



General Assembly

Distr.: Limited
6 August 2014

Original: English

**United Nations Commission
on International Trade Law**
Working Group III (Online dispute resolution)
Thirtieth session
Vienna, 20-24 October 2014

Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II)

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-4	2
II. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules	5-74	2
A. General remarks	5-22	2
B. Notes on draft procedural rules	23-74	5
1. Introductory rules	24-51	6
2. Commencement	52-63	12
3. Negotiation	64-65	15
4. Facilitated settlement	66-68	16
5. Recommendation	69-72	16
6. Settlement	73-74	17



I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (“ODR”) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.¹ At its forty-fourth (Vienna, 27 June-8 July 2011),² forty-fifth (New York, 25 June-6 July 2012),³ forty-sixth (Vienna, 8-26 July 2013)⁴ and forty-seventh (New York, 7-19 July 2014)⁵ sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010), the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat prepare draft generic procedural rules for ODR (the “Rules”), taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions. From its twenty-third (New York, 23-27 May 2011) to twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group has considered the content of the draft Rules.

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

4. At its twenty-eighth (Vienna, 18-22 November 2013) and twenty-ninth (New York, 24-28 March 2014) sessions, the Working Group proceeded to consider the draft text of the track of the Rules that did not end in a binding arbitration phase (“Track II”).⁶

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

A. General remarks

5. At its twenty-ninth session, the Working Group affirmed its wish to ensure that the work it was undertaking took into account current ODR practice and possible future developments (A/CN.9/801, para. 14). It furthermore affirmed that due

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

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

³ *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 79.

⁴ *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 222.

⁵ *Ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, under preparation.

⁶ A/CN.9/795, para. 21.

process, transparency, accountability and impartiality of the actors should form an integral part of the Rules (A/CN.9/801, para. 15). Support was also expressed for the principle of technological neutrality: in other words, that the Rules did not prescribe the type, functionality or methodology of the technology to be used in ODR proceedings (see A/CN.9/801, paras. 19, 21).

6. Moreover, a key point arising out of informal expert consultations with the Secretariat and reported to the Working Group at its twenty-ninth session was that (i) there was a great need to develop fair, transparent dispute resolution processes that would provide access to justice for the broadest spectrum of consumers; and at the same time that (ii) overly prescriptive Rules might hamper that aim by creating a system that was unworkable in practice (A/CN.9/801, para. 29).

7. The Working Group may wish to consider how the Rules — both Track I and Track II — could better incorporate principles of technological neutrality. The Working Group may also wish to consider further the usability of the Rules, and particularly whether the level of prescriptiveness in the Rules would be attractive to users, whilst at the same time balancing the desire to provide for accountability and transparency.

8. The Working Group may also wish to consider further streamlining and simplifying the Rules where appropriate. At its twenty-ninth session, the Working Group made some progress in this respect, agreeing to delete a provision on waiver of liability (formerly article 15: see A/CN.9/801, paras. 159-160) and streamlining the provision on language of proceedings (article 14; see A/CN.9/WG.III/WP.130/Add.1, paras. 4-5, and A/CN.9/801, para. 157). However, there remain provisions of Track II of the Rules that may be considered overly prescriptive both in terms of procedure as well as in confining technological implementation of the Rules.

Communications

9. One area in which the Rules might benefit from consideration as to whether technological neutrality could be improved is in relation to article 3 on communications. For example, at the request of the Working Group, a new definition of “designated electronic address” has been suggested in technologically neutral terms, which aim to encompass all types of electronic addresses (ODR platforms, parties’ e-mail addresses, etc.) that might be used to exchange communications under the Rules. In practice, it is foreseeable that all communication, save perhaps the communication of the notice of the claim to the respondent, could be conducted over a platform rather than by e-mail notifications to the parties. The Working Group may wish to consider whether article 3 on communications, and provisions throughout the Rules, could better reflect that possibility (see also paras. 42 and 48-49 below).

ODR provider, ODR platform and ODR administrator

10. The Working Group considered at its twenty-eighth session whether the Rules accurately reflected the current practice of online dispute resolution in the definitions of the entities involved in the process (A/CN.9/795, para. 51).

11. At the twenty-ninth session of the Working Group, a view was expressed that centralizing the concept of ODR administration in a single term (“ODR

administrator”) would best capture both the diversity of existing practice as well as accommodate future developments in ODR systems (A/CN.9/801, para. 17).

