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## **Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules**

**Note by the Secretariat**

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction . . . . .	1-4	2
II. Online dispute resolution for cross-border electronic transactions: draft procedural rules . . . . .	5-86	3
A. General remarks . . . . .	5-6	3
B. Notes on draft procedural rules . . . . .	7-86	3
1. Introductory rules . . . . .	7-34	3
2. Commencement . . . . .	35-50	9
3. Negotiation . . . . .	51-57	13
4. Neutral . . . . .	58-68	15
5. Facilitated settlement and arbitration . . . . .	69-71	17
6. Decision by the neutral . . . . .	72-75	18
7. Other provision . . . . .	76-86	19



## 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.<sup>1</sup> 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.<sup>2</sup>

2. At its twenty-second session (Vienna, 13-17 December 2010),<sup>3</sup> 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.<sup>4</sup>

3. At its twenty-third session (New York, 23-27 May 2011),<sup>5</sup> the Working Group considered draft generic procedural rules as contained in document A/CN.9/WG.III/WP.107. At that 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 for resolving disputes and a cross-border enforcement mechanism (A/CN.9/721, para. 140).

4. This note contains an annotated draft of generic procedural rules, taking into account the deliberations of the Working Group at its twenty-second and twenty-third sessions.

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

<sup>2</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 224 (Unedited text as adopted).

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

<sup>4</sup> [www.uncitral.org/uncitral/en/publications/online\\_resources\\_ODR.html](http://www.uncitral.org/uncitral/en/publications/online_resources_ODR.html).

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

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

### A. General remarks

5. Several issues relating to the design of an overall ODR framework arise when considering the draft procedural rules (the Rules). Document A/CN.9/WG.III/WP.110 addresses a number of these key issues, including the organization of ODR proceedings (see A/CN.9/WG.III/WP.110).

6. The Working Group may wish to take into account that the Rules have been prepared based on the assumption that the ODR proceedings include a negotiation phase, followed by a phase of facilitated settlement and, if that second phase is inconclusive, a final and binding decision by a neutral. Where relevant, indications have been given herein regarding variations to the Rules in the event parties are given discretion in choosing phases.

### B. Notes on draft procedural rules

#### 1. Introductory rules

##### 7. 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 in whole or in part by the use of electronic means of 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 Annexes and form part of the Rules]:*

*“[(a) Guidelines for online dispute resolution providers;]*

*“[(b) Online dispute resolution provider supplemental rules;]*

*“[(c) Guidelines and minimum requirements for neutrals;]*

*“[(d) Substantive legal principles for resolving disputes;]*

*“[(e) Cross-border enforcement mechanism;]*

*“[...];*

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

#### *Remarks*

8. The Working Group may wish to consider whether a short preamble should be included in the Rules to clarify the context in which the Rules are intended to be used, as well as the complementary instruments that are part of the ODR framework. Inclusion of a preamble could permit a simplification of draft article 1 (see below, para. 10).

9. The Working Group may wish to note that a discussion of general issues and questions regarding a global ODR framework can be found at A/CN.9/WG.III/WP.110).

*Paragraph (1)*

10. With respect to defining the term “cross-border transaction”, the Working Group may wish to note that the United Nations Convention on the Use of Electronic Communications in International Contracts adopted in 2005 (“Electronic Communications Convention” or “ECC”) applies to the “formation or performance of a contract between parties whose places of business are in different States.” This definition includes the term “place of business” which is defined in article 6 of the Electronic Communications Convention.<sup>6</sup> The Working Group may wish to consider whether that definition would also be appropriate in the context of the Rules.

*Paragraph (2)*

11. Paragraph (2) seeks to clarify that the Rules are one element in an overall ODR framework (see A/CN.9/WG.III/WP.110).

