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

Note by the Secretariat

Addendum

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

A. General remarks

1. This addendum contains a draft of Track II of the Rules. As noted at paragraph 9 of document A/CN.9/WG.III/WP.123, the Working Group may also wish to have regard to the annotations in relation to the Rules as set out in documents A/CN.9/WG.III/WP.119 and its addendum, as that commentary largely remains applicable but has not been reproduced here. Likewise commentary relating to articles common to both Track I and Track II set out in document A/CN.9/WG.III/WP.123 has not been reproduced here.

2. The Working Group may wish to consider whether any provisions in Track II might be simplified or streamlined given the absence of an arbitration stage in this track and the greater flexibility that might entail.

B. Notes on draft procedural rules

3. The following preamble and articles 1-13 contained in this document A/CN.9/WG.III/WP.123/Add.1 pertain only to Track II of the draft Rules.

1. Introductory rules

4. Draft preamble

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

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

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

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

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

[(d) Cross-border enforcement mechanism;]

[...];

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

5. Draft article 1 (Scope of application)

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

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

["2. These Rules shall only apply to claims:

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

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

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

Remarks

Paragraph (3)

6. The Working Group may wish to note that option 1 of paragraph (3) as contained in para. 26 of document A/CN.9/WG.III/WP.119 has been deleted, as it does not apply to Track II of the Rules.

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

"For purposes of these Rules:

ODR

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

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

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

Parties

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

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

[TBD]

“6. ‘Neutral’ means an individual that assists the parties in settling or resolving the dispute.

Communication

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

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

8. Draft article 3 (Communications)

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

“2. As a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information.”

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

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

“5. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.

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

“7. The ODR provider shall promptly notify all parties and the neutral of the availability of any electronic communication at the ODR platform.

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

Remarks

Paragraph (8)

9. At its twenty-seventh session, the Working Group agreed to proceed on the basis that the final outcome of a Track II proceeding would be the rendering of a non-binding recommendation by a neutral (A/CN.9/769, para. 56) (although it was also acknowledged that discussions in relation to draft article 8 were necessarily linked with those in relation to draft article 8(bis)).

10. The Working Group moreover requested that the Rules provide for more clarity when ODR proceedings move from one stage of proceedings to the next; although this was specifically requested in relation to the various stages of Track I proceedings, the Working Group may wish to consider whether a parallel provision should be included in Track II proceedings, and consequently paragraph (8) has been inserted for the consideration of the Working Group (see A/CN.9/769, paras. 46-47, para. 84, paras. 86-87).

2. Commencement

11. Draft article 4A (Notice)

“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4). 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 be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]

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

“4. The notice shall include:

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

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

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

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

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

“[(f) the location of the claimant];

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

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

“[...].”

12. Draft article 4B (Response)

“1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of 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.

“[2.

[Option 1: The respondent may also, in response to the notice, communicate to the ODR provider via the same ODR platform in the same proceedings a claim which arises out of the same transaction identified by the claimant in the notice (‘counterclaim’).] The counterclaim shall be communicated no later than [seven (7)] calendar days [after the notice of the claimant’s claim is communicated to the ODR provider. [The counterclaim shall be dealt with in the ODR proceedings together with the claimant’s claim.]

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d).]”

[Option 2: “The respondent may, in response to the notice, communicate a counterclaim to the ODR provider. ‘Counterclaim’ means a[n independent] claim by the respondent against the claimant which arises out of the same transaction identified by the claimant in the notice [with the same ODR provider].”.] The counterclaim shall be communicated no later than [seven (7)] calendar days after the notice of the claimant’s claim is communicated to the ODR provider. The counterclaim shall be dealt with in the ODR proceedings together with the claimant’s claim.]

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d).]”

“3. 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 the grounds on which the claim is made;

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

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

“[(e) the location of the respondent;]

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

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

“[...]”

3. Negotiation

13. Draft article 5 (Negotiation and settlement)

Negotiation

“1. [Upon communication of the response [and, if applicable, counterclaim] referred to in article 4B to the ODR provider[, and notification thereof to the claimant], the parties shall attempt to settle their dispute through direct negotiation, including, where appropriate, the communication methods available on the ODR platform.]

“2. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within seven (7) calendar days of commencement of the ODR proceedings, it is presumed to have refused to negotiate and the ODR proceedings 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 (Appointment of Neutral).

“3. If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the response to the ODR platform [and notification thereof to the claimant], then the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall notify the parties in accordance with article 3(8) and promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).

