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

Note by the Secretariat

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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 (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] At its forty-fourth (Vienna, 27 June-8 July 2011)[2] and forty-fifth (New York, 25 June-6 July 2012)[3] sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010),[4] the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural rules for online dispute resolution in cross-border electronic transactions (the "Rules"), including taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions.[5] From its twenty-third (New York, 23-27 May 2011)[6] to twenty-sixth (Vienna, 5-9 November 2012)[7] sessions, the Working Group considered draft generic procedural rules as contained in documents A/CN.9/WG.III/WP.107, A/CN.9/WG.III/WP.109, A/CN.9/WG.III/WP.112 and its addendum, and A/CN.9/WG.III/WP.117 and its addendum, consecutively.

3. At its twenty-sixth session, the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute ("pre-dispute arbitration agreements") are considered binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex).

4. This note contains an annotated draft of the Rules taking into account the deliberations of the Working Group at its previous sessions, including its request for a "two-track" set of Rules as set out in paragraph 3 above.

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17).

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

[4] The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

[5] A/CN.9/716, para. 115.

[6] The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

[7] The report on the work of the Working Group at its twenty-sixth session is contained in document A/CN.9/762.

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

A. General remarks

Legal nature of the Rules

5. The Working Group may wish to bear in mind in its consideration of the Rules that, as set out in draft article 1, the Rules are of a contractual nature, and nothing therein serves to override mandatory law.

6. At the twenty-sixth session of the Working Group, two approaches in relation to the application of the Rules were expressed: (i) under a first approach, pre-dispute arbitration agreements should apply to all B2C and B2B transactions, and (ii) under a second approach, as pre-dispute arbitration agreements are not considered binding on consumers in certain jurisdictions, disputes involving consumers in those jurisdictions should not be settled by arbitration (A/CN.9/762, paras. 15, 17, 18, 20-22 and annex).

7. Consequently the suggestions of the Working Group in the discussion paper annexed to document A/CN.9/762 amounted to a proposal that the Rules include different sets of provisions depending on whether the consumer's domestic law would permit a pre-dispute arbitration agreement to be binding upon that consumer.

Two-track set of the Rules

8. With that proposal in mind, the following options for creating a "two-track" set of the Rules pursuant to the Working Group's proposal were considered:

- *At the time of transaction, requiring any of the following:*

(i) a vendor to classify whether the purchaser is a business or consumer, and the jurisdiction of any consumer, and to tailor the relevant dispute resolution clause accordingly;

(ii) purchasers to self-categorize (i.e., identify themselves as consumers or businesses) and as being subject to the laws of a certain jurisdiction;

(iii) those identifying themselves as consumers to select at the time of transaction whether they would prefer an ODR proceeding ending in arbitration, or not;

- *During the proceedings or at the time of making a claim, requiring:*

(iv) the neutral to make a determination regarding the consumer's jurisdiction and/or whether a party was a consumer or a business; or

(v) the ODR provider to make a determination regarding the consumer's jurisdiction and/or whether a party was a consumer or a business;

(vi) a "second click" by some or all claimants, at the time of lodging a claim, and in addition to the action of lodging a claim (itself likely a post-dispute agreement to arbitrate, see document A/CN.9/744, para. 20), to indicate the claimant's agreement at that post-dispute stage to engage in a process ending in binding arbitration (see A/CN.9/744, para. 33).

9. The difficulties perceived in relation to the above approaches were as follows. In relation to (i), requiring vendors to determine whether their counterparty is a business or consumer, and the relevant jurisdiction and law applicable to that counterparty, and to tailor their dispute resolution clause accordingly, would possibly thwart a presumptive objective of the Rules, namely to remove investigatory burden and risk from merchants to encourage them to sell cross-border. The Working Group has previously identified the difficulties inherent in categorizing consumers and businesses in the context of online transactions (see e.g. A/65/17, para. 265; A/CN.9/721, para. 35). In relation to (ii) and (iii), self-categorization by consumers and/or selection of desired outcome would be unlikely to satisfy those delegations desirous of the valid application of pre-dispute arbitration agreements to all parties, where permitted by law (A/CN.9/762, para. 18), nor would it necessarily provide for greater consumer protection. Moreover, the Rules are not solely intended to govern B2C transactions, but rather, and further to the mandate of the Commission, the Rules also apply to B2B transactions. The Working Group may wish to consider whether it is desirable for respondents which are businesses to have the option to opt out of an arbitration stage at the outset of proceedings.

