United Nations A/CN.9/WG.III/WP.119/Add.1

General Assembly

Distr.: Limited
12 March 2013

Original: English

United Nations Commission on International Trade Law
Working Group III (Online Dispute Resolution)
Twenty-seventh session
New York, 20-24 May 2013

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

Addendum

Note by the Secretariat

Contents

V.13-81737 (E)

3. Negotiation

1. Draft article 5 (Negotiation and settlement)

Negotiation

"*1. [Upon communication of the response [and, if applicable, counter-claim] referred to in article 4B to the ODR provider[, and notification thereof to the claimant]], the parties shall attempt to settle their dispute through direct negotiation, including, where appropriate, the communication methods available on the ODR platform.]*

"*2. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within seven (7) calendar days, it is presumed to have refused to negotiate and the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).*

"*3. If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the response to the ODR platform [and notification thereof to the claimant], then the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).*

"*4. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days.*

Settlement

"*5. If settlement is reached [during the negotiation stage] [and/or at any other stage of the ODR proceedings], [the terms of such settlement shall be recorded on the ODR platform], [at which point,] the ODR proceedings will automatically terminate.*"

Remarks

General

2. The provisions of draft article 5 have been reordered, taking into account the proposals of the Working Group at its twenty-fifth session and with a view to reflecting more clearly the probable chronology of negotiation and settlement (see A/CN.9/WG.III/WP.117/Add.1, para. 2). The Working Group may wish to consider including the provisional subheadings provided in this article in order to better distinguish between the negotiation and settlement phases, particularly if the Working Group is inclined to consider settlement as a process that could take place at any time during the proceedings, including during the facilitated settlement stage and/or prior to the conclusion of any decision-making stage (although see A/CN.9/744, para. 85).

3. In relation to a settlement stage, the Working Group may further wish to consider any technical aspects regarding formation of settlement agreements,

including whether a separate provision providing for disputes arising out of the settlement might be required in this respect. A paragraph contained in a previous draft of the Rules providing for the possibility of re-opening or re-commencing proceedings should a settlement not be implemented has been deleted, as being at odds with principles of law whereby settlement agreements amount to contracts that must be enforced in accordance with the terms of that contract, and moreover as conflating the enforcement of a settlement with other stages of ODR proceedings (i.e. the rendering of a decision or award).

Paragraph (1)

4. At its twenty-fifth session, the Working Group requested the Secretariat to modify the drafting of paragraph (1) to take into account suggestions that the negotiation stage should be more clearly defined and furthermore to ensure that the Rules supported implementation of negotiated settlements (A/CN.9/744, paras. 79-81). Consequently, paragraph (1) now addresses the timing and content of the negotiation stage. This paragraph formerly addressed the consequences of settlement (namely, termination of proceedings), which now appears as draft paragraph (5).

Paragraphs (2) and (3)

5. Paragraphs (2) and (3) both provide, in different circumstances, for ODR proceedings to move to the next stage of proceedings (facilitated settlement). That stage would be the same in both Tracks of a two-track system (A/CN.9/WP.119, paras. 15-20). Therefore previous language which referred to stages of proceedings following the facilitated settlement stage has been removed as unnecessary and potentially confusing.

6. In paragraph (2), the phrase "*[respond to the notice]*" has been replaced by "*communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3)*" in the interest of maintaining consistency with the requirements for the notice set out in draft article 4B, and also in order to avoid ambiguity in relation to the timing of receipt (see A/CN.9/WP.119, para. 21).

7. In paragraph (3), bracketed language has been included with the aim of clarifying the timing of receipt of the response, and to maintain consistency with the other provisions in this article.

8. Additional language has also been added to paragraph (3) to clarify the stage at which a neutral would be appointed.

Paragraph (4)

9. At the twenty-fifth session of the Working Group, it was suggested that limiting the time period during which an extension could be agreed would be preferable to facilitate efficient proceedings; ten days was agreed to be sufficient in this respect (A/CN.9/744, paras. 84, 86).