**12. Draft article 1 (Scope of application)**

*“The Rules shall apply to ODR proceedings where parties to an online transaction have agreed that disputes in relation to that transaction shall be referred for settlement under the Rules, [subject to the right of the parties to pursue other forms of redress].*

*Remarks*

13. The Working Group may wish to consider how such an agreement between the parties would be reached, and how the Rules would be incorporated in any such agreement.

14. The term “online transaction” may refer to transactions conducted either partly or wholly by electronic means. The Working Group may wish to consider whether

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<sup>6</sup> Article 6 of the Electronic Communications Convention:

1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.
2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
3. If a natural person does not have a place of business, reference is to be made to the person’s habitual residence.
4. A location is not a place of business merely because that is:
  - (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or
  - (b) where the information system may be accessed by other parties.
5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

the Rules could be used for transactions conducted by use of electronic means of communication in whole or in part.

15. The Working Group may wish to further consider whether the Rules should provide greater detail as to types of claims to be covered by, or indeed excluded from, the operation of the Rules (A/CN.9/721, para. 51).

16. With respect to the bracketed text at the end of draft article 1 (“*subject to the right of the parties to pursue other forms of redress*”), the Working Group may wish to recall its discussion at its twenty-third session, and the diverging views expressed on the need to retain those words (A/CN.9/721, paras. 41-49). The bracketed text is intended to refer to situations where pre-dispute agreements to arbitrate might not be binding upon consumers and thus where only one party might be bound by such an agreement.

**17. Draft article 2 (Definitions)**

*“For purposes of these Rules:*

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

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

*Option 1 [“3. ‘electronic communication’ means any communication made by any person to whom these 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, telegram, telex, telecopy, [short message services (SMS), web-conferences, online chats, Internet forums, or microblogging];”]*

*Option 2 [“3. ‘digitized communication’ means 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;]*

*“4. ‘neutral’ means an individual that assists the parties in settling the dispute and/or renders a [decision] [award] regarding the dispute in accordance with the Rules;*

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

*“6. ‘ODR’ means online dispute resolution which is a system for resolving disputes where the [procedural aspects of the dispute resolution mechanisms are] [procedure for dispute resolution is] conducted and facilitated through the use of [electronic communications] [digitized communications] and other information and communication technology;*

*“7. ‘ODR platform’ means [an] [one or more than one] online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing [electronic communications] [digitized communications] used in ODR;*

*“8. ‘ODR provider’ means an online dispute resolution provider which is an entity that administers ODR proceedings and provides an ODR platform for the parties to resolve their disputes in accordance with the Rules;*

*“[...]”*

*Remarks*

*Paragraph (1) “claimant”*

18. The proposed definition of “claimant” clarifies that a claimant may be either the buyer or the seller.

*Paragraph (2) “communication”*

19. The definition of “communication” is derived from article 4 (a) of the Electronic Communications Convention, where it is confined to use of electronic communications in connection with the formation or performance of a contract between parties. The definition has been modified so as to accommodate the context of ODR including both B2B and B2C transactions.

*Paragraph (3) [“electronic communication”] [“digital communication”]*

20. The definition of “electronic communication” is derived from articles 4 (b) and 4 (c) of the ECC and article 2 (a) of the UNCITRAL Model Law on Electronic Commerce (MLEC) adopted in 1996 (with additional article 5 bis adopted in 1998). That definition refers to “electronic mail, telegram, telex, or telecopy”. Since the adoption of the MLEC, other technological innovations have emerged, and therefore the Working Group may wish to consider whether the provision should be amended to include short message services (SMS), web-conferences, online chats, Internet forums, microblogging, and other information and communication technologies as examples of electronic communications.

