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Report of Working Group III (Online Dispute Resolution) on the work of its twenty-ninth session (New York, 24-28 March 2014)

Contents

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions.

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 commerce 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 commerce 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] At its forty-sixth session, the Commission unanimously confirmed the decisions made at its forty-fifth session.[6]

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-ninth session in New York, from 20 to 24 March 2014. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Brazil, Bulgaria, Canada,

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

[2] Ibid., para. 218.

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

[4] Ibid., para. 79.

[5] Ibid.

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

China, Colombia, Croatia, Germany, Greece, Hungary, India, Indonesia, Israel, Iran (Islamic Republic of), Japan, Mexico, Nigeria, Malaysia, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey and United States of America.

6. The session was also attended by observers from the following States: Czech Republic, Egypt, Libya, Malta, Netherlands, Romania, Saudi Arabia and United Arab Emirates.

7. The session was also attended by observers from the United Nations Office of Legal Affairs.

8. The session was also attended by observers from the following inter-governmental organizations: European Union (EU) and League of Arab States (LAS).

9. The session was also attended by observers from the following non-governmental organizations: American Arbitration Association (AAA), American Bar Association (ABA), Center for International Legal Education, University of Pittsburgh (CILE), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), Moot Alumni Association (MAA), National Centre for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA), Penn State Dickinson School of Law, Queen Mary University of London School of International Arbitration and European Law Students' Association (ELSA).

10. The Working Group elected the following officers:

Chairman: Mr. Soogeun OH (Republic of Korea)

Rapporteur: Ms. Martha CARRILLO (Mexico)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.126);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.127 and Add.1); and

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft guidelines (A/CN.9/WG.III/WP.128).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of online dispute resolution for cross-border electronic commerce transactions: draft procedural rules.
5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

13. 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.127 and its addendum; A/CN.9/WG.III/WP.128). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a revised draft of procedural rules on online dispute resolution (the "Rules") based on deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the Rules.

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

A. General remarks

14. The Working Group affirmed its wish to ensure that the work it was undertaking took into account current ODR practice and possible future developments. It was recalled that at its twenty-eighth session the Working Group acknowledged that the Rules, when complete, will proceed into a real world setting where they would be accepted, or not, by industry, including merchants and consumers, and that as such ought to be drafted in order to be usable, practical and acceptable in that setting. It was also said that it was important that the Rules could work in different legal environments, given that they are intended to be used in cross-border e-commerce transactions.

15. The Working Group also affirmed that due process, transparency, accountability and impartiality of the actors should form an integral part of the Rules being described.

ODR provider, ODR platform and ODR administrator

16. The Working Group considered the nature of existing online dispute resolution practices and whether the draft Rules' distinction between ODR providers and ODR platforms reflected that practice, and accommodated possible future permutations of ODR practice (see A/CN.9/WG.III/WP.127, paras. 10-13).

17. It was said that centralizing the concept by using the term "ODR administrator" would best capture existing practice as well as provide for flexibility in relation to the evolution of ODR systems.

18. A second suggestion was made to have a definition that addressed both an administrator and a platform, in order to ensure that all communications in the Rules took place via the platform.

19. Another suggestion was made to include different definitions for "ODR platform" and "ODR provider" on the basis that the underlying responsibilities and actions of the different entities ought to be transparent to users of the Rules. In

response it was said that decentralizing terms in that way was less technologically neutral than a single, flexible term that could accommodate technological developments. It was also said that defining an "ODR administrator" that was ultimately responsible for providing a service need not define what that administrator does as its back-end functions.

20. In relation to transparency, the view was expressed that the concept was critical in disputes involving consumers, but that in practice that was unrelated to the functions of a provider or platform (see para. 19 above). It was said that transparency was critical as regards, namely: (i) the clear identification at the outset of a dispute as to how that dispute would be resolved and who would be resolving that dispute; and (ii) the nature of the outcome of the dispute (e.g. as binding or otherwise).

21. It was said in support of a proposal for ensuring that the Rules retained a technologically neutral approach that the Rules ought not to be overly prescriptive in defining the technological methodology. Moreover, it was said that in practice the terms "ODR platform" and "ODR provider" were not used in the online dispute resolution field and that it was difficult to provide a clear and distinct definition for those terms.

22. The Working Group agreed to consider that matter further (see paras. 49-54 below).

Concurrent proceedings

23. It was said that the Rules currently contained provisions in draft articles 4A and 4B (paras. (4)(e) and (2)(d) respectively) to the effect that parties were not pursuing additional judicial remedies. It was suggested to delete those provisions in relation to Track II of the Rules, given that those provisions could in any event provide no comfort to the other party in law that another proceeding was not in fact being initiated.

24. Support was expressed for that proposal. It was also said that in the interests of transparency it might be advisable for a party to give notice of the initiation of any other proceedings to the other party in an ODR proceeding.

25. In that respect, it was suggested to include the words "and also information in relation to the pursuit of other legal remedies" at the end of paragraph (5) of article 4A and paragraph (3) of article 4B. After discussion, that proposal was agreed (see also paras. 83 and 85 below).

