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## **Online dispute resolution for cross-border electronic commerce transactions**

### **Note by the Secretariat**

### **Notes on a non-binding descriptive document reflecting elements and principles of an ODR process**

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## I. Introduction

1. At the Commission's forty-eighth session (Vienna, 29 June-16 July 2015), it was agreed that any future text should build upon the progress achieved in the context of prior Working Group sessions and the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process.<sup>1</sup>

2. This note consequently sets out (a) the principles of an online dispute resolution process on which the Working Group has expressed agreement as contained in the earlier drafts of ODR Rules considered by the Working Group; (b) the areas of the ODR process on which the Working Group has achieved consensus; and identifies (c) areas on which the Working Group may wish to confirm consensus.

## II. Principles

3. The Working Group has consistently emphasized certain principles that underpin the content of the Rules, namely fairness, transparency, due process and accountability.<sup>2</sup>

4. The Working Group has revisited on multiple occasions the underlying purpose of its work in drafting procedural rules for ODR arising out of cross-border e-commerce transactions, namely to address the fact that traditional judicial mechanisms for legal recourse do not offer an adequate solution for cross-border e-commerce disputes, and that a global online dispute resolution process could provide a solution.<sup>3</sup>

5. It has also been generally agreed that such a global system ought to be simple, fast and efficient, in order to be able to be used in a "real world setting",<sup>4</sup> including that it should not impose costs,<sup>5</sup> delays and burdens that are disproportionate to the economic value at stake.<sup>6</sup>

6. The Working Group has also observed the need for a global standard to accommodate evolution of ODR practice.<sup>7</sup> It has been generally agreed by the Working Group that in practice procedural rules for ODR would not necessarily be administered word for word by ODR administrators, but rather would be adapted,

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<sup>1</sup> *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 352.

<sup>2</sup> See in particular A/CN.9/801, paras. 15 and 29; A/CN.9/WG.III/WP.128, paras. 17 et seq.; as well as submissions by the Government of Canada: A/CN.9/WG.III/WP.114; and the CILE: A/CN.9/WG.III/WP.115.

<sup>3</sup> The original mandate to the Working Group was based, inter alia, on this notion: see A/65/17, para. 254.

<sup>4</sup> A/CN.9/801, para.14; A/CN.9/827, para. 44.

<sup>5</sup> The Working Group has specifically agreed that the fees of ODR proceedings themselves should be reasonable: see A/CN.9/WG.III/WP.133, draft article 17.

<sup>6</sup> A/65/17, para. 254. See also the Proposal by China as set out in A/CN.9/833 at para. 73.

<sup>7</sup> A/CN.9/801, para. 32.

customized and improved upon by the private sector, similarly to practice in relation to the UNCITRAL Arbitration Rules.<sup>8</sup>

### III. Stages of an ODR process

7. The Working Group has broadly agreed on the process of an online dispute resolution proceeding (save for the nature of a final stage of proceedings) which would take place pursuant to ODR Rules. That process consists of three stages: negotiation; facilitated settlement; and a third (final) stage.

8. As envisaged in the Working Group, the ODR process commences when a claimant submits a notice of claim through the ODR platform to the ODR administrator.<sup>9</sup> The ODR administrator informs the respondent of the existence of the claim and the claimant of the response.<sup>10</sup> The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.<sup>11</sup>

9. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process moves to a second, “facilitated settlement” stage (see, further, paras. 32-34 below). In that stage of proceedings, the ODR administrator appoints a neutral adjudicator (a “neutral”), who communicates with the parties in an attempt to reach a settlement.<sup>12</sup>

10. If facilitated settlement fails, a third and final stage of proceedings might commence, but the nature of that stage of proceedings, and the means of enforcement of any outcome, has not been agreed by the Working Group, and is expressly excluded from the scope of this Note.

### IV. Scope of ODR process

11. The Working Group has agreed in principle that an ODR process should apply to disputes arising out of cross-border, low-value e-commerce transactions.<sup>13</sup> The term low-value has not been defined.<sup>14</sup> The Working Group has considered that an

<sup>8</sup> A/CN.9/827, para. 54; A/CN.9/795, para. 15. The Working Group has recognized that the process will be subject to applicable provisions of law: see A/CN.9/WG.III/WP.133, Draft article 1(3); A/CN.9/827, para. 68; and A/CN.9/WG.III/WP.119, para. 5.

<sup>9</sup> A/CN.9/WG.III/WP.133, Draft article 4A.

