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Online dispute resolution for cross-border electronic commerce transactions

Note by the Secretariat

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* This document is submitted later than the required ten weeks prior to the start of the meeting because of the need to complete consultations.



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I. Introduction

1. At its forty-third session (New York, 21 June to 9 July 2010), the Commission considered a note by the Secretariat on the issue of online dispute resolution (A/CN.9/706). The note, in particular, summarized the discussion at the colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State University Dickinson School of Law, under the title “A fresh look at online dispute resolution (ODR) and global e-commerce: towards a practical and fair redress system for the 21st century trader (consumer and merchant)” (Vienna, 29 and 30 March 2010).¹ The Commission also had before it a note by the Secretariat (A/CN.9/710) transmitting information provided by the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution. The Commission was generally of the view that topics identified at the colloquium required attention and that work by the Commission in the field of online dispute resolution would be timely.²

2. After discussion, the Commission established a working group 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. At that session, the Commission also agreed that the form of the legal standards to be prepared should be decided after further discussion of the topic.³ As to the scope of work, the Commission agreed that, although it would be feasible to develop a generic set of rules applicable to both B2B and B2C transactions, the Working Group should have the discretion to suggest different approaches, if necessary.⁴

3. ODR is a means of dispute settlement which may or may not involve a binding decision being made by a third party, implying the use of online technologies to facilitate the resolution of disputes between parties. Online dispute resolution has similarities with offline conciliation⁵ and arbitration, although the information management and communication tools which may be used during all or part of the proceedings can have an impact on the methods by which disputes are resolved. ODR may be applied to a range of disputes affecting B2B and B2C transactions. It

¹ Information about the colloquium is available at the date of this report from www.uncitral.org/pdf/english/news/IICL_Bro_2010_v8.pdf.

² *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 251-256.

³ *Ibid.*, para. 257.

⁴ *Ibid.*, para. 256.

⁵ The term “conciliation” is used in this note with the same meaning as in article 1(3) of the UNCITRAL Model Law on International Commercial Conciliation, expressing a broad notion of a voluntary dispute resolution mechanism controlled by the parties and conducted with the assistance of a neutral third person or persons. The broad nature of the definition indicates that there is no intention to distinguish among procedural styles or approaches that might fall within the scope of article 1(3), which reads: “For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.” The Model Law does not distinguish between conciliation or mediation processes.

could be logical to apply ODR for the resolution of disputes relating to transactions involving the use of Internet. Online arbitration raises specific legal issues stemming from the formal requirements contained in national and international arbitration laws and conventions.

4. The concept of ODR is particularly relevant in addressing disputes arising out of low value, high volume transactions that require an efficient and affordable dispute resolution process. This suggests the need for specific legal standards for ODR, being more than a simple adaptation of existing arbitration and electronic communication rules. The purpose of this note is to provide background information on ODR, and to suggest matters that may need to be addressed in the formulation of legal standards on ODR.

II. Examples of online dispute resolution models and systems

A. General remarks

5. This section introduces existing models of online conciliation and arbitration together with the technologies used, and highlights issues which may need special consideration. It does not deal with complaint handling mechanisms or trustmarks, which lie outside the formal dispute resolution context. Complaint handling is a process that facilitates negotiation of consumer grievances without the intervention of third parties.⁶ A trustmark in the context of electronic commerce generally refers to an image, logo or seal found on a website that purports to indicate the reliability of the online merchant. The trustmark is offered as a proof that the online merchant is a member of a professional organization or a network, and that the online merchant has a redress mechanism in place.⁷ In addition, this note does not cover certain highly specialised ODR systems such as the Internet Corporation for Assignment Names and Numbers (ICANN) Uniform Domain Name Dispute Resolution Policy and the World Intellectual Property Organization (WIPO) Domain

⁶ Some examples of existing complaint handling models are eConsumer.gov, European Consumer Centres Network (ECC-Net) and International Consumers Advisory Network (ICA-Net). As an initiative of the International Consumer Protection and Enforcement Network (ICPEN), eConsumer.gov provides a web portal to allow individuals to file complaints about online and related transactions with foreign companies. The ECC-Net helps consumers make a complaint and reach an amicable solution with the trader and also helps consumers reach a solution through the appropriate mechanism (a third party). A trial of ICA-Net is ongoing since January 2009 and its functions are as follows: to receive cross-border complaints from domestic consumers; to offer them relevant information or advice; to inform the other Consumer Advisory Liaison Office (CALO) in a different country where a business in dispute is located regarding the complaint; and to urge the business to solve the dispute through the other CALO.

⁷ An example of trustmark in the context of online dispute resolution is the Better Business Bureau (BBB) OnLine. Approved merchants put a BBBOnLine logo on their websites that links to the BBB site so consumers can determine in advance which companies participate in the program and learn about redress mechanisms for when complaints are not resolved internally. Another example is Euro-Label, a cooperation of national suppliers of Internet trustmarks with national websites in Germany, Austria, Poland, Italy, France and Spain. Organizations such as the Global Trustmark Alliance (GTA) and the Asia-Pacific Trustmark Alliance (ATA) exist to further promote and strengthen the global trustmark system.

Name Dispute Resolution, as they raise a different set of issues.⁸ These systems already have in place the relevant mandatory rules regarding applicable law, jurisdiction and enforcement.

