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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.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).

4. At its twenty-seventh session (New York, 20-24 May 2013), the Working Group considered a proposal to implement a two-track system, one track of which would end in a binding arbitration phase (“Track I”), and one track of which would not (“Track II”). It also considered the draft text of Track I of the Rules, as contained in document A/CN.9/WG.III/WP.119 and its addendum.

5. 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 Track II of the Rules, contained in document A/CN.9/WG.III/WP.123/Add.1, and document A/CN.9/WG.III/WP.127 and its addendum, respectively.

6. At its forty-seventh session, the Commission agreed that the Working Group should at its thirtieth session address the text of Track I of the Rules, as well as the issues identified in paragraph 222 of the report of the forty-sixth session of the Commission,⁶ some of which were further addressed in document A/CN.9/WG.III/WP.125, a proposal by the Governments of Colombia, Honduras, Kenya and the United States of America, and should continue to achieve

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), para. 140.

⁶ *Ibid.*, *Sixty-eighth Session, Supplement No. 17* (A/68/17).

practical solutions to open questions.⁷ Accordingly, at its thirtieth session, the Working Group considered the text of Track I of the Rules contained in document A/CN.9/WG.III/WP.131, and heard various proposals thereon.

7. This note sets out a revised draft text for Track I of the Rules based on the draft before the Working Group at its thirtieth session in document A/CN.9/WG.III/WP.131, as proposed to be amended by the third proposal submitted at the that session (A/CN.9/827, paras. 58-80). For the ease of the reader, the remarks explaining the derivation of the draft in A/CN.9/WG.III/WP.131 have not been repeated, save footnotes that indicate where decisions of the Working Group remain outstanding. The draft text below also sets out the alternative formulations in the first, second and fourth proposals regarding Track I of the Rules after the formulation in the third proposal (see, further, A/CN.9/827, paras. 58-69 and 75-102).

8. The Working Group reported at that session that despite strenuous efforts from all participants to come to consensus, fundamental differences between States that allowed binding pre-dispute agreements to arbitrate and others remained, and that further progress on the Rules would require the Working Group to find ways to bridge those differences (A/CN.9/827, paras. 15, 37 and 69). The draft text for Track I of the Rules is therefore followed by a summary of the issues that give rise to the differences concerned (see A/CN.9/WG.III/WP.133/Add.1), which the Working Group may wish to use to assess the extent to which differences remain and can be bridged, and so to report on its progress to the Commission.

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

A. General remarks

9. In paragraph 8 of A/CN.9/WG.III/WP.131, the Working Group was invited to consider the extent to which Track I can or ought to reflect the same provisions as Track II, diverging only at the final stage of proceedings. The discussions of the Working Group at the thirtieth session indicated that this issue would be considered at a future time.

Model dispute resolution clause

10. The Working Group heard a proposal to include, in transactions to be subject to the Rules, a model dispute resolution clause in the following terms:

*“Subject to the provisions of Article 1(a) of the UNCITRAL ODR Track I Rules, any dispute, controversy or claim arising hereunder and within the scope of the UNCITRAL ODR Track I Rules providing for a dispute resolution process ending in a binding arbitration, shall be settled by arbitration in accordance with the UNCITRAL ODR Track I Rules presently in force”.*⁸

⁷ Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 138-140.

⁸ A/CN.9/827, para. 64 (part of the second proposal). The proponents also suggested an equivalent change for Track II of the Rules, as follows: “Where, in the event of a dispute arising

B. Draft preamble

11. *“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 designed to provide an easy, fast, cost-effective procedure for dispute resolution in low-value, high-volume electronic commerce transactions.]*
- [3. The Rules are designed to create a safe, predictable legal environment for transactions, to ensure traders’ confidence in the online market.]*
- [4. The Rules are designed to be able to facilitate micro, small and medium-sized enterprises’ access to international markets through electronic commerce and mobile electronic commerce.]⁹*
- [“5. 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;]*
- [...].”*

C. Draft procedural rules — Track I¹⁰

1. Introductory rules

12. Draft article 1 (Scope of application)

Paragraph 1

“1(a). The Rules shall apply where the parties to a sales or service contract concluded using 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.

hereunder and within the scope of the UNCITRAL ODR Track II Rules providing for a dispute resolution process ending in a non-binding recommendation, the parties wish to seek an amicable settlement of that dispute, the dispute shall be referred for negotiation, and in the event that negotiation fails, facilitated settlement, in accordance with the UNCITRAL ODR Track II Rules presently in force.”

⁹ Regarding draft paragraphs 2, 3 and 4, see the third proposal, “The Purpose and Principles of Drafting”, A/CN.9/827, para. 72.

