United Nations A/CN.9/762

General Assembly

Distr.: General
19 November 2012

Original: English

United Nations Commission on International Trade Law
Forty-sixth session
Vienna, 8-26 July 2013

Report of Working Group III (Online Dispute Resolution) on the work of its twenty-sixth session (Vienna, 5-9 November 2012)

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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 relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions.[2] The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer (C2C) transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.[3]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.[4] It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.[5]

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.116, paragraphs 5-14.

II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-sixth session in Vienna, from 5 to 9 November 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Bolivia (Plurinational State of), Brazil, Canada, China, Colombia, Czech Republic, El Salvador, France, Germany,

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

[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para.218.

[3] Ibid., para. 218.

[4] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

[5] Ibid., para. 79.

Honduras, Israel, Japan, Kenya, Mexico, Pakistan, Philippines, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Belarus, Belgium, Cyprus, Dominican Republic, Ecuador, Finland, Hungary, Indonesia, Netherlands, Panama, Poland, Portugal.

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

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

(a) *Intergovernmental organizations*: League of Arab States;

(b) *International non-governmental organizations*: Center for International Legal Education (CILE), Construction Industry Arbitration Council (CIAC), Institute of Law and Technology (Masaryk University), Instituto Latinoamericano de Comercio Electrónico (ILCE), Madrid Court of Arbitration, National Center for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA).

9. The Working Group elected the following officers:

Chairman: Mr. Augustín MADRID PARRA (Spain)

Rapporteur: Ms. Olga KOSTYSHYNA (Ukraine)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.116);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.117 and Add.1);

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.113);

(d) A proposal by the Government of Canada on principles applicable to Online Dispute Resolution providers and neutrals (A/CN.9/WG.III/WP.114); and

(e) Note submitted by the Center for International Legal Education (CILE) on Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules (A/CN.9/WG.III/WP.115).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of online dispute resolution for cross-border electronic transactions: draft procedural rules.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.117 and its addendum; A/CN.9/WG.III/WP.113; A/CN.9/WG.III/WP.114; and A/CN.9/WG.III/WP.115). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

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

A. General remarks

13. At the beginning of the Working Group's twenty-sixth session, a proposal was made that the Working Group break for informal consultations in an attempt to reach understanding on certain key issues on which opinion was said to be currently divided within the Working Group. There was broad agreement that such informal consultations could be productive in moving forward the general consideration of the Rules.

14. On the afternoon of the first day of the session, a brief report of the progress of the informal consultations was given by one delegation on behalf of those who participated. It was said that there were broadly two perspectives expressed, namely: (i) on the one hand, from those countries whose laws rendered pre-dispute agreements to arbitrate not binding upon consumers, and (ii) on the other, from those countries where no such laws were in place. It was said that the presence of an arbitration phase in the Rules could be problematic in those countries where such agreements were not regarded as binding.

15. A suggestion to overcome this difficulty was to have a "two track" system of ODR, one track of which would include negotiation, facilitated settlement and arbitration phases, and one which would not include an arbitration phase. It was said this might be accomplished by the preparation of alternative clauses or provisions under which parties to a transaction could agree to the use of the ODR Rules, with different clauses providing for the application of a different "track". There was said to be consensus on the need for flexibility in the Rules, allowing (inter alia) for such a two-track approach.

16. In this respect, a link with draft article 8(1) bis was made, which article dealt with the movement to an arbitration phase where the parties had been unable to reach a settlement of their dispute. That issue concerned the requirement in some countries for a post-dispute agreement on the part of a consumer in order to proceed to an arbitration phase, and the related question of when in the proceedings such an agreement (sometimes referred to as a "second click") would be required. It was indicated that progress on this issue would benefit from further informal

consultations, which were then undertaken with the agreement of the Working Group.

17. Several delegations expressed the need for an arbitration stage in ODR leading to a legally binding outcome, particularly in developing countries where it was said to give consumers — as well as small businesses — in transactions a degree of protection they currently lacked. Views were expressed by a number of other delegations to the effect that all countries have an interest in an efficient, rapid and cost-effective global dispute resolution system, and it had to be decided what kind of solutions would result from such a system. It was clarified that the informal consultations consisted of brainstorming intended to reach a common understanding and were not to be regarded as having resulted in conclusions which were binding upon the participants.