21. The Working Group may also wish to consider whether a more abstract and technology-neutral concept, such as “digitized communication” might be used instead of “electronic communication”. Digitized communication refers to information in analogue form — such as documents, objects, images, texts and sounds — that is converted or transformed into a digital format so that it can be directly processed by a computer or other electronic devices. The broader concept of digitized communication may accommodate new technology such as automatic speech recognition that allows computers to interpret human speech and transcribe it to text or to translate text to speech and may also include radio-frequency identification that uses communication through the use of radio waves to transfer information between an electronic tag and a reader. These new technologies and other future technologies could be relevant to ODR proceedings. Further, the term digitized communication could be more suitable given that electronic communication for dispute resolution may require a one-on-one hearing in electronic form while a contract for an electronic transaction could be said to be mostly based on a written document in electronic format.

*Paragraph (4) “neutral”*

22. The Working Group may wish to note that general issues to be considered regarding neutrals are outlined in A/CN.9/WG.III/WP.110.

23. An issue arises as to the possibility of the neutral mingling the roles of conciliator (i.e. facilitating at the facilitated settlement stage) and arbitrator (i.e. rendering binding decisions) (A/CN.9/721, paras. 66-67). In commercial settings, the mediator/conciliator is normally not the arbitrator, unless the parties decide otherwise. The approach may be different for ODR, given the need for speed and simplicity (A/CN.9/716, paras. 61-65) and bearing in mind the considerations raised at paragraph 67 of A/CN.9/721. The Working Group may wish to consider this question in light of its decision on how the various steps in ODR proceedings are to be articulated.

24. The Working Group may wish to further consider which of the terms “arbitrator” or “neutral”, and “award” or “decision”, are more appropriate for use in the Rules (A/CN.9/721, para. 24).

*Paragraph (6) “ODR”*

25. At its twenty-second session, the Working Group agreed that consideration of a definition of ODR could usefully be deferred to a later point in the discussion, when the components of the concept had been more fully elaborated (A/CN.9/716, para. 40). It was also suggested that the definition of ODR be limited to instances where procedural aspects of a case are conducted online (A/CN.9/716, para. 35). The Working Group may wish to decide whether ODR could be conducted in whole or in part online and if so, define what “in part” means (A/CN.9/716, para. 37).

*Paragraph (7) “ODR platform”*

26. The Working Group may wish to note that general issues to be considered regarding ODR platform are outlined in A/CN.9/WG.III/WP.110.

27. Several issues arise regarding the definition of an ODR platform. One is whether an ODR provider is foreseen as operating more than one ODR platform. The platform might include an e-mail server where the parties and the ODR provider communicate, a web-based portal, a customized solution or internal enterprise resource planning system or any other type of format. An ODR platform might be a single system such as a website or more than one system such as a website and a mobile phone application linked to a website. In this regard, the Working Group may wish to consider inclusion of the bracketed text [*one or more than one*].

*Paragraph (8) “ODR provider”*

28. The Working Group may wish to note that general issues to be considered regarding ODR providers are outlined in A/CN.9/WG.III/WP.110.

29. The definition of ODR provider entails various issues such as role and responsibility, approval, and selection process. The Working Group may wish to consider the extent to which roles and responsibilities of ODR providers should be defined, and whether such definition should be included in the Rules or in the Guidelines.

**30. Draft article 3 (Communications)**

*“1. All communications in the course of ODR proceedings shall be transmitted by electronic means to the ODR provider and shall be addressed through the ODR platform.”*

*“[2. The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be that [those] set out in the notice of ODR (“the notice”), unless the claimant notifies the ODR provider or ODR platform otherwise.”*

*“3. The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be 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 or ODR platform when accepting these Rules or any changes notified during the ODR proceeding.”*

*[“4. 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.]”*

*“5. The ODR provider shall 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 notify all parties and the neutral of the availability of any electronic communication at the ODR platform.”*

*Remarks**Paragraphs (2) and (3)*

31. The Working Group may wish to refer to the discussion at its twenty-third session suggesting the division of the paragraph on designated electronic addresses of parties (see A/CN.9/721, paras. 84-86). It may be noted that until the respondent files a response the only address the ODR provider has for the respondent is that provided by the claimant. Hence the definition takes account of this.