¹⁰ For the equivalent procedural rules for Track II, see A/CN.9/WG.III/WP.130. For a discussion of streaming mechanisms that would place purchasers on either Track, see A/CN.9/WG.III/WP.130.

[1(b). Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer¹¹ that disputes relating to the transaction and falling within the scope of the Rules will be exclusively 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”).”]

Alternative formulations for paragraph 1(b)

(i) Second proposal (A/CN.9/827, para. 63)

“1(b). These Rules shall not apply where one party to the transaction is a consumer from a State listed in Annex X, unless the Rules are agreed after the dispute has arisen. For buyers who are located in certain States at the time of the transaction, a binding arbitration agreement capable of resulting in an enforceable award requires that the agreement to use the Track I Rules take place after the dispute has arisen.”

Accompanied by a footnote to read: “Pre-dispute arbitration agreements with certain buyers might not be considered valid under applicable national law in some jurisdictions, and consequently, awards arising out of such agreements might not be enforceable against a purchaser in those jurisdictions”.]

(ii) Fourth proposal (A/CN.9/827, para. 75)

“1(b). Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer (a) that disputes relating to the transaction and falling within the scope of the Rules, will be exclusively 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”) and (b) for buyers whose billing address is in a state listed in the designated website, that in certain states, including the state of the buyer’s billing address, a binding arbitration agreement capable of resulting in an enforceable award, requires that the agreement to use Track I take place after the dispute has arisen.”¹²

Accompanied by a footnote to read: “Pre-dispute arbitration agreements with certain buyers might not be considered valid under applicable national law in some jurisdictions, and consequently, awards arising out of such agreements might not be enforceable against a purchaser in those jurisdictions”.]

Paragraph 2

“2. These Rules shall only apply to claims:

¹¹ The more recent proposals have included the term “buyer”. In A/CN.9/WG.III/WP.131, para. 57, the Working Group’s attention was drawn to the fact that the term “buyer” had not been used in the Rules and lacked consistency with other provisions. The Working Group may therefore wish to consider the use of this term in the Rules: it appears in draft Articles 1(a), 1(b), and 15.

¹² It was also proposed that this paragraph should be accompanied by guidance for ODR administrators to check the purchaser’s location, relying on mailing address or billing address, and advise vendors that they should consider the appropriateness of pursuing binding arbitration accordingly (A/CN.9/827, para. 75).

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

(b) *That full payment was not received for goods or services provided.*

Paragraph 3

[“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.”]

Alternative formulation for paragraph 3 (second proposal, A/CN.9/827, para. 68)

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

13. 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.

[TBD]

[“5a. ‘Consumer’ means a natural person who is acting primarily for personal, family or household purposes.”]

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.”

14. 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 arbitration stage of proceedings.”

2. Commencement

15. Draft article 4A (Notice)

“1. The claimant shall communicate to the ODR administrator a notice in accordance with 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 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) 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 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.”]¹³

16. 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. [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. 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) 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 the respondent 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;]

¹³ The Working Group may wish to note that paragraph (5) has been inserted in square brackets for its consideration, and reflects a modification made to article 4A in Track II proceedings. Should the Working Group determine that paragraph (5) ought to be retained, it is suggested to delete the second sentence of paragraph (1) as redundant. In any event, the inclusion of subparagraph (e) and the intended legal consequences of that subparagraph might warrant additional consideration by the Working Group; a similar provision was deleted in respect of Track II proceedings.

“[(g) 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 notice, any other relevant information, including information in support of its response, and also information in relation to the pursuit of other legal remedies.”]¹⁴

17. [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).”]

3. Negotiation

18. 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 does 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 3, 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 submission of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence.

¹⁴ A new paragraph (3) has been inserted in square brackets, and reflects a modification made to article 4B in Track II proceedings. Similar to the discussion set out in the preceding footnote, the Working Group might wish to review this provision having regard also to the second sentence of paragraph (1) and paragraph (2)(d).

Extension of time

“5. 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.”¹⁵

4. Facilitated settlement**19. 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 ODR proceedings shall move to the final stage of proceedings pursuant to draft article 7(Guidance of ODR Administrator).”

20. Draft article 6 bis (fourth proposal, A/CN.9/827, para. 76)

“1. If the dispute resolution clause provides that Track I of the Rules applies and the buyer’s billing address is not in a state listed in the designated website, or if it provides that Track II of the Rules applies, then the proceedings shall move to the applicable track pursuant to articles [...].

2. If the dispute resolution clause provides that Track I of the Rules applies, and the buyer’s billing address is in a State listed in the designated website, the ODR administrator may suggest measures to address the situation.”