10. In relation to (iv), complex determinations of residence, jurisdictional requirements and choice of law by a neutral presiding over a simple low-value dispute between parties anywhere in the world, are not envisaged by the Rules. Nor would such determinations produce an efficient dispute resolution process.

11. In relation to (v), the Working Group may wish to recall that ODR providers will be private entities, most likely selected by businesses and prescribed in contracts of adhesion, to provide an ODR service. The Working Group may wish to consider whether such entities would be willing or able to provide accurate assessments, regarding, for instance, place of residence of consumers and to implement different outcomes based on those assessments, and even in the event they were, whether consumers would be satisfied with this type of determination and where they could seek recourse if not.

12. Finally, in relation to (vi) in paragraph 8 above, or any variation thereof, the validity of the initial dispute resolution clause might be compromised if such a clause were to be superseded by a second “acknowledgement” or agreement. In any event, such a second click by consumers post-dispute could not resolve any concern relating to consumer respondents. Nor would a post-dispute agreement to arbitrate by both parties appear to be practical in either B2B transactions, or in the vast majority of B2C transactions, where the respondent is likely to be a business, thus substantially reducing the ability of claimants to achieve relief under the Rules in instances where a business respondent declines to arbitrate post-dispute.

13. In respect of most potential determinations set out above, disputes might arise in relation to a categorization, ancillary to the substantive dispute intended to be resolved by the ODR proceedings.

14. Furthermore, there are a number of benefits to a set of procedural rules being a self-contained, global system. First, procedural rules are intended to provide a clear legal process, and, particularly in a context involving simple low-value disputes, often involving consumers, ought to be clear and simple. Second, procedural rules are contractual in nature and as such are subject to mandatory law. Thus a single

coherent instrument is already subject to the possibility of being overridden in some respects by national law; building additional complexity into the Rules might render them difficult to use. Finally adding an element of discretion or categorization into procedural rules, and thus conferring certain additional rights on parties in some jurisdictions or complex obligations on third parties, such as ODR providers or neutrals, may simply be unworkable in practice.

Proposed new structure of the Rules

15. The present draft Rules have consequently been drafted as two discrete sets of Rules, one ending in a binding arbitration stage (tentatively referred to as "Track I"), and another (tentatively referred to as "Track II") with two possible final outcomes for the Working Group to consider: either an outcome terminating (i) at the close of the facilitated settlement stage, even if no settlement has been reached; or (ii) if a settlement has not been reached, with a non-binding decision by a neutral, enforceable via private mechanisms such as trustmarks. The latter approach received support as a third alternative to the "two track" system at the twenty-sixth session of the Working Group (A/CN.9/762, paras. 19-21).

16. A dispute resolution clause would therefore need to specify whether disputes arising under that transaction would be resolved under "Track I" or "Track II" of the "UNCITRAL ODR Rules". In practice, therefore, no determination would be made by the seller in relation to the jurisdiction or status (consumer or business) of the counterparty to the contract; rather, the Track specified in the dispute resolution clause would apply irrespective of the nature of the purchaser. Each Track would comprise a stand-alone set of Rules.

17. This approach seeks to accommodate both positions expressed by the Working Group at its twenty-sixth session whilst taking account of the legal and practical difficulties of a determination before or during the dispute of the type of purchaser and of its jurisdiction(s). If a dispute resolution clause specifies that disputes arising under the transaction will be conducted under Track I of the Rules (ending in arbitration), all parties would be bound by the final award where the applicable domestic law so permitted. Consumers in jurisdictions where pre-dispute arbitration agreements are not considered binding on them would engage in the same ODR process but would not be bound by the award under their national legislation (failing a post-dispute agreement to arbitrate). If a dispute resolution clause specifies that disputes arising under the transaction will be conducted under Track II of the Rules, proceedings would not end in arbitration for any party.

