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

Note by the Secretariat

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I. Introduction

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

2. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural rules for ODR, including taking into account that the types of claims with which ODR would deal should be B2B and B2C cross-border low-value, high-volume transactions (A/CN.9/716, para. 115).

3. At that session, the Working Group also requested the Secretariat to list available information regarding ODR known to the Secretariat with references to websites or other sources where they may be found (A/CN.9/716, para. 115). The Working Group may wish to note that that list is now available on the UNCITRAL website.²

4. This note contains an annotated draft of procedural rules, based on the deliberations of the Working Group at its twenty-second session.

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

A. General remarks

5. At the twenty-second session of the Working Group, the view was generally shared that there was an absence of an agreed international standard on ODR, and that a need existed to address in a practical way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high-volumes worldwide and required a dispute resolution response that was rapid, effective and inexpensive. The view was also expressed that enforcement of awards cross-border was difficult if not impossible in light of the lack of treaties providing expressly for cross-border enforcement of awards in B2C transactions (A/CN.9/716, para. 16). Issues raised included: how a global ODR system would be funded (and indeed whether States would be willing to fund it); and, in the context of enforcement and the validity of the arbitration agreement, whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was appropriate and applicable to those ODR cases leading to an arbitral award, as they dealt with disputes involving consumers. Reference was made to treaty obligations under the New York Convention (A/CN.9/716, para. 23).

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

² www.uncitral.org/uncitral/en/publications/online_resources_ODR.html.

6. The present note contains draft fast-track procedural rules that could be used as a model by ODR providers, and does not address the question of enforcement of decisions made in the context of ODR. The Working Group may wish to note that the draft procedural rules have been drafted in a generic manner, so as to apply to B2B and B2C transactions, provided that those transactions have the common feature of being low-value. This is in line with the mandate of the Commission that work on that topic should focus on ODR relating to cross-border e-commerce transactions, including B2B and B2C transactions (see above, para. 1).³

7. Taking into account the decision of the Working Group at its twenty-second session to formulate simple, user-friendly generic rules that reflect the low-value of claims involved, the need for a speedy procedure, and that emphasize conciliation since the majority of cases are resolved at that stage (A/CN.9/716, para. 55), the draft procedural rules have the following characteristics:

(a) They include a negotiation phase, followed by a phase of facilitated settlement and, if that second phase is inconclusive, by a final and binding decision by a neutral person. To take account of the need for a speedy procedure, the neutral appointed by the ODR provider handles both phases of facilitated settlement and arbitration; the term “neutral” has been chosen to encompass both possible functions;

(b) It is proposed that, unless otherwise decided by the parties, disputes are handled by a sole neutral, who is selected by the ODR provider and not the parties, although the parties can challenge the choice of the neutral through a simplified procedure; and

(c) There would not be any hearing, as the procedure is based on documents filed online.

8. Subjects for further consideration by the Working Group include the general legal framework in which those rules should come into operation (see below, paras. 13-14), as well as the question of arbitrability (see below, para. 12).

B. Notes on draft procedural rules

1. Introductory rules

9. Draft article 1 (Scope of application)

“1. UNCITRAL online dispute resolution rules for cross-border electronic transactions (“the Rules”) shall be used for the settlement of disputes arising from any cross-border transactions, conducted by the use of electronic means of communication.

“2. The Rules apply where parties to an online transaction have agreed that disputes in relation to that transaction shall be referred for settlement under the Rules[, subject to the right of the buyer to pursue other forms of redress].

³ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 257.*

“3. The Rules do not apply to transactions relating to any of the following:

(a) [...];

(b) [...];

(c) [...];

...

“4. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of [...].”

Remarks

Paragraph (2)

10. The Working Group may wish to consider whether there ought to be a limitation period within which claims must be brought, or whether that matter should be left to relevant applicable laws. In some proposed ODR rules, the claimant is required to initiate ODR proceedings within six months of paying for the purchase (Article 4 of Annex A to Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers submitted by the United States of America for Organization of American States (OAS) Seventh Inter-American Specialized Conference on Private International Law (“OAS/ODR Proposal”).

11. The Working Group may wish to consider how the agreement to arbitrate would materialize. In that regard, it could be suggested to provide instructions for the ODR provider to include in its ODR platform an “OK-box” (click-wrap agreement) or other electronic means whereby the parties agree to the application of the Rules to their dispute.

