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Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 November 2011)

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I. Introduction

1. At its forty-third session, (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission took note of a concern raised that, given that online dispute resolution was a somewhat novel subject for UNCITRAL and that it related at least in part to transactions involving consumers, the Working Group should adopt a prudent approach in its deliberations, bearing in mind the Commission's direction at its forty-third session that the Working Group's work should be carefully designed not to affect the rights of consumers.[2] Further, the view was expressed that the Working Group should bear in mind the need to conduct its work in the most efficient manner, which included prioritizing its tasks and reporting back with a realistic time frame for their completion.

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

4. At its twenty-second session (Vienna, 13-17 December 2010) and twenty-third session (New York, 23-27 May 2011), the Working Group commenced its work on the preparation of legal standards on online dispute resolution for cross-border electronic transactions, in particular, procedural rules on online dispute resolution for cross-border electronic transactions.

5. 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.108, paragraphs 5-14.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-fourth session in Vienna, from 14 to 18 November 2011. The session was attended by representatives of the following States members of the Working Group: Austria, Bolivia, Canada, China,

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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-fifth Session, Supplement No. 17* (A/65/17), para. 256; and ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 215.

Colombia, Czech Republic, Egypt, El Salvador, France, Germany, India, Israel, Italy, Japan, Jordan, Kenya, Malaysia, Mexico, Nigeria, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Angola, Croatia, Denmark, Dominican Republic, Finland, Hungary, Indonesia, Netherlands, Romania, Slovakia, Sudan, Syrian Arab Republic.

8. The session was also attended by observers from the European Union.

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

(a) *Intergovernmental organizations*: Islamic Development Bank (IDB), Secretaría de Integración Económica Centroamericana (Sieca);

(b) *International non-governmental organizations*: Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRDP), Chartered Institute Of Arbitrators (CIARB), Construction Industry Arbitration Council, India (CIAC), Electronic Consumer Dispute Resolution (ECODIR), European Law Students' Association (ELSA), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of Law and Technology (Masaryk University), Internet Bar Organization (IBO), Instituto Latinoamericano de Comercio Electrónico (ILCE), International Arbitral Centre Of the Austrian Federal Economic Chamber (VIAC), Moot Alumni Association (MAA), New York State Bar Association (NYSBA).

10. The Working Group elected the following officers:

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

Rapporteur: Mr. Walid Nabil TAHA (Egypt)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.108);

(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.109); and

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.110).

12. The Working Group adopted the following agenda:

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

III. Deliberations and decisions

13. The Working Group engaged in discussions on online dispute resolution for cross-border electronic transactions: draft procedural rules on the basis of documents A/CN.9/WG.III/WP.109 and A/CN.9/WG.III/WP.110. The deliberations and decisions of the Working Group on these topics are reflected below.

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

A. General remarks (A/CN.9/WG.III/WP.109, paras. 5-6)

14. At the outset, it was noted that the work on procedural rules for online dispute resolution was not a stand-alone process and that designing one part of the online dispute resolution (ODR) framework required taking into account other parts since they were all interrelated and must operate together. In that regard, the Working Group recalled its decision to first work on draft generic procedural rules for ODR (A/CN.9/716, para. 115) and then to consider other issues, such as applicable law and enforcement of awards, which could affect the final form of the ODR procedural rules ("the Rules"). Several delegations expressed the view that the generic procedural rules for ODR could be adopted on a provisional basis at the next Commission session.

15. The Working Group recalled the decision by the Commission that while the Working Group should be free to interpret that its mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation.[3] The Working Group noted that it was tasked to consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at the next session.

B. Notes on draft procedural rules (A/CN.9/WG.III/WP.109, paras. 5-86)

1. Introductory rules (A/CN.9/WG.III/WP.109, preamble, draft articles 1-3)

Preamble

Paragraph (1)

16. The Working Group discussed whether the term "low-value" should be defined. It was suggested to include, in the additional documents to the Rules, a guideline on how that term might be defined or a specific monetary value which might range from 1,500 euros to 5,000 euros. In that regard, concerns were raised that "low-value" was a subjective term which depended on factors such as inflation, exchange rates and regional economic and commercial differences. Additionally, it was mentioned that the Rules or any additional document should not include a

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

predetermined monetary value, as that could become outdated and require revision, which would be difficult. It was also noted that the monetary value of a dispute might increase during the course of the dispute resolution proceeding and thereby exceed the set limit. In response to the suggestions, it was pointed out that, based on the experience of Concilia.net, parties tended to limit themselves to presenting claims that were generally less than 2,000 euros. After discussion, it was agreed that the term "low-value" should not be defined in the Rules but should be dealt with in a commentary or other additional document for the purpose of illustrating one or more examples of low-value cases.

17. It was agreed to delete the phrase "*in whole or in part*" in the draft Preamble and to include it elsewhere in the Rules.

18. It was suggested that the exclusion of types of claims such as bodily harm, consequential damages and debt collection should be identified in an additional document, and not in the draft Preamble.

19. A further suggestion was made to include in the draft Preamble that the Rules were intended to apply to disputes relating to the "sale of goods and performance of services".

20. As to the question of defining "cross-border", the Working Group recalled its mandate given by the Commission to undertake work in the field of ODR relating to cross-border e-commerce transactions and further recalled its previous deliberation (A/CN.9/721, paras. 27-30). After discussion, it was agreed that the Rules would not contain a definition of the term "cross-border".

