


**United Nations Commission
 on International Trade Law**
Forty-ninth session

New York, 27 June-15 July 2016

**Report of Working Group III (Online Dispute Resolution)
 on the work of its thirty-second session
 (Vienna, 30 November-4 December 2015)**
Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-6	2
II. Organization of the session	7-13	3
III. Deliberations and decisions	14	4
IV. Draft non-binding descriptive document reflecting elements and principles of an ODR process	15-130	4
A. The Proposal for an outcome document	20-118	5
B. A/CN.9/WG.III/WP.137, paragraphs 42 and 43	119	24
C. Proposed additional text for item 22 of the Proposal and proposal for a new section, Section IX bis	120-127	25
D. Proposed revised introductory text for the outcome document	128-129	26
E. Drafting instructions	130-131	27

* Reissued for technical reasons on 19 January 2016.

V.15-08916 (E) 311215 040116



Please recycle

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 relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions.¹ The Commission decided *inter alia* at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.²

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.³ It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.⁴ The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.⁵

4. At its forty-sixth⁶ and forty-seventh⁷ sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. At its forty-eighth⁸ session (Vienna, 29 June-16 July 2015), 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 (arbitration/non-arbitration). It was also agreed that the Working Group would be given a time limit of one year or no more than two Working Group sessions, after which the work of the Working Group would come to an end, whether or not a result had been achieved.

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

² *Ibid.*

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

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 222.

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

⁸ *Ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, para. 352.

6. A compilation of historical references regarding the consideration by the Commission of the work of the Working Group between 2000 and 2014 can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

II. Organization of the session

7. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its thirty-second session in Vienna, from 30 November to 4 December 2015. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Brazil, China, Colombia, Czech Republic, El Salvador, France, Germany, Hungary, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Uganda, United States of America and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Bolivia (Plurinational State of), Cyprus, Dominican Republic, Luxemburg, Moldova, Netherlands, Peru, Romania, Senegal, Slovakia, Syrian Arab Republic, United Arab Emirates.

9. The session was also attended by observers from the European Union (EU).

10. The session was also attended by observers from the following non-governmental organizations: American Bar Association (ABA), Asia Pacific Regional Arbitration Group (APRAG), Asociación Americana de Derecho Internacional Privado (ASADIP), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), China Society of Private International Law — Wuhan University (CSPIL), Electronic Consumer Dispute Resolution — University College Dublin (ECODIR), Eurochambres, European Law Institute (ELI), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), ICC International Court of Arbitration (ICC), Institute of International Commercial Law (IICL), Institute of Law and Technology — Masaryk University (ILT), International Bar Association (IBA), Law Association for Asia and the Pacific (LAWASIA), Regional Centre for International Commercial Arbitration-Lagos (RCICAL).

11. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah-Teck CHAN (Singapore)

Rapporteur: Mr. Nasir AYYAZ (Pakistan)

12. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.135);

(b) A note by the Secretariat on a non-binding descriptive document reflecting elements and principles of an ODR process (A/CN.9/WG.III/WP.137);

(c) A note by the Secretariat on the proposal by the Russian Federation (A/CN.9/WG.III/WP.136); and

(d) A note by the Secretariat on the proposal by Israel (A/CN.9/WG.III/WP.138).

13. The Working Group adopted the following agenda:
 1. Opening of the session.
 2. Election of officers.
 3. Adoption of the agenda.
 4. Consideration of the notes on a non-binding descriptive document reflecting elements and principles of an ODR process.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.137) and other proposals submitted during the session. The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

IV. Draft non-binding descriptive document reflecting elements and principles of an ODR process

15. The Working Group heard a proposal by Colombia and the United States of America for Technical Notes on Online Dispute Resolution (referred to herein as the Proposal). The proponents informed the Working Group that the proposal had been prepared to implement the Commission's mandate and to reflect existing UNCITRAL documents, notably its Notes on Organizing Arbitral Proceedings.⁹ It was added that the Proposal closely followed the elements and description of A/CN.9/WG.III/WP.137, and the contents of its paragraph 44 (addressing next steps that the Working Group might wish to take), so as to take the form of a draft outcome document.

16. For these reasons, the proponents noted, the Proposal set out introductory paragraphs presenting the purpose, character and overview of an ODR process. It was added that the document had been submitted in order to assist the Working Group in finalizing its text on the ODR process in the very short time available.

17. The delegation submitting A/CN.9/WG.III/WP.138 presented the proposal therein, and noted that the two proposals reflected similar areas for discussion for the Working Group.

18. The Working Group proceeded to base its deliberations on A/CN.9/WG.III/WP.137, with appropriate reference to the equivalent paragraphs of the other proposals noted above. The discussion from paragraphs 20 through 118 herein is based upon and follows the structure of the Proposal. Another delegation

⁹ See UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

stated that it would make further proposals as that process continued. It was noted that the Working Group would record its agreements on the substance of a draft outcome document in its Report of the session, and that it would finalize the editing thereof at the next session.

19. Reference was made to paragraph 44 of A/CN.9/WG.III/WP.137. As regards paragraph 44(a), it was agreed that the question of the title of the document would be considered at a later time. As regards paragraph 44(b), it was agreed on a preliminary basis that an introductory text for an ODR process in the outcome document could read as set out in the Proposal.¹⁰

A. The Proposal for an outcome document

1. Section I of the Proposal

20. The Working Group proceeded to consider an introductory text to describe an ODR process for which the following text was proposed.

