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Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011)

Contents

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I. Introduction

1. At its thirty-third session (New York, 12 June-7 July 2000), the Commission held a preliminary exchange of views on proposals to include online dispute resolution in its future work programme.[1] At its thirty-fourth[2] (Vienna, 25 June-13 July 2001) and thirty-fifth[3] (New York, 17-28 June 2002) sessions, the Commission decided that future work on electronic commerce would include further research and studies on the question of online dispute resolution and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) with respect to possible future work in that area. At its thirty-ninth (New York, 19 June-7 July 2006) to forty-first (New York, 16 June-3 July 2008) sessions, the Commission took note of suggestions that the issue of online dispute resolution should be maintained as an item for future work.[4]

2. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission had heard a recommendation that a study should be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions, with a view to addressing the types of electronic commerce disputes that might be solved by online dispute resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute resolution providers, and the issue of enforcement of awards made through the online dispute resolution process under the relevant international conventions.[5]

3. At its forty-third session (New York, 21 June-9 July 2010), the Commission had before it a note by the Secretariat on the issue of online dispute resolution which summarized the discussion at a colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State Dickinson School of Law (A/CN.9/706).[6] The Commission also had before it a note from the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution reproduced in document A/CN.9/710.

4. At that session, after discussion, the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.[7] It was also agreed that the form of

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[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 385.

[2] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 287 and 311.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 180 and 205.

[4] Ibid., *Sixty-first Session, Supplement No. 17 (A/61/17),* paras. 183 and 186-187; *Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), para. 177; and *Sixty-third Session, Supplement No. 17* (A/63/17), para. 316.

[5] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338, and A/CN.9/681/Add.2, para. 4.

[6] The Colloquium, entitled "A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)" was held in Vienna, on 29 and 30 March 2010. Information about the colloquium is available at the date of this report at www.uncitral.org/pdf/english/news/IICL_Bro_2010_v8.pdf.

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

the legal standard to be prepared should be decided after further discussion of the topic.

5. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its work on the preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions. The report of the Working Group on its twenty-second session can be found in document A/CN.9/716.

6. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.III/WP.106, paragraphs 5-13.

II. Organization of the session

7. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-third session in New York, from 23 to 27 May 2011. The session was attended by representatives of the following States members of the Working Group: Benin, Brazil, Cameroon, Canada, Chile, Czech Republic, Egypt, France, Germany, Greece, Honduras, Iran (Islamic Republic of), Israel, Japan, Kenya, Malaysia, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Croatia, Ecuador, Indonesia, Iraq, Kuwait, Lebanon, Madagascar, Myanmar, Netherlands, Panama, and Peru.

9. The session was attended by observers from the following organizations of the United Nations System: United Nations Economic Commission for Africa (UNECA); and World Intellectual Property Organization (WIPO).

10. The session was attended by an observer from the following international intergovernmental organizations invited by the Commission: European Union.

11. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Bar Association (ABA), Asian-African Legal Consultative Organization (AALCO), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (NYCBAR), Center for International Legal Education (CILE), *Centre de Recherche en Droit Public* (CRDP), Chartered Institute of Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), Council of Bars and Law Societies of Europe (CCBE), Electronic Consumer Dispute Resolution (ECODIR), Forum for International Commercial Arbitration C.I.C (FICACIC), Institute of International Commercial Law (Penn State Dickinson School of Law), Inter-American Commercial Arbitration Commission (IACAC), Internet Bar Organization (IBO), International Institute for Conflict Prevention and Resolution (CPR), International Technology Law Association (ITECHLAW), Latin American E-Commerce Institute (ILCE), Madrid Court of Arbitration, National Center for Technology and Dispute Resolution (NCTDR), and Pace Institute of International Commercial Law.

12. The Working Group elected the following officers:

Chairman: Mr. Soo-geun OH (Republic of Korea)

Rapporteur: Ms. Roselyn AMADI (Kenya)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.106); and

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.107).

14. The Working Group adopted the following agenda:

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

III. Deliberations and decisions

15. The Working Group continued its discussion on online dispute resolution ("ODR") for cross-border electronic commerce transactions and considered draft procedural rules ("procedural rules") on the basis of document A/CN.9/WG.III/WP.107. The deliberations and decisions of the Working Group on that topic are reflected in Chapter IV below.

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

16. At the outset, it was recalled that the Working Group's focus was on low-value, high-volume cross-border electronic commerce transactions and that ODR constituted a means of resolving disputes which differed from previous UNCITRAL standards on arbitration. It was further recalled that the work undertaken by the Working Group needed to be practical and realistic in order for it to be easily implemented in practice.