18. It was decided that the informal consultations, though they did not result in formal agreement, were helpful in leading to greater common understanding of certain issues, in particular that the Rules could accommodate both an approach to ODR embodying an arbitration stage and one without such a stage. Several delegations stated that any arbitration stage would need to address the concerns regarding consumer protection expressed by delegations whose jurisdictions provided that pre-dispute agreements to arbitrate are not binding on consumers.

19. There was broad understanding that the ODR Rules should permit pre-dispute arbitration agreements among jurisdictions where they are permitted by law to be binding on all parties. It was also agreed that there was a shared concern for consumer protection, which may be reflected differently in different country contexts and systems. It was further agreed that the Working Group would resume its consideration of the draft Rules, beginning with draft article 9, on the basis that that article would not apply to the "non-arbitration" track of any compromise arrangement that might be reached.

20. A suggestion was made that the two-track system discussed by the Working Group might not have adequately accounted for the possibility of a third track, specifically, a decision by a neutral which would not amount to a formal arbitral decision, but rather which would be subject to private enforcement mechanisms. It was said that such a third option would not preclude the possibility for formal arbitration. It was also stated that the Commission had explicitly mandated the Working Group to consider a private enforcement option in its 2012 Report (A/67/17), and specifically in paragraph 79(c) thereof. This suggestion received support by the Working Group.

Proposal

21. A document was introduced in order to clarify the two tracks that had been discussed throughout the week informally by delegations and to provide proposed language for relevant articles in the Rules; that document, which was not formally adopted by the Working Group, and the language of which was not discussed at this session, is appended to this Report as an annex. Many delegations commended the cooperation that had taken place in the preparation of that document, and expressed optimism that a two-track approach, which could accommodate two distinct perspectives within the group regarding the application of the Rules, could provide a basis for further consideration of the Rules. It was said however that the document

should not be seen as precluding other tracks, and in particular a track providing a possible alternative compliance mechanism to arbitration, and a structure to the Rules enabling such a mechanism to exist.

22. It was also said in relation to the first view set out in that document, by way of clarification, that it also encompassed the position that the ODR Rules should be designed so as not to provide for an automatic progression to an arbitration stage, particularly in relation to consumers whose jurisdictions provided that pre-dispute agreements to arbitrate are not binding on them, and who had not agreed post-dispute to arbitrate their online dispute.

23. It was said that while progress had been made in compiling that document, there was a risk that the marketplace was a dynamic one, and that as it moved on it could render the work of the Working Group irrelevant. It was pointed out that the group most in need of effective ODR processes is consumers, and that keeping the Rules simple and accessible should be a paramount goal.

24. Other delegations encouraged the Working Group to provide concrete proposals for language, linked to specific articles, which would reflect the legal positions of the delegations, for the next session so as to improve the progression of the Rules and to improve the efficiency of its work. It was also said that the document could provide a basis for a new iteration of the Rules to be considered at the twenty-seventh session of the Working Group.

B. Notes on draft procedural rules

6. Decision by the neutral

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

25. The Working Group considered draft article 9 as contained in paragraph 44 of document A/CN.9/WG.III/WP.117/Add.1.

Paragraph (1)

"Award" versus "decision"

26. Several delegations expressed a preference for the use of the word "award" rather than the word "decision", on the basis that "award" resonated with existing language in national legal systems regarding the outcome of a substantive dispute, as well as in the existing UNCITRAL Arbitration Rules. It was said that that language would not be controversial vis-à-vis the presumptive "first track", as set out in paragraph 15 above.

27. It was also said in support of the "award" language that it would support harmonized legal terminology, and that that word had always been used in a traditional arbitration context. It was moreover stated that it was important to move forward with the Rules and that removing the brackets, while not amounting to a final view on the topic, would progress the Working Group's consideration of the Rules.

