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on International Trade Law**
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Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.¹ At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering 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 report to the Commission at its next session.²

2. At its twenty-second session (Vienna, 13-17 December 2010),³ the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural rules for ODR, including taking into account that the types of claims with which ODR would deal should be B2B and B2C cross-border low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group also requested the Secretariat to list available information regarding ODR known to the Secretariat with references to websites or other sources where they may be found (A/CN.9/716, para. 115). The Working Group may wish to note that that list is available on the UNCITRAL website.⁴

3. At its twenty-third session (New York, 23-27 May 2011)⁵ and its twenty-fourth session (Vienna, 14-18 November 2011),⁶ the Working Group considered draft generic procedural rules as contained in documents A/CN.9/WG.III/WP.107, and A/CN.9/WG.III/WP.109, respectively. At that session, the Working Group requested that the Secretariat, subject to availability of resources, prepare a revised version of the draft generic procedural rules as well as documentation addressing issues of guidelines for neutrals, minimum standards for ODR providers, substantive legal principles for resolving disputes and a cross-border enforcement mechanism (A/CN.9/721, para. 140 and A/CN.9/739, para. 151).

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

⁴ www.uncitral.org/uncitral/en/publications/online_resources_ODR.html.

⁵ The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

⁶ The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/739.

4. This note contains an annotated draft of generic procedural rules, taking into account the deliberations of the Working Group at its twenty-second, twenty-third, and twenty-fourth sessions.

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

A. General remarks

5. These Rules have been prepared in accordance with the decision of the Working Group to draft generic procedural rules for ODR, taking into account that the types of claims with which ODR would deal should be B2B and B2C low-value, high-volume cross-border electronic transactions. Rules prepared in this format — and the application of which, per draft article 1 thereof, requires the agreement of the parties — are of a contractual nature, and subject to mandatory law.

6. Several issues relating to the design of an overall ODR framework arise when considering the draft procedural rules (the Rules). Document A/CN.9/WG.III/WP.113 addresses a number of these issues, including guidelines and minimum standards for ODR providers and neutrals, and substantive principles for deciding cases.

7. The Working Group may wish to take into account that the Rules have been prepared based on the assumption that the ODR proceedings include a negotiation phase, followed by a phase of facilitated settlement and, if that second phase is inconclusive, a final and binding decision by a neutral. Where relevant, indications have been given herein regarding variations to the Rules in the event parties are given discretion in choosing phases.

B. Notes on draft procedural rules

1. Introductory rules

8. Draft preamble

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

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

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

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

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

[(d) Cross-border enforcement mechanism;]

[...];

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

Remarks

Paragraph (1)

9. In accordance with the decision by the Working Group, the Rules do not include definitions of the terms “low-value” and “cross-border” (A/CN.9/739, paras. 16 and 20) but the definition of “low-value” could be dealt with in a commentary or other additional document for the purpose of illustrating one or more examples of low-value cases (A/CN.9/WG.III/WP.113, para. --).

10. The Working Group may wish to note that at the previous session a proposal was made to include in the draft preamble that the Rules were intended to apply to disputes relating to the “sale of goods and performance of services” (A/CN.9/739, para. 19).

Paragraph (2)

11. The Working Group agreed to proceed with deliberation as to the contents of the documents enumerated in paragraph (2) noting that the list of documents is not exhaustive (A/CN.9/739, para. 21). The Working Group may wish to consider which of these documents and any additional documents the Working Group should be preparing in the fulfilment of its mandate. The Working Group may wish to note that A/CN.9/WG.III/WP.113 addresses issues related to the documents identified in paragraph (2) (see above, para. 6).

Paragraph (3)

12. Another complementary — and optional — document would contain supplemental rules adopted by ODR providers. An ODR provider may choose to adopt supplemental rules to deal with issues that are not included in the Rules and that may require different treatment for each ODR provider — e.g. costs, definition of calendar days, responses to challenge of neutrals.

