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

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] At its forty-fourth (Vienna, 27 June-8 July 2011)[2] and forty-fifth (New York, 25 June-6 July 2012)[3] sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010),[4] the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat prepare draft generic procedural rules for ODR (the "Rules"), taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions.[5] From its twenty-third (New York, 23-27 May 2011)[6] to twenty-eighth (Vienna, 18-22 November 2013)[7] sessions, the Working Group has considered the content of the Rules.

3. At its twenty-sixth session (Vienna, 5-9 November 2012), the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute ("pre-dispute arbitration agreements") are considered binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex).

4. At its twenty-eighth session (Vienna, 18-22 November 2013), the Working Group proceeded to consider the draft text of the track of the Rules that did not end in a binding arbitration phase ("Track II").[8]

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

A. General remarks

Drafting matters

5. The Working Group may wish to note that the order of the provisions of Track II of the Rules as contained in this note has been modified slightly from its

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

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

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

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

[5] A/CN.9/716, para. 115.

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

[7] The report on the work of the Working Group at its twenty-eighth session is contained in document A/CN.9/795.

[8] A/CN.9/795, para. 21.

previous iteration, in order to reflect better the flow of proceedings and to increase clarity in timelines as well as the commencement of different stages of proceedings.

6. The Working Group may wish to consider whether the definition, and use of the terms "communication" and "electronic communication" in the Rules, as set out in draft article 2(7), accurately capture the intended meaning of the provisions to which those terms are relevant — namely, that all communications in the course of ODR proceedings must be submitted electronically. In that respect, the Working Group may wish to consider whether there would ever be exceptional circumstances that would warrant reverting to paper or hard copy means of communication.

7. The terms, which were used interchangeably throughout the Rules, have been consolidated in option 1 of draft article 2(7) and the use of the term "communication" throughout the Rules has also been made consistent, and reflects the definition set out in that option.[9]

8. The Working Group may also wish to note that referring to a "transaction" and "agreements made at the time of transaction" in the preamble and in article 1 may create ambiguity as to the nature of the relationship between parties to a dispute. In that respect, the Working Group may wish to consider whether a contractual relationship will in practice exist, or ought as a matter of policy to exist, as between the parties to a dispute, and if so whether it is desirable to use terminology such as "contract" in the Rules to describe that relationship.

9. Finally, the Working Group requested that the term "electronic address" in articles 3 and 4 be reconsidered and more clearly phrased. In that respect, the Working Group may wish to have regard to the guidance set out at paragraph 185 of the explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention"), in relation to that term: "... the term 'electronic address' … appears in other international instruments such as the Uniform Customs and Practices for Documentary Credits ('UCP 500') Supplement for Electronic Presentation ('eUCP') ... Indeed, the term 'electronic address' may, depending on the technology used, refer to a communications network, and in other instances could include an electronic mailbox, a telecopy device or another specific 'portion or location in an information system that a person uses for receiving electronic messages'".

ODR provider, ODR platform and ODR administrator

10. The Working Group considered at its twenty-eighth session whether the Rules, which prescribed an ODR provider-led process by requiring all documents to go via an ODR provider (see, e.g., the definitions of those terms in draft article 2), accurately reflected the current practice of online dispute resolution, and the various possibilities for the process to be either provider-led or platform-led, or alternatively for the provider and the platform to be the same entity (A/CN.9/795, para. 51). The Working Group may wish to consider whether it is desirable for the Rules to refer to the relationship between the ODR provider and ODR platform (in the definitions

[9] The term "electronic communication" continues to be used in the preamble, and draft articles 1(1) and 2(1), because the term "communication" is only defined under option 1 in draft article 2(7).

section or otherwise), which, notwithstanding the current variety of practice, could further evolve with the development of the market, or whether a single term such as "ODR administrator" might allow for multiple modalities in terms of the relationship between an ODR platform and provider (see A/CN.9/795, paras. 48-56; see also A/CN.9/WG.III/WP.119, para. 22).

11. Having regard to that issue, the Working Group requested the Secretariat to prepare language that would define a single ODR entity for the purpose of the Rules (A/CN.9/795, para. 57). Such a definition has been inserted in draft article 2(3), as option 3.

