



General Assembly

Distr.: Limited
22 December 2015

Original: English

**United Nations Commission
on International Trade Law**
Working Group III (Online dispute resolution)
Thirty-third session
New York, 29 February-4 March 2016

Online dispute resolution for cross-border electronic commerce transactions

Note by the Secretariat

Draft outcome document reflecting elements and principles of an ODR process

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* Reissued for technical reasons on 25 January 2016.



I. Introduction

1. At the Commission's forty-eighth session (Vienna, 29 June-16 July 2015), it was agreed that any future text should build upon the progress achieved in the context of prior Working Group sessions and the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process.¹

2. At its thirty-second session, the Working Group discussed a draft outcome document on the basis of several proposals made at that session.² Several proposals for specific parts or provisions of the outcome document remained to be discussed, and it was agreed to defer the consideration thereof to the next session.³ It was also agreed, at the 32nd session, that the Working Group would finalize the draft outcome document at the next session.

3. This note consequently sets out the draft outcome document reflecting elements and principles of an ODR process as it stood at the end of the 32nd session. It also sets out outstanding issues to be further considered by the Working Group at its 33rd session.

II. Draft outcome document

4. At the 32nd session of the Working Group, it was agreed that the draft outcome document would contain nine sections as set out below. A proposed tenth section which appears at the end of the note between square brackets also remains to be discussed. Similarly, in each relevant section, the specific provisions which are identified as outstanding issues appear thereafter in square brackets.

5. It was also agreed that the eventual outcome document would commence with an introductory section. Two proposals for an introductory text were made and both are first reproduced below.

¹ *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 352.

² Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, paras. 15-19.

³ Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, paras. 19, 30, 36, 127 and 129, in particular as regards the title of the document, the introductory text, items 18, 22, 42bis and section IX bis (now paras. 16, 21, 44 and draft Section X).

“[Technical Notes on Online Dispute Resolution]”⁴**Section I — Introduction”**

*First formulation.*⁵

“[Purpose of Technical Notes

1. The purpose of the Technical Notes is to foster the development of ODR as a form of dispute resolution by assisting the participants in an Online Dispute Resolution (ODR) system in the conduct of ODR proceedings.
2. The Technical Notes apply to the online resolution of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. Given that procedural styles and practices in ODR proceedings vary widely, the Technical Notes are intended to be of assistance regardless of the structure or framework of an ODR system.
3. The Technical Notes are intended to assist the full range of potential participants in an ODR system, including ODR administrators, ODR platforms, neutrals, and the parties to the dispute.
4. The Technical Notes reflect approaches to ODR systems that reflect principles of fairness, due process, transparency and accountability that are essential to any ODR system, but they are not intended to be an exhaustive or exclusive summary of approaches that incorporate such principles. The Technical Notes do not promote any practice of ODR as best practice.

Non-binding Character of the Technical Notes

5. The Technical Notes do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding.
6. The Technical Notes are not suitable to be used as rules for any ODR proceeding, since they are only of a descriptive nature and do not establish any obligation on the parties or on persons and/or entities administering or facilitating an ODR proceeding to act in a particular manner. Accordingly, the use of the Technical Notes does not imply any modification to any ODR rules that the parties may have selected.

Overview of ODR

7. In tandem with the sharp increase of cross-border transactions concluded via the Internet, there has been extensive discussion regarding the use of information and communication technology tools for resolving disputes which arise from such online transactions.
8. One such tool is online dispute resolution (“ODR”), which has emerged as having the potential to provide a simple, fast, flexible and effective option for the

⁴ Ibid., para. 19.

⁵ The first formulation was contained in the Colombia/USA proposal (referred to as the “Proposal” in A/CN.9/862) and was agreed on a preliminary basis at the beginning of the 32nd session of the Working Group. See A/CN.9/862, paras. 19 and 20.

resolution of such disputes, in particular when they relate to low-value transactions. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. ODR systems can be designed to facilitate communications in an efficient and user-friendly manner, in order to obtain an outcome without the need for physical presence at a meeting or hearing. ODR can provide a more cost-effective alternative to traditional approaches, the latter of which in some cases may be overly complex, costly and time-consuming in light of the nature and value of the dispute. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in the developed and developing world.]”

