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Online ADR for the E-Commerce?
European Union's ADR Legislation for Cross-Border Online Trade

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The European Union has adopted the ADR Directive and ODR Regulation in 2013 with the purpose to strengthen the e-commerce within the EU. Not covered by these legislations is the trade in the B2B sector. The author examines the question of whether online ADR under the currently applicable legal framework would be possible in Germany. At the center of his review is the possibility of an arbitration clause which refers exclusively to an online ADR scheme, may be included in the General Terms and Conditions of an online trader.

Key Words : Consumer Rights, Mediation, Enforcement Systems, Alternative Dispute Resolution, Online Dispute Resolution, European Union, General Terms and Conditions, New York Convention, E-Commerce.

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Ⅰ. Introduction

The e-commerce has recently developed into the most important marketing channel throughout all business sectors. According to market research firm eMarketer worldwide consumers will spend $1.672 trillion online in the year 2015. That figure represents 7.3% of overall global retail sales, which are expected to be $22.822 trillio n[1]. As the number of people using internet increases in the coming years, and the readiness to do it for shopping purpose, the share of online sales will grow around the world without any doubt.

The e-commerce has also pushed the main goal the EU, the creation of one single market in Europe, significantly forward. Since the turn of the millennium, cross-border online shopping within the EU has notably increased. In the years 2011/2012 10% of all online purchase was provided from a seller with a business seat in another EU country, compared with only 6 in 2006[2].

In the earlier development stage of the e-commerce the driving engines were major online sales platforms like Amazon, ebay, Alibaba etc, but now, more and more offline companies take the e-commerce opportunity into their own hands and operate their own web-sales portals. These web-sales portals do not handle only small-stakes sales. Sales of export goods worth of several $ 100,000 are no longer a rarity. Some analysts even estimate that the B2B e-commerce market is ten times that of B2C e-commerce.

National and supranational legislators like EU are keen to support and promote this economic trend by enhancing consumer protections rights and facilitating their enforcement. It belongs to the common sense that by mere enhancing the consumer protection rights nothing will be substantially gained. As long as the user of e-commerce systems don't have time and cost efficient mechanism of enforcement at disposal, consumer rights vested to them have no practical value.

There is a strange correlation in Germany between the shift of the trade from offline to online at one side and the number of civil litigations pertaining small-stake claims (dispute amount below 1,000 Euro) on the other side. In the past 10 years the number

1) https://www.internetretailer.com/2014/12/23/global-e-commerce-will-increase-22-year, last visit on August 12, 2015.

2) See Flash Eurobarometer 332, 2012, p. 18.

of such litigations has decreased by 2% annually[3]. One cannot assume that the participants of e-commerce system are less inclined to legal disputes. Simple reason for the decrease of small-stake litigations is the inefficiency of the state court system. Its users refuse to use this right enforcement system to pursue a right which has a value below 1,000 Euro if the cost of the usage is high above this sum. The cost of the usage of the state court system outside one's own country is, of course, much higher.

Same correlation can be observed in other countries: In the United Kingdom the number of small claims hearings decreased by almost one third within 10 years (Judicial and Court Statistics 2011, 17). In the US small claims courts in 28 states showed an average 14% decrease in caseload between 2008 and 2010[4].

In this connection the alternative dispute resolution mechanisms come into consideration. The provision of an effective enforcement mechanism in the e-commerce is not merely a duty of the state. The e-commerce industry itself takes on this task more and more in its own interest. The effective and efficient customer rights enforcement becomes more and more a peculiarity for a high quality e-commerce provider.

However, it is difficult for provider of e-commerce platforms to offer an own ADR mechanism, because they are not and cannot be impartial from the prospective of their users. On the other hand, their reach is limited to their own customers. Such ADR mechanism must per se remain island solutions.

The proposal for a new New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was submitted by the USA with the Working Group II of the United Nations Commission on International Trade Law (UNCITRAL) is to be seen in this context. This proposal aims to extent the regime of the New York Convention 1958 to settlement awards arising from mediation or arbitration proceedings.