<sup>10</sup> A/CN.9/WG.III/WP.133, Draft article 4B.

<sup>11</sup> A/CN.9/WG.III/WP.133, Draft article 5. See, also, para. 32 below.

<sup>12</sup> A/CN.9/WG.III/WP.133, Draft article 6. See, also, the definition in para. 17 below.

<sup>13</sup> The language used by the Working Group has been “disputes arising out of cross-border, low-value transactions conducted by means of electronic communication.” (A/CN.9/WG.III/WP.133, preamble, para. 1). This Working Paper refers simply to “low-value e-commerce transactions” for simplification of terminology.

<sup>14</sup> A/CN.9/795, paras. 25, 31-32; A/CN.9/739, para. 16. At its thirty-first session, the Working Group considered that it might consider “at a later stage” whether the terms “low-value” and “consumers” needed to be defined: A/CN.9/833, para. 34. See, also, A/CN.9/WG.III/WP.128, para. 36.

ODR process would apply to disputes arising out of both business-to-business as well as business-to-consumer transactions.<sup>15</sup>

12. It has been agreed that an ODR process may apply to disputes arising out of both sales and service contracts.<sup>16</sup>

13. The Working Group has agreed that parties to an e-commerce transaction should explicitly agree at the time of the transaction to be bound by an ODR process in the event that a dispute arises at a later stage.<sup>17</sup>

## V. ODR definitions<sup>18</sup>

14. The Working Group has agreed on a number of definitions in relation to the parties to an online dispute resolution proceeding, as well as the technological components required for an online dispute resolution process.

15. The Working Group has defined online dispute resolution, or “ODR”, as a “mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology”.<sup>19</sup> The Working Group has acknowledged that the process may be implemented differently by different administrators of the process, and may evolve over time.<sup>20</sup>

16. The Working Group has consistently referred respectively to a “claimant” and “respondent” as the party initiating ODR proceedings and the party to whom the notice of proceedings is directed, in line with traditional, offline, alternative dispute resolution nomenclature. The term the Working Group has agreed upon to define the “individual that assists the parties in settling or resolving the dispute” is the “neutral”.

17. The Working Group has undertaken its work on the basis that ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR process cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral adjudicator (that is, without an administrator). Instead, to enable the use of technology to facilitate a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications. Such a system has been referred to in the Working Group as an “ODR platform.”<sup>21</sup>

18. The Working Group has also proceeded on the premise that the ODR platform must be administered and coordinated. The entity that carries out such administration and coordination has been referred to by the Working Group as the “ODR administrator.” The Working Group has observed that the ODR administrator

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<sup>15</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257; A/CN.9/716, para. 14.

<sup>16</sup> A/CN.9/WG.III/WP.133, Draft article 1(1)(a); A/CN.9/801, para. 36; A/CN.9/795, para. 40.

<sup>17</sup> A/CN.9/WG.III/WP.133, Draft article 1(1)(a).

<sup>18</sup> A/CN.9/WG.III/WP.133, Draft article 2.

<sup>19</sup> A/CN.9/WG.III/WP.133, Draft article 2(1).

<sup>20</sup> A/CN.9/801, para. 32.

<sup>21</sup> A/CN.9/WG.III/WP.133, Draft article 2(3); A/CN.9/WG.III/WP.130, Draft article 2(3). The relevant draft article in A/CN.9/WG.III/WP.133 has not yet been considered by the Working Group; accordingly citations here and later in this Note refer to both Working Papers.

may administer the platform, but alternatively may also be a separate entity<sup>22</sup> from the ODR platform.<sup>23</sup>

19. The Working Group has indicated that both the ODR administrator and the ODR platform should be specified in the dispute resolution clause that forms part of the contract between the parties at the time of the e-commerce transaction.<sup>24</sup> It has been said that such specification would increase transparency and accountability insofar as parties to a transaction would have relevant information on the dispute at the time they agreed to the dispute resolution clause, rather than only at the time the dispute were to arise.<sup>25</sup>

20. The Working Group has defined the communications that may take place during the course of proceedings as “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.”<sup>26</sup>

## VI. Communications

21. The Working Group has agreed that all communications in ODR proceedings must take place via the ODR platform.<sup>27</sup> Consequently, both the parties to the dispute, and the ODR platform itself, must have a designated “electronic address”.<sup>28</sup> The term “electronic address” has been defined in line with other UNCITRAL texts.<sup>29</sup>

22. The Working Group has agreed that the ODR administrator must:

- (a) Acknowledge receipt of any communication by the ODR platform;<sup>30</sup>
- (b) Notify parties of the availability of any communication received by the ODR platform;<sup>31</sup>
- (c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.<sup>32</sup>

<sup>22</sup> The Working Group has not ruled out that these could be two separate legal entities.