26. It was furthermore agreed to delete paragraphs (4)(e) of article 4A, and paragraph (2)(d) of article 4B (see also paras. 76 and 85 below).

State of current practice in online dispute resolution

27. A reference was made to the request of the Working Group at its twenty-eighth session (A/CN.9/795, para. 18) that the Secretariat prepare a report in relation to current practices in the online dispute resolution field in order to ensure that the work being undertaken by the Working Group remained relevant with existing frameworks.

28. The Secretariat reported that it had consulted informally with experts from multiple regions and with diverse practitioner and academic experience in relation to existing ODR practices and the implications of those practices for the Rules. The Secretariat explained that key points in relation to those consultations included: (i) the belief that both consumer and business groups around the world are unanimous in seeking fair, proportionate, effective, online, cross-border redress for low value cross-border disputes; (ii) that online dispute resolution already exists, and that even when the Rules were complete, they would be voluntary in nature and thus must accord with real life practice in order to be used in a commercial context; (iii) that there is a risk that overly prescriptive Rules would not be used in practice; (iv) that ODR administrators, marketplaces, and payment providers would in practice want the flexibility to design, build, and deploy both non-binding and binding ODR systems; (v) that tracking consumers and transactions on the basis of nationality and legal jurisdiction at the outset of a transaction would be very difficult for e-commerce merchants and marketplaces, and that additional requests for information in an online business transaction could result in the loss of customers; (vi) that the Internet is borderless, and applying different sets of procedural rules depending on the nationality of one disputing party would be commercially impractical for ODR entities and unlikely to happen in practice; and finally, (vii) that higher level process requirements or values (e.g. due process, transparency, impartiality) and limits as to when the rules apply, could provide a sound basis on which ODR administrators could design ODR systems that could best meet the needs of various disputes, marketplaces, and consumer communities.

29. In particular, it was emphasized by experts that there was a great need to develop fair, transparent dispute resolution processes that would provide access to justice for the broadest spectrum of consumers, and that overly prescriptive Rules might hamper that aim by creating a system that was unworkable in practice.

30. In response to the points set out in paragraphs 28-29 above, it was clarified that these were opinions expressed by experts, but that the ultimate decision-making in relation to the Rules lay with the Working Group. It was also said that further expert input could be useful in satisfying the request of the Working Group at its twenty-eighth session for the Secretariat to consult in relation to current ODR practice. It was also said that the benefit of the Rules was their ability to set a global reference standard that addressed differences in national law. It was furthermore observed that in a global standard, a certain level of detail could not be avoided.

31. In relation to specific questions posed in respect of current practice, it was said that the average value of transactions resolved by ODR in some marketplaces (the example was given of eBay) was approximately 75 USD for cases involving items not received and 100 USD for cases involving goods not as described, within a time frame of 10-16 days on average; another example was given of the Mexican online dispute resolution program of the national consumer protection agency (Concilianet), which was said to resolve cases with an average value of 300 USD within a time frame of 28 days. It was also said that a variety of processes existed for resolving disputes in different ODR systems, ranging from crowd-sourcing to algorithmic resolutions of disputes.

32. By way of conclusion, it was observed that the Working Group had expressed the view that the Rules ought to be as practical as possible in a global context, and it was important to find a balance and to bear in mind the existing practice of online

dispute resolution, and to design Rules that could encompass that practice and permit the evolution of practice.

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33. It was proposed to proceed by considering Track II of the Rules, as contained in document A/CN.9/WG.III/WP.127 and its addendum.

B. Notes on draft procedural rules

1. Draft article 1 (Scope of application)

34. The Working Group considered draft article 1 as contained in paragraph 29 of document A/CN.9/WG.III/WP.127.

Paragraph (1)

35. The Working Group considered whether the term "transaction" was sufficiently clear, or whether the phrase "contract concluded or performed using electronic communications" might be clearer (A/CN.9/WG.III/WP.127, paras. 8 and 32).

36. The view was expressed that replacing the words "transaction conducted by use of electronic communications" in paragraph (1) with "sales or service contract concluded using electronic communications" would lend greater clarity to the provision. After discussion, that proposal was agreed.

Paragraph (1)(bis)

37. The Working Group recalled its discussions regarding whether paragraph (1)(bis) might relate more appropriately to Track I proceedings than to simplified Track II proceedings where such formality might not be required (A/CN.9/795, para. 34).

38. A suggestion was made to: (i) remove the square brackets surrounding the provision as a whole, on the basis that the considerations therein are equally important in a Track II proceeding as in a Track I proceeding; (ii) add the words "and independent" between "separate" and "from" to further emphasize that the agreement to use the Rules should be an independent one; (iii) delete the words "to the buyer" following the phrase "notice in plain language"; and (iv) delete the square brackets around the word "and".