“Section I — Introduction

Purpose of Technical Notes

§1. The purpose of the Technical Notes is to foster the development of ODR as a form of dispute resolution by assisting the participants in an Online Dispute Resolution (ODR) system in the conduct of ODR proceedings.

§2. The Technical Notes apply to the online resolution of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. Given that procedural styles and practices in ODR proceedings vary widely, the Technical Notes are intended to be of assistance regardless of the structure or framework of an ODR system.

§3. The Technical Notes are intended to assist the full range of potential participants in an ODR system, including ODR administrators, ODR platforms, neutrals, and the parties to the dispute.

§4. The Technical Notes reflect approaches to ODR systems that reflect principles of fairness, due process, transparency and accountability that are essential to any ODR system, but they are not intended to be an exhaustive or exclusive summary of approaches that incorporate such principles. The Technical Notes do not promote any practice of ODR as best practice.

Non-binding Character of the Technical Notes

§5. The Technical Notes do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding.

§6. The Technical Notes are not suitable to be used as rules for any ODR proceeding, since they are only of a descriptive nature and do not establish

¹⁰ For the purposes of this Report only, and in order to avoid confusion between the numbered paragraphs of A/CN.9/WG.III/WP.137 and this Report, and the paragraphs of the Proposal, references to “item numbers” in this document are to the numbered paragraphs of the Proposal.

any obligation on the parties or on persons and/or entities administering or facilitating an ODR proceeding to act in a particular manner. Accordingly, the use of the Technical Notes does not imply any modification to any ODR rules that the parties may have selected.¹¹

Overview of ODR

§7. In tandem with the sharp increase of cross-border transactions concluded via the Internet, there has been extensive discussion regarding the use of information and communication technology tools for resolving disputes which arise from such online transactions.

§8. One such tool is online dispute resolution ('ODR'), which has emerged as having the potential to provide a simple, fast, flexible and effective option for the resolution of such disputes, in particular when they relate to low-value transactions. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. ODR systems can be designed to facilitate communications in an efficient and user-friendly manner, in order to obtain an outcome without the need for physical presence at a meeting or hearing. ODR can provide a more cost-effective alternative to traditional approaches, the latter of which in some cases may be overly complex, costly and time-consuming in light of the nature and value of the dispute. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in the developed and developing world."

21. It was agreed that any further comments on the proposed text would take the form of proposed amendments to the wording itself.

22. It was suggested, as regards the remainder of the document, that the repeated phrase in the proposal "*it is advisable that*" could be replaced with an introductory phrase to express the concept throughout the document. It was also suggested that the location of the definitions in the outcome document would be considered at a later stage.

23. It was noted that an UNCITRAL document would not generally contain footnotes but that, as subparagraph 44(c) of A/CN.9/WG.III/WP.137 indicated, relevant elements of the elaboration process could be set out in the outcome document so as to assist the reader.

24. It was suggested that (a) the outcome document could be called a "Guideline", and (b) items 1-8 of the Proposal be shortened by replacing them with the following sentences:

"Guideline on Online Dispute Resolution (ODR) for cross-border electronic commerce transactions of UNCITRAL (hereinafter referred to as Guideline) aims to provide an easy, fast, cost-effective convenient and efficient procedure for dispute resolution in low-value, high-volume cross-border electronic commerce transactions. The Guideline is a non-binding descriptive document reflecting present common commercial practices of ODR process."

¹¹ See UNCITRAL Notes on Organizing Arbitral Proceedings (1996), paras. 2-3.

25. The suggestion to reduce the length of the text received support, though a concern expressed was that the suggested revised text might not include all elements that could be considered necessary. It was said that a revised text could be proposed at a later stage (see paras. 128 and 129 below).

2. Section II of the Proposal

26. The Working Group then proceeded to consider the principles that would underpin an ODR process, for which the following text was proposed.¹²

“Section II — Principles

*§9. Certain principles that should underpin any ODR process include fairness, transparency, due process and accountability.”*¹³

27. An alternative proposal was that this item should read, *“The principles that underpin any ODR process include fairness, transparency, due process and accountability”*. After discussion, this proposal was accepted and the Working Group proceeded with the consideration of items 10 to 16.

*“§10. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.”*¹⁴

*§11. ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.”*¹⁵

“Transparency

*§12. It is advisable to disclose any contractual relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.”*¹⁶

*§13. The ODR administrator may wish to publish anonymized data or statistics on its decisions, in order to enable parties to assess its overall record.”*¹⁷

*§14. All relevant information should be available on the ODR administrator’s website in a user-friendly and accessible manner.”*¹⁸

¹² Commentary and proposals made during the session are included under each relevant item of the Proposal.

¹³ A/CN.9/WG.III/WP.137, para. 3.

¹⁴ Ibid., para. 4.

¹⁵ Ibid., para. 5.

¹⁶ A/CN.9/WG.III/WP.138, para. 1.

¹⁷ Ibid., para. 2.

¹⁸ Ibid., para. 3.

“Independence

§15. *It would be advisable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.*¹⁹

§16. *It would be useful for the ODR administrator to adopt internal policies dealing with identifying and handling conflicts of interest.*”²⁰

28. It was noted that while these policies might be internal, their existence might be publicly-acknowledged. Accordingly, it was agreed that this item should read, “*It would be useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.*” and the Working Group proceeded with the consideration of items 17 and 18.

“Expertise

§17. *The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.*²¹

§18. *An internal oversight/quality assurance process could help the ODR administrator to ensure that neutrals’ decisions conform with the standards it has set for itself.*”

29. It was proposed that a discussion of confidentiality and of the mode of agreement of ODR rules should be included in this section of the outcome document, given the importance of these concepts.