Paragraph (3)

12. The Working Group may wish to consider whether the Rules should define the types of claims to which they apply (i.e. sale of goods) or whether they should contain a limitation of their scope (A/CN.9/716, para. 47). Some existing ODR rules and proposals have adopted the approach that certain types of disputes will be so excluded. Generally, these refer to disputes which raise issues of bodily injury, family law, taxation or intellectual property (Article 1(2) of Electronic Consumer Dispute Resolution (ECODIR) Rules), and disputes related to privacy violations, intellectual property, other claims arising in tort, or claims for indirect and consequential loss (Article 2 of OAS/ODR Proposal).

Paragraph (4)

13. Paragraph (4) seeks to clarify that the Rules are only one element in a framework to be designed for an ODR system to be effective. At its twenty-second session, the Working Group requested the Secretariat to provide for a future meeting a document setting out principles and issues involved in the design of an ODR system (A/CN.9/716, para. 115(b)).

14. The Working Group may wish to note that the Internet Corporation for Assigned Names and Numbers (ICANN) Uniform Domain Name Dispute

Resolution Policy (UDRP) system allows for providers to adopt “Supplemental Rules”, consistent with UDRP Rules, covering such matters as fees, guidelines on word and page limits of submissions, file size and other format modalities, the means of communicating with the provider and the neutral (UDRP Article 1) or for any other matters not already covered by the UDRP Rules. In this regard, the Working Group may wish to consider whether such separate and additional rule or guideline may be useful to and complement the current work. In the event the Working Group finds it useful, it may also wish to consider the nature of such a document. For the purposes of this Note, reference will be made to guidelines for ODR providers (“Guidelines for ODR providers”) where clarification of the procedural rules in view of technical and design aspects of the ODR platform are needed and where it would complement these rules.

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

“For purposes of these Rules:

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

“2. “communication” means any statement, declaration, demand, notice, response, submission, notification or request that the parties are required to make in connection with ODR;

“3. “electronic communication” means any communication that the parties make by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy;

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

“5. “respondent” means the party to whom the notice is directed;

“6. “ODR” means online dispute resolution which is a system for resolving [cross-border] disputes where the [procedural aspects of the dispute resolution mechanisms are][procedure for dispute resolution is] conducted and facilitated through the use of electronic communications and other information and communication technology;

“7. “ODR platform” means an online dispute resolution platform which is a system for generating, sending, receiving, storing or otherwise processing electronic communications used in ODR;

“8. “ODR provider” means an online dispute resolution provide which is an entity that administers ODR proceeding and provides an ODR platform for the parties to resolve their disputes in accordance with these Rules;

“9. “ODR proceedings” means an online dispute resolution proceedings which are ...;

“[...]”

Remarks

Paragraph (2)

16. The definition of “communication” is derived from an equivalent in article 4(a) of United Nations Convention on the Use of Electronic Communications in International Contracts adopted in 2005 (Electronic Communications Convention), where it is confined to use of electronic communications in connection with the formation or performance of a contract between parties.

Paragraph (3)

17. The definition of “electronic communication” is derived from articles 4(b) and 4(c) of the Electronic Communications Convention and article 2(a) of the UNCITRAL Model Law on Electronic Commerce (MLEC) adopted in 1996 (with additional article 5 bis adopted in 1998). That definition refers to “electronic mail, telegram, telex, or telecopy”. Since the adoption of the MLEC, other technological innovations have emerged, and therefore the Working Group may wish to consider whether the provision should be amended to include short message services (SMS), Web-conferences, online chats, Internet forums, microblogging, and other information and communication technologies as examples of electronic communications. The Working Group may also wish to consider whether a more abstract and technology-neutral concept, such as “digitized communications” might be used instead of “electronic communications”.

Paragraph (6)

18. At its twenty-second session, the Working Group agreed that consideration of a definition of ODR could usefully be deferred to a later point in the discussion, when the components of the concept had been more fully elaborated (A/CN.9/716, para. 40). It was also suggested that the definition of ODR be limited to instances where procedural aspects of a case are conducted online (A/CN.9/716, para. 35). The Working Group may wish to decide whether ODR could be conducted in whole or in part online and if so, define what “in part” means (A/CN.9/716, para. 37).