Paragraph (2)

21. The Working Group considered whether the separate documents should be attached to the Rules as annexes or be set out separately elsewhere (A/CN.9/721, para. 53). After discussion, it was agreed to remove the square brackets from the phrase "*which are attached to the Rules as Annexes and form part of the Rules*" and to proceed with deliberation as to the contents of the documents enumerated in paragraph (2). It was noted that the list of documents was not exhaustive and that additional documents might be added.

22. The Working Group agreed to insert the words "*and minimum requirements*" between the words "*Guidelines*" and "*for*" in paragraph (a).

23. Additionally, it was agreed to delete paragraph (b) on the grounds that ODR providers would be able to develop their own Supplemental Rules provided they were consistent with the Rules.

Paragraph (3)

24. It was proposed to modify the paragraph to read as follows: "*Any separate and supplemental [rules] [documents] must conform to the Rules.*"

Draft article 1 (Scope of application)

25. It was noted that the concept of clear and adequate notice to the parties required more precise definition (A/CN.9/721, para. 57) and it was proposed to modify the draft article to read as follows: "*Where the parties have agreed to submit*

to dispute resolution under these Rules as one of the terms of the online dispute resolution or before the dispute arises, the Rules apply only if the [buyer] [party] was given clear and adequate notice of the agreement to arbitrate. Such notice needs to provide for a consent of the [buyer] [party] to the ODR process and Rules separate from the underlying electronic commerce transaction (e.g., a separate OK click consenting to ODR) in order to ensure that the [buyer] [party] knowingly agreed to arbitrate the dispute under the rules."

26. It was further proposed to include a new paragraph in draft article 1: "*As a condition to using the Rules the seller must list its contact information.*" (A/CN.9/721, para. 58).

27. Those proposals generated debate on the issue of the effect in various jurisdictions of pre-dispute agreements to arbitrate involving consumers, and the issue of enforcement of awards involving consumers generally.

28. A number of views were expressed: that in some jurisdictions such agreements were not binding upon consumers due to their regulations or public policy; conversely, that in many jurisdictions that was not the case; that the intent of the Working Group was to create a remedy for consumers where none currently existed; that traditional dispute resolution mechanisms were too costly and time-consuming for these types of low-value disputes; that Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") required States parties to recognize such agreements; that the application of said Article II was dependent upon what was capable of arbitration; that a law permitting a consumer to pursue other forms of redress notwithstanding such an agreement might not be enforceable in the State of the vendor; that inclusion of the bracketed text in draft article 1 could discourage vendors from using the Rules.

29. After discussion, it was agreed that the issues so raised were important ones requiring additional consultation before further consideration at a future meeting. It was agreed that the bracketed text in draft article 1 and both of the provisions proposed above should remain in square brackets pending further deliberation. It was suggested that the issue of the scope of the agreement be addressed in that context and whether the Secretariat could propose different options for provisions on the agreement covering either all or separate stages of the proceedings.

Draft article 2 (Definitions)

Paragraph (1) "claimant"

30. As to the issue whether the claimant might be either the buyer or the seller, it was mentioned that the Rules were intended to apply to B2B as well as B2C, in which case it would be open to both parties to the transaction to bring a claim. After discussion, it was decided to retain the current text.

Paragraph (2) "communication"

31. The Working Group decided to retain the current wording of the paragraph.

Paragraph (3) "electronic communication"

32. The Working Group agreed that option 1 "electronic communication" provided a broader definition and that that definition was in line with UNCITRAL texts on electronic commerce. At the same time, it was mentioned that the concept of digitized communication was important in view of technological progress and it was agreed that the definition of electronic communication be expanded to include elements from option 2 on digitized communications.

33. The Working Group agreed to delete the words "*telegram, telex*" and to delete the square brackets from the phrase "*short message services (SMS), web-conferences, online chats, Internet forums, or microblogging*".

Paragraph (4) "neutral" and paragraph (5) "respondent"

34. The Working Group accepted the definitions in draft article 2, paragraph (4) ("neutral") and draft article 2, paragraph (5) ("respondent") without change.

Paragraph (6) "ODR"

35. As to the definition of "ODR", following discussion it was decided to amend the provision to read as follows: "*6. 'ODR' means online dispute resolution which is a system for dispute resolution through an information technology-based platform and facilitated through the use of electronic communications and other information technology.*"

Paragraph (7) "ODR platform"

36. Following discussion it was agreed to modify the definition of "ODR platform" to read as follows: "*7. 'ODR platform' means one or more than one online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.*"

37. It was further agreed that the considerations raised in paragraphs 26 and 27 of A/CN.9/WG.III/WP.109 concerning definition of "ODR platform" had been dealt with by the agreed re-wording of draft article 2, paragraph (7).

Paragraph (8) "ODR provider"

38. Proposals were made to amend the definition of "ODR provider", including by replacing "*and*" with "*and/or*" in the phrase "that administers ODR proceedings *and* provides an ODR platform". Further consideration of those proposals was deferred until after deliberations on draft article 3, paragraph (1), on communications, as it was said that the definition of ODR provider could change depending on the stage at which the Rules contemplated the first involvement of the ODR provider in the proceedings.

39. It was decided to retain the bracketed text [*electronic communications*] and to remove the bracketed text [*digitized communications*].