30. In this regard, an additional item, to read as follows, was proposed: “*The ODR administrator should adopt and implement appropriate confidentiality measures.*” While support was expressed for this proposal, it was queried whether including the question of confidentiality had previously been agreed in the Working Group. In response, it was stated that the principle had been implicit in earlier discussions in the Working Group, though had not been addressed extensively. After discussion, the proposal was deferred to a later stage in the session.

31. A further proposal was to include the following paragraph: “*It is desirable for the ODR administrator to provide the means by which the parties can indicate their consent to ODR process and awareness of its stages and procedures.*” While support was expressed for this proposal, to reflect the principle that there should be no ODR without consent, it was suggested that this issue would be better addressed in a dispute resolution clause, as the ODR administrator would not always be engaged at the relevant time. In response, it was stated that the proposal could be qualified so that the provision would apply only where the ODR administrator was engaged in the process, or that the principle could be expressed in more general terms. After discussion, it was agreed that the principle would be phrased as “*The ODR process should be based on the explicit and informed consent of the parties*”.

¹⁹ Ibid., para. 4.

²⁰ Ibid., para. 5.

²¹ Ibid., para. 6.

32. Subject to the amendments to items 9 and 16 of the Proposal, and the additional text in paragraph 31 immediately above, the Working Group agreed the text of this Section as proposed.

3. Section III of the Proposal

33. The Working Group then proceeded to consider the stages of an ODR process, for which the following text was proposed.²²

“Section III. Stages of an ODR Process

“§19. The process of an online dispute resolution proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.”²³

34. An alternative proposal, that this item should read, *“The process of an online dispute resolution proceeding consists of three stages, namely negotiation; facilitated settlement; and a third (final) stage”*, did not gain support and the Working Group proceeded with the consideration of items 20 and 21.

“§20. The ODR process may commence when a claimant submits a notice of claim through the ODR platform to the ODR administrator. The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. 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.”²⁴

§21. If that negotiation process fails (i.e. does not result in a settlement of the claim, the process may move to a second, ‘facilitated settlement’ stage (see, further, paragraphs 40-42 below). In that stage of proceedings, the ODR administrator appoints an individual that will assist the parties in settling or resolving the dispute (a ‘neutral’), who communicates with the parties in an attempt to reach a settlement.”²⁵

35. The Working Group included a definition of the term “neutral” in this item pending a final decision on the location of the definitions section in the outcome document and proceeded with the consideration of item 22.

“§22. If facilitated settlement fails, a third and final stage of proceedings might commence.”²⁶

36. The Working Group agreed items 19-21 of the section as proposed and deferred its consideration of item 22 to a later time.

²² Commentary and proposals made during the session are included under each relevant item of the Proposal.

²³ A/CN.9/WG.III/WP.137, para. 7.

²⁴ Ibid., para. 8.

²⁵ Ibid., para. 9.

²⁶ Ibid., para. 10.

4. Section IV of the Proposal

37. The Working Group then proceeded to consider the scope of an ODR process, for which the following text was proposed.²⁷

“Section IV. Scope of ODR Process

*§23. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.”*²⁸

38. It was further proposed that the types of claims should be limited to (a) goods sold or services rendered that were not delivered, not timely delivered, that were not properly charged or debited, and/or that were not provided in accordance with the sales or service contract; and (b) where full payment was not received for goods or services provided. The proposal, however, did not gain support and the Working Group proceeded with the consideration of item 24.

*“§24. An ODR process may apply to disputes arising out of both sales and service contracts.”*²⁹

39. The importance of the issue of consent to ODR, notably as regards whether any such consent should be required at the time of the transaction, was recalled. Accordingly, it was suggested that paragraph 13 of A/CN.9/WG.III/137 should be included in the text. In response, it was suggested that the Working Group had considered that consent to ODR could be given at a later time such as when a dispute arose. After discussion, it was agreed that the agreed wording in paragraph 31 above would address this issue satisfactorily, and that reference to the issue of consent in this item was not necessary.

40. The Working Group agreed the Section as proposed.

5. Section V of the Proposal

41. The Working Group then proceeded to consider provisions on definitions, roles and responsibilities, and communications in an ODR process, for which the following text was proposed.³⁰

“Section V. ODR Definitions, Roles and Responsibilities, and Communications

§25. Online dispute resolution, or ‘ODR’, is a ‘mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology’. The process may be implemented

²⁷ Commentary and proposals made during the session are included under each relevant item of the Proposal.

²⁸ A/CN.9/WG.III/WP.137, para. 11.

²⁹ A/CN.9/WG.III/WP.137, para. 12.

³⁰ Commentary and proposals made during the session are included under each relevant item of the Proposal.

differently by different administrators of the process, and may evolve over time.³¹

§26. As used herein a 'claimant' is the party initiating ODR proceedings and the 'respondent' the party to whom the notice of proceedings is directed, in line with traditional, offline, alternative dispute resolution nomenclature. The 'individual that assists the parties in settling or resolving the dispute' is the 'neutral'.³²

§27. 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 is referred to herein as an "ODR platform."³³

42. It was agreed that the term "facilitate" in items 25 and 27 was used in a different sense from that in items 19 and 21 of the Proposal, and that, to avoid confusion, an alternative term would be found. The Working Group then proceeded with the consideration of items 28 to 32.