10. The Working Group may wish to consider whether the intent of this paragraph is to extend the deadline for filing a response (under draft article 4B), or for reaching a settlement (under draft article 5(5)). Although these options are not

mutually exclusive, the Working Group may wish to recall its consensus that only one of these options should be included (A/CN.9/744, para. 85). There was some discussion regarding whether paragraph (4) should govern only the commencement of proceedings, and hence be applicable only to a response, or whether it should instead place some limitation on the capacity of the parties to negotiate through the ODR system by limiting the time in which they can reach settlement through such negotiation (without prejudice to their ability to negotiate outside the ODR system in any event) (A/CN.9/744, para. 85).

Paragraph (5)

11. The Working Group may wish to consider whether a settlement may be reached at any stage of ODR proceedings, in which case, it may be advisable to include settlement in a separate draft article to distinguish it from the negotiation process (see para. 2 above).

12. Preference was expressed by the Working Group for settlements to be clearly recorded on the ODR platform (A/CN.9/744, para. 90). Therefore, it may be considered to include in the Guidelines for ODR Neutrals and Providers provisions on the length of time those settlement agreements would be kept on the platform or in the records of the ODR provider, issues of confidentiality, and other considerations; and in that respect, the Working Group may wish to decide whether the words "on the ODR platform" in paragraph (5) allow for sufficient flexibility in relation to the record to be kept by the ODR provider.

13. The Working Group may further wish to consider any technical aspects regarding formation of settlement agreements, including whether a separate provision on disputes arising out of the settlement might be required in this respect.

4. Neutral

14. **Draft article 6 (Appointment of neutral)**

"*1. The ODR provider shall appoint the neutral [by selection from a list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions]] and shall promptly notify the parties of such appointment.*

"*[2. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the ODR proceedings to be conducted and completed expeditiously in accordance with the Rules.]*

"*3. The neutral shall declare his or her independence and shall disclose to the ODR provider any circumstances [arising at any time during the ODR proceedings] 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.*

"*[4. 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 articles 8 (bis) or 9, that neutral shall [resign and inform the parties and the ODR provider accordingly] [disclose the same to the ODR provider]. The ODR provider shall promptly communicate such information to the parties.]*

"*5. Either party may object to the neutral's appointment within [two (2)] calendar days [(i)] of the notification of appointment [without giving reasons therefor] [; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, [including a neutral's declaration or disclosure pursuant to paragraphs (3) [or (4)]] [setting out the fact or matter giving rise to such doubts,] at any time during the ODR proceedings]*.

"*5 bis. Where a party objects to the appointment of a neutral [under paragraph 5(i) above], 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)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final[, subject to paragraph 5(ii) above]. [Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to paragraph 5(ii) above.] [Where a party objects to the appointment of a neutral under paragraph 5(ii) above, [the ODR provider] shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced]*.

"*[6. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.]*

"*7. If the neutral has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her [pursuant to paragraph (1)] [and will inform the parties promptly of that selection]. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.*

"*8. The number of neutrals shall be one [unless the parties agree otherwise]*."

Remarks

Paragraph (1)

15. It was suggested that the words "*or belonging to other arbitral institutions*" be inserted in square brackets in order to accommodate access to a wider range of neutrals, including neutrals from arbitral institutions (A/CN.9/744, para. 103). The Working Group may wish to consider (i) whether ODR providers will be encouraged (under a Guidelines document) to maintain lists of neutrals, and the purpose of such a list; (ii) if so, whether permitting selection of neutrals "belonging to other arbitral institutions" would detract from the purpose of maintaining a list of neutrals; and (iii) if lists of qualified neutrals are not to be maintained by ODR providers, whether the phrase "*[by selection from a list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions]*" should be deleted.

16. The Working Group may wish to note that the words "*and shall promptly notify the parties of such appointment*" were previously located (in slightly different form) elsewhere in this article, but have been relocated to paragraph (1) to clarify the chronology of communication of a neutral's appointment to the parties.

Paragraph (2)

17. Draft article 6(2) has been moved from draft article 7(1), following the determination of the Working Group that this paragraph was more closely related to the appointment of the neutral (A/CN.9/744, para. 104).

Paragraph (3)

18. The Working Group may wish to recall its proposal that the neutral's duty of independence and impartiality be drafted as an ongoing one (A/CN.9/744, para. 92).