17. It was pointed out that the task of the Working Group was not to draft a new set of arbitration rules but to design a process that would satisfy the need for a rapid and inexpensive means of resolving disputes in an online environment. In that regard, it was said that the Working Group would have to consider how a new ODR system would differ from traditional dispute resolution mechanisms.

A. General remarks (A/CN.9/WG.III/WP.107, paragraphs 5-8)

18. The Working Group first engaged in a discussion of the appropriateness and applicability of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") to ODR cases leading to an arbitral award. It was recalled that the assumption had been made at the twenty-second session of the Working Group that the New York Convention would be applicable to enforcement of arbitral awards under ODR cases. One view was that ODR awards should be enforceable under the New York Convention but that consideration of the issue should be deferred until after the procedural rules had been dealt with. It was noted that any discussion of the involvement of the New York Convention must take account of the advice and deliberations of Working Group II (Arbitration and Conciliation).

19. The view was expressed that the issues of enforcement and the applicability of the New York Convention should be addressed before proceeding to discussion of the scope of application of the procedural rules. It was stated that which law would determine the legal validity of the agreement to settle disputes through the ODR process should be addressed as otherwise any decision resulting from that process might not be enforceable.

20. There were differing views as to whether the term "low-value" needed to be defined either now or at a later stage.

21. It was observed that the question of the "digital divide" should be addressed as some developing countries did not have extensive access to the Internet and might not be able to partake fully in an ODR system. It was also observed that electronic communication included mobile phones, which were widely used in a number of developing countries, particularly in Africa.

22. It was suggested that emerging technology might make videoconference hearings fast and inexpensive, even when compared to procedures that relied only on filing of documents, and the possibility for conducting hearings therefore might be contemplated by the procedural rules on an exceptional basis, although it was pointed out that the cost implications of holding hearings would have to be explored. For that reason and others, support was expressed for the view that the procedural rules should be forward-looking, and be able to accommodate any changes in technology and practice that might arise in the long-term future.

23. Another suggestion was to not force parties to go through all three stages contemplated in the procedural rules if they wanted, for example, to proceed speedily and go straight to final and binding decision by a neutral person.

24. It was suggested that the term "arbitrator" should be used instead of "neutral" and "award" instead of "decision" in the procedural rules, in order to accord with the terminology used in the New York Convention. A different view was that consideration of that terminology, since it was related to enforcement issues, should be deferred until enforcement was dealt with by the Working Group.

25. A question was raised as to the final form of the instrument to be produced by the Working Group, and at what stage that should be addressed. The Working Group agreed that that matter should remain open for discussion at a future session once deliberations had progressed sufficiently.

26. After discussion, the Working Group concluded that the form of the instruments to be developed by the Working Group could not be decided at that point. The possibility of developing a protocol to the New York Convention for the enforcement of ODR decisions was raised but it was considered premature to express opinion on the feasibility or the need of such instrument.

B. Notes on draft procedural rules (A/CN.9/WG.III/WP.107, paragraphs 5-63)

1. Introductory rules (A/CN.9/WG.III/WP.107, draft articles 1-3)

Draft article 1 (Scope of application)

Paragraph (1)

27. The Working Group first considered whether there needed to be a definition of the term "cross-border", as it could be interpreted as referring to the location of a business or equipment and technology supporting an information system. In that regard, one suggestion was to use the approach of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) ("Electronic Communications Convention") Article 1 of which provided that the Electronic Communications Convention applied 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". Another suggestion was to reference the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Article 2 of which characterized a cross-border dispute as "one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party".

28. The view was expressed that the term "cross-border" should be deleted, so that the procedural rules would be applicable to domestic transactions as well. In that regard, the point was made that it was often difficult for a consumer to discern whether he was entering into a transaction which was cross-border.

29. Another view was that the term "cross-border" should be retained as it was part of the mandate given to the Working Group by the Commission, it would be a necessary element in order to engage the New York Convention, and it emphasized the non face-to-face nature of the transactions which called for greater protection of the buyer. The view was also expressed that extending the application of ODR to domestic disputes would go beyond the mandate given by the Commission and, in any event, the scope could always be extended by users if they wished.

