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 on International Trade Law**
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**Online dispute resolution for cross-border electronic
 commerce transactions: draft procedural rules**

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.¹ At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided 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 report to the Commission at its next session.²

2. At its twenty-second session (Vienna, 13-17 December 2010),³ the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural rules for ODR, including taking into account that the types of claims with which ODR would deal should be B2B and B2C, cross-border, low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group also requested the Secretariat to list available information regarding ODR known to the Secretariat with references to websites or other sources where they may be found (A/CN.9/716, para. 115). The Working Group may wish to note that that list is available on the UNCITRAL website.⁴

3. At its twenty-third session (New York, 23-27 May 2011),⁵ twenty-fourth session (Vienna, 14-18 November 2011)⁶ and twenty-fifth session (New York, 21-25 May 2012),⁷ the Working Group considered draft generic procedural rules as contained in documents A/CN.9/WG.III/WP.107, A/CN.9/WG.III/WP.109, and A/CN.9/WG.III/WP.112 and its addendum, respectively. At the twenty-fourth session, the Working Group requested that the Secretariat, subject to availability of resources, prepare a revised version of the draft generic procedural rules as well as documentation addressing issues of guidelines for neutrals, minimum standards for ODR providers, substantive legal principles

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

³ The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

⁴ www.uncitral.org/uncitral/en/publications/online_resources_ODR.html.

⁵ The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

⁶ The report on the work of the Working Group at its twenty-fourth session is contained in document A/CN.9/739.

⁷ The report on the work of the Working Group at its twenty-fifth session is contained in document A/CN.9/744.

for resolving disputes and a cross-border enforcement mechanism (A/CN.9/721, para. 140 and A/CN.9/739, para. 151). At its twenty-fifth session, the Working Group engaged in discussions on the draft procedural rules (A/CN.9/744).

4. This note contains an annotated draft of generic procedural rules for online dispute resolution in cross-border electronic transactions (the “Rules”), taking into account the deliberations of the Working Group at its twenty-second, twenty-third, twenty-fourth and twenty-fifth sessions.

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

A. General remarks

5. These Rules have been prepared in accordance with the decision of the Working Group to draft generic procedural rules for ODR, taking into account that the types of claims with which ODR would deal should be B2B and B2C low-value, high-volume cross-border electronic transactions. Rules prepared in this format — and which, pursuant to draft article 1 thereof, require the agreement of the parties — are of a contractual nature, and subject to mandatory law.

6. Several issues relating to the design of an overall ODR framework arise when considering the Rules. Documents A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115 address a number of these issues, including guidelines and minimum standards for ODR providers and neutrals, and proposed substantive principles for ODR claims and relief.

B. Notes on draft procedural rules

1. Introductory rules

7. Draft preamble

“1. The UNCITRAL online dispute resolution rules (“the Rules”) are intended for use in the context of cross-border low-value, high-volume transactions conducted by means of electronic communication.

“2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which [are attached to the Rules as an Appendix and] form part of the Rules:

[(a) Guidelines and minimum requirements for online dispute resolution providers;]

[(b) Guidelines and minimum requirements for neutrals;]

[(c) Substantive legal principles for resolving disputes;]

[(d) Cross-border enforcement mechanism;]

[...];

“[3. Any separate and supplemental [rules] [documents] must conform to the Rules.]”

Remarks

Paragraph (1)

8. The Working Group may wish to note that at a previous session of the Working Group, a proposal was made to indicate in the draft preamble that the Rules were intended to apply also to disputes relating to the “sale of goods and performance of services” (A/CN.9/739, para. 19).

Paragraph (2)

9. The Working Group at its twenty-fourth session noted that the list of documents in paragraph (2) is not exhaustive (A/CN.9/739, para. 21). The Working Group may wish to consider which of these documents and any additional documents the Working Group should be preparing in the fulfilment of its mandate. The Working Group may wish to note that A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115 address issues related to the documents identified in paragraph (2) (see para. 6, above).

Paragraph (3)

10. An ODR provider may choose to adopt supplemental rules to deal with issues that are not included in the Rules and that may require different treatment for each ODR provider — e.g. costs, definition of calendar days, responses to challenge of neutrals.