18. Ideally a business vendor's webpage or even an internal link within a dispute resolution clause should set out the implications of its dispute resolution procedures including the implications for consumers in certain jurisdictions of, for example, the non-binding nature a pre-dispute resolution clause. However, as imposing obligations on businesses is not within the scope of the Rules, the Working Group may wish to consider whether the guidelines for ODR providers should require that the implications of Track I or Track II of the Rules (as applicable) should be stated clearly and simply for both parties when a claim is filed.

19. The content of the proposed draft Rules accommodating two Tracks is set out in paragraphs 23-69 below. Although for economy of drafting, this note does not repeat the provisions which would be common to both Tracks, the final Rules would

necessarily encompass two discrete and stand-alone sets of Rules (Track I and Track II), with no commonality with or cross-reference to the other Track, so that each Track could be referred to independently by its constituent users.

20. For ease of reference, the Working Group may wish to note that the draft preamble and articles 1 to 7 and 11-15 would be identical in both Tracks I and II. Draft article 8(2) would be tailored to the relevant Track. Track II would additionally include draft article 8 (bis); Track I, draft articles 9, 9 (bis), 9 (ter) and 10.

Drafting matters

21. The Working Group may wish to note that, for the sake of consistency, the following changes have been made throughout the Rules. First, in line with other UNCITRAL instruments, the word "promptly" has been used throughout the Rules, instead of the phrase "without delay", where those were proposed as alternatives. Second, the phrase "submitted to the ODR platform" has been replaced with the term "communicated to an ODR provider", in order to achieve greater consistency with the definitions set out in draft article 2, and to improve consistency more generally throughout the Rules.

ODR provider and ODR platform

22. As a general remark, the Working Group may wish to consider whether the relationship between the ODR platform and the ODR provider is sufficiently clear in the Rules, and the delineation of the roles of those entities clearly framed within the ODR process. Although the supplementary document setting out guidelines for ODR providers may provide further structure in this regard, the Working Group may wish to consider whether the Rules ought to express the respective roles more clearly. The definitions of ODR platform and ODR provider have been slightly modified to attempt to clarify the relationship between these entities (draft articles 2(2) and (3)), as has the first paragraph of draft article 3.

B. Notes on draft procedural rules

1. Introductory rules

23. **Draft preamble**

"1. The UNCITRAL online dispute resolution rules ("the Rules") are intended for use in the context of cross-border low-value, high-volume transactions conducted by means of electronic communication.

"2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which [are attached to the Rules as an Appendix and] form part of the Rules:

[(a) Guidelines and minimum requirements for online dispute resolution providers;]

[(b) Guidelines and minimum requirements for neutrals;]

[(c) Substantive legal principles for resolving disputes;]

[(d) Cross-border enforcement mechanism;]

[…];

"[3. Any separate and supplemental [rules] [documents] must conform to the Rules.]"

Remarks

Paragraph (2)

24. At its twenty-fourth session, the Working Group noted that the list of documents in paragraph (2) is not exhaustive (A/CN.9/739, para. 21). The Working Group may wish to consider which of these documents and any additional documents the Working Group should prepare in the fulfilment of its mandate. The Working Group may wish to note that documents A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115 address issues related to the documents identified in paragraph (2).

Paragraph (3)

25. An ODR provider may choose to adopt supplemental rules to deal with issues that are not included in the Rules and that may require different treatment for each ODR provider — e.g. costs, definition of calendar days,[8] responses to challenge of neutrals.

26. **Draft article 1 (Scope of application)**

"1. The Rules shall apply where the parties to a transaction conducted by use of 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 by ODR under the Rules.

["1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction[, and] notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the ODR Rules will be exclusively resolved through ODR proceedings under the ODR 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 leased [or services rendered] were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the agreement made at the time of the transaction; or

(b) that full payment was not received for goods [or services] provided.

["3.

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[8] At its twenty-fourth session, the Working Group agreed to retain the term "calendar days" throughout the Rules (A/CN.9/739, para. 64). The Working Group may wish to recall its decision to provide in an additional document the recommendation that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own rules with regard to time so long as they are not inconsistent with the Rules (A/CN.9/721, para. 99).