39. In relation to point (i) in paragraph 38 above, it was said that in practice, requiring a separate click from purchasers for additional contractual terms often led to a reduced number of transactions, and hence would be unlikely to be implemented by merchants. It was said in response that paragraph (1)(bis) ought to remain in the text as it provided an important consumer protection mechanism.

40. In relation to point (ii) in paragraph 38 above, it was said that adding the words "and independent" was redundant given the existing requirement for agreement under paragraph (1)(bis) to be "separate" from the transaction.

41. Some support was given to a proposal to retain the square brackets around the words “and whether Track I or Track II of the Rules apply to that dispute” pending the further consideration of Track I. Another suggestion was made to delete that text, and likewise to delete it where it appeared in Track I of the Rules.

42. A suggestion was made to replace the term “proceedings under the Rules” with the phrase “proceedings under these Rules”.

43. After discussion, it was agreed to delete the square brackets around the entirety of the text of paragraph (1)(bis) and retain the language therein with the following modifications: (i) to delete the square brackets around the word “and” (see para. 38 above); (ii) to delete the words “to the buyer” (see para. 38 above); (iii) to add the words “and independent” after the word “separate” (see para. 40 above); (iv) in the fourth line, to replace the words “the Rules” with the phrase “these Rules” (see para. 42 above); and (v) to retain the internal square brackets and text therein (see para. 41 above).

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

Paragraph (2)

45. It was agreed to delete the square brackets around subparagraphs (a) and (b) of paragraph (2) and to permit the Secretariat to ensure that language was consistent with other provisions in paragraph (1). It was agreed that the language “at the time of the transaction” would be deleted pursuant to a decision of the Working Group at its twenty-eighth session (A/CN.9/795, para. 41).

Paragraph (3)

46. After discussion, it was agreed to retain paragraph (3) in the form set out at paragraph 29 of document A/CN.9/WG.III/WP.127.

2. Draft article 2 (Definitions)

47. The Working Group considered draft article 2 as contained in paragraph 38 of document A/CN.9/WG.III/WP.127.

Paragraph (1)

48. After discussion, it was agreed to retain paragraph (1) in the form set out at paragraph 38 of document A/CN.9/WG.III/WP.127.

Paragraphs (2) and (3)

49. The Working Group recalled its discussion in relation to the terms “ODR platform”, “ODR provider” and “ODR administrator” (see paras. 16-22 above).

50. It was said that the term "ODR administrator" could better encompass the different types of entities undertaking a function of administrating ODR without prescribing the nature of the entity providing the service. It was further suggested that in addition to a definition of "ODR administrator", it was important to retain the term "ODR platform" in order to ensure that the Rules clearly expressed that communications were to take place via a platform rather than, for example, in hard copy.

51. In relation to the need to differentiate liability of different entities, an example was given of a dispute resolution system that encompassed servers, neutrals and administrators all located in different jurisdictions, but where the ultimate liability rested with a central entity. It was said that the term "ODR administrator" was preferable in light of that type of example given the breadth of that term in practice, and that it might also eliminate the need to define "ODR platform" separately.

52. In response, a view was expressed that "ODR platform" was an important component of an ODR process and consequently ought to be included in the Rules. A new definition for that term was proposed as follows: "'ODR platform' means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules."

53. It was said that it was important to link the discussion of an "ODR administrator" with article 12 of the Rules in relation to the entity specified in the dispute resolution clause. With that in mind, a new definition for the term "ODR administrator" was proposed as follows: "'ODR administrator' means the entity that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform, and which is specified in the dispute resolution clause".

54. After discussion, it was agreed that the definitions of "ODR administrator" and "ODR platform" as set out in paragraphs 52 and 53 above would replace the definitions set out in options 1, 2 and 3 of paragraph (1) of article 2 (para. 38 of document A/CN.9/WG.III/WP.127), and that the term "ODR provider" and all references thereto would be deleted from the Rules.

Paragraphs (4), (5) and (6)

55. After discussion, it was agreed to retain paragraphs (4), (5) and (6) as set out in paragraph 38 of document A/CN.9/WG.III/WP.127.

Paragraph (7)

56. After discussion, it was agreed that option 1 in relation to paragraph 7, setting out a consolidated definition of "communication", should be used to define that term in the Rules.

Electronic address

57. A suggestion was made to define "electronic address" or "designated electronic address" in the Rules. One suggestion was made to define the latter term as follows: "'Designated electronic address' means the electronic address designated by each party and by the ODR administrator for the purposes of exchanging communication under these Rules".

58. The Working Group recalled that the United Nations Convention on the Use of Electronic Communications in International Contracts contained some guidance in relation to the term "electronic address" at paragraph 185 of the explanatory note thereto (see A/CN.9/WG.III/WP.127).

59. After discussion, it was agreed that the Rules ought to contain a definition of the term "electronic address" and the Secretariat was requested to include language in that respect in the next iteration of the Rules, taking into account existing usage of that term in UNCITRAL texts.