11. Draft article 1 (Scope of application)

“1. The Rules shall apply where the parties to a transaction conducted by use of electronic communications have[, [at the time of transaction] [either at the time of the transaction or after a dispute has arisen],] explicitly agreed that disputes relating to that transaction and falling within the scope of the ODR Rules shall be submitted to ODR under the Rules.

[“1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction and notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the ODR Rules will be exclusively resolved through ODR proceedings under the ODR Rules.”]

[“2.

Option 1: [“The Rules shall not apply where the law of the buyer’s state of residence provides that agreements to submit a dispute within the scope of the ODR Rules are binding on the buyer only if they were made after the dispute has arisen and the buyer has not given such agreement after the dispute has arisen or confirmed such agreement which it had given at the time of the transaction.”]

Option 2: [“These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of the law applicable to the

ODR proceedings from which the parties cannot derogate, that provision shall prevail.]

Option 3: [“Nothing in these Rules overrides a rule of law intended for the protection of consumers.”]

“3. As a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information.”

Remarks

Paragraphs (1) and (1) bis.

12. The current proposed wording of paragraphs (1) and (1) bis. require an agreement to submit disputes to ODR, which agreement is separate from the transaction. It was suggested that a separate agreement would better ensure that a consumer was providing “informed consent” when agreeing to submit disputes to ODR (A/CN.9/744, paras. 23-24). The consent of the parties might be so expressed in the form of a separate “OK box” (click-wrap agreement) accessible from or linked to the underlying transaction.

13. The Working Group may wish to consider whether paragraph (1) should clearly specify that the agreement to submit disputes to ODR under the Rules must take place at the same time as the substantive transaction, notwithstanding that a further confirmatory “click” may be required by some consumers at a later stage, where mandatory law requires a consumer’s post-dispute agreement to enter into an arbitration phase of dispute resolution.

14. Specifically, there was a suggestion at the Working Group’s twenty-fifth session that a “second click” by a consumer at a post-dispute stage to confirm its agreement to submit its dispute to ODR under the Rules might alleviate concerns expressed that in some jurisdictions consumers were barred from entering into an agreement to arbitrate pre-dispute (A/CN.9/744, para. 33). The Working Group may wish to consider:

(i) at which stage of the ODR process such a confirmatory second click would be appropriate, and in particular whether a reconfirmation at the stage of arbitration (that is, following a failure at both the negotiation and negotiated settlement stages) would entitle all consumers to benefit from the first two stages of ODR by virtue of having accepted the ODR Rules at the time of transaction;

(ii) whether all consumers or only consumers in certain jurisdictions would be obliged to provide a post-dispute confirmatory click, bearing in mind the difficulties with defining or ascertaining a consumer’s “habitual residence”. This may be an issue to be addressed by regional ODR providers, should they have the capacity to know and track the consumer law requirements in their region;

and alternatively,

(iii) whether an action, such as making a claim, might amount to the requisite confirmation by the consumer post-dispute to submit its dispute to ODR (see A/CN.9/744, para. 20).

Paragraph (2)

15. Although options 1 and 2 were not originally proposed as alternatives, the Working Group may wish to consider whether one option alone would be sufficient to clarify in the Rules that ODR proceedings are subject to relevant national consumer protection law, particularly with regard to jurisdictions where pre-dispute agreements to arbitrate involving consumers are not binding upon consumers. A third option the Working Group may wish to consider by way of further alternative has been included in square brackets and is derived from language in a note to Article 1 of the UNCITRAL Model Law on Electronic Commerce.

Paragraph (3)

16. At its twenty-fifth session the Working Group agreed to retain paragraph (3) (previously paragraph (2)), which sets out as a pre-condition for the use of the Rules the requirement that the parties provide their contact information (A/CN.9/744, para. 39). The word “electronic” has been added for the sake of clarity.

17. Because this paragraph is expressed as a pre-condition to the operation of the Rules, the Working Group may wish to consider including a time frame by which this condition must be satisfied. Bracketed language has been inserted to mirror the timing options currently set out in draft article 3, and the Working Group may wish to consider whether this draft paragraph would itself be better placed in draft article 3 (see A/CN.9/744, para. 42, and paras. 68-71).

