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Report of Working Group III (Online Dispute Resolution) on the work of its twenty-seventh session (New York, 20-24 May 2013)

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] At that session the Commission decided inter alia at that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer transactions and to elaborate possible rules governing consumer-to-consumer relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation.[2]

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

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.118, paragraphs 5-14.

II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-seventh session in New York, from 20 to 24 May 2013. The session was attended by representatives of the following States members of the Working Group: Algeria, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Czech Republic, Egypt, El Salvador, France, Germany, Greece, Honduras, India, Israel, Italy, Japan, Malta, Mexico, Nigeria, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of).

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

[2] Ibid., para. 218.

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

[4] Ibid., para. 79.

6. The session was also attended by observers from the following States: Belarus, Democratic Republic of Congo, Hungary, Indonesia, Ireland, Netherlands, Oman, Panama, Qatar, Somalia, Tunisia.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international non-governmental organizations: American Bar Association (ABA), American National Standards Institute (ANSI), Asia Pacific Regional Arbitration Group (APRAG), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRPD), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of International Commercial Law (IICL), Instituto Latinoamericano de Comercio Electrónico (ILCE), Internet Bar Organziation (IBO), Maritime Organisation of West and Central Africa (MOWCA), Moot Alumni Association (MAA), New York State Bar Association (NYSBA), Regional Centre for International Commercial Arbitration — Lagos (RCICA), National Center for Technology and Dispute Resolution (NCTDR), Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Soo-geun OH (Republic of Korea)

Rapporteur: Ms. Rosario Elena A. LABORTE-CUEVAS (Philippines)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.118);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.119 and Add.1);

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: timelines (A/CN.9/WG.III/WP.120);

(d) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.113);

(e) A proposal by the Government of Canada on principles applicable to Online Dispute Resolution providers and neutrals (A/CN.9/WG.III/WP.114); and

(f) Note submitted by the Center for International Legal Education (CILE) on Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules (A/CN.9/WG.III/WP.115).

11. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of online dispute resolution for cross-border electronic transactions: draft procedural rules.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

12. 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.119 and its addendum, and A/CN.9/WG.III/WP.120). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations of the Working Group on other business are reflected in chapter V.

13. At the closing of its deliberations, the Working Group requested the Secretariat to prepare (i) a revised draft of procedural rules for online dispute resolution for cross-border electronic transactions; and (ii) a paper setting out an overview of existing private enforcement mechanisms.

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

A. Proposals to resolve outstanding substantive issues on the draft procedural rules for online dispute resolution for cross-border electronic transactions

14. It was recalled that at the beginning of its twenty-sixth session, the Working Group engaged in extensive informal consultations in an attempt to reach understanding on certain key issues, namely, to address how the draft procedural rules for online dispute resolution for cross-border electronic transactions ("the Rules") could accommodate an approach to online dispute resolution ("ODR") embodying an arbitration stage as well as an approach without such a stage.[5]

15. It was furthermore recalled that those informal consultations had resulted in a proposal, appended as an Annex to document A/CN.9/762, for the development of a "two-track system", one track of which ended in arbitration, and one that did not.

16. At its twenty-seventh session, a number of delegations reiterated that the Working Group needed to devise a global system for online dispute resolution accommodating both jurisdictions that provided for pre-dispute arbitration agreements to be binding on consumers, and jurisdictions that did not.

B2B-only proposal

17. Some delegations stated that one possible way forward would be first to consider a set of Rules that would be applicable to business-to-business ("B2B") disputes only, with a view to moving to deliberations of the issues raised by

[5] See A/CN.9/762, paras. 13 and 18.

business-to-consumer ("B2C") disputes at a later time. It was recalled that the mandate of the Working Group was in relation to both B2B and B2C low-value, high-volume disputes, but that the Commission had given a mandate to the Working Group to consider different approaches than a single set of procedural rules.

18. A B2B-only proposal was said to have the advantages of permitting the Working Group to avoid the complex consumer protection issues that it was said had divided the Working Group and to facilitate a more expeditious consideration of the Rules.

19. In relation to the suggestion that proceeding on a B2B-only basis would help the Working Group reach consensus, it was said that whilst this might be a viable preliminary means of moving forward, the Working Group should not lose sight of its mandate in relation to low-value, high-volume disputes.

20. It was also said that the Working Group should be mindful that most disputes falling into a low-value, high-volume category would involve consumers and that limiting the Rules to B2B transactions only at this stage would thus not address the majority of the transactions intended to be addressed by the Rules. It was also said that the work of the Working Group to date, as well as the knowledge on consumer protection issues accrued, might be lost should B2C transactions be excluded from discussions.