12. At its twenty-eighth and twenty-ninth sessions, the Working Group further raised issues of liability in relation to the respective roles of ODR platform and provider. Specifically, views were expressed that it was important for the Rules to be clear as to which ODR entity (platforms, administrators, and so on) was responsible for which part of the ODR proceedings, and to whom (A/CN.9/795, para. 53; A/CN.9/801, para. 51). The Working Group may wish to consider whether it is the role of procedural rules to create obligations and clear lines of liability for the underlying entities, or whether the Rules ought rather to create a clear procedure addressed to end-users of the Rules.

13. The Working Group ultimately agreed at its twenty-ninth session to define both the term ODR administrator, as well as the term “ODR platform” in the Rules, and to delete all references in the Rules to an “ODR provider” (A/CN.9/801, paras. 52-54). Consequently references to an ODR provider have been replaced throughout the Rules with references to an ODR administrator. The Working Group furthermore decided that the dispute resolution clause ought to specify both the ODR administrator and the ODR platform (A/CN.9/801, para. 134; and see below, para. 15).

14. In light of the discussion at paragraphs 5-8 above, the Working Group may wish to consider whether such an approach sufficiently provides for technological neutrality and the evolution of ODR systems.

Model dispute resolution clause

15. At its twenty-ninth session, the Working Group considered including, as Annex to the Rules, a model dispute resolution clause; delegations were invited to consult with a view to agreeing on such a clause (A/CN.9/801, paras. 135-137). The Working Group has variously suggested that the dispute resolution clause ought to specify (i) both the ODR administrator and ODR platform (A/CN.9/801, para. 134; and above, para. 13); (ii) whether the proceedings are Track I or Track II (see article 1(1)(bis), and para. 31 below); (iii) the electronic address of the ODR platform (A/CN.9/801, para. 61); and (iv) the language of proceedings (A/CN.9/801, para. 150). It is suggested that the Working Group consider further the contents of online dispute resolution clauses for both arbitral and non-arbitral proceedings, and moreover, determine whether any other information ought to be included in article 13.

Legal effect of a recommendation under a Track II ODR proceeding

16. At its twenty-ninth session, the Working Group agreed that a recommendation as provided for in Track II was intended to have a non-binding effect (A/CN.9/801, para. 108).

17. The Working Group agreed that whilst there was nothing to prevent disputing parties from pursuing additional or concurrent judicial remedies alongside an ODR claim under Track II proceedings, that in the interests of transparency it might be advisable for parties to give notice of the initiation of any other proceedings at the outset of ODR proceedings (A/CN.9/801, paras. 23-26).

18. The Working Group at its twenty-ninth session also considered whether the parties could agree to be bound by a recommendation, and the legal effect of such an agreement in different jurisdictions. Specifically, differences of view were expressed in relation to whether an agreement to comply with a recommendation arising out of Track II proceedings would amount to a basis for initiating a claim, or for initiating enforcement proceedings in a national court (A/CN.9/801, paras. 103-104, 108). The Working Group may wish to consider how the law governing such an agreement might be determined.

Guidelines

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

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

Timelines

21. The Working Group agreed at its twenty-ninth session to consider all timelines in the Rules holistically at the conclusion of its deliberations on Track II of the Rules (A/CN.9/801, paras. 165-166). The Working Group may wish to consider including a generic provision in the Rules that would ensure ODR proceedings would conclude within a certain amount of time, but that would give ODR administrators and/or neutrals flexibility within that time frame to set their own timelines for different stages of proceedings.

22. The Working Group may wish to recall in that respect that, subject to a decision made at its twenty-ninth session, a new article 12 has been inserted to require ODR administrators, or, where relevant, neutrals, to notify disputing parties of all deadlines under the Rules (see A/CN.9/801, para. 117; and A/CN.9/WG.III/WP.130/Add.1, para. 9).

B. Notes on draft procedural rules

23. The following preamble and articles 1-17 contained in this note and its addendum pertain only to Track II of the draft Rules.

1. Introductory rules

24. Draft preamble

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

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

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

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

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

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

[“...];”

Remarks

General

25. The Working Group did not consider the draft preamble at its twenty-ninth session. The Working Group may wish to consider whether the Rules would be functional without the documents referred to in paragraph (2) of the preamble. As the legal nature, and addressees, of the Rules differ from those of the ancillary documents listed in paragraph (2), it might be advisable not to attach the documents currently listed in paragraph (2) as an Appendix to the Rules (see A/CN.9/WG.III/WP.127, para. 28, A/CN.9/WG.III/WP.127/Add.1, para. 10 and A/CN.9/WG.III/WP.128, para. 8).