30. After discussion, it was decided to place the term "cross-border" in square brackets.

31. The Working Group next considered whether the scope of the procedural rules should be limited to transactions "conducted by the use of electronic means of communication". It was suggested that that phrase was unclear, as for example when a transaction was initiated by telephone and a response was given in writing on paper; also that the present formulation made an unjustifiable difference between two types of purchase, as when the same product could be purchased in a shop or by downloading it from a website. In that context, attention was drawn to the definition

of "electronic communication" provided in the procedural rules which drew from the definition contained in the Electronic Communications Convention. Under that definition, electronic communication had a broad meaning and included communication by fax, and conceivably by Voice over Internet Protocol (VoIP).

32. It was further suggested that it should be clarified that the phrase "conducted by the use of electronic means of communication" was referring to transactions and not to the means of dispute resolution.

33. The Working Group was reminded that its mandate from the Commission was to focus on "online dispute resolution relating to cross-border e-commerce transactions including business-to-business and business-to-consumer transactions", and that the terms "cross-border" and "e-commerce transactions" therefore had a place in the deliberations of the Working Group.[8]

34. A proposal was made to add a paragraph after draft article 1, paragraph (1) along the following lines:

> "*The parties may agree to enlarge the scope of application of the Rules to domestic disputes and to transactions conducted off-line, such as by way of paper-based documents.*"

35. A proposal was made that the existing wording of paragraph (1) should be kept, since it made no mention of business-to-business ("B2B"), business-to-consumer ("B2C") or consumer-to-consumer ("C2C") nor of "consumer" and "business", and was thus open and flexible and did not raise problems relating to definition of the parties.

36. Another proposal was that reference to low-value, high-volume transactions be added to the paragraph. It was also proposed that a definition of "low-value" be provided.

37. There was broad agreement that C2C transactions should fall within the scope of the Working Group's work and of the procedural rules. Reasons for that included: it was often difficult to distinguish a consumer from a business or to define what a "business" was; the large and growing volume of C2C transactions that gave rise to disputes; and the fact that C2C transactions generally conformed to the definition of low-value, high-volume transactions.

Paragraph (2)

38. It was suggested that the paragraph be reworded as follows:

> "*The Rules apply where parties to an online transaction have agreed to submit to dispute resolution under these Rules all or any differences involving the sale of goods or provision of services provided that it meets other requirements under these Rules.*"

39. The question was raised whether a case that had been brought to ODR could subsequently be re-litigated in a court as a claim, particularly since the court might view the processes under ODR as being less thorough than those available in the court.

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[8] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

40. Another issue was raised as to whether the paragraph should clarify which phases of dispute settlement were being agreed to by the parties when they agreed to application of the procedural rules.

41. With respect to the bracketed text at the end of the paragraph i.e. "*[subject to the right of the buyer to pursue other forms of redress]*", it was suggested that that text be deleted since, inter alia, it called into question both the buyer's decision to accept arbitration and the applicability of the New York Convention which, it was said, provided that agreements to arbitrate were binding. In response, the view was expressed that the language of New York Convention Article II (1) left open the question of whether in some States disputes relating to consumers were capable of settlement by arbitration, and thus whether the New York Convention would apply.

42. It was pointed out that a study was to be produced by the Secretariat at a future session on the question of enforceability of awards under the New York Convention to disputes involving consumers.

43. Another view was that the bracketed text should be retained, as it referred to situations where pre-dispute binding agreements to arbitrate might not be binding upon consumers and thus where one party might be bound by the agreement on dispute resolution and the other not. Yet another view was that the bracketed text be retained because most consumers would choose to proceed by way of ODR rather than the costly and less attractive route of litigation in the courts.

44. Yet another view was that the bracketed text be replaced with language emphasizing the buyer's right to receive adequate notice of the dispute resolution process he was entering into, on the assumption that the process the Working Group was being asked to devise would be one that was fair to all parties.

45. It was said that, if the bracketed text remained it would give a buyer the right to object to the jurisdiction of the neutral, contradicting draft article 8, paragraph (4) of the procedural rules, which provided that the neutral might rule on his own jurisdiction.

46. One suggestion was to replace the bracketed text in draft article 1, paragraph (2) with the following:

> "*The Rules apply without prejudice to the rules of international treaties and of national applicable law which could not be derogated from by agreement of the parties, inter alia those rules that are aimed at protection of consumers.*"

47. The consensus was that in order to achieve a balance in the provision, "*buyer*" should be replaced with "*parties*" in the bracketed text.

48. There was support for a suggestion to replace the bracketed text with language indicating a time limit, for example six months, within which claims must be initiated by way of ODR. A contrary view was that time limits of that sort should be left to be dealt with by national law. It was also observed that such a time limit could unduly prolong resolution of disputes by giving a buyer an option to resort to the courts after the expiry of the time limit.