40. Concerns were raised that definitions of ODR provider and ODR platform needed to be clear so as to differentiate the obligations referred to them in the Rules. It was observed that the definition of ODR provider encompassed the roles of

ODR administrator and ODR platform provider. It was proposed that these roles might need to be defined separately.

Draft article 3 (Communications)

Paragraph (1)

41. The Working Group considered a suggestion to amend draft article 3, paragraph (1) by adding a new second sentence as follows: "*Where applicable, prior to the selection of the ODR provider, all communications shall be addressed in the manner and at the address set forth in the transaction agreement between the parties*". This was said to address the situation where an ODR provider had not yet been sought, as no notice had yet been communicated pursuant to draft article 4, yet the parties wished to avail themselves of an ODR platform in order to facilitate their negotiations.

42. In response it was suggested that: it was difficult to contemplate a situation in which the use of an ODR platform would be sought by the parties before an ODR provider had been engaged; that the ODR provider should be designated and involved from the very beginning and should be made aware of all communications between the parties so as to better administer the process; that involvement of the ODR provider from the earliest stage would allow for the provision to the parties of any necessary translation function and would prevent improper conduct by one party, such as denying that any communications had been received from the other party.

43. It was observed that it was an open question as to when the Rules would take effect, namely whether they would apply before the communication of a notice under draft article 4. If the Rules did not apply prior to this point, it was said that the stage of negotiations between the parties would be left out of the purview of the Rules. That raised the additional question of whether the contents of any "without prejudice" negotiations between the parties could be revealed to the neutral eventually appointed to deal with the dispute.

44. One solution suggested was to withdraw the proposed amendment to draft article 3, paragraph (1) and, recalling the discussion of draft article 2, paragraph (8), to amend the latter article by replacing "*and*" with "*and/or*" in the phrase "that administers ODR proceedings *and* provides an ODR platform". This raised the question of whether the definition of "ODR provider" should include an operator of an ODR platform.

45. Another proposal was that the Rules contain two new definitions, one for "ODR platform provider" and one for "ODR service provider", the former being applicable to the stage at which the parties were using the ODR platform for negotiation purposes, the latter to denote a provider who is administering the ODR proceedings, whether on its own platform or using another platform. In support of that proposal, it was pointed out that there were cases where the parties might avail themselves of the platform but not require the services of a provider in order to resolve their dispute. The example of eBay was given in that regard.

46. Further proposals were made:

(a) To modify the definition of ODR provider to read as follows: "*ODR provider means an ODR provider which is an entity that administers ODR*

proceedings or provides an ODR platform, or both, for the parties to resolve their disputes in accordance with the Rules";

(b) To retain the current wording as it was broad enough to cover various designs of the ODR process and combinations thereof. It was pointed out that the current wording accommodated a negotiation phase that was monitored by the ODR provider and of which the ODR provider kept a record of communications between the parties during the negotiation phase, thus providing an incentive for the parties to reach a settlement.

47. It was noted that the definition of ODR provider should be flexible, simple and clear. It was further noted that the Working Group should bear in mind the effect of any change in the definition of ODR provider on the use of that term as it occurred subsequently in the Rules, in order to avoid any confusion.

48. After discussion, it was agreed to put draft article 2, paragraph (8) in square brackets.

49. A further proposal was to amend the paragraph to read as follows: "*All communications in the course of ODR proceeding shall be transmitted by electronic means to the ODR provider or through the ODR platform to be re-transmitted to the ODR provider*".

50. After discussion, it was agreed to retain draft article 3, paragraph (1).

Paragraphs (2) and (3)

51. It was agreed to remove the words "*or ODR platform*" from both paragraphs (2) and (3).

Paragraph (4)

52. It was proposed to modify the current draft to read as follows: "*The time of the receipt of an electronic communication under the Rules is the time when the ODR provider sends the communication to the intended addressee or when the ODR provider notifies the intended addressee that the communication is capable of being retrieved by the addressee at the ODR platform.*" Further, it was proposed to add the words "*whichever is later*" at the end of the sentence to provide flexibility.

53. Another proposal was to retain the current wording as it was clear and consistent with article 10 of United Nations Convention on the Use of Electronic Communications in International Contracts ("Electronic Communications Convention"). In response, it was pointed out that the Convention applied to businesses while the scope of the Rules included B2B and B2C disputes.

54. After discussion, the Working Group agreed to retain paragraph (4) and to revisit the paragraph at a future session.

Paragraph (5)

55. It was proposed to include paragraph (5) in the guidelines and minimum requirements for ODR providers or any other additional document to the Rules. After discussion, it was agreed to retain the current words in the Rules.

Paragraph (6)

56. It was proposed to insert "*without delay*" after the word "*neutral*".

57. It was mentioned that the guidelines and minimum requirements for ODR providers or any other additional document to the Rules could include issues related to: automatic function to confirm receipt of electronic communications; capacity of ODR platform to receive electronic communications that were massive in quantity; the time required to receive and to display those electronic communications; and interruptions of electronic communications beyond the control of the parties.

58. After discussion, it was agreed to put the words "*without delay*" in square brackets.

2. Commencement (A/CN.9/WG.III/WP.109, draft article 4)

Draft article 4 (Commencement)

Paragraph (1)

59. It was proposed to delete the words "*as far as possible*" and to insert the following phrase at the end of the paragraph: "*If there is no evidence, then according to Annex A, detailed explanations should be appended.*"

60. Another suggestion was to retain the current wording as it provided flexibility and did not obligate the parties to provide all evidence, but rather served as a guideline.