B. Online conciliation

6. There is a limited number of existing online conciliation models available. One example is *MédiateurDuNet.fr*, a joint system of the Forum des droits sur l'Internet in France and the French courts, in which interested parties are directed by the courts of first instance to the Forum to conduct free mediation either before or during the court proceedings.⁹ Another example in the area of dispute resolution is an initiative of eBay, an online mediation experiment which started in 1999.¹⁰

7. A third example involving online conciliation is the Electronic Consumer Dispute Resolution Rules (ECODIR), a pilot project based on a university initiative undertaken with the support of the European Commission and Ireland's Department of Enterprise, Trade and Employment.¹¹ ECODIR is the only project to date to provide a multi-step ODR procedure with a complete set of rules. Under these rules, complaints could be submitted to an ODR online platform if the dispute arose out of an online transaction and if at least one of the parties to the disputed transaction was a consumer. The system offered an ODR online platform providing a two-step process of negotiation and mediation in accordance with the ECODIR rules.¹²

8. In online conciliation, proceedings are carried out using electronic communications such as e-mail¹³ or an ODR online platform through which the parties can communicate, or both.¹⁴ Some proceedings are carried out by mobile phones.¹⁵ In online conciliation, two channels of communication may be provided by technical means, one for a private dialogue between one party and the

⁸ The ICANN (Internet Corporation for Assignment Names and Numbers) has accredited resolution to settle domain name disputes online. These domain name disputes are resolved in accordance with the ICANN Uniform Domain Name Dispute Resolution Policy ("UDRP"). The purpose of UDRP is to provide effective resolution of domain name disputes regarding ownership of the domain name, and designate certain dispute resolution providers to conduct arbitrations.

⁹ A/CN.9/706, para. 26. Currently, 7 courts participate in the initiative. www.foruminternet.org/particuliers/mediation/.

¹⁰ A total of 225 complaints were filed, three quarters by buyers and one quarter by sellers, involving mostly non-delivery, non-payment, inability to reach the other party and damage to reputation. Mediation was attempted in 144 cases. Approximately 46 per cent of the complaints were successfully resolved, in 25 per cent of the cases the respondents refused to participate, and in 54 per cent of the cases an impasse was reached.

¹¹ The project operated from October 2001 to June 2003.

¹² www.ecodir.org/index.htm; www.ecodir.org/odrp/rules.htm.

¹³ This was the case in the eBay online mediation experiment.

¹⁴ *MédiateurDuNet* involves communication via an ODR online platform and by e-mail.

¹⁵ The dispute resolution mechanism provided by the Commission on Conflict Mediation (CCM) of Afghanistan — the m-Jirga (Mobile Phone Jirga) — encourages the use of mobile phones and other devices in the dispute resolution process. Parties can call a special number on their mobile phone to begin the process and disputants will be able record their cases. Panels of elders will then convene by phone to hear each case and the elders will then be able to weigh in with their decision.

conciliator, and the other for open dialogue with all participants, including the conciliator.

C. Online arbitration

9. An example of online arbitration is the joint project of the International Centre for Dispute Resolution (ICDR) and General Electric for the online resolution of disputes between manufacturers and suppliers.¹⁶ Online arbitration is conducted under the American Arbitration Association (AAA) Commercial Arbitration Rules and no rules specific to online arbitration apply. Another model is that of the China Council for the Promotion of International Trade and the China Chamber of International Commerce, which adopted the China International Economic and Trade Arbitration Commission Online Arbitration Rules (“the CIETAC Rules”) in 2009.¹⁷ The CIETAC Rules apply mostly to larger volume business to business electronic commerce disputes.

10. In an online arbitration, electronic file management can be used. Electronic file management is a closed system whose access is limited to the parties and arbitrators (i.e. website) or is only used by the arbitration institution (i.e. Intranet). Examples of electronic file management include AAA WebFile organized by AAA,¹⁸ and NetCase housed at the ICC International Court of Arbitration.¹⁹ Both systems provide an ODR online platform for filing complaints; uploading, downloading and transferring documents; and communicating with other participants in the dispute.²⁰

III. Standards on online dispute resolution

A. Existing standards

11. Currently, there are few legal standards on ODR. Many standards in related areas may apply directly or indirectly, such as legal texts on conciliation,

¹⁶ A/CN.9/706, para. 29.

¹⁷ A/CN.9/706, para. 25.

¹⁸ AAA WebFile is an ODR online platform to file complaints, to upload and download documents, to review progress of the case and to communicate with ICDR via a message centre. In addition to filing claims online, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Neutrals, use a case-customized message board and check the status of their case. <https://apps.adr.org/webfile/>.

¹⁹ The NetCase system allows arbitrators and parties to communicate online and facilitates the management of their arbitration case in a secure online environment. NetCase enables all participants in an arbitration to communicate electronically through a secure online website to conduct arbitrations, store and organize documents on ICC’s secure ODR online platform, and access information about their arbitration at any time. NetCase also provides forums where certain participants, authorized to access the respective forum, can communicate with each other. www.iccwbo.org/id19772/index.html.

²⁰ Further information would need to be gathered on the actual use of the system as information was not readily available.

arbitration, electronic commerce and electronic communications,²¹ and regulations on consumer protection.²² This section will focus on existing standards that specifically deal with ODR at the international level. In most cases, these standards take the form of guidelines set up by international non-governmental organizations. None of these guidelines actually provide for the setting up of a fully-fledged online dispute resolution system.

International Chamber of Commerce

12. The International Chamber of Commerce (ICC) Guidelines on Using Information Technology in Arbitration (“the ICC Guidelines”) examine issues relating to, and provide operational standards for, the use of information technology (IT) in international arbitration settings. The ICC Guidelines include a section on how to use the Operating Standards for Using IT in International Arbitration (“the ICC Standards”), which describes standard procedures allowing parties and arbitrators to exchange information regarding their capabilities to use IT solutions in arbitration proceedings. The parties may agree to apply the ICC Standards, and if so they need to specify the means of communication — such as e-mail or otherwise on the Internet through a website — by submitting a form annexed to the ICC Guidelines to the other party and the sole arbitrator or arbitral tribunal.²³

13. The ICC Standards establish the parties’ duty to properly manage their e-mails, for example, to regularly check their inboxes and confirm receipt of each e-mail manually, or promptly notify the sender if certain data is missing or it is incomprehensible. These standards provide that parties should agree on a protocol in case they wish to apply additional security measures or to communicate via a website operated by a neutral third party. Additionally, the ICC Standards determine the technicalities regarding electronic submission of complaints, documents and evidence (including the method of converting hard copies into electronic files, file format compatibility, full searchability, file sharing and particulars of the file system to be used during the entire arbitration). For instance, electronic files must be electronic photocopies of the original and in any case, unless the parties agree otherwise or the arbitrator/arbitral tribunal instructs differently, hard copy submissions must be accompanied by a CD or DVD containing the electronic files. Additionally, each party must make sure throughout the arbitration that files are kept in order and they are not corrupted, and that file names reflect the content of the file.