5. Arbitration**21. Draft article 7 (Arbitration)**

“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 evaluate the dispute based on the information submitted by the parties[, and having regard to the terms of the agreement,]

¹⁵ In relation to paragraph (5), the Working Group may wish to recall that in Track II proceedings, it retained the phrase “for reaching settlement” and deleted the phrase “for the filing of the response”. It is suggested that a similar approach could be adopted in Track I.

and shall render an award. The ODR administrator shall communicate the award to the parties and the award shall be recorded on the ODR platform.

“4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.

“4 bis. The requirement in paragraph 3 for:

(a) The award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and

(b) The award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.

“5. The award shall state brief grounds upon which it is based.

“6. The award shall be rendered promptly, preferably within ten calendar days [from a specified point in proceedings].

“6. bis. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

“7. The award shall be final and binding on the parties. The parties shall carry out the award without delay.

“8. In all cases, the neutral shall decide [ex aequo et bono], 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].”

22. [Draft Guidance of ODR Administrator regarding article 7 (proposed as part of the third proposal, A/CN.9/827, para. 72)]

“If the Neutral has not succeeded in facilitating a settlement at the expiry of the facilitated settlement stage, the ODR administrator shall, on the basis of information submitted by the parties, present to the parties the following options, and ensure that they are aware of the legal consequences of the choice of each track:

(1) Arbitration (as referred to in draft article 7 of Track I);

(2) The Neutral’s recommendation (as referred to in Track II);

(3) ...”]

23. [Draft article 7 (bis) Correction of award]

“Within [five (5)] calendar days [after the receipt of the award], a party, with notice to the other party, may request the neutral to correct in the 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 [including a brief statement of reasons therefor] within [two (2)] calendar days of receipt of the request. Such corrections [shall be recorded on the ODR platform and] shall form part of

the award. [The neutral may within [five (5)] calendar days after the communication of the award make such corrections on its own initiative.]]”¹⁶

24. [Draft article 7 (ter) Internal review mechanism]

“1. Either party may request annulment of the award within ten (10) calendar days of the communication of the award, by application to the ODR administrator; on the grounds that (a) the place of arbitration unfairly prejudiced that party; or (b) there has been a serious departure from a fundamental rule of procedure prejudicing that party’s right to due process.

“2. The ODR administrator shall appoint a neutral unaffiliated with the ODR proceedings the subject of the request to assess the request within five (5) calendar days. Once the neutral is appointed, the ODR administrator shall notify the parties of such appointment.

“3. That neutral shall render a final decision on the request for annulment within seven (7) calendar days of his or her appointment. If the award is annulled the ODR proceedings shall, at the request of either party, be submitted to a new neutral appointed in accordance with article 6.”]

6. Settlement

25. 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.”

7. Neutral

26. 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.

¹⁶ The Working Group may wish to consider replacing the language “after the receipt of the award” with the phrase “after the award is communicated to the parties”, in order to better reflect the language in article 7(3). The Working Group may also wish further to consider linking this language to the provisions on receipt and deemed receipt in article 3.

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 subparagraph 4(ii) above, 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.”

27. 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.”

28. 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[, 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.]”¹⁷

“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. 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.”

8. General provisions

29. [Draft article 12 — Deadlines

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

30. Draft article 13 (Dispute resolution clause)

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

31. Draft article 14 (Place of proceedings)

“[The ODR administrator shall select the place of proceedings, such place to be selected from among the list set out in the Appendix to [Track I of] these Rules.]”¹⁸

32. Draft article 15 (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

¹⁷ It is suggested that, in accordance with changes made in relation to Track II proceedings, the square bracketed text in paragraph (2) be deleted.

¹⁸ Article 14 (formerly article 10) has been relocated from the subheading “Arbitration” to “General Provisions”. Article 14 has not yet been considered by the Working Group.

ODR proceedings accepted by the buyer].¹⁹ 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.”

33. Draft article 16 (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.”

34. Draft article 17 (Exclusion of liability)

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

35. Draft article 18 (Costs)

“The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.”²⁰

36. [Draft article 17 (Fees of ODR proceedings)]

“The fees of ODR proceedings shall be reasonable in amount, and made available to the parties in advance of proceedings.”²¹

37. [Annex X/list on designated website]

[List of jurisdictions which would opt in to inclusion in such an Annex or listing on designated website]

¹⁹ The phrase “the offer for ODR proceedings” is not a defined term, and introduces a lack of clarity and an increased complexity in the draft, raising questions such as when an offer for proceedings has been made, and when acceptance has been proffered. 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 (see A/CN.9/WG.III/WP.130/Add.1, para. 16). See, also, footnote 10 above regarding the use of the term “buyer”.

²⁰ In its consideration of the text of Track II proceedings, the Working Group agreed to use the word “decision” rather than “award” in the provision on costs: A/CN.9/801, paragraphs 161-163. The Working Group has not yet considered article 18 (formerly article 15) in relation to Track I proceedings.

²¹ 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).