerical or typographical error, [or any error or omission of a similar nature]. If the neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefore] within [two (2)] calendar days of receipt of the request. Such corrections [shall be in writing and] shall form part of the [decision] [award].”

“5. In all cases, the neutral shall decide in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction].”

Remarks

Paragraph (1)

14. The Working Group may wish to deliberate on what happens in the event that a neutral fails to render a decision within the time provided in the paragraph (A/CN.9/739, para. 133) as well as to consider the suggestion to impose reputation-based penalties on ODR parties defaulting on their obligations (A/CN.9/739, para. 136).

Paragraph (2)

15. The Working Group may wish to address the question whether a neutral needs to provide grounds for his decision (A/CN.9/739, para. 137).

Paragraph (3)

16. The Working Group may wish to note that paragraph (3) has been placed in square brackets as it relates to issues raised under draft article 1 and the square bracketed text therein [*“subject to the right of parties to pursue other forms of redress”*] (A/CN.9/739, para. 138).

Paragraph (4)

17. The Working Group may wish to address the question whether a neutral needs to provide grounds for his correction to the decision (A/CN.9/739, para. 139).

Paragraph (5)

18. The Working Group may wish to note that, as paragraph (5) relates to substantive legal principles for resolving disputes, it was suggested to delete it from

draft article 9 and to include it elsewhere (A/CN.9/739, para. 141). The Working Group may also wish to note that this issue is discussed in A/CN.9/WG.III/WP.113.

7. Other provisions

19. Draft article 10 (Language of proceedings)

“[The ODR proceedings shall be conducted in the language used in connection with the transaction in dispute, [unless another language is agreed upon by the parties] [unless the neutral decides otherwise]. [In the event the parties do not agree on the language of proceedings, the language of proceedings shall be determined by the neutral.]”

Remarks

20. The Working Group may wish to note that in some situations, the language used in connection with a transaction may be different for the seller and buyer, depending on their respective locations. For instance, a seller may access a selling website in one language while the website automatically changes to another language depending on the buyer’s Internet protocol (IP) address, which reflects his location and the language commonly used there. In such a case, identifying the “language used in connection with the transaction” could be problematic.

21. In addition, a common argument against choosing the language of the transaction as the language of proceedings is that the level of understanding of a language needed to conclude a transaction may differ from that needed when making a claim. Technology may assist parties in overcoming such language issues, making it possible for users to submit a claim while having little understanding of the language of the ODR platform. However, it should be borne in mind that a given ODR platform may not have the capacity to provide such technology-based services, and may not be able to accommodate the full range of languages.

22. In order to facilitate agreement on the language of proceedings, the Working Group may wish to provide for selection of language by the parties in annexes A and B of draft article 4 (see A/CN.9/WG.III/WP.112, para. 38).

23. Draft article 10 reflects the suggestion made by the Working Group that, where the parties have failed to reach an agreement on the language of proceeding, this matter could be left to the discretion of the neutral (A/CN.9/716, para. 105). In that case, the Working Group may wish to consider how the language of proceedings is to be determined prior to the involvement of the neutral and on what grounds the neutral will decide on the language of proceedings.

24. The Working Group may also wish to note that in cases where the neutral needs to review supporting documentation submitted by the parties, the ODR provider may need to appoint a neutral who has understanding of the relevant language(s).

25. A proposal was made to include a separate paragraph along the following lines (A/CN.9/739, para. 143): “*An ODR provider dealing with parties using different languages shall ensure that its system, Rules and neutrals are sensitive to these differences and shall put in place mechanisms to address the needs of parties in this regard*”. The Working Group may wish to consider whether such a reference is more appropriately placed in guidelines and minimum requirements for ODR providers.

26. **Draft article 11 (Representation)**

“A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider.”

27. **Draft article 12 (Exclusion of liability)**

“[Save for intentional wrongdoing or gross negligence, neither the neutral nor the ODR provider shall be liable to the parties for any act or omission in connection with any ODR proceedings under the Rules.]”

Remarks

28. Draft article 12 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It mirrors article 16 of the UNCITRAL Arbitration Rules, with necessary adjustments.

29. **Draft article 13 (Costs)**

“[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]”

Remarks

30. The term “costs” refers to an order by a neutral for the payment of money from one party (usually the losing party) to another (usually the successful party) in compensation for the successful party’s expenses in bringing its case.

31. The Working Group may wish to consider, in the event the claimant is successful in ODR proceedings where the neutral is involved, whether his or her filing fee should be paid by the unsuccessful party.