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Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session (New York, 29 February-4 March 2016)

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 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 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-sixth[6] and forty-seventh[7] sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. At its forty-eighth[8] 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.

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[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-third session in New York, from 29 February-4 March 2016. The session was attended by representatives of the following States members of the Working Group: Argentina, Armenia, Austria, Brazil, Bulgaria, Canada, China, Colombia, Czech Republic, Ecuador, El Salvador, Fiji, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Mexico, Namibia, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Egypt, Iraq, Libya, Netherlands, Romania, Saudi Arabia and Syrian Arab Republic.

9. The session was also attended by observers from the following Non-Member States and Entities: Holy See.

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

11. The session was also attended by observers from the following intergovernmental organizations: World Intellectual Property Organization (WIPO).

12. The session was also attended by observers from the following non-governmental organizations: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Asia Pacific Regional Arbitration Group (APRAG), Centre de recherche en droit public (CRDP), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), China Society of Private International Law (CSPIL), European Law Students' Association (ELSA), Institute of International Commercial Law (Pace Law School) (IICL), International Technology Law Association (ITECHLAW), Internet Bar Organization (IBO), Jerusalem Arbitration Center (JAC), Law Association for Asia and the Pacific (LAWASIA), National Center for Information Technology and Dispute Resolution (NCITDR), New York State Bar Association (NYSBA).

13. The Working Group elected the following officers:

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

Rapporteur: Mr. Isaias MEDINA (Venezuela)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.139);

(b) A note by the Secretariat on a draft outcome document reflecting elements and principles of an ODR process (A/CN.9/WG.III/WP.140).

15. 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 note on a draft outcome document reflecting elements and principles of an ODR process.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

16. 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.140). 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

Consideration of A/CN.9/WG.III/WP.140

Title and Section I

17. The Working Group decided to defer discussion on the title of the proposed outcome document and proposals for "Section I — Introduction" until later in the session, and to address the other outstanding issues in A/CN.9/WG.III/WP.140 sequentially.

Section II — Principles

18. It was recalled that the section should group all relevant principles in a logical manner.

19. As regards the bracketed text in paragraph 16, the importance of confidentiality in ODR proceedings was recalled. It was noted, in that context, that the proceedings might take place in conflict and other sensitive situations, and that reaching a resolution might require the full frankness of the parties. It was consequently suggested that the square brackets should be deleted, so that the phrase in square brackets would be included in the outcome document.

20. A proposal to address the security of ODR proceedings in part of the outcome document was also made, noting that the ODR process was Internet-based and could be vulnerable to hacking. It was suggested, in this regard, to expand the bracketed text to read, "The ODR administrator and ODR platform should adopt and implement appropriate confidentiality and other measures to ensure the security of the ODR process". Support was expressed for the proposal, emphasizing the particular importance of security in the context of ODR.

21. It was agreed that the concepts of confidentiality and security were linked and raised important issues for an ODR process. Objection was made to raising new issues at this stage of the process, however, particularly given the need to conclude deliberations on the outcome document at this session.

22. It was added that the proposed sentence would not be appropriate under the subheading "expertise". It was also recalled that the draft outcome document itself expressly stated that its contents were not intended to be exhaustive. For these reasons, it was proposed that the sentence in square brackets should be deleted. Support was expressed for this proposal.

23. The Working Group recalled its decision at its previous session not to address confidentiality in the outcome document (A/CN.9/862, para. 119). Some delegations queried whether the Working Group's decision was also that the outcome document should avoid mention of confidentiality entirely, as the Working Group had also agreed to bear in mind the importance of the issue of confidentiality in the outcome document. It was added that failing to mention confidentiality might indicate that confidentiality was not an important issue, contrary to the stated position of the Working Group.

24. It was recalled that the Working Group had previously agreed the importance of standards for security of data exchange for ODR providers (A/CN.9/862, para. 82), and that data security was an important element of "confidentiality". It was also stated that the notion of "confidentiality" extended beyond data security, and that there was no consensus on the scope of the term itself.