*Paragraph (4)*

32. Paragraph (4), which reflects article 10 of the Electronic Communications Convention, is relevant to the overall time frame of the ODR proceedings.<sup>7</sup> Given that the Rules are intended to promote simplicity, speed and efficiency, and that the dispute resolution is cross-border, uncertainties over time of receipt of

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<sup>7</sup> Article 10 of Electronic Communications Convention updates article 15 of MLEC. The amendments made to article 10 of Electronic Communications Convention are consistent with those prevailing in the paper world and limit the ability of an addressee to deliberately delay or impede delivery of a communication by not accessing it. They also take into account the fact that the information system of the addressee may not be reachable for reasons outside the control of the originator (for instance, the use of anti-spam filters for e-mails).



communications could delay proceedings and therefore it may be necessary to identify a consistent standard to identify the time of their receipt.

*Paragraph (5)*

33. Paragraph (5) deals with acknowledgement of receipt of electronic communications (A/CN.9/721, para. 89). Such acknowledgement has two functions: one is to communicate acknowledgement to the sender of the electronic communication; the second is to notify the other party and, where necessary, the neutral that the first party has communicated an electronic message.

34. It was suggested that the ODR provider also acknowledge the date and time of the receipt of communications, and that matters of calculation of time and acknowledgment of receipt could be handled at the ODR platform by the use of technical means (see A/CN.9/721, para. 100).

## **2. Commencement**

### **35. Draft article 4 (Commencement)**

*“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in annex A. 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 promptly communicated by the ODR provider to the respondent.*

*“3. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in annex B within [five (5)] [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.*

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

*“Annex A*

*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;*

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

*“(f) Option 1 [statement that the claimant agrees to participate in ODR proceedings;]*

*Option 2 [statement identifying the stage[s] of ODR proceedings in which the claimant wishes to participate]*

*Option 3 [statement that the parties have an agreement to resort to ODR proceedings in case any dispute arises between them]*

*“(g) statement that the claimant is not currently pursuing other remedies against the respondent with regard to the transaction in issue;*

*“(h) statement that filing fee of [ ] has been paid;*

*“[(i) location of claimant;]*

*[...]”*

*“Annex B*

*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) the signature of the respondent and/or the respondent’s representative in electronic form;*

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

*“[(g) location of respondent;]*

*[...]”*

*Remarks*

*Paragraphs (2) and (3)*

36. The Working Group may wish to note that, depending on how ODR provider and ODR platform are defined, it could be foreseen that notices may be communicated to the ODR provider or ODR platform. These paragraphs will have to be made consistent with the provisions on communications and with the definitions of ODR provider and ODR platform. The Working Group may wish to note that the designation of recipient of electronic communications, either ODR provider or ODR platform, may affect the time of receipt of electronic communications which in turn affects the time frame of ODR proceedings.

*Paragraph (3)*

37. The Working Group may wish to consider how the period of time under the Rules should be calculated and whether the calculation should be left to the ODR provider (see A/CN.9/WG.III/WP.110).

*Paragraph (4)*

38. Paragraph (4) deals with the commencement of ODR proceedings. The Working Group may wish to consider whether the proceedings should be deemed to commence when the ODR provider receives the notice from the claimant (Article 4 of World Intellectual Property Organization (WIPO) Mediation Rules) or when the respondent receives the notice (Internet Corporation for Assigned Names and Numbers, Uniform Domain Name Dispute Resolution Policy).

39. The Working Group may wish to consider, in the event that ODR is designed to allow the parties and/or ODR providers to select a specific phase or phases of proceedings, whether each specific phase of the ODR proceedings — negotiation, facilitated settlement and arbitration — should contain its own definition of commencement.

40. The current wording of the paragraph makes commencement of proceedings dependent on receipt of the notice, either by the ODR provider or the respondent. Annex A (f) now contemplates a choice by the parties, or at least the claimant, of a particular stage of the ODR proceedings.