Paragraph (7)

19. The definition of ODR platform should be construed so as to accommodate development of future technologies. The ODR platform might include an e-mail server where the parties and the ODR provider communicate, a Web-based portal, a customized solution or internal enterprise resource planning system or any other type of format.

20. The Working Group may wish to consider the appropriateness of including in the Guidelines for ODR providers directions as to the design of an ODR platform including adherence to principles of technological neutrality, and accommodating interoperability and scalability of technologies.

21. The Working Group may wish to consider whether the Guidelines for ODR providers should include instructions on design of an ODR platform to accommodate the following circumstances and to provide an efficient and timely procedure:

(a) The platform should be designed in such a way that parties are required to submit all necessary information in order to proceed to the next stage of the ODR process. This would avoid the ODR provider having to request additional information for clarification;

(b) In situations where the design of the ODR platform cannot prevent defects in a notice, the ODR provider may request the claimant to remedy any defects or to provide such further information as may be necessary to proceed with the claim. Additionally, where the claimant has wrongly identified the respondent, the claimant could be permitted to amend the notice and transmit it through the ODR provider to a newly designated respondent. This may be important as in the current infrastructure of online transactions, it is often difficult for consumers to distinguish the actual merchant from outsourced vendors who are partially responsible for the transaction such as maintenance of website, delivery and other matters. The Working Group may wish to consider whether the amendment process for this and other circumstances should be formulated in the procedural rules or in Guidelines for ODR providers;

(c) In the event the claimant has more than one claim against the same respondent, the neutral may decide to consolidate several claims into one. The Working Group may wish to decide whether the procedural rules should provide the opportunity for a claimant to consolidate such cases where appropriate. Alternatively, the Working Group may wish to direct ODR providers to design the ODR platform so as to accommodate this. The Working Group may wish to consider this in the Guidelines for ODR providers. It may also wish to contemplate the stage of ODR proceedings (negotiation or arbitration) at which this issue may arise; and

(d) The Working Group may wish to foresee circumstances where claims of a number of claimants are joined and submitted to a respondent.

Paragraph (8)

22. The Working Group may wish to decide whether details of the role and responsibility of the ODR provider should be defined and whether they should be included in the procedural rules or in the Guidelines for ODR providers.

23. The Working Group may wish to note that there might be a need for a definition, in domestic legislation or otherwise, of how ODR providers would be approved and licensed, and the method by which they would receive or be assigned cases.

24. Further, there might also be a need for a determination of the means by which ODR providers would be selected. This is relevant to issues of forum shopping and accreditation of ODR providers. In this regard, the Working Group may wish to note that European Consumer Centres' Network (ECC-Net) selects its ODR providers in accordance with European Union law and eConsumer.gov does so in accordance with Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic

Commerce (“GDBe-Consumers International Agreement”) whereas under the OAS/ODR proposal, the selection of provider is from a list of ODR providers maintained by a central clearing house (Article 5 of OAS/ODR proposal).

Paragraph (9)

25. The Working Group may wish to consider whether “ODR proceedings” should be defined and if so, what the definition should contain.

26. Draft article 3 (Communications)

“1. All communications between parties and the neutral in the course of ODR proceedings shall be transmitted by electronic means to the ODR provider and shall be addressed through the ODR platform.

“2. The designated electronic addresses of the parties for the purpose of all communications arising under the Rules shall be those set out in the notice of ODR (“the notice”), unless either party notifies the ODR provider otherwise.

“3. The time of receipt of an electronic communication from the parties or the neutral to the ODR provider is the time when it becomes capable of being retrieved by the ODR provider at the ODR platform.

“4. The time of receipt of an electronic communication from the ODR provider to the parties or the neutral is the time when it becomes capable of being retrieved by them at the ODR platform.”

Remarks

27. It is important to define the flow of communications between parties and the neutral as this relates to technical and design aspects of the ODR platform. The Working Group may wish to identify aspects that should be addressed in the Rules and in Guidelines for ODR providers.

Paragraph (2)

28. The Working Group may wish to consider who has the burden of identifying the electronic address of the respondent — whether it falls solely to the claimant or whether the ODR provider should intervene (and bearing in mind whether tasking the ODR provider with such a function is in keeping with the requirement for a speedy process). In considering how an ODR provider would ascertain a respondent’s electronic address, one option would be to use a trustmark system in which respondent merchants would opt in to ODR proceedings by virtue of their participation in the ODR system.⁴

⁴ Trustmark in the context of electronic commerce generally refers to an image, logo or seal found on a website that purports to indicate the reliability of the online merchant. The trustmark is offered as proof that the online merchant is a member of a professional organization or a network, and has a redress mechanism in place (A/CN.9/WG.III/WP.105, para. 5).

