

Report: UNCITRAL Working Group III on Online Dispute Resolution—A Change of Focus in the Outcome Document

By Clara Flebus

Introduction

In 2010, the United Nations Commission on International Trade Law (“UNCITRAL”) established Working Group III on Online Dispute Resolution (“ODR”) to create unified standards and mechanisms for online dispute resolution of cross-border electronic commerce disputes.¹ The project was born out of the shared concern that traditional judicial venues such as national courts do not offer adequate redress for international disputes arising out of low-value, high-volume cross-border e-commerce transactions. In addition, it was recognized that the credit card charge-back system used in the United States—an efficient solution that deals directly with payment without requiring additional enforcement mechanisms—is not available in most countries.

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In fact, worldwide, very few legal mechanisms currently exist to obtain redress in the context of e-commerce. Thus, the objective of Working Group III was to foster the development of a global and coherent ODR system that would improve access to justice by providing an efficient, low-cost, and reliable framework for dispute resolution. This aim was viewed as consistent with UNCITRAL’s mission to further the unification of international trade law and contribute to the expansion of cross-border commerce and economic growth.

The Original Mandate: ODR Model Rules

Initially, the Working Group’s mandate included the drafting of harmonized procedural rules to resolve international disputes arising out of both business-to-business (“B2B”) and business-to-consumer (“B2C”) e-commerce transactions. The goal was to produce ODR model rules capable of being applied by ODR providers worldwide. The challenge lay in conceiving rules that needed to comply with the restrictions imposed by national laws on the ability of private parties to enter into agreements to use certain types of ODR. At its inception, the Working Group agreed that arbitration was a necessary compo-

nent of ODR because it provides finality and the possibility of enforcing the arbitral award across borders through the 1958 New York convention. However, a tension subsequently developed between those jurisdictions that allow pre-dispute agreements to arbitrate with consumers and deem the resulting arbitral awards as valid and enforceable (e.g., the United States), and other jurisdictions in which mandatory consumer protection law renders pre-dispute agreements to arbitrate non-binding upon consumers (e.g., the European Union member states).

In 2012, the Working Group proposed a compromise solution: a “two track” system that separated binding arbitration from other non-binding ODR mechanisms. In track I, the parties would agree at the time of purchase that any dispute would be resolved through successive phases including negotiation, facilitated settlement, and arbitration. Track I would be applicable to B2B disputes and also to B2C disputes in countries where pre-dispute arbitration agreements could be enforced against consumers. Conversely, in track II the parties would only agree to negotiation and facilitated settlement when they executed the online transaction with a single click. A second click would be necessary for consumers to expressly consent to arbitration after a dispute arose and the parties failed to reach a solution through the non-binding phases of negotiation and facilitated settlement. The requirement of a second click was conceived to ensure consumer protection against arbitration in those jurisdictions where pre-dispute arbitration agreements are not allowed.

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As the deliberations of the Working Group continued over the years, many delegations recognized that the implementation of a “two track” system posed the difficult issue of guiding the parties to choose the proper track based upon the jurisdiction and the status of the purchaser. Members of the Working Group first observed that it may not always be clear whether the purchaser is, in fact, a “consumer” because the concept of consumer is defined differently in different jurisdictions. Second, it was noted that private international law offers various criteria for determining jurisdiction, including nationality of the

parties, place of residence, place of purchase, and others, which may have complex definitions. Third, it became apparent that the jurisdictional issue is more complicated in the e-commerce context because vendors' websites can be accessed from several countries, customers can make a purchase while visiting a foreign country, and network traffic can be rerouted through other countries. In an attempt to resolve these problems, the Working Group discussed the creation and maintenance of a list of countries that would fall into each of the two tracks. The list would become an "annex" to the ODR rules and tell ODR providers which rules to apply in a specific transaction. Another issue discussed by the Working Group was whether the "two track" system would require two sets of rules or a single set of rules including two tracks.

A Change of Focus in 2015

At its thirty-first session held in New York in February 2015, the Working Group discussed a new proposal envisaging a single set of rules. The proposal provided for a three stage process comprising negotiation, negotiated settlement facilitated by a neutral party, and a final determination pursuant to a procedure to be determined by the parties on the basis of options set forth by the neutral party. The options would only include a non-binding recommendation or binding arbitration. In the event the parties could not agree on the procedure for a final determination, the default procedure would be a non-binding recommendation.

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However, this new proposal did not clarify whether a single click or two clicks were required and left that issue to be determined based upon the national law of each jurisdiction. This solution was deemed unsatisfactory and the Working Group reached an impasse. Some countries expressed the view that the UNCITRAL Commission should terminate the mandate of the Working Group, while others advocated that the Working Group should continue its efforts to find a consensus on the new proposal.

When the UNCITRAL Commission convened in July 2015, a further proposal was presented to avoid termination of the Working Group altogether. This proposal provided that the Working Group could change its focus and

develop a non-binding descriptive document reflecting those elements of an ODR process on which consensus had been previously reached, and excluding the question of the nature of the final stage of the ODR process (arbitration or non-arbitration) that had caused insurmountable differences among the delegations. The UNCITRAL Commission instructed the Working Group to continue its work toward elaborating such a document and also imposed a time limit of one year, specifying that after a year the project would come to an end whether or not a result had been achieved.

