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The UNCITRAL Technical Notes on Online Dispute Resolution – Paper Tiger or Game Changer?

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Is the future of dispute settlement online? There may not be a more relevant topic for the future of dispute resolution, including arbitration, than Online Dispute Resolution ("ODR"), so it was concluded at the 17th ODR Conference organized by the ICC International Court of Arbitration in Paris in June 2017 (see here, also reported on Kluwer Arbitration Blog here and here).

The United Nations Commission on International Trade Law ("UNCITRAL") recognized the potential of ODR already a few years ago. In 2010, at its 43rd session, it decided to undertake work in this specific legal field. This led to the establishment of Working Group III on ODR ("Working Group") which developed the recently adopted Technical Notes on Online Dispute Resolution ("Technical Notes").

There is no universal definition and understanding of ODR. However, for the purposes of the Technical Notes, para. 24 defines ODR as a *"mechanism for resolving disputes through the use of electronic communications and other information and communication technology"*. The Technical Notes further clarify that *"ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others)"* (para. 2).

Background and Initial Mandate of the Working Group

UNCITRAL tasked the Working Group with developing a global ODR system for cross-border e-commerce disputes since traditional judicial mechanisms may not offer an adequate solution for resolving these disputes, the number of which is increasing and where the amount in controversy is often quite small. Therefore, UNCITRAL regarded the development of tailored procedures which do not create costs, delays and burdens disproportionate to the economic value at stake as critical (UN Doc A/CN.9/706, para. 50).

The Working Group was given the task to develop a practical avenue for a simple, quick and inexpensive resolution of e-commerce disputes, however, it was not to prepare a new set of arbitration rules (UN Doc A/CN.9/721, para. 17). Its mandate included drafting a generic set of procedural rules which were intended to apply to both business-to-consumer and business-to-business online transactions (UN Doc A/CN.9/WG.III/WP.105, para. 2; all documents of the Working Group are available here). Additionally, guidelines and minimum standards for ODR providers and for neutrals that assist the parties in settling or resolving a dispute (e.g. a mediator or

arbitrator), substantive legal principles for resolving disputes and a cross-border enforcement mechanism should be developed (UN Doc A/CN.9/WG.III/WP.112, para. 3). The procedural rules were meant to be of a contractual nature and to apply by agreement of the parties to the extent that there was no conflict with mandatory provisions of domestic law (UN Doc A/CN.9/744, para. 16).

The Working Group envisaged a three-tiered ODR procedure, which would start with negotiations between the parties and, if unsuccessful, it would be followed by facilitated settlement proceedings involving a third-party neutral who would mediate between the parties in order to reach a settlement. The final stage would entail arbitration. The Working Group, however, faced difficulties in agreeing on the nature of the final phase. In particular, disagreement arose on the question whether it were to be binding on the parties, the reason for it being that the legal validity of pre-dispute consumer arbitration agreements is treated differently in the various jurisdictions. The European Union, for example, restricts in Directive 93/13/EEC on unfair terms in consumer contracts and in Directive 2013/11/EU on alternative dispute resolution for consumer disputes the validity of such agreements. In order to deal with this issue, the Working Group considered developing two different tracks, one ending in a binding arbitration phase (Track I) and the other one concluding with a non-binding recommendation by the neutral (Track II). However, in the end, no consensus on this issue could be reached.

The UNCITRAL Technical Notes on ODR

As a consequence of the lack of progress in developing a set of procedural rules, UNCITRAL eventually redefined the mandate of the Working Group. On this basis, it had to develop *"a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration)"* (UN Doc A/70/17, para. 352). The Technical Notes, which UNCITRAL adopted at its 49th session in 2016, were born as a result of the redefined mandate.

The Technical Notes are a descriptive document of a non-binding nature and are neither exhaustive nor exclusive (see para. 6). They are *"intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications"* (para. 5) and to promote the development of ODR by providing assistance to ODR administrators and platforms as well as to neutrals and the parties to ODR proceedings (see para. 3). Parties can organize their ODR proceedings in accordance with the Technical Notes and have to agree on the exact details and elements of the proceedings in this respect. Moreover, ODR providers may use the Technical Notes as guidance to set up their rules of procedure.

The main elements of an ODR process are reflected in Sections III, VII, VIII and IX. The Technical Notes assume that the whole procedure will be conducted exclusively online through a platform. They foresee several stages: The first two stages were adopted from the draft procedural rules on which the Working Group had already reached consensus, that is technology-enabled negotiation as a first stage (see paras. 37-39), which is followed by a facilitated settlement phase involving a third-party neutral (e.g. a mediator/conciliator) (see paras. 40-44). The final stage only comes into play should the parties not have reached settlement during the first two phases. In such instances, it is desirable that *"the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take"* (para. 45). This provision thus leaves the nature of the final stage open, thereby providing for maximum flexibility. It could, for example, consist of binding arbitration proceedings or end with a non-binding recommendation by the neutral,

depending on what the parties have agreed.

The Technical Notes also include provisions about the principles which should apply in ODR proceedings (see Section II). They consider approaches to ODR systems that represent principles of independence, impartiality, effectiveness, efficiency, due process, fairness, transparency and accountability (paras. 4 and 7 et seq.). Ideally, ODR proceedings should be subject to the same due process and confidentiality standards that generally apply in offline dispute resolution proceedings (see para. 53).

Furthermore, the Technical Notes deal with the appointment and role of neutrals (see Section X), the language of the proceedings (see Section XI) and governance (see Section XII).

Conclusion

Having invested six years of work, UNCITRAL could not realize its initial ambitious goal of developing an international set of procedural rules including guidelines and minimum standards for ODR platforms/administrators and for neutrals as well as substantive legal principles for resolving disputes and a cross-border enforcement mechanism. Instead, the adopted Technical Notes lay down in a rather general and vague manner the basic concepts and elements of ODR proceedings. Given their non-binding and descriptive nature, it remains to be seen to what extent the Technical Notes will be of any practical relevance.

Even though they fall short of the envisaged creation of a global ODR system, the Technical Notes are a welcome step in the right direction since they offer the opportunity to further promote and build on ODR. While ODR is not a new phenomenon, it remained an unrealized, theoretical concept with high, but untapped potential until now. Besides the European legal framework, i.e. the Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and the Directive 2013/11/EU on alternative dispute resolution for consumer disputes, the Technical Notes now present another valuable legal instrument of an international organization specifically dealing with ODR. In particular, the Technical Notes highlight its benefits, i.e. that ODR offers a simple, flexible, fast and inexpensive mechanism to resolve disputes that arise out of e-commerce transactions. They may serve as useful guidance for States, ODR platform providers and administrators, neutrals as well as disputing parties on how to effectively organize such proceedings.

The regulatory initiatives of UNCITRAL, the European Union as well as the Council of Europe which has encouraged its Members to further develop and promote ODR mechanisms (see Doc. 13918, para. 5) and is currently preparing a technical study on the development of ODR mechanisms (see here), prove that increased attention has been given to ODR more recently. Albeit gradually, it is becoming an important alternative to traditional offline alternative dispute resolution and court litigation for certain kinds of disputes, in particular those arising out of cross-border e-commerce transactions.

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