Paragraph (4)

19. Paragraph (4) has been relocated from draft article 8 to draft article 6, which addresses appointment of a neutral, in order that it remains applicable to both Track I and Track II.[1] Paragraph (4) furthermore resonates with the other provisions in draft article 6 regarding impartiality of a neutral and, where applicable, the procedure for appointing a new neutral. In this respect, the Working Group may wish to consider whether, when a neutral develops doubts as to his or her ability to remain impartial or independent, he or she ought to resign, or to disclose the information to the ODR provider, in which case paragraph (5)(ii) would apply at a party's discretion. Language has been inserted to provide for the latter option, so that instead of resigning on the basis of doubt alone, the neutral would be obliged to inform the ODR provider of the information giving rise to such doubts, following which the parties could object pursuant to the procedures provided for in paragraph (5).

Paragraph (5)

20. At its twenty-fifth session, the Working Group requested the Secretariat to draft a separate provision in draft article 6 permitting a party to object to the appointment of a neutral at any stage of proceedings where there was a justification for such objection (A/CN.9/744, para. 94). Consequently, the former paragraph (3) has been split into two paragraphs, (5) and (5) bis, to differentiate between the right of a party to object to the appointment of a neutral at any time, and the consequences of such objection.

21. There are two possible routes by which a party might object to a neutral. The first, set out in paragraph (5)(i), expresses the ability of either party to object to an appointment immediately after the notification of appointment. In that case, the neutral would be automatically replaced.

22. The second, set out in paragraph (5)(ii), permits either party to object to a neutral's appointment at any time during proceedings, should justifiable doubts arise as to that neutral's independence, and within two days of learning of the facts

[1] Albeit with a slight modification required to remove "article 8 (bis)" from this paragraph should Track I be applicable, and to remove "article 9" should Track II be applicable.

leading to such doubts. The Working Group may wish to consider (i) whether a two-day period is sufficient; (ii) whether the objecting party would need to furnish an objective justification for such a fact or matter (see A/CN.9/744, para. 94, as well as the ongoing duty to self-report required by the neutral in draft articles 6(3) and 6(4)); (iii) if so, whether a decision would need to be made on replacement of the neutral; and (iv) if a decision was required, whether the existing neutral would be competent to make such decision on that challenge (bearing in mind the current competence-competence provision in article 7(4)).

23. With regard to point (iv) above, if the neutral is not considered the appropriate person to make this decision, a question for consideration is whether the responsibility for such assessment falls to the ODR provider. Language has been inserted in the last sentence of paragraph (5) bis to accommodate such a decision. Alternatively, this may be an issue to be resolved either by a review mechanism internal to the ODR provider (see draft article 9 (ter)) or by guidelines or rules for ODR providers.

24. Paragraph (5) bis has been slightly amended to include a reference to the "final appointment" of a neutral (subject to the ongoing duty of a neutral to disclose information impugning his or her impartiality), in order to clarify the point at which paragraph (6) takes effect.

Paragraph (6)

25. Paragraph (6) has been amended to reflect the principle that within a three-day period the parties may object to the provision of information to the neutral, but that after the expiration of that period the full set of information would be conveyed to the neutral (A/CN.9/744, para. 97).

Paragraph (7)

26. The first set of bracketed language has been included to reflect the fact that any new appointment should also be from the list of neutrals referred to in paragraph (1), and that the parties would be notified accordingly.

Paragraph (8)

27. At its twenty-fifth session, the Working Group agreed to retain paragraph (8) as drafted, on the basis that it provided clarity while also permitting a certain degree of flexibility (A/CN.9/744, paras. 101-102). The Working Group may wish to consider whether (i) in low-value disputes, it would be appropriate or necessary to have more than one neutral; and (ii) the Rules as currently drafted accommodate more than one neutral. In relation to (ii), the following questions would need to be considered: how, and when, would the parties agree to have more than one neutral? How would the neutrals communicate with one another? If the parties appointed an even number of neutrals, how would decisions be made in the case of deadlock? Where the Rules provide for a neutral to perform a certain function (i.e. request information from the parties), would all neutrals be required to fulfil that function were more than one neutral to be appointed?

28. The Working Group may wish to consider whether moving paragraph (8) to follow paragraph (1) might create a more logical chronology.