26. Draft article 1 (Scope of application)

“1. The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

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

“2. These Rules shall only apply to claims:

“(a) that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the sales or service contract referred to in paragraph 1; or

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

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

Remarks

General

27. The Rules do not currently set out a time frame in which a claim may be brought, and indeed it may be for the ODR administrator to set such a limitation period. However the Working Group may also wish to consider whether to include a time period in article 1, in order to link the time for bringing an online claim to (i) a certain time after the goods or services have been paid for or delivered; or (ii) a certain time after the alleged breach.⁷ In the alternative, guidelines might set out a suggested period in which claims could be brought in the online system (see A/CN.9/WG.III/WP.127, para. 30).

28. Although procedural rules would typically not prescribe a limitation period, but would rather rely on national law to do so, the Working Group may wish to consider whether the Rules or guidelines should prescribe such a period in order to provide for procedural clarity for parties as well as ODR administrators. Such a period would not affect or override any period for bringing claims specified in national law (see A/CN.9/WG.III/WP.127, para. 31).

Paragraph (1)

29. At its twenty-ninth session, the Working Group agreed to replace the phrase “transaction conducted by use of electronic communications” with the phrase “sales or service contract concluded using electronic communications”. The Working Group may wish to consider in more detail the implications of including service contracts within the scope of the Rules.

Paragraph (1)(bis)

30. At its twenty-ninth session, the Working Group agreed that paragraph (1)(bis) would be amended to read as follows: “Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the ‘dispute resolution clause’)” (A/CN.9/801, para. 44). The Working Group may wish to note that the word “above” has been deleted from the first sentence of that proposal as inconsistent with the drafting style in other provisions. Furthermore, the term “the Rules” has been substituted for “these Rules” in the second sentence, for the purpose of achieving internal consistency within the paragraph.

⁷ The United Nations Convention on the Limitation Period in the International Sale of Goods (1974), which does not apply to sales of goods for personal or household use, sets out principles for prescription periods based on the date on which the claim accrues (article 9).

31. In relation to the phrase “and whether Track I or Track II of the Rules apply to that dispute”, the Working Group may wish to consider this language in the context of its consideration of a model dispute resolution clause (see above, para. 15).

Paragraph (2)

32. The Working Group agreed at its twenty-eighth session that the Rules ought to include an exhaustive list of the type of claims that may be brought and that the phrase “[made] at the time of the transaction” at the end of subparagraph (a) ought to be deleted as restricting excessively the basis on which a claim may be brought (A/CN.9/795, para. 41). That language, with modifications, was re-inserted by the Secretariat (“in conformity with the agreement made at the time of transaction”) to accord more closely with the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (“CISG”) (A/CN.9/WG.III/WP.127, para. 33), and pursuant to the request of the Working Group to replace the phrase “in accordance with the agreement” (A/CN.9/795, para. 42). However the words “[made] at the time of the transaction” at the end of that phrase have been deleted from that phrase at the request of the Working Group (A/CN.9/801, para. 45).

33. Paragraph (2) has consequently been amended to refer to “the sales or service contract referred to in paragraph 1”, rather than to “the agreement”, in order to clarify the contract to which paragraph (2) refers.

34. The Working Group may wish to have regard to the discussion in relation to the CISG, which does not apply to consumer contracts, but in relation to which it might wish to retain consistency in the Rules (see A/CN.9/WG.III/WP.127, paras. 33-36).

35. Specifically, the Working Group may wish to consider whether a similar approach to that set out in articles 31, and 54-60 of the CISG ought to be taken in relation to paragraph (2). In that respect, the Working Group may wish to consider amending paragraph (2)(a) as follows: “that goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, not provided in conformity with the agreement [made at the time of transaction], and/or that documents related to the goods were not provided”; and amending paragraph (2)(b) as follows “that full payment was not received for goods or services provided and/or the purchaser did not take delivery of the goods”.

36. 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 administrator’ means the entity [specified in the dispute resolution clause] that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform.

“3. ‘ODR platform’ means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules.

Parties

“4. ‘Claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.

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

Neutral

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

Communication

“7. ‘Communication’ means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.

“8. ‘[Designated] electronic address’ means an information system, or portion thereof, [designated] by the parties to the online dispute resolution process to exchange communications related to that process.”