Two-track implementation proposal

21. Other delegations proposed a two-track system whereby merchants, at the time of the transaction, would generate two different online dispute resolution clauses, depending on the jurisdiction and status (business or consumer) of the purchaser. Under that proposal, consumers from jurisdictions (so-called "Group I" States) in which pre-dispute agreements to arbitrate were not binding on them, would, at the transaction stage, be presented with a dispute resolution agreement providing for ODR with a non-binding result. Consumers from jurisdictions in which pre-dispute agreements to arbitrate were binding on them, and business purchasers, would be presented with a dispute resolution agreement providing for ODR ending in an arbitration stage, in the event that an online merchant intended to offer Track II of the Rules.

22. It was said that such a process would require the seller to gather two pieces of information: (a) the shipping or billing address of the buyer, to identify that purchaser's jurisdiction; and (b) whether the purchase was for private or professional purposes, to identify whether the purchaser was a consumer. Using this data, the seller's website would automatically direct the purchaser to the correct ODR track.

23. That proposal would furthermore require an Annex to the Rules to identify "Group I" and non-Group I jurisdictions, to provide information to the seller to appropriately direct consumers from the relevant jurisdiction down the relevant track. It was said that for this system to work, a definition of "consumer" would need to be added to the Rules. It was suggested that consumers from Group I countries could agree to arbitrate post-dispute. It was said that such a proposal was technically simple to implement and provided interoperability with regional systems.

24. In response to that proposal it was said, first, that such a proposal would require the Working Group to revisit one of the fundamental areas on which the Working Group had achieved consensus, namely the inadvisability of defining "consumer" in an international text; and second, the issue (set out in paragraph 23 above) of devising an Annex purporting to decide for States which rules would apply to that State's consumers was not for the Working Group to decide, and nor was it for States to provide that kind of submission or update it. It was said that should States fail to provide such information, for example, then those States would simply not be able to be included in such an Annex and it would create serious implementation problems in relation to the Rules.

25. It was furthermore said that although the Working Group may be able to devise a definition of consumer, the application of the definition, when it applies, to whom it applies and who applies that definition would remain unresolved. In relation to listing States in an Annex by reference to their consumer protection laws, it was said that such a list would be problematic given the wide variety and non-uniformity of provisions even in "Group I" jurisdictions in relation to pre-dispute arbitration agreements. For these reasons it was said that resolving basic rules in a B2B context as a preliminary step was desirable, and that complex questions relating to consumers could be addressed at a later stage.

26. It was furthermore stated that for common law jurisdictions, where case law and public policy can evolve rapidly, such an Annex would be of little utility and might be misleading.

27. It was also suggested by other delegations that the application of the two-track system should not be determined by reference to the jurisdiction and status (i.e., business or consumer) of the purchasers at the time of transaction. Otherwise, in practice, the development of online transactions would be hindered.

28. Delegations supporting the proposal set out in paragraphs 21-23 above stated in response that the definition of consumer appears in other international instruments, such as the Hague Convention on Choice of Court Agreements, and the Working Group could take cognisance of those definitions, bearing in mind that such a definition would not necessarily be congruent with the definition of consumer in all States. It was also said that countries could proactively opt-in to inclusion on a "Group I" list.

29. The view was also expressed that the proposal would be inconsistent with the structure and proper interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, therefore undermining existing international arbitration practice.

Decision

30. After discussion, it was determined that there had not been a preponderance of views to discard the two-track system in favour of a B2B-only set of Rules as a preliminary stage.

Two-track implementation proposal

31. A proposal was submitted for further consideration in relation to specific language to be included in Track I, draft article 1, and Track 1, draft article 2 in

order to implement the proposal set out in paragraphs 21-23 above. It was said that that language was provided to facilitate discussions in relation to ensuring that consumers from certain jurisdictions would not be subject to an arbitration track of the Rules, but rather only to the presumptive "Track II" resulting in a non-arbitral stage of proceedings.

32. That proposal would insert:

(a) In article 1 of Track I of the Rules, a paragraph 1(a) that would read as follows: "*1a. These Rules shall not apply where one party to the transaction is a consumer from a State listed in Annex X, unless the Rules are agreed after the dispute has arisen*."

(b) In article 2 of Track I of the Rules, a paragraph 5(a) as follows: "*5a. 'consumer' means a natural person who is acting primarily for personal, family or household purposes*."