61. It was suggested that the requirement of notice identified in annex A was not necessary for the negotiation stage and that such requirements became relevant only in the facilitated settlement and arbitration stages. It was further suggested that annex A could be simplified to require the submission of only essential information that would facilitate negotiation between the parties.

62. After discussion, it was agreed to retain paragraph (1).

Paragraph (2)

63. It was agreed that use of the terms "*promptly*" and "*without delay*" should be consistent throughout the Rules.

Paragraph (3)

64. It was agreed to modify the time period for the preparation of the response to seven calendar days. It was further agreed to retain the word "calendar". The Working Group requested the Secretariat to look into the definition of calendar days to ensure consistency with other UNCITRAL texts.

Paragraph (4)

65. The Working Group considered the two square-bracketed options offered in paragraph (4). After discussion, it was agreed to remove the brackets from and retain the first option, namely the words "*the ODR provider at the ODR platform*" and delete the words "*the respondent*".

Annex A

Annex A (a) to (d)

66. It was agreed to retain the paragraphs.

Annex A (e)

67. It was agreed to remove the square brackets from the concluding words of paragraph (e).

Annex A (f)

68. With regard to paragraph (f), a proposal was made to delete option 2 and form a new paragraph combining elements of options 1 and 3, as follows: "*Statement that the claimant agrees to participate in ODR proceedings or, if applicable, statement that the parties have an agreement to resort to ODR proceedings in case any dispute arises between them.*"

69. In response, a number of issues were raised surrounding the necessity of including a negotiation stage in the ODR proceedings, including: that the negotiation stage was crucial to the ODR process as it ensured that the parties were put in touch with one another, and that it was of little cost to the parties; that many successful existing ODR systems included a mandatory negotiation stage; that that stage acted as a "funnel" for the system by which many cases were resolved thus greatly reducing the number of cases having to move on to the stages of facilitated settlement or decision by a neutral; that keeping the stage promoted meaningful negotiation since traders may often ignore e-mails from buyers but were more likely to react to a message from or through an ODR provider indicating that there was a complaint or dispute from a buyer; that there should be no option for parties to opt out of or bypass the negotiation stage (so-called "cherry-picking"); that permitting cherry-picking would require the formulation of rules on which party could make the choice and at what point in time, as well as whether an ODR provider could accommodate such a choice, all of which would add unnecessary complexity to the process.

70. Other views were: that parties should be offered the option to bypass the negotiation stage and go directly to other stages in order to save time and expense; that the stage was superfluous to parties that had already attempted to negotiate a resolution and failed; that some jurisdictions did not regard pre-dispute agreements to arbitrate as binding upon consumers and so the provision as worded would not be acceptable in such jurisdictions.

71. One proposal, citing the importance of identifying the "entry point" into the system, was that there be a presumption that the negotiation stage would apply unless a party could show that bona fide attempts at negotiation between the parties had been tried and failed, in which case the party could elect to proceed to a subsequent ODR stage.

72. After discussion, it was decided to delete option 2 and combine options 1 and 3 as proposed, while placing square brackets around the words "*or, if applicable, statement that the parties have an agreement to resort to ODR proceedings in case any dispute arises between them.*" It was observed that, since discussion of that issue was related to the square-bracketed text in draft article 1,

namely "*subject to the right of the parties to pursue other forms of redress*", the matter would come up for discussion at a later stage.

Annex A (g)

73. Paragraph (g) was the subject of considerable discussion. It was pointed out that the paragraph was intended to prevent multiplicity of proceedings and to ensure that the ODR process was an exclusive one with regard to any particular dispute; that such exclusivity inter alia would ensure that businesses were encouraged to participate in the process knowing that they would not be subject to other proceedings in respect of the same matter; that ODR was intended to provide an avenue of redress for consumers — in low-value cross-border transactions — where no such remedy existed at present through national courts; that other successful ODR systems had such a provision; that since ODR begins with an agreement between the parties to participate in it, they have already signalled their willingness to be bound by its results; that the exclusivity principle in paragraph (g) was significant enough that it should be elevated to the status of a separate article in the Rules rather than being a statement in an annex.

74. Other observations regarding paragraph (g) included: that a claimant should be able to avail himself of ODR notwithstanding that he has commenced a proceeding in the courts (in order, for instance, not to exceed a limitation period) since the court proceeding might be delayed and ODR could offer a quicker solution; that the legal proceedings should in that case be suspended during the online settlement proceedings; that a consumer having invoked a chargeback might have to wait for that remedy to take effect and in the meantime should not be prevented from accessing ODR.

75. It was pointed out that paragraph (g) as worded might preclude a claimant from using ODR where he was pursuing a claim in the courts for a matter which was related to the transaction in issue (such as bodily injury resulting from a product) but which itself was not receivable under the Rules, and that that would be an unintended prejudicial result of the paragraph.

76. After discussion, it was agreed to accept a proposal that paragraph (g) be retained in its present form, but with inclusion of the words "*specific dispute in relation to the*" between the words "the" and "transaction", to make it clear that exclusivity applied only to the specific claim at issue in the ODR proceedings.

Annex A (h)

77. Following a suggestion to delete paragraph (h) as superfluous, on the grounds that the ODR provider would already know whether or not a claimant had paid a filing fee, it was agreed to delete the paragraph.