13. Draft article 1 (Scope of application)

Option 1 — “[1. The Rules shall apply to ODR proceedings where parties to a transaction conducted by use of electronic communication have agreed that disputes in relation to that transaction shall be referred for settlement under the Rules, [subject to the right of the parties to pursue other forms of redress].]

Option 2 — “[1. Where parties to a transaction conducted by use of electronic communications have agreed, either at the time of the transaction or afterwards, that disputes in relation to that transaction shall be submitted to online dispute resolution under the Rules (“agreement”), the Rules shall apply if the parties were given clear and adequate notice of the agreement. [Such notice needs to provide for a consent of a party to the ODR proceedings and the Rules separate from the underlying transaction, in order to ensure that that party knowingly agreed to arbitrate the dispute under the Rules].]

“[2. As a condition to using the Rules the [seller] [parties] must list its contact information.]”

Remarks

Paragraph (1)

14. Option 1 is a more generally worded provision that does not explicitly state the time of the agreement to refer the dispute for settlement under the Rules. Option 2 refers to two possible time periods when an agreement to resort to ODR under the Rules could have been reached, namely pre-dispute and post-dispute. The consent of the parties might be so expressed in the form of a separate OK box (click-wrap agreement) accessible from or linked to the underlying transaction. The Working Group may wish to consider including the last square bracketed sentence in Option 2 in guidelines and minimum requirements for ODR providers.

15. With respect to the square bracketed text at the end of Option 1 (*“[subject to the right of the parties to pursue other forms of redress]”*), the Working Group may wish to recall its discussion at its twenty-third session, and the diverging views expressed on the need to retain those words (A/CN.9/721, paras. 41-49 and A/CN.9/739, paras. 27-29). The square bracketed text is intended to refer to situations where pre-dispute agreements to arbitrate might not be binding upon consumers and thus where only one party might be bound by such an agreement.

Paragraph (2)

16. At its twenty-fourth session, the Working Group agreed to include paragraph (2) in square brackets (A/CN.9/739, paras. 26 and 29). Should the Working Group decide to include this paragraph, in the Rules, it may wish to consider where it should be located (i.e. in draft article 1 or elsewhere) and that business parties may have different sets of contact information for different purposes.

17. Draft article 2 (Definitions)

“For purposes of these Rules:

“1. ‘claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.

“2. ‘communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

“3. ‘electronic communication’ means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into a digital format so as to be directly processed by a computer or other electronic devices.

“4. ‘neutral’ means an individual that assists the parties in settling the dispute and/or renders a [decision] [award] regarding the dispute in accordance with the Rules.

“5. ‘respondent’ means any party to whom the notice is directed.

“6. ‘ODR’ means online dispute resolution which is a [system] [mechanism] for resolving disputes [through an information technology based platform and] facilitated through the use of electronic communications and other information and communication technology.

“7. ‘ODR platform’ means one or more than one online dispute resolution platform which is a [system] for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.

“[8. ‘ODR provider’ means an online dispute resolution provider which is an entity that administers ODR proceedings [and] [and/or] provides an ODR platform[, or both,] for the parties to resolve their disputes in accordance with the Rules.]”

[...]

Remarks

Paragraph (1) “claimant”

18. The Working Group agreed to retain the text as the Rules are intended to apply to B2B as well as B2C in which case it would be open to both parties to the transaction to bring a claim (A/CN.9/739, para. 30).

Paragraph (3) “electronic communication”

19. In line with the principle of technological neutrality enshrined in UNCITRAL texts on electronic commerce, the definition of the term “electronic communication” is intended to provide guidance without excluding any existing or future method of electronic communication. More concretely, the definition is intended to encompass the broader concept of digitized communication and accommodates new technologies, including those facilitating one-on-one hearing in electronic form such as automatic speech recognition that allows computers to interpret human speech and transcribe it to text or to translate text to speech, and may also include radio-frequency identification that uses communication through the use of radio waves to transfer information between an electronic tag and a reader.

Paragraph (6) “ODR”

20. The Working Group may wish to note that the term “system” is used both here and in the definition of ODR platform in paragraph (7), with meanings that obviously differ, and to consider whether, to avoid inconsistencies that could cause confusion to a reader, use of the term should be aligned throughout the Rules.