*Remarks**Paragraphs (2) and (3)*

37. At its twenty-ninth session, the Working Group agreed to include definitions of the terms “ODR administrator” and “ODR platform” in the Rules (A/CN.9/801, paras. 49-54).

38. In relation to paragraph (2), a suggestion was made at the twenty-ninth session of the Working Group to create a link between the definition of an ODR administrator, and draft article 13 of the Rules, which specified the entity to be named in the dispute resolution clause. Specific wording in relation to that paragraph was proposed as follows “‘ODR administrator’ means the entity that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform, and which is specified in the dispute resolution clause” (A/CN.9/801, para. 53).

39. Slightly different wording has been proposed in paragraph 36 above in order to enhance clarity of drafting. In addition, the Working Group may wish to consider whether an explicit link to the dispute resolution clause is necessary or desirable in this provision, the purpose of which is to provide a definition of an ODR administrator in the context of the Rules. Article 13 sets out a discrete requirement for the contents of the dispute resolution clause (see also above, para. 15).

Paragraph (4)

40. The Working Group may wish to consider deleting the phrase “by issuing a notice”, in order to preserve, to the extent possible, the stand-alone nature of definitions in article 2.

Paragraph (7)

41. At its twenty-ninth session the Working Group agreed to simplify the definition of “communication” so that it would both (i) be defined as broadly as possible to capture any form of communication that may take place under the Rules; and (ii) ensure that all communication under the Rules would be electronic in form (A/CN.9/801, para. 56; see also A/CN.9/WG.III/WP.127, para. 44). The definition agreed upon at that session, as contained in paragraph (7) of article 2, also conforms with the definitions of communication and electronic communication in the United Nations Convention on the Use of Electronic Communications in International Contracts (“Electronic Communications Convention”). The phrase “for the purposes of these Rules” has been deleted as redundant with the chapeau.

Paragraph (8)

42. The Working Group agreed at its twenty-ninth session that the Rules ought to contain a definition of the term “electronic address” or “designated electronic address” (A/CN.9/801, paras. 57-59), taking into account existing usage in UNCITRAL texts. Although neither the Electronic Communications Convention nor other standards such as the ICC Uniform Customs and Practice for Documentary Credits for Electronic Presentation (also known as eUCP) define the notion of “electronic address”, in those standards the underlying understanding is that that term refers to an information system (as defined in article 2(f) of the UNCITRAL Model Law on Electronic Commerce) or portion thereof used by a party. A definition of “designated electronic address” has been inserted in article 2 that is intended to provide a technologically neutral manner of expressing this concept in the context of the Rules. In relation to the retention of the word “designated”, see paragraphs 46, and 56-57 below.

43. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform shall be designated in the dispute resolution clause. Each party shall [designate][provide the ODR administrator with] [a designated] electronic address.

“2. A communication shall be deemed to have been received when, following communication to the ODR administrator in accordance with paragraph 1, the ODR administrator notifies the parties of the availability thereof in accordance with paragraph 4. [The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.]

“3. The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral [at their electronic addresses].

“4. The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform.

“5. The ODR administrator 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 (1)

44. The Working Group may wish to consider the mechanism set out in paragraph (1) further, and specifically, whether the intention is that communications are sent “... to the ODR administrator” or simply that all communications are sent “via the ODR platform”. If the former, the Working Group may wish to clarify further the intended role of an administrator and whether the existing language in the Rules is sufficiently technologically neutral and best accommodates the respective roles of platform and administrator.

45. The second sentence of paragraph (1) has been slightly modified to improve clarity of drafting. Without the modifications, second sentence of paragraph (1) would have read as follows: “The electronic address of the ODR platform to which documents must be submitted shall be specified in the dispute resolution clause.”

46. At its twenty-ninth session, the Working Group requested that the following sentence be added to the end of paragraph (1): “Each party shall provide the ODR administrator with an electronic address to be used for communications” (A/CN.9/801, paras. 61, 62 and 64). It was said that such an insertion would enable the deletion of two paragraphs and result in a more streamlined draft article 3. Specifically, it was said that that language would accommodate the parties’ ability to provide updated electronic addresses throughout the proceedings. The Working Group might wish to consider in this respect: (i) the different types of address that might be designated for the purpose (e.g. an inbox on the platform itself; an e-mail address, etc.), the term “designated electronic address” providing a technologically neutral term that ought to provide for such different types of address; and (ii) that when considering the time at which an electronic address needs to be first designated, a respondent can only receive the notice if it has designated its electronic address before proceedings have commenced. The Working Group might also wish to consider whether the ability of parties to provide updated designated electronic addresses might be made explicit in the Rules.