Annex A (i)

78. Discussion on paragraph (i) concerned the fact that it was necessary to ascertain the location of the parties to ensure the transaction in issue was in fact of a cross-border nature and thus within the scope of the Rules.

79. It was suggested that the term "location" might be confusing in languages other than English, and that terms such as "country of residence" (for individuals)

and "place of business" (to maintain conformity with the terminology used in article 6 of the Electronic Communications Convention) might be inserted in the paragraph to clarify the meaning of "location". In response, it was also suggested that the term "location" should be consistent with the other UNCITRAL texts.

80. After discussion, it was agreed to retain paragraph (i).

Annex B

Annex B (a)

81. It was proposed to include the phrase "*where the Respondent is the seller*" at the beginning of the paragraph. In support of that proposal, it was pointed out that personally identifiable information was already available to actual sellers at the time of the transaction and that the collection of such information by an imposter posing as a seller could put a buyer at risk for fraud and identity theft. In response, concerns were voiced: that in some transactions, it was not required to provide such information; that the identification of parties was essential under the Rules — for instance, for the neutral to know the identity of the parties to confirm his impartiality and neutrality; and that the signature of the respondent as mentioned in annex B, paragraph (e) could not be verified if the identity of the respondent was not disclosed.

82. Another proposal was to retain the wording as is, since the scope of the Rules was not limited to the relationship between the buyer and the seller and that the Rules should accommodate various types of transactions including those that might not require personally identifiable information to be disclosed. Further, it was mentioned that the current wording accommodated situations where the parties had more than one electronic address and where the registered name of a company might differ from the name under which it traded.

83. After discussion, it was agreed to retain the paragraph as is.

Annex B (b) and (c)

84. The Working Group decided to retain the paragraphs.

Annex B (d)

85. One proposal was to modify the paragraph to read as follows: "*statement that the respondent agrees, or where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings*".

86. In light of the deliberation regarding the mirror provision in annex A, paragraph (f), it was agreed to put annex B, paragraph (d) in square brackets.

Annex B (e)

87. As with annex A, paragraph (e), it was agreed to insert the phrase "*including any other identification and authentication methods*" at the end of the paragraph. Having heard a suggestion that identification and authentication in ODR proceedings should be consistent with the work undertaken by Working Group IV on electronic commerce, it was noted that that topic could be discussed at a later

stage. It was agreed to rearrange the order of items in annexes A and B so that the provisions on signature would be last.

Annex B (f)

88. As with annex A, paragraph (g) and noting the concerns raised (see above, paras. 73-76), it was agreed to accept the proposal to insert the words "*specific dispute in relation to the*" between the words "the" and "transaction".

Annex B (g)

89. The Working Group reiterated its discussion on the mirror provision in annex A, paragraph (i).

90. The Working Group engaged in a discussion on the issue of counterclaims. It was questioned whether a provision on counterclaims could be included in the Rules given the insertion of the words "*specific dispute in relation to the transaction*" in annex A, paragraph (g) and annex B, paragraph (f), namely that a counterclaim might raise a different issue.

91. It was suggested to include the provision on counterclaims proposed in paragraph 50 of A/CN.9/WG.III/WP.109. It was pointed out that a counterclaim could be a useful element in the negotiation stage.

92. Another suggestion was to replace the last bracketed sentence [*The counterclaim shall be decided by the neutral appointed to decide the first claim.*] with [*The counterclaims shall be dealt with in the ODR proceeding together with the first claim.*]. This was said to respond to the question as to who decided whether the counterclaim fell within the ambit of the initial claim. A further suggestion was to include in the Rules a definition of counterclaim. Views were expressed on whether a definition of counterclaim should be included in the Rules or whether it should be up to the parties to define. Concerns were raised that the impact of counterclaims on the proceedings needed further deliberation. Concerns were also raised that in a speedy process involving B2B and B2C claims that the parties should be able to resolve all matters in one proceeding.

93. After discussion, it was agreed to include the suggested provision on counterclaims in the Rules as draft article 4, paragraph (5). It was agreed to modify the bracketed text as proposed and to extend the five calendar days therein to seven. Further, the Working Group requested the Secretariat to prepare a definition of counterclaim and suggest where it might be included in the Rules.

3. Negotiation (A/CN.9/WG.III/WP.109, draft article 5)

94. At the outset, the Working Group recalled several working assumptions related to negotiation: that direct negotiation by the parties through the ODR platform was one stage of ODR proceedings; that the ODR proceeding was composed of three phases — negotiation, facilitated settlement and arbitration — while keeping in mind that compression to a two-phase stage could be considered; that a party could refuse negotiation and request to move to the next stage; and that there were different types of negotiation including automated and assisted negotiation.

95. As to the issue of the commencement of the negotiation phase, the Working Group recalled its discussion on draft article 4, paragraph (4) (see above, para. 65).

After discussion, there was broad support that commencement of ODR proceedings encompassed the commencement of negotiation, and in this respect it was recognized that ODR proceedings are one package.