"§28. An ODR platform must be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the 'ODR administrator.' The ODR administrator may be separate from or part of the ODR platform."³⁴

§29. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform should be specified in the dispute resolution clause.³⁵

§30. The communications that may take place during the course of proceedings have been defined 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.'³⁶

§31. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated 'electronic address'. The term 'electronic address' is also defined in other UNCITRAL texts.³⁷

³¹ A/CN.9/WG.III/WP.137, para. 15.

³² Ibid., para. 16.

³³ Ibid., para. 17.

³⁴ Ibid., para. 18.

³⁵ Ibid., para. 19.

³⁶ Ibid., para. 20.

³⁷ Ibid., para. 21.

§32. To enhance efficiency it is desirable that the ODR administrator promptly:

- (a) Acknowledge receipt of any communication by the ODR platform;
- (b) Notify parties of the availability of any communication received by the ODR platform; and
- (c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.”³⁸

43. A suggestion to delete the phrase “to enhance efficiency” did not gain support and the Working Group proceeded with the consideration of item 33.

“§33. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, the ODR administrator should be empowered to extend deadlines, in order to allow for some flexibility when appropriate.”³⁹

44. Subject to reconsideration of the word “facilitated” in items 25 and 27 of the Proposal, the Working Group agreed the Section as proposed.

6. Section VI of the Proposal

45. The Working Group then proceeded to consider the commencement of an ODR process, for which the following text was proposed.⁴⁰

“Section VI. Commencement of ODR proceedings

§34. ODR proceedings may be 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.⁴¹

§35. In order to commence an ODR proceeding and to enable it to proceed in an administratively efficient manner, it is desirable that the notice 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;

³⁸ Ibid., para. 22.

³⁹ Ibid., para. 24.

⁴⁰ Commentary and proposals made during the session are included under each relevant item of the Proposal.

⁴¹ A/CN.9/WG.III/WP.137, para. 25.

(f) *The signature or other means of identification and authentication of the claimant and/or the claimant's representative,*⁴² and

(g) *The location of the claimant.*"

46. It was suggested that sub-item (g) be deleted, on the basis that the Working Group had not come to consensus on the inclusion of this provision in such a notice (with reference to the Working Group reports A/CN.9/739, paras. 78-80, A/CN.9/795, para. 84, A/CN.9/833, para. 77, for example). On the other hand, it was recalled that the issue of location of the claimant had been discussed in the context of separate tracks of earlier draft Rules on ODR, and that agreed text on notice provisions included the location of the claimant (with reference to A/CN.9/801, para. 77, for example). It was suggested that this inclusion indicated that a consensus had been reached to include the location of the claimant.

47. It was noted, however, that there had been no clear understanding of what the term "location" might mean in the context of a single approach to an ODR process, which, it was suggested, indicated that clear consensus had not been reached.

48. Reference was also made to the mandate given to the Working Group, which, it was said, would allow the Working Group to build on issues in one Track of the earlier draft Rules upon which earlier consensus had been achieved in the Working Group.

49. It was added that the language proposed was not prescriptive and that the intention of the proposed inclusion of the location of the claimant was to provide practical rather than legal parameters for the administration of ODR claims.

50. It was noted, among other things, that the Working Group reports above set out no clear understanding in the Working Group on the meaning of location and so indicated that the issue had not achieved consensus. Accordingly, it was concluded that reference to the location of the claimant and therefore sub-item (g) would be deleted.

51. An alternative formulation of items 34 and 35 above was proposed as follows. It was explained that this formulation sought to set out the steps of the process and the time at which they should be taken:

First paragraph: *"The claimant shall communicate to the ODR administrator a notice when disputes arise."*

Second paragraph: *"The notice [should/could] contain the following:*

(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*

⁴² Ibid., para. 26.

(f) *The signature or other means of identification and authentication of the claimant and/or the claimant's representative.*"

Third paragraph: *"The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform."*

Fourth paragraph: *"ODR proceedings may be 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."*

52. Reference in this regard was made to paragraph 352 of the Commission report A/70/17 and the mandate set out therein. The first and third paragraphs of the alternative proposal were derived, it was clarified, from proposals made to the Working Group at earlier sessions; the second and fourth paragraphs reordered items 34 and 35 of the Proposal (and repeated their contents, save for a minor change to the chapeau to the second paragraph). It was emphasized that these provisions sought to explain, first, what the claimant should do when a dispute arose (that is, to send a notice to the ODR administrator), and that this step would commence the ODR process. Second, the provisions set out the contents of the notice, and third, they identified what the ODR administrator should do upon receipt of that notice. The fourth element sought to determine when the proceeding commenced.

53. The structure of the proposal as so explained received support.

54. On the other hand, it was stated that the language and structure of the alternative proposal would be more reflective of prescriptive rules for an ODR process, particularly as compared with the Proposal regarding items 34 and 35, which, it was said, were facilitative, included explanations for the provisions, and had been designed to reflect the non-binding descriptive nature of the outcome document.

55. Another view was to combine item 34 of the Proposal with the second paragraph of the alternative proposal.

56. After discussion, it was suggested that the first two items of the Section could read as follows, and that this text could replace items 34 and 35 in the Proposal:

First paragraph: *"In order to commence an ODR proceeding, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:*

(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.*"

Second paragraph: *"ODR proceedings may be 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."*

57. After deciding to remove the superfluous words *"the respondent and"* from the second paragraph, this suggestion to replace items 34 and 35 was accepted.

58. It was queried whether the term "parties" should also be defined. In answer to that question, it was recalled that item 26 of the Proposal (see para. 41 above) explained that the parties comprised the claimant and respondent which, it was considered, would be sufficient for the purposes of the outcome document. The Working Group then proceeded with the consideration of item 36.