18. The Working Group may wish to recall its discussion regarding the need for the parties to provide a current, functioning electronic address, and the fact that, as currently drafted, no sanctions exist under the Rules for a deliberate (or negligent) failure to do so (see A/CN.9/744, para. 43).

19. Draft article 2 (Definitions)

“For purposes of these Rules:

ODR

“1. ‘ODR’ means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.

“2. ‘ODR platform’ means one or more than one online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.

“3. ‘ODR provider’ means an online dispute resolution provider which is an entity that administers ODR proceedings for the parties to resolve their disputes in accordance with the Rules, whether or not it maintains an ODR platform.

Parties

“4. ‘claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.

“5. ‘respondent’ means any party to whom the notice is directed.

“6. ‘neutral’ means an individual that assists the parties in settling the dispute and/or [renders an award or other decision regarding the dispute] [resolves the dispute] in accordance with the Rules.

Communication

“7. ‘communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

“8. ‘electronic communication’ means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into a digital format so as to be directly processed by a computer or other electronic devices.

[“9. ‘writing’ means a data message containing information that is accessible so as to be useable for subsequent reference.”]

Remarks

General

20. The Working Group may wish to review the order of the definitions, which have been reorganized by theme (rather than strictly alphabetically) in order to establish a consistent order among different language versions of the Rules, as requested by the Working Group in its twenty-fifth session (A/CN.9/744, para. 47).

Paragraph (6) “neutral”

21. The first bracketed option in paragraph (6), the definition of “neutral”, (previously paragraph (4)) has been modified slightly in order to reflect the language in Article 33(1) of the UNCITRAL Arbitration Rules, pursuant to the suggestion of the Working Group at its twenty-fifth session (A/CN.9/744, para. 53). The second bracketed option removes any reference to the words “award” or “decision”. The Working Group may wish to recall its discussion (A/CN.9/744, para. 54) to the effect that the purpose of this provision is to define the role of the neutral and not any determination he or she may make.

Paragraph (9) “writing”

22. At the twenty-fifth session of the Working Group, it was proposed that a definition for the word “writing” be added to the list of definitions, and reflect the language in Article 6 of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/744, para. 59).

23. The word “writing” currently appears twice in the draft Rules, in draft article 9, paragraphs (2) and (4), as a requirement pertaining to the decision or award rendered by the neutral. The Working Group may also wish to consider

whether, in light of the addition of this definition, the word “writing” should be inserted in relation to the agreement, in article 1, paragraph (1) bis. of the Rules.

24. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be submitted by electronic means via the ODR platform designated by the ODR provider.

“2. The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be [that][those]

Option 1: [set out in the notice of ODR (“the notice”), unless the claimant notifies the ODR provider otherwise].

Option 2: [notified by the claimant to the ODR provider when accepting the Rules [under article 1(3) above] and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable)].

“3. The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be

Option 1: [[that] [those] notified by the respondent to the ODR provider when accepting the Rules [under article 1(3) above] and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.]

Option 2: [the address[es] for the respondent which [has] [have] been provided by the claimant. Thereafter, the designated electronic address[es] of the respondent for the purpose of all communications arising under the Rules [shall be [that] [those] which the respondent notified to the ODR provider when accepting the Rules [or any changes notified during the ODR proceedings and as updated to the ODR provider at any time thereafter during the ODR proceedings]].

“[4.

Option 1: The time of the receipt of an electronic communication under the Rules is the time when it becomes capable of being retrieved by the addressee of the communication [at the ODR platform] [[provided that the addressee has been notified thereof] [pursuant to paragraph (6) below]]. [An electronic communication is presumed to be capable of being retrieved when the addressee has been notified thereof in accordance with paragraph 6 below]. [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.]

Option 2: A communication shall be deemed to have been received when, following submission to the ODR platform in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). [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.]

“5. The ODR provider shall [promptly] [without delay] communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses.

“6. The ODR provider shall [promptly] [without delay] notify all parties and the neutral of the availability of any electronic communication at the ODR platform.”