33. The reason for the proposal was said to be to ensure that a purchaser, where he or she was a consumer, was directed to the correct track of the Rules at the time of transaction. It was said that that would be accomplished by a party identifying, first, whether he or she was from a State which did not regard pre-dispute agreements to arbitrate as binding on consumers and, second, whether he or she was a consumer.

34. A further aspect of the proposal would be to include an Annex comprising a list of jurisdictions, which would opt in to inclusion on that list in order to exclude the application of Track I of the Rules to consumers in those jurisdictions (pursuant to draft article 1a of that proposal, set out in para. 26 above).

35. It was suggested that such an approach would be easy to implement in that it relied on purchasers to provide two simple pieces of information, namely their shipping or billing address and whether they were a consumer, and that that data, coupled with reference to the list of countries in the proposed Annex, would enable a vendor's website to automatically offer the appropriate dispute resolution clause to the prospective purchaser.

36. Several delegations indicated that the proposal was helpful as a way forward, and expressed the view that while the approach proposed was not a perfect one it could effectively direct purchasers to the appropriate ODR track in a significant percentage of cases at the time of transaction. It was also stated that, though there may be a risk that certain purchasers could be directed to the wrong track, the proposal addressed a perceived greater risk, namely that consumers could find themselves in a track involving arbitration which they did not intend to take and which was inappropriate in view of their jurisdictions' consumer protections laws.

37. In relation to issues requiring further consideration, it was said that party autonomy could be compromised by such an approach, and in particular it was questioned whether UNCITRAL should as a matter of policy, or could legally, adopt Rules that self-proclaim they are inapplicable to certain States or parties as such, as proposed article 1(a) would purport to do.

38. It was also said that the definition of the term "consumer" in that proposal required additional review. On the one hand, it was said that the proposed definition encapsulated the essence of the definition of consumer in many jurisdictions, and provided an accurate filter for a large percentage of consumers. On the other hand,

delegations expressed concern that such a definition risked miscategorizing too many consumers and/or was inconsistent with many national definitions.

39. Concerns were also expressed in relation to the requirement inherent in that proposal for consumers to self-identify as consumers at the time of transaction. It was said that such self-categorization might provide too much scope for consumers, whether intentionally or mistakenly, to characterize their status incorrectly. In response to that concern, it was said that whilst such mischaracterizations were possible and even likely, self-categorization was not difficult, and existed already in relation to certain online and offline transactions.

40. In relation to the proposed Annex, questions were raised regarding who would maintain the list of jurisdictions, and what the consequence would be where a jurisdiction was added to the list after a consumer from that jurisdiction had already entered into an agreement specifying Track I.

41. It was also stated that such a proposal, which required the provision of data from consumers, such as self-characterization as well as their billing or shipping address, would be very difficult to implement in practice, particularly for merchants where huge volumes of Internet transactions took place on a daily basis and where flash sales, for example, were very popular and necessarily took little time for the purchaser to undertake.

42. Various delegations also stated that while the proposal provided a positive compromise solution on its face, further consultation was needed and it was necessary to obtain further instructions. An objection was also made by one delegation that the proposal contravened its public policy.

43. Further to the discussion on that proposal, it was determined that the proposal had received sufficient support to be considered as a basis for future discussion, and that although delegations had expressed reservations, the proposal was to be commended insofar as it had sought in concrete terms to implement the two-track system. It was agreed that all components of the proposal would be put in square brackets for further consideration and that the concerns raised in relation to the proposal would need to be further addressed.

44. The Working Group proceeded to discuss the draft Rules as contained in document A/CN.9/WG.III/WP.119/Add.1, commencing with draft article 8 (Facilitated settlement).

B. Consideration of outstanding substantive issues on the draft procedural rules for online dispute resolution for cross-border electronic transactions

1. Draft article 8 (Facilitated settlement)

45. The Working Group considered draft article 8 as contained in paragraph 37 of document A/CN.9/WG.III/WP.119/Add.1.

General

46. A suggestion was made to include in the relevant paragraphs of draft article 8 a notification to the parties when the ODR proceedings moved from one stage of

proceedings to the next; in the draft Rules the words “automatically move” (e.g., to the next stage of proceedings) were said not to provide sufficient notice to the parties.

47. It was agreed that a provision would be added into draft article 3 to provide for such a notification and a mandate was given to the Secretariat to draft appropriate language in that respect.

48. It was said in that respect that the word “automatically” should be reconsidered specifically in relation to paragraph (2) of article 8 as it related to Track I, which dealt with the transition from a facilitated settlement stage to an arbitration stage of proceedings. In response, a proposal was made to insert, at the end of paragraph (2) (Track I), the following language: “, and the provider shall promptly notify the parties that they have moved from the consensual stage of the proceedings to the binding arbitration stage.”