Paragraph (8) “ODR provider”

21. The Working Group may wish to note that at its twenty-fourth session, it had noted that: (a) the definition of the term “ODR provider” should be flexible, simple and clear; (b) the Working Group should bear in mind the effect of any change in

the definition of the term “ODR provider” on the use of that term throughout the Rules, in order to ensure consistent use of terminology and thus to avoid any confusion (A/CN.9/739, para. 47). The Working Group may also wish to note that the definition of the term “ODR provider” should be broad enough to cover various designs of the ODR process and combinations thereof.

22. The Working Group may note that the square bracketed phrases [and] and [and/or] are to address the possibility of the definition of “ODR provider” including an operator of an ODR platform (i.e. ODR platform provider) (A/CN.9/739, para. 44).

23. The Working Group may wish to note that at its twenty-fourth session the concern had been expressed that the definition of the term “ODR provider” encompassed the roles of ODR administrator and ODR platform provider, and that these roles might need to be defined separately (A/CN.9/739, para. 40).

24. The Working Group may also wish to note that the definition of the term “ODR provider” could change depending on the stage at which the Rules contemplated the first involvement of the ODR provider in the proceedings (A/CN.9/739, para. 38).

25. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be transmitted by electronic means [to the ODR provider and shall be addressed through the ODR platform] [to the ODR provider or through the ODR platform to be re-transmitted to the ODR provider].

“2. The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be [that] [those] set out in the notice of ODR (“the notice”), unless the claimant notifies the ODR provider otherwise.

“3. The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be the address[es] for the respondent which has [have] been provided by the claimant. Thereafter, the designated electronic address[es] of the respondent for the purpose of all communications arising under the Rules shall be that [those] which the respondent notified to the ODR provider when accepting the Rules or any changes notified during the ODR proceeding.

“[4. The time of the receipt of an electronic communication under the Rules is the time when it becomes capable of being retrieved by the addressee of the communication at the ODR platform.]

“5. The ODR provider shall [promptly] [without delay] communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses.

“6. The ODR provider shall [promptly] [without delay] notify all parties and the neutral of the availability of any electronic communication at the ODR platform.”

*Remarks**Paragraph (4)*

26. Paragraph (4) reflects article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”) and is relevant to the overall time frame of the ODR proceedings.⁷ The Rules are intended to promote simplicity, speed and efficiency, and relate to the resolution of disputes arising from cross-border transactions. This means that uncertainties as to the time of receipt of communications could delay proceedings and thus it may be necessary to identify a consistent standard to determine the time of their receipt. The Working Group may wish to note that the scope of the Rules includes disputes arising from B2B and B2C transactions, and to consider whether any adjustment may be necessary in light of the fact that the Electronic Communications Convention refers to B2B transactions. The Working Group may wish to note that there are various options to ascertain the time of receipt of an electronic communication communicated through the ODR platform. The general rule found in article 10 of the Electronic Communications Convention requires that an electronic communication be capable of being retrieved by the addressee at an electronic address designated by the addressee in order to be deemed to have been received by him. This is presumed to occur when the communication reaches the addressee’s electronic address.

27. In light of the above, requiring a more specific time of receipt, as proposed at the twenty-fourth Working Group session (A/CN.9/739, para 52) might in fact create further uncertainties. The Working Group may wish to consider the following instances when defining the time of dispatch and receipt of electronic communication:

(a) The time when the ODR provider dispatches the electronic communication, that is the time when it leaves an information system under the control of the originator (article 10(1) of Electronic Communications Convention);

(b) The time the ODR platform (information system) dispatches the electronic communication to the addressee;

(c) The time when the ODR provider notifies that the electronic communication is capable of being retrieved by the addressee at the ODR platform;

(d) The time when the ODR platform dispatches the notification that the communication is capable of being retrieved by the addressee;

(e) The time when the addressee accesses the ODR platform and opens the electronic communication;

(f) The time when the addressee receives the notification that the communication is capable of being retrieved; and

⁷ Article 10 of Electronic Communications Convention updates article 15 of Model Law on Electronic Commerce. The amendments made to article 10 of Electronic Communications Convention 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. They 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).