*Second formulation:*⁶

“[Overview of ODR

1. In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.
2. One such mechanism is online dispute resolution (“ODR”), which can assist the parties in resolving the dispute in a simple, fast, and flexible manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.

Purpose of the Technical Notes [/Guidelines]

3. The purpose of the Technical Notes [/Guidelines] is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.
4. The Technical Notes [/Guidelines] reflect approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.
5. The Technical Notes [/Guidelines] are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. They do not promote any practice of ODR as best practice.

Non-binding nature of the Technical Notes [/Guidelines]

6. The Technical Notes [/Guidelines] are a descriptive document. They are not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding. They do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding, and do not imply any modification to any ODR rules that the parties may have selected.]”

⁶ Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, paras. 25 and 128.

Additional proposed paragraph:

“[These Technical Notes do not supplant or override applicable law]”⁷

“Section II — Principles”⁸

7. The principles that underpin any ODR process include fairness, transparency, due process and accountability.⁹

8. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.

9. ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.

Transparency

10. It is desirable to disclose any contractual relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.

11. The ODR administrator may wish to publish anonymized data or statistics on its decisions, in order to enable parties to assess its overall record.

12. All relevant information should be available on the ODR administrator’s website in a user-friendly and accessible manner.

Independence

13. It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.

14. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.

Expertise

15. The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.

16. An internal oversight/quality assurance process may help the ODR administrator to ensure that neutrals’ decisions conform with the standards it has set for itself. [The ODR administrator should adopt and implement appropriate confidentiality measures.]¹⁰

⁷ Ibid., para. 103.

⁸ For ease of reference, the numbering of the remainder of the draft outcome document follows on from the end of the second formulation of the introductory section.

⁹ Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, para. 27.

¹⁰ Ibid., para. 30.

17. The ODR process should be based on the explicit and informed consent of the parties.

Section III — Stages of an ODR Process

18. The process of an online dispute resolution proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.

19. The ODR process may commence when a claimant submits a notice of claim through the ODR platform to the ODR administrator. The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.

20. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, “facilitated settlement” stage (see paragraphs 40-44 below). In that stage of proceedings, the ODR administrator appoints a neutral (see para. 25 below), who communicates with the parties in an attempt to reach a settlement.¹¹

[21. If facilitated settlement fails, a third and final stage of proceedings might commence.]¹² [In that stage of proceeding, the ODR administrator may remind the parties, or set out for the parties, possible process options to choose.]¹³

Section IV — Scope of ODR Process

22. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.

23. An ODR process may apply to disputes arising out of both sales and service contracts.

Section V — ODR Definitions, Roles and Responsibilities, and Communications

24. Online dispute resolution, or “ODR”, is a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology”. The process may be implemented differently by different administrators of the process, and may evolve over time.

25. As used herein a “claimant” is the party initiating ODR proceedings and the “respondent” the party to whom the notice of proceedings is directed, in line with traditional, offline, alternative dispute resolution nomenclature. A neutral is an individual that assists the parties in settling or resolving the dispute.¹⁴

26. ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR process cannot be conducted on an ad hoc

¹¹ Ibid., para. 35.

¹² Ibid., para. 36.

¹³ Ibid., para. 120 and 123-125.

¹⁴ See footnote 11.

basis involving only the parties to a dispute and a neutral adjudicator (that is, without an administrator). Instead, to permit the use of technology to enable¹⁵ a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications. Such a system is referred to herein as an “ODR platform”.

27. An ODR platform should be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the “ODR administrator”. The ODR administrator may be separate from or part of the ODR platform.

28. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform be specified in the dispute resolution clause.

29. The communications that may take place during the course of proceedings have been defined as “any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.”

30. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated “electronic address”. The term “electronic address” is defined in other UNCITRAL texts.¹⁶

31. To enhance efficiency it is desirable that the ODR administrator promptly:

- (a) Acknowledge receipt of any communication by the ODR platform;
- (b) Notify parties of the availability of any communication received by the ODR platform; and
- (c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.

32. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, it is desirable that, the ODR administrator be empowered to extend deadlines, in order to allow for some flexibility when appropriate.