3. Draft article 3 (Communications)

60. The Working Group considered draft article 3 as contained in paragraph 46 of document A/CN.9/WG.III/WP.127.

Paragraphs (1), (2) and (3)

61. A proposal was made to replace paragraph (1) as follows: "All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform to which documents must be submitted shall be specified in the dispute resolution clause."

62. It was suggested to add an additional sentence to the end of paragraph (1) as set out in paragraph 61 above, as follows: "Each party shall provide the ODR administrator with an electronic address to be used for communications". It was said that that change would enable the deletion of paragraphs (2) and (3).

63. A concern was raised that deleting paragraphs (2) and (3) would have the consequence of eliminating language providing for parties to update their electronic addresses. In response, it was said that the language proposed in paragraph 62 above was broad enough to encompass the provision of updated electronic addresses by the parties.

64. After discussion, it was agreed that paragraph (1) would be redrafted pursuant to the proposals set out in paragraphs 62-63 above, and that paragraphs (2) and (3) would be deleted.

Paragraph (4)

65. After discussion, it was agreed that the second sentence of paragraph (4) would be better placed in draft article 11, and the Secretariat was requested to relocate that provision accordingly (A/CN.9/WG.III/WP.127, para. 51).

Paragraph (5)

66. A suggestion was made to replace paragraph (5) as follows: "The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral at their electronic addresses." After discussion, that proposal was agreed.

Paragraph (6)

67. A suggestion was made to replace paragraph (6) as follows: "The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform." After discussion, that proposal was agreed.

Paragraph (7)

68. After discussion, it was agreed to retain paragraph (7) in the form set out at paragraph 46 of document A/CN.9/WG.III/WP.127.

4. Draft article 4A (Notice)

69. The Working Group considered draft article 4A as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

Paragraph (1)

70. After discussion, it was agreed to retain paragraph (1) as set out in paragraph 52 of document A/CN.9/WG.III/WP.127.

Paragraph (2)

71. A proposal was made to delete the first sentence, and retain the second sentence, of paragraph (2). A view was expressed that that paragraph was redundant in light of paragraph (6) of draft article 3 (see para. 67 above). In response, it was said that it was important for explicit provision to be made for the respondent to be notified following the submission of a notice by a claimant. After discussion it was agreed to retain the second sentence without square brackets, and to delete the text of the first sentence of that paragraph, such that it would read: "The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform."

Paragraph (3)

72. General support was expressed for option 1. A suggestion was made to replace the language set out in option 1 as follows: "ODR proceedings shall be deemed to commence when, following communication to the ODR administrator of the notice pursuant to paragraph (1), the ODR administrator notifies the parties of the availability of the notice at the ODR platform."

73. After discussion, the language as set out in paragraph 72 above was agreed.

Paragraph (4)

Subparagraphs (a) and (b)

74. After discussion, it was agreed to (i) retain the phrase "electronic address" in subparagraph (a); and (ii) delete the word "designated" in subparagraphs (a) and (b). In all other respects it was agreed to retain the language of subparagraphs (a) and (b) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

Subparagraphs (c) and (d)

75. After discussion, it was agreed to retain the text of subparagraphs (c) and (d) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

Subparagraph (e)

76. The Working Group recalled its decision to delete subparagraph (e) (see above, paras. 23-26).

Subparagraph (f)

77. No objections were raised to the language in subparagraph (f) and consequently it was agreed to retain the language as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

Subparagraph (g)

78. After discussion, it was agreed to retain subparagraph (g) in the form set out at paragraph 52 of document A/CN.9/WG.III/WP.127 (see also below, para. 157).

Subparagraph (h)

79. It was proposed to delete the phrase "including any other identification and authentication methods" (A/CN.9/WG.III/WP.127, para. 62) on the basis that that text was redundant with the term "signature", which, as used in UNCITRAL texts on e-commerce included other identification and authentication methods. Support was expressed for that proposal.

80. In response, concerns were raised that the terms "signature" and "electronic signature" were not clear for consumers. A proposal was made to include examples of electronic signatures in the Rules or in the commentary.

81. Another suggestion was made to use the term "electronic signature" in lieu of the term "signature".

82. After discussion, it was agreed to retain the language as set out in paragraph 52 of document A/CN.9/WG.III/WP.127, to retain the language "and/or the claimant's representative" and delete the square brackets around those words. Another proposal was made to replace references in the Rules to "signature" (in article 4A(4)(h), and article 4B(2)(g)) with the phrase "signature or other means of identification and authentication". After discussion, that proposal was agreed.

Paragraph (5)

83. The Working Group recalled its decision to add the words "and also information in relation to the pursuit of other legal remedies" at the end of paragraph (5) (para. 25, above). In all other respects it was agreed to retain the language of paragraph (5) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

5. Draft article 4B (Response)

84. The Working Group considered draft article 4B as contained in paragraph 65 of document A/CN.9/WG.III/WP.127.

85. After discussion, it was agreed to make consequential changes to article 4B to retain consistency with the changes made in article 4A (see paras. 23-26 and 69-83 above, and para. 157 below). In all other respects it was agreed to retain the text of article 4B as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

6. Draft article 4C (Counterclaim)

86. The Working Group considered draft article 4C as contained in paragraph 67 of document A/CN.9/WG.III/WP.127. After discussion, it was agreed to retain that article in the form set out therein.