*Annex A**Annex A (c) and (d)*

41. The Working Group may wish to consider whether annex A should enumerate the grounds on which claims can be made and the available remedies. 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.

*Annex A (e)*

42. It should be noted that the term “electronic signature” differs from “digital signature”. Electronic signature<sup>8</sup> refers to any type of signature that functions to identify and authenticate the user including identity management.<sup>9</sup>

<sup>8</sup> 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 ways of implementation to be effective.

<sup>9</sup> 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”. It was illustrated that the functions of

*Annex A (g)*

43. In order to prevent multiplicity of proceedings relating to the same dispute, it was suggested that annex A (g) together with a companion provision in annex B could assist in that regard (see also reference to annex B (f)) (A/CN.9/721, para. 122).

*Annex A (i)*

44. Paragraph 1 of the preamble specifies that the Rules are applicable to “cross-border ... transactions”, which may indicate a need to ascertain the location of parties. The Working Group may therefore wish to consider including a requirement by the claimant to identify his location in the notice (see also reference to annex B (g)).

*Annex B*

45. Annex B deals with the response to the notice and mirrors the provisions of annex A.

*Annex B (a)*

46. As with annex A (a) and (b), 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).

*Annex B (b) and (c)*

47. Annex B (b) and (c) mirror annex A (c) and (d) and similarly, the Working Group may wish to consider whether annex B should enumerate the responses to the statements, allegations and proposed solutions contained in the notice.

*Annex B (d)*

48. The Working Group may wish to consider modifying the language of paragraph (d) as set out below, in light of any views it may have on the issue of pre-dispute binding agreements to participate in ODR: “[*(d) statement that the respondent agrees, or where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings*]”.

*Annex B (e)*

49. Annexes B (e), B (f) and B (g) mirror annexes A (e), A (g) and A (i) respectively and any discussion above regarding the former is applicable to the latter.

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identity management were achieved by three processes: identification, authentication and authorization (see A/CN.9/692 and A/CN.9/728).

*Other*

50. The Working Group may wish to consider whether the Rules should contemplate the filing of counter-claims. The following paragraph is suggested:

*[“5. The respondent may communicate a claim in response to the notice communicated by the claimant (‘counter-claim’). The counter-claim must be initiated [[with the same ODR provider] and regarding the same disputed transaction identified in the notice] no later than [five (5)] [calendar] days [after the notice of the first claim is communicated to the respondent]. [The counter-claim shall be decided by the neutral appointed to decide the first claim].”]*

### 3. Negotiation

#### 51. Draft article 5 (Negotiation)

*“1. [If the respondent responds to the notice and accepts one of the solutions proposed by the claimant] [if settlement is reached], the ODR provider shall communicate the acceptance to the claimant [and the ODR proceeding is [automatically] terminated].*

*“2. [If none of the solutions proposed by the party are accepted by the other party] [If the parties have not settled their dispute by negotiation within [ten (10)] [calendar] days of the response.] [If the parties have not reached an agreement] [If no settlement is reached], [one of the parties] [then either party] may request that the case be moved to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 below. [Either party may object, within [three (3)] [calendar] days from receiving the notice of appointment of the arbitrator, to providing the arbitrator with information generated during the negotiation stage].*

*Option 1 [“3. If the respondent does not respond to the notice within [five (5)] [calendar] days, he/she is presumed to have refused to negotiate and the case shall automatically move to the facilitated settlement [and arbitration] stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 below.]*

*Option 2 [“3. If the respondent does not respond to the notice within [five (5)] [calendar] days, he/she is presumed to have refused to negotiate and the negotiation shall automatically be terminated and either party shall have the option to proceed to the next phase[s] of the proceeding.]*

*“[4. The parties may agree to extend the deadline for the filing of the response however no such extension shall be for more than [--][calendar] days].”*

*Remarks*

52. The Working Group may wish to note that the negotiation stage can involve assisted negotiation, automated negotiation or both. In assisted negotiation, the parties endeavour to reach a settlement communicating by electronic means offered by the ODR provider. In automated negotiation, each party offers a solution, usually

in monetary terms, for settlement of the dispute which is not communicated to the other party. The software then compares the offers and aims to reach a settlement for the parties if the offers fall within a given range. The Rules may need to take into consideration the use of automated negotiation where it is the technology (software) that “negotiates” the settlement on the basis of proposals submitted by the parties. The Working Group may wish to consider whether the provisions on negotiation should include assisted negotiation and automated negotiation.