Draft article 5 (Negotiation)

Paragraph (1)

96. The Working Group considered the various options in bracketed text in the paragraph and agreed that the phrase "*if settlement is reached*" was preferable to begin the paragraph, and that the paragraph should provide for automatic termination of the ODR proceeding in that event. Following a suggestion to incorporate those two elements and to simplify the language of the paragraph, it was agreed to amend the paragraph as follows: "*If settlement is reached, then the ODR proceeding is automatically terminated.*"

Paragraph (2)

97. After discussion, it was agreed to retain the second bracketed text, requiring the parties to settle their dispute by negotiations within a period of ten days, following which the case should move automatically to the next stage, with all references to the appointment of a neutral/arbitrator removed from that paragraph. The Secretariat was asked to re-draft the paragraph accordingly.

Paragraph (3)

98. Concerns were expressed that the respondent might not in fact have received notice of the proceedings and thus would not be aware that the time period was running, and that some measure was needed to deal with this potential prejudice to the respondent.

99. It was further suggested that such prejudice could extend to a consumer, in any case where a consumer was the respondent. In response, it was pointed out that in the vast majority of cases consumers would be claimants and not respondents, and so this risk was rather minimal. A further response was that since both parties were participating in ODR by agreement and that a provision had been proposed to require a seller to provide its contact details as a precondition to participating in the ODR system (see above, para. 81), which details should be presumed to be correct, then the risk of such prejudice was minimal.

100. It was also pointed out that: there was a presumption of receipt of communications in draft article 3, paragraph (4) based upon the Article 10 (2) of the Electronic Communications Convention; that where the negotiation phase was fully automated then nothing could be done within that stage to address an issue of potential non-receipt of a notice. It was further pointed out that the time of deemed receipt of the notice by the respondent was dealt with in draft article 3, paragraph (4).

101. There was broad support for the proposition that issues relating to possible non-receipt of communications by a respondent should be dealt with by the neutral, who would be present in the facilitated settlement stage and who had wide powers under draft article 7. The Secretariat was asked to prepare necessary amendments to the language of draft article 7 to enable the neutral to address such issues.

102. There was broad agreement that option 1 was preferable, with the deadline for response being increased to seven from five calendar days, and that option 2 should be deleted. A concern was expressed that, within an overall period for negotiations of ten days, allowing up to seven days for the filing of a response would leave too little time for negotiation between the parties.

103. There was a proposal to insert the words "*unless one party has chosen otherwise*" between "stage," and "at which point …", in order to reflect the possibility to move past the facilitated settlement stage and directly to arbitration. Another proposal was that, where the respondent was presumed to have refused to negotiate, then the case should go automatically to the facilitated settlement stage. After discussion, the Working Group agreed to a working assumption that if the parties failed to reach a settlement at the negotiation stage, then the case would proceed automatically to the next stage.

Paragraph (4)

104. There was strong support for conducting the ODR procedure promptly and the extension of time limits for the negotiation phase and steps within that phase should be allowed only if both parties agreed to do so.

105. Views were expressed on the ultimate time limit for any extension: that a limit was necessary to prevent one party prolonging the negotiation period in bad faith; that there should be only one such extension allowed and for a fixed duration.

106. After discussion, it was agreed that the parties should be permitted, where they both expressly agree, to a one-time extension of the time limit on negotiations, such extension to be for a period not exceeding ten days beyond the original time limit.

107. A separate question was raised as to the consequences of a settlement being reached and proceedings then being automatically terminated, as called for in draft article 5, paragraph (1). It was pointed out that such a settlement might not be honoured by one of the parties.

108. Suggestions to address that problem included: adding a rule allowing a party to ask that a neutral issue the settlement in the form of an award or decision; allowing the aggrieved party to recommence ODR proceedings to seek an award or decision based on the terms of the settlement, which a neutral would have the power to grant; providing for an administrative application by a party to the ODR provider to have the settlement drawn up and issued as an award or decision.

109. A further proposal was for a simple and clear provision that, in the event parties failed to implement the settlement agreed at the negotiation stage, a party could re-launch ODR proceedings with a view to seeking a binding award based thereon.

110. After discussion, the Working Group requested the Secretariat to draft a provision reflecting the discussion on this issue, for consideration at a future meeting, as well as a provision on how parties might accelerate through the negotiation phase and move to the next phase.

4. Neutral (A/CN.9/WG.III/WP.109, draft articles 6-7)

Draft article 6 (Appointment of neutral)

Paragraph (1)

111. It was proposed to retain the bracketed text [*through the ODR platform*], and further to delete the bracketed text [*automatically*] since the ODR platform would by its nature appoint the neutral automatically. After discussion, the Working Group agreed to retain the first bracketed text and delete the second bracketed text.

Paragraph (2)

112. The Working Group agreed to retain the paragraph.

Paragraph (3)

113. The Working Group deliberated whether communications exchanged at the negotiation stage should be made available to the neutral. It was mentioned that such a practice was in accordance with the purpose of the Rules to provide a swift and efficient procedure.

114. Another suggestion was to provide parties with the option to object to such information going to the neutral, and thus to retain the bracketed text at the end of paragraph (3). In response, it was pointed out that a balance had to be maintained between due process and efficiency of the proceedings and that the unbracketed text in paragraph (3) struck the right balance.

115. It was suggested that that issue be deferred pending consideration of whether ODR was a two or three stage process. In response, it was pointed out that the provision of such information went to the issue of possible tainting of the neutral's impartiality, which was relevant whether the neutral was acting in the facilitated settlement stage or the arbitration stage.

116. After discussion, it was agreed to reverse the order of paragraphs (3) and (4) since the appointment of the neutral could only be final after any objections had been dealt with. It was also agreed to retain the bracketed text at the end of paragraph (3).