47. In addition, alternative language has been proposed in relation to the last sentence of paragraph (1), to make clearer the fact that when a party provides an electronic address, in fact it is designating the electronic address to be used for communications under the Rules.

Paragraph (2)

48. Paragraph (2) introduces a deeming rule on the time of receipt of the electronic communications. The current text of draft paragraph (2) refers to “notification of the availability of the communication”. The Working Group may wish to consider how this might work in practice. For example, should the designated electronic address of one of the parties be part of the same information system as ODR platform itself, (in other words, an “inbox” on the platform), under article (2), the communication and notification of its availability would in practice be sent to the same designated electronic address. If the Working Group intends that a notification is sent to a different designated electronic address, the text as drafted does not make that clear.

49. Consequent to those concerns, proposed text based on Article 10 of the Electronic Communications Convention has been included in square brackets. Although the Working Group decided at its twenty-fifth session to delete similar language (A/CN.9/744, para. 73; see also A/CN.9/WG.III/WP.119, paras. 50-52), it is proposed that it might wish to reconsider inserting such language, which may better protect the recipient in cases in which the communication has been sent, but may not be retrieved by the addressee due to reasons outside its control (e.g., firewalls, spam filters, viruses, etc.). Moreover such language would obviate the need to have a deemed receipt for two different communications — the communication proper and the notification of the communication. In other words, only one communication would be sent and it would be deemed received when it is possible for the recipient to retrieve it.

Paragraph (3)

50. Paragraph (3) has been redrafted according to a decision of the Working Group at its twenty-ninth session (A/CN.9/801, para. 66). The words “at their electronic addresses” have been placed in square brackets pending further discussion of the definition of designated electronic address and of the intended process of receipt of communications and an additional notification of such receipt (see paras. 48-49 above).

Paragraph (5)

51. The Working Group may wish to consider, in light of its decision at its twenty-ninth session to include a general provision in the Rules to reflect that the neutral or ODR administrator should notify parties of all relevant deadlines during the course of proceedings (A/CN.9/801, para. 117), inserted as article 12, whether paragraph (5) remains necessary.

2. Commencement

52. Draft article 4A (Notice)

“1. The claimant shall communicate to the ODR administrator a notice in accordance with paragraph 4.

“2. The ODR administrator 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 administrator of the notice pursuant to paragraph 1, the ODR administrator notifies the parties of the availability of the notice at the ODR platform.

“4. The notice shall include:

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

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

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

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

“(e) the location of the claimant;

“(f) the claimant’s preferred language of proceedings;

“(g) the signature or other means of identification and authentication of the claimant and/or the claimant’s representative.

“5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim, and also information in relation to the pursuit of other legal remedies.”

Remarks

General

53. At its twenty-ninth session, the Working Group made a number of amendments in relation to article 4A. Notably, the Working Group suggested that initiating ODR proceedings under Track II of the Rules was not a bar to initiating concurrent judicial proceedings. However, the Working Group agreed that the Rules should provide that a disputing party ought to notify the other disputing party if it was pursuing other legal remedies (para. (5)) (see A/CN.9/801, paras. 23-26, 78, 83, 157).

54. In line with its decision to delete the term “ODR provider”, that phrase has been replaced in article 4A with the term “ODR administrator”.

55. The phrase “the form contained in”, which referred to the information for inclusion in the notice set out in paragraph (4), has been deleted in paragraph (1) to improve clarity of drafting.

Paragraph (4)

Designated electronic address

56. At its twenty-ninth session, the Working Group requested the deletion of the word “designated” before “electronic address” in paragraphs (a) and (b). The term has been retained in paragraph (a) in square brackets to indicate that if a claimant provides an electronic address it is in practice designating one. However, the Working Group may wish to consider whether the designation of an electronic address should be explicitly provided for in this article, when the presumptive intention is that an electronic address must be designated (at least on the part of the respondent) prior to the commencement of proceedings, and may be updated (by any party) at any time (see above, para. 46).

57. In relation subparagraph (b), the term has likewise been retained but the Working Group may wish to consider further the inclusion of the term “[designated] electronic address”, or even simply to which electronic address the claimant ought to refer; in particular, the Working Group may wish to consider whether a statement by the claimant under subparagraph (b) in the notice would amount to the designation of the electronic address of the respondent, and whether such designation would be desirable (see also below, para. 61).