12. At its twenty-eighth session, the Working Group further raised issues of liability in relation to the respective roles of ODR platform and provider, and specifically observed that it was important to be clear in the Rules which entity was responsible to whom, and for which part of the ODR proceedings (A/CN.9/795, para. 53). The Working Group may wish to consider whether it is the role of procedural rules to create obligations and clear lines of liability for the underlying entities, or whether the Rules ought rather to create a clear procedure directed toward end-users of the Rules.

13. Consequential amendments, including in articles 3, 4, 6, 7, 9, 10 and 12, would be required following any decision in that respect.

"Final and binding"

14. The Working Group considered at its twenty-eighth session whether Track II constituted a dispute resolution process with a "final and binding" outcome. (A/CN.9/795, paras. 75-80).

15. In that respect, the Working Group may wish to differentiate between: (i) the legal effect of an agreement to submit disputes to a Track II ODR proceeding; and (ii) the legal effect on the parties of a recommendation arising out of that proceeding.

(i) Legal effect of an agreement to submit disputes to a Track II ODR proceeding

16. In relation to the legal effect of an agreement to submit disputes to a Track II ODR proceeding, draft article 1 of the Rules provides for explicit agreement between the parties to submit disputes to ODR, and consequently for a clear (and binding) contractual basis for those proceedings. The Working Group may wish to consider whether Option II of article 4A, paragraph (3), undermines that agreement — essentially by requiring a one-sided "second click", or a second agreement by the respondent, taking place post-dispute (see A/CN.9/WP119, paras. 8 and 12).

17. In addition, the Working Group may wish to consider whether the effect of entering into Track II ODR proceedings ought to prevent a party from seeking judicial or arbitral remedies while Track II ODR proceedings are underway (see draft article 4A, paragraph (4)(e), and its counterpart provision in draft article 4B). If so, the Working Group may wish to consider including an undertaking in the Rules to that effect (see UNCITRAL Conciliation Rules 1980, article 16).

18. In that respect, and for the avoidance of doubt, the Working Group may wish to consider whether a party ought to be able to withdraw from Track II ODR proceedings before a recommendation is issued, and if so, whether there ought to be

a clear provision for a party to express its withdrawal from Track II ODR proceedings at any time during proceedings. The Working Group might wish to consider that a right to withdraw from Track II proceedings would accrue to both parties to a dispute, not just a claimant.

(ii) Legal effect on the parties of a recommendation arising out of that proceeding

19. In relation to the legal effect on the parties of a recommendation arising out of that proceeding, draft article 7(4) currently states that a recommendation is not binding on the parties unless they otherwise agree. The Working Group may wish to consider differentiating between the desirability of an outcome that has consequences (e.g. a chargeback implemented on the basis of a recommendation), and a "final and binding" outcome. A recommendation that is enforced via a "private enforcement mechanism" seeks to encourage compliance with decisions, or to provide an execution mechanism for a decision, but may itself be subject to final enforcement in national courts (see A/CN.9/WG.III/WP.124, para. 5).

Guidelines

20. At its twenty-eighth session, the Working Group requested the Secretariat to draft preliminary guidelines that would indicate elements of the Rules better directed toward ODR providers and platforms than contained in procedural rules. Background and proposed content for those guidelines is contained in document A/CN.9/WG.III/WP.128, which may provide a useful reference point for assessing the Rules, and determining whether any content currently in the Rules might be better placed in those guidelines.

21. The Working Group may wish to note that the Rules provide a procedural framework for the resolution of disputes between purchasers and merchants. The neutral and ODR provider are part of that procedural framework, and consequently the rights and obligations of, and powers conferred on those entities as set out in the Rules, apply to those entities by virtue of their participation in the Rules-based process.

B. Notes on draft procedural rules

22. The following preamble and articles 1-16 contained in this document and in document A/CN.9/WG.III/WP.127/Add.1 pertain only to Track II of the draft Rules.

1. Introductory rules

23. **Draft preamble**

"1. The UNCITRAL online dispute resolution rules ("the Rules") are intended for use in the context of disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.