49. After discussion, it was decided that in the absence of consensus on modifying draft article 1, paragraph (2) the text should remain as is for now, with the various suggested changes being noted for future consideration.

Paragraph (3)

50. With respect to draft article 1, paragraph (3), the following proposals were made:

(a) Several delegations expressed the view that paragraph (3) should be deleted, on the grounds that it was not practicable to devise a fully exhaustive list of matters to be excluded from ODR and that, in any event, the parties should be free to choose whether to apply the procedural rules to their particular dispute. In that regard it was suggested to amend paragraph (1) to be more specific as to the nature of the claims to be covered, referring to the mandate from the Commission and including reference to low-value, high-volume transactions.

(b) A contrary view was that certain matters needed to be excluded from the operation of the procedural rules so that they retained their focus of dealing with low-value, high-volume cross-border electronic commerce transactions, and to exclude from the system complex cases that might have lengthy or difficult procedural issues: examples were given of claims against financial institutions, intellectual property cases or those dealing with personal injury.

(c) Another approach was suggested, which was to define what types of claims fell within the scope of the procedural rules rather than those that fell outside them.

51. It was concluded that paragraph (3) should be deleted while at the same time paragraph (1) should be amended to provide greater detail as to claims to be covered by the procedural rules. The Working Group requested the Secretariat to reformulate the text taking into account the suggestions made, for consideration at a future session.

Paragraph (4)

52. There was broad support for a proposal to replace the current wording of paragraph (4) with the following:

> "*The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which are attached to these Rules as Annexes and form part of these Rules:*"
>
> "*(a) Substantive legal principles for deciding cases;*"
>
> "*(b) Guidelines for ODR providers and arbitrators;*"
>
> "*(c) Minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control; and*"
>
> "*(d) Cross-border enforcement mechanism.*"

53. A question was however raised as to whether it was appropriate to refer to such matters in the text of the procedural rules themselves, or whether these provisions should appear elsewhere including in the ODR arbitration clause in the contract. The point was made that any additional provisions must be brought clearly to the attention of consumers.

54. In response to a question as to the words "the Rules are only one element in a framework to be designed for an ODR system to be effective" (A/CN.9/WG.III/WP.107, para. 13), it was explained by reference, inter alia, to paragraphs 21 and 115(a) of the Report of the Working Group III on the work of its twenty-second session (A/CN.9/716) that the documents to be prepared for the Working Group's consideration included procedural rules; standards for ODR providers; substantive legal principles, including equitable principles, for resolving disputes; and a cross-border enforcement mechanism.

55. It was further suggested that a paragraph be added, which would provide that any supplemental rules for ODR providers should be in conformity with the procedural rules, as follows: "*Any supplemental rules must conform to these Rules*". There was broad support for that suggestion and it was concluded that such a paragraph should be placed in square brackets pending agreement on its final wording and its location in the procedural rules.

56. There was broad support for a proposal to add two new paragraphs to draft article 1, the first of which would read as follows:

> "*Where the parties have agreed to submit to dispute resolution under these Rules as one of the terms of the online transaction or before the dispute arises, the Rules apply only if the buyer was given clear and adequate notice of the agreement to arbitrate.*"

57. It was suggested that the proposed new paragraph be placed in square brackets and that the concept of clear and adequate notice to the buyer required more precise definition.

58. The second proposed new paragraph would read as follows:

> "*As a condition to using the Rules the seller must list its contact information.*"

59. It was suggested that the proposed new paragraph become draft article 3, paragraph (2) and that buyers should also be required to give their contact information.

60. As to both proposed new paragraphs, it was suggested that they be moved to a separate article, possibly draft article 1 bis, as they were not properly part of the scope of application. It was questioned whether use of the terms "buyer" and "seller" was appropriate in the context of the procedural rules.

61. It was concluded that the suggested new paragraphs be placed in square brackets in draft article 1, pending discussion at a future session on where they should be located, and that consideration of the appropriateness of the terms "buyer" and "seller" be deferred for further discussion at a later time.

Draft article 2 (Definitions)

Paragraph (3)

62. There was a suggestion to delete "telegram" and "telex" from the list of means of communication, and to add other communication methods such as Short Message Service (SMS).

Paragraph (4)

63. Reference was made to a working assumption that ODR was a process in three phases and that draft article 7 did not involve the appointment of an arbitrator but rather was a phase akin to conciliation, and therefore, the neutral acting under draft article 7 could not be the same person as the one acting under draft article 8. It was also observed that a neutral acting under draft article 8 might need to have legal expertise to fulfil that role.