25. After further discussion, it was agreed that the text in square brackets would be deleted, and that the issue of data security would be addressed in paragraph 26 of the outcome document, to be discussed later in the session. As regards other aspects of confidentiality, it was noted that the question of information passing between the parties and the neutral was already addressed in paragraph 47(f) of the draft outcome document, and that a reference to "confidentiality" might be included in Section I of the document or elsewhere in Section II, a point that would be addressed at a later time in the session.

26. It was also agreed to replace the words "neutrals' decisions" in paragraph 16 with a reference to the neutral itself, as the standards concerned would also refer to the neutral's action and conduct.

27. It was observed that paragraph 17 of the draft outcome document currently appeared under the heading "Expertise", and it was proposed that it would be better introduced under an additional subheading, namely "Consent". This proposal was accepted.

28. As regards paragraph 10, it was proposed that the term "contractual" be deleted, so as to avoid unnecessarily limiting the scope of the paragraph. This proposal was accepted.

29. As regards paragraph 11, it was proposed that the term "anonymized" be deleted, as some systems allowed names to be disclosed (under, for example, "naming and shaming" mechanisms). In response, the Working Group was urged not to delete the term "anonymized", because, it was said, there would be a risk of inappropriate disclosure of information about the parties, their transactions and the dispute concerned. In this regard, it was proposed that permission to publish data

and statistics should expressly be subject to applicable principles of confidentiality. There was support for these proposals taken together and also recalling the earlier statements of the Working Group on similar issues (see para. 77 of A/CN.9/716). It was agreed that the words "consistent with the applicable principles of confidentiality" should be added to paragraph 11.

30. An alternative formulation to refer to the consent of the parties did not gain support.

31. It was also added that the proposed addition to paragraph 11 could also be regarded as addressing the outstanding issues relating to confidentiality (see, further, paras. 19-25 above). In response, it was objected that the issue of confidentiality was of a broader nature than publishing data or statistics, and a more general statement of principle should be included in the outcome document.

32. It was also proposed that the term "decisions", which might be construed too narrowly, be replaced with the term "outcomes". This proposal was accepted.

Section III — Stages of an ODR Process

Paragraph 21

33. As regards the first bracketed text in paragraph 21, it was agreed that a reference to the possibility of a third and final stage would be appropriate at this point in the draft outcome document. It was therefore agreed to delete the square brackets and include the text in the final outcome document.

34. As regards the second bracketed text in paragraph 21, it was recalled that there was no consensus on the nature of the third and final stage, and that the text concerned might therefore exceed the mandate given to the Working Group. It was added that the first sentence alone might provide sufficient comment on that final stage.

35. It was recalled that the mandate excluded "the question of the nature of the final stage of the ODR process" (A/70/17, para. 352). Nonetheless, the Working Group had proceeded on the basis that there would or could be a final stage if facilitated settlement failed, and that it might take different forms. The deliberations of the Working Group on a proposal to include the language now found in the second bracketed text at the previous session (A/CN.9/862, paras. 120-127) were also recalled, noting that the Working Group had deferred its consideration thereof.

36. It was observed that the second bracketed text was linked with bracketed language in paragraphs 44 and 53 of the draft outcome document.

37. It was stated that, in the absence of a facilitated settlement at the end of the second stage, the nature of the process would effectively require the ODR administrator to advise the parties of any further options available to them. It was also suggested that the neutral might undertake this role.

38. As the nature of the final stage would not be addressed in the outcome document, it was suggested that the better action would be not to include the second bracketed text of paragraph 21 of the draft outcome document. On the other hand, it was noted that the outcome document would be incomplete without any mention of the point at issue, though the point might be better located elsewhere, it was added.

39. It was consequently proposed that the second bracketed text could be replaced with the phrase, “in which case the ODR administrator or neutral may inform the parties of the nature of such stage”. The proposal received support.

40. It was suggested that the word “nature” required greater precision. In response, it was noted that the word “nature” in this context carried the same meaning as its use in paragraph 352 of A/70/17.