Option 1: ["The Rules shall not apply where the applicable law at the buyer's place of residence provides that agreements to submit a dispute within the scope of the ODR Rules are binding on the buyer only if they were made after the dispute has arisen and the buyer has not given such agreement after the dispute has arisen or confirmed such agreement which it had given at the time of the transaction.]

Option 2: ["These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision applicable law from which the parties cannot derogate, that provision shall prevail.]

Remarks

Paragraph (1)

27. Paragraphs (1) and (1) bis require an agreement to submit disputes to ODR, which agreement is separate from the transaction. It was suggested that a separate agreement would better ensure that a consumer was providing "informed consent" when agreeing to submit disputes to ODR (A/CN.9/744, paras. 23-24). The consent of the parties might be so expressed in the form of a separate "OK box" (click-wrap agreement) accessible from or linked to the underlying transaction.

Paragraph (1) bis

28. In paragraph (1) bis, language has been included in square brackets to provide for the requisite information to be given to the buyer at the time of the transaction in relation to the relevant Track of the Rules that will govern the dispute resolution procedure.

29. A definition for "dispute resolution clause" has also been inserted for the Working Group to consider as the requirements for, and severability of, this clause are referred to elsewhere in the Rules (see e.g. draft articles 2(3), 3(1), 7(4), 10 and 11).

30. A model dispute resolution clause for each Track ought to be included in an appendix to the Rules, and to include the relevant determination of applicable law (see paras. 68-70 of document A/CN.9/WG.III/119/Add.1).

Paragraph (2)

31. It may be desirable for the scope of the disputes to which the Rules will apply to be defined in the Rules. The language in the current draft paragraph (2) addresses the nature of the possible claims set out in document A/CN.9/WG.III/WP.115; by consequence it also excludes claims that may be inappropriate for resolution by ODR under the Rules, such as consequential damage or personal injury.

32. Alternatively, the scope of the Rules could be defined by cross-referring to article 4A (Notice), should that article be amended to set out the full list of claims that might be initiated under the Rules (see para. 55 below).

Paragraph (3)

33. Although options 1 and 2 were not originally proposed as alternatives, the Working Group may wish to consider whether one option alone would be sufficient to clarify in the Rules that ODR proceedings are subject to relevant national consumer protection law, particularly with regard to jurisdictions where pre-dispute agreements to arbitrate involving consumers are not binding upon consumers.

34. The Working Group may wish to consider that the Rules are contractual rules and therefore would, in any event, not serve to override national law.

35. **Draft article 2 (Definitions)**

"For purposes of these Rules:

ODR

"1. 'ODR' means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.

"2. 'ODR platform' means an online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR proceedings.

"3. 'ODR provider' means the online dispute resolution provider specified in the dispute resolution clause referring disputes to online dispute resolution under these Rules. An ODR provider is an entity that administers ODR proceedings [and designates an ODR platform][, whether or not it maintains an ODR platform].

Parties

"4. 'claimant' means any party initiating ODR proceedings under the Rules by issuing a notice.

"5. 'respondent' means any party to whom the notice is directed.

"6. 'neutral' means an individual that assists the parties in settling or resolving the dispute.

Communication

"7. 'communication' means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

"8. 'electronic communication' means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed

into a digital format so as to be directly processed by a computer or other electronic devices.

Remarks

General

36. The Working Group may wish to review the order of the definitions, which have been reorganized by theme (rather than strictly alphabetically) in order to establish a consistent order among different language versions of the Rules, as requested by the Working Group at its twenty-fifth session (A/CN.9/744, para. 47).

37. The Working Group may recall that, at its twenty-fifth session, it requested a definition of "writing" to be added to the list of definitions in draft article 2, in reference to the requirement for an award in draft article 9 to be made in writing and signed by a neutral (A/CN.9/744, para. 59). At its twenty-sixth session, the Working Group likewise (and in relation to the same requirement in draft article 9) requested a definition of "signature" to be inserted in the Rules (A/CN.9/762, para. 44).

38. In an attempt to achieve greater clarity in the Rules, the means by which to satisfy the requirement for an award to be made in writing and signed for the purposes of draft article 9, have been included in draft article 9 itself, rather than defined as separate terms. Both terms are peculiar to draft article 9 (although the term "electronic signature" is also used in draft articles 4A and 4B) and may not warrant a separate definition in these Rules.