"§36. In order to enable a response to an ODR proceeding to proceed in an administratively efficient manner, it is desirable 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;*

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

(d) *The signature or other means of identification and authentication of the respondent and/or the respondent's representative;*

(e) *Notice of any counterclaim containing the grounds on which the counterclaim is made,⁴³ and*

(f) *The location of the respondent."*

59. For reasons of consistency with the earlier decision regarding proposed sub-item 35(g), it was agreed that sub-item (f) would be deleted.

60. As regards proposed sub-item (b), it was queried whether an "electronic address" alone would be sufficient. In response, the discussions in the Working Group that had led to this provision were recalled.

61. It was proposed that the amendments agreed for item 34 should be reflected in the chapeau to item 36 as follows: *"It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements ..."* (and continuing with sub-items (a) to (e) as proposed).

62. In connection with this suggestion, it was queried why the reference to a reasonable time frame was included in the chapeau. In response, it was explained that the reference would enable the effective application of item 38(b) of the Proposal (see para. 72 below).

⁴³ A/CN.9/WG.III/WP.137, para. 28.

63. As regards proposed sub-item (b), it was suggested that the sub-item should read as follows: “*A response to the claim made by the claimant and to the grounds on which the claim is made*”. It was clarified that the Proposal reflected the earlier consensus of the Working Group that references in the notices of both the claimant and the respondent to the “grounds of claim” encompassed references to the claim and responses as well as to the grounds upon which they were made. Accordingly, it was considered that that additional text would not be necessary.

64. In conclusion, it was agreed that the chapeau to item 36 in the Proposal would read, “*It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant’s notice on the ODR platform, and that the response include the following elements ...*”; that sub-item (f) would be deleted and that item 36 would otherwise remain unchanged. The Working Group then proceeded with the consideration of item 37.

“§37. As much as is possible, it is preferable that both the notice of claim and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.”⁴⁴

65. It was suggested that the evidential burden indicated by the reference to “*all documents and other evidence*” might be onerous, and that the phrase should be replaced by the alternative phrase “*the documents and other evidence*”. It was noted, in response, that the reference had been included to encourage a single submission of all documents in the possession of either party upon which that party sought to rely. In addition, it was recalled that the item envisaged that any documents that were unavailable to a party could be produced through references to those documents in the notices themselves.

66. As regards the phrase “[i]n addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice,” it was stated that provision of this information would contradict practice in one jurisdiction. Consequently, clarification why this element had been included was sought. In response, it was recalled that the purpose was to avoid multiple or parallel proceedings, an issue that had been discussed at some length in the Working Group, and so as to ensure full disclosure to this end.

67. In conclusion, it was agreed to leave item 37 as per the Proposal.

Additional proposal (A/CN.9/WG.III/WP.136)

68. The Working Group heard a presentation of A/CN.9/WG.III/WP.136. The submitting delegation proposed that additional text be included in items 35 (f) and 36 (d) of the Proposal. The text proposed was based on the text of draft Articles 4A and 4B in A/CN.9/WG.III/WP.136 (under the heading “*Comment to the attention of the experts of Working Group III UNCITRAL “Online dispute resolution — ODR”*”), and it was suggested that reference should also be made to the contents of a UN-CEFACT document.” The document, it was said, was named Recommendation for ensuring legally significant trusted

⁴⁴ Report of Working Group III, (Vienna, 18-22 November 2013), A/CN.9/795, para. 92.

trans-boundary electronic interaction and was available online at: www1.unece.org/cefact/platform/download/attachments/55378391/Rec+draft+v.0.91+08.09.15.pdf. It was added that references in the proposed text to “defendant” should be understood as references to “respondent” for the purposes of an ODR process.

69. It was recalled that the Working Group had not earlier reached consensus on this element of an ODR process and, in that context, it was observed that the existing mandate of the Working Group would not encompass a discussion of this proposal.

70. It was noted that the proposal raised issues of identification and authentication of (in this context) a claimant and a respondent respectively, which were issues that UNCITRAL’s Working Group IV (Electronic Commerce) had addressed. The Secretariat was therefore requested to present the proposals set out in A/CN.9/WG.III/WP.136 to that Working Group for its consideration.

71. The Working Group agreed to a revised formulation of items 34 and 35 as noted above; to item 36 of the Proposal as revised and to item 37 of the Proposal.

7. Section VII of the Proposal

72. The Working Group then proceeded to consider the negotiation stage of an ODR process, for which the following text was proposed.⁴⁵

“Section VII. Negotiation

§38. The first stage of proceedings may commence 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.⁴⁶

§39. This first stage may be referred to as ‘negotiation’, comprising ‘negotiation between the parties via the ODR platform’.”⁴⁷

73. It was suggested that the order of the items be reversed, so as to ensure consistency in presentation with Section VI above (Commencement of ODR proceedings).

74. A concern was raised that so doing might indicate that the negotiation stage was mandatory, contrary to the intended flexibility in the envisaged outcome document, and as set out in item 19 of the Proposal.

75. In response, it was stated that the phrasing of items 38 and 39 would not indicate that the negotiation stage was mandatory.

76. A further suggestion was for the definition set out in item 39 to be located together with other definitions (see, further, para. 22 above).

⁴⁵ Commentary and proposals made during the session are included under each relevant item of the Proposal.

⁴⁶ A/CN.9/WG.III/WP.137, para. 30.

⁴⁷ Ibid., para. 31.