*Paragraph (1)*

53. Draft article 5, paragraph (1) refers to the termination of negotiations and the ODR proceedings in the case where the parties have reached an agreement. The Working Group may also consider that a negotiation should terminate by way of a settlement agreement either in all cases or where requested by a party. In that regard, consideration may be given to technical aspects regarding formation of settlement agreements, including in which part of the ODR framework these should be addressed.

*Paragraph (2)*

54. The Working Group may wish to decide whether the Rules should impose a time limit for the negotiation phase, in particular, the time within which the respondent must accept a solution or propose an alternative solution, and the time within which the claimant must notify acceptance or rejection of the respondent’s solution. Another option is to set an overall time frame for negotiations, within which the parties are required to reach agreement. Putting such time pressure on the parties may act as an incentive for them to reach a settlement. The Working Group may wish to deliberate on the issue of time limits, the mechanism by which the provider can ascertain that a respondent has received the notice, and in which part of the global ODR framework the issue should be addressed.

*Paragraph (3)*

55. Paragraph (3) contains two options. Under option 1, the parties will be drawn from one phase of the proceedings to the next automatically. Under the second option, the transition from negotiation to facilitated settlement phase and then to arbitration will be the result of express consent by the parties.

*Paragraph (4)*

56. The Working Group may wish to consider whether the Rules should regulate extensions of time for filing a response.

57. The Working Group may also wish to consider whether the option to extend the negotiation phase should be at the discretion of the parties or whether such extension may be refused by the ODR provider.

#### 4. Neutral

##### 58. Draft article 6 (Appointment of neutral)

*“1. The ODR provider [through the ODR platform] shall [automatically] appoint the neutral by selection from a list of qualified neutrals maintained by the ODR provider.*

*“2. The neutral shall declare his independence and shall disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.*

*“3. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment and shall provide the neutral all communications and documents regarding the dispute received from the parties. [Either party may object, within [three (3)] [calendar] days from receiving the notice of appointment of the neutral, to providing the neutral with information generated during the negotiation stage”].*

*“4. Either party may object to the neutral’s appointment within [two (2)] [calendar] days of the notice of appointment. In the event of an objection, the ODR provider will invite the non-objecting party to submit comments within [two (2)] [calendar] days and then either communicate the appointment of the neutral to the parties or appoint a new neutral.*

*“5. If the neutral has to be replaced during the course of the proceedings, the ODR provider [through the ODR platform] will [automatically] promptly appoint a neutral to replace him or her and will inform the parties. The proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.*

*“6. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the dispute resolution to be conducted and completed expeditiously in accordance with the Rules.*

*“[7. The number of neutrals shall be one unless the parties otherwise agree.]”*

##### *Remarks*

59. The Working Group may wish to note that general issues to be considered regarding neutrals are outlined in A/CN.9/WG.III/WP.110.

##### *Paragraph (1)*

60. The selection of neutrals by the ODR provider should in practice be automatically handled by the ODR platform, which would have access to the list of neutrals. This would enhance the impartiality and independence of the neutral in that the automated selection process does not involve any decision by the ODR provider or any other parties. In order to clarify this in the procedural rules, the Working Group may wish to consider including the words *[through the ODR platform]* and *[automatically]* in paragraphs (1) and (5).

*Paragraph (3)*

61. The Working Group may wish to clarify whether “all communications and documents regarding the dispute received from the parties” should include the communications exchanged at the negotiation stage, since the claimant, upon filing, is required to submit relevant evidence and documents.