Paragraphs (2) and (3) "ODR provider"

39. Paragraphs (2) and (3) have been slightly modified to make clearer the presumptive link between ODR platform and provider, although the Working Group may still wish to consider whether this link is sufficiently clearly articulated in the Rules (see para. 22 above).

40. Paragraph (3) has been amended, alongside a new draft article 11, to ensure the Rules provide for a link between the dispute resolution clause and the determination of the ODR provider. This may be considered desirable because, as "ad hoc" proceedings are not possible under the Rules, it is important that the contract between the parties specify the provider which will perform the administrative functions under the Rules.

41. The Working Group may wish to consider whether it is necessary to specify whether the ODR provider need maintain an ODR platform, or whether such information may be better suited for a document setting out guidelines for ODR providers.

Paragraph (6) "neutral"

42. The definition of the neutral has been slightly modified in order to achieve greater clarity and simplicity of drafting.

43. **Draft article 3 (Communications)**

"1. All communications in the course of ODR proceedings shall be communicated by electronic means to the ODR provider via the ODR platform designated by the ODR provider. [The electronic address of the ODR platform

to which documents may be submitted shall be specified in the dispute resolution clause].

"2. As a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information."

"3. [The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be [that][those][notified by the claimant to the ODR provider under article 3(2)] and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable)].

"4. [The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be [[that] [those] notified by the respondent to the ODR provider when accepting the Rules [under article 3(2) above] and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.]

"[5. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). [The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.]

"6. The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses.

"7. The ODR provider shall promptly notify all parties and the neutral of the availability of any electronic communication at the ODR platform."

Remarks

Paragraph (1)

44. At its twenty-fifth session, the Working Group agreed that paragraph (1) would reflect the principle that all communications in the ODR process take place through the ODR platform (A/CN.9/744, paras. 62-63).

45. The Working Group may wish to consider (i) when and how the designation of an ODR platform by an ODR provider will take place; and (ii) whether the dispute resolution clause should include the electronic address to which a claimant should submit a claim, or whether such an indication would be premature. In any event, the Working Group may wish to consider how a claimant would obtain information regarding the relevant ODR platform.

Paragraph (2)

46. At its twenty-fifth session, the Working Group agreed to retain paragraph (2), which sets out as a pre-condition for the use of the Rules the requirement that the parties provide their contact information (A/CN.9/744, para. 39). The word

"electronic" has been added before the words "contact information" for the sake of clarity.

47. Because paragraph (2) relates to the matter of communication rather than scope, it has been relocated from draft article 1 (see A/CN.9/744. para. 42, and paras. 68-71). As it expresses a pre-condition to the operation of the Rules, a deadline by which this condition must be satisfied (taking into account the language in draft article 3) may be desirable. Bracketed language has been inserted in this respect.

Paragraphs (3) and (4)

48. At its twenty-fifth session, the Working Group requested the Secretariat to prepare draft language to reflect different options with regard to draft article 3, paragraphs (3) and (4), for further consideration (A/CN.9/744, para. 71). Further to that request, these paragraphs have been re-drafted to address concerns that (a) any notice is directed in the first instance to an electronic address (or addresses) provided by the respondent at the time of its agreement to submit disputes to the Rules; and (b) the given electronic address or addresses remains consistent and up-to-date throughout the proceedings.

49. Both parties are required to provide their respective electronic addresses as a pre-condition for using the Rules pursuant to paragraph (2), and consequently previous options inconsistent with that provision have been deleted.

Paragraph (5)

50. The Working Group decided at its last session that paragraph (5), which, as originally drafted, reflected article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention", or the "ECC"), should be re-drafted, bearing in mind the close relationship of this paragraph with paragraph (6), and moreover taking into account article 2(5) of the UNCITRAL Arbitration Rules (A/CN.9/744, para. 73).

51. Consequently, draft paragraph (5) now provides for "deemed receipt", thus avoiding the ambiguity of previous language requiring a communication to be "capable of being retrieved", at the time the ODR provider notifies the parties that the relevant communication is available on the platform. While a deemed receipt provision may transfer slightly more risk of non-receipt of communication to the parties, as compared to a presumptive receipt provision (because the presumption can be rebutted), it also may provide for more certainty of timing.