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

"*[1. Subject to the Rules [and the Guidelines and Minimum Requirements for ODR Neutrals], the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*]

"*[1 bis. The neutral, in exercising his or her functions under the Rules, 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 remain at all times wholly independent and impartial and shall treat both parties equally.*]

"*2. Subject to any objections under article 6, paragraph (6), the neutral shall conduct the ODR proceedings on the basis of documents submitted 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.*]

"*3. At any time during the proceedings the neutral may [require] [request] 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.*

"*4. 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, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.*

"*[5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules.]]*"

Remarks

Paragraphs (1) and (1) bis

30. Paragraphs (1) and (1) bis (formerly paragraph (2)) characterize (i) the functions of the neutral; and (ii) the neutral's broad discretion to conduct the ODR proceedings as he or she sees appropriate, subject to certain constraints (see A/CN.9/744, para. 105).

31. The Working Group may wish to consider whether a document to be prepared in relation to guidelines and minimum requirements for neutrals (see A/CN.9/WG.III/WP.114) should be explicitly incorporated into paragraph (1) as a standard to which the neutral is subject in his or her conduct of proceedings.

Paragraph (2)

32. The Working Group may wish to recall its agreement that paragraph (2) should be subject to the ability of a party to object to the provision by the ODR provider to the neutral of information generated during the negotiation stage of ODR proceedings (A/CN.9/744, para. 108).

33. The Working Group may wish to consider deleting the last sentence of paragraph (2), as it does not confer additional powers on the neutral and nor does it serve to proscribe the power of the neutral in practice. Furthermore it may be considered slightly confusing when read alongside paragraph (3).

Paragraph (3)

34. The Working Group may wish to recall that it considered modifying slightly the powers of the neutral in order to allow the neutral to request, but not to require, the parties to provide additional information (A/CN.9/744, para. 109).

35. The Working Group may also wish to consider whether the provision on costs might be at odds with the current language in draft article 15.

Paragraph (5)

36. The Working Group may wish to recall its request to the Secretariat to redraft paragraph (5) (previously paragraph (6)) in order to oblige the neutral to conduct enquiries where any doubt existed regarding receipt of the notice, and to give the neutral the discretion to do so regarding all other communications (A/CN.9/744, paras. 115-117). Square bracketed language has been inserted to reflect this request.

5. Facilitated settlement

37. **Draft article 8 (Facilitated settlement)**

"*1. The neutral shall communicate with the parties to attempt to reach an agreement ("facilitated settlement"). If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform], [at which point,] the ODR proceedings will automatically terminate.*"

Track I

"*2. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral] (the "expiry of the facilitated settlement stage"), the ODR proceedings shall automatically move to arbitration, pursuant to article 9.*"

Track II

Option 1:

"*2. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral], the ODR proceedings shall automatically terminate.*"

Option 2:

"*2. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral] (the "expiry of the facilitated settlement stage"), the ODR proceedings shall automatically move to the final stage of proceedings pursuant to article 8 (bis).*"

Remarks

General

38. The previous language serving as a mechanism to trigger the next stage of proceedings should the facilitated settlement fail to result in a settlement agreement has been replaced by, in relation to Track I, a mechanism for the commencement of arbitration, and in relation to Track II, two options for the Working Group's consideration.

39. The facilitated settlement stage has been defined in paragraph (1), in order more clearly to define this second stage of proceedings. The end of the facilitated settlement stage has also been defined, as the expiry of ten calendar days from the appointment of the neutral, in order to provide a time-based trigger for moving to the next stage of proceedings.

Paragraph (1)

40. In lieu of the words "settlement" or "agreement", which were used apparently interchangeably in this paragraph, the term "settlement agreement" has been inserted.

41. Square-bracketed language has been inserted in paragraph (1) to reflect the settlement language in draft article 5(5). The Working Group may wish to consider whether another option might be to simply note that, if settlement is achieved, the provisions on settlement in draft article 5(5) will apply.

Paragraph (2)

42. Paragraph (2), as the trigger for the relevant next stage of proceedings, would necessarily require different wording in Track I (arbitration track) and Track II (non-arbitration track). Previous language allowing for automatic progression to an arbitration stage has consequently been deleted from the Track II version of the Rules (A/CN.9/762, para. 22).

43. In relation to Track II, two options have been included for the consideration of the Working Group. Under the first option, the proceedings would terminate after the facilitated settlement stage had expired, if no settlement agreement had yet been reached.