Paragraph (4)

29. This paragraph which reflects article 10 of Electronic Communications Convention is relevant to the overall timeframe of the ODR process.⁵ Given that the Rules are intended to promote simplicity, speed and efficiency, and that the dispute resolution is cross-border, uncertainties over time of receipt of communications could delay proceedings.

30. At the Working Group's twenty-second session, the need for rules regarding receipt of communications was questioned on the basis that providers would have their own rules (A/CN.9/716, para. 83). However, another view was that a common protocol on technology issues would be helpful (A/CN.9/716, para. 84). The Working Group agreed that consideration of communication issues could be taken up at a later stage once deliberations had progressed further (A/CN.9/716, para. 85).

31. In light of the previous deliberations, the Working Group may wish to decide whether these Rules should contain provision on receipt of electronic communications or whether those matters should be at the discretion of the ODR provider. If the former is the case, then such a rule could state: "5. The ODR provider shall communicate acknowledgment of receipt of communications from the parties [and the neutral] to their designated electronic addresses."

2. Commencement

32. Draft article 4 (Commencement)

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

"2. The notice shall then be promptly communicated to the respondent.

"3. The respondent shall communicate a response to the notice in accordance with the form contained in annex B within five (5) [calendar] days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

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

⁵ Article 10 of Electronic Communications Convention updates article 15 of MLEC. The amendments made to article 10 of Electronic Communications Convention are consistent with those prevailing in the paper world and limit the ability of an addressee to deliberately delay or impede delivery of a communication by not accessing it. They also take into account the fact that the information system of the addressee may not be reachable for reasons outside the control of the originator (for instance, the use of anti-spam filters for e-mails).

“Annex A

The notice shall include:

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

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

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

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

“(e) the signature of the claimant and/or the claimant’s representative in electronic form;

“(f) statement that the claimant agrees to participate in ODR proceedings;

“(g) statement that the claimant is not currently pursuing other remedies against the respondent with regard to the transaction in issue;

“(h) filing fee of [];

[...]”

“Annex B

The response shall include:

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

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

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

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

“(e) the signature of the respondent and/or the respondent’s representative in electronic form;

[...]”

Remarks

Paragraph (3)

33. The Working Group may wish to clarify the term “days”, and how the period of time under the Rules should be calculated. In this regard article 2 (6) of the UNCITRAL Arbitration Rules provides that “official holidays or non-business days occurring during the running of the period of time are included in calculating the period”.

Paragraph (4)

34. There are several options for fixing a date for commencement of dispute resolution proceedings. One can be when the ODR provider receives the notice from the claimant (Article 4 of World Intellectual Property Organization (WIPO) Mediation Rules). Alternatively, it could be when the response is submitted by the respondent including agreement to participate in the proceedings (article 2(3) of UNCITRAL Conciliation Rules). A further option would be when the ODR provider communicates the notice to the respondent (Articles 4(c) and 2(a) of ICANN UDRP).

Annex A

35. Annex A contains the items that should be included in the notice of arbitration. The Working Group may wish to consider whether annex A should enumerate the grounds on which claims can be made and the available remedies. Some suggested grounds for claims are: goods not ordered, not delivered/provided, not as described, remedies could include: discount, replacement, return for a full refund. In a global cross-border environment for low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies. Otherwise there is a substantial risk of flooding the system with complex cases, making it inefficient and expensive.

36. Additionally, the Working Group may wish to consider whether the Guidelines for ODR providers should include instructions on facilitating the agreement of parties by electronic means. The ODR provider might provide a one-time electronic method where the parties agree to the entire ODR proceedings or may provide a stage by stage option where the parties agree to each stage of the process. The ODR provider could provide electronic authentication methods such as a click-wrap agreement, among others, whereby the parties agree to the process by clicking an “OK-box”.

Annex B

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

3. Negotiation**38. Draft article 5 (Negotiation)**

“1. If the respondent responds to the notice and accepts one of the solutions proposed by the claimant, the ODR provider shall communicate the acceptance to the claimant [and the ODR proceeding is terminated].