49. It was clarified that the purpose of the word “automatically” was to prevent the need for any intervention by the neutral or the parties to trigger the next phase of proceedings. Several delegations expressed support for retaining the word “automatically” to preserve that meaning. A proposal to replace the word “automatically” with the phrase “without the intervention of the parties or neutral” was not supported, and was said to unnecessarily complicate the drafting. Another suggestion was made to delete the word “automatically”, as it was not necessary to convey the meaning of the sentence, namely that no further action was needed to move to the arbitration stage of proceedings.

50. After discussion it was agreed to delete the word “automatically” from article 8(2) (Track II), and to insert the language proposed in paragraph 48 above, with any modifications the Secretariat may deem necessary to maintain consistency with other provisions.

Paragraph (1)

51. Two issues were discussed in relation to paragraph (1). First, it was queried whether the facilitated settlement stage terminated at the time of settlement, or at the time the settlement agreement was recorded on the ODR platform. It was clarified that the latter option, which was contained in the current draft, reflected the understanding that in an online environment, agreement had to be recorded; in order to be regarded as having been arrived at during the course of proceedings, such agreement should be recorded before the proceedings terminated.

52. It was agreed to remove the square brackets in paragraph (1) to reflect that agreement.

53. Second, a proposal was made in relation to the second sentence of paragraph (1), namely that a settlement agreement concluded during the facilitated settlement stage, in a Track I proceeding only, should be submitted to a neutral who would give that agreement the status of an arbitral award. Disagreement was expressed in relation to that proposal on the basis that a settlement agreement is a contractual agreement between the parties and should not be conflated with an arbitration stage of proceedings. It was agreed that language would be submitted in relation to that proposal for the consideration of the Working Group, and that

following that submission the second sentence of paragraph (1) might require relocation. It was agreed to consider that sentence further at a later stage.

Paragraph (2), Tracks I and II

54. It was said that in order to maintain consistency with paragraph (1) and avoid a situation where a purchaser was not made aware of the appointment of a neutral for some time, paragraph (2) should refer to the notification to the parties of the appointment of a neutral, rather than to the appointment of the neutral itself. It was clarified that draft article 6(1) provided that the appointment of a neutral would be "promptly" notified to the parties and that a cross-reference to that article might be included for the avoidance of doubt.

Paragraph (2), Track II

55. The two options as set out in paragraph 37 of document A/CN.9/WG.III/WP.119/Add.1 were considered in relation to the final stage of Track II proceedings. Under option 1, Track II proceedings would terminate at the expiry of the facilitated settlement stage, if no settlement had been reached. Under option 2, a non-binding decision would be rendered.

56. Support was expressed for option 2, with various delegations observing that the solution encompassed by that option conformed with national systems and legislation already in place, as well as ODR systems currently in existence. It was agreed to proceed on the basis of option 2, acknowledging that such discussions could not be entirely dissociated from discussions on draft article 8(bis).

2. Draft article 8(bis) (Decision by a neutral)

General

57. As a general matter relating to the content of draft article 8(bis), the Secretariat was requested to provide a document at a future session setting out an overview of existing private enforcement mechanisms. That request received support.

58. It was discussed whether the appropriate term for the outcome of the neutral's deliberations at the draft article 8(bis) stage of proceedings should be a "decision" or a "recommendation". After discussion, the Working Group agreed to replace the word "decision" as it appeared throughout draft article 8(bis) with the word "recommendation", which was said better to reflect the intended character of the non-binding determination to be made.

Paragraph (1)

59. The Working Group agreed to retain paragraph (1) as drafted.

Paragraph (2)

60. It was said that the neutral should make a recommendation based not only on the information submitted by the parties, as currently required by paragraph (2), but also on the basis of the terms of the contract, given the contractual underpinning for transactions and consequently for disputes.

61. There was support for that proposal, and consequently it was agreed to add the words “and on the terms of the contract” after the term “submitted by the parties”.

62. In relation to the square brackets in paragraph (2), a query was raised as to the meaning of recording a recommendation on the ODR platform, and specifically, whether such a record would be available only to the parties and the neutral or to the public. It was clarified that there were no provisions in draft article 8(bis) relating to the publication of recommendations to be made by a neutral under that article. Several delegations expressed support for that understanding, and observed the impracticality of publishing recommendations in low-value high-volume disputes. After discussion it was agreed to delete the square brackets and retain the contents therein.

Paragraph (3)

63. A suggestion was made to delete paragraph (3), on the basis that in a recommendation stage of proceedings, a recommendation could be made on the basis of the documents provided pursuant to article 4, and that supplementary provisions regarding burden of proof were not necessary.

