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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, respectively.

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. At its twenty-seventh session (New York, 20-24 May 2013), a number of delegations reiterated that the Working Group needed to devise a global system for online dispute resolution accommodating both jurisdictions that provided for pre-dispute arbitration agreements to be binding on consumers, and jurisdictions that did not.⁸

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.

⁸ A/CN.9/769, para.16.

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

A. General remarks

General framework of the ODR system

5. The Working Group may wish to consider as a preliminary matter at its twenty-eighth session the general framework of the ODR system, including issues such as the respective roles of the ODR provider and the ODR platform (see A/CN.9/WG.III/WP.119, para. 22), the intended use if any of trustmarks or other quality seals by merchants (see A/CN.9/WG.III/WP.124), the possibility for or desirability of engagement with third parties in order to facilitate “private enforcement” of recommendations, awards or settlement agreements (see A/CN.9/WG.III/WP.124), and the nature of the relationship between an ODR provider and a merchant, including how a merchant will in practice select an ODR provider.

6. The Working Group may also wish to consider the contractual nature of the Rules. As the iterations of the Rules become more advanced, it appears possible that the “ownership” of the Rules may lie not with parties to a dispute or with merchants, but with ODR providers; that is, rather than the Rules being negotiated as a contractual document between parties, it is possible that an ODR provider will offer the Rules, or a modified version of the Rules, to merchants. Merchants will thus contract to use a certain ODR provider and the Rules of that provider. The Working Group may wish to consider whether this has implications for the Rules: for example, would such usage affect the provisions of the Rules on the scope of application? Need the governing law be specified in the Rules (Track I), or in practice will the ODR provider select the governing law that is convenient to it to apply?

7. The Working Group may also wish to consider further the relationship between the ODR provider and the merchant. For example, ought issues of independence and neutrality to be addressed in guidelines or elsewhere? The Working Group might wish to consider whether an ODR provider that is exclusively funded by a single merchant or marketplace raises particular issues that can or ought to be addressed in the context of the ODR system it is designing.

Two-track implementation proposal

8. The Working Group will recall that it was determined at its twenty-seventh session that there had not been a preponderance of views to discard the two-track system in favour of a B2B-only set of Rules (A/CN.9/769, para. 30), and that a proposal put forward in relation to a two-track system (hereafter, the “two-track implementation proposal”) had received sufficient support to be considered as a basis for future discussion (A/CN.9/769, para. 43). The language put forward under the two-track implementation proposal relates only to Track I of the Rules, and the new provisions proposed comprise a paragraph 1(a) to article 1; a new paragraph 5(a) to article 2; and an Annex.

Structure of this note

9. This note contains an annotated draft of the Rules, with each track being considered separately in order to facilitate consideration of the two discrete sets of Rules envisaged under a two-track system. Thus a draft of Track I of the Rules can be found in its entirety in document A/CN.9/WG.III/WP.123, and a draft of Track II in document A/CN.9/WG.III/WP.123/Add.1. The Working Group may wish to have regard to the annotations in relation to the Rules as set out in document A/CN.9/WG.III/WP.119 and its addendum, as that commentary largely remains applicable but has not been reproduced here.

B. Notes on draft procedural rules

10. The preamble and articles 1-15 contained in this document pertain only to Track I of the draft Rules.

1. Introductory rules

11. 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

12. Although the Working Group has identified online dispute resolution as being particularly relevant in addressing disputes arising out of low value, high volume transactions from its inception (see A/CN.9/716, para. 48, and A/CN.9/WG.II/WP.105, para. 4), the Working Group may wish to consider whether the meaning of “high-volume transactions” as it appears in the preamble, and specifically, whether such phrase would have meaning to the users of the Rules.

13. 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 under the Rules.

[“1a. These Rules shall not apply where one party to the transaction is a consumer from a State listed in Annex X, unless the Rules are agreed after the dispute has arisen.”]

[“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.

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 of applicable law from which the parties cannot derogate, that provision shall prevail.”]

Remarks

Paragraph (1)

14. The Working Group may wish to note that the phrase “resolved by ODR under the Rules” has been modified to read “resolved under the Rules”, for clarity of drafting, and as ODR is defined only in article 2 of the Rules.