77. Two additional sub-items were proposed, as follows. It was explained that the intention was to expand the scope of Section VII so to set out all steps for the negotiation phase upon which the Working Group had previously reached consensus.

First paragraph: *“The parties could settle their dispute by negotiation within a reasonable period of time of the commencement of the negotiation stage of proceedings.”*

Second paragraph: *“The parties may agree to a one-time extension of the deadline for reaching settlement. However no such extension shall be for more than for a reasonable period of time.”*

78. In response to these suggestions, it was observed that the proposed language could be construed as being prescriptive, and that an alternative approach could be to state that it would be desirable for the ODR platform to issue guidelines on timelines and any appropriate extension.

79. After discussion, it was agreed that Section VII would read in its entirety as follows:

“§38. The first stage may be a negotiation, conducted between the parties via the ODR platform.

§39. The first stage of proceedings may commence 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 reasonable period of time after the notice has been communicated to the respondent.”

§39bis. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceeds to the next stage.”

8. Section VIII of the Proposal

80. The Working Group then proceeded to consider the facilitated settlement stage of an ODR process, for which the following text was proposed.⁴⁸

“Section VIII. Facilitated settlement

§40. The second stage of ODR proceedings may be facilitated settlement, whereby a ‘neutral’ individual is appointed and communicates with the parties to try to achieve a settlement.

§40bis. That stage may commence if negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings.⁴⁹

⁴⁸ Commentary and proposals made during the session are included under each relevant item of the Proposal.

⁴⁹ A/CN.9/WG.III/WP.137, para. 32.

*§41. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoints a 'neutral' individual, and notifies the parties of that appointment, and certain details about the identity of the neutral.*⁵⁰

*§42. In the facilitated settlement stage, it is desirable that the neutral communicates with the parties to try to achieve a settlement.*⁵¹

81. After discussion, an additional item 42bis was proposed, as follows: “*If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.*”

82. A proposal to include the phrase “*Subject to the agreement of the parties*” at the beginning of item 42bis did not gain support.

83. It was noted that item 42bis would apply where the parties in fact engaged in a facilitated settlement stage of an ODR proceeding, so that the provision would not prevent the parties from agreeing to bypass a facilitated settlement phase, if they so choose.

84. It was noted that the Working Group would consider whether to add any further reference to the final stage in item 42bis if and when it revisited item 22 of the Proposal.

85. The Working Group agreed the text of the proposed items 40-42bis, as amended.

9. Section IX of the Proposal

86. The Working Group then proceeded to consider the appointment and powers of the neutral in an ODR process, for which the following text was proposed.⁵²

“Section IX. Appointment and powers of the neutral

*“§43. To enhance efficiency and reduce costs, it is preferable that the ODR administrator not appoint a neutral until a neutral is required for a dispute resolution process in accordance with the applicable rules of procedure. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator ‘promptly’ appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.”*⁵³

87. It was clarified that the “applicable rules of procedure” referred to whatever rules the parties had agreed to use in the ODR proceedings concerned, and that the text would therefore be amended to refer to the “*agreed ODR rules*”.

⁵⁰ Ibid., para. 33.

⁵¹ Ibid., para. 34.

⁵² Commentary and proposals made during the session are included under each relevant item of the Proposal.

⁵³ A/CN.9/WG.III/WP.137, para. 35.

88. It was proposed that the following words in item 43 be deleted: “*To enhance efficiency and reduce costs, it is preferable that the ODR administrator not appoint a neutral until a neutral is required for a dispute resolution process in accordance with the applicable rules of procedure. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, ...*”. It was observed that this introductory language repeated points of general application in the process, and was therefore unnecessary.

89. Alternative views were that the proposed text in the Proposal should be retained.

90. Regarding the phrase “[*t*]o enhance efficiency and reduce costs”, it was observed that an online dispute resolution process differed from a traditional (offline) process in which the neutral would generally be appointed at the outset, and so this phrase served to highlight the greater flexibility available in the online context (and the consequent possibility of minimizing costs). An alternative suggestion was that the objective of minimizing costs could be included as a general principle earlier in the document. In response, it was observed that the point merited emphasis in this item.

91. Regarding the phrase, “*it is preferable that the ODR administrator not appoint a neutral until a neutral is required for a dispute resolution process*”, it was said that this statement again highlighted the possibility of minimizing costs. It was also suggested that a revised formulation, “*it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process*”, would remove any unintended negative tone in the item.

92. Regarding the phrase, “[*a*]t the point in an ODR proceeding at which a neutral is required for the dispute resolution process, ...” it was stated that this phrase provided context and would enable a clearer understanding of the remainder of the sentence as presented in the Proposal.

93. After discussion, it was agreed to replace the first sentence of item 43 in the Proposal with the following sentence: “*To enhance efficiency and reduce costs, it is preferable that the ODR administrator only appoint a neutral when a neutral is required for a dispute resolution process in accordance with the applicable ODR rules.*”

94. Subject to this amendment, the Working Group agreed the text of item 43 as it was presented in the Proposal and proceeded with the consideration of item 44.

“§44. *It is desirable that neutrals should have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, ODR neutrals need not be lawyers.*”⁵⁴

95. It was observed that the relevant laws of national systems might prescribe requirements to practise as a lawyer and whether lawyers were allowed to act as ODR neutrals and that this formulation might contradict domestic provisions. Another view was that there was nothing in the outcome document that could contradict locally applicable law.

⁵⁴ Report of Working Group III, Vienna, 13-17 December 2010, A/CN.9/716, paras. 62-63.