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

Settlement

“5. If settlement is reached [during the negotiation stage] [and/or at any other stage of the ODR proceedings], the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”

4. Neutral

14. Draft article 6 (Appointment of neutral)

“1. The ODR provider shall appoint the neutral [by selection from a list of qualified neutrals maintained by the ODR provider] and shall promptly notify the parties of that appointment and the name of the neutral appointed.

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

“3. The neutral shall, at the time of accepting his or her appointment, declare his or her independence and disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A neutral, from the time of his or her appointment and throughout the ODR proceedings, shall without delay disclose any such circumstances to the ODR provider. The ODR provider shall promptly communicate such information to the parties.

“4. Either party may object to the neutral’s appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

Objections to the appointment of a neutral

“5. Where a party objects to the appointment of a neutral under paragraph (4)(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final, subject to paragraph (4)(ii). Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to (4)(ii).

“6. Where a party objects to the appointment of a neutral under paragraph 4(ii), the ODR provider shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

Objections to provision of information

“7. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the

expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.

Number of neutrals

“8. The number of neutrals shall be one.”

Remarks

General

15. The Working Group clarified at its twenty-seventh session that it intended to consider draft article 6 separately for Track I and for Track II, as the latter track may lend itself to a more simplified or streamlined approach for the appointment of a neutral (A/CN.9/769, para. 107).

16. The draft text set out in paragraph 14 above currently reflects the text considered by the Working Group in relation to Track I. The Working Group may wish to consider how this might be simplified in relation to Track II, and in particular, whether challenges to the appointment of a neutral would be required or desirable in a Track II proceeding.

17. [Draft article 6 (bis) (Resignation or replacement of neutral)]

“If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her pursuant to article 6. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.”

18. The Working Group may wish to consider that even should a streamlined article 6 be proposed in relation to Track II, a separate provision on resignation or replacement of neutral may still be required.

19. Draft article 7 (Power of the neutral)

“1. Subject to the Rules [and the Guidelines and Minimum Requirements for ODR Neutrals], the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.

“1 bis. The neutral, in exercising his or her functions under the Rules, 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 remain at all times wholly independent and impartial and shall treat both parties equally.

“2. Subject to any objections under article 6, paragraph (7), the neutral shall conduct the ODR proceedings on the basis of documents submitted 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 unless the neutral decides otherwise.]

“3. At any time during the proceedings the neutral may [require] [request] 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.

“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, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.

“5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules.”

5. Facilitated settlement

20. Draft article 8 (Facilitated settlement)

“1. The neutral shall communicate with the parties to attempt to reach an agreement (“facilitated settlement”). If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.”

“2. If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 6(1) (the “expiry of the facilitated settlement stage”), the ODR proceedings shall move to the final stage of proceedings pursuant to article 8(bis) and the parties shall be notified accordingly pursuant to article 3(8).

21. Draft article 8(bis) (Recommendation by a neutral)

“1. The neutral shall at the expiry of the facilitated settlement stage proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

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

“3. The neutral shall evaluate the dispute based on the information submitted by the parties and on the terms of the contract and shall make a

recommendation. The ODR provider shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.

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

Remarks

General

22. The Working Group agreed at its twenty-seventh session to describe the non-binding determination to be made by a neutral under draft article 8(bis) as a “recommendation” (A/CN.9/769, para. 58). The terminology in that article, has been amended accordingly.

23. Draft article 8(bis) is currently located under the more general heading “facilitated settlement”. The Working Group may wish to consider whether a separate heading is warranted in relation to this draft article.

Paragraph (1)

24. The Working Group may wish to note that the term “expiry of the facilitated settlement stage” has been defined in draft article 8 as the failure to settle within of ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 6(1). The Working Group may wish to consider whether this timeline is sufficiently clear.

Paragraph (4)

25. The Working Group may wish to consider whether the second sentence of paragraph (4) provides sufficiently helpful clarification to the parties to a dispute, a neutral or an ODR provider such that it should be retained, or whether it could be better placed in guidelines for ODR providers and neutrals.

6. General provisions

26. Draft article 9 (ODR provider)

“[The ODR provider shall be specified in the dispute resolution clause.]”

27. Draft article 10 (Language of proceedings)

“[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties’ due process rights under article [x]].

“2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.

“3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.

“4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [[failing which, the language the other party included in its notice or response as its preferred language]].”

28. Draft article 11 (Representation)

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

29. Draft article 12 (Exclusion of liability)

“[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]”

30. Draft article 13 (Costs)

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