7. Draft article 5 (Negotiation)

87. The Working Group considered draft article 5 as contained in paragraph 70 of document A/CN.9/WG.III/WP.127.

General

88. A proposal was made that commentary or guidelines to the Rules indicate, in relation to a negotiation stage, that an ODR administrator should give a description to parties of what types of technical programmes it uses and the way negotiation will be conducted — for example, whether algorithms would be used.

89. It was agreed to include such an indication in guidelines or commentary. It was further agreed to retain article 5 in the form set out in paragraph 70.

8. Draft article 6 (Facilitated settlement)

90. The Working Group considered draft article 6 as contained in paragraph 77 of document A/CN.9/WG.III/WP.127.

Paragraph (1)

91. After discussion, it was agreed to retain paragraph (1) in the form set out in paragraph 77 of document A/CN.9/WG.III/WP.127.

Paragraphs (2) and (3)

92. It was proposed that in paragraph (2), language be inserted such that the ODR administrator would be required to give notice to the disputing parties of the ten-day deadline specified in paragraph (3). That proposal was accepted, and the Secretariat was requested to insert language in that respect, and to make any consequential changes required in paragraph (3).

9. Draft article 7 (Recommendation by a neutral)

93. The Working Group considered draft article 7 as contained in paragraph 82 of document A/CN.9/WG.III/WP.127.

Paragraphs (1)-(3)

94. After discussion, it was agreed to retain paragraphs (1) to (3) in the form set out in paragraph 82 of document A/CN.9/WG.III/WP.127.

Paragraph (4)

95. The view was expressed that the second sentence of paragraph (4) ought to be retained. It was said in support of that view that that sentence improved clarity and legal certainty. It was further explained that that sentence encapsulated the essence of what distinguished Track II from Track I, namely that the outcome of the former did not have a res judicata effect. Nonetheless, it was said that Track II could be coupled with mechanisms that would encourage compliance, and that the Rules ought to state that possibility explicitly.

96. In response, it was said that the second sentence of paragraph (4) was not appropriate in procedural rules and would be better placed in commentary or guidelines.

97. A proposal was made to replace the second sentence as follows: "The ODR administrator may introduce the use of trustmarks or other methods to identify and encourage compliance with recommendations".

98. After discussion, a second proposal, intended to replace the entirety of paragraph (4), and taking into account the proposal set out in paragraph 97 above, was made as follows ("the second proposal"): "The recommendation shall not be binding on the parties. However, a party or both parties may commit to comply with the recommendation. The ODR administrator may introduce mechanisms to encourage compliance with the recommendation." It was suggested that in addition to that proposal, it would be helpful to insert in the preamble to Track II, language that would make it clear that the recommendation under Track II would not produce a res judicata effect.

99. In support of the second proposal, it was said that it included generic language that was open in relation to the point in time at which agreement was required, and that it provided for a commitment by one or both parties to comply with the recommendation.

100. It was suggested to modify the last sentence of the second proposal so that it would read as follows: "Mechanisms to encourage compliance with the recommendation may be introduced."

101. A question was raised as to the legal effect intended when the disputing parties agreed to comply with the recommendation, and specifically whether that would produce a contractual agreement that could be enforced. It was said that if that were the case, it might be advisable to link such an agreement to the provision on settlement (draft article 8). Another view was expressed that it was important to retain a distinction between settlement and an agreement to comply with a recommendation.

102. It was said that the second proposal raised a number of technical and substantive concerns. It was said that the language reduced transparency for disputing parties, by enabling two different possible outcomes: a non-binding process, and a binding process capable of ending in an outcome enforceable by a court. It was also said that the concept of including mechanisms that would encourage compliance with a recommendation in a non-binding process was problematic insofar as it could be viewed as coercive. It was moreover said that the intention of the proposal to enable, at least in some instances, a binding outcome enforceable in court, was similar to a Track I outcome and as such raised a

question regarding different attitudes toward the two tracks, as reflected in negative terminology and additional requirements proposed for Track I in document A/CN.9/WG.III/WP.123, article 1A and article 1(3), option 1.

103. In response to those concerns, it was said that it was clear that Track II does not lead to a result that would be enforceable before the courts. A distinction was made between a traditional court proceeding, ending in an outcome that could be enforced, and a Track II proceeding, which ended in a recommendation that could not be enforced in the courts, and which was not equivalent to such a court decision. It was furthermore said that an agreement between disputing parties to abide by a recommendation would not make that recommendation enforceable in a court.

104. In response, it was said that an agreement to be bound by a recommendation did itself provide a basis for initiating court proceedings, and consequently a basis for initiating enforcement proceedings. It was said in response that there was a fundamental difference between providing a basis for commencing court proceedings, and a basis for commencing enforcement proceedings.