²¹ For instance, the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the Electronic Communications Convention); the UNCITRAL Model Law on Electronic Commerce, 1996, with additional article 5 bis as adopted in 1998; and the UNCITRAL Model Law on Electronic Signatures, 2001.

²² For instance, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, that applies since 2009 in cross-border litigation to civil and commercial matters where the claim does not exceed 2000 euros.

²³ The party must complete a “Standards Initiation Form” and submit it to the other party and the sole arbitrator or arbitral tribunal within 10 business days, and the recipient party must respond and also complete the Standards Initiation Form. The Standards Initiation Form includes the details of the entities concerned, the scope of implementation, file formats proposed to be used and information to check interoperability and compatibility. Once they are successfully exchanged, the Standards Initiation Forms from both parties are consolidated into a “Consolidation Form”, which is agreed by the arbitrator or the arbitral tribunal.

Organization for Economic Cooperation and Development

14. The Organization for Economic Cooperation and Development (OECD) addressed the issues of consumer disputes through the development of E-commerce Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) and the OECD Recommendation on Consumer Dispute Resolution and Redress (2007).²⁴

The Global Business Dialogue on e-Society

15. The Global Business Dialogue on e-Society (GBDe) is a private sector initiative, established in January 1999 to assist the development of a global policy framework for the emerging online economy.²⁵ In November 2003, GBDe reached an agreement with an international non-governmental organization, Consumers International, on guidelines for the provision of dispute resolution services for e-commerce (“the GBDe Agreement”). This agreement outlines principles relevant to the creation of an ADR system geared toward merchants, providers of services in the field of dispute settlement and governments. The principles refer to the need to adjust the requirements of alternative dispute settlement mechanisms to the online context, but there are no further guidelines relating to ODR per se.²⁶

European Committee of Standardization

16. The CEN (European Committee of Standardization) Workshop Agreement on Standardisation of Online Dispute Resolution Tools (2007) contains guidelines (“the CEN Guidelines”) that give general directions for users to access ADR resources using electronic tools, focusing on ODR.²⁷ According to the CEN Guidelines, ODR mechanisms can be classified as follows: assisted negotiation, automated negotiation, mediation and arbitration. Furthermore, the CEN Guidelines also refer to technical aspects of ODR such as electronic communication considerations, confidentiality and security.

B. Standards under consideration

The Organization of American States (OAS)

17. Several initiatives are currently being considered by the OAS through the Inter-American Specialized Conference on Private International Law. These initiatives include a proposal for a State-sponsored initiative to resolve cross-border electronic commerce consumer contract disputes for the sale of goods and services.²⁸

²⁴ A/CN.9/706, para. 14.

²⁵ *Ibid.*, para. 27-28.

²⁶ www.gbd-e.org/pubs/ADR_Guideline.pdf.

²⁷ The CEN Workshop Agreement on Standardisation of Online Dispute Resolution, available at: ftp://cenftp1.cenorm.be/PUBLIC/CWAs/STAND-ODR/CWA16026_STANDODR.pdf

²⁸ For a description of this proposal see A/CN.9/706, para. 18.

Optional Instrument (Blue Button)

18. Another ODR proposal has been developed by academics within the European Union centred under the form of an Optional Instrument for resolution of B2C transactions, also referred to as “Blue Button”.²⁹ This type of arrangement would permit businesses to offer consumers and other businesses dispute settlement pursuant to the terms of an Optional Instrument, which would in effect be a European Union-wide contract and sales law. This Optional Instrument would provide a high level of consumer protection (as required by existing EU Directives) plus general rules of contract and sales law. The Optional Instrument would only be applicable to the sale of goods and would contain at minimum rules on pre-contractual obligations, conclusion of contract, content and interpretation of contract, validity, withdrawal, unfair terms, performance, conformity and remedies for non-performance. If the client chooses the “Blue Button”, the optional European contract and sales law would apply in place of the law which would otherwise be applicable according to conflict of laws rules.

IV. Issues for possible consideration

A. Definitions

19. This section includes definitions of certain terms. The Working Group may wish to consider these definitions and whether there are other terms which should also be defined.

ODR

20. A definition of ODR has been included in the introduction (see para. 3 above). The Working Group may wish to consider whether it is sufficient or whether it should be expanded to also cover informal private negotiation, automated or assisted negotiation (using negotiation software or an online service).³⁰ In the latter case, the Working Group may wish to consider text along the following lines: “Online dispute resolution (ODR) usually refers to alternative dispute settlement methods using information and communication technology (ICT) and, in particular, electronic forms of interaction on the Internet. ODR can be conducted in whole or in part online. ODR is a means of settling disputes that incorporates the use of the e-mail communications, streaming media, ODR online platforms such as websites and other information technology as part of the dispute resolution process.”

²⁹ Ibid., para. 16.

³⁰ In automated negotiation, the parties negotiate through a dispute resolution provider that facilitates the administration of the negotiation, for example, by contacting the other party and providing a software or application for negotiation and/or blind bidding. A typical negotiation assistance software allows the users to analyse their bargaining positions by evaluating and prioritising their negotiation objectives and by calculating the outcome most efficient for all parties. Blind-bidding process is an automated algorithm that evaluates bids from the parties and settles the case if the offers are within a prescribed range. In assisted negotiation, the parties negotiate with the help of an ODR online platform that facilitates the process by providing efficient technology and a designated place for the negotiation to take place.

ODR provider

21. “ODR provider” means an intermediary that administers the process and provides an ODR online platform for the parties to resolve their dispute by their chosen resolution method.

22. Online conciliation and online arbitration generally involve an ODR provider. However, in some States, resolution of the dispute takes place informally, without the assistance of an intermediary, in particular in the case of informal negotiations.

ODR online platform

23. “ODR online platform” refers to a forum provided by the ODR provider. An ODR online platform may be a platform accessible to the public such as websites on the Internet (an open platform) or a platform with limited or restricted access such as Intranet or internal electronic file management system (a closed platform).