Remarks

Paragraph (1)

25. The Working Group agreed at its twenty-fifth session that paragraph (1) would reflect the principle that all communications in the ODR process take place through the ODR platform (A/CN.9/744, paras. 62-63). Consequently, language throughout the Rules has been inserted in brackets to clarify that while the parties *communicate* [e.g., a notice] to the ODR provider, the process requires *submitting a communication to the ODR platform* (see by way of example draft article 4A, paragraph (1), below).

Paragraphs (2) and (3)

26. At its twenty-fifth session, the Working Group requested the Secretariat to prepare draft language to reflect different options with regard to draft article 3, paragraphs (2) and (3), for further consideration (A/CN.9/744, para. 71). Several considerations were suggested to be relevant in this respect: (i) the desire to avoid the potentially confusing use of the term “notice” before that term was formally defined in the Rules; (ii) the support for the proposition that the designated contact address for the parties should be the contact address provided at the time the parties accepted the Rules; and (iii) the potential difficulty a claimant may face in the event a respondent’s electronic address has changed in the period between the agreement to submit a dispute to ODR under the Rules, and the time of a dispute arising in practice, and where such change has not been communicated to the ODR provider.

27. Further to these considerations and the Working Group’s request, the Secretariat has inserted square bracketed language in paragraph (2), as option 2, and paragraph (3), as option 1. These options are intended to address concerns that (a) any notice is directed in the first instance to an electronic address (or addresses) provided by the respondent at the time of acceptance of the Rules (assuming that acceptance of the Rules takes place at the time of transaction, and thus precedes the notice); and (b) the given electronic address or addresses remains consistent and up-to-date throughout the proceedings.

28. The Working Group may recall that both parties are required to provide their respective electronic addresses as a pre-condition for using the Rules (draft article 1(3)); an option in paragraph (3) permitting the claimant to provide an electronic address for the respondent in the notice (option 2) may be inconsistent with that provision, in circumstances where agreement to use the Rules has taken place at the time of the transaction.

29. In this regard, both paragraph (2) and paragraph (3) are closely linked with draft article 1, paragraphs (1) and (1) bis., in relation to the timing and nature of

acceptance of the Rules, and to draft article 1, paragraph (3), which specifies that each party must provide its contact information as a condition to using the Rules.

Paragraph 4

Option 1

30. The Working Group remarked at its last session that paragraph (4), which as originally drafted reflected Article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”, or the “ECC”), should be re-drafted, bearing in mind the close relationship of this paragraph with paragraph (6), and moreover taking into account Article 2(5) of the UNCITRAL Arbitration Rules (A/CN.9/744, para. 73).

31. The Working Group may wish to recall that the ECC creates an explicit presumption that an electronic communication is capable of being retrieved when it reaches the addressee’s electronic address (Article 10(2) ECC: *see also* A/CN.9/WG.III/WP.112, para. 26). As this presumption cannot be directly transposed to an ODR context, in which communications are submitted to the ODR platform rather than directly to an electronic address, pursuant to draft article 3, paragraph (1), the term “capable of being retrieved” may require some qualification or explanation; two options have been inserted in square brackets for the consideration of the Working Group in this respect, based on the relationship of this paragraph with paragraph (6).

32. The Working Group however may wish to consider that paragraph (4) is intended to govern the timing of receipt; in this respect, the Working Group may wish to consider whether timing should be based on an objective point of entry into an information system (i.e. at the moment it is submitted to the ODR platform), or whether receipt should be deemed at the moment when a communication is “capable of being retrieved” by the recipient.

If the latter:

(i) and such capability is to be presumed when the ODR provider has notified the relevant parties of the availability of the communication on the platform, does receipt in fact take place at the time of notification by the ODR provider? (*See also option 2, set out in paragraphs 34-35 below*)

(ii) when is the presumption overturned? In situations where, for example, a (consumer) party is on holiday and does not check his or her e-mails for two weeks; or if a (consumer) party fails to update his e-mail address, and an old or inactive account is used as his contact address, is a communication sent to that address “capable of being retrieved”? Does the presumption hold notwithstanding these practical, possible scenarios? If there is ambiguity in relation to capability of receipt, then there is ambiguity regarding timing of receipt, in which case the ODR proceedings may experience disruption;

(iii) if ODR proceedings have not yet reached a stage where a neutral has been appointed, who determines whether the presumption that a communication is capable of receipt, has been overturned?