64. In response, it was said that paragraph (3) provided a useful basis in law for the making of a recommendation, and that it should be retained. After discussion, the Working Group agreed to retain paragraph (3) as drafted.

Paragraphs (2) and (3)

65. It was agreed to reverse the order of paragraphs (2) and (3) to better provide for the natural chronology of proceedings.

Paragraph (4)

66. One delegation proposed new language for paragraph (4) as follows: “The decision shall be [enforceable/implemented] through a private mechanism in accordance with the Cross-border enforcement mechanism set out in the document referred to at paragraph 2(d) of the Preamble to the Rules.” It was said that that approach would provide for more flexibility and encompass a wider range of enforcement processes, including enforcement mechanisms that would only develop during or after the conclusion of the draft Rules. That proposal did not receive support.

67. The Working Group considered the first sentence of paragraph (4), which stated: “The decision shall not be binding on the parties”. It was suggested that the intent of that sentence was that any decision rendered pursuant to draft article 8(bis) should not have res judicata effect, and that the provision should reflect this explicitly.

68. In response, it was said that the term res judicata was confusing. An example was provided that the res judicata considerations differ in relation to settlement agreements in civil law as opposed to common law jurisdictions. It was also said that use of the term res judicata might foreclose access to many enforcement mechanisms currently in existence. It was consequently agreed that the term res judicata should be avoided.

69. A separate proposal was made to amend the language of paragraph (4) to state that the making of a recommendation would not prevent a party from bringing its case in court. That proposal was said to be insufficiently precise, and was not supported.

70. It was proposed that a recommendation should be binding where the parties so agreed, and that language should be added to paragraph (4) accordingly. There was support for that suggestion, with reference to similar provisions in national laws. It was said that agreement between the parties would give the recommendation a contractually binding character.

71. After discussion, the Working Group agreed that paragraph (4) should reflect the proposal set out in paragraph 70 above, namely that a recommendation should be binding where the parties so agreed. The Working Group also considered whether consent by the parties to make such a recommendation binding should be given after the recommendation had been made, or could be made at any time during proceedings. After discussion, there was consensus to leave the timing of parties' consent open in this respect. On the basis of these discussions, it was agreed to amend the first sentence of paragraph (4) such that it would read as follows: "The decision shall not be binding on the parties unless they otherwise agree." It was agreed that the remainder of paragraph (4) would remain unchanged.

3. Draft article 9 (Arbitration)

72. The Working Group considered draft article 9 as contained in paragraph 54 of document A/CN.9/WG.III/WP.119/Add.1.

General

73. The Working Group considered whether a neutral could continue his or her appointment at the arbitration stage of proceedings, or whether a new neutral should be appointed at the time an arbitration commenced.

74. Different views were expressed in relation to whether the same neutral could act in the facilitated settlement stage, as well as in an arbitration stage of proceedings. It was widely acknowledged that the Rules should provide for a fast, efficient and low-cost means of resolving disputes in relation to low-value, high-volume disputes.

75. Bearing that in mind, three primary suggestions were made.

76. The first, from delegations supporting a presumption that a different neutral be appointed at an arbitration stage, proposed that whilst the default situation should be that of different neutrals for the two stages, parties could give express consent to retain the same neutral.

77. It was said that such a proposal was premised on the fact that in certain jurisdictions, national law provided that a mediator should not act as an arbitrator in the same proceedings. It was further said that providing for different neutrals was important to preserve the different roles of mediator and neutral, as well as the different legal implications of mediation and arbitration, including for example the provision of confidential information to a neutral during a mediation stage, which might not be appropriate to pass on to a neutral acting in an arbitration stage. It was

suggested that having the same neutral for both processes could result in a challenge to the enforcement of an award.

78. A second proposal was made to retain the same neutral throughout proceedings, unless (i) parties agreed otherwise; or (ii) neither party objected. Several delegations observed that their national law permitted such a continuous appointment, and that in light of the low-value, high-volume nature of the transactions the Rules were intended to address, such a process would be much more efficient and less costly to the parties. In support of that proposal, it was also said that the Rules were intended to address a new system of online dispute resolution containing elements of mediation and of arbitration, but that the Rules did not contemplate full-fledged mediation with exchanges of confidential or ex parte information that may be considered prejudicial in certain circumstances or jurisdictions. It was also said that that proposal could promote efficiency in time and cost of proceedings, and that providing the parties the unilateral right to object to the continued appointment of the same neutral at an arbitration stage would provide a sufficient safeguard.