B. Scope of work

24. As already mentioned (see para. 1 above), the Commission requested the Working Group to undertake work in the field of ODR relating to cross-border electronic commerce transactions, including B2B and B2C transactions.

25. The Commission took note of the commonly shared view expressed during the colloquium that traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border electronic commerce disputes, and that the solution (providing a quick resolution and enforcement of disputes across borders) might reside in a global ODR system for small value, high volume B2B and B2C disputes.³¹ This paper was not drafted with specific attention to consumer law issues; however, the Working Group may wish to bear in mind that matter when discussing the issues identified below. In particular, the Working Group may wish to consider how any ODR standard could be made compatible with consumer law.

26. The Commission also took note of the concerns expressed with regard to the difficulty of harmonizing consumer protection law and agreed that, while work should be carefully designed not to affect the rights of consumers, it would be feasible to develop a generic set of rules applicable to both B2B and B2C transactions.

27. Given the above considerations and decisions of the Commission, the Working Group may wish to consider the exact scope and form of its work. For example, if work is to focus on small value disputes, flexible standards might need to be considered, since what is regarded as small value may not be the same in every State.

³¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 254.

C. Identification and authentication

28. Proper mechanisms of identification and authentication will be required at different stages of the ODR proceedings. A party's identity in an electronic setting can be verified through the use of a variety of technologies associated with electronic signature or identity management. The terms "electronic authentication" and "electronic signature" refer to various techniques for the purpose of replicating, in an electronic environment, some or all of the functions identified as characteristic of handwritten signatures or other traditional authentication methods.³² Identity management refers to the currently prevailing business model that requires service providers and other businesses to identify and authenticate users seeking access to services or databases.³³ Given that in ODR trust is an important factor, the Working Group may wish to consider whether the legal standards dealing with it should incorporate any existing standard on electronic signatures.

29. The Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001³⁴ states the following functions of an electronic signature: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; and to associate that person with the content of a document. A signature can perform a variety of additional functions, depending on the nature of the document that was signed. In the context of ODR, a signature might attest to the intent of a party to be bound by an arbitration agreement or to commence arbitration.

30. The principle of technological neutrality has gained wide acceptance in legislative and regulatory frameworks globally.³⁵ Most modern laws on electronic commerce (many of which are based on or draw guidance from the UNCITRAL Model Law on Electronic Commerce 1996)³⁶ espouse technological neutrality and are able to facilitate the recognition of new technologies used in electronic authentication. The electronic authentication methods currently available and in use are: "digital signatures" based on public-key cryptography (PKI); biometric devices; techniques involving the use of personal identification numbers (PINs); digitized versions of handwritten signatures; and other methods such as a click-wrap agreement (that is, clicking an "OK-box").³⁷

31. With respect to electronic signatures in the context of ODR, the Working Group may wish to consider whether any legal standard should specify that an

³² Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods, United Nations publication, Sales No. E.09.V.4, paras. 15-23.

³³ See A/CN.9/692, paras. 48-66.

³⁴ United Nations publication, Sales No. E.02.V.8.

³⁵ Technological neutrality refers to the notion that legislation should be neutral rules providing coverage of all situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or medium used treating all existing technologies equally and further facilitating the application to new technologies. The principle of technological neutrality is important in view of the speed of technological innovation and development and ensures that the law is able to accommodate future developments and does not quickly become obsolete.

³⁶ United Nations publication, Sales No. E.99.V.4.

³⁷ Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001, para. 33.

electronic signature, in whatever form, or any other identification method, is not discriminated against vis-à-vis a paper-based signature in accordance with the principle of functional equivalence.³⁸ An additional consideration is whether the legal standard should adhere to the principle of technological neutrality and not discriminate against different types of technologies that may be used. Further, the question of whether discrimination between electronic signatures used domestically and those used in the context of international trade transactions should be discouraged, is a matter for the Working Group as this could result in a duality of regimes governing the use of electronic signatures, creating a serious obstacle to the use of such techniques.

D. Commencement of proceedings

32. A prerequisite for resorting to online conciliation or arbitration is that participants must have access to the relevant technology required by the respective ODR provider. An issue the Working Group may wish to consider is the extent to which such requirements must be specified in the terms and conditions of the ODR provider, to which the parties must consent. In the case of conciliation, consent occurs when a party submits an invitation to conciliation or agrees to participate therein; in arbitration, consent is normally contained in the arbitration agreement.³⁹

33. In electronic commerce, the parties have the freedom to agree on appropriate identification and authentication methods for their purposes, subject only to overriding public policy concerns in line with the principle of party autonomy. This consent to use electronic communication need not be expressly indicated or be given in a particular form; such a requirement would itself be an unreasonable barrier to electronic commerce. However, in the field of ODR, absolute certainty can be achieved by obtaining the explicit consent of the parties to use electronic forms of communication before commencing any proceedings.

34. Online conciliation is commenced when one party sends an (online) invitation to the other party, or submits a request to the ODR provider that the other party be contacted. Such a request may be made with or without first submitting a complaint to the ODR provider. The necessary elements of an invitation to conciliate are usually determined and included in an electronic form which the party must fill out and submit to the ODR provider. Online conciliation starts when the invited party informs the inviting party of its consent to conciliate.

³⁸ As set forth in the UNCITRAL Model law on Electronic Commerce, the principle of functional equivalence establishes that, provided certain criteria are met, electronic communication should enjoy the same level of legal recognition as that of the paper documents performing the same function. The functional equivalent approach is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques.

³⁹ For example, in order to use the ICC NetCase system, all parties and arbitrators in an arbitration case are required to agree to and sign the "Statement of Acceptance of the Conditions of Access and Use of NetCase". This Statement deals with confidentiality, security and intellectual property matters, as well as other technicalities and terms of use. The Statement also includes a provision stating that in case of posting documents on NetCase, time limits start to run on the day following the day of posting.

35. In online arbitration, the arbitration agreement serves as the basis of the arbitration. An option that online merchants may choose, in practice, is to include an arbitration agreement in the contract concluded between the parties or in a separate document, such as the general terms and conditions applicable to the transaction, that is, clicking on the corresponding button or ticking a box certifying that it consents to the terms and conditions. Regarding the conclusion of arbitration agreements in an online environment, the Working Group may consider the relevance of consumer law in this regard.