28. Several delegations supported leaving the words "decision" and "award" in paragraph (1) in square brackets until the Working Group had better defined the

incorporation of the presumptive "two tracks" in the Rules and to reflect that differing views still remained in relation to the two words. It was also said that other means of enforcement, such as private enforcement mechanisms, might require non-arbitration based solutions, and that therefore it would be preferable not to limit the terminology of paragraph (1) at this time.

29. In response to a question regarding whether there existed a difference between "decisions" and "awards", it was said (i) that a procedural difference existed, with the latter being handed down in relation to substance, and the former in relation to matters of procedure and interim measures; and (ii) that in the context of facilitated settlement, the outcome would not result in either an award or a decision, but that in the context of arbitration, the outcome would always be an "award".

30. A suggestion was made to include in the commentary the clarification that (i) an "award" would be applicable only to arbitration; (ii) that the Rules would need to resolve issues relating to the prohibition on binding, pre-dispute agreements to arbitrate in a number of jurisdictions; and (iii) that the Rules would recognize that, in addition to arbitration, another path would exist, including mediation-only, or adjudication.

Time limits

31. Paragraph (1) as set out in paragraph 44 of document A/CN.9/WG.III/WP.117/Add.1 required the neutral to render its decision or award within seven calendar days, with a possible extension of seven additional calendar days.

32. Some delegations expressed the view that seven calendar days (plus the seven-day extension, currently square-bracketed) provided sufficient time for the neutral to render a decision, based on the low-value, high-volume nature of the disputes, and that such timing would facilitate the quick and cost-efficient resolution of disputes. Other delegations expressed the view that seven days would not be sufficient, but did not propose another option to be inserted into the text.

33. Another suggestion was made to commence the timeline for the rendering of a decision or award from the day the neutral received the final submissions, rather than from when the parties submitted the same.

34. It was stated that two clear positions had emerged in relation to paragraph (1): (i) some delegations expressed the view that the square brackets in paragraph (1) should be retained; and (ii) other delegations favoured deleting the square brackets, retaining the word "award" and deleting the word "decision" throughout.

35. Despite the support for the retention of the square brackets in relation to paragraph (1), the prevailing view in relation to that paragraph was that the brackets should be removed, the word "award" retained, and the word "decision" deleted.

36. Some delegations requested that their objection to that conclusion, as being recorded prematurely and potentially prejudicing future consideration of the paragraph, be recorded. It was also clarified that paragraph (1) only referred to a potential arbitration track, and that in any event paragraph (1) could be revisited at a future reading of the Rules by the Working Group.

37. It was further agreed to remove all other square brackets in paragraph (1), including around the words "with possible extension of additional seven (7) calendar days", and around the words "without delay", such that that phrase would be retained, and in addition to delete the word "promptly".

Paragraph (2)

Brief grounds

38. There was broad consensus that wording requiring brief grounds for the neutral's decision should be retained in paragraph (2), including to maintain consistency with article 34(3) of the UNCITRAL Arbitration Rules 2010 (the "UNCITRAL Arbitration Rules"). It was consequently agreed to remove the square brackets in paragraph (2).

39. A further suggestion was made that a requirement for the neutral to provide brief grounds should also be included in supplementary documents to be prepared at a future session, such as the Guidelines for ODR Providers and Neutrals.

Place of arbitration and identity of parties

40. Various delegations expressed support for including in paragraph (2) a requirement that, in addition to the date, the award made under that paragraph also include (a) the place where the award was made, and (b) the identity of the parties to the dispute.

41. In relation to (a), a distinction was made between determining the place of arbitration, and recording the place of arbitration in the award. It was agreed that paragraph (2) was the appropriate place in which to express the requirement for the latter, but not the former, which should be addressed elsewhere in the Rules.

42. In relation to (b), the suggestion that the provision require that the award include the identity of the parties did not receive support, on the bases that: (i) it was self-evident that the parties' identities would be contained in an award and that explicit wording to that effect was not required; and (ii) such inclusion would be unusual and inconsistent with existing UNCITRAL texts.