<sup>23</sup> A/CN.9/WG.III/WP.133, Draft article 2(2); A/CN.9/WG.III/WP.130, Draft article 2(2).

<sup>24</sup> A/CN.9/WG.III/WP.133, Draft article 13.

<sup>25</sup> A/CN.9/801, paras. 53 and 134; A/CN.9/WG.III/WP.133, Draft article 13; A/CN.9/WG.III/WP.130/Add.1, Draft article 13.

<sup>26</sup> A/CN.9/WG.III/WP.133, Draft article 2(7); A/CN.9/WG.III/WP.130, Article 2(7); A/CN.9/795, paras. 52-53.

<sup>27</sup> A/CN.9/WG.III/WP.133, Draft article 3(1).

<sup>28</sup> A/CN.9/WG.III/WP.133, Draft article 2(8) and Draft article 3(1).

<sup>29</sup> A/CN.9/801, paras. 57-59.

<sup>30</sup> A/CN.9/WG.III/WP.133, Draft article 3(3).

<sup>31</sup> A/CN.9/WG.III/WP.133, Draft article 3(4). The notifications would advise, for example, that notices from the claimant and/or responses are available on the ODR platform, such as those notices envisaged under A/CN.9/WG.III/WP.133, Draft article 4A(2); A/CN.9/WG.III/WP.130, Draft article 4A(2). See also A/CN.9/WG.III/WP.133, Draft articles 3, 4A and 4B, and 5.

<sup>32</sup> A/CN.9/WG.III/WP.133, Draft article 3(5); A/CN.9/795, para. 110. See A/CN.9/WG.III/WP.133, Draft article 12, in relation to notification of deadlines, which was not agreed by the Working Group.

23. The Working Group has agreed that the ODR administrator must make these notifications “promptly”.<sup>33</sup>

24. The Working Group has proceeded on the basis that a communication is deemed to be received by a party when the administrator notifies that party of its availability on the platform;<sup>34</sup> deadlines in the proceedings run from the time the administrator has made that notification.<sup>35</sup>

## **VII. Commencement of ODR proceedings<sup>36</sup>**

25. The Working Group has agreed that ODR proceedings are deemed to have commenced when, following a claimant’s communication of a notice to the ODR administrator, the ODR administrator notifies the respondent and the parties that the notice is available at the ODR platform.<sup>37</sup>

26. The Working Group has agreed that the notice should contain:

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

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

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

(d) Any solutions proposed to resolve the dispute;

(e) The claimant’s preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant’s representative.<sup>38</sup>

27. The Working Group has considered, but not yet achieved consensus, as to whether information in addition to these areas ought to be included in the notice.<sup>39</sup>

28. The Working Group has also agreed that the respondent’s response to the notice should include:

(a) The name and 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; and

(c) Any solutions proposed to resolve the dispute; and

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<sup>33</sup> See, for example, A/CN.9/WG.III/WP.133, Draft article 3(3); A/CN.9/WG.III/WP.130, Draft article 3(3).

<sup>34</sup> A/CN.9/WG.III/WP.133, Draft article 3(2).

<sup>35</sup> A/CN.9/WG.III/WP.133, Draft article 3(2); A/CN.9/WG.III/WP.130, Draft article 3(2).

<sup>36</sup> See generally, A/CN.9/WG.III/WP.133, Draft articles 4A and 4B.

<sup>37</sup> A/CN.9/WG.III/WP.133, Draft article 4A(3).

<sup>38</sup> A/CN.9/WG.III/WP.133, Draft article 4A(4); A/CN.9/WG.III/WP.130, Draft article 4A(4).

<sup>39</sup> Areas that remain under consideration include for example whether additional information may be provided by the claimant at the time it submits its notice, including information in support of its claim and information in relation to the pursuit of other legal remedies: A/CN.9/WG.III/WP.133, para. 15.