41. It was agreed that the second bracketed language would be deleted from paragraph 21, and that the additional language in paragraph 39 above would be inserted in its place.

Section IV — Scope of ODR Process

Paragraph 26

42. Further to the Working Group’s consideration of data security issues earlier in the session (see, further, para. 20 above), it was agreed to add the words “in a manner that ensures data security” at the end of the penultimate sentence of paragraph 26.

Section VIII — Facilitated settlement

Paragraph 44

43. It was queried whether this paragraph should remain in the light of the Working Group’s decision on paragraph 21 (see para. 41 above). It was observed, in response, that to include the paragraph would be consistent with the presentation of the first stage of the process as described in paragraphs 37 to 39 of the draft outcome document, and that the reference to “a reasonable time” in the paragraph was helpful in describing the end of this stage of the process. In light of these matters, it was decided to remove the square brackets and to include the bracketed language in the outcome document.

Section X — Paragraph 53 of the draft outcome document

44. It was stated that this paragraph was unnecessary in light of the Working Group’s decisions on paragraphs 21 and 44 of the draft outcome document (see paras. 41 and 43 above). It was added that the inclusion of the paragraph would exceed the limited mandate that the Commission had given to this Working Group, in particular as there was no consensus on the possible process options for the final stage of the process. Support for these views was expressed.

45. An alternative view was that the outcome document would be incomplete without further reference to the final stage, so that the scope of the paragraph and its inclusion as a separate section would be appropriate. It was added that the mere mention of the third stage would not contradict the limited mandate of this Working Group, and that to do so would assist users in understanding the scope of the ODR process as a whole. Support for these views was also expressed.

46. In this regard, it was suggested that a description of the types of process that might comprise the final stage could also be included to ensure completeness, but that any such description should not indicate preferences among those processes or address their legal consequences.

47. It was also suggested that the point could be addressed at the end of Section VIII or as a new section after Section VIII, perhaps by including the substance of the text added to paragraph 21 earlier in the session (see para. 41 above). This suggestion also received support.

48. After discussion, it was agreed that an additional provision addressing the final stage of the process would be included in the outcome document, to be located as a new Section VIII bis.

49. As regards the text for such a provision, three possible formulations were proposed:

(a) "The ODR administrator may inform the parties of the nature of the final stage";

(b) "While not addressing here the nature of the final stage of the ODR process (arbitration/non-arbitration), if facilitated settlement fails, a third and final stage might commence, in which case the ODR administrator may inform the parties of the nature of the final stage";

(c) To retain the language in paragraph 53 without the final phrase, so that it would read "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 for the final stage".

50. Support was expressed for elements of these proposals, and the need to avoid reopening discussion on the nature of the final stage was re-emphasized. It was agreed that the provision should be descriptive and informative for users.

51. After discussion, it was agreed that the provision would read as follows, "If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take." In consequence, it was agreed that paragraph 53 and its introductory heading would be deleted from the draft outcome document. It was also agreed that the subtitle for the section would be "Final Stage".

Section I — Introduction

General remarks

52. The Working Group recalled that it had deferred its consideration of the two formulations for this Section to this session, and agreed to consider the individual parts of the two formulations together, as denoted by the subheadings in each formulation.

53. The first issue raised was the sequencing of the three parts of the Section. It was noted that the first formulation followed UNCITRAL's Notes on Organization of Arbitral Proceedings, and so could be retained; another view was that the second formulation would be more logical in the context of the ODR outcome document, and as the title of the document had yet to be finalized.

54. Following informal consultations, it was agreed that the Working Group would proceed to discuss the draft introduction on the basis of the second formulation as set out in document A/CN.9/WG.III/WP.140.

55. It was noted that reference was made to the title of the outcome document in several places in the draft introduction, and that the title remained to be agreed.

Section I — Overview of ODR

56. The subtitle "Overview of ODR" and the language of paragraph 1 of the second formulation were agreed.

57. It was proposed that an additional sentence be included after the first sentence of paragraph 2 of the second formulation, as follows: "Online dispute resolution is a mechanism for resolving disputes through which the full range of traditional forms of dispute resolution (including but not limited to negotiations, mediation, conciliation, arbitration, adjudication and expert determination) where applicable, are facilitated by the use of electronic communications, other information and communication technology".