36. Where an arbitration agreement is concluded entirely online, for instance, by the online acceptance of general terms and conditions, a question may arise as to whether its form satisfies the written form requirement under Article II(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁴⁰ In that context it may be noted that UNCITRAL has adopted a Recommendation to promote flexible interpretation of Article II(2) of the New York Convention (see para. 73 below).

E. Submission of complaint, statements and evidence

1. Complaint and statements of claim and of defence

37. In ODR, the complaint and statements of claim and defence can be expected to be submitted electronically through the ODR online platform of the ODR provider. In addition, documents are accessible to the parties, as well as the conciliator or arbitral tribunal, on the ODR online platform throughout the process. Access to certain documents may be restricted to certain participants.

38. In some systems the statement of claim may be submitted in an electronic form on the ODR online platform (see para. 23 above), and a party might wish to attach documents thereto. Electronic document submission systems, such as NetCase at the ICC or the AAA's WebFile, already exist (see paras. 9-10 above). The question of confidentiality and security of the notice of arbitration and other documents submitted electronically, as well as the amendment of electronically submitted documents, need to be considered also through the application of appropriate technology.

39. Upon receipt of the statement of claim, the ODR provider's administrative staff or an automated process needs to ensure that it is properly recorded and forwarded electronically to the other party.

40. Amendments to a statement of claim or defence could be provided for at any time during the online arbitration, unless the tribunal considered it inappropriate under the circumstances. Technology used by the ODR provider could be expected to be capable of processing such amendments, and of forwarding the related communications.

2. Submission of evidence

41. In arbitration, the submission of evidence is governed by the relevant laws and the applicable procedural rules. Due to the use of technology in online arbitration,

⁴⁰ United Nations, *Treaty Series*, vol. 330. No. 4735.

submission of evidence in an online arbitration needs to be aligned with the relevant technical requirements of the ODR provider such as the types, sizes and formats of documents. The Working Group might wish to consider that these matters may be included in the general rules or regulations, or the terms and conditions of the ODR provider.

42. A fundamental requirement of arbitration is due process, and with respect to electronic communication, the production of evidence and statements should be carefully considered. The UNCITRAL Model Law on Electronic Commerce provides, in Article 9, an appropriate standard on the admissibility of an electronic communication in evidence, namely, that admissibility should not be denied on the sole ground that it is an electronic communication or, if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

F. Number and appointment of conciliators or members of the arbitral tribunal

43. Conciliators or arbitrators may be appointed by the parties, or by the ODR provider drawing from a list that the ODR provider maintains. The value of the claim may be a matter of consideration when deciding on the number of conciliators or arbitrators. The issue of ensuring impartiality and independence of conciliators or arbitrators is addressed below (see paras. 48-50).

44. On an ODR online platform, the parties may use a variety of technologies to appoint their conciliators. In conciliation, existing models allow parties to nominate a certain number of persons from a list supplied by the ODR provider, submitting names in their order of preference. The sole conciliator is then appointed when the same name appears on the lists of both parties. Another approach allows the ODR provider to appoint a conciliator from its own list, which may speed up the process, although this entails the risk that the conciliator so appointed might not be acceptable to a party for certain reasons.

45. In arbitration, the matter is of particular importance. The ability of the parties to choose their arbitrators should be preserved, and if a party does not do so, a mechanism for assisting in the appointment procedure should be provided for.

G. Impartiality and independence of conciliators or members of the arbitral tribunal

46. In ODR, procedural principles applying to conciliation and arbitration, such as transparency, impartiality, independence and good faith are important because the parties do not meet face to face. Doubts as to independence and impartiality might be addressed by setting out appropriate guidelines and/or a code of conduct, according to which neutrals must act in ODR. The Working Group may wish to consider this issue, as well as whether an appropriate electronic communication method should be in place in order to preserve these principles, by ensuring that all participants are given simultaneously all relevant information and that the parties are informed of all procedural acts performed throughout the process.

47. In an arbitration proceeding, arbitrators are generally under a continuing duty to disclose any circumstances that might raise a doubt as to their impartiality or independence in a case, a standard which could be considered for ODR as well. Such disclosure could be made to the parties, other arbitrators and the ODR provider, who could undertake any steps necessary to rectify the situation. Again, given the speed and efficiency of electronic communications, deadlines for submitting a challenge or response in this regard could be shorter than in traditional arbitration.

H. Confidentiality and issues related to security of communications

48. The issue of confidentiality in an arbitration can be divided into the following three aspects: privacy during the proceedings; confidentiality prior to the award; and confidentiality after the award. The arbitration proceedings, the existence of pending arbitrations and outcome of the award are confidential.

49. In ODR, the confidentiality requirement is closely connected with the requirement of security within the online environment where resolution of the dispute takes place. In addition to technical measures providing security of electronic data and communications, the issue arises of making certain that participants are subject to conditions ensuring that electronic data and communications are not disclosed to unauthorized parties. Such mandatory provisions on confidentiality may already be contained in the policies of the ODR provider, to which the parties would become subject when entering the process.

50. Security issues arise with respect to both transmission and retention of electronic communications.⁴¹ The purpose of confidentiality, i.e. the requirement not to make accessible certain information to persons not entitled to it and not to allow intermediaries to share information with others, is intended to protect sensitive data and information involved in the dispute.

I. Communication between the conciliators or members of the arbitral tribunal and the parties

51. One function of the ODR provider is to ensure effective communication between the parties and the conciliator or arbitrator throughout the proceedings. In conciliation, the parties may communicate with the conciliator either jointly or separately. The technology used by the ODR provider must be suitable for either joint or separate communications, and confidential sessions should not be accessible to the other party. In arbitration, the technology used by the ODR provider must be suitable for smooth communications between the parties, and for conducting online

⁴¹ The process is exposed to the following risks: unauthorized third parties may access the information (confidentiality); the data transmitted may be modified without proper authorization (integrity); collection and dissemination of information is not secured and the information does not remain private but may be viewed by the public (privacy); the process of verifying the right user may be compromised (authentication); permission of access data is given to unauthorized persons (authority); data may only be available to the person who is authorized to view it (availability); and a party may deny association with a certain electronic transmission or evidence submitted (non-repudiation).

arbitration hearings complying with the rules applicable to hearings. The Working Group may wish to consider the necessity of specifying rules of conduct, and the enabling technology, in this regard.