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

["(a) Guidelines and minimum requirements for online dispute resolution providers/platforms/administrators;]

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

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

["(d) Cross-border enforcement mechanism;]

["...];"

Remarks

Paragraph (1)

24. The term "high-volume" no longer appears in the preamble, following a decision of the Working Group at its twenty-eighth session to delete it (A/CN.9/795, para. 24; see also A/CN.9/WG.III/WP.123, para. 12).

25. The meaning and usage of the phrase "low-value", both in relation to paragraph (1) of the preamble as well as in article 1(1), remains a matter for the further consideration of the Working Group (A/CN.9/795, paras. 25-27; 31-32). The Working Group considered at its twenty-fourth session that a definition for that phrase ought not to be included in the Rules, but indicative information set out in guidelines (A/CN.9/795, paras. 25-6; A/CN.9/739, para. 16). The Working Group may wish to have regard to document A/CN.9/WG.III/WP.128 in that respect.

26. The phrasing of paragraph (1) has also been slightly modified to reflect the fact that the Rules are intended for use in the context of "disputes arising out of" cross-border, low-value transactions.

Paragraph (2)

27. At its twenty-eighth session, the Working Group agreed to delete a paragraph in the preamble that referred to separate and supplemental rules or documents, on the basis that such a reference might be confusing (A/CN.9/795, para. 29).

28. Words indicating that the documents listed in paragraph (2) "form part of the Rules" have been deleted, as the legal nature, and addressees, of the Rules differ from those of the ancillary documents listed in paragraph (2). For the same reasons, and as set out in document A/CN.9/WG.III/WP.128, it might be advisable not to attach the documents currently listed in paragraph (2) of the preamble to the Rules as an Appendix.

29. **Draft article 1 (Scope of application)**

"1. The Rules shall apply where the parties to a transaction conducted by use of electronic communication have explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

["1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction[, and] notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under the Rules [and whether Track I or Track II of the Rules apply to that dispute] (the 'dispute resolution clause')].

"2. These Rules shall only apply to claims:

["(a) that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the agreement made at the time of the transaction; or

"(b) that full payment was not received for goods or services provided.]

"3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail."

Remarks

General

30. The Working Group may wish to consider whether to include a time period in article 1, in order to link the time for bringing an online claim to (i) a certain time after the goods or services have been paid for or delivered; or (ii) a certain time after the alleged breach.[10] In the alternative, guidelines might set out a suggested period in which claims could be brought in the online system.

31. Although procedural rules would typically not prescribe a limitation period, but would rather rely on national law to do so, the Working Group may wish to consider whether the Rules or guidelines should prescribe such a period in order to provide for procedural clarity for parties as well as ODR administrators. Such a period would not affect or override any period for bringing claims specified in national law.

Paragraph (1)

32. The Working Group may wish to consider whether the term "transaction conducted by use of electronic communications" is sufficiently clear, or whether clarifying further by replacing that phrase with "contract concluded or performed using electronic communications", might be clearer (see para. 8 above).

Paragraph (1)(bis)

33. At its twenty-eighth session, the Working Group considered whether paragraph (1)(bis) might relate more appropriately to Track I proceedings, rather than to simplified Track II proceedings (A/CN.9/795, para. 34). The Working Group may wish to consider whether a link exists between paragraph (1)(bis) and any declaration in relation to the pursuit of other remedies, under article 4(A), paragraph (4)(e) (see paras. 17-18 above).

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[10] The United Nations Convention on the Limitation Period in the International Sale of Goods (1974), which does not apply to sales of goods for personal or household use, sets out principles for prescription periods based on the date on which the claim accrues (article 9).

Paragraph (2)

34. The Working Group agreed at its twenty-eighth session that the Rules ought to include an exhaustive list of the type of claims that may be brought (currently contained in paragraph (2)(a)) (see A/CN.9/795, para. 37). The words "or leased" in that list have been deleted on the basis that leasing claims might involve complex issues (for example, damage to leased goods) that are likely to fall outside the scope of the Rules.