43. It was consequently agreed that in addition to requiring an award to contain the date on which it was made, paragraph (2) should also include language requiring the award to contain the place of arbitration, but that no explicit requirement to identify the parties would be added to that paragraph.

"Made in writing and signed by the neutral"

44. It was said that the word "writing" in the context of an electronic proceeding was clear, further to the existence of a draft definition for the word writing in draft article 2(9) of the Rules, but that no such definition existed for the word "signature" in the Rules. The Working Group requested the Secretariat to include in the subsequent draft of the Rules a definition for the word "signature" based on existing UNCITRAL standards in the electronic commerce sphere.

Publication

45. A suggestion was made that the Rules attempt to require the publication of awards, subject to redaction of sensitive information including the parties'

identities. Some delegations supported this proposal on the grounds: (i) that it would introduce transparency into the ODR system, and provide a means of oversight given the probable lack of judicial review; (ii) that the provision of this type of information to the public (including consumers) could be educational; and (iii) that current trends in arbitration were to promote transparency, such as in UNCITRAL's Working Group II and in cases of arbitration relating to sports. It was suggested that one way to include this proposal in the Rules would be to include a provision mandating publication "unless the parties otherwise agreed".

46. Other delegations opposed this proposal on the grounds that: (i) the default premise of arbitration is that it is by nature confidential, and that issues of transparency in investor-State arbitration and in anti-doping sports tribunals were not relevant or appropriate analogies to low-value, online disputes; (ii) permitting publication would require a host of complicated supplementary rules, such as protection of confidential information; (iii) the volume of online disputes envisaged under the Rules would render publication impracticable; and (iv) the oversight mechanism referred to by those in support could be fulfilled by the aggregation of statistics and data from ODR providers.

47. It was agreed to consider the matter further at a future session of the Working Group, and to facilitate that discussion to include in square brackets in the next iteration of the Rules a provision reflecting the content of article 34(5) of the UNCITRAL Arbitration Rules.

Paragraph (3)

48. The following suggestions were made with regard to paragraph (3): (i) to remove the square brackets around the paragraph; and (ii) to retain the term "award" rather than "decision" in order to be consistent with the terminology in draft article 9(1). It was also suggested to retain the phrase "without delay" rather than "promptly" in the second line, in order to be consistent with similar usage in the UNCITRAL Arbitration Rules. A suggestion to use the term "promptly" rather than "without delay" did not attract support.

49. A further suggestion was made that paragraph (2) should provide for the neutral to set a deadline for the parties to carry out the award.

50. A proposal was made to include in the Rules language 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. That proposal was supported by several delegations.

51. The proposal, and/or its inclusion in paragraph (3), was questioned on the grounds that it would be unenforceable, that it concerned the arbitration agreement and not the award, and that it would compromise the intended simplicity of the Rules. It was also said that, as a two-track approach was in contemplation by the Working Group, it remained to be seen whether and where such a provision might be located in the Rules.

52. Following discussion it was decided: (i) that the square brackets around paragraph (3) would be removed and that the paragraph would read as follows: "The

award shall be final and binding on the parties. The parties shall carry out the award without delay."; (ii) with regard to the proposal for additional wording set out in paragraph 50 above, in light of support for the view that it raised an issue of some importance, that the proposed wording would be placed in square brackets to be discussed at a future meeting, including consideration as to where in the Rules it might be most appropriately placed in light of the potential two-track approach to the Rules.

Paragraph (4)

53. A suggestion was made to retain the term "award", delete the term "decision" and to remove all remaining square brackets from the paragraph.

54. Following discussion it was agreed to amend the paragraph accordingly.

55. Some delegations also expressed the view that (i) the neutral should be permitted on his or her own initiative to correct the award; and (ii) a provision regarding interpretation of the award, parallel to the provision at article 37 of the UNCITRAL Arbitration Rules, be included.

56. The Working Group requested that the Secretariat include such additional provisions in the next iteration of the Rules, and that to avoid overcomplicating paragraph (4), that those provisions be included in a new article 9(bis), to be square-bracketed and considered at a subsequent reading of the Rules.