52. Given that ODR aims to provide efficient and timely dispute resolution, it may be considered whether any legal standard should specifically regulate issues of acknowledgement of receipt of electronic communications. As ODR relies on electronic means of communication, its rules as to dispatch and receipt of communications — which may differ from those in traditional dispute resolution — will need to be precisely defined. The United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (Electronic Communications Convention)⁴² and the UNCITRAL Model Law on Electronic Commerce are instruments which provide useful guidance in this regard.

1. Time of dispatch

53. The time of dispatch of an electronic communication can be categorized according to the control of the relevant information system. Under article 10(1) of the Electronic Communications Convention, the dispatch occurs when the communication leaves an information system under the control of the originator. When the electronic communication has not left an information system under the control of the originator or of the party who sent it on the originator's behalf, namely, when both parties are using the same information system, the time of dispatch is when the communication is received.

2. Time of receipt

54. The time of receipt of an electronic communication differs depending on whether it has been received at the designated electronic address for exchange of electronic communication or some other address. In the case of its receipt at the designated electronic address, the time of receipt is deemed to be when it becomes capable of being retrieved by the addressee at the designated address (Article 10 of the Electronic Communications Convention). In the case of receipt at a non-designated electronic address, the time of receipt is when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that it has been sent to that address (Article 10(2) of the Electronic Communications Convention). A general presumption is that an electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address. These rules are consistent with those prevailing in the paper world and limit the ability of an addressee to deliberately delay or impede delivery of a communication by not accessing it. These rules also take into account the fact that the information system of the addressee may not be reachable for reasons outside the control of the originator (for instance, the use of anti-spam filters for e-mails). Given their status as UNCITRAL standards, the Working Group may wish to consider their inclusion in any future legal standard, as appropriate.

⁴² United Nations publication, Sales No. E.07.V.02.

3. Acknowledgment of receipt

55. In situations where the parties have not agreed that the acknowledgement be given in a particular form or by a particular method, acknowledgement may be by any communication by the addressee, automated or otherwise, or any conduct of the addressee (Article 14(2) of the UNCITRAL Model Law on Electronic Commerce).

56. Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgment is received (Article 14(3) of the UNCITRAL Model Law on Electronic Commerce).

57. The above rules are subject to consent by the parties. However, in the context of ODR, the Working Group may wish to consider whether a legal standard on the acknowledgment of receipt of electronic communications requires a prescriptive approach.

4. Error

58. With the increasing use of automated systems, errors in electronic submissions can frequently occur. In electronic commerce, automated systems normally provide an opportunity for a natural person to correct an error. Where that opportunity is not provided for, the person has the right to withdraw that portion of the communication containing the input error. This withdrawal is under the condition that the person notifies the other party of the error as soon as possible after having learned of the error, and that the person so notifying has not received any material benefit or value from the electronic transaction (Article 14 of the Electronic Communications Convention).

J. Hearings

59. Hearings of witnesses or independent experts could be needed in online arbitration. Such hearings could take place by video or telephone conference, services which could be integrated into the ODR online platform. Keeping a record of such hearings, whether electronically or in paper form, may be required for various reasons and would need to be taken into account in the establishment of an ODR system.

60. Hearings could take place on the ODR online platform in writing (where the parties and the conciliator or arbitrator communicate with each other in dialogue boxes), or orally. Oral hearings could occur through video or telephone conference or similar methods, which could be integrated services on the ODR online platform. Again, keeping a record of such hearings is an important matter.

61. With respect to record of electronic data, the UNCITRAL Model Law on Electronic Commerce article 10 states that requirements for retaining data messages are met if certain conditions are satisfied: the information contained is accessible to be usable for subsequent reference; the data message is retained in the format in which it was generated, sent or received; and information retained enables the identification of the origin and destination of a data message and the date and time when it was communicated.

62. In ODR, the closure of proceedings could be indicated accordingly on the ODR online platform, e.g. by restricting the parties' further access to the relevant areas of the platform.

K. Representation of the parties and assistance

63. In conciliation, the parties may be assisted or represented by other persons provided that their names are submitted to the conciliator. Such assistance could also be allowed in online conciliation, in which case the conditions of participation by representatives would need to be determined. It might be practicable to require the parties to submit the names of such representatives and the capacities in which they act via the ODR online platform. It may also be advisable to determine the party bearing the consequences and risks associated with involving representatives (such as sharing passwords and login information, making decisions or agreements on the party's behalf etc.). Parties to an arbitration may similarly be assisted or represented by persons of their choice. The conditions of the involvement of representatives in online arbitration would need to be determined, including informing the arbitral tribunal of their identity and the quality in which they act. Such information could be submitted via the ODR online platform. Again, as with conciliation, the bearing of the consequences and risks associated such involvement would need to be addressed.

L. Place of arbitration

64. The place of arbitration has a legal impact on a number of matters, such as the applicable domestic procedural law, procedures for setting aside, determining the court having jurisdiction to grant interim measures or assist and supervise the arbitral tribunal in certain matters, and the recognition and enforcement of the arbitral award.

65. In online arbitration, determining the place of arbitration may be problematic. For instance, parties and arbitrators may be in different geographical locations, or the actual location of a party may differ from the address that it has submitted. In order to avoid controversies during the arbitration process and, subsequently, with recognition and enforcement of arbitral awards, it may be useful to ascertain the place of arbitration, rather than leaving it to the agreement of the parties. The place of arbitration may also affect the application of mandatory laws and public policy considerations on online arbitration.

M. Settlement agreement and termination of the proceedings

66. In conciliation and arbitration, the parties may terminate the proceedings by a settlement agreement. In conciliation, a settlement agreement can be prepared by the parties or, upon request of the parties, by the conciliator; whereas in arbitration, the arbitral tribunal may record the settlement in the form of an award if requested by the parties and agreed by the arbitral tribunal. In both cases, the question arises as to the concluding and signing of a settlement in order to make it enforceable as a

contract between the parties. Appropriate methods of electronic signature may be considered for that purpose.