35. The Working Group may wish to note that the term "in conformity with the agreement made at the time of transaction" in subparagraph (a) has been inserted in replacement of the term "in accordance with the agreement …" to accord more closely with the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG"), and pursuant to the request of the Working Group to replace the phrase "in accordance with the agreement" (A/CN.9/795, para. 42).

36. Although the CISG does not apply to consumer contracts, the Working Group may wish to have regard to two additional elements of the CISG and their relationship to this provision. First, although the CISG does not use the term "timely delivery" (currently included in subparagraph (a)), the term "timely" is sometimes used to encompass the delivery requirements of article 33 of the CISG. Second, in relation to subparagraph (b), the Working Group may wish to note that the CISG gives the buyer two obligations under article 53: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."[11] In other words, payment and taking delivery are treated independently (see articles 54-60 CISG). Moreover, article 31 CISG requires the seller to "hand over any documents relating to [the goods]".

37. The Working Group may wish to consider whether a similar approach ought to be taken in relation to paragraph (2). In that respect, the Working Group may wish to consider amending paragraph (2)(a) as follows: "that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, not provided in conformity with the agreement made at the time of transaction, and/or that documents related to the goods were not provided"; and amending paragraph (2)(b) as follows "that full payment was not received for goods or services provided and/or the purchaser did not take delivery of the goods".

38. **Draft article 2 (Definitions)**

"For purposes of these Rules:

ODR

"1. 'ODR' means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.

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[11] See, e.g., UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, Article 33, paras. 6, 8, 9, available from www.uncitral.org/uncitral/en/case_law/digests.html.

Option 1:

"2. 'ODR platform' means an online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR proceedings.

"3. 'ODR provider' means the online dispute resolution provider specified in the dispute resolution clause. An ODR provider is an entity that administers ODR proceedings [and designates an ODR platform][, whether or not it maintains an ODR platform].

Option 2:

"2. 'ODR platform' means the entity specified in the dispute resolution clause that supplies a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.

"3. 'ODR provider' means the entity that administers ODR proceedings agreed upon by the parties; and should be specified in the dispute resolution clause if the specific ODR provider is known at the time of transaction.

Option 3:

"2. 'ODR administrator' means the entity specified in the dispute resolution clause that administers and coordinates ODR proceedings.

Parties

"4. 'Claimant' means any party initiating ODR proceedings under the Rules by issuing a notice.

"5. 'Respondent' means any party to whom the notice is directed.

Neutral

"6. 'Neutral' means an individual that assists the parties in settling or resolving the dispute.

Communication

Option 1

"7. 'Communication' for the purposes of these Rules means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.

Option 2

"7. 'Communication' means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

"8. 'Electronic communication' means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means [including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats,

Internet forums, or microblogging] and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into an electronic format so as to be directly processed by a computer or other electronic devices."

Remarks

Paragraphs (2) and (3)

39. Three options have been included for the consideration of the Working Group, following agreement at its twenty-eighth session to consider further the role of ODR providers and platforms in practice, as well as the need for the Rules to distinguish between the roles of those two entities (see paras. 10-13 above).

Options 1 and 2

40. Options 1 and 2 define "ODR provider" and "ODR platform" separately, with the first option indicating that most systems will be provider-led, insofar as platforms would be designated by providers; the second option provides more neutral language in respect of the inter-relationship between platform and provider. The phrase "dispute resolution clause referring disputes to online dispute resolution under these Rules" has been replaced by "dispute resolution clause" in option 1, to retain consistency with the other options in relation to paragraphs (2) and (3).

41. The Working Group may wish to consider whether the Rules ought to distinguish between the roles of platform and provider: in short, whether such a designation is useful for the functioning of the Rules. If so, the Working Group may wish to consider whether options 1 or 2 adequately reflect the nature of the existing ODR systems and also provide for a potential evolution of ODR practice. If not, the Working Group may wish to consider whether option 3 provides a more streamlined approach that reduces the need to consider the mechanics of the underlying system within the Rules themselves.

Option 3

42. A third option has been included to define an "ODR administrator" — a single entity that would maintain full party-facing contact and responsibility for the administration of a dispute (see A/CN.9/795, paras. 56-57, and paras. 10-13 above). The definition indicates that that entity would "administer and coordinate" ODR proceedings, in order to account for the fact that such an entity might be a provider, platform, or both, but that for the purposes of the Rules, that entity would be the administrator of all services provided to the parties.