79. In response, it was said that whilst a presumption that the neutral would not be replaced at the arbitration stage would be helpful in streamlining proceedings, two possible obstacles to that proposal would need to be addressed. First, it was said that the exchange of any ex parte communications during a facilitated settlement stage could prejudice the outcome of an award rendered by the neutral, and that the Rules should be explicit in prohibiting such communications during the facilitated stage in order to avoid that problem. Second, it was said that a neutral might have undue coercive influence during a facilitated settlement stage, and in that respect, the parties ought to be given the right to object to the continued appointment of that neutral at the arbitration stage.

80. Finally a third proposal was made to subsume the facilitated settlement stage into the arbitration stage of proceedings, as a subset of that stage. It was said that that would have the benefit of putting parties on notice that they were in the arbitration stage, and that the matter of a neutral's impartiality at two different stages of proceedings would therefore become moot. It was suggested that at the beginning of the arbitration phase, the neutral could request, or require, the parties to engage in a facilitated settlement; in addition, and by analogy, it was said that in international commercial arbitration, an arbitrator encouraging facilitated settlement at the outset of proceedings was emerging as a best practice. Delegations supporting that proposal suggested a two-stage process would be less costly than a three-stage process. It was also clarified that two stages only had previously been contemplated by the Working Group, and reference made to paragraph 128 of document A/CN.9/744.

81. In response to the third proposal, it was said that ODR is best resolved through non-binding processes and that the facilitated settlement stage should therefore not be subsumed into an arbitration stage; broad support was expressed for the need to retain such a stage as an integral part of a three-stage process. It was also observed that different procedural requirements, and cost implications, attached to a facilitated settlement as opposed to an arbitration stage.

82. The Working Group agreed to consider the issue further at a future session.

Paragraph (1)

83. It was observed that should the Working Group determine, in its future considerations pursuant to paragraphs 73-82 above, that a new neutral should be appointed at the arbitration stage, the language in paragraph (1) would require consequential amendment.

84. It was reiterated, further to the discussion in relation to draft article 8(2) (Track I), that a clear notification should be provided to the parties in relation to the transition from the facilitated settlement stage to the arbitration stage of proceedings.

85. It was also proposed that the time frame in which a neutral should provide for final submissions should be more clearly linked to the appointment of the neutral. In that respect, it was suggested that paragraph (1) be replaced with the following language: "The neutral shall within [x] days from the receipt by the parties of the notification referred to in Article 8(2) set a time limit of 10 calendar days for final submissions to be made". It was recalled that the Working Group had amended draft article 8(2) to provide for such a notification to the parties (see paragraphs 48 and 50 above).

86. Further to the suggestion set out in paragraph 84 above, it was agreed that the notification to the parties in relation to the transition between phases of proceedings, whether set out in draft article 8(2) (Track I), article 9(1), or both, should be clear; and moreover, bearing in mind the suggestion in paragraph 85 above, that there should be a clear time frame for submissions to be made following that notification. The Working Group gave a mandate to the Secretariat to provide language in the next draft of the Rules accordingly.

87. The Secretariat was also requested to ensure that language throughout the document was consistent in relation to matters of notification to the parties. A separate request was made to the Secretariat to clarify in the next iteration of the Rules when notifications to the parties, or specific documents (such as arbitration agreements and awards) must be made "in writing".

Paragraph (2)

88. After discussion it was agreed to delete the square brackets and retain the contents therein. It was agreed that in all other respects paragraph (2) would be retained in its current form.

Paragraph (3)

89. It was agreed to retain paragraph (3) in its current form.

Paragraphs (2) and (3)

90. The Working Group agreed to reverse the order of paragraphs (2) and (3) to better provide for the natural chronology of proceedings and to retain consistency with draft article 8(bis) (see paragraph 65 above).

Paragraph (4)

91. It was agreed to retain paragraph (4) in its current form.

Paragraph (4) (bis)

92. It was agreed that, save for any amendment or relocation to the definition of the word "writing" necessitated if that word were to be used in other locations throughout the Rules (see paragraph 87 above), that paragraph (4)(bis) would be retained in its current form.

Paragraph (5)

93. It was agreed to retain paragraph (5) in its current form.

Paragraph (6)

94. A question arose as to the consequence should a neutral fail to render an award in accordance with the timeline specified in paragraph (6). It was stated that in some States an award may be, or may be rendered, invalid, should the neutral fail to comply with the timeline provided for in the procedural rules or in national legislation. It was observed that promptness is a key aspect of ODR and that the Rules should encourage decisions to be reached in a timely manner.