96. It was added that the first sentence alone would provide sufficient assurance, and that the second sentence was both unnecessary and could be interpreted as implying that ODR neutrals should not be lawyers.

97. In light of these points, it was stated that the second sentence should be deleted.

98. It was noted that reasons for retaining the second sentence included that disputes might focus on issues of fact rather than of law, that the decisions to be taken in an ODR process need not be of a judicial nature, and so as to minimize costs.

99. A discussion in the Working Group in 2010 was recalled: “There was consensus that conciliators or members of the arbitral tribunal (“neutrals”) ought not necessarily to be lawyers, although they should be required to have relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question”.⁵⁵ It was also recalled that the Working Group had come to a general understanding that a neutral need not be a lawyer.

100. It was suggested that the second sentence could read “*However, ODR neutrals need not necessarily be lawyers*”.

101. Further suggestions were that the second sentence could read “*ODR neutrals may include, but are not limited to, lawyers*”; “*Any legally-qualified professionals could be ODR neutrals*”; and “*However, subject to any professional regulation, ODR neutrals need not necessarily be lawyers*”, and to refer to “*legally-qualified persons*” or “*qualified lawyers*”, rather than to “*lawyers*”.

102. After discussion, and noting the provision was permissive and not restrictive in nature, it was agreed that the second sentence of item 44 would read as follows: “*However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers*”. The Working Group agreed the text of the first sentence of item 44 as per the Proposal.

103. An additional suggestion was to include in the introduction to the document a statement that “*These Technical Notes do not supplant or override applicable law*”.

104. The Working Group then proceeded with the consideration of item 45.

“§45. *In respect of the process of appointment of a neutral, it is desirable that:*”

105. An alternative formulation for the chapeau was suggested, as follows:

“*With regard to the appointment and functions of neutrals, the following are desirable:*

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

(b) *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;*

⁵⁵ Ibid., para. 63.

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

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

106. It was suggested that the words “*In the event of an objection to an appointment of a neutral*” be at the beginning of the sentence, so as to clarify when the determination in question would be made.

“(e) *There be only one neutral per dispute appointed at any time for reasons of cost efficiency;*

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

(g) *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.*”⁵⁶

107. Subject to the inclusion of the amendments proposed to the chapeau and to sub-item (d), the Working Group agreed item 45.

108. In the light of the amendments made, it was agreed to revise the title of Section IX to read “*Appointment, powers and functions of the neutral*”. The Working Group then proceeded with the consideration of item 46.

“46. *In respect of the powers of the neutral, it is preferable that:*

(a) *Subject to any Rules, the neutral may conduct the ODR proceedings in such a manner as he or she considers appropriate;*”

109. It was agreed to replace the words “*any Rules*” with the words “*any applicable ODR rules*” to ensure consistency throughout the outcome document.

“(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;*”

110. It was decided that sub-item (b) would read as follows, “[t]he neutral shall avoid unnecessary delay or expense in the conduct of the proceedings and shall provide a fair and efficient process for resolving disputes,” and that an additional sub-item (b)bis would be included, as follows: “*The neutral shall remain independent, impartial and treat both parties equally throughout the proceedings*”.

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

111. It was observed that this sub-item referred to the entire ODR proceedings rather than to the negotiation stage as per item 45(f), and that these items should be aligned in scope. Accordingly, it was agreed that the sub-item be reworded as follows: “*The neutral shall conduct proceedings based on such communications as are before the neutral during the proceedings*”.

⁵⁶ A/CN.9/WG.III/WP.137, para. 36.

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

(e) The neutral has discretion to extend deadlines set out in any Rules.”⁵⁷

112. It was agreed to refer to “*any applicable ODR rules*” as per sub-item (a) above. A suggestion that the sub-item be reworded to provide: “*The neutral has discretion to extend deadlines, subject to the applicable ODR rules*”, did not gain support. It was recalled that the Working Group had earlier reached consensus on the principle that the neutral should have the discretion to extend deadlines for a reasonable time, and consequently that this provision reflected a core or fundamental principle of the process. It was also agreed that the words “*for a reasonable time*” be included in the sub-item, so that it would read as follows: “*The neutral has discretion to extend any deadlines set out in any applicable ODR rules for a reasonable time*”.

113. Subject to the amendments agreed to sub-items (a), (b), (c) and (e), the Working Group agreed item 46 and proceeded with the consideration of item 47.

“§47. While the process for appointment of a neutral for an ODR process is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.”⁵⁸

114. In response to a query, it was explained that the time periods in question should be expedited in the context of an ODR process (as compared with the UNCITRAL Arbitration Rules, for example), without prejudice to due process standards. Suggestions were made to remove the introductory words in the item, “[w]hile the process for appointment of a neutral for an ODR process is subject to the same due process standards that apply to that process in an offline context”, on the basis that they were superfluous, and to replace the reference to “*time-effective*” with the word “*speedy*”. After discussion, it was agreed to retain the item as proposed.

10. Section X of the Proposal

115. The Working Group then proceeded to consider the language used in an ODR process, for which the following text was proposed.⁵⁹

“Section X — Language

§48. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. 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

⁵⁷ Ibid., para. 37.

⁵⁸ Ibid., para. 38.

⁵⁹ Commentary and proposals made during the session are included under each relevant item of the Proposal.

*it wishes to proceed in a different language so that the ODR administrator can identify other language options.”*⁶⁰

116. It was queried why the words “that the parties may select”, which had appeared in the equivalent text in A/CN.9/WG.III/WP. 137 were not included in the Proposal, on the basis that the missing language could be of significant importance to the parties in practice. In response, it was stated that the ODR administrator might not be able to operate in all languages that the parties might select, and that the missing language would be implicit in the item as proposed. After discussion, it was decided to include the words “*that the parties may select*”, and the item was otherwise agreed as proposed.