Specifying relevant entity in dispute resolution clause

43. The specification of the ODR provider, platform or administrator in the dispute resolution clause is also provided for (in square brackets) in draft article 9. The Working Group may wish to consider the value of identifying one or all of these entities at the time of the dispute resolution clause, and/or the time of the dispute arising, and when the different entities will be appointed. In that respect the Working Group may wish to consider whether, if an ODR platform identifies an ODR provider after the dispute has arisen, that would be problematic for the

purposes of transparency, and moreover whether the identification of the ODR platform in the dispute resolution clause would be useful to the disputing parties.

Paragraphs (7) and (8)

Option 1

44. The Working Group may wish to consider whether the terms "communication" and "electronic communication" could be consolidated, as set out in option 1, and further discussed at paras. 6-7 above. The definition contained in option 1 captures the need to ensure that (i) "communication" is defined as broadly as possible to capture any form of communication that may take place under the Rules; and (ii) all communication under the Rules is electronic in form. The definition in option 1 also conforms with the definitions of communication and electronic communication in the Electronic Communications Convention.

Option 2

45. The definitions in option 2 as set out in paragraphs (7) and (8) derive from article 4 of the Electronic Communications Convention, but the Working Group may wish to consider whether those definitions adequately serve the intention of the Rules that all communications in the course of proceedings are made electronically via the platform. The phrase "electronic format" has been substituted for "digital format" in paragraph (8) in order to provide as technology-neutral a definition as possible. Should the Working Group decide to retain the wording in option 2, it may wish to consider whether it is necessary to include the phrase "so as to be directly processed by a computer or other electronic devices" in paragraph (8).

46. **Draft article 3 (Communications)**

"1. All communications in the course of ODR proceedings shall be communicated to the [ODR provider via the ODR platform designated by the ODR provider]/[ODR administrator]. [The electronic address of the ODR platform/administrator to which documents must be submitted shall be specified in the dispute resolution clause.]

"2. The designated electronic address of the claimant for the purpose of all communications arising under the Rules shall be that notified by the claimant to the ODR provider under paragraph (2) and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable).

"3. The electronic address for communication of the notice by the ODR provider to the respondent shall be that notified by the respondent to the ODR provider under paragraph (2) and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.

"4. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). The neutral may in his or her discretion extend any deadline in

the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.

"5. The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic address.

"6. The ODR provider shall promptly notify all parties and the neutral of the availability of any communication at the ODR platform.

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

Remarks

General

47. The Working Group may wish to note that the phrase "ODR administrator" has been added by way of alternative to paragraph (1) for illustrative purposes, but that remaining consequential changes throughout the draft would necessarily have to be made should the Working Group determine that that definition (option 3, article 2, paragraphs (2)-(3)) ought to replace separate definitions of ODR providers and ODR platforms.

48. The Working Group may wish to note that the words "may be submitted" in the second sentence of paragraph (1) have been replaced with "must be submitted" to clarify the need for all information to be submitted electronically via the ODR platform or administrator.

49. The Working Group may wish to note that paragraph (2), which provided that "[a]s a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information", has been deleted on the basis that it created inconsistency in practice with other provisions in draft article 3.

Electronic address

50. In relation to the use of the term "electronic address" and/or "designated electronic address", the Working Group agreed to consider the definition and meaning of that term in relation to its use in draft articles 3 and 4. The Working Group may wish to consider whether the explanation set out in paragraph 9 above provides further clarity, or whether a definition of the term "electronic address" might be useful.

Paragraph (4)

51. The Working Group may wish to consider whether the second sentence of paragraph (4) would be better placed in draft article 11, in particular in light of article 11(5).

2. Commencement

52. Draft article 4A (Notice)

"1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4).

"2. [The notice shall be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]

Option 1:

["3. ODR proceedings shall [be deemed to] commence when, following communication to the ODR provider of the notice pursuant to paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (2).]