95. A proposal was made to replace the text of draft paragraph (6) in its entirety as follows: "The award shall be rendered promptly, preferably within ten calendar days [from a specified point in proceedings]". Strong support was received for this proposal, which was said to reinforce the need for timeliness in the Rules, while avoiding complex legal arguments over the consequences of gross delay on the part of a neutral.

96. After discussion, it was agreed to adopt the proposal set out in paragraph 95 above. It was also agreed that a document setting out guidelines for ODR providers could address issues of timeliness including, for example, replacement of the neutral should he or she fail to undertake his or her duties in a timely way.

Paragraph (6)(bis)

97. Support was expressed for the contents of paragraph (6)(bis) on the basis that it articulated the Working Group's deliberations at its twenty-sixth session, and that furthermore it reflected existing language in Article 34(5) of the UNCITRAL Arbitration Rules.

98. It was agreed to delete the square brackets and retain the contents of paragraph (6)(bis) as drafted. It was furthermore suggested that the publication of statistics and summaries of decisions in relation to ODR proceedings was a matter to be addressed in a document setting out guidelines for ODR providers.

Paragraph (7)

99. It was agreed to retain paragraph (7) as drafted.

Paragraph (8)

100. A number of views were expressed in relation to paragraph (8), a new provision that had been inserted to provide for substantive rules on the merits in the context of the draft Rules.

101. On the one hand, it was said in support of paragraph (8) that it reflected an approach taken in other UNCITRAL texts, including the Model Law and the Arbitration Rules. It was also said that the principle of *ex aequo et bono* provided for an expedient and common sense basis for resolving low-value, high-volume disputes, and that that principle was used in some countries in relation to such disputes.

102. On the other hand, it was said that an *ex aequo et bono* provision was ambiguous and essentially amounted to a lack of substantive law, and that it gave too wide a discretion to the neutral. In that respect, a proposal was made to amend paragraph (8) such that it would provide for a decision to be made according to the terms of the contract and in addition, *ex aequo et bono*. Some support was expressed for that proposal. In response, it was said that requiring a neutral to act *ex aequo et bono* as well as in accordance with the terms of the contract could be confusing as the contract terms may prescribe an applicable domestic law.

103. Another view was expressed that recourse to traditional applicable law would not be appropriate in the context of ODR, and that a better solution might be to refer in paragraph (8) to an as yet-to-be-drafted document, but referred to in the draft preamble to the Rules, which would address substantive legal principles applicable to disputes. Some support was also expressed for that proposal.

104. It was also said that *ex aequo et bono* was a legal concept that would be difficult for consumers to understand, and that it should be expressed in plain language.

105. After discussion, it was agreed that the term "*ex aequo et bono*" would be placed in square brackets and alternative suggestions would be proposed by the Secretariat at a future session of the Working Group.

4. Draft article 6 (Appointment of neutral)

106. The Working Group considered draft article 6 as contained in paragraph 16 of document A/CN.9/WG.III/WP.117/Add.1, in relation to the appointment of the neutral.

General

107. It was clarified that the Working Group would consider draft article 6 first in relation to the set of Rules for Track I, thus allowing the Working Group to resume discussions on a potentially simplified or streamlined approach for the appointment of a neutral under the set of Rules for Track II at a future date.

Paragraph (1)

108. It was suggested that the phrase in square brackets "or belonging to other arbitral institutions" should be deleted, unless there was a way to ensure that an ODR provider could have oversight over such a list and that expanding that list to other arbitral institutions would risk dilution or loss of such oversight. It was stated that, although a document in relation to guidance for ODR providers and neutrals had not yet been drafted, it was envisaged that the ODR provider would provide a list of neutrals that would be accessible to parties. Moreover, it was said that an ODR provider would have some oversight function in relation to neutrals, including

their replacement during proceedings if necessary, and that ODR providers and neutrals would be familiar with the fast track arbitration envisaged in the Rules, which it was said was different from traditional arbitration.

109. It was also suggested in that vein that the identity of the neutrals should be made known to the parties such that the parties could reasonably object to an appointment.

110. After discussion, it was agreed that the phrase "[or belonging to other arbitral institutions]" would be deleted, and that the identity of the neutral should be notified to the parties upon his or her appointment. The Secretariat was requested to include language to that effect in the next iteration of the Rules.

Paragraph (2)

111. Support was expressed for paragraph (2) on the basis that it reflected other provisions in UNCITRAL texts (including in a model statement contained in an annex to the UNCITRAL Arbitration Rules 2010).