105. It was said that in the context of low-value electronic commerce disputes, the likelihood of any party resorting to court was very low.

106. After discussion, it was concluded that the language as set out in paragraph 82 of A/CN.9/WG.III/WP.127 would be retained as option 1, and the language set out in paragraph 98 above, as option 2.

Timing of agreement

107. In relation to the specification in paragraph (4) that the recommendation shall not be binding on parties "unless they otherwise agree", a proposal was made to require that agreement to take place before a recommendation had been communicated. In response, it was said that leaving the timing of such agreement open provided for greater flexibility in the dispute, and furthermore the form in which that agreement was given could be determined by the ODR administrator.

Conclusion

108. It was agreed that the recommendation as provided for in article 7 of Track II was intended to have a non-binding effect. In relation to the effect of an agreement to comply with a recommendation, it was said that the Working Group had expressed different views both on the legal nature of that agreement and the relative importance of the stage of court proceedings it might trigger, and that that issue deserved further discussion. Finally it was observed that in relation to a compliance mechanism referred to in the second proposal, that whether such a mechanism ought to be addressed in the Rules, and if so, the location of such a reference, remained a matter for further consideration.

10. Draft article 8 (Settlement)

109. The Working Group considered draft article 8 as contained in paragraph 88 of document A/CN.9/WG.III/WP.127. After discussion, it was agreed to retain that article in the form set out therein.

11. Draft article 9 (Appointment of a neutral)

110. The Working Group considered draft article 9 as contained in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

General

111. A view was expressed that, in view of the discussion set out in paragraphs 27-32 above, article 9, as well as other articles in the Rules, could be further streamlined, particularly in relation to deadlines specified. It was clarified that the deadlines in the Rules would be reconsidered in their entirety at a later stage (see paras. 165-166 below).

Paragraph (1)

112. A proposal was made in relation to paragraph (1) to replace the words "and any other relevant or identifying information in relation to that neutral" with the phrase "and of the information in relation to that neutral as set out in points […] of the Guidelines and Minimum Requirements for Neutrals". It was said that specific guidance ought to be set out in relation to the information required to be provided to disputing parties in respect of each neutral, and that providing such information in guidelines for neutrals could create clarity in that respect.

113. In response, it was said that procedural rules should not rely on guidelines for specific information relevant to the functioning of those rules, and to include such a provision in the Rules would set an undesirable precedent for UNCITRAL texts.

114. After discussion, it was agreed that the Rules should be clear and understandable to users, and the Working Group agreed to consider further the matter of how to enunciate in the Rules themselves what information ought to be provided to disputing parties in respect of the neutral.

Paragraphs (2)-(7)

115. After discussion, it was agreed to retain paragraphs (2) to (7) as set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

Paragraph (8)

116. It was said that as an important provision, paragraph (8) ought to include language requiring the neutral to inform parties of the deadline in which they might object to the provision of information generated during the negotiation stage. That proposal received support.

117. After discussion, it was agreed that paragraph (8) would be retained in the form set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1, but that the Secretariat would add a general provision in the Rules to reflect that the neutral or ODR administrator should notify parties of all relevant deadlines during the course of proceedings.

Paragraph (9)

118. After discussion, it was agreed that paragraph (9) would be retained in the form set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

12. Draft article 10 (Resignation or replacement of neutral)

119. The Working Group considered draft article 10 as contained in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1. After discussion, it was agreed to retain that article as set out therein.

13. Draft article 11 (Power of neutral)

120. The Working Group considered draft article 11 as contained in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

Paragraph (1)

121. After discussion, it was agreed that paragraph (1) would be retained in the form set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

Paragraph (1)(bis)

122. After discussion, it was agreed that paragraph (1)(bis) would be retained in the form set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

Paragraphs (2) and (3)

123. A proposal was made to merge paragraphs (2) and (3) as follows: "Subject to any objections under article 9, paragraph (8), the neutral shall conduct the ODR proceedings on the basis of documents submitted by the parties, any communications made by them to the ODR administrator, and such other materials as the neutral may request or allow the parties to submit. The neutral shall determine time periods for the submission of such other materials." That proposal did not receive support.

124. In relation to paragraph (2), it was said that that paragraph was an important provision allowing each party to be heard and promoting a fair and transparent process. A query was raised as to whether that provision provided for a decision to be made only on the basis of communications that were transparent to both parties. In response, it was clarified that paragraph (2) was subject to article 9(8), which permitted parties to object to the provision of communications to the neutral.

125. After discussion, it was agreed to retain paragraph (2) as set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

126. In relation to paragraph (3), it was suggested that allowing the neutral to request further information from the parties could burden the process, and a proposal was made to replace the word "request" in that paragraph with the word "allow". In response, it was said that the principle of permitting the neutral to request additional documents was consumer protective, and provided the neutral with the discretion to suggest to parties that they may wish to submit a certain document.

127. After discussion, it was agreed to retain paragraph (3) as set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

Paragraph (4)

128. It was said that paragraph (4) was not necessary to include, on the basis that a competence-competence provision in relation to neutrals was not appropriate for simple, streamlined Rules. After discussion, it was agreed to delete paragraph (4).