Option 2:

["3. ODR proceedings shall commence when the respondent submits a response pursuant to article 4B accepting the [mediation/conciliation].]

"4. The notice shall include:

"(a) the name and [designated electronic address] of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

"(b) the name and designated electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

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

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

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

"(f) the location of the claimant;

"(g) the claimant's preferred language of proceedings;

"(h) the signature of the claimant [and/or the claimant's representative] including any other identification and authentication methods.

["5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim.]"

Remarks

Paragraph (3)

53. At its twenty-eighth session the Working Group agreed on the need for a provision setting out a clear commencement stage of proceedings, and an additional option was proposed in order to trigger the commencement of proceedings at the time a response was submitted (option 2).

54. The Working Group may wish to consider, in relation to option 2, whether requiring a respondent to lodge a response before proceedings can commence, in practice gives the respondent the right to refuse to enter into ODR proceedings notwithstanding that it had agreed to do so contractually at a previous stage (pursuant to article 1(1)) (see also para. 16 above). In relation to option 2, the Working Group might also wish to consider whether describing Track II proceedings as a "mediation" or "conciliation" accurately describes the multi-stage process encompassed by that track.

55. In relation to option 1, the Working Group may wish to consider whether the square bracketed language "to be deemed" is necessary in light of the requirement of paragraph (3) for parties to be notified, in conjunction with the power of the neutral under article 11(5) to redress any difficulties in relation to receipt of notice (see A/CN.9/795, para. 72).

Paragraph (4)

Subparagraph (a)

56. In relation to subparagraph (a), the Working Group agreed to consider the definition and meaning of "electronic address" both in relation to that subparagraph as well as in relation to draft article 3 (see paras. 9 and 50 above).

57. The Working Group may wish to consider whether representation of parties is appropriate in Track II proceedings (see also draft article 14, and para. 19 of document A/CN.9/WG.III/WP.127/Add.1).

Subparagraph (e)

58. In relation to subparagraph (e), and as further set out in paragraphs 17 and 33 above, the Working Group ought to consider whether Track II proceedings require a stay of other action while those proceedings are underway, and moreover, whether a court or arbitral tribunal would be obliged under its own national legislation to implement such a stay. If the ODR proceedings in Track II are not intended to have a *res judicata* effect, then it is proposed to delete subparagraph (e); if such an effect is intended, the Working Group might wish to consider inserting an undertaking such as that set out in article 16 of the UNCITRAL Conciliation Rules 1980 (see para. 17 above).

Subparagraph (f)

59. In relation to subparagraph (f), it is suggested that the "location" of the claimant is a confusing term and moreover that it does not in any event have relevance for a Track II proceeding (see A/CN.9/795, para. 84, and A/CN.9/739, paras. 78-80).

Subparagraph (h)

60. In relation to subparagraph (h), the term "signature … in electronic form" has been replaced by "signature", consistent with UNCITRAL texts on e-commerce[12] that provide a functional equivalence rule for signatures.

61. It is moreover proposed that the Working Group further consider the function performed by the claimant's signature requirement. In that respect, it should be noted that a signature may perform multiple functions, and that, in order to establish functional equivalence between electronic signatures and paper-based ones, the electronic signature needs to satisfy two requirements, namely to identify the author, and to ascertain the intention of the author with respect to the signed communication (see article 9(3), Electronic Communications Convention). The Working Group may therefore wish to clarify whether in this case the function of the (electronic) signature is to identify the claimant and to establish a link between the claimant and the claim.

62. At its twenty-eighth session, the Working Group agreed to retain the language "including any other identification and authentication methods" in subparagraph (h) (A/CN.9/795, para. 86). However, it is suggested that that language ought to be deleted in light of the clarifications provided on the signature requirement. Moreover, the current text might be interpreted as restricting electronic signature methods to certain authentication methods such as, for example, the log-in of the parties to the ODR platform.

Paragraph (5)

63. The Working Group agreed at its twenty-eighth session that it was desirable to encourage claimants to submit all relevant information to the extent possible at the time of the notice, but that the provision of such information ought not to be mandatory (A/CN.9/795, para. 92). Consequently, a new paragraph (5) has been inserted to provide for the (non-mandatory) provision of information by the claimant at the time it submits its notice. The following text has been deleted from paragraph (1), to avoid redundancy: "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."