64. It was suggested that the objectivity of the neutral could be challenged during his conduct of ODR proceedings on the basis of his having been involved at the point of facilitated settlement.

65. Another view was that there was no conflict where the neutral dealing with facilitated settlement under draft article 7 was the same individual conducting ODR proceedings pursuant to draft article 8.

66. There was support for the notion that an arbitrator in appropriate circumstances could explore with the parties possibilities for settlement as envisaged in draft article 7, and that with the agreement of the parties, such a combined procedure could be possible. However, a concern was raised as to whether the same person could oversee facilitated settlement and subsequently be an arbitrator, in light of the fact that he might have received confidential information from the parties which might compromise his impartiality.

67. On the question of possible mingling of the roles of arbitrator and conciliator, reference was made to paragraph 47 of the UNCITRAL Notes on Organizing Arbitral Proceedings and article 12 of the UNCITRAL Model Law on International Commercial Conciliation (2002). It was noted that in general the position of UNCITRAL had been to provide a default rule separating the role of conciliator and arbitrator and recognizing the discretion of the parties otherwise to agree. While there was no prohibition on, or an attempt to discourage, an arbitrator exploring the possibilities for conciliation, the key was that parties needed to know that the roles of arbitrator and conciliator differed and to express their consent on the dispute settlement method to be applied. The matter was therefore open for discussion by the Working Group, bearing in mind the need to be clear on the intent of the parties.

68. There were suggestions that, given the cost associated with an arbitration stage, it might be necessary to impose an extra fee on users in the event they would proceed to that stage.

69. The point was made that ODR procedural rules might be different from arbitration rules and further that it was important to emphasise the consensual aspects of the ODR process since most cases were resolved at that stage.

Paragraph (7)

70. The question was posed as to the function of an ODR platform and whether it was essentially a communication channel or a mail box. In response, it was said that an ODR platform was more than just an e-mail inbox, but rather was an interconnected software application operating under common protocol.

71. A proposal was made to amend the definition of ODR platform as follows:

"*ODR platform means an online dispute resolution system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications in order to manage and resolve cases.*"

72. Another proposal was made to indicate that ODR provider might be defined as "one or more entities".

Paragraph (8)

73. A proposal was made to amend the definition of ODR provider as follows:

"*'ODR provider' means an entity that operates within or under the overall ODR platform and administers ODR processes in accordance with these Rules.*"

74. It was pointed out that further discussion of the concepts of ODR platform and ODR provider would assist the Working Group in understanding the definitions.

Paragraph (9)

75. A question was raised as to whether "cherry-picking" by ODR providers and by users of the system (meaning choosing to offer services in respect of, or to make use of, particular phases of the process) should be permitted.

76. One view was that "cherry-picking" by users of the system should be discouraged as it would render the process less effective.

77. Another view was that dealing with the procedural rules as a single integrated package was seen as fulfilling the goal of simplicity.

78. Several issues were noted relating to the definition of ODR:

(a) That there were broadly two parts to ODR, consensual and mandatory, and the procedural rules should make it clear when there was a transition from one to the other; it should be clear to all parties when they were in the mandatory part;

(b) In that regard, there might need to be a different rule on commencement referable to each phase of the ODR process;

(c) Whether information from the facilitated settlement stage should be made known to the neutral at the arbitration stage;

(d) That a more detailed arbitration procedure might be needed in order to ensure enforceability.

79. There was support for the view that it was important to have arbitration as an end stage as that would motivate sellers to resolve disputes early in the process.

80. Several delegations indicated that ODR was emerging as a two-stage process, first a consensual stage followed, where necessary, by arbitration. The Working Group would need to consider the appropriate way to design a system that incorporated these phases, bearing in mind that arbitration within the ODR process was a quite distinct phase.

81. After discussion, it was agreed to proceed with consideration of the procedural rules as a single package applying to all phases, bearing in mind that particular variations might be needed as the Working Group examined each particular phase.

82. With respect to draft article 2, it was agreed that the Working Group would continue its consideration of the definitions therein at a future session.

