



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

Addendum

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

B. Notes on draft procedural rules

7. Neutral

1. Draft article 9 (Appointment of neutral)

“1. The ODR administrator shall appoint the neutral promptly following commencement of the facilitated settlement stage of proceedings. Upon appointment of the neutral, the ODR administrator shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

“2. The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently and in accordance with the time limits in the Rules.

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

Objections to the appointment of a neutral

“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.

“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 administrator. 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 administrator 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 paragraph 4(ii).

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

“7. In the event both parties object to the appointment of a neutral under paragraph 4(i) or 4(ii), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR administrator, notwithstanding the number of challenges that has been made by either party.

Objections to provision of information

“8. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR administrator 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 administrator shall convey the full set of existing information on the ODR platform to the neutral.

Number of neutrals

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

*Remarks**General*

2. The Working Group will recall that it has consistently agreed that the deadlines throughout the Rules would be considered in their entirety at a later stage (A/CN.9/801, paras. 111, 165-166). A view was also expressed at the twenty-ninth session of the Working Group that article 9 could be further streamlined, particularly in relation to deadlines specified (A/CN.9/801, para. 111).

Paragraph (1)

3. At its twenty-ninth session, the Working Group agreed to consider further the matter of how to enunciate in the Rules the types of information that ought to be provided to disputing parties in relation to the neutral (A/CN.9/801, para. 114).

4. **Draft article 10 (Resignation or replacement of neutral)**

“If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR administrator shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.”

5. At its twenty-ninth session, the Working Group agreed to retain article 10 as set out in paragraph 4 above (A/CN.9/801, para. 119). The phrase “ODR administrator” has been inserted in lieu of the phrase “ODR provider through the ODR platform”, to indicate the entity that shall appoint a replacement neutral.

6. **Draft article 11 (Power of the neutral)**

“1. Subject to the Rules, 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 9, paragraph 8, the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings.

“3. At any time during the proceedings the neutral may 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, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules.”

Remarks

7. At its twenty-ninth session, the Working Group agreed to delete a *competence-competence* provision in relation to neutrals in draft article 11, on the basis that such provision would not be appropriate for simple, streamlined Rules (A/CN.9/801, para. 128).

General

Paragraph (4)

8. At its twenty-ninth session, the Working Group agreed to move the following sentence from article 3(4) to article 11: “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” (A/CN.9/801, paras. 65, 129). The Working Group agreed to modify that sentence and paragraph (4) reflects those modifications (see A/CN.9/801, para. 131).

8. General provisions

9. Draft article 12 — Deadlines

“The ODR administrator, or, if relevant, the neutral, shall notify parties of all relevant deadlines during the course of proceedings.”

Remarks

10. At its twenty-ninth session, the Working Group requested the Secretariat to insert 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). Article 12 has been inserted in this regard. It is notable that while a neutral might retain some discretion to set or notify parties of deadlines, the ODR administrator would have to fulfil that function prior to the appointment of such a neutral.

11. Draft article 13 (Dispute resolution clause)

“The ODR platform and ODR administrator shall be specified in the dispute resolution clause.”

Remarks

12. The Working Group considered at its twenty-ninth session that for reasons of transparency and accountability, both the ODR platform and ODR administrator ought to be specified in the dispute resolution clause (A/CN.9/801, para. 134). The

title of draft article 13 has been modified (formerly “ODR provider”) to reflect this change.

13. In addition, the Working Group considered that a model dispute resolution clause might be annexed to the Rules. The Working Group was invited to consult with a view to agreeing upon a model dispute resolution clause which could be considered at a later stage (A/CN.9/801, paras. 135-137; and A/CN.9/WG.III/WP.130, para. 15).

14. The Working Group may wish to consider how prescriptive a dispute resolution clause ought to be, and in particular, whether such an approach is sufficiently technologically neutral (see A/CN.9/WG.III/WP.130, paras. 5-8; 15).

15. Draft article 14 (Language of proceedings)

“The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)][the offer for ODR proceedings accepted by the buyer]. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select.”

Remarks

16. At its twenty-ninth session, the Working Group amended and streamlined the provision in the Rules addressing language of proceedings (A/CN.9/801, para. 157). One amendment introduced the phrase “the offer for ODR proceedings accepted by the buyer”; but because what constitutes offer and acceptance of ODR proceedings have not been defined in the Rules, such a phrase introduces a lack of clarity and an increased complexity, raising questions such as when an offer for proceedings has been made, and when acceptance has been proffered. Moreover, the term “buyer” has not been used in the Rules and lacks consistency with other provisions. The Working Group may consequently wish to consider alternative language, such as: “The ODR proceedings shall take place in the language of [the agreement to submit disputes to ODR under the Rules in article 1(1)] ...”, inserted in square brackets as an alternative.

17. Draft article 15 (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 administrator.”

Remarks

18. The Working Group agreed at its twenty-ninth session to retain the Rules’ provision on representation as set out in paragraph 17 above. The Working Group may wish to consider whether representation is necessary or appropriate, particularly in Track II proceedings.

19. **Draft article 16 (Costs)**

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

Remarks

20. Draft article 16 reflects a principle often seen in arbitration proceedings, whereby the Rules prevent a neutral from awarding the costs incurred in proceedings by the successful disputing party to be paid by the unsuccessful disputing party. The Working Group recorded consensus at its twenty-ninth session that the “winning” party in ODR proceedings ought not to be able to reclaim its costs from the losing party (A/CN.9/801, para. 163).

21. However, the Working Group may wish to consider whether a costs provision reflecting such a principle is necessary in Track II proceedings.

22. **Draft article 17 (Fees of ODR proceedings)**

“The fees of ODR proceedings shall be reasonable in amount, and communicated to the parties in advance of proceedings.”

Remarks

23. At its twenty-ninth session, the Working Group agreed that the Rules could address in a new provision the need for fees levied by ODR administrators or platforms to be reasonable (A/CN.9/801, para. 164).

24. The Working Group may wish to note that the UNCITRAL Arbitration Rules as revised in 2010 contain a detailed provision on fees and expenses of arbitrators. However, the new draft article 17 in paragraph 22 above specifically avoids referring to the fees charged by a specific ODR entity (administrator, platform or neutral), in order to retain both technological neutrality as well as flexibility of practice in general.