44. The second option would permit a non-binding decision to be rendered and for its enforcement to be subject to private enforcement mechanisms such as trustmarks. In this respect, the Working Group may wish to recall the support given by the Working Group at its twenty-sixth session for consideration of a "third track" providing for a decision by a neutral to render a non-binding decision enforceable by private enforcement mechanisms (A/CN.9/762, paras.19-20).

45. Although a "Track III" of the Rules could theoretically be devised in order to accommodate both options set out in paragraphs 43 and 44 above, the Working Group may wish to consider whether creating three discrete sets of Rules might create excessive complexity regarding the understanding of, and thereby diminish the user-friendliness of, the Rules.

46. Should Option 1 be selected in relation to Track II, draft article 8 (bis) would be deleted from (and for the avoidance of doubt would not appear anywhere in) the Rules.

6. Decision

47. **Draft article 8 (bis) (Decision by a neutral)**

"*1. The neutral shall at the expiry of the facilitated settlement stage proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.*

"*2. The neutral shall evaluate the dispute based on the information submitted by the parties and shall render a decision. The ODR provider shall communicate the decision to the parties [and the decision shall be recorded on the ODR platform]*.

"*3. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.*

"*4. The decision shall not be binding on the parties. However, the parties are encouraged to abide by the decision and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with decisions.*"

Remarks

General

48. Draft article 8 (bis) would only apply should the Working Group decide to retain Option 2 (Track II) in draft article 8(2).

49. The first two paragraphs of draft article 8 (bis) mirror the provisions required for the neutral to render a decision pursuant to draft article 9, and in practice the decision-making process would likely look similar, although without a binding and enforceable arbitral award as the outcome.

50. In respect of both draft article 8 (bis) and draft article 9, the Working Group may wish to consider whether any issues relating to proceedings where the same person acts as mediator and decision maker might arise.

Paragraph (3)

51. This paragraph has been relocated to paragraph (3) of draft article 8 (bis) and correspondingly to paragraph (3) of draft article 9, in light of its applicability only to a decision-making stage of proceedings.

52. The second sentence reflects the Working Group's proposal that there should be provision in the Rules for, in exceptional circumstances, reversing the burden of proof in situations where the party required to prove a fact was not in possession of the evidence needed to do so, or could not readily or easily obtain it (A/CN.9/762, paras. 66-67).

53. The Working Group may wish to consider whether, if each party has the burden of proving facts relied on to support is claim or defence, as a matter of principle the neutral should also have the power to require or request production of documents and information as currently included in the Rules in draft article 7(3).

7. Arbitration

54. **Draft article 9 (Arbitration)**

"*1. The neutral shall, at the expiry of the facilitated settlement stage, proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.*

"*2. The neutral shall evaluate the dispute based on the information submitted by the parties and shall render an award. The ODR provider shall communicate the award to the parties [and the award shall be recorded on the ODR platform]*.

"*3. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts of the ODR proceedings so require.*

"*4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.*

"*[4 bis. The requirement in paragraph (3) for:*

(a) the award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and

(b) the award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.]

"*5. The award shall state brief grounds upon which it is based.*

"*6. The award shall be rendered promptly and in any event within seven (7) calendar days (with possible extension of additional seven (7) calendar days) after the date for the communication of final submissions provided by the neutral under paragraph (1). Failure to render an award within this time limit shall not constitute a basis for challenging the award.*

"*[6. bis. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.]*

"*7. The award shall be final and binding on the parties. The parties shall carry out the award without delay.*

"*8. In all cases, the neutral shall decide* ex aequo et bono*, 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

General

55. The Working Group agreed at its twenty-sixth session that the word "award" should be retained throughout draft article 9 (A/CN.9/762, para. 35). It was furthermore clarified at that session that the term "award" would only apply to an arbitration stage of ODR proceedings (A/CN.9/762, para. 30).

56. Track I of the Rules will conclude with an arbitration stage and will result in an award which is binding on all parties, save by application of law to the contrary. Thus the Working Group's suggestion to include in this article for further consideration wording to the effect that an award would not be binding in a case involving a consumer whose participation in ODR originated in a pre-dispute agreement to arbitrate which purported to deprive the consumer of his or her right of access to a court for resolution of the dispute, and where the law of the consumer's jurisdiction guaranteed such right (A/CN.9/762, paras. 50, 52) has not been included (see A/CN.9/WG.III/WP.119, para. 17).