Paragraph (4)

117. It was suggested to replace paragraph (4) with the wording proposed in paragraph 65 of A/CN.9/WG.III/WP.109. Further, it was pointed out that the challenge process should be straightforward with no possibility of comments or reasons. It was also observed that since it was in the interest of at least one party to have a speedy process, it would be rare that that party present multiple challenges to the neutral.

118. After discussion, it was agreed to retain the first sentence of paragraph (4) and to replace the rest of the paragraph with the proposal suggested in paragraph 65 of A/CN.9/WG.III/WP.109.

Paragraph (5)

119. It was agreed to retain the words [*through the ODR platform*] and delete [*automatically*] on the same reasoning as for draft article 6, paragraph (1).

Paragraph (6)

120. It was agreed to retain the paragraph.

Paragraph (7)

121. Recalling discussion from the last session (A/CN.9/716, para. 62), it was proposed to remove the brackets as the paragraph provided a practical solution to facilitate the process. Another view was to retain the brackets on the grounds that the Rules should not deprive the parties of the option to choose the number of neutrals. Another proposal was to delete the phrase "unless the parties otherwise agree". After discussion, it was agreed to retain the text as is, with brackets, with a possibility to discuss the related issues in an additional document.

Draft article 7 (Power of the neutral)

Paragraph (1)

122. It was suggested to strengthen paragraph (1) by including the phrase "*subject to safeguards to preserve impartiality of the neutral and the integrity of the process*" after the word "appropriate". The view was expressed that the matter could be addressed in greater detail in a code of conduct for neutrals. After discussion, it was agreed to retain the paragraph bearing in mind the phrase proposed.

123. The Secretariat was asked to consider whether draft article 6, paragraph (6) should be placed in draft article 7, paragraph (1), on the grounds that it might be more appropriately thought of as an obligation of the neutral rather than a precondition.

Paragraph (2)

124. It was suggested to retain the first bracketed text "[*conduct the ODR proceeding*]" and delete the second bracketed text. Another suggestion was to retain the last bracketed text "[*unless the neutral decides otherwise*]" to allow for admission of other material, including by way of video-conference or other technologies. It was further pointed out that admission of further materials could entail additional cost and thus require the consent of the parties, since the Rules do not contemplate an award of costs. After discussion, it was agreed to retain the first and third bracketed texts and to remove the second bracketed text.

Paragraph (3)

125. One proposal to clarify the paragraph was to replace the words "*to amend any document submitted*" with "*to amend any document <u>that party</u> submitted*". Another proposal was to delete the word "*any*" and to specify the type of documents that were referred to. A further proposal was to delete the first sentence.

126. After discussion, it was agreed to amend paragraph (3) by combining the first and third sentences, to read as follows: "*At any time during the proceedings the*

neutral may require or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine".

127. As to the second sentence, it was decided to put it in square brackets for discussion at a future meeting since it raised issues of proof, on the understanding that the sentence could be moved to another place in the Rules.

Paragraph (4)

128. After discussion, it was agreed that paragraph (4) would remain as drafted.

5. Facilitated settlement and arbitration (A/CN.9/WG.III/WP.109, draft articles 8-9)

Draft article 8 (Facilitated Settlement)

129. Bearing in mind its earlier conclusion (see paras. 97 and 103) that a case moves automatically to the facilitated settlement stage in the event negotiation fails, the Working Group proceeded to consider draft article 8. There was broad agreement to the insertion of a time limit in the facilitated settlement stage.

130. A proposal was made, supported by several delegations, to retain the first two sentences and replace all the text thereafter with the following: "*If the parties do not reach an agreement within ten (10) calendar days, the neutral shall render a [decision] [award] pursuant to Article 9.*"; and further to add a second paragraph to draft article 8 as follows: "*2. If, as a consequence of his or her involvement in the facilitation of settlement, any neutral develops doubts as to his or her ability to remain impartial or independent in the future course of the proceedings under Article 9, that neutral shall resign and inform the parties and the ODR provider accordingly.*"

131. Another proposal was to retain the first two sentences plus the words of the third sentence up to and including "reach an agreement" and thereafter insert the wording from option 3 in the current draft text, while placing square brackets around the term "phases[s]" therein.

132. After deliberation, it was agreed that the first two sentences of draft article 8 would remain as drafted, that options 1 and 2, for which no support was expressed, would be deleted, and that the two proposals outlined above would be placed in square brackets for consideration at a future meeting.

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

Paragraph (1)

133. It was agreed, in keeping with earlier deliberations in that regard, that the terms [*decision*] [*award*] in draft article 9 should remain in square brackets pending further discussion. A proposal was made to replace "*promptly*" with "*without delay*" in the first sentence. A question was raised as to what happened in the event that a neutral failed to render a decision within the time provided in the paragraph; it was agreed to defer that issue for future consideration. Following brief discussion as to

whether to amend the suggested time period, it was decided to retain the reference to seven calendar days and remove the square brackets.

134. Various views were expressed on the issue of extending the time for a neutral to render a decision/award: that a quick and practical ODR process called for no extension of the time limit; that a short extension of three calendar days maximum could be permitted in cases of exceptional complexity; that in the interests of having quality decisions extensions should be permitted; that seven calendar days was too short and fifteen calendar days more appropriate. After discussion, it was agreed to leave seven days as the deadline for decision, to insert a provision permitting a further seven day extension, to place square brackets around the numbers "seven" in each case, and to remove the brackets from "calendar".