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The Technical Notes on Online Dispute Resolution

Since July 2015, the Working Group has endeavored to draft a non-binding document entitled "Technical Notes on Online Dispute Resolution," which describes elements and principles of an ODR process—an example of a similar type of document can be found in the "UNCITRAL Notes on Organizing Arbitral Proceedings." The stated purpose of the Technical Notes on ODR is to support the development of ODR and assist all potential participants in an ODR system, including ODR administrators, ODR platforms, neutrals, and the parties to the dispute. The Technical Notes are not suitable to be used as rules for any ODR proceeding because they do not impose any legal requirement that is binding upon the parties or the people/entities involved in administering or facilitating an ODR proceeding. Rather, the Notes describe practices and procedures that reflect approaches to ODR mechanisms based upon principles of fairness, due process, accountability, and transparency.

"It is recommended that the neutral party be required to declare his or her impartiality and independence."

The Notes define the scope of the ODR process as including disputes regarding both B2B and B2C transactions, and covering claims arising out of sales as well as service contracts executed online. ODR is described as a process that may comprise three stages: negotiation, facilitated settlement, and a third and final stage. If the negotiation stage does not result in a settlement of the claim, the process may move to the second stage, facilitated settlement, in which the ODR administrator appoints a neutral party who communicates with the par-

ties in an effort to bring about a resolution. If that stage also fails, a third phase may be commenced in which the ODR administrator or neutral party may inform the parties of the nature and the form of that phase. The Notes provide specific guidance on commencement of the ODR proceedings, negotiation and facilitated settlement stages, appointment, powers and functions of the neutral party, handling of language issues, and governance of the proceedings. It is recommended that the neutral party be required to declare his or her impartiality and independence.

At the most recent Working Group's meeting held in New York in February-March 2016 (its thirty-third session), some delegations pointed out that an Internet-based ODR process could be vulnerable to hacking. A discussion followed about whether the Technical Notes should include a recommendation that ODR administrators and platforms adopt appropriate measures to ensure the security of the ODR process. In previous sessions, the Working Group had already acknowledged the importance of standards for security of data exchange for ODR providers.

"The Notes are intended to be of assistance regardless of the structure and framework of an ODR system, which may offer a variety of dispute resolution mechanisms including, for example, conciliation, negotiation, mediation, facilitated settlement, arbitration, ombudsmen, and complaint boards."

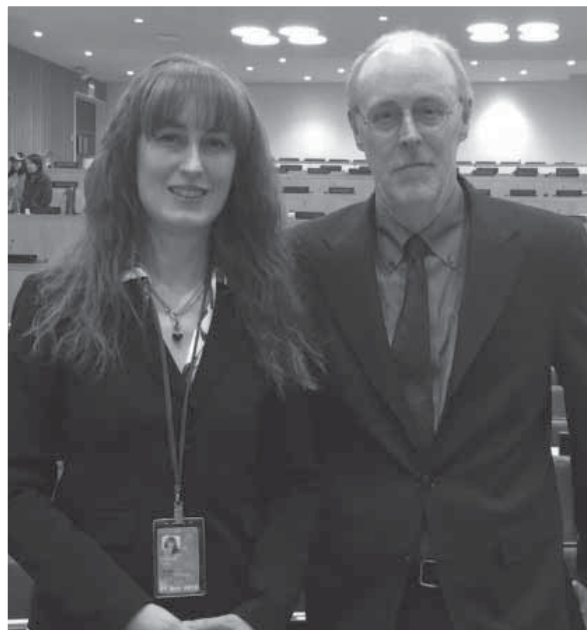
Thus, the Notes were amended to include a recommendation that an ODR process employ a system for processing communications (*i.e.*, generating, sending, receiving, storing, exchanging information) operated in a manner that ensures data security. The Working Group also discussed including a recommendation that ODR administrators who wish to publish data or statistics regarding their decisions should comply with applicable principles of confidentiality.

The Technical Notes were submitted and adopted by the UNCITRAL Commission at its forty-ninth session this past June/July in New York. Given the rapid growth of cross-border e-commerce transactions, ODR has emerged as a necessary tool capable of providing a simple, quick, and effective option for the resolution of disputes arising out of online contracts. In this regard, the Notes are a step in the direction of harmonizing ODR systems and practices worldwide. The Notes are intended to be of assistance regardless of the structure and framework of an ODR system, which may offer a variety of dispute resolution mechanisms including, for example, conciliation, negotiation, mediation, facilitated settlement, arbitration, ombudsmen, and complaint boards.

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Endnote

1. In the Autumn 2014 edition of this publication, vol. 27, no. 2, Ms. Flebus provided an article that highlighted her interview of Soogeun Oh, Chairman of UNCITRAL Working Group III on ODR (2010-2014).



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