How far this so called New York Convention II, can be processed during the meeting in Vienna in autumn 2015 remains open. However, it is for sure that a New York Convention II will not be in place before the end of this decade.

This paper will examine, therefore, to what extent under the existing regime of the

3) Destatis, Fachserie 10, Reihe 2.1, Rechtspflege: Zivilgerichte, 2012, 12 et seq.
4) See http://www.courtstatistics.org/Civil/2012W5CIVIL.aspx, last visit on August 13, 2015.

New York Convention 1958 and rules of other national and supranational law an online ADR award would be enforceable under the German law.

Under the regime of the MFN clause of Article VII New York Convention 1958, methods and standards of national law must be applied when and if they are arbitration friendlier than the rules of New York Convention 1958. Therefore, the recently installed ADR legislation of the EU and Germany shall be reviewed from this prospective (I), followed by a short presentation of ADR schemes practiced currently in Germany (II). International online arbitration schemes will only be efficient and thus be successful if and when masses of cases are processed through such schemes. This is only possible if the operators of e-commerce websites are willing and legally allowed to refer through their general terms and conditions (following "GTC") to an online arbitration platform as an exclusive dispute resolution instance (III). Finally we will take a closer look how far an online arbitration mechanism using the Internet and other the ITC technology must be designed to be admissible (from the exequatur procedure prospective) under the German law (IV).

Ⅱ. ADR Legislation in Europe and Germany

1. Directive 2013/11/EU

The Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22 / EC of 18th June 2013 (following "ADR Directive") applies to the disputes between traders and consumers, and aims to build a local network of ADR institutions to provide a fast and low-cost dispute resolution mechanism. Online retailers can, but are not obliged to take part at the scheme. If they do, however, they have to inform their customers about this dispute resolution mechanism on their website.

A EU's directive is to be implemented within a specified period of time into the national law of all Member States. It leaves the national legislation each of the Member States in principle at what level it will implement the respective directive. The ADR Directive was to be implemented by July 9, 2015 at the latest by the Member States.

Main point of the ADR Directive is described in Article 5, according to which the "Member States shall facilitate access by consumers to ADR procedures and shall ensure that disputes covered by this Directive and which involve a trader established on their respective territories can be submitted to an ADR entity which complies with the requirements set out in this Directive."

In more detail, the Directive contains some essential quality requirements for ADR entities to be established by the Member States.

These quality criteria are as follows:

(1) Access

Article 5 para. 2 ADR Directive sets forth as a minimum standard for an ADR entity the duty to maintain an up-to-date website which provides the parties with easy access to information concerning the ADR procedure, and which enables consumers to submit a complaint and the requisite supporting documents online.

(2) Qualification of Personnel

Article 6 of the ADR Directive lays down requirements for the personal skills of persons employed by the ADR entities. It is required that the personnel needs to have the knowledge and the skills that are required for work in the field of ADR, or court settlement of consumer disputes, and have a general understanding of the law. Hence it is not clear whether these people should have the qualification for judgeship, resulting corresponding to the "work in the field of ADR" and the judicial settlement of disputes. But since hereinafter the need for a general understanding of law is mentioned, one can assume that this is a minimum requirement.

(3) Effectiveness

According to Article 8 ADR Directive the Member States must ensure that ADR procedures are designed effectively, by which the European legislator understands the online and offline availability, freedom to consult own lawyer at any phase and time, usage free of charge or maximum charge of a nominal fee, and process duration in principle of maximum 90 days.

(4) Fairness

Article 9 ADR Directive comprises principles of fairness as procedural duty which include the adversarial procedure, the provision of a written decision which contains reason, the information of the parties in advance about their right to withdraw from the procedure at any time and to seek their rights before state courts, their right to use an outside legal counsel at any time, and their right to be informed in advance about the necessity of their consent to the result of the ADR procedure with granting sufficient time for their decision.

(5) Binding Effects

Article 10 ADR Directive stipulates that consumers may not be bound to participate in an ADR procedure by a prior agreement and that the parties, in the case of imposing a binding resolution, must be informed in advance about the consequences of their consent. Article 11 sets forth that any resolution imposed by the ADR entity may not disregard any mandatory consumer protection rules and that the consumer's domicile law shall be the applicable law in any case.