135. Views differed on the question of possible publication of a decision/award. It was said that such publication could guide potential users of ODR as to how cases were decided and thus reduce unnecessary disputes in future, and that certain other ODR systems published all their decisions. There was general agreement that any publication of a decision should remove references to identifying information related to the parties, and that it would be useful to keep and publish statistics on ODR outcomes. It was observed that the issue seemed to be not whether to publish, but how much information to disclose when publishing. It was concluded that publication was an issue for future consideration.

136. Suggestions for imposing reputation-based penalties on ODR parties defaulting on their obligations were deferred to a future meeting.

Paragraph (2)

137. After discussion, it was decided that draft article 9, paragraph (2) should remain as drafted. The question as to whether a neutral needed to provide grounds for his decision was raised, and was deferred for future consideration.

Paragraph (3)

138. It was proposed that, as with draft article 1, the phrase [*subject to the right of parties to pursue other forms of redress*] should be inserted at the end of the first sentence. After discussion, and for the reasons discussed under draft article 1 (see above, paras. 25-29), it was agreed that the text of draft paragraph (3) should be placed in square brackets.

Paragraph (4)

139. Views were expressed on whether or not a decision by a neutral should contain reasons. There was support for the notion that basic reasons in an award would make it useful to those referring to published decisions in future, though it was pointed out that in an environment of a high volume of cases, any such reasons needed to be kept very brief, including for the purposes of keeping the costs of proceedings low. A suggestion was made that the ODR platform could provide simple methods for the neutral to formulate such reasons. After discussion, it was agreed that the Secretariat would prepare draft wording providing for brief reasons to be inserted in paragraph (4) and discussed at a future session.

140. It was pointed out that the phrase "*or any error or omission of a similar nature*" was vague and gave the neutral too wide a discretion in correcting the award. In response, it was suggested that the present text should be maintained as it is from the view point of integrity with other UNCITRAL texts. After discussion, it was agreed that that phrase be placed in square brackets.

Paragraph (5)

141. It was suggested to delete the phrase "*and shall take into account any usage of trade applicable to the transaction*" since that phrase could be difficult for consumers to understand. Noting that the scope of the Rules included both B2B and B2C disputes, another suggestion was to put the phrase in square brackets. In response, it was suggested that the phrase could be redrafted to clearly reflect that it would be applicable for B2B disputes only or alternatively, that such clarification be included in the additional documents. A further suggestion was to delete the paragraph since it was more related to the substantive legal principles for deciding ODR cases.

142. After discussion, it was agreed to put the phrase in square brackets and discuss the appropriate location for that phrase at a future session.

6. Other provisions (A/CN.9/WG.III/WP.109, draft articles 10-13)

Draft article 10 (Language of proceedings)

143. It was proposed to include a new paragraph "*An ODR provider dealing with parties of different languages shall ensure its system, Rules and neutrals are sensitive to these differences and shall put in place mechanisms to address client needs in this regard*" in draft article 10. It was further proposed that the Secretariat suggest wording for that proposal consistent with the Rules.

144. It was clarified that draft article 10 addressed the issue of language used in the ODR proceeding and that the issue of how the ODR platform would ensure offering various languages was a separate issue to be considered either in the Rules or in additional documents.

145. It was proposed to insert the phrase "*unless the neutral decides otherwise*" in the first bracketed sentence after the word "parties".

146. After discussion, the Working Group agreed, noting that these were sensitive and complex issues, to put draft article 10 and the two proposals made in square brackets for further deliberation taking into account the discussions above and the available technologies that might be of assistance.

Draft article 11 (Representation)

147. It was decided to leave draft article 11 as drafted, but to replace the term "addresses" therein with the term "designated electronic addresses" to ensure conformity with the language in annexes A and B to draft article 4. It was also decided that the words "[*authority to act*]" would remain in square brackets.

Draft article 12 (Exclusion of liability)

148. It was pointed out that the wording of draft article 12 was similar to that found in other sets of arbitration rules, although the fact that the Rules would cover consumers as parties to disputes added a new dimension. Concern was expressed that the bracketed text referring to "*any other persons involved in the ODR proceedings*" needed to be considered carefully, as it could be interpreted to provide immunity to a negligent legal practitioner advising a party. It was also cautioned that having too great a risk of liability in the Rules could discourage ODR providers by making the process potentially too expensive.

149. After discussion, it was concluded that opinions varied on the degree of exclusion of liability to be permitted and to whom it would extend. It was agreed to place the entire draft article in square brackets, while inserting the words "or gross negligence" after the word "wrongdoing". The Secretariat was asked to propose alternative wording for the draft article which would cast it more in the language of a rule and less in contractual terms.

Draft article 13 (Costs)

150. It was clarified that the term "costs" meant an order by a neutral for the payment of money from one party to another party, and did not refer to the fees associated with commencing a proceeding. There were several expressions of concern that the provision as worded might be contentious and that it required further debate by the Working Group. After discussion, it was agreed to place the entire draft article in square brackets.

V. Future work

151. The Working Group noted that its twenty-fifth session was scheduled to take place in New York from 28 May to 1 June 2012 or if the resources required for the Secretariat to organize meetings in New York are not made available by the General Assembly, in Vienna from 7 to 11 May 2012.