Paragraph (5)

129. The Working Group recalled its decision to relocate the second sentence of article 3(4) (as set out in A/CN.9/WG.III/WP.127), to article 11 (see para. 65 above). That sentence read as follows: "The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform".

130. A proposal was made to replace paragraph (5) with that sentence, but to modify that sentence to provide for greater flexibility such that the neutral would have a general power to extend any deadline without a need for a party to show good cause. A view was expressed that unlike the text set out in paragraph 129 above, paragraph (5) provided for a neutral to "make inquiries" in determining whether or not to extend deadlines, and that it was important to retain such a concept.

131. Consequently it was suggested that paragraph (5) be replaced with the following sentence: "The neutral, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules". A view was expressed that the phrase "such inquiries as he or she may deem necessary" was vague, and that examples of what those inquiries might be could be set out in guidelines.

132. After discussion, the proposed language in paragraph 131 above was agreed, and it was furthermore suggested that examples of possible inquiries by a neutral be provided for in guidelines.

14. Draft article 12 (ODR provider)

133. The Working Group considered draft article 12 as contained in paragraph 15 of document A/CN.9/WG.III/WP.127/Add.1.

134. It was said that both the ODR platform and the ODR administrator ought to be specified in the dispute resolution clause for purposes of transparency and accountability. After discussion, it was agreed that draft article 12 would read as follows: "The ODR platform and ODR administrator shall be specified in the dispute resolution clause."

Model dispute resolution clause

135. A proposal was made to include, as an Annex to the Rules, a model dispute resolution clause. That proposal received support. In relation to the content of such a clause, it was said that it should address the essential functional elements of an ODR process. It was also said that a model clause should contain a link to the website of the ODR administrator, to provide for additional transparency for users.

136. As a general comment, it was suggested that at the time a buyer agreed to an ODR process, it would need information in plain language and in a language it

could understand as to the detail of the process, all the steps involved in ODR proceedings, the language of the proceedings, and the outcome of the proceedings. It was said that while that information may not need to be in a model clause, it should be made available to buyers at the time of agreement to submit disputes to ODR under the Rules.

137. Delegations were invited to consult with a view to agreeing upon a draft model dispute resolution clause which would be considered at a later stage.

15. Draft article 13 (Language of proceedings)

138. The Working Group considered draft article 13 as contained in paragraph 17 of document A/CN.9/WG.III/WP.127/Add.1.

139. It was said that a provision on language needed to be flexible, and sensitive to technology that was already being used to promote multilingual proceedings or to reduce language barriers, such as translation tools and pictograms. It was further suggested that an administrator would necessarily determine language, as a neutral would not in any event be appointed at the outset of ODR proceedings.

140. In response, a view was expressed that an ODR administrator ought not to have an unlimited choice of languages to choose from, and that the language of the offer of the underlying transaction — in other words, the language in which the merchant offered the goods or services to the purchaser — should be the language of the dispute resolution proceedings. A different view was expressed that concluding a transaction in a foreign language was often unproblematic, but that conducting dispute resolution proceedings would be much more complex.

141. A proposal was made to replace article 13 with the following language: “The proceedings shall be conducted in the language or languages which the parties understand and in which they are able to communicate.” It was said in support of that proposal that it did not give any discretion to an ODR administrator or neutral and that it implied that technology could be used to provide for multiple languages in the event parties did not have a common language. It was further said that additional guidance in relation to translation, including technical tools to assist with translation, could be set out in guidelines.

142. Concerns were expressed that that proposal did not provide for certainty that an ODR platform or administrator could accommodate the languages of the parties, and that it did not provide an initial reference point from which to offer proceedings. In that respect, it was suggested that the language of proceedings be linked to the language of the transaction or the contract.

143. A second proposal was made to replace article 13 in its entirety with the following language: “The ODR proceedings shall take place in the language of the underlying ODR agreement. In the event that a party indicates to the ODR administrator or neutral that it does not wish to proceed in that language, the ODR administrator or neutral shall identify other languages the parties can select for the proceedings. The proceedings shall then be conducted in the language or languages that the parties understand.” In support of that proposal, it was said that it provided for a language in which the ODR administrator or platform could commence proceedings, with a mechanism for parties to express a preference for another

language if that initial choice was not acceptable. The desirability of including guidance in relation to translation and tools for translation was reiterated.

144. A concern was raised that parties ought to be able to know in advance of ODR proceedings which languages were available. Likewise, it was said that the dispute resolution clause might need to be provided to parties in a language that they understood.

145. Another view was expressed that existing online translation tools were not adequate and that a neutral or ODR administrator should select a common language to be used, such as that used in the transaction.

146. In response, it was said that the language of the transaction or the contract could serve as a default language for proceedings, but that parties to a dispute ought to have the possibility to select a language in which they would be more comfortable conducting a dispute, if such a language was provided for by the ODR platform or administrator.