Section VI — Commencement of ODR proceedings

33. In order to commence an ODR proceeding, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:

- (a) The name and 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 address of the respondent and of the respondent’s representative (if any) known to the claimant;

¹⁵ Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, para. 42.

¹⁶ The outcome document will cross refer to those texts.

- (c) The grounds on which the claim is made;
- (d) Any solutions proposed to resolve the dispute;
- (e) The claimant's preferred language of proceedings; and
- (f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

34. ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the parties that the notice is available at the ODR platform.¹⁷

35. It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements:

- (a) The name and 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 grounds on which the claim is made;
- (c) Any solutions proposed to resolve the dispute;
- (d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative; and
- (e) Notice of any counterclaim containing the grounds on which the counterclaim is made.

36. As much as is possible, it is desirable that both the notice of claim and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.

Section VII — Negotiation

37. The first stage may be a negotiation, conducted between the parties via the ODR platform.

38. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:

- (a) Notification thereof to the claimant; or
- (b) Failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent.

39. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceed to the next stage.

¹⁷ Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, para. 57.

Section VIII — Facilitated settlement

40. The second stage of ODR proceedings may be facilitated settlement, whereby a neutral is appointed and communicates with the parties to try to achieve a settlement.

41. That stage may commence if negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings.

42. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoint a neutral, and notify the parties of that appointment, and provide certain details about the identity of the neutral.

43. In the facilitated settlement stage, it is desirable that the neutral communicate with the parties to try to achieve a settlement.

[44. If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.]¹⁸

Section IX — Appointment, powers and functions of the neutral

45. To enhance efficiency and reduce costs, it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process in accordance with any applicable ODR rules.¹⁹ At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator “promptly” appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

46. It is desirable that neutrals have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers.

47. With regard to the appointment and functions of neutrals, the following are desirable that:

(a) The neutral’s acceptance of his or her appointment operates to confirm that he or she has the time necessary to devote to the process;

(b) The neutral be required to declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) The ODR system provides parties with a method for objecting to the appointment of a neutral;

¹⁸ Ibid., para. 84.

¹⁹ Ibid., paras. 87 and 109. For consistency, the same expression is used in paragraphs 45 and 48 of the draft outcome document.

(d) In the event of an objection to an appointment of a neutral, the ODR administrator be required to make a determination as to whether the neutral shall be replaced;

(e) There be only one neutral per dispute appointed at any time for reasons of cost efficiency;

(f) A party be entitled to object to the neutral receiving information generated during the negotiation period; and

(g) If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator be required to appoint a replacement, subject to the same safeguards as set out during the appointment of the initial neutral.

48. In respect of the powers of the neutral, it is desirable that:

(a) Subject to any applicable ODR rules,²⁰ the neutral be enabled to conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral be required to avoid unnecessary delay or expense in the conduct of the proceedings;

(c) The neutral be required to provide a fair and efficient process for resolving disputes;

(d) The neutral be required to remain independent, impartial and treat both parties equally throughout the proceedings;

(e) The neutral be required to conduct proceedings based on such communications as are before the neutral during the proceedings;

(f) The neutral be enabled to allow the parties to provide additional information in relation to the proceedings; and

(g) The neutral be enabled to extend any deadlines set out in any applicable ODR rules for a reasonable time.

49. While the process for appointment of a neutral for an ODR process is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.

Section X — Language

50. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, it is desirable that a party to the proceedings be able to indicate in the notice or response whether it wishes to proceed in a different language, so that the ODR administrator can identify other language options that the parties may select.

²⁰ Ibid., paras. 87 and 109. For consistency, the same expression is used in paragraphs 45 and 48 of the draft outcome document.

Section XI — Governance

51. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.

52. It is desirable that ODR proceedings be subject to the same due process standards that apply to that process in an offline context, in particular independence, neutrality and impartiality.

[Section X — ...

53. If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator, on the basis of information submitted by the parties, remind the parties of, or set out for the parties, the possible process options of final stage, and ensure that the parties are aware of the legal consequences of the choice of the process.]”²¹

²¹ Ibid., para. 121.