67. The ODR provider should ensure that any communications relating to the termination of the proceedings are forwarded in a timely manner to all participants, in a form that allows proof thereof, including via e-mail or other written communication via the ODR online platform. The ODR online platform needs to be specialized and suitable for the sending and retention of such communication and relevant electronic data (see para. 61).

N. Enforcement issues

68. The attractiveness of online conciliation and online arbitration would presumably be increased if any settlements reached were to enjoy a regime of expedited enforcement, and this is a matter the Working Group may wish to consider.

69. In traditional conciliation, methods for enforcing a settlement agreement can vary greatly between legal systems and are dependent upon the technicalities of domestic procedural law. Some jurisdictions impose certain requirements, such as for a signature or a written form of agreement, whereas in other jurisdictions no special provisions apply, with the result that settlement agreements are enforceable as would be any contract between the parties. In the national legislation of some countries, parties who have settled a dispute through conciliation are empowered to appoint an arbitrator specifically to issue an award based on the settlement agreement of the parties. In some jurisdictions, the status of an agreement reached following conciliation depends on whether or not the conciliation took place within the court system and legal proceedings in relation to the dispute are on foot. Some legal systems provide for enforcement in a summary fashion if the parties and their counsel signed the settlement agreement and it contained a statement that the parties may seek summary enforcement of it. Settlement agreements may also be the subject of expedited enforcement if, for example, they have been notarized or formalized by a judge.

70. Article 14 of the UNCITRAL Model Law on International Commercial Conciliation⁴³ leaves the matter of enforcement to the applicable domestic law, allowing the States to implement a procedure for enforcement of settlement agreements. In line with this provision, the Working Group might wish to consider whether to address the matter of enforcing settlement agreements in conciliation, and if so, whether to discuss it in the form of rules, regulations, in a commentary or otherwise.⁴⁴

71. In international commercial arbitration, foreign arbitral awards are recognized and enforced under the New York Convention. The New York Convention does not refer to the admissibility of electronic communications with regard to aspects of arbitration that are important regarding recognition and enforcement (e.g. the requirement that an arbitration agreement be in writing, and the formal requirements

⁴³ United Nations publication, Sales No. E.05.V.4.

⁴⁴ See also *Guide to Enactment of the UNCITRAL Model Law on International Commercial Conciliation*, paras. 87 to 92.

for the award to be submitted for recognition and enforcement).⁴⁵ Article II of the New York Convention provides that each Contracting State must recognize an agreement in writing under which the parties undertake to submit to arbitration a dispute. Article IV provides that a duly authenticated original or a duly certified copy of this agreement must be submitted when seeking recognition and enforcement of the arbitral award.

72. It should be noted that the Electronic Communications Convention includes in its article 20 a provision intended to clarify that electronic communications may also be used in connection with the formation or performance of contracts that are subject to certain Conventions, including the New York Convention. The Electronic Communications Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States (article 1). The reference to the New York Convention has been added in the list under article 20 of the Electronic Communications Convention in the interests of achieving some progress towards the objective of uniform interpretation of the written form requirement contained in article II(2) of the New York Convention. The inclusion of a reference to the New York Convention under article 20 of the Electronic Communications Convention is intended to provide a uniform definition of “writing”, a definition that is more consistent with developing technological practices in international commercial arbitration. It also seeks to provide a solution to the requirement under article IV, paragraph 1(b) of the New York Convention that an original agreement be supplied. However, that interpretation would prevail only in instances where the Electronic Communications Convention applies.

73. Further, it should be noted that the Commission also adopted, at its thirty-ninth session in 2006, a “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”.⁴⁶ The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II(2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration⁴⁷ (see below, para. 80). Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the “more favourable law provision” contained in article VII(1) of the New York Convention, the Recommendation clarifies that “any interested party” should be allowed “to avail itself of rights it may have, under the law or treaties of the country where an

⁴⁵ This matter was addressed in the 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 (see para 74 below).

⁴⁶ A/61/17, Annex 2

⁴⁷ United Nations publication, Sales No. E.08.V.4.

arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.

74. Article V(1)(a) of the New York Convention provides that recognition and enforcement of a foreign arbitral award may be refused if the arbitration agreement is not valid under the law of the country where the award was made (provided that the parties did not subject the arbitration agreement to any other law). Under Article V(1)(d) of the New York Convention, recognition and enforcement may be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place. The meaning of “the country where the award was made” and “the country where the arbitration took place” may be ambiguous in the case of online arbitration for the reasons discussed above in relation to the determination of the place of arbitration (see paras. 64-65 above).

75. Practical questions that may be raised in connection with the enforcement of awards include: whether the award is or should be issued in hard copy, duly signed and sealed by the arbitrators and/or the ODR provider, and sent to the parties; whether an electronic or scanned format of a hard copy bearing the necessary signatures and seals could be considered as duly authenticated; or whether any special rules should apply to the definition of due authentication of online arbitral awards. It also remains to be determined what a “copy” of an online arbitral award is and under what circumstances it is acceptable for recognition and enforcement. The Working Group may wish to consider whether the application of the enforcement mechanisms provided by the New York Convention should be regarded as an optimal solution for small value claims in the context of ODR. The Working Group may wish to further consider whether a specific system would need to be set up either to ensure enforcement of such claims or to avoid the need for enforcement altogether.

O. Applicable law

76. Arbitrations are conducted under the applicable substantive and procedural laws that may be agreed upon by the parties or designated otherwise. An effective instrument on international ODR might address the issue of certainty as to the applicable law.

77. The parties may agree upon the applicable law in the contract at the time of the transaction. Such agreement is often embedded in the seller’s general terms and conditions applicable to the transaction. (In online sales transactions, in particular, buyers may be unaware of such clause despite accepting the applicable sales terms by clicking the corresponding button.) Conversely, the parties could agree upon the applicable law after the dispute arose. Consideration should also be given to whether and how mandatory laws and public policy considerations, for instance, regarding consumers, may apply in online arbitrations.