“2. If none of the solutions proposed by the party are accepted by the other party, one of the parties may request that the case be moved to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 below.

“3. If the respondent does not respond to the notice within five (5) [calendar] days, he/she is presumed to have refused to negotiate and the case shall automatically move to the facilitated settlement stage, at which point the

ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 below.

“[4. The parties may agree to extend the deadline for the filing of the response however no such extension shall be for more than [--][calendar] days].”

Remarks

Paragraph (1)

39. Paragraph (1) deals with the termination of negotiation and the ODR proceedings in the case where the parties have reached an agreement. The Working Group may wish to clarify how the date of termination of negotiation should be defined.

40. The Working Group may wish to consider providing in the Guidelines for ODR providers that the ODR platform should be designed so that once the respondent accepts a solution and the acceptance has been communicated, the ODR platform will automatically generate an agreement form formalizing the settlement.

Paragraph (2)

41. The Working Group may wish to decide whether the Rules should impose a time limit for the negotiation phase, in particular, the time within which the respondent must accept a solution or propose an alternative solution, and the time within which the claimant must notify acceptance or rejection of the respondent's solution. Another option is to set an overall time frame for negotiations, within which the parties are required to reach agreement. Putting such time pressure on the parties may act as an incentive for them to reach a settlement.

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

Paragraph (3)

43. The Working Group may wish to consider for inclusion in the Guidelines for ODR providers the mechanism by which the provider can ascertain that a respondent has received the notice.

44. Where there is no response, the Working Group may consider whether the provision should allude the process to move directly to the arbitration stage without any possibility for facilitated settlement.

Paragraph (4)

45. Negotiation in the context of ODR may refer to assisted negotiation and/or facilitated negotiation. In the context of ODR, the parties negotiate through an ODR provider that facilitates the administration of the negotiation, for example, by contacting the other party and providing a software or application for negotiation and/or blind bidding. A typical negotiation assistance software allows the users to analyse their bargaining positions by evaluating and prioritizing their negotiation objectives and by calculating the outcome most efficient for all parties.

Blind-bidding process is an automated algorithm that evaluates bids from the parties and settles the case if the offers are within a prescribed range. In assisted negotiation, the parties negotiate with the help of an ODR platform that facilitates the process by providing efficient technology and a designated place for the negotiation to take place. The Working Group may wish to consider whether these specific types of negotiation should be referred to in the Rules.

4. Facilitated settlement and arbitration

a. Appointment of neutral

46. Draft article 6 (Appointment of neutral)

“1. The ODR provider shall appoint the neutral by [random] selection from a pool of qualified neutrals maintained by the ODR provider.

“2. The neutral shall disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.

“3. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment and shall provide the neutral all of the communications and documents regarding the dispute received from the parties.

“4. Either party may object to the neutral’s appointment within two (2) [calendar] days of the notice of appointment. In the event of an objection, the ODR provider will invite the non-objecting party to submit comments within two (2) [calendar] days and then either communicate the appointment of the neutral to the parties or appoint a new neutral.

“5. If the neutral has to be replaced during the course of the proceedings, the ODR provider will promptly appoint a neutral to replace him or her and will inform the parties. The proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.

“6. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the dispute resolution to be conducted and completed expeditiously in accordance with the Rules.

“[7. The number of neutrals shall be one unless the parties otherwise agree.]”

Remarks

Paragraph (1)

47. At its twenty-second session, the Working Group agreed that neutrals need not necessarily be lawyers but should be required to have relevant professional and dispute resolution experience and skills (A/CN.9/716, para. 63). The Working Group may wish to consider whether to include in the Guidelines for ODR providers the criteria to be met by the ODR provider in maintaining a pool of, and appointing, neutrals by the ODR provider.

Paragraph (3)

48. The Working Group may wish to clarify whether “all of the communications and documents regarding the dispute received from the parties” should include the communications exchanged at the negotiation stage, since the claimant, upon filing, is required to submit everything of relevance. For example, in the ECODIR model, the neutral has access to all information and documents from the negotiation stage in order to find a solution that is rapid and acceptable to the parties.

Paragraph (4)

49. At its twenty-second session, the Working Group agreed that providing an opportunity for parties to challenge the appointment of neutrals should be considered (A/CN.9/716, para. 70). The Working Group may wish to take into consideration the possibility of subsequent challenges to the neutral once the neutral has made disclosure pursuant to paragraph 2.