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative.<sup>40</sup>

29. As with the notice of claim, the Working Group has considered, but not yet achieved consensus, as to whether additional information ought to be included in the response.<sup>41</sup>

## VIII. Negotiation<sup>42</sup>

30. The Working Group has generally agreed that the first stage of proceedings commences following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant; or

(b) Failing a response, the lapse of a certain period of time after the notice has been communicated to the respondent.<sup>43</sup>

31. This first stage is "negotiation", which the Working Group has agreed comprises "negotiation between the parties via the ODR platform."<sup>44</sup>

## IX. Facilitated settlement

32. If negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a certain time period), or where one or both parties to the dispute request to move directly to the next stage of proceedings, the Working Group has agreed that the second, facilitated settlement stage of proceedings commences.<sup>45</sup>

33. Upon commencement of the facilitated settlement stage of proceedings, the ODR administrator appoints a "neutral" individual,<sup>46</sup> and notifies the parties of that appointment, and certain details about the identity of the neutral.<sup>47</sup>

34. In the "facilitated settlement" stage, the neutral communicates with the parties to try to achieve a settlement.<sup>48</sup>

<sup>40</sup> As regards issues of language, see para. 43 below.

<sup>41</sup> See A/CN.9/WG.III/WP.133, Draft article 4B(2)(d)-(g). Areas that remain under consideration include for example whether additional information may be provided by the respondent at the time it submits its notice, including information in support of its response or its pursuit of other legal remedies: A/CN.9/WG.III/WP.133, para. 16 .

<sup>42</sup> See generally A/CN.9/WP. 133, Draft article 5.

<sup>43</sup> A/CN.9/WG.III/WP.133, Draft article 5(1).

<sup>44</sup> A/CN.9/WG.III/WP.133, Draft article 5(2).

<sup>45</sup> A/CN.9/WG.III/WP.133, Draft article 5(3) and Draft article 5(4).

<sup>46</sup> The Working Group has determined that a "neutral" must be a "physical person" rather than a "legal person": A/CN.9/795, para. 60.

<sup>47</sup> A/CN.9/WG.III/WP.133, Draft article 6(1).

<sup>48</sup> A/CN.9/WG.III/WP.133, Draft article 6(2).

## **X. Appointment and powers of the neutral**

35. The Working Group has agreed that the ODR administrator should “promptly” appoint the neutral at the commencement of the facilitated settlement stage of proceedings. Upon appointment, the ODR administrator would promptly notify the parties of the name of the neutral any other relevant or identifying information in relation to that neutral.<sup>49</sup>

36. In respect of the process of appointment of a neutral, the Working Group has agreed:<sup>50</sup>

(a) That the neutral by accepting confirms that he or she has the time necessary to devote to the process;

(b) That the neutral shall declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) That the parties shall have a method for objecting to the appointment of a neutral;

(d) That the ODR administrator shall make a determination as to whether the neutral shall be replaced;

(e) That there shall be only one neutral per dispute appointed at any time;<sup>51</sup>

(f) That a party may object to the neutral receiving information generated during the negotiation period; and

(g) That if the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator will appoint a replacement subject to the same safeguards as set out during the appointment of the initial neutral.<sup>52</sup>

37. In respect of the powers of the neutral, the Working Group has agreed:

(a) That subject to the Rules, the neutral may conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral shall conduct the proceedings without unnecessary delay or expense, shall provide a fair and efficient process for resolving disputes, and shall remain independent, impartial and treat both parties equally;

(c) The neutral shall conduct proceedings based on the communications made during the proceedings;

(d) The neutral may allow the parties to provide additional information in relation to the proceedings;

(e) The neutral has discretion to extend deadlines set out in the Rules.<sup>53</sup>

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<sup>49</sup> A/CN.9/WG.III/WP.133, Draft article 6(1); A/CN.9/WG.III/WP.130, Draft article 6(1); A/CN.9/795, para. 128; A/CN.9/801, para. 114.

<sup>50</sup> A/CN.9/WG.III/WP.133, Draft article 9.

<sup>51</sup> See A/CN.9/WG.III/WP.133, Draft article 6(1); A/CN.9/WG.III/WP.130, Draft article 6(1).

<sup>52</sup> A/CN.9/WG.III/WP.133, Draft article 10.

<sup>53</sup> A/CN.9/WG.III/WP.133, Draft article 11(5).