(g) The time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee (article 10(2) of Electronic Communications Convention).

2. Commencement

28. Draft article 4 (Commencement)

“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in annex A. The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

“2. The notice shall then be communicated by the ODR provider to the respondent [promptly] [without delay].

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

“4. ODR proceedings shall be deemed to commence on the date of receipt by the ODR provider at the ODR platform of the notice referred to in paragraph (1).

“[5. The respondent may, in response to the notice communicated by the claimant, communicate a claim which arises out of the same transaction [or same factual circumstances] identified by the claimant in the notice [with the same ODR provider] (‘counter-claim’).] The counter-claim shall be initiated no later than [seven (7)] calendar days [after the notice of the first claim is [communicated to] [received by] the respondent]. [The counter-claim shall be dealt with in the ODR proceeding together with the [first claim] [notice by the claimant].]”

Annex A

“The notice shall include:

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

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

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

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

“(e) a statement that the claimant agrees to participate in ODR proceedings [or, if applicable, a statement that the parties have an agreement to resort to ODR proceedings in case of any dispute arising between them].”

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

“(g) the location of the claimant;

“[(h) the preferred language of proceedings;]

“(i) the signature of the claimant and/or the claimant’s representative in electronic form including any other identification and authentication methods;

“[...]”

Annex B

“The response shall include:

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

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

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

“[(d) a statement that the respondent agrees to participate in ODR proceedings];

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

“(f) the location of the respondent;

“[(g) the preferred language of proceedings;]

“(h) the signature of the respondent and/or the respondent’s representative in electronic form including any other identification and authentication methods;

“[...]”

Remarks

Paragraphs (2) and (3)

29. The Working Group may wish to note that, depending on how the terms “ODR provider” and “ODR platform” are defined, it could be foreseen that notices may be communicated to the ODR provider or ODR platform. These paragraphs will have to be made consistent with the provisions on communications and with the definitions of ODR provider and ODR platform. The Working Group may also wish to note that the designation of the recipient of an electronic communication, whether ODR provider or ODR platform, may affect the time of receipt of electronic communications which in turn affects the time frame of ODR proceedings.

Paragraph (3)

30. At its twenty-fourth session, the Working Group agreed to retain the term “calendar” throughout the Rules. The Working Group may wish to note that UNCITRAL texts do not contain a definition of “calendar” days, however article 2(6) of the UNCITRAL Arbitration Rules, deals with extensions of time when the last day of a period of time is an official holiday or non-business day and

provides that official holidays or non-business days occurring during the running of the period of time are included in calculating the time period.

31. The Working Group may wish to recall its decision to provide in an additional document that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own rules with regard to time so long as they are not inconsistent with the Rules (A/CN.9/721, para. 99). The Working Group may wish to consider whether these matters should be addressed in the Rules together with the relevant questions of how the period of time under the Rules should be calculated and whether the calculation should be left to the ODR provider and addressed in guidelines and minimum requirements for ODR providers.

Paragraph (4)

32. Paragraph (4) deals with the commencement of ODR proceedings. The current wording of the paragraph makes commencement of proceedings dependent on receipt of the notice from the claimant, either by the ODR provider or the respondent.

33. The Working Group may wish to consider, in the event that ODR is designed to allow the parties and/or ODR providers to select a specific phase or phases of proceedings, whether each specific phase of the ODR proceedings — negotiation, facilitated settlement and arbitration — should contain its own definition of commencement.

Paragraph (5)

34. Draft article 4, paragraph (5) reflects the Working Group's decision to include a provision on counterclaims in the Rules (A/CN.9/739, para.93). In response to its request for a definition of counterclaim (A/CN.9/739, para. 93), the Working Group may wish to include the following definition in paragraph (5) or in draft article 2: “[‘Counter-claim’ means a[n independent] claim by the respondent against the claimant which arises out of the same transaction or same factual circumstances identified by the claimant in the notice [with the same ODR provider]]”.