33. In response to a concern raised at its twenty-fifth session, the Working Group may wish to consider whether the final, bracketed sentence, in concert with the language in (currently bracketed) draft article 7, paragraph (5) (power of the neutral to make inquiries) is sufficient to address situations where a party — particularly a consumer respondent — has not been capable, for any number of reasons, of retrieving a communication from the platform.

Option 2

34. A suggestion was made at the last session to redraft paragraph (4) to reflect Article 2, paragraph (5) of the UNCITRAL Arbitration Rules.⁸ Consequently, option 2 has been inserted, which provides for “deemed receipt”, thus avoiding any notion of when a communication is “capable of being retrieved” including any presumption thereof. The proposed language deems receipt at the time the ODR provider notifies the parties that the relevant communication is available on the platform. Whilst a deemed receipt provision may transfer slightly more risk of non-receipt of communication to the parties, as compared to a presumptive receipt provision (because the presumption can be rebutted), it also may provide for more certainty of timing. However, the outcomes of option 1 and option 2 are not necessarily different: see paragraph 32(i) above.

35. Option 2 also currently provides, in brackets, for the discretionary power of the neutral to extend deadlines should the addressee show good cause for failure to retrieve that communication from the platform.

2. Commencement

36. Draft article 4A (Notice)

“1. The claimant shall [communicate to the ODR provider][submit to the ODR platform] a notice in accordance with the form contained in paragraph (4). The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

“2. [The notice shall then be communicated by the ODR provider to the respondent [promptly] [without delay].][The ODR provider shall [promptly][without delay] notify the respondent that the notice is available at the ODR platform.]

“3. ODR proceedings shall be deemed to commence on the date of [receipt by the ODR provider at] [submission to] the ODR platform of the notice referred to in paragraph (1).

“4. The notice shall include:

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

⁸ Article 2(5) of the UNCITRAL Arbitration Rules states: “A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee’s electronic address.”

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

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

“(d) any solutions proposed to resolve the dispute;

“(e) a statement that the claimant agrees to participate in ODR proceedings [or, if applicable, a statement that the parties have an agreement to resort to ODR proceedings in case of any dispute arising between them].”

“(f) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;

“(g) the location of the claimant;

“[(h) the preferred language of proceedings;]

“(i) the signature of the claimant and/or the claimant’s representative in electronic form including any other identification and authentication methods;

“[...].”

Remarks

General

37. The Working Group may wish to consider whether draft articles 4A and 4B, in relation to Commencement, should be moved to precede the current draft article 3, in relation to Communications, in order to promote a chronology in the Rules which more closely follows the presumed chronology of proceedings.

38. At its twenty-fifth session the Working Group agreed that draft article 4 should be split into separate articles, on notice and response respectively. In addition the Working Group agreed to incorporate the contents of existing annexes by reflecting them as paragraphs in the respective articles (A/CN.9/744, para. 76). Thus the former Annex A is now included as draft article 4A, paragraph (4), and the former Annex B as draft article 4B, paragraph (3).

39. The Working Group may wish to recall its discussion and the suggestion of an approach using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions as the basis for deciding cases (A/CN.9/716, para. 101). The Working Group may wish to consider, further to A/CN.9/WG.III/WP.113, paragraphs 10-14, and A/CN.9/WG.III/WP.115, Section IV(B), the proposal that the Working Group adopt an approach of enumerating, in draft articles 4A, paragraph (4), and draft article 4B, paragraph (3), a list of possible claims, and responses thereto, to be included in the notice and response respectively.

40. Square-bracketed language has been inserted in the first paragraph of draft articles 4A and 4B respectively, should the Working Group wish to reflect the language of draft article 3, paragraph (1), which sets out that the notice and response are submitted in the first instance to the ODR platform (see e.g. para. 25, above).

Paragraph (2)

41. The Working Group may wish to consider whether the ODR provider will directly communicate the notice to the respondent, or whether the ODR provider will notify the respondent of the existence of the notice at the ODR platform. As the latter option may be more consistent with the form of communication set out in draft article 3, a second sentence has been inserted in brackets to provide for this option.

Paragraph (3)

42. The Working Group may wish to consider simplifying this paragraph in order that the timing is based on the time of receipt of the communication at the ODR platform, rather than the time of receipt by the ODR provider, which may be less transparent.