58. There was support for the inclusion of some additional text in the paragraph.

59. Alternative formulations for the phrase "the full range of traditional forms of dispute resolution options", were also proposed, including that the words "the full range" be replaced with "a broad range", to refer to "modern" as well as to "traditional" forms and to refer to "dispute resolution", without qualification.

60. It was said that users of the outcome document, and particularly consumers in developing countries, would benefit from a brief description of the possible range of forms of ODR, as provided by the bracketed language.

61. It was also observed that ODR could encompass non-traditional forms of dispute resolution in addition to those described, and that the field was a developing one. It was therefore queried whether the proposed list was sufficiently comprehensive and would stand the test of time. In response, the non-exclusive nature of the list was emphasized, and it was said that the broad reference to electronic communications and other technologies would allow for developments in ODR.

62. A further view was that if the illustrative list in bracketed text included forms of ODR that were not mentioned or explained in the remainder of the outcome document, the result might be confusing, particularly for consumers. It was added that removing the list would by implication operate to include all possible forms of ODR. For these reasons, it was stated that the bracketed text should not be included.

63. On the other hand, support was expressed in favour of the inclusion of an illustrative list such as that in the bracketed text. There were proposals for additional forms of ODR to feature in such a list, including "ombudsmen", "complaints boards", and "conciliation". An additional view was that such a list should also include newer forms of ODR, such as blind bidding, reputational systems, consumer complaint systems and credit-card charge-backs.

64. A further proposal was to replace the proposed additional sentence with the following text, to be included after the word "approaches" in the second sentence: "and forms (including but not limited to negotiation, mediation, conciliation, arbitration, adjudication and expert determination)". It was also stated that this formulation, combined with the existing reference to "hybrid processes" in paragraph 2, would also encompass all relevant forms of communications and

technologies. In response, it was added that an additional reference to a "broad range" or "full range" of forms would enhance the understanding of the user. Support for these two proposals, taken together, was expressed.

65. After consultation, it was proposed that the second sentence of paragraph 2 be amended to read as follows, "ODR encompasses a broad range of approaches and forms (including but not limited to conciliation, mediation, arbitration, ombudsmen, complaints boards, and others), including the potential for hybrid processes including both online and offline elements."

66. After further discussion, the prevailing view was that an illustrative list would be included in the revised second sentence of paragraph 2.

67. It was proposed that the illustrative list should include, in addition to the forms of ODR set out in paragraph 64 above, the terms "negotiation" and "facilitated settlement", as these forms were addressed in the draft outcome document. Support was expressed for this proposal.

68. It was also proposed that additional forms, such as those set out in paragraph 63 above, be included in the illustrative list. In response, it was queried whether all the forms enumerated were in fact forms of ODR, and it was added that inclusion of all the forms might make the list excessively long. Including such terms, it was also said, might be confusing for the user, particularly if the list did not distinguish between forms of ODR that were and were not addressed in the outcome document.

69. A further proposal to insert the words "modern" and "traditional" before the word "approaches", and to include the term "expert determination", did not gain support.

70. After discussion, it was decided that the forms "negotiation" and "facilitated settlement" would be added to those set out in paragraph 65 above. It was agreed that the illustrative list as it appeared in the outcome document would therefore comprise the forms of ODR set out in paragraph 65 above, together with the forms "negotiation" and "facilitated settlement". The Secretariat was instructed to insert the latter two forms at appropriate places in the illustrative list.

71. It was also proposed that the word "secure" be added in the first sentence of paragraph 2, so as to reflect the Working Group's decision to address data security in the draft outcome document made earlier in the session. Support was expressed for this proposal. Another view was that it was not necessary to add language in paragraph 2 as the matter was appropriately addressed elsewhere, and that the focus of this paragraph was different. It was decided to include the word "secure" as proposed.