35. The Working Group may wish to note that several questions arise in relation to counter-claims:

(a) Should the respondent file a new claim or include the counter-claim in the response? Can the response to the notice be presumed to encompass any counter-claim? Should this be made apparent to the claimant, for instance by way of the respondent indicating same by clicking a separate check-box? Will the neutral have the discretion to decide that a response encompasses or constitutes a counter-claim, in the absence of an express statement to that effect by the respondent?

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

(c) Who decides whether the counter-claim falls within the ambit of the initial claim in the notice by the claimant? (A/CN.9/739, para. 92). The Working Group may wish to consider the extent to which this question is addressed by draft

article 7 and in particular paragraph (4) thereof (power of the neutral to rule on his own jurisdiction).

(d) Should the Rules or additional documents regulate the grounds for deciding whether a counter-claim falls within the ambit of the initial claim?

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

Annex A

Annex A (c) and (d)

36. The Working Group may wish to consider whether annex A should enumerate the grounds on which claims can be made and the available remedies. In a global cross-border environment for resolving low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies, to avoid the risk of overloading the system with complex cases, making it inefficient and expensive.

Annex A (f)

37. The Working Group may wish to note that, at its twenty-third session, it was suggested that annex A, paragraph (f), together with a companion provision in annex B could assist in preventing a multiplicity of proceedings relating to the same dispute (see also reference to annex B (d)) (A/CN.9/721, para. 122).

Annex A (h)

38. In the interest of efficiency of proceedings, the Working Group may wish to consider requiring the parties to select a preferred language of the proceedings, in the event they wish to use a language different from that used in connection with the transaction in dispute (see A/CN.9/WG.III/WP.112/Add.1, paras. 20-25).

Annex A (i)

39. The Working Group may wish to recall its discussion that complex identification and authentication methods may not be necessary for the purposes of ODR, and that current UNCITRAL texts on electronic commerce already addressed methods that were reliable and appropriate for the purposes for which they were used (article 7(2)(b) of UNCITRAL Model Law on Electronic Commerce, A/CN.9/716, para. 49). The issue of identification and authentication of parties in ODR might be more appropriately dealt with in a document separate from the Rules such as guidelines and minimum standards for ODR providers. It should also be noted that the term “electronic signature” differs from “digital signature”. Electronic

signature⁸ refers to any type of signature that functions to identify and authenticate the user including identity management.⁹

Annex B

40. Annex B deals with the response to the notice and mirrors the provisions of annex A.

Annex B (a)

41. As with annex A (a) and (b), the issue of data protection or privacy and online security in the context of communicating information relating to the parties in the course of ODR proceedings should be taken into consideration (A/CN.9/721, para. 108).

Annex B (b) and (c)

42. Annex B (b) and (c) mirror annex A (c) and (d) and similarly, the Working Group may wish to consider whether annex B should enumerate the responses to the statements, allegations and proposed solutions contained in the notice.

Annex B (d)

43. The Working Group may wish to consider modifying the language of paragraph (d) as set out below, in light of any views it may have on the issue of pre-dispute binding agreements to participate in ODR: “[*(d) a statement that the respondent agrees, or where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings*]”.

Annex B (e)-(h)

44. Annex B (e) to (h) mirrors discussion on Annex A (f) to (i), respectively.

3. Negotiation

45. Draft article 5 (Negotiation)

“1. If settlement is reached, then the ODR proceeding is automatically terminated.”

⁸ Article 2 (a) of Model Law on Electronic Signatures defines electronic signatures as “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message”. Digital signature generally uses cryptography technologies such as public key infrastructure (PKI), which require specific technology and means of implementation to be effective.

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

“2. If the parties have not settled their dispute by negotiation within [ten (10)] calendar days of the response, then the ODR proceeding shall automatically move to the [next] [facilitated settlement [and arbitration]] stage[s].