43. It was suggested to consider adding options for including separate definitions of commencement for each specific phase of the ODR proceedings — negotiation, facilitated settlement and arbitration (see A/CN.9/WG.III/WP.112, paras. 32-33).

*Paragraph (4) (Formerly Annex A)**Paragraphs (4)(c) and (4)(d)*

44. The Working Group may wish to consider whether draft paragraph (4) should enumerate the grounds on which claims can be made and the available remedies (A/CN.9/WG.III/WP.112, paragraph 36; see also A/CN.9/WG.III/WP.115, Section IV(B)). In a global cross-border environment for resolving low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies, to avoid the risk of overloading the system with complex cases, making it inefficient and expensive.

Paragraph (4)(f)

45. The Working Group may wish to note that, at its twenty-third session, it was suggested that paragraph (4)(f), together with a companion provision in draft article 4B, paragraph (3), could assist in preventing a multiplicity of proceedings relating to the same dispute (see A/CN.9/721, para. 122).

Paragraph (4)(h)

46. In the interest of promoting efficiency of proceedings, the Working Group may wish to consider requiring the parties to select a preferred language of the proceedings, in the event they wish to use a language different from that used in connection with the transaction in dispute (see A/CN.9/WG.III/WP.112/Add.1, paras. 20-25).

Paragraph (4)(i)

47. The Working Group may wish to recall its discussion that complex identification and authentication methods may not be necessary for the purposes of ODR, and that current UNCITRAL texts on electronic commerce already address methods of electronic signature that are reliable and appropriate for the purposes for which they were used (Article 7(2)(b) of UNCITRAL Model Law on Electronic

Commerce; see A/CN.9/716, para. 49). The issue of identification and authentication of parties in ODR might be more appropriately dealt with in a document separate from the Rules such as guidelines and minimum standards for ODR providers. It should also be noted that the term “electronic signature” differs from “digital signature”. Electronic signature⁹ refers to any type of signature that functions to identify and authenticate the user including identity management.¹⁰

48. Draft article 4B (Response)

“1. The respondent shall [communicate to the ODR provider][submit to the ODR platform] a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

“[2.

[Option 1: The respondent may, in response to the notice [communicated by the claimant], [communicate][submit] a claim which arises out of the same transaction [or same factual circumstances] identified by the claimant in the notice [with the same ODR provider][to the ODR platform] (‘counter-claim’).] The counter-claim shall be [submitted][initiated] no later than [seven (7)] calendar days [after the notice of the first claim is [submitted to the ODR platform] [communicated to] [received by] the respondent]. [The counter-claim shall be dealt with in the ODR proceedings together with the [first claim] [notice by the claimant].]”

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d).]”

[Option 2: “The respondent may, in response to the notice, submit a counter-claim to the ODR platform. ‘Counter-claim’ means a[n independent] claim by the respondent against the claimant which arises out of the same transaction or same factual circumstances identified by the claimant in the notice [with the same ODR provider]”.] The counter-claim shall be [submitted][initiated] no later than [seven (7)] calendar days [after the notice of the first claim is [submitted to the ODR platform] [communicated to] [received by] the respondent]. [The counter-claim shall be dealt with in the ODR proceedings together with the [first claim] [notice by the claimant].

⁹ Article 2 (a) of Model Law on Electronic Signatures defines electronic signatures as “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message”. Digital signature generally uses cryptography technologies such as public key infrastructure (PKI), which require specific technology and means of implementation to be effective.

¹⁰ Identity management could be defined as a system of procedures, policies and technologies to manage the life cycle and entitlements of users and their electronic credentials. It was illustrated that verifying the identity of person or entity that sought remote access to a system, that authored an electronic communication, or that signed an electronic document was the domain of what had come to be called “identity management”. The functions of identity management are achieved by three processes: identification, authentication and authorization (see A/CN.9/692 and A/CN.9/728).

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d)].]”

“3. The response shall include:

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

“(b) a response to the statement and allegations contained in the notice;

“(c) any solutions proposed to resolve the dispute;

“[(d) a statement that the respondent agrees to participate in ODR proceedings];

“(e) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;

“(f) the location of the respondent;

“[(g) the preferred language of proceedings];

“(h) the signature of the respondent and/or the respondent’s representative in electronic form including any other identification and authentication methods;

“[...].”