52. Draft paragraph (5) also provides, in square brackets, for the discretionary power of the neutral to extend deadlines should the addressee show good cause for failure to retrieve that communication from the platform.

2. Commencement

53. Draft article 4A (Notice)

"1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4). The notice should, as

far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

"2. [The notice shall be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]

"3. ODR proceedings shall [be deemed to] commence when, following communication to the ODR provider of the notice pursuant to paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (2).

"4. The notice shall include:

"(a) the name and designated electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

"(b) the name and electronic addresses of the respondent and of the respondent's representative (if any) known to the claimant;

"(c) the grounds on which the claim is made;

"(d) any solutions proposed to resolve the dispute;

"(e) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;

["(f) the location of the claimant];

"[(g) the claimant's preferred language of proceedings;]

["(h) the signature of the claimant and/or the claimant's representative in electronic form including any other identification and authentication methods;]

"[...]

Remarks

General

54. At its twenty-fifth session the Working Group requested that draft article 4 be restructured into separate articles, on notice and response respectively (A/CN.9/744, para. 76).

55. The Working Group may wish to consider, further to A/CN.9/WG.III/WP.113, paragraphs 10-14, and A/CN.9/WG.III/WP.115, Section IV(B), the proposal that the Working Group adopt an approach of enumerating, in draft article 4A, paragraph (4), and draft article 4B, paragraph (3), a list of possible claims, and responses thereto, to be included in the notice and response respectively. Alternatively, the Working Group may consider that draft article 1(2) sufficiently delineates the scope of claims which may be appropriate for online dispute resolution.

56. A subparagraph contained in a previous draft of the Rules requiring the claimant to set out at the time of submitting its notice whether it agrees to

participate in ODR proceedings has been removed as potentially confusing, in light of the agreement required at the time of transaction in draft article 1.

Paragraph (3)

57. This paragraph has been slightly modified to align the commencement of proceedings, predicated on the receipt of notice, with the deemed receipt provision in draft article 3(5). In any event, the Working Group may wish to consider whether paragraph (3) is necessary, as the date of commencement of proceedings is not relevant to any other provision in the Rules, and, should parallel proceedings be initiated elsewhere, *res judicata* considerations would likely be governed by national law.

Paragraph (4)

Paragraph (4)(e)

58. The Working Group may wish to note that, at its twenty-third session, it was suggested that paragraph (4)(e), together with a companion provision in draft article 4B, paragraph (3)(e), could assist in preventing a multiplicity of proceedings relating to the same dispute (see A/CN.9/721, para. 122).

Paragraph 4(f)

59. The Working Group may wish to consider whether the location of the claimant has any practical relevance as it may not be an indicator of language or relevant jurisdiction.

Paragraph (4)(g)

60. Paragraph (4)(g) has been amended slightly to clarify that the preferred language specified at this stage is that of the claimant. A corresponding amendment has been made in draft article 4B, paragraph (3)(f), to reflect the Working Group's request (reflected in draft article 12) that the language of proceedings should be agreed by parties at the commencement of ODR proceedings.

Paragraph (4)(h)

61. The Working Group may wish to recall that at its twenty-second session it observed that complex identification and authentication methods may not be necessary for the purposes of ODR, and that current UNCITRAL texts on electronic commerce already address methods of electronic signature that are reliable and appropriate for the purposes for which they were used (article 7(2)(b) of UNCITRAL Model Law on Electronic Commerce; see A/CN.9/716, para. 49). The issue of identification and authentication of parties in ODR might be more appropriately dealt with in a document separate from the Rules such as guidelines and minimum standards for ODR providers. It should also be noted that the term "electronic signature" differs from "digital signature". Electronic signature[9] refers

[9] Article 2 (a) of Model Law on Electronic Signatures defines electronic signatures as "data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message". Digital signature generally uses cryptography

to any type of signature that functions to identify and authenticate the user including identity management.[10]

62. **Draft article 4B (Response)**

"1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

"[2.