57. For the avoidance of doubt, under Track II, proceedings will conclude pursuant to draft article 8 (at the end of a facilitated settlement stage) or by non-binding decision pursuant to draft article 8 (bis), and draft article 9 will not apply.

Paragraphs (1) and (2)

58. The previous paragraph (1) has been reorganized into two paragraphs ((1) and (2)) in order to clarify the timing of proceedings following the expiry of the facilitated settlement stage, as well as the procedural steps to be taken by a neutral in rendering an award. The Working Group may wish to consider whether the award, like the settlement agreement, should be recorded on the ODR platform.

Paragraph (4)

59. The requirement for the decision or award to be in writing and signed by the neutral reflects the language in article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration, as well as the Working Group's decision at its twenty-sixth session for the award to contain the date on which it was made and the place of arbitration (A/CN.9/762, para. 43).

Paragraph (4) bis

60. The Working Group at its twenty-fifth session proposed that a definition for the word "writing" be added to the list of definitions, and reflect the language in Article 6 of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/744, para. 59). At its twenty-sixth session the Working Group requested that the Secretariat include a definition for the word "signature", in accordance with existing UNCITRAL standards (A/CN.9/762, para. 44; see also A/CN.9/WG.III/WP.119, paras. 40-41).

61. The requirements for the award to be in writing and signed have been inserted as a new paragraph (4) bis and reflect articles 6 and 7 respectively of the UNCITRAL Model Law on Electronic Commerce. Reference was also made to the definition of "electronic signature" in the UNCITRAL Model Law on Electronic Signatures 2001.

Paragraph (5)

62. The Working Group expressed broad consensus at its twenty-sixth session that wording requiring brief grounds for the neutral's decision should be included in this article (A/CN.9/762, para. 38).

Paragraph (6)

63. Paragraph (6) (formerly paragraph (1)) has been relocated in order to clarify the chronology of proceedings at an arbitration stage. The Working Group may wish to recall its agreement to permit an extension of 7 calendar days in relation to the time in which the neutral may render his or her award (A/CN.9/762, para. 37).

64. The Working Group may wish to consider the possibility of a neutral failing to render a decision within the time provided in paragraph (6) (A/CN.9/739, para. 133); and in addition, whether it would be desirable or possible to impose reputation-based penalties on ODR parties defaulting on their obligations (A/CN.9/739, para. 136).

Paragraph (6) bis

65. The Working Group may recall its decision to consider further whether awards should be made public, and its mandate to the Secretariat to insert in square brackets a provision reflecting the content of Article 34(5) of the UNCITRAL Arbitration Rules in this respect (A/CN.9/762).

Paragraph (7)

66. At its twenty-sixth session the Working Group agreed to remove the square brackets around this paragraph (A/CN.9/762, para. 52).

Paragraph (8)

67. The requirement for a neutral to decide "*ex aequo et bono*", or in good faith and based on equity, has been inserted to provide for the applicable law in relation to an arbitral decision. The Working Group may recall that at its twenty-sixth session it noted that the previous wording of this paragraph failed

adequately or completely to address the need for a substantive law (A/CN.9/762, para. 58).

68. An *ex aequo et bono* determination incorporates the principles of speed, common sense and equity that the Working Group has indicated are fundamental to ODR proceedings (A/CN.9/716, para. 101). This type of arbitration (where the neutral may decide the dispute on the basis of principles he or she believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The explanatory note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 (the "Model Law") states that although the Model Law refers to *ex aequo et bono* principles in article 28(3), it does not intend to regulate this area. The Model Law rather calls the attention of the parties on the need to provide clarification in the arbitration agreement. Likewise the Model Law makes clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. The same language is reflected in paragraph (8) of these Rules.

69. The principle of *ex aequo et bono* also appears in article 35 of the UNCITRAL Arbitration Rules, in circumstances where the parties authorize an arbitral tribunal to decide on that basis.