Remarks

General

49. As noted in paragraphs 25 and 40 above, the Working Group may wish to consider modifying slightly the language of this article in order that language of submission of communications to the ODR platform is consistent throughout the Rules.

Paragraph (1)

50. At its twenty-fourth session, the Working Group agreed to retain the term “calendar” throughout the Rules (A/CN.9/739, para. 64). The Working Group may wish to note that UNCITRAL texts do not contain a definition of calendar days.¹¹

51. The Working Group may wish to recall its decision to provide in an additional document the recommendation that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own rules with regard to time so long as they are not inconsistent with the Rules (A/CN.9/721, para. 99). The Working Group may wish to consider whether these matters should be addressed in the Rules together with the relevant questions of how the period of time under the Rules should be calculated and

¹¹ However, article 2(6) of the UNCITRAL Arbitration Rules, deals with extensions of time when the last day of a period of time is an official holiday or non-business day and provides that official holidays or non-business days occurring during the running of the period of time are included in calculating the time period.

whether the calculation should be left to the ODR provider and addressed in guidelines and minimum requirements for ODR providers.

Paragraph (2)

52. Draft article 4B, paragraph (2) (formerly draft article 4, paragraph (5)), reflects the Working Group's decision to include a provision on counter-claims in the Rules (A/CN.9/739, para. 93).

53. At its twenty-fourth session, the Working Group requested that the Secretariat prepare a definition of counter-claim as an alternative to that proposed in option 1, and moreover to suggest where such a definition might be included in the Rules (A/CN.9/739, para. 93). Consequently, option 2 was inserted in brackets. The Working Group may wish to retain the stand-alone definition proposed in option 2 in this paragraph, or separately, in draft article 2 (Definitions).

54. The Working Group may wish to note that several questions arise in relation to counter-claims:

(a) Should the respondent file a new claim or include the counter-claim in the response? Can the response to the notice be presumed to encompass any counter-claim? Should this be made apparent to the claimant, for instance by way of the respondent indicating same by clicking a separate check-box? Will the neutral have the discretion to decide that a response encompasses or constitutes a counter-claim, in the absence of an express statement to that effect by the respondent? Should the counter-claim be in the form of an original claim as set out in article 4A, paragraph (4)?

(b) Will there be an option for the claimant to file a response to the counter-claim, or might the neutral have the discretion to request that the claimant do so?

(c) How will it be determined whether the counter-claim falls within the ambit of the initial claim in the notice by the claimant? (A/CN.9/739, para. 92). The Working Group may wish to consider the extent to which this question is addressed by draft article 7 and in particular paragraph (4) thereof (power of the neutral to rule on his own jurisdiction, including the existence or validity of the agreement to submit the dispute to ODR).

(d) Should the Rules or additional documents regulate the grounds for deciding whether a counter-claim falls within the ambit of the initial claim?

(e) Does the filing of a counter-claim prevent the respondent from filing a new claim on the same transaction and with a different ODR provider?

Paragraph (3)

55. Paragraph (3) addresses the content of the response to the notice and mirrors the provisions of draft article 4A, paragraph (4).

Paragraph (3)(a)

56. As with draft article 4A, paragraph (4), the issue of data protection or privacy and online security in the context of communicating information relating to the

parties in the course of ODR proceedings should be taken into consideration (A/CN.9/721, para. 108).

Paragraphs (3)(b) and (3)(c)

57. Paragraphs (3)(b) and (c) mirror draft article 4A, paragraphs (4)(c) and (d). As with the counterpart provisions in draft article 4A, the Working Group may wish to consider whether draft article 4B, paragraph (3) should enumerate the responses to the statements, allegations and proposed solutions contained in the notice.

Paragraph (3)(d)

58. The Working Group may wish to consider whether this provision is necessary in light of the agreement required by both parties at the time of transaction (see above, paras. 12-14).

Paragraphs (3)(e)-(h)

59. Paragraphs (3)(e) to (h) mirror discussion in respect of draft article 4A, paragraphs 4(f) to (i), respectively.