[Option 1: The respondent may also, in response to the notice, communicate to the ODR provider via the same ODR platform in the same proceedings a claim which arises out of the same transaction identified by the claimant in the notice ('counter-claim').] The counter-claim shall be communicated no later than [seven (7)] calendar days [after the notice of the claimant's claim is communicated to the ODR provider. [The counter-claim shall be dealt with in the ODR proceedings together with the claimant's claim.]

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d)].]"

[Option 2: "The respondent may, in response to the notice, communicate a counter-claim to the ODR provider. 'Counter-claim' means a[n independent] claim by the respondent against the claimant which arises out of the same transaction identified by the claimant in the notice [with the same ODR provider]]".] The counter-claim shall be communicated no later than [seven (7)] calendar days after the notice of the claimant's claim is communicated to the ODR provider. The counter-claim shall be dealt with in the ODR proceedings together with the claimant's claim.]

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d)].]]"

"3. The response shall include:

"(a) the name and designated electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

"(b) a response to the statement and allegations contained in the notice;

"(c) any solutions proposed to resolve the dispute;

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technologies such as public key infrastructure (PKI), which require specific technology and means of implementation to be effective.

[10] Identity management could be defined as a system of procedures, policies and technologies to manage the life cycle and entitlements of users and their electronic credentials. It was illustrated that verifying the identity of person or entity that sought remote access to a system, that authored an electronic communication, or that signed an electronic document was the domain of what had come to be called "identity management". The functions of identity management are achieved by three processes: identification, authentication and authorization (see A/CN.9/692 and A/CN.9/728).

"(d) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;

"[(e) the location of the respondent];

"[(f) whether it agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]

"[(g) the signature of the respondent and/or the respondent's representative in electronic form including any other identification and authentication methods;]

"[...]"

Remarks

General

63. A provision contained in a previous draft of the Rules, requiring the respondent to set out at the time of response whether it agrees to participate in ODR proceedings, has been removed as creating uncertainty in light of the agreement required at the time of transaction in draft article 1.

Paragraph (2)

64. Draft article 4B, paragraph (2), reflects the decision of the Working Group to include a provision on counter-claims in the Rules (A/CN.9/739, para. 93).

65. At its twenty-fourth session, the Working Group requested that the Secretariat prepare a definition of counter-claim as an alternative to that proposed in option 1, and moreover suggest where such a definition might be included in the Rules (A/CN.9/739, para. 93). Consequently, option 2 was inserted in brackets. The Working Group may wish to retain the stand-alone definition proposed in option 2 in this paragraph, or separately, in draft article 2 (Definitions).

66. In addition to considering whether the definition as currently drafted would be sufficiently broad to encompass counter-claims in B2B disputes, the Working Group may also wish to consider the following issues:

(a) Should the respondent file a new claim or include the counter-claim in the response? If the former, should the counter-claim be in the form set out in draft article 4A?

(b) Can the response to the notice be presumed to encompass any counter-claim in the absence of an express statement or indication by the respondent that such a counter-claim is being made? Will the neutral have the discretion to decide that a response encompasses or constitutes a counter-claim, in the absence of such an express statement?

(c) Will there be an option for the claimant to file a response to the counter-claim, or might the neutral have the discretion to request that the claimant do so?

(d) How will it be determined whether the counter-claim falls within the ambit of the initial claim in the notice by the claimant? (A/CN.9/739, para. 92). The Working Group may wish to consider the extent to which this question is addressed by draft article 7(4) (power of the neutral to rule on his own jurisdiction, including the existence or validity of the agreement to submit the dispute to ODR);

(e) Does the filing of a counter-claim prevent the respondent from filing a new claim on the same transaction and with a different ODR provider, in practice?

Paragraph (3)

67. Paragraph (3) addresses the content of the response to the notice and mirrors the provisions of draft article 4A, paragraph (4).

Paragraph (3)(a)

68. As with draft article 4A, paragraph (4), the issue of data protection or privacy and online security in the context of communicating information relating to the parties in the course of ODR proceedings ought to be taken into consideration (A/CN.9/721, para. 108).

Paragraph (3)(f)

69. Paragraph (3)(f) has been amended slightly in order that it conforms with the language requested by the Working Group in draft article 12 (Language of proceedings), which suggests that the language of proceedings should be agreed by parties at the commencement of ODR proceedings (see also para. 60 above).