(6) Possibility of Rejection of an Application

Article 5 para. 4 ADR Directive enables Member States to allow ADR entities to maintain and introduce means to reject a complaint application. This is possible in the cases where:

- the consumer has not tried in prior to contact the respective trader to discuss the complaint and to solve the dispute directly with him;
- the dispute is frivolous or vexatious;
- the dispute is being processed by another ADR entity or by a state court or has been already processed already;
- the amount in dispute is below or above a pre-determined monetary threshold;
- the consumer has not filed his complaint within a pre-determined period, which is at least one year after the date on which the consumer has submitted the complaint to the trader;
- the treatment of such type of dispute would undermine the effective operation of the ADR entity seriously.

2. Regulation on Consumer Online Dispute Resolution (ODR Regulation)

Together with the ADR Directive, the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22 / EC (following "ODR Regulation") was adopted. This EU regulation contains supplementary rules for the disputes falling under the ADR Directive which arise from cross-border online trade between consumer and companies with business seats in the EU. Article 5 para. 1 lit. e) ADR Directive stipulates that all ADR entities must accept disputes covered by the ODR Regulation.

Through the ODR Regulation EU will install "an independent, impartial, transparent, effective, quick and fair extrajudicial mechanism for the settlement of disputes arising from the cross-border online sale of goods or rendering of services within the EU with the purpose to strengthen the confidence of consumers and traders in the cross-border e-commerce". The ODR Regulation comes into force as of January 1, 2016. The online dispute resolution platform (hereinafter "ODR Platform") will be an interactive website offering a single point of contact for consumers and businesses and shall be built on existing ADR entities in the Member States and shall respect the legal traditions of the Member States.

Consumers and businesses shall thus be given the opportunity to submit complaints via the ODR Platform by filling in an online form in all official languages of the EU and attach relevant documents. The complaints will be then forwarded to the ADR entity responsible for the dispute in question.

The ODR Platform will be developed and operated by the European Commission. The Commission is responsible for all required functions of the ODR Platform including translation, maintenance, funding and data security.

The ODR Platform will have the following features:

- Provision of an electronic complaint form;
- Information the opponent on the complaint;
- Determination of the competent ADR entity or the competent ADR entities and transfer of the complaint to the ADR entity agreed upon by the party involved in accordance with Article 9 of the ADR Regulation;

- Provision free of charge of an electronic case management tool which enables the parties and the ADR entity to conduct the dispute resolution procedure online via the ODR Platform;
- Provision of a feedback system through which the parties may comment on the ADR Platform and the ADR entity carries out the procedure;
- Provision of an electronic form, by means of which ADR entities shall transmit the information referred to in Article 10 letter c the ODR Regulation;
- Access to information and statistical data pertaining to the ADR Platform.

Basically, a result of the procedure shall be in place within 90 calendar days after receipt of the complete complaint file by the ADR entity. In highly complex disputes the body responsible for settling may extend duration at its discretion.

The ADR Platform is a single point of contact for all consumers and businesses, the use of which is free of charge. If the complaint is forwarded by the ODR Platform to an ADR entity the cost of the respective ADR entity will be determined by the procedural rules of the referenced ADR entity.

3. Mediation Act

In 2012 the Mediation Act was introduced (Mediation Act of 21 June 2012 (Federal Law Gazette I, p. 1577)). The legislation process for the Mediation Act was triggered by the EU Directive 2008/52 /EC (Mediation Directive) of 20 May 2008[5]. This EU directive prescribed the implementation of certain aspects of mediation in civil and commercial areas for cross-border disputes until May 20, 2011.

According to Section 1 para. 1 Mediation Act, mediation is a confidential and structured proceedings through which parties involved seek voluntarily and responsibly an amicable settlement for their dispute with the help of one or more mediators.

This Mediation Act introduced the following fundamental change in German civil procedural law.