112. It was said however that such a provision, whilst of sufficient importance to be included in the Rules, could also be considered to impose an obligation on a neutral; it was said that the Rules could not purport to do that, given their status as a contractual agreement between parties to a dispute, and that paragraph (2) should consequently be redrafted. It was also queried whether transferring the burden to the ODR provider to ensure the neutral had sufficient capacity to undertake its role was appropriate, and whether the Rules could bind the ODR provider in that respect.

113. It was clarified that an ODR provider, analogously to an arbitral institution administering an UNCITRAL arbitration, was not a contractual party to the Rules. It was furthermore said that the wording of paragraph (2) was in line with similar instruments and provided useful guidance in relation to the duties of a neutral that were sufficiently important to be included in the Rules.

114. It was consequently agreed to remove the square brackets and retain the text of paragraph (2) as drafted.

Paragraph (3)

115. There was broad support for retaining the principle included in the square brackets, namely that the obligation for a neutral to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence was an ongoing one.

116. It was observed that with the removal of the square brackets, the provision may not be sufficiently clear with regard to the need for the neutral to disclose such circumstances existing at the time of his or her appointment. Article 11 of the UNCITRAL Arbitration Rules 2010 and Article 12 of the UNCITRAL Model Law on International Commercial Arbitration were cited as possible bases for better encapsulating that principle.

117. It was agreed that the square brackets in paragraph (3) would be deleted, to preserve the principle of an ongoing duty of disclosure, and the Secretariat was requested to make any necessary amendments to the paragraph to ensure that

pre-existing circumstances at the time of appointment and requiring disclosure under paragraph (3) would also fall under the obligation in that paragraph.

Paragraph (4)

118. It was agreed that the square-bracketed language "resign and inform the parties and the ODR provider accordingly" should be deleted. It was further agreed that paragraph (4) consequently was redundant, in light of the amendments made to paragraph (3) as set out in paragraphs 116-117 above, and should be deleted.

119. It was further agreed that the Secretariat would prepare wording for a separate provision dealing in general with resignation and replacement of neutrals, including in instances where neutrals wished to resign for reasons of independence and impartiality, for consideration at a future session.

Paragraph (5)

120. The question arose whether to delete the square-bracketed text "without giving reasons therefor". It was explained that that text originated in a desire to provide a quick and simple procedure for peremptory challenges to neutrals without the delay and complexity entailed in providing justification at the time of appointment. After discussion it was agreed to retain that language, and to delete the square brackets.

121. It was clarified that there were two routes under paragraph (5) under which a neutral could be disqualified: first, at the time of appointment, at which time it had been agreed that reasons need not be given and that disqualification would be automatic; and second, at any time during proceedings, upon reasons being given that a fact or matter had arisen leading to doubts as to the impartiality or independence of the neutral.

122. It was also agreed that the wording "[including a neutral's declaration or disclosure pursuant to paragraphs (3) [or (4)]]" was unnecessary and could be deleted.

123. In all other respects, it was agreed to retain the language in paragraph (5) and to delete all remaining square brackets, save for the time frame, which would be considered holistically with other time frames in the Rules at a future session.

Paragraph (5)(bis)

124. After discussion, and recalling the clarification made regarding the contents of paragraph (5) and the two routes for the disqualification of a neutral, it was said that the language of paragraph (5)(bis) could be simplified or split into two or three separate paragraphs for the sake of clarity.

125. The Secretariat was given a mandate to revisit the language in that paragraph and amend the drafting accordingly.

126. In all other respects it was agreed to retain the language in paragraph (5)(bis) and remove all square brackets save for those relating to time frames.

Paragraph (6)

127. It was agreed to retain the language and delete the square brackets in paragraph (6).

Paragraph (7)

128. Broad support was expressed to retain the content of paragraph (7) as drafted. A proposal that the words "[and will inform the parties promptly of that selection]" be deleted as redundant in light of existing wording paragraph (1) also received support.

129. After discussion, it was agreed to delete all square brackets in paragraph (7), and also to accept the proposal to delete the wording "and will inform the parties promptly of that selection". In all other respects paragraph (7) would be retained in its current form.

Paragraph (8)

130. Support was expressed for the principle that only one neutral was envisaged by the Rules as drafted to date, and as a practical matter, one neutral was more appropriate in the context of the low-value high-volume disputes the subject of the Rules. It was also acknowledged that as the Rules were contractual as between the parties, there was nothing to prevent the parties from agreeing otherwise.

131. After discussion, it was agreed to delete the text in square brackets.

V. Other business

132. The Working Group noted that subject to confirmation by the Commission, its twenty-seventh session was scheduled to take place in Vienna from 7-11 October 2013.