62. The Working Group may wish to include a phrase that gives the parties the option to object to providing the neutral with information generated during negotiation.

*Paragraph (4)*

63. At its twenty-second session, the Working Group agreed that providing an opportunity for parties to challenge the appointment of neutrals should be considered (A/CN.9/716, para. 70). The Working Group may wish to take into consideration the possibility of subsequent challenges to the neutral once the neutral has made disclosure pursuant to paragraph (2).

64. The Working Group may wish to consider providing an option for the ODR provider to reject an objection by a party, and whether to give reasons for such rejection, with a view to assuring parties that neutrals are being impartially appointed: [*“Where the ODR provider rejects an objection by a party, it shall communicate to the parties the reasons therefor”*].

65. Another option is to have a straightforward procedure with no possibility of comment or reasons: [*“Where a party objects to the appointment of a neutral, that neutral shall be automatically disqualified and another appointed in his place by the ODR provider. Each party shall have a maximum of [three (3)] such challenges to the appointment of a neutral, following which the appointment of a neutral by the ODR provider will be final.”*]

*Paragraph (7)*

66. At the twenty-second session of the Working Group, there was general agreement that, in the absence of agreement otherwise by the parties, there should be a sole neutral (A/CN.9/716, para. 62).

**67. Draft article 7 (Power of the neutral)**

*“1. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate, provided that the parties are treated equally. The neutral, in exercising his or her discretion, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall act fairly and shall remain at all times wholly independent and impartial.”*

*“2. The neutral shall [conduct the ODR proceedings] [decide the dispute] on the basis of documents filed by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only [unless the neutral decides otherwise].”*



“3. The neutral shall have the power to allow any party, upon such terms (as to costs and otherwise) as the neutral shall determine, to amend any document submitted. Each party shall have the burden of proving the facts relied on to support its claim or defence. At any time during the proceedings the neutral may require the parties to provide additional information, produce documents, exhibits or other evidence within such a period of time as the neutral shall determine.

“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, a dispute settlement clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A [decision] [award] by the neutral that the contract is null shall not automatically entail the invalidity of the dispute settlement clause.”

*Remarks*

*Paragraph (2)*

68. At the twenty-third session of the Working Group, it was suggested that emerging technology might make videoconference hearings fast and inexpensive, even when compared to procedures that relied only on filing of documents, and the possibility for conducting hearings therefore might be contemplated by the procedural rules on an exceptional basis, although it was pointed out that the cost implications of holding hearings would have to be explored. For that reason and others, support was expressed for the view that the procedural rules should be forward-looking, and be able to accommodate any changes in technology and practice that might arise in the long-term future (A/CN.9/721, para. 22). In light of this, the Working Group may wish to consider including the bracketed text: *[unless the neutral decides otherwise]* so as to leave open the possibility for the neutral to use the above-mentioned technologies.

## 5. [Facilitated Settlement and arbitration]

### 69. Draft article 8 (Facilitated Settlement)

*“The neutral shall evaluate the dispute based on the information submitted and shall communicate with the parties to attempt to reach an agreement. If the parties reach an agreement, the ODR proceeding is [automatically] terminated. If the parties do not reach an agreement, [OPTION 1. the ODR provider shall promptly request the neutral to render a decision] [OPTION 2. either party may request the neutral to render a decision] [OPTION 3. the parties shall have the option to proceed to the next phase[s] of the proceeding.]”*

*Remarks*

70. The current paragraph contains options for transition from facilitated settlement to the next phase of proceedings. The first option assumes that the parties have agreed to participate in all phases of ODR proceedings and therefore the ODR provider promptly proceeds to the next phase. Under the second and third options, it is a party that requests transition, the assumption being that such request — and

acceptance of that request by the other party — constitute agreement to participate in that subsequent phase.