57. The Working Group further considered the time limits set out in paragraph (4), and specifically, whether that paragraph should prescribe deadlines and the length of the time period, and/or whether it would be preferable to have a general provision in the Rules to permit the neutral to extend any deadline with the agreement of the parties. In this regard, the Working Group requested the Secretariat to provide at its next session a list of the different time limits contained throughout the Rules, and suggested that such a list be considered, alongside a general provision regarding modification or extension of deadlines with consent of the parties, at a future session of the Working Group.

Paragraph (5)

58. It was stated by some delegations that paragraph (5) ostensibly dealt with applicable law, but that it failed adequately or completely to address that substantive topic. A suggestion was made to move the paragraph from draft article 9 to the section of the Rules that would deal with applicable law, for example, a document annexed to the Rules regarding substantive legal principles for resolving disputes, as referred to in paragraph 2(c) of the preamble ("substantive legal principles annex"). It was said that paragraph (5) could explicitly incorporate such an annex, for example by way of a reference in paragraph (5) or elsewhere in the main text of the Rules stating that the neutral would decide disputes in accordance with the principles set out in such an annex.

59. Another view was expressed that the draft Rules should be consistent to the extent possible with the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration, both of which included a reference to the determination of disputes based on the terms of the contract and the applicable trade usage, and that although the latter may or may not apply in consumer disputes,

the rendering of the award would have to take account of the terms of the contract. It was further stated that the Rules should clearly contain the essential elements required in the determination of the award. In support of that view, it was suggested that paragraph (5) should remain, as drafted, in its current location.

60. It was said in response that (i) there may be some difficulty in being selective about using provisions of existing UNCITRAL texts, given that those texts are typically designed as a package; and (ii) a reference to trade usage was not appropriate in the context of low-value consumer disputes.

61. In light of the diverging views within the Working Group, it was agreed that no definitive decision would be taken in relation to paragraph (5) and that it would be revisited at a subsequent reading of the Rules.

Paragraph (6)

Location

62. There was support for the view that paragraph (6) be moved from draft article 9 of the Rules. There was support for moving the paragraph to draft article 4A, as well as suggestions that it could be moved to the substantive legal principles annex referred to in paragraph 58 above.

Content

63. In terms of the content of paragraph (6), one view was expressed that a provision on burden of proof should track as closely as possible that set out in article 27 of the UNCITRAL Arbitration Rules.

64. It was also suggested that the commentary reflect that the proof required in the Rules be of a simple nature, for example proffering a receipt to prove purchase of goods. Some delegations pointed out that providing proof could be problematic, particularly for consumers in an online environment. Examples were given of the difficulty of proving online the non-delivery or defective condition of an item. Thus, it was said that provisions relating to proof could not simply be transposed from arbitration rules that were devised to deal only with B2B cases, but had to take account of both the online nature of ODR proceedings, and the fact that in many instances parties seeking to prove their case would be relatively unsophisticated consumers, usually acting without the benefit of legal advice.

65. A suggestion which attracted some support was to set out requirements for proof that were specific to each category or type of claim, in each instance focusing on how a party could in practical terms provide the necessary proof.

66. A proposal was made that there should be provision in the Rules for 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. This was said to be an exception that could be invoked when the facts of the case required. There was some support for this proposal, with one suggestion that it be dealt with in the commentary to the Rules or in a document setting out guidelines and minimum requirements for neutrals (“guidelines for neutrals”; see preamble, paragraph 2(b), as set out in para. 7 of document A/CN.9/WG.III/WP.117).

Conclusion

67. Following discussion it was decided that the paragraph dealt with an important matter but was inappropriately located in draft article 9 and, while remaining in square brackets, should be moved provisionally to draft article 4A. It was further agreed that the proposal set out in paragraph 66 above, relating to reversal of the burden of proof, should also be included for further consideration, itself in square brackets.

7. Other provisions

Draft article 10 (Language of proceedings)

68. The Working Group considered draft article 10 as contained in paragraph 53 of document A/CN.9/WG.III/WP.117/Add.1.

69. A number of delegations expressed support for the Rules containing a provision on language, on the grounds inter alia that simply because a consumer could transact in one language did not mean that consumer would be able to engage in ODR proceedings in that language, and that therefore protection should be built into the Rules in this respect.