70. The Working Group may wish to note that in some jurisdictions an express agreement between the parties to arbitrate on the basis of *ex aequo et bono* principles is required. The inclusion of the applicable law in a dispute resolution clause between the parties may therefore be desirable (see A/CN.9/WG.III/119, para. 30). However, as previously stated in the commentary, and as set out in draft article 1 of the Rules themselves, the Rules are contractual in nature and would thus not override national law, including in relation to areas of applicable law. Nor would the Rules (cf. the Model Law) seek to regulate this area.

71. [**Draft article 9 (bis) Correction of award**

"*Within [five (5)] calendar days after the receipt of the award, a party, with notice to the other party, may request the neutral to correct in the 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 therefor] within [two (2)] calendar days of receipt of the request. Such corrections [shall be recorded on the ODR platform and] shall form part of the award. [The neutral may within [five (5)] calendar days after the communication of the award make such corrections on its own initiative.]]*"

Remarks

72. The Working Group may wish to recall that at its twenty-sixth session it requested that a new draft article 9 (bis) be added to provide for the correction of awards (A/CN.9/762, paras. 55-56). A similar suggestion that a provision regarding interpretation of award be included has not been inserted in this draft, in the interest of improving simplicity.

73. **Draft article 9 (ter) Internal review mechanism**

"*[1. Either party may request annulment of the award within ten (10) calendar days of the communication of the award, by application to the ODR provider via the ODR platform, on the grounds that (a) the place of arbitration unfairly prejudiced that party; or (b) there has been a serious departure from a fundamental rule of procedure prejudicing that party's right to due process.]*

"*[2. The ODR provider shall appoint a neutral (i) unaffiliated with the ODR proceedings the subject of the request, and (ii) from the list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions], to assess the request within five (5) calendar days. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment.*

"*[3. That neutral shall render a final decision on the request for annulment within seven (7) calendar days of his or her appointment. If the award is annulled the ODR proceedings shall, at the request of either party, be submitted to a new neutral appointed in accordance with article 6.]*"

Remarks

General

74. The Working Group may wish to consider whether the Rules should permit or oblige ODR providers to create a second-tier procedural review mechanism in limited circumstances. Such a strictly procedural, non-merit-based review mechanism would provide for a more self-contained ODR process and permit online reviews of any post-award of procedural unfairness. Such a review mechanism could function so that a party could, after an arbitral award was rendered, appeal to the review mechanism to annul an award if it felt it had received a lower level of procedural protection than in its own jurisdiction. An internal review would not be a review on the merits.

75. On the one hand, such a mechanism could reduce the importance of the place of proceedings and reduce the need for recourse to court in the place of arbitration, which may be impractical; on the other hand, such a mechanism might not be practical in the context of an ODR provider resolving a high number of disputes per year.

76. Such a provision would only be relevant in an arbitration stage whereby an award was rendered under draft article 9.

77. **Draft article 10 (Place of proceedings)**

"*[The ODR provider shall select the place of proceedings, such place to be selected from among the list set out in the Appendix to [Track I of] these Rules.]*"

Remarks

78. The Working Group may wish to recall its decision that the means of determining the place of arbitration should be addressed in the Rules (A/CN.9/762, para. 41). Draft article 10 is relevant to proceedings conducted pursuant to Track I

only, as the seat of proceedings would be irrelevant to any stage not including arbitration.

79. An arbitration, even an online arbitration, must have a seat or place of arbitration, in order to establish the procedural law governing the arbitration and to avoid uncertainty and debate about the legal validity of the award. The seat ought also to be a signatory country to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") to increase the chances of the New York Convention being applicable to an award. The Working Group may wish to consider including a long or short list of countries to be included in an Appendix to Track I, based on signatory status to the New York Convention and the Convention on the Use of Electronic Communications in International Contracts, and also whether a country has adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

80. The Working Group may wish to consider how the seat should be determined, i.e., whether the ODR provider should be permitted to select the seat from a pre-determined list, as currently provided in draft article 10, thus promoting flexibility and allowing regional providers to select a seat within their region, or whether alternative options might be preferable — for example, a single seat for all ODR proceedings, analogous to the Court of Arbitration for Sport, which specifies that the place of all arbitrations under its rules shall be Switzerland. Were a single "global seat" such as this to be considered desirable by the Working Group, that seat could be specified in draft article 10 and in the dispute resolution clause between parties, and may therefore lead to more certainty.