(1) A new provision of Section 253 para. 3 ZPO was established. This provision rules that all application for litigation shall include: "…an indication of whether the

5) Retrieved September 1, 2015 at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF

complaint carried out an attempt for mediation or any other method that preceded the extrajudicial resolution of conflicts, as well as a statement as to whether there are grounds in place against such proceedings".

Even if this information is not a mandatory requirement for a litigation application, the prior non-judicial conflict resolution effort is not at the discretion of the parties. For lawyers ignoring the information requirement may be at breach of their professional code (Section 1 para. 3, in conjunction with para. 1 BORA). In addition, they could be made liable for malpractice because of delayed service of the litigation application to the opponent thus incurring damages.

All plaintiffs' lawyers must therefore ask themselves whether they have adequately addressed the ADR opportunities and discuss them with their clients prior to bringing the dispute before the state courts.

Many legal expenses insurance companies in Germany have included mediation procedure immediately after the introduction of the Mediation Act with huge financial and marketing success[6].

(2) According to the new provision of Section 278 para. 5 ZPO, the state court may refer the parties to a conciliation procedure or other settlement mechanism before a conciliation judge (*Güterichter*), who is installed for this purpose without the power of decision on the case. The conciliation judge may "use all methods of conflict resolution including mediation." To clarify his role, a new Section 278a ZPO was added which stipulates:

"Section 278a Mediation, extrajudicial Conflict Settlement

(1) The court may suggest mediation or another method of extrajudicial conflict settlement to the parties.

(2) If the parties decide to conduct a mediation or any other method of alternative dispute resolution the court shall order the suspension of the proceedings."

Section 278a para. 1 sentence 1 ZPO thus enables the court to initiate a consensual conflict settlement procedure between the parties. This may be particularly appropriate if the dispute in place encloses conflicts which cannot be satisfactory resolved through court litigation.

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6) See Haft/v. Schlieffen, Handbuch Mediation, 2008, p. 3

The result of such an ADR procedure can be enforced if is recorded by the court or notarized by a notary public or recorded in the form of lawyers' settlement.

Ⅲ. ADR Institutions in Germany

The existing institutions for ADR in Germany show high degree of heterogeneity with respect to procedure types, their stakeholder and binding effect of the result. They differ considerably from one another. Here, the most important ones are introduced.

1. State and semi-state Institutions

(1) Online-Schlichter.de

Some German Federal States have joined forces together to implement the ODR Regulation even before the ODR Regulation was formally adopted in 2013. Already in 2009 the online conciliation entity "Online-Schlichter.de" was established by the State Baden Württemberg. The States of Hesse, Berlin and Rhineland-Pfalz joined the project in the following years. Meanwhile, the online conciliation entity offers its service to 37 million citizens of Germany. Online-Schlichter.de is competent for civil disputes in the field of e-commerce for the supply of goods or the rendering of services. The dispute must be occurred between businesses and consumers who concluded a contract using the Internet.

The communication between the conciliation board and the parties shall take place exclusively via Internet. The further course of the process is determined by the conciliator at his discretion in compliance with the principles of impartiality and fairness. Requests and desires of the parties shall be considered where possible. The conciliator shall finish the procedure within three months time frame.

The procedure is voluntary and can be cancelled at anytime by the parties. The right of the parties to conduct state court litigation is not affected by the conciliation procedure. If the parties accept the conciliation proposal the result leads into a conciliation agreement but the agreement itself is not enforceable. If the counterparty refuses to serve the conciliation agreement a lawsuit before a court must be raised based on the conciliation agreement.

According to an own press release, Online-Schlichter.de 3,323 conciliation applications were placed online in the period between 2009 and 2013, of which 2/3 could be resolved. The Federal Government of Germany has indicated that it will promote the expansion of the Online-Schlichter.de nationwide and so that this ADR scheme would thus not reach "only" 37 million but all 80 million German citizens[7].

(2) Conciliation Boards of Trade Associations and Chambers of Commerce

There is a tradition in Germany that business associations and trade and craft chambers have their own conciliation boards. These facilities have existed since almost the Middle Ages as a part of the self-governing professional association system ("*Meister-Innung*").