“3. If the respondent does not respond to the notice within [five (5)] [seven (7)] calendar days, he/she is presumed to have refused to negotiate and the ODR proceeding shall automatically move to the [next] [facilitated settlement [and arbitration]] stage[s] [, at which point the ODR provider shall [promptly] [without delay] proceed with the appointment of the neutral in accordance with article 6 below].

“4. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than [ten (10)] [five (5)] [seven (7)] calendar days.

“[5. Where a party has failed to implement any settlement reached under paragraph (1), either party may re-commence ODR proceedings to seek a [decision] [award] reflecting the terms of the settlement which [decision] [award] a neutral shall have the power to grant.]”

Remarks

46. The Working Group may wish to note that the Rules take into account several working assumptions related to negotiation: that direct negotiation by the parties through the ODR platform was one stage of ODR proceedings; that the ODR proceeding was composed of three stages — negotiation, facilitated settlement and arbitration — while keeping in mind that compression to a two-stage process could be considered; that a party could refuse negotiation and request to move to the next stage; and that there were different types of negotiation including automated and assisted negotiation (A/CN.9/739, para. 94). Other working assumptions include: that if the parties failed to reach a settlement at the negotiation stage, then the case would proceed automatically to the next stage (A/CN.9/739, para. 103); that commencement of ODR proceedings encompassed the commencement of negotiation, and in this respect it was recognized that ODR proceedings are one package (A/CN.9/739, para. 95).

47. The Working Group may wish to note that the negotiation stage can involve assisted negotiation, automated negotiation or both. In assisted negotiation, the parties endeavour to reach a settlement communicating by electronic means offered by the ODR provider. In automated negotiation, each party offers a solution, usually in monetary terms, for settlement of the dispute which is not communicated to the other party. The software then compares the offers and aims to reach a settlement for the parties if the offers fall within a given range. The Rules may need to take into consideration the use of automated negotiation where it is the technology (software) that “negotiates” the settlement on the basis of proposals submitted by the parties. The Working Group may wish to consider whether the provisions on negotiation should include assisted negotiation and automated negotiation.

Paragraph (2)

48. The current draft takes into account that parties are required to settle their dispute by negotiation within a period of ten days following which the case should

move automatically to the next stage, with all references to the appointment of a neutral removed from the paragraph (A/CN.9/739, para. 97).

49. The current draft does not provide the parties the option to choose or request that the proceeding be moved to the next stage, nor does it specify the action of the ODR provider when so moving the proceeding, namely “[at which point the ODR provider shall [promptly] proceed with the appointment of the neutral [without delay] in accordance with article 6 below]”, which language has now been deleted. Thus far in the proceeding no neutral has yet been appointed under the Rules (A/CN.9/739, para. 97). The Working Group may wish to consider including the above phrase in paragraph (2) or elsewhere in the Rules.

Paragraph (3)

50. Where there has been no response to the notice, paragraph (3) requires that the proceedings move to the next stage automatically. This is in line with paragraph (2) and the decision by the Working Group (A/CN.9/739, para. 97). The Working Group may wish to consider the following alternative option where the transition from negotiation to facilitated settlement phase and then to arbitration will be the result of express consent by the parties: “3. *If the respondent does not respond to the notice within [five (5)] [seven (7)] calendar days, he/she is presumed to have refused to negotiate and either party shall have the option to move to the [next] [facilitated settlement [and arbitration]] stage[s]*”.

Paragraph (4)

51. The Working Group may wish to consider whether the intent is to extend the deadline for filing a response (under draft article 4, paragraph (3)) or for reaching a settlement (under draft article 5, paragraph (2)), or both. Both options are offered, and they could be expressed in separate paragraphs, should the decision be to offer both.

52. The Working Group may also wish to consider whether the option to extend the negotiation phase should be at the discretion of the parties or whether such extension may be refused by the ODR provider.

Paragraph (5)

53. The Working Group may wish to consider whether there should be a time limit within which proceedings must be re-commenced following failure to implement the settlement (A/CN.9/739, paras. 107-110).