Section I — Purpose of the Technical Notes

Paragraph 4

72. It was proposed that the word "confidentiality" be included in the paragraph, after the word "fairness".

73. The discussion of confidentiality earlier in the session was recalled, and it was stated that the matter had been addressed in the revisions to paragraphs 11 and 26 of the draft outcome document (see paras. 29 and 42 above). It was added that

including the words “confidentiality” and “transparency” in the same paragraph would be confusing.

74. An alternative approach, it was suggested, would be to replace the words “due process standards” in paragraph 52 of the draft outcome document with the phrase “standards of confidentiality and due process”. This proposal received support.

75. It was agreed to address the issue of confidentiality, as proposed, in paragraph 52, and consequently that paragraph 4 in the outcome document would remain as set out in the second formulation.

Conclusions as regards Section 1 — Introduction of the outcome document

76. There being no proposals to amend the subsection of the second formulation entitled “Non-binding Character of the Technical Notes” or to amend the proposed additional text in the second formulation, it was agreed to include the second formulation, as amended in paragraphs 70, 71 and 75 above, as the Introduction to the outcome document.

Title of the outcome document

77. It was proposed that the term “Guidelines” in the subheading of the introduction would be more accessible to potential users, and should be used as the title for the outcome document. Support was expressed for that proposal.

78. An alternative proposal was that the term should be “Technical Notes”. It was said that this term had appeared in an earlier iteration of the draft outcome document, and better reflected the mandate of the Working Group. It was also stated that the term “Technical Notes” would avoid confusion with the different scope of other UNCITRAL texts including the word “Guide” in their title. It was added that there was no UNCITRAL document entitled “Guidelines”, and that the term “Notes” had been used in another UNCITRAL text, the “UNCITRAL Notes on Organizing Arbitral Proceedings”, whose scope, it was said, was similar to that of the draft outcome document. It was also observed that the term “Technical Notes” would avoid any implication that the outcome document might include prescriptive rules. Support was also expressed for this proposal.

79. In addition, it was said that the use of the title “Technical Notes” in Chinese might lead to misunderstanding, in that there was no literal translation of the term in Chinese that would carry the intended meaning of “Technical Notes”. While the use of the term “Technical Notes” might accurately reflect the contents of the outcome document in the English version, it was stated that the term “技术指引” should be used in the Chinese language version, so as to convey accurately the intended meaning of the title and content of the outcome document. It was also stated that the scope and intended use of the “UNCITRAL Notes on Organizing Arbitral Proceedings” were different from the draft outcome document.

80. The prevailing view was in favour of the use of the term “Technical Notes”, and so that the outcome document would be entitled “Technical Notes on Online Dispute Resolution”.

81. After hearing a concern that the term “Technical Notes” in Russian would also not convey that the outcome document included issues with a legal context, the Secretariat was instructed to ensure that the appropriate scope and meaning of the

outcome document was reflected in the title of that document in all official languages.

82. It was confirmed that the outcome document would be entitled "Technical Notes on ODR", subject to the questions of language noted in paragraphs 79 and 81 above.

Final reading of the draft outcome document

83. The Working Group proceeded to conduct a final review of the draft outcome document. No further comments were made, other than as regards Section X — Language (paragraph 50 of the draft outcome document).

84. It was proposed that the phrase "it is desirable that the ODR administrator provide the ODR process in a language that the users can understand" be added in paragraph 50 of the outcome document, to replace the final phrase of the paragraph or as additional text elsewhere in the paragraph. The proposal received support.

85. Another view was that earlier discussions on the language provisions in the Working Group had not reached consensus on elements other than those set out in paragraph 50 of A/CN.9/WG.III/WP.140. It was added that an ODR system might also not be able to accommodate all languages. For these reasons, objection to the proposal was made.

86. After discussion, it was agreed that paragraph 50 would remain as set out in A/CN.9/WG.III/WP.140.

87. The Working Group agreed that the draft outcome document would be submitted to the Commission in the form set out in A/CN.9/WG.III/WP.140 as revised in the course of this session.