Paragraph (7)

50. At the twenty-second session of the Working Group, there was general agreement that, in the absence of agreement by the parties, there should be a sole neutral (A/CN.9/716, para. 62).

51. The Working Group may wish to consider whether the neutral for both the facilitated settlement and the arbitration could be the same person. In commercial cases, the mediator/conciliator is normally not the arbitrator, unless the parties decide otherwise. The approach could be different for ODR, given the need for speed and simplicity.

b. Conduct of ODR proceedings

52. Draft article 7 (Facilitated Settlement)

“The neutral shall evaluate the dispute based on the information submitted and determine whether the dispute would benefit from a facilitated settlement. If so, the neutral may communicate with the parties to attempt to reach an agreement. If the parties reach an agreement, the neutral shall render a [decision][award] on that basis.”

53. Draft article 8 (Conduct of ODR proceedings)

“1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate, provided that the parties are treated equally. The neutral, in exercising his or her discretion, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall act fairly and shall remain at all times wholly independent and impartial.

“2. The neutral shall decide the dispute on the basis of documents filed by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only.

“3. The neutral shall have the power to allow any party, upon such terms (as to costs and otherwise) as the neutral shall determine, to amend any document submitted. Each party shall have the burden of proving the facts relied on to support its claim or defence. At any time during the proceedings the neutral may require the parties to provide additional information, produce documents, exhibits or other evidence within such a period of time as the neutral shall determine.

“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, a dispute settlement clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A [decision][award] by the neutral that the contract is null shall not automatically entail the invalidity of the dispute settlement clause.

“5. The place of the [arbitration] [dispute resolution] shall be as agreed by the parties, failing which it will be decided by the neutral.”

Remarks

54. The Working Group may wish to consider whether instead of time limits for individual stages of the proceeding there should be overall time limit for proceeding.

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

“1. The neutral shall render a [decision][award] promptly and in any event within seven (7) [calendar] days after the parties make their final submissions to the neutral. The ODR provider shall communicate the [decision][award] to the parties. Failure to adhere to this time limit shall not constitute a basis for challenging the [decision][award].

“2. The [decision][award] shall be final and binding on the parties. The parties shall carry out the [decision][award] without delay.

“3. Within five (5) [calendar] days after the receipt of the [decision][award], a party, with notice to the other party, may request the neutral to correct in the [decision][award] any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the neutral considers that the request is justified, he or she shall make the correction within two (2) [calendar] days of receipt of the request. Such corrections [shall be in writing and] shall form part of the [decision][award].

“4. In all cases, the neutral shall decide in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances, and shall take into account any usage of trade applicable to the transaction.”

Remarks

Paragraph (1)

56. Requests by the neutral for an extension of time in which to submit the decision are foreseeable. The Working Group may wish to consider whether to include provisions relating thereto.

57. **Draft article 10 (Language of proceedings)**

“The ODR proceedings shall be conducted in the language used in connection with the transaction in dispute, unless another language is agreed upon by the parties. In the event the parties do not agree on the language of the transaction, the language of the ODR proceedings shall be determined by the neutral.”

Remarks

58. Draft article 10 reflects the suggestion made by the Working Group that where the parties have failed to reach an agreement on the language of proceeding, this matter could be left to the discretion of the neutral (A/CN.9/716, para. 105).

59. **Draft article 11 (Representation)**

“A party may be represented or assisted by a person or persons chosen by that party. The names and addresses of such persons [and the authority to act] must be communicated to the other party through the ODR provider.”

c. Exclusion of liability

60. **Draft article 12 (Exclusion of liability)**

“Save for intentional wrongdoing, the parties waive, any claim against the neutral, the ODR provider [and any other persons involved in the ODR proceedings] based on any act or omission in connection with the ODR proceedings.”

Remarks

61. Draft article 12 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It mirrors article 16 of the UNCITRAL Arbitration Rules, with necessary adjustments.

62. **Draft article 13 (Costs)**

“The neutral shall make no [decision][award] as to costs and each party shall bear its own costs.”

Remarks

63. The Working Group may wish to consider, in the event the claimant is successful in an arbitration phase, whether his or her filing fee should be paid by the unsuccessful party.