Paragraph (1a)

15. Paragraph (1a) has been included in square brackets pursuant to the proposal made at the twenty-seventh session of the Working Group (A/CN.9/769, paras. 32 and 43). It applies only to Track I of the Rules and requires a party to a transaction to self-identify its jurisdiction and status (e.g., business or consumer). It furthermore requires the inclusion of an Annex comprising a list of jurisdictions, which would opt in to inclusion on that list in order to exclude the application of Track I of the Rules to consumers in those jurisdictions.

16. The ostensible consequence of this paragraph is that Track I of the Rules would preclude its own applicability to consumers from jurisdictions listed in the

Annex, in instances where the resort to online dispute resolution under the Rules takes place before a dispute has arisen.

17. In relation to the inclusion of an Annex listing countries to which a set of UNCITRAL procedural rules would not apply, the Working Group may wish to consider the following matters:

(a) What is the proposed legal implication if a State “accedes” to the list — is it taking a legal position regarding its law on pre-dispute agreements to arbitrate, or is it expressing an indicative preference for its consumers not to be permitted to arbitrate in the context of ODR? Likewise what is the legal implication of omission — if a State does not accede to the list, is it expressing a view regarding its national law?

(b) What is the basis of the decision to accede to a list? For example, various States may have complex consumer laws that do not neatly address pre- or post-dispute agreements to arbitrate.

(c) On what legal (public international law) basis and by what mechanism could States accede to a list in a set of procedural rules and how, in practical terms, would they indicate their accession or a withdrawal thereof?

(d) How, and by whom, are requests to be made to States to self-declare? Would the period for States to self-declare be ongoing and without deadline?

(e) Which entity would compile and maintain the authoritative version of the list?

(f) Would the onus to keep merchants informed about new “accessions” to the list be on merchants themselves or on the keeper of the list? Are there foreseeable issues of liability arising from the maintenance of a list?

(g) What would be the implications for consumers if a State were to accede in the midst of an online proceeding involving that consumer? Or after that consumer had signed a contract but before a dispute had arisen?

(h) What are the practical and legal implications in the event of a modification of the contractual terms of the Rules, e.g. if the parties were to delete or modify the Annex?

(i) Would there be any scope for a consumer whose jurisdiction is on the list to agree to arbitration post-dispute?

(j) What are the legal implications if a purchaser goes down the “wrong track” — either because a consumer from a listed State is offered a Track I proceeding by a merchant, or because he mis-identifies himself as a business or consumer?

(k) Does the Working Group foresee any precedential implications for future UNCITRAL texts in including such a list?

Paragraph (3)

18. Should the Working Group elect to retain paragraph (1a), it may wish to delete Option 1 of paragraph (3), as that option would become redundant.

19. 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.

[TBD]

[“5a. ‘consumer’ means a natural person who is acting primarily for personal, family or household purposes.]

“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**Headings*

20. The heading “Parties” may be misleading insofar as it currently includes the definition of neutral, and the square-bracketed definition of consumer; however the Rules often refer to “parties” with the express meaning of parties to a dispute. The Working Group may wish to consider whether to define “parties” or whether to limit the terms under that heading to claimant and respondent only. A placeholder has been placed in square brackets for the consideration of the Working Group in this respect.

Paragraph (5a)

21. Paragraph (5a) has been included in square brackets pursuant to the two-track implementation proposal made at the twenty-seventh session of the Working Group (A/CN.9/769, paras. 32 and 43). It would be included only in Track I of the Rules (see A/CN.9/769, para. 32, and para. 8 above).

22. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be communicated 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 of the claimant for the purpose of all communications arising under the Rules shall be that notified by the claimant to the ODR provider under paragraph (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 for communication of the notice by the ODR provider to the respondent shall be that notified by the respondent to the ODR provider under paragraph (2) 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 address.

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

“8. The ODR provider shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the facilitated settlement stage of proceedings; the expiry of the facilitated settlement stage of proceedings; and, if relevant, the commencement of the arbitration stage of proceedings.

Remarks

General

23. The Working Group may wish to note that in the interest of improving clarity, a number of square brackets have been removed, as has the possibility of parties to a dispute to provide multiple electronic addresses.

Paragraph (1)

24. The phrase “by electronic means” to describe how communications shall be communicated to the ODR provider has been deleted, as inconsistent with other provisions of the Rules.

Paragraph (6)

25. The Working Group may wish to consider whether such a provision is necessary, given that neither deadlines nor other elements of the Rules tend to be related to notification of acknowledgement of receipt.

Paragraph (8)

26. Paragraph (8) is a new provision included at the request of the Working Group to clarify when ODR proceedings move from one stage of proceedings to the next (A/CN.9/769, paras. 46-47, para. 84, paras. 86-87).