Draft article 3 (Communications)

Paragraph (1)

83. After discussion, the Working Group approved draft article 3, paragraph (1) in substance, without any change.

Paragraph (2)

84. It was suggested that the current paragraph be divided into two separate paragraphs, as follows:

> "*The designated electronic addresses of the respondent for the purpose of all communications arising under the Rules shall be those which the respondent notified to the ODR provider or ODR platform when accepting these Rules or any changes notified during the ODR proceeding.*"
>
> "*The designated electronic addresses of the claimant for the purpose of all communications arising under the Rules shall be those set out in the notice of ODR ("the notice"), unless the claimant notifies the ODR provider or ODR platform otherwise.*"

85. There was broad support for the division of draft article 3, paragraph (2) into two paragraphs and the rewording as proposed, though a view was expressed that the original wording should remain. A suggestion was made to reverse the order of the paragraphs from that proposal.

86. The issue was raised of the requirement in some States that consumers showed they had made a non-judicial attempt to resolve their case before they might approach the national courts. It was suggested that where the respondent did not respond to the notice, the ODR provider could certify that the claimant had indeed attempted to deal with the case by way of ODR, and that such certification would assist the consumer to satisfy such a requirement.

Paragraph (3) and paragraph (4)

87. There was support for a suggestion to combine draft article 3, paragraphs (3) and (4) into a single paragraph. The Working Group requested the Secretariat to reformulate the text, taking into account the suggestions made, for consideration at a future session.

88. One delegation raised the issue of the need for a rule requiring proof of service of the claim in cases where a default judgment was sought and the buyer was the respondent.

89. There was support for a proposal to make the following further addition to draft article 3:

> "*The ODR provider shall communicate acknowledgements of receipt of electronic communications from any party to all other parties at their designated electronic addresses.*"

2. Commencement (A/CN.9/WG.III/WP.107, draft article 4)

Draft article 4 (Commencement)

90. A question arose as to whether a claimant might choose to enter the ODR process at a phase of his choosing and, if so, at what point did he make that choice. It was also asked whether an ODR provider could offer services in respect of only some of the phases of the ODR process.

91. It was proposed that in drafting of the procedural rules, regard should be had to inequality of bargaining power between parties and the risk of the stronger party imposing a dispute resolution system on the weaker party.

92. It was suggested that the following four principles were important in designing the ODR system:

(a) Arbitral decisions must be binding on the parties, to ensure effective enforcement;

(b) When being offered a choice to accept the procedural rules, whether pre- or post-dispute, buyers must be given a separate, clear and adequate notice about ODR;

(c) Online sellers should be obliged to implement the decisions, and should have the right to bring claims against non-paying buyers;

(d) Rules or guidelines should set out best practices for providing online notices to the parties, and adequate measures should be devised to ensure that claims would be brought to responding parties' attention.

93. Emphasis was also placed on the importance of ensuring that the procedural rules were relevant to the situation in developing countries, where small and medium enterprises lacking financial literacy might be claimants, and where in the absence of effective judicial remedies, ODR might be the only option available to such claimants.

94. One means identified to encourage sellers to honour their obligations to implement ODR outcomes was publication of their failure to do so.

Paragraph (1)

95. Support was voiced for addition to the procedural rules of a paragraph as follows and to place it at the end of paragraph (1) of draft article 3:

> "*The ODR provider shall communicate acknowledgment of receipt of communications from the parties [and the neutral] to their designated electronic addresses.*"

96. It was suggested that the ODR provider also acknowledged the date and time of the receipt of communications.

97. A clarification was made that notification to the parties of the availability of the content of communications by the parties or the neutral did not mean that the contents of such communications were being disclosed.

98. It was further suggested that any material accompanying the procedural rules should include reference to the obligation of the parties to regularly check the ODR platform regarding the status of their case in the ODR proceedings.

99. Following a discussion of the necessity of referring in that draft article to a specified standard time, such as Greenwich Mean Time, it was decided to provide in any material accompanying the procedural rules that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own procedural rules with regard to time so long as they would not be inconsistent with the generic rules.

100. It was suggested that matters of calculation of time and acknowledgment of receipt of electronic communications could be handled at the ODR platform by the use of technical means.

101. The importance of language in the submission of documents was widely recognized and acknowledged, particularly with regard to submission of evidence and claims by buyers. In response, it was suggested that language might not pose a problem in practice in that regard since evidence and the claim would usually be in the language of the original contract, and in any event ODR platforms would have technology to assist in resolving language issues by using codes which allowed simultaneous access in various languages.

102. A suggestion was made that there might need to be a limit placed on the number of documents that could be submitted by a party, in order to avoid overloading the ODR platform.

Paragraph (2)

103. In response to a concern that the term "*promptly*" required further definition, it was pointed out that that was already a defined term in several UNCITRAL instruments. There was wide support for keeping that expression.