71. The Working Group may also wish to consider whether a facilitated settlement should terminate by way of a settlement agreement either in all cases or where requested by a party.

## **6. Decision by the neutral**

### **72. Draft article 9 ([Issuing of] [Communication of] [decision] [award])**

*“1. The neutral shall render a [decision] [award] promptly and in any event within [seven (7)] [calendar] days after the parties make their final submissions to the neutral. The ODR provider shall communicate the [decision] [award] to the parties. Failure to adhere to this time limit shall not constitute a basis for challenging the [decision] [award].*

*“2. The [decision] [award] shall be made in writing and signed by the neutral, and shall contain the date on which it was made.*

*“3. The [decision] [award] shall be final and binding on the parties. The parties shall carry out the [decision] [award] without delay.*

*“4. Within [five (5)] [calendar] days after the receipt of the [decision] [award], a party, with notice to the other party, may request the neutral to correct in the [decision] [award] any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the neutral considers that the request is justified, he or she shall make the correction within [two (2)] [calendar] days of receipt of the request. Such corrections [shall be in writing and] shall form part of the [decision] [award].*

*“5. In all cases, the neutral shall decide in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances, and shall take into account any usage of trade applicable to the transaction.”*

#### *Remarks*

##### *Paragraph (1)*

73. Requests by the neutral for an extension of time in which to submit the decision are foreseeable. The Working Group may wish to consider whether to include provisions relating thereto.

74. The Working Group may wish to consider whether draft article 9 should contain a paragraph on publication of the decision by the neutral or the ODR provider.

##### *Paragraph (5)*

75. The issue of applicable law will be considered at a future meeting of the Working Group.

## 7. Other provisions

### 76. Draft article 10 (Language of proceedings)

*“[The ODR proceedings shall be conducted in the language used in connection with the transaction in dispute, unless another language is agreed upon by the parties.] [In the event the parties do not agree on the language of proceedings, the language of proceedings shall be determined by the neutral.]”*

#### Remarks

77. The Working Group may wish to note that in some situations, the language used in connection with a transaction may be different for the seller and buyer, depending on their respective locations. For instance, a seller may access a selling website in one language while the website automatically changes to another language depending on the buyer’s Internet protocol (IP) address, which reflects his location and the language commonly used there. In such a case, identifying the “language used in connection with the transaction” could be problematic.

78. A common argument against choosing the language of the transaction as the language of proceedings is that the level of understanding of a language needed to conclude a transaction may differ from that needed when making a claim. Technology may be able to overcome such language issues, making it possible for users to submit a claim while having little understanding of the language of the ODR platform.

79. Draft article 10 reflects the suggestion made by the Working Group that, where the parties have failed to reach an agreement on the language of proceeding, this matter could be left to the discretion of the neutral (A/CN.9/716, para. 105). In that case, the Working Group may wish to consider how the language of proceedings is to be determined prior to the involvement of the neutral.

### 80. Draft article 11 (Representation)

*“A party may be represented or assisted by a person or persons chosen by that party. The names and addresses of such persons [and the authority to act] must be communicated to the other party through the ODR provider.”*

### 81. Draft article 12 (Exclusion of liability)

*“Save for intentional wrongdoing, the parties waive any claim against the neutral, the ODR provider [and any other persons involved in the ODR proceedings] based on any act or omission in connection with the ODR proceedings.”*

#### Remarks

82. Draft article 12 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It mirrors article 16 of the UNCITRAL Arbitration Rules, with necessary adjustments.

83. For discussion on persons or actors involved in the ODR proceedings, see A/CN.9/WP.110.

84. **Draft article 13 (Costs)**

*“The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.”*

*Remarks*

85. The Working Group may wish to consider, in the event the claimant is successful in ODR proceedings where the neutral is involved, whether his or her filing fee should be paid by the unsuccessful party.

86. For discussion on the funding of ODR providers and charges levied by ODR providers, see A/CN.9/WP.110.