70. It was said on the one hand that the UNCITRAL Arbitration Rules and Model Law provided a good basis on which to determine language of proceedings, namely, that subject to agreement by the parties, the neutral shall decide. Other delegations said on the other hand that considerations involved in commercial arbitration under those UNCITRAL instruments, such as the fact that arbitrators are selected by the parties, the arbitration clause is individually negotiated, and the parties may have access to resources including translation, rendered those standards inapplicable to consumer-based online disputes.

71. In order to ensure sensitivity to language problems faced by consumers in cross-border transactions, other delegations variously supported the following suggestions: (i) the inclusion of text set out in paragraph 59 of document A/CN.9/WG.III/WP.117/Add.1 be included in article 10 or in the guidelines for neutrals, with one delegation suggesting less robust language should be used (i.e. “may” instead of “shall”); (ii) that the commentary and/or guidelines mention that it would be preferable for each party to use its own language; and (iii) that pre-dispute agreement between the parties in relation to language might be less persuasive than post-dispute agreement, as consumers may not pay careful attention pre-dispute to a language option in a dispute clause in an online agreement.

“Unless a neutral decides otherwise”

72. Several delegations expressed support for a residual power of the neutral to determine the language of proceedings, where the parties had failed to do so.

73. Other delegations stated that it may be problematic that a neutral could override the agreement of the parties, both for reasons of contract sanctity as well as because the neutral may not share the language of the parties.

74. It was said that the general power under draft article 7(1) bis for a neutral to conduct the proceedings so as to avoid unnecessary delay and expense and to

provide a fair and efficient process for resolving the dispute, might be sufficient to accommodate concerns regarding over-prescribing language in the Rules themselves, particularly when read in conjunction with a future document to be drafted regarding guidelines and minimum requirements for neutrals.

Proposal for new draft article 10

75. A proposal was put forward to replace draft article 10 with the following language:

"Article 10

Paragraph (1)

The ODR proceedings shall be conducted in the language or languages agreed upon by the parties at the commencement of the ODR proceedings.

Paragraph (2)

In the event the parties do not agree on the language or languages of proceedings, the language or languages of proceedings shall be determined by the neutral taking into account the parties' due process right under article [x].

Paragraph (3)

The determination of a language or languages referred to in paragraph (2) shall apply to all communications in the course of the ODR proceedings.

Paragraph (4)

An ODR provider dealing with parties using different languages shall ensure that its systems, rules and neutrals are sensitive to these differences and shall put in place mechanisms to address the needs of parties in this regard."

76. Broad support was expressed for that proposal. Suggestions were made to modify that proposal to refer, in paragraph (2), of the proposal, not to an as yet to be determined article, but rather to the power of the neutral presently set out in article 7(1) bis, to provide a fair and efficient process for resolving disputes. It was also said in relation to paragraph (2) that language could be added to protect consumers in the event the language they had contracted to apply was not in fact a language they understood.

77. In relation to paragraph (4) of that proposal, it was also said that that requirement appeared to impose responsibilities on ODR providers which would be better placed in the guidelines document to be prepared as an annex to the Rules.

78. In addition, it was said that in relation to the third paragraph of that proposal, wording should be included to the effect that evidence could be provided in the original language, accompanied by a translation.

79. Further to that suggestion, a proposal for a further two paragraphs was made as a proposed addition to the proposal set out in paragraph 75 above, as follows:

"Paragraph (5)

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

Paragraph (6)

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 it, into a language which the other party understands."

80. Support was expressed in relation to the proposed new paragraph (5) of that proposal. In relation to the proposed new paragraph (6), several delegations expressed concerns that that paragraph might create a disproportionate cost to and burden on consumers. It was agreed to consider further paragraph (6) during a subsequent reading of the Rules.

81. There was consensus that the current draft text of article 10, as contained in paragraph 53 of document A/CN.9/WG.III/WP.117/Add.1, should be replaced with the proposed paragraphs (1) to (6), set out in paragraphs 71 and 75 above, with any minor modifications the Secretariat may deem necessary, in square brackets for further consideration.