2. Commencement

27. 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 address 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;]

[“...”]

28. **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 grounds on which the claim is made, as set out in the notice;

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

“(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

Paragraph (3)(b)

29. The Working Group may wish to note that the phrase “the statement and allegations” has been replaced by “the grounds on which the claim is made,” in order to provide for consistency with draft article 4A, paragraph (4)(c).

3. Negotiation

30. 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 of commencement of the ODR proceedings, 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 notify the parties in accordance with article 3(8) and 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

Paragraph (2)

31. The Working Group may wish to note that the timing of seven (7) calendar days has been augmented by the words “of commencement of the ODR proceedings” (itself defined in draft article 4A, paragraph (3)), in order to enhance clarity in relation to timing.

Paragraph (3)

32. The Working Group may wish to note that language has been inserted to reflect its request that parties be notified as proceedings move from one stage to another (see para. 26 above).

Paragraph (5)

33. In order to maintain consistency with the Working Group’s agreement at its twenty-seventh session that a settlement agreement must be recorded, and moreover should be recorded before proceedings ended (A/CN.9/769, para. 51), the content of the square brackets in paragraph (5) has been retained.

34. That agreement was reached in relation to the second sentence of draft article 8, paragraph (1), which contains a similar principle. At its twenty-seventh session, the Working Group considered whether that sentence of article 8(1) should be relocated (A/CN.9/769, para. 53). The Working Group may wish to consider whether draft article 5(5) can apply at any stage of the ODR proceedings (see also A/CN.9/WG.III/WP.119/Add.1, paras 11-13), and consequently whether it should form a separate provision and moreover can replace the second sentence of draft article 8(1) altogether.

4. Neutral

35. 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] and shall promptly notify the parties of that appointment and the name of the neutral appointed.

“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, at the time of accepting his or her appointment, declare his or her independence and disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any such circumstances to the ODR provider. The ODR provider shall promptly communicate such information to the parties.

“4. 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, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

Objections to the appointment of a neutral

“5. Where a party objects to the appointment of a neutral under paragraph 4(i), that neutral shall be automatically disqualified and replaced pursuant to article 6(bis). 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 (4)(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to paragraph (4)(ii).

6. Where a party objects to the appointment of a neutral under subparagraph 4(ii) above, the ODR provider shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

Objections to provision of information

“7. 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.

Number of neutrals

“8. The number of neutrals shall be one.”

*Remarks**General*

36. The Working Group clarified at its twenty-seventh session that it intended to consider draft article 6 separately for Track I and for Track II, as the latter track may lend itself to a more simplified or streamlined procedure for the appointment of a neutral (A/CN.9/769, para. 107). The text set out in paragraph 35 above reflects the consideration of the Working Group of draft article 6 as it relates to Track I proceedings (A/CN.9/769, para. 107).

37. The Working Group may wish to note that paragraph (4) (as contained in A/CN.9/WG.III/WP.119/Add.1) has been deleted, and paragraph (7) (as contained in A/CN.9/WG.III/WP.119/Add.1) has been relocated to a new draft article 6(bis), in order to accommodate the request of the Working Group that the resignation or replacement of a neutral be addressed in a separate article (A/CN.9/769, paras.118-119; see also A/CN.9/769 paras. 128-129).

38. The Working Group may also wish to note that headings have been added to draft article 6, with a view to promoting clarity and readability.

Paragraph (1)

39. Paragraph (1) has been modified to include the principle that the identity of neutrals should be made known to the parties in order that the parties could reasonably object to that neutral's appointment (A/CN.9/769, paras. 109-110). The Working Group may wish to consider whether, if the intention is to provide a basis on which the parties could object to a neutral, a name would be sufficient in this respect.

Paragraph (3)

40. Paragraph (3) has been modified in accordance with the request of the Working Group to retain the obligation of ongoing disclosure, and to accord more closely with article 11 of the UNCITRAL Arbitration Rules (as revised in 2010) (A/CN.9/769, paras. 115-117).

41. The word "promptly" has been added in the final sentence in order to provide for greater consistency within the Rules.

Paragraphs (5) and (6)

42. As requested by the Working Group at its twenty-seventh session, paragraph (5)(bis) of article 6 as contained in A/CN.9/WG.III/WP.119/Add.1 has been split into two paragraphs, numbered (5) and (6), to improve clarity (A/CN.9/769, paras. 124-125). Paragraph (5) has been slightly modified to reflect the existence of a new draft article 6 (bis).