64. Parallel amendments have been included in draft article 4B, paragraphs (1) and (5).

65. **Draft article 4B (Response)**

> *"1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform.*

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[12] See Article 7 of the UNCITRAL Model Law on Electronic Commerce (1996); Article 6 of the UNCITRAL Model Law on Electronic Signatures (2001); and article 9(3) of the Electronic Communications Convention.

"2. The response shall include:

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

"(b) a response to the grounds on which the claim is made;

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

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

"(e) the location of the respondent;

["(f) whether the respondent agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]

["(g) the signature of the respondent and/or the respondent's representative including any other identification and authentication methods].

["5. The respondent may provide, at the time it submits its notice, any other relevant information, including information in support of its response.]"

Remarks

Paragraph (1)

66. The Working Group may wish to note that paragraph (1) will require amendment to maintain consistency with the content, when determined, of article 4A, paragraphs (1)-(3); until that content has been finally determined, the phrase "receipt of the notice" has been replaced by "being notified of the availability of the notice on the ODR platform" in order to improve drafting consistency.

67. **Draft article 4C (Counterclaim)**

"[1. The response to an ODR notice may include one or more counterclaims provided that such counterclaims fall within the scope of the Rules and arise out of the same transaction as the claimant's claim. A counterclaim shall include the information in article 4A, paragraphs (4)(c) and (d).

"2. The claimant may respond to any counterclaim within [seven (7)] calendar days of being notified of the existence of the response and counterclaim on the ODR platform. A response to the counterclaim must include the information in article 4, paragraphs (4)(b) and (c).]"

Remarks

68. Further to the decision of the Working Group at its twenty-eighth session that a separate provision ought to be included in relation to counterclaims and responses thereto, a new draft article 4C has been included.

69. The Working Group may wish to note that deadlines flowing from the notification of the response will also have to accommodate the possibility of a

counterclaim and response thereto as an alternative reference time from which the next stage of proceedings will be triggered.

3. Negotiation

70. **Draft article 5 (Negotiation)**

Negotiation

Commencement of the negotiation stage

"1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR provider, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph (2), whichever is earlier.

"2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform.

Commencement of the facilitated settlement stage

"3. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within the time period set out in article 4B, paragraph (1), or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence.

"4. If the parties have not settled their dispute by negotiation within ten (10) calendar days of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence.

Extension of time

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

Remarks

71. The Working Group may wish to note that a paragraph in relation to settlement has been moved to a separate article — draft article 8 — to reflect the agreement of the Working Group on the principle that settlement could be achieved not only at a negotiation stage, but at any stage of proceedings (A/CN.9/795, para. 122).

Paragraphs (1) and (2)

72. Paragraph (1) has been slightly modified to accommodate deadlines flowing from both a response stage, and, if applicable, a counterclaim stage.

73. Paragraph (1) has been slightly modified, and a new paragraph (2) added, to reflect more clearly the commencement of negotiation, and the content of that stage. The phrase "including, where appropriate, the communication methods available on the ODR platform" in paragraph (1) has been replaced by "… via the ODR platform", to clarify that all negotiation within the context of Track II proceedings ought to take place via the ODR platform. While it might be desirable as a matter of policy for the parties to communicate outside that platform should that communication achieve a settlement, any communication outside the platform would fall outside of the relevant ODR Track II proceeding.

Paragraphs (3) and (4)

74. Paragraphs (3) and (4) have been slightly modified in order more clearly to define the consequences of failing to submit a response; or agreeing or electing to move to the next stage of proceedings (facilitated settlement).

75. The draft set out in paragraph 70 above links the end of a negotiation stage with the beginning of a facilitated settlement stage, whereas previously it had been linked to the appointment of a neutral, but not to the next stage of proceedings.

76. Consequent to that modification, draft article 6 in relation to facilitated settlement has been modified to link the commencement of the facilitated settlement stage with the appointment of a neutral. It is suggested that such a chronology more clearly sets out the various stages of the process and the actions associated with each stage of proceedings. The Working Group may wish to consider whether paragraphs (3) and (4) would be better situated at the beginning of draft article 6.