38. The Working Group has generally expressed agreement that the appointment and challenge procedures for neutrals should be simple and time-effective.<sup>54</sup>

## **XI. Language**

39. The Working Group has not agreed on the basis for selecting the language of proceedings. However, it has agreed that even where an ODR agreement or ODR rules specify a language to be used in proceedings, a party to the proceedings should be able to indicate in the notice or response whether it wishes to proceed in a different language so that the ODR administrator can identify other language options that the parties may select.<sup>55</sup>

## **XII. Governance**

40. The Working Group has broadly agreed that it is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.<sup>56</sup> However, the Working Group has not determined the content of those guidelines nor whether they ought to form part of a description of the process (see further below para. 42 (c)).<sup>57</sup>

41. The Working Group has also broadly agreed on the importance of independence, neutrality and impartiality of the neutral in the ODR process<sup>58</sup> and reference was made to the importance of a code of conduct in that context.<sup>59</sup> The appropriate professional skills and experience required of a neutral could also be addressed.

## **XIII. Additional areas on which the Working Group may wish to confirm consensus**

42. The Working Group may wish to confirm consensus on additional areas that could be covered in the descriptive document, as guidelines on general points of principle or procedure.<sup>60</sup> For example:

(a) The Working Group may wish to address whether the above description of an ODR process is sufficient to reflect current practice in the ODR field; and also whether it is sufficiently flexible to evolve with changing practice in a technology-enabled field;<sup>61</sup>

<sup>54</sup> A/CN.9/833, para. 63.

<sup>55</sup> A/CN.9/WG.III/WP.133, Draft article 15; A/CN.9/WG.III/WP.130/Add.1, Draft article 14. See also A/CN.9/WG.III/WP.128, para. 53; and A/CN.9/762, paras. 71, 74.

<sup>56</sup> A/CN.9/795, para. 57; A/CN.9/WG.III/WP.128, para. 4.

<sup>57</sup> A/CN.9/WG.III/WP.128, paras. 13-15; A/CN.9/WG.III/WP.133, preamble; A/CN.9/827, para. 26; A/CN.9/801, para. 113.

<sup>58</sup> A/CN.9/716, para. 66.

<sup>59</sup> A/CN.9/716, para. 67.

<sup>60</sup> See, e.g. A/CN.9/WG.III/WP.128.

<sup>61</sup> A/CN.9.801, paras. 14, 27-32.

(b) The Working Group may wish to address further whether such a process would apply globally and to all stakeholders within the ODR process (including ODR platforms, administrators and neutrals) or rather to the contractual parties to the transaction concerned only;<sup>62</sup> and

(c) The Working Group may wish to address further its earlier considerations as regards how and whether confidentiality, processing and transfer of information, data security, and archiving, should be addressed in a global description of an ODR process,<sup>63</sup> and on the responsibilities of the ODR platform and administrator for procedural issues including fairness, due process, transparency, accountability, neutral appointment or selection, and the performance capabilities of the ODR platform.<sup>64</sup>

43. The Working Group may also wish to confirm more detailed points of procedure: for example, as regards the ODR administrator, whether the ODR administrator could provide parties with an overview of the ODR process or processes, including neutral selection, the order and progression of the process (such as the status of all filings and communications that are available on the ODR platform) and costs; whether the location of the claimant could be included in the claimant's notice; whether the respondent's response could include the location of the respondent, notice of any counterclaim and the supporting evidence therefor, whether the respondent agrees with the language of proceedings provided by the claimant, or whether another language of proceedings is preferred. The Working Group may also wish to consider questions of supporting evidence, and procedures for appointment of the neutral and challenge procedures.

#### **XIV. Next steps**

44. The Working Group may wish to consider the scope and content of the above description of an ODR process. The Working Group may also wish to address:

(a) The style of such a document. First, how it should be described (such as Technical Notes) and, secondly, how the guidance should be phrased. For example, whether the principles and procedures should be prefaced with the words "the system may address", "it is desirable that", or another approach to reflect the flexibility that the Working Group has acknowledged is inherent in its approach;

(b) The extent to which the descriptive paragraphs should themselves be prefaced with a general statement of purpose and/or benefits of ODR proceedings;

(c) Whether a description of the UNCITRAL process in elaborating the eventual document should also be included.

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<sup>62</sup> By application of the issues set out in A/CN.9/WG.III/WP.128, paras. 9-12.

<sup>63</sup> A/CN.9/795, para. 123; see also A/CN.9/WG.III/WP.128, paras. 33-35.

<sup>64</sup> See in particular A/CN.9/801, paras. 15 and 29; A/CN.9/WG.III/WP.128, paras. 17 et seq.; as well as submissions by the Government of Canada: A/CN.9/WG.III/WP.114; and the CILE: A/CN.9/WG.III/WP.115.