104. There was general agreement to a proposal to amend the wording of the paragraph by inserting the words "*by the ODR platform*" after the word "*communicated*".

Paragraph (3)

105. There was general agreement to a proposal to amend the wording of the paragraph by inserting the words "*to the ODR platform*" after the word "*communicate*" in the first line of the paragraph.

106. Concern was expressed that the proposed five day deadline for filing a response might be too short.

Paragraph (4)

107. A question was raised as to the appropriateness of that formulation for time of commencement, namely how it could be said that ODR proceedings had

commenced before both parties had signified their agreement to participate in ODR proceedings.

Annex A (b)

108. It was said that careful consideration should be given to any data protection or privacy issues and online security in the context of communicating information relating to the parties in the course of ODR proceedings.

Annex A (c) and Annex A (d)

109. The Working Group was reminded of the importance of giving consideration to simplifying the grounds for claims, and the remedies available, in order to ensure that ODR was quick and efficient.

Annex A (e)

110. A proposal was made to improve the text by indicating that the signatures of the parties could be by way of any form of electronic authentication. One suggestion was that there was no need for a signature of the claimant.

Annex A (f)

111. Several delegations questioned the necessity for the parties to acknowledge their agreement to participate in ODR (for example, by click-wrap agreement) where the parties had a pre-existing agreement to proceed by way of ODR. In response, it was noted that there might be no pre-existing agreement, or that clicking to agree meant that the parties were agreeing to the use of a specific ODR provider.

112. It was noted that there might be multiple ODR providers and that such an agreement could signify agreement to use a particular provider.

113. It was pointed out that if the ODR process was to be binding and thus engage the application of the New York Convention, then there would have to be clear notice to the respondent that proceedings had been initiated.

114. It was decided that the question of the parties agreeing to participate in ODR proceedings upon the filing of a notice or response required further deliberation, taking into account the various scenarios, including where there was already in place a pre-dispute agreement between the parties to use ODR, and where there was no such pre-dispute agreement. The situation where a respondent refused to agree to ODR, and the situation where the response of the respondent to the claim constituted an agreement to ODR, were also said to require further deliberation.

115. There was a proposal to modify the language of annex A (f) as follows, and to place in square brackets the proposed language, pending the deliberations of the Working Group on the issue of pre-dispute binding agreements to participate in ODR:

> "*[(f) statement that the claimant agrees or, where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings]*"

Annex B (d)

116. There was a proposal to modify the language of annex B (d) as follows, and to place in square brackets the proposed language, pending the deliberations of the Working Group on the issue of pre-dispute binding agreements to participate in ODR:

> "*[(d) 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)

117. Several delegations stated that in addition to the electronic signature, any other form of electronic authentication should also be permitted.

118. A new paragraph (5) for draft article 5 was proposed, dealing with the issue of counterclaims as follows:

> *["If a party initiates its claim in response to a claim initiated by the other party ("counter-claim"), such a claim must be initiated with the same ODR provider regarding the same disputed transaction as the first claim not later than [5] days after the notice of the first claim is sent to such party. The counter-claim shall be decided by the arbitrator appointed to decide the first claim."]*

119. Another proposal was made to include the following:

> "*[If the respondent has a counter-claim, he must specifically state thereafter what he hopes to obtain.]*"

120. It was proposed to add a new annex (annex C) dealing with counterclaims and comprising the matters set out in paragraphs (c) (d) and (h) of annex A.

121. The following issues were raised regarding counterclaims:

(a) whether claims and counterclaims would be handled by the same provider and the same neutral;

(b) who decided whether a response constituted a counterclaim;

(c) what measures were needed to ensure that counterclaims were dealt with in the same proceeding and not as claims in separate proceedings.

122. In order to prevent multiplicity of proceedings relating to the same dispute, it was suggested that annex A (g) together with a companion provision in annex B could assist in that regard.

3. Negotiation (A/CN.9/WG.III/WP.107, draft article 5)

Draft article 5 (Negotiation)

123. One view was that draft article 5 should address the consequences of various possible scenarios of negotiation between the parties. In response, it was noted that the current language of draft article 5 addressed those matters in a simple and satisfactory manner.

124. Several questions were raised with regard to draft article 5:

(a) if one party refused take part in negotiation, at what point could the other party force a move to the facilitated settlement stage?

(b) how in practice was a negotiated agreement to be carried out?

(c) how was the move from negotiation to the facilitated settlement phase triggered?