11. Section XI of the Proposal

117. The Working Group then proceeded to consider the governance of an ODR process, for which the following text was proposed.⁶¹

“Section XI — Governance

*§49. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.*⁶²

*§50. ODR proceedings are subject to the same due process standards that apply to that process in an offline context, in particular independence, neutrality and impartiality.”*⁶³

118. The Working Group agreed the Section as proposed.

B. A/CN.9/WG.III/WP.137, paragraphs 42 and 43

119. As regards the suggestions in sub-paragraphs 42(a), (b) and (c), and paragraph 43 of the document A/CN.9/WG.III/WP.137, the Working Group decided that further provision in the draft outcome document would not be necessary, particularly in light of the limited mandate of the Working Group and the proposals made regarding the outcome document during the course of the session. In addition, and as regards the suggestion regarding confidentiality in paragraph 42(c), and the outstanding proposal to include confidentiality as a principle to be followed in the ODR process which was made earlier in the session (see paras. 29 and 30 above), the Working Group decided not to address confidentiality in the outcome document. The Working Group was urged, however, to bear the importance of confidentiality in mind when finalizing the outcome document.

⁶⁰ A/CN.9/WG.III/WP.137, para. 39.

⁶¹ Commentary and proposals made during the session are included under each relevant item of the Proposal.

⁶² A/CN.9/WG.III/WP.137, para. 40.

⁶³ *Ibid.*, para. 41.

C. Proposed additional text for item 22 of the Proposal and proposal for a new section, Section IX bis

120. The Working Group heard a proposal for additional text for item 22 of the Proposal (see paragraph 36 above), in the following terms: *“In that stage of proceeding, the ODR administrator may remind the parties, or set out for the parties, possible process options to choose.”*

121. The Working Group also heard a proposal for a new section, Section IX bis, in the following terms: *“If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator, on the basis of information submitted by the parties, remind the parties of, or set out for the parties, the possible process options of final stage, and ensure that the parties are aware of the legal consequences of the choice of the process.”*

122. It was agreed to consider these proposals sequentially.

123. As regards the proposed addition to item 22, it was stated that this proposal went beyond the mandate of the Working Group as it sought to address the nature of the final stage of an ODR process, and further that the proposal sought to address an element of an ODR process upon which there had been no consensus.

124. In response, the proponents agreed that the mandate as set out in paragraph 352 of document A/70/17 required that the outcome document should exclude the nature of the final stage of the ODR process. However, the proponents stated that the reference to the “nature of the final stage” should be construed so as to exclude only a discussion of whether the final stage should be arbitration/non-arbitration. They added that paragraph 352 of document A/70/17 also reflected the Commission’s agreement that the outcome document should build upon the consensus reached in earlier sessions. In the view of the proponents, the proposed addition discussed the role of the ODR administrator when facilitated settlement failed, and was necessary so as to complete the outcome document. In this regard, it was said, the proposal went no further than items 19-22 of the Proposal in terms of referring to the final stage. It was added that there had been consensus, when the two Tracks of earlier draft Rules were merged, that there would be a single track for third stage of the ODR process. For these reasons, the role of the administrator at this stage needed to be clarified.

125. In response, it was said that the substance of the proposed addition was already addressed in item 32(c) of the Proposal.

126. It was also said that a new Section IX bis was necessary as the introductory text of the Proposal referred to a number of approaches to an ODR process.

127. The Working Group did not complete its consideration of these proposals and deferred them to its next session.

D. Proposed revised introductory text for the outcome document

128. The Working Group heard a revised proposal for the introductory items of the outcome document, in the following terms:

“I. Introduction

Overview of ODR

§1. *In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.*

§2. *One such mechanism is online dispute resolution (‘ODR’), which can assist the parties in resolving the dispute in a simple, fast, and flexible manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.*

Purpose of the Technical Notes [Guidelines]

§3. *The purpose of the Technical Notes [Guidelines] is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.*

§4. *The Technical Notes [Guidelines] reflect approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.*

§5. *The Technical Notes [Guidelines] are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. They do not promote any practice of ODR as best practice.*

Non-binding nature of the Technical Notes [Guidelines]

§6. *The Technical Notes [Guidelines] are a descriptive document. They are not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding. They do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding, and do not imply any modification to any ODR rules that the parties may have selected.”*

129. The Working Group did not consider this proposal and deferred it to its next session.

E. Drafting instructions

130. In response to suggestions that the language in some items could be considered prescriptive, it was noted that the draft outcome document sought to distinguish between elements of the process which the Working Group considered as core or fundamental principles or steps, and other, more flexible, principles or steps. As regards the core or fundamental principles or steps (generally expressed using the word “shall” in the proposed text), it was suggested that these elements could be expressed in terms that it would be desirable for the neutral to be required to follow those principles and undertake those steps respectively. As regards other elements, it was observed that the document could be expressed in terms that it would be desirable for the neutral to be permitted to undertake or follow elements as appropriate.

131. The Working Group requested the Secretariat, in revising the draft outcome document:

- (a) To ensure that the provisions in the outcome document were appropriately located;
 - (b) To ensure consistency in drafting between the chapeau and operative provisions in relevant items;
 - (c) To ensure consistency in drafting between the headings and text within the document; and
 - (d) To avoid unnecessary repetition.
-