4. Facilitated settlement

77. **Draft article 6 (Facilitated settlement)**

"1. Upon commencement of the facilitated settlement stage of ODR proceedings, the [ODR provider/platform/administrator] shall promptly appoint a neutral in accordance with article 9 and shall notify the parties thereof in accordance with article 9(1).

"2. Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.

"3. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) (the 'expiry of the facilitated settlement stage'), the final stage of proceedings shall commence pursuant to article 7 (Recommendation by a neutral)."

Remarks

Paragraph (1)

78. Paragraph (1) has been included in order to clarify the process following commencement of the facilitated settlement stage (see also paras. 74-76 above).

Paragraph (2)

79. Further to the agreement of the Working Group that settlement provisions ought to be the subject of a discrete article applicable to any stage of proceedings (see para. 71 above, and A/CN.9795. paras. 121-122), the following sentence has been deleted from paragraph (2) as redundant with new draft article 8: "If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate."

80. The words "Following appointment" have been inserted at the beginning of paragraph (2) in order to improve clarity.

Paragraph (3)

81. Paragraph (3) has been slightly modified to ensure consistency with the modifications made to draft article 5 in relation to the commencement of the next stage of proceedings.

5. Recommendation

82. **Draft article 7 (Recommendation by a neutral)**

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

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

"3. The neutral shall, within fifteen (15) calendar days of the expiry of the facilitated settlement stage, evaluate the dispute based on the information submitted by the parties, and having regard to the terms of the agreement, and shall make a recommendation in relation to the resolution of the dispute. The ODR provider shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.

"4. The recommendation shall not be binding on the parties unless they otherwise agree. [However, the parties are encouraged to abide by the recommendation and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with recommendations.]"

Remarks

Paragraph (1)

83. The Working Group may wish to note that some slight drafting modifications have been made to paragraph (1) to promote clarity of drafting and consistency with other provisions in the Rules.

Paragraph (2)

84. The Working Group may wish to consider whether paragraph (2) is necessary or appropriate in the context of Track II proceedings. It is suggested that "burden of proof" is a legal concept that touches upon both procedural and substantive matters depending on the context and the jurisdiction, and that including a provision on burden of proof in procedural rules the outcome of which is a non-binding determination by a neutral may unnecessarily increase the complexity of proceedings.

Paragraph (3)

85. Several minor modifications have been made in relation to the drafting of paragraph (3), specifically: (i) a deadline has been inserted for the rendering of a "recommendation"; (ii) the phrase "on the terms of the contract" has been replaced with "having regard to the terms of the agreement", in accordance with the way that term is described in the preamble and in article 1; and (iii) the words "in relation to the resolution of the dispute" have been added after the word "recommendation", in order to clarify the object and purpose of the recommendation.

86. The deadline now referred to in paragraph (3) is linked to the deadline in paragraph (1), in order to give the neutral a minimum of five days after the submission of any final information by the parties to render a decision. The Working Group may wish to consider whether the deadlines in paragraphs (1) and (3) are suitable.

Paragraph (4)

87. It is proposed that paragraph (4) could be better placed in commentary or guidelines. In that respect, language has been inserted in document A/CN.9/WG.III/WP.128.

6. Settlement

88. **Draft article 8 (Settlement)**

> *"If settlement is reached at any stage of the ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate."*

Remarks

General

89. Pursuant to the decision of the Working Group that settlement ought to be provided for at any time during ODR proceedings, a discrete provision on settlement has been included in draft article 8 (A/CN.9/795, para. 121-122; see also para. 71 above).

90. The Working Group may wish to consider whether guidelines ought to provide further information in respect of how a settlement ought to be recorded, and whether that process ought to be different prior to the appointment of a neutral, and after the appointment of a neutral (see A/CN.9/795, para. 120).

91. The Working Group may further wish to consider any technical aspects regarding formation of settlement agreements, including whether a separate provision on disputes arising out of the settlement might be required in this respect (see A/CN.9/WG.III/WP.119/Add.1, para. 13).