125. An issue was raised as to whether the procedural rules were intended to be mandatory or to be used at the option of the parties; if mandatory, then it was urged that the procedural rules be kept at an abstract level and flexible, in order to facilitate ease of participation by a range of ODR providers who might employ various technologies.

Paragraph (1)

126. It was illustrated that automated software was an important factor in the speedy handling of large volumes of cases. The observation was made that negotiation was an automated ODR stage where the "fourth party" was technology, and that systems using such technology had proven highly successful in resolving a large percentage of the cases submitted to them.

127. Several proposals were made regarding paragraph (1):

(a) to replace "*If the respondent responds to the notice and accepts one of the solutions proposed by the claimant,*" with "*If settlement is reached*";

(b) to add "*automatically*", so that the phrase read "*the ODR proceeding is automatically terminated*";

(c) to add "*This solution shall be binding on the parties*";

(d) to replace paragraph 1 with "*If the parties reach an agreement, they shall communicate it to the ODR provider, in which case the ODR platform will automatically generate an agreement form recording the settlement*".

128. It was noted that in some States a case was only regarded as concluded when the agreement or decision had been implemented. It was suggested that one option for a claimant whose agreement had not been implemented was to resubmit his claim and proceed to request a decision by a neutral.

129. The importance of maintaining simple language, accessible to non-lawyers, was stressed.

130. After discussion, it was concluded that draft article 5, paragraph (1) would be modified to take into account that negotiation was terminated when the settlement had been implemented.

Paragraph (2)

131. Several proposals were made regarding paragraph (2):

(a) that draft article 5, paragraph (2) should be replaced by: "*[If the parties have not settled their dispute by negotiation within 10 days of the response, then either party may request ...]*";

(b) that "*if none of the solutions proposed by the party are accepted by the other party*" be replaced by "*[If the parties have not reached an agreement]*";

(c) that the following be added after paragraph (2): "*Either party could object, within [3] days from receiving the notice of appointment of the arbitrator, to providing the arbitrator with information generated during the negotiation stage*";

(d) to change "*If none of the solutions proposed by the party are accepted by the other party*" to "*If no settlement is reached*".

Paragraph (3)

132. It was suggested that the term "five (5) days" should be put into square brackets and considered at a later stage. It was further suggested that it might be appropriate to leave such time limits to the discretion of individual ODR providers. Concern was expressed that paragraph (3) as currently drafted could result in consumers, when they were respondents, being forced into facilitated settlement or arbitration.

133. It was further suggested to insert the words "and arbitration" between the words "settlement" and "stage" in draft article 5, paragraph (3).

4. Facilitated settlement and arbitration (A/CN.9/WG.III/WP.107, draft articles 6-12)

134. It was suggested to put square brackets around the words "Facilitated settlement and arbitration" which appeared before draft article 6.

a. Appointment of neutral (A/CN.9/WG.III/WP.107, draft article 6)

Draft article 6 (Appointment of neutral)

Paragraph (1)

135. Discussion on paragraph (1) included:

(a) It was agreed to delete the word random;

(b) That the process for appointment of the neutral should be set out in detail;

(c) That common minimum criteria for appointment of neutrals by ODR providers should be set out in a separate document.

Paragraph (2)

136. Comments on paragraph (2) included:

(a) That the neutral should be required to positively declare his independence;

(b) That the meaning of impartiality of the neutral be set out in a separate document.

Paragraph (4)

137. Comments on paragraph (4) included:

(a) That the ODR provider should be required to give reasons for disregarding a party's objection to a neutral;

(b) To simplify the objection process, by providing for automatic disqualification of a neutral when a party objects, with a possible limit to prevent repeated objections made in bad faith.

138. After discussion, it was generally agreed that any objection regarding the appointment of the neutral should be dealt with in a straightforward manner and should not open the possibility of providing comments or reasons for objecting.

V. Future work

139. It was noted that while some draft articles had been considered in the current Working Group session, the document as a whole would be further considered at the subsequent session and that its current structure should be maintained pending the outcome of those considerations.

140. The Working Group requested the Secretariat, subject to availability of resources, to prepare documentation for its next session addressing the following issues:

(a) Guidelines for neutrals;

(b) Minimum standards for ODR providers;

(c) Substantive legal principles for resolving disputes; and

(d) A cross-border enforcement mechanism.

141. The Working Group requested the Secretariat to prepare a new draft of the procedural rules taking into account the views expressed by the Working Group at the current session.

142. The Working Group noted that its twenty-fourth session was scheduled to take place in Vienna from 14 to 18 November 2011.