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

"If the neutral resigns or otherwise 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 article 6. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions."

*Remarks**General*

44. At its twenty-seventh session, the Working Group considered that a general provision should be included in the Rules to address resignation and replacement of neutrals (A/CN.9/769, para. 119), including in instances where neutrals wished to resign for reasons of independence and impartiality.

45. **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 (7), 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

46. The Working Group may wish to note that in the interest of improving clarity, a number of square brackets have been removed.

Paragraph (2)

47. In order to maintain consistency with article 27(4) of the UNCTRAL Arbitration Rules 2010, the Working Group may wish to consider whether in addition to determining relevance, the neutral ought also to determine admissibility, materiality and weight of the evidence in question.

Paragraph (3)

48. The Working Group may wish to consider whether paragraph (3) is necessary, particularly given the broad discretion the neutral is granted by virtue of paragraph (1).

5. Facilitated settlement

49. 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.”

“2. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of notification of the appointment of the neutral pursuant to article 6(1) (the “expiry of the facilitated settlement stage”), the ODR proceedings shall move to the final stage of proceedings pursuant to article 9, and the provider shall promptly notify the parties pursuant to article 3(8) that they have moved from the consensual stage of proceedings to the binding arbitration stage.”

Remarks

Paragraph (1)

50. The Working Group may wish to consider, bearing in mind its previous discussions indicating that the second sentence of paragraph (1) might require relocation, and having regard to the contents of draft article 5(5), whether the second sentence of paragraph (1) could be deleted (A/CN.9/769, para. 53; see also paragraph 34 above).

Paragraph (2)

51. Paragraph (2) has been modified to reflect the agreement of the Working Group that the transition from a facilitated settlement stage of proceedings to an arbitration stage should be more clearly notified to the parties (A/CN.9/769, paras. 46-50), and that the expiry of the facilitated settlement stage should be linked to the notification to the parties of the neutral, rather than to the appointment of the neutral itself (A/CN.9/769, para. 54). The Working Group may wish to consider whether the language it proposed at its twenty-seventh session for insertion at the

end of paragraph (2), “and the provider shall promptly notify the parties pursuant to article 3(8) that they have moved from the consensual stage of proceedings to the binding arbitration stage” (A/CN.9/769, para. 48), could be further simplified.

6. Arbitration

52. 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 notification to the parties of the expiry of the facilitated settlement stage.

“2. 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.

“3. 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.

“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, preferably within ten calendar days [from a specified point in proceedings].

“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**Paragraph (1)*

53. At its twenty-seventh session the Working Group agreed that timeframes for the submissions referred to in paragraph (1) should follow from the notification to parties of the appointment of the neutral (A/CN.9/769, paras. 85-86). The Working Group may wish to note that the term “expiry of the facilitated settlement stage” has been defined in draft article 8 as the failure to settle within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 6(1) (see para. 51 above). The Working Group may wish to consider whether this timeline is sufficiently clear.

Paragraph (4)(bis)

54. The Working Group requested at its twenty-seventh session that the Secretariat clarify when notifications to the parties, or specific documents must be made “in writing” (A/CN.9/769, para. 87). However in light of the nature of online dispute resolution, in which the proceedings take place entirely within the online environment, and the general trend in UNCITRAL instruments to move away from creating restrictions in relation to “writing” (see e.g. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by UNCITRAL on 7 July 2006), no additional insertions have been made to the Rules in this respect.

55. Thus the only time that “writing” is mentioned or defined in the Rules is in draft article 9, paragraph (4)(bis), in relation to the requirements of an award.

Paragraph (8)

56. Further to the discussion of the Working Group at its twenty-seventh session, the term “ex aequo et bono” has been placed in square brackets, pending alternative suggestions.

57. [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.]”

58. 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.]”

59. **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.]”

7. **General provisions**

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

“[The ODR provider shall be specified in the dispute resolution clause.]”

61. **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].”

62. **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.”

63. **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.]”

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

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

65. **[Annex X**

[list of jurisdictions which would opt in to inclusion in such an Annex]]

Remarks

66. The Annex component of the “two-track implementation proposal” put forward at the twenty-seventh session of the Working Group is addressed further at paragraph 17 above.

67. As a matter of style, the Working Group may wish to consider how an Annex will function alongside the Appendices envisaged in the preamble, and whether these two types of documents ought to be further differentiated in some way.