78. Absent the parties’ agreement, the applicable substantive law is generally designated by the private international law of the forum. In online arbitration, this may be problematic because the place of arbitration might be uncertain.⁴⁸ On the

⁴⁸ See paragraph L. above on the place of arbitration.

other hand, if the rules of arbitration or the parties' agreement allows, the arbitrator may be granted a wide discretion to decide upon the applicable substantive law.

79. The parties may agree upon the applicable procedural rules in their contract at the time of the transaction in which case this set of rules applies. The parties may also defer such agreement until after the dispute arises, however, in online arbitrations in particular, there may be a risk that the parties would not be able to communicate effectively given the existence of a dispute and the distance between the parties.

80. The arbitration law of the forum serves as background law for a number of procedural matters not governed by the rules agreed upon by the parties or designated by the arbitrator.

81. The Working Group may also wish to note that certain legislation on arbitration would be more favourable to the development of ODR. Concerning the UNCITRAL Model Law on International Commercial Arbitration, the original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II(2) of the New York Convention, which requires that an arbitration agreement be in writing. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention. The second approach defines the arbitration agreement in a manner that omits any form requirement. Countries having adopted legislation reflecting the content of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 would create an environment more favourable to the development of ODR.

P. Language of proceedings

82. Determining the language of proceedings in ODR is crucial to success, since all variations of the ODR process are based on clear and efficient communication among the parties and the neutral. The language of the proceedings in B2B transactions may be determined by the parties but, for example, in B2C transactions, there may be mandatory laws which determine the language.

83. The language to be used may depend on several factors, such as the identity of the parties, the language of the disputed transaction, the language of the website where the transaction took place, or the language of the website administering ODR.

84. Parties may agree on the language before or after the dispute arises. In some online arbitrations, an arbitration agreement is included in the contract subject to the dispute. In online sales transactions, the general terms and conditions may contain such a clause.

85. Absent the parties' agreement, the language of the ODR may be determined through other means, including by reference to the terms and conditions of the underlying sales transaction, or the conditions laid down by the ODR provider. However, given the nature of ODR, party autonomy in this regard may be limited by the range of languages made available on the relevant ODR online platform.

86. The determination of the parties' location has an effect on the language of the proceeding. For instance, a party located in a country using English may get access to an ODR online platform in that language, while the language of the ODR online platform may differ for another party located in a country with a different language.

87. Article 6(4) of the Electronic Communications Convention, dealing with the location of the parties, specifies that the location of the equipment and of the supporting technology, or the place from which the information system is accessed, are not necessarily relevant for the determination of the party's place of business. Article 6(5) of that Convention introduces a similar rule with respect to the use of country-specific domain names or e-mail addresses. Such rules are particularly useful as mobility has made access to electronic communications ubiquitous, such that location of equipment may not be meaningful for the determination of the party's place of business.

Q. Costs and speed of proceedings

88. The services of ODR providers may be offered either free of charge or for a fee. The issue of the cost of the process to parties may have an impact on their willingness to make use of it.

89. For complex cases in which the proceedings may involve online hearings in addition to written submissions, the parties may decide to use technologies other than, or in addition to, those provided by the ODR provider. Allocation of these related costs is another important factor to be considered by parties choosing ODR.

90. Research and experimentation with ODR indicate that the availability of dispute resolution which is faster than regular litigation or ADR may motivate parties to use ODR. If offered the opportunity to resolve their disputes without the need to travel and with the help of rapid electronic communications, parties may become more willing to embrace ODR. Since the speed of proceedings is a key motivating factor, it seems reasonable to consider tailoring the legal framework for ODR to promote this aspect.

V. Conclusion

91. In order to remove paper-based obstacles in electronic transactions and to enhance legal certainty and commercial predictability where electronic communications are used, the regulating legal standard should give legal recognition to the fundamental principles of non-discrimination, functional equivalence, technological neutrality, party autonomy and geographical non-discrimination. These principles of electronic commerce incorporated in legislation for electronic transactions were developed for B2B transactions. It should be noted by the Working Group that B2C transactions may require a special set of rules.

92. Development of a legal standard for online dispute resolution raises various issues for consideration, a number of which have been referred to in the foregoing paper. The Working Group may wish to consider the following matters in relation to its deliberations:

(a) Whether to recommend a set of generic rules of procedure for ODR, which rules might encompass the following aspects: consent to conciliate or arbitrate (see paras. 32-33 above); requirements for an arbitration agreement (see paras. 35-36 above); qualifications of conciliators and arbitrators; how conciliators and arbitrators are appointed (by the parties or otherwise) (see paras. 43-45 above); guidelines or a code of conduct for conciliators and arbitrators (see paras. 46-47 above); standardized phases of the ODR process including negotiation, conciliation and arbitration (see para. 20 above); submission of documents (see paras. 37-42 above); language of the proceedings (see paras. 82-87 above); making settlement agreements (see paras. 66-67 above); and expedited time limits for filing of documents and other matters related to costs and speed (see paras. 88-90 above);

(b) Whether there should be access to courts for review, and if so, to which courts and on what grounds (see paras. 68-75 above);

(c) How is the “place of arbitration” determined and what relevance does it have (see paras. 64-65 above);

(d) Ensuring security and confidentiality of communications and data, including preventing improper disclosure to parties outside the process (see paras. 48-49 above);

(e) Whether the legal standards dealing with ODR should incorporate existing standards on electronic signatures (see paras. 28-31 above);

(f) Principles applicable to the exchange of information electronically in the ODR process, including technological neutrality, non-discrimination and functional equivalence, as found in existing UN standards (see paras. 51-58 above);

(g) What form of hearing, if any, would be appropriate for ODR (see paras. 59-62 above);

(h) Recognition and enforcement of awards, in particular under the New York Convention, including: defining place of arbitration; requirement for the arbitration agreement to be in writing; written form and authentication of awards (see paras. 68-75 above); and

(i) Whether the applicable law should be the law of the vendor’s State, the purchaser’s, or some other law (see paras. 76-81 above).