8. General provisions

81. **Draft article 11 (ODR provider)**

"*[The ODR provider shall be specified in the dispute resolution clause.]*"

Remarks

82. This provision has been included in order that the Rules contain a means of ensuring that the ODR provider to be used by the seller is specified in the arbitration clause. Such a specification is required both to provide maximum transparency, certainty and choice for the buyer, and moreover to ensure that the ODR proceedings are able to take effect, given that no "ad hoc" proceedings are envisaged under the Rules (see also para. 39 of A/CN.9/WG.III/WP.119).

83. The Working Group may wish to consider the consequences of the failure of the dispute resolution clause to specify the ODR provider and specifically how the provider would be selected in that instance.

84. **Draft article 12 (Language of proceedings)**

"*[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties' due process rights under article [x]].*

"*2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the*

proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.

"*3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.*

"*4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [failing which, the language the other party included in its notice or response as its preferred language]].*"

Remarks

General

85. At its twenty-sixth session, the Working Group proposed new wording for draft article 12 (Language of proceedings) (A/CN.9/762, paras. 75-81). That wording, along with some alternative proposed language intended to capture the sense of that drafting in a more concise manner, or in language more consistent with other UNCITRAL texts, has been included.

86. A proposal was made at the Working Group's twenty-sixth session, as well as at its twenty-fifth session, to include a separate paragraph along the following lines (A/CN.9/762, para. 75; 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 provision is more appropriately placed in guidelines and minimum requirements for ODR providers; in particular, the Working Group has previously acknowledged that the Rules cannot place obligations on ODR providers (A/CN.9/744, para. 78), and in this respect, it may wish to consider to what extent the Rules are able to, or ought to, mandate the systems implemented and used by an ODR provider.

Paragraph (1)

87. The language proposed by the Working Group at its twenty-sixth session in relation to paragraph (1) read: "The ODR proceedings shall be conducted in the language or languages agreed upon by the parties at the commencement of the ODR proceedings." Given the Working Group's indication that the language of proceedings should be agreed at the outset of proceedings, the wording of article 4A, paragraph (4)(g), and article 4B, paragraph (3)(f), has been slightly amended to provide for the possibility of that agreement. Notably, those provisions only currently permit each party to specify a single preferred language; thus, the parties could either agree on one language, or propose in total two different languages, in which case the neutral would need to determine if both languages would be the "languages of proceedings". The Working Group may also wish to note that the contract between the parties may itself specify the language of proceedings.

88. The language proposed by the Working Group at its twenty-sixth session in relation to paragraph (2) read: "In the event the parties do not agree on the language of proceedings, the language or languages of proceedings shall be determined by the neutral taking into account the parties' due process rights under article [x]]".

89. For clarity and brevity, those two paragraphs proposed by the Working Group and as set out in paragraphs 86 and 87 above have been reformulated and consolidated, and now comprise paragraph (1) of draft article 12. Moreover paragraph (1) now reflects more closely the wording in article 19 of the UNCITRAL Arbitration Rules.

90. The reference to parties' due process rights proposed by the Working Group at its twenty-sixth session has been retained in square brackets. The Working Group may wish to recall its discussion regarding whether a reference to the power of the neutral presently set out in draft article 7(1) bis, to provide a fair and efficient process for resolving disputes, might be sufficient, rather than a reference to an as yet to be determined article (A/CN.9/762, para. 76).

Paragraph (2)

91. The Working Group may wish to consider whether this paragraph would be better placed in draft article 3, Communications.

Paragraph (4)

92. The Working Group may wish to determine whether a translation, if required, be into a language "the other party understands", or into the other language of the proceedings, if any, failing which the language the other party indicated as its preferred language pursuant to draft article 4A (Notice) or 4B (Response).

93. The Working Group may wish to recall that several delegations had expressed concerns in relation to a potential requirement for translation of documents, given that such a requirement might impose disproportionate costs on consumers (A/CN.9/762, para. 80).

94. 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).

95. **Draft article 13 (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.*"

96. **Draft article 14 (Exclusion of liability)**

"*[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]*"

Remarks

97. Draft article 14 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It has been re-drafted to mirror article 16 of the UNCITRAL Arbitration Rules.

98. **Draft article 15 (Costs)**

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

Remarks

99. 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 his or her case.