Location of the claimant

58. The Working Group may wish to consider whether “the location of the claimant” in paragraph (4)(e) is a useful metric; and if so, whether the term “location” accurately serves the purpose it aims to achieve.

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

“1. The respondent shall communicate to the ODR administrator a response to the notice in accordance with paragraph 2 within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform.

“2. The response shall include:

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

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

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

“(d) the location of the respondent;

“(e) whether the respondent agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(f), or whether another language of proceedings is preferred;

“(f) the signature or other means of identification and authentication of the respondent and/or the respondent’s representative.

“3. The respondent may provide, at the time it submits its response, any other relevant information, including information in support of its response, and also information in relation to the pursuit of other legal remedies.”

*Remarks**General*

60. Consequential changes reflecting the modifications to draft article 4A have been made in draft article 4B (A/CN.9/801, para. 85).

Paragraph (2)

61. In relation to subparagraph (a), the word “designated” has been placed in square brackets. In relation to the designation of an electronic address of a respondent, the Working Group may wish to consider the desirability that, as set out in paragraph 46 above, a respondent can only receive the notice if it has designated its electronic address before proceedings have commenced (see also para. 57 above).

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

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

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

Remarks

63. At its twenty-ninth session, the Working Group agreed to retain draft article 4C as set out in paragraph 62 above.

3. Negotiation

64. Draft article 5 (Negotiation)

Commencement of the negotiation stage

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

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

Commencement of the facilitated settlement stage

“3. If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 2 within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence.

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

Extension of time

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

Remarks

65. At its twenty-ninth session, the Working Group agreed that guidelines to the Rules ought to indicate, in relation to a negotiation stage, that an ODR administrator should give a description to parties of what types of technical programmes would be used and the way negotiation would be conducted (A/CN.9/801, paras. 88-89).

4. Facilitated settlement

66. Draft article 6 (Facilitated settlement)

“1. Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)].

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

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

Remarks

Paragraph (1)

67. At its twenty-ninth session, the Working Group requested the Secretariat to insert language in draft article 6 to ensure that the ODR administrator would be required to give notice to the disputing parties of the ten-day deadline specified in paragraph (3) (A/CN.9/801, para. 92). That language has been inserted in paragraph (1) in square brackets.

68. The Working Group also requested that the Secretariat insert a generic provision to reflect that neutral or ODR administrator should notify all parties of all relevant deadlines during proceedings (A/CN.9/801, para. 117). In light of that provision, inserted as a new article 12, the Working Group may wish to consider whether including specific language in paragraph (1) to this effect is necessary or desirable.

5. Recommendation

69. Draft article 7 (Recommendation by a neutral)

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

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

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

Option 1

“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 administrator may introduce the use of trustmarks or other methods to identify compliance with recommendations.]”

Option 2

“4. The recommendation shall not be binding on the parties. However, a party or both parties may commit to comply with the recommendation. The ODR administrator may introduce mechanisms to encourage compliance with the recommendation.”

*Remarks**Paragraph (4)*

70. At its twenty-ninth session, the Working Group agreed that the recommendation provided for in article 7 of Track II proceedings (Recommendation by a neutral) was not intended to have a binding effect (A/CN.9/801, para. 108; see also A/CN.9/769, para. 56). The Working Group expressed differing views at that session as to the legal nature of an agreement by parties to a dispute to comply with a recommendation, and also of the desirability and timing of such an agreement (A/CN.9/801, paras. 95-108).

71. At its twenty-ninth session, the Working Group agreed to include two options in relation to paragraph (4).

72. The Working Group may wish to consider whether providing instructions as to what an ODR administrator may or may not do to encourage compliance is helpful or necessary in the context of procedural rules, or whether that guidance could be better placed in guidelines (see also A/CN.9/WG.III/WP.127, para 87; A/CN.9/WG.III/WP.128, para. 47). It may further wish to consider, in relation to option 2, whether the term “commit[ment] to comply” is sufficiently clear in legal or procedural terms. In any event, the Working Group may wish to recall that it left the matter of whether “mechanisms” in relation to compliance ought to be addressed in the Rules open for further consideration (A/CN.9/801, para. 108).

6. Settlement**73. Draft article 8 (Settlement)**

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

*Remarks**General*

74. Pursuant to the decision of the Working Group that settlement ought to be provided for at any time during ODR proceedings, a discrete provision on settlement has been included in draft article 8 (A/CN.9/795, para. 121-122; A/CN.9/801, para. 108).