147. After discussion, another proposal was made in relation to article 13, as follows (the "third proposal"): "The ODR proceedings shall take place in the language of the offer for ODR proceedings accepted by the buyer. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings. The ODR proceedings shall be conducted in the language or languages that the parties select."

148. It was said in support of the third proposal that it provided notice to the buyer of the language in which proceedings would be conducted, and likewise provided guidance in relation to the language to be used at the inception of proceedings, while allowing flexibility to parties to adjust their decision within the framework offered by the administrator during the course of proceedings. It was said that in the very small number of possibilities where one of the languages offered was not a language in which a party felt it could communicate, that was a matter best addressed in commentary.

149. Several modifications were proposed in relation to the language of the third proposal as set out in paragraph 147 above as follows. First, a proposal was made to replace, in the second sentence, the phrase "available languages that the parties can select for the proceedings", with the phrase "a language or languages in which the parties can communicate".

150. A different modification to the language of the third proposal was suggested as follows: (i) in the first sentence, to insert the word "indicated in the offer for ODR proceedings" in replacement of the words "of the offer for ODR proceedings"; and (ii) to merge the second and third sentences, by inserting the word ", and" between them. It was clarified that in relation to (i), the intention was to indicate in the dispute resolution clause the language in which proceedings would take place.

151. In response to the third proposal set out in paragraph 147 above, as well as the modifications thereto proposed in paragraph 150 above, it was said that requiring the language in which ODR proceedings were to take place to be specified in the dispute resolution clause would permit a merchant to offer transactions in one language (the language of the target market, for example) and mandate that dispute resolution proceedings would take place in another (the language, for

example, of that merchant's primary place of business). A concern was also raised that the draft text of the third proposal would not accommodate a situation in which an ODR administrator indicated languages that could be selected, but where a party refused or failed to select one of those languages.

152. An additional proposal was made to modify the text of the third proposal with the second modification proposed in paragraph 150 above, so that article 13 would read as follows: "The ODR proceedings shall take place in the language of the offer for ODR proceedings accepted by the buyer. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select."

153. Three concerns were raised in relation to that proposal. First, it was said that the term "offer for ODR proceedings accepted by the buyer" was ambiguous insofar as it appeared to be referring to the "dispute resolution clause" defined in article 1(1)(bis), and moreover, that the term "buyer" was not defined anywhere in the Rules.

154. Second, it was said that the Rules or guidelines should send a strong message to ODR administrators that they ought, under that provision, to make reasonable efforts to provide as broad a spectrum of languages as possible.

155. Third, it was said that the language in that proposal should ensure that it would capture the need for a complaint form to be provided in the language selected by the claimant.

156. It was furthermore suggested that further thought ought to be given as to whether the dispute resolution clause should specifically set out the languages in which the services ought to be provided.

157. After discussion, it was agreed that the language set out in paragraph 152 above would replace the entirety of article 13 as set out in paragraph 17 of A/CN.9/WG.III/WP.127/Add.1. It was furthermore clarified that the provisions on language in articles 4A(4)(g) and 4B(2)(f) would not require further modification (see above, paras. 78 and 85).

16. Draft article 14 (Representation)

158. After discussion, the Working Group agreed to retain article 14 in the form set out in paragraph 18 of document A/CN.9/WG.III/WP.127/Add.1.

17. Draft article 15 (Exclusion of liability)

159. A proposal was made to delete article 15 on the basis that such a waiver of liability in relation to ODR administrators and neutrals could be best placed in contractual arrangements that included those entities as parties. A reference was made to a mirror provision in Article 16 of the UNCITRAL Arbitration Rules 2010, which provided for exclusion of liability against relevant third parties in arbitration proceedings.

160. After discussion, it was agreed to delete article 15.

18. Draft article 16 (Costs)

161. A proposal was made to retain article 16 and to retain the word "decision", in lieu of "award", such that the provision would read as follows: "The neutral shall make no decision as to costs and each party shall bear its own costs."

162. Consensus was recorded in relation to the principle that the winning party in ODR proceedings ought not to be able to reclaim its costs from the losing party.

163. After discussion, the language set out in paragraph 161 above was agreed.

Fees

164. A concern was expressed that the Rules did not currently address the need for fees levied by ODR administrators or platforms to be reasonable. It was agreed that a new provision could be included for consideration in that respect at a future session.

19. Other matters

Timelines

165. The Working Group recalled its decision to reassess the timelines in the Rules as a whole at the conclusion of its deliberations on Track II. In relation to timelines, it was suggested that a more generic, flexible approach that was not so prescriptive would be desirable. It was said that the Rules needed to be informative to potential users and also needed to give sufficient discretion to ODR administrators and neutrals to modify time frames as needed, on the understanding that a primary objective was to accommodate a fair and efficient process.

166. The Working Group agreed to consider that matter further at a later stage.

C. Other business

167. Several delegations expressed disappointment that document A/CN.9/WG.III/WP.125 had not been discussed during the course of the Working Group's twenty-ninth session.