V. Future work

82. The Working Group noted that its twenty-seventh session was scheduled to take place in New York from 20-24 May 2013.

Annex

Note by the Secretariat

During the course of the twenty-sixth session of Working Group III (Online Dispute Resolution), a number of delegations submitted to the Secretariat the following text discussed in the content of informal consultations which had taken place alongside the Working Group's twenty-sixth session.

The text is reproduced in the form in which it was received by the Secretariat.

Overview of rules enabling multiple pathways for ODR

Following informal consultations which drew out the differing positions of various delegations on the processes to be applied to ODR, the delegation of the Czech republic would like to present the following as a basis for further discussion.

As a basis for further discussion it is recognized that there is an issue regarding the effect of pre-dispute arbitration agreements on the design of the ODR Rules with respect to buyers, the following are two views how to reflect this concern:

View 1

It is suggested that, at the appropriate point in the text of the Generic Rules, a provision will need to be added to provide a procedure that accommodates binding pre-dispute arbitration agreements, while ensuring that the ODR process does not — without the buyers consent — move on to arbitration if the buyer is resident in the country according to the laws of which relevant agreements are not binding on him.

View 2

It is suggested that, at the appropriate point in the text of the Generic Rules, a procedure will need to be added that accommodates binding pre-dispute arbitration agreements without imposing awards arising out of such agreements on buyers who would not be permitted to enter into such agreements under applicable law from which the parties cannot derogate.

ODR Proceedings

Draft article A (Negotiation and settlement)

1. Upon receipt of the response and, if applicable, counter-claim referred to in Article [XX, paragraph[s] (_)-(_)], at the ODR platform and notification thereof to the claimant, the parties shall attempt to settle their dispute through direct negotiation including, where appropriate, through the communication methods available on the ODR platform.

2. If the respondent does not submit a response to the ODR provider within seven (7) calendar days of [...], it is presumed to have refused to negotiate and the ODR proceedings shall automatically move to the form of neutral resolution selected in the ODR agreement, at which point the ODR provider shall promptly

proceed with the appointment of the neutral in accordance with Article XX (Appointment of Neutral).

3. If the parties have not settled their dispute by negotiation within ten (10) calendar days of [...], the ODR proceedings shall automatically move to the neutral resolution stage(s) selected in the ODR agreement.

4. Extension provision.

5. If settlement is reached during the negotiation stage, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.

Draft article B (Neutral Resolution)

1. The dispute resolution process(es) used for neutral resolution shall be determined by the ODR clause agreed to by the claimant and the respondent and may consist of: (a) facilitated settlement; (b) arbitration; (c) facilitated settlement which, if unsuccessful, is followed by arbitration; or (d) facilitated settlement which if unsuccessful is followed by adjudication or recommendation.

2. Facilitated Settlement: Where the ODR clause specifies facilitated settlement, the neutral shall evaluate the dispute based on the information submitted and shall communicate with the parties to attempt to reach an agreement.

(a) Where the ODR clause specifies arbitration or adjudication/recommendation, the neutral may offer the parties the opportunity to agree to engage in facilitated settlement prior to that stage of the ODR proceedings.

3. If the parties reach a settlement, such settlement shall be recorded on the ODR platform, at which point, subject to article 7, paragraph (5), the ODR proceedings will automatically terminate.

4. If the parties do not reach a settlement within ten (10) calendar days, and the ODR clause provides for arbitration or adjudication(recommendation, the parties shall proceed to the arbitration or adjudication/recommendation stage of the ODR proceedings. Where the ODR clause does not provide for arbitration or adjudication/recommendation, the ODR proceedings will automatically terminate unless both parties agree in a writing submitted to the ODR platform that they wish to proceed to arbitration or adjudication/recommendation.

(a) In the event of arbitration, the neutral shall render an award pursuant to [Article 9].

(b) In the event of adjudication/recommendation, the neutral shall render a decision in accordance with the terms of the ODR clause.

5. [Neutral inability to remain impartial or independent.]