The craft associations for instance are obliged to establish "conciliation facilities to settle disputes between owners of craft enterprises and their clients" and thus craft associations may conciliate "disputes between guild members and their clients on request" (Section 54 para. 3 no. 3 HWO (Handwerksordnung, Act on Craft Order[8]).

For example, conciliation boards of the Automobile Trade Association are very popular among the consumers leading thousands of disputes per year to a satisfactory solution.

The legal powers of such conciliation boards are not restricted to only consent based results. The law allows that a conciliation award of such settlement boards can even be enforced if it was issued by a body which fulfils certain statutory requirements.

2. ADR entities of the online industry

In addition, the online industry itself offers ADR service to its customers. Leaders in this area are large e-commerce sites like eBay or Amazon. eBay for example experimented with a so called "Community Court" which is operated by experienced customers. Alibaba.com offers a similar system to their customers.

There are also independent companies that offer online ADR as a genuine business

7) Press release of Online-Schlichter.de as of March 26, 2013, available online at https://www.online-schlichter. de/media/file/7.PM_BDD_ZEV.pdf, last access on August 10, 2015

8) Handwerksordnung, Act on Craft Order, retrieved September 1, 2015 at: http://www.gesetze-im-internet.de/hwo/BJNR014110953.html

model. Among the best known are “modria.com”, “cybersettle.com”, “smartsettle.com”, “juripax.com” (which was acquired by “modria.com” in 2014). They offer their ADR services to online traders with the argument that specialized and professional operated and impartial, claim management were a peculiarity of high-service brand[9]. In fact, this assertion seems to be accepted more and more by the online businesses.

Ⅳ. Arbitration Clause in the GTC

As shown above, both the EU as well as Germany support and promote through legislation the ADR for online trading. However, online ADR entities will have a masse influx only if and when the online trader begin to determines ADR entities as an exclusive competent body for all disputes arising from the online trade through their GTC displayed on their website. The validity of an arbitration clause in GTC on a website under German law will then be evaluated at the latest if the award resulting from such an ADR procedure were to be enforced. In an exequatur procedure a German court will review the effectiveness of the arbitration clause applying, among others the Article II of New York Convention.

1. Article Ⅱ paragraph 1 New York Convention

First, it should be noted that GTC on a web page does not meet the requirements of Article II para. 1 New York Convention. What is needed is an agreement in writing which means according to Article II para. 2 New York Convention, an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

The mutual writing requirement of the first alternative is not fulfilled because the arbitration agreement has been signed neither by the trader nor by the customer. Exchange of letters or telegrams within the meaning of Article II para. 2, second Alternative New York Convention is also not given. On an e-commerce website there are no documents which are being exchanged between the parties[10].

9) See Stark/Engel, The CESL as a European Brand, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution, 2013, p. 339 et seq.

10) See also BGH, judgment of 21 September 2005, III ZB 18/05, WM 2005, 2201, 2202.

2. Application of the MFN Clause of Article VII New York Convention

However, due to the MFN clause of Article VII New York Convention an arbitration clause comprised in the GTC of a website may be effective as far as they are deemed valid for e-commerce legal relationship under German law. For the validity of GTC in the e-commerce the German law provides special rules that must be taken into account.

(1) Inclusion of the GTC by Reference on the Website

For the question of whether the GTC of a website has become part of the contract entered into between the trader and the customer is determined in accordance with the provisions of Section 305 sec BGB where both the customer and the trader are situated in Germany. Basically, the following requirements must be fulfilled for the inclusion of the GTC of the trader into the contractual relationship with his customer:

1) Explicit Notification

The owner of the GTC must expressly point out that the sales contract is being processed under his GTC. To comply with this requirement the notice must be arranged and designed in a manner that it cannot be overlooked by an average customer, even at a cursory level. Not enough is therefore a hidden or misleading notification. It is also not sufficient to merely mention the GTC in the main menu of the website. The user must clearly and unequivocally express his will for inclusion so that the customer can clearly recognize and understand this.

The most common method is to request from the customer to set a check mark if he consents to the GTC and wishes to proceed with his order procedure. For example: A text such as "I have read the general terms and conditions and agree to their validity" is displayed and a check box with a hook appears after clicking on the check box. Such method is regarded as sufficient to fulfill the explicitness of the notice requirement.

2) Possibility to take Notice

The trader must provide the customers with the opportunity to take notice of the GTC in a reasonable manner. This legal requirement is met if the GTC of the provider can be accessed and printed out using a clear and visible link on the order page. Part of reasonableness of the opportunity to take notice is that the GTC must be linguistically and visually clearly designed and that they are understandable for an average intelligible customer.

However, the prerequisites for the inclusion are loosened compared to the inclusion of GTC in offline transactions because the Internet already provides for a high level of consumer protection, as the customer is in the most case at home and has opportunities to read the GTC without "the selling pressure" and thus is able to check thoroughly before completing the order process.

3) Consent of the Customer

The customer ultimately has to be in consent with the inclusion of the GTC. This is assumed to be given if the customer dispatches the order form after he has marked the check box which notifies that he has read and acknowledged the GTC of the trader. A commonly accepted method is also to send GTC together with the order confirmation of the trader. In this case, not rejecting the GTC is deemed to be an approval of them.

4) The Language as a Prerequisite for the Validity of the GTC

A legally significant feature is the choice of language in which the GTC as well as the notification to them are displayed. The inclusion of the GTC (which contains the arbitration clause) into the contractual relationship is only established if both the reference to the GTC as well as the GTC themselves are written in a language which is understandable to the respective customer. Even on a website which is being used by international customers English must not be always the contractual language. The general rule is that the GTC must be presented in a language which was used in previous negotiations and correspondence; applying this rule for e-commerce would mean that the trader must offer for display his GTC in all languages he uses for the sale process on his website.

A German customer for example, would be able to successfully deny the applicability of the GTC on a website due to lack of understanding if the website offered German language for the sales process but contained only an English version of the GTC. Currently, the majority of cross-border e-commerce websites have this shortcoming.

(2) Breach of mandatory Rules of Consumer Protection

However, German courts limit the possibility to include an arbitration clause in the GTC on a website if the customer is a consumer. For B2C transactions consumers are protected by mandatory consumer protection rules to which belongs the Section 1031 para. 5 of ZPO, which reads:

"Arbitration agreements to which a consumer is a party must be contained in a document which was personally signed by the parties." This is not the case with GTC on a website.

Therefore, an arbitration clause which is contained in a GTC on a web page is invalid against a consumer[11].

Vis-a-vis a customer who is not a consumer (so enterprises or companies) this restriction does not apply. Therefore, in B2B e-commerce transactions arbitration clause can be validly agreed through GTC on websites.

Ⅴ. Requirements for an admissible International Online Arbitration

We turn now to the question whether an arbitration award of an online arbitration procedure could be executed in Germany.

11) See BGH judgment of June 8, 2010 - XI ZR 349/08, judgment of January 25, 2011 - XI ZR 350/08, XI ZR 106/09.

1. Qualification as an International Arbitration Award within the Meaning of Article III New York Convention

In an exequatur procedure concerning an arbitration award which was the result of an international online arbitration procedure the competent German court will at first evaluate whether award qualifies as "a foreign arbitral award" within the meaning of Article III of the New York Convention is fulfilled. German courts apply not strong requirements for this. It is sufficient that the award was not made by a state court but comes from an arbitration body recognized by the law of the respective foreign state. Required is therefore only that the institution which has issued the award has its business seat abroad. If the seat of the arbitral board is a domestic one then the award will be enforced under the rules for domestic arbitration award. Recourse to Article III New York Convention would be unnecessary in this case.

2. Admissibility of the Arbitration Procedure using the Internet

For the admissibility of processing the arbitration via Internet, the principle applies that the parties involved have the power to design and determine the arbitration proceedings. According to Section 587 para. 1 ZPO[12] the parties may through an arbitration agreement itself or in a subsequent written agreement set forth the arbitration procedure. The online trader who will have determined the online arbitration scheme as an exclusive dispute resolution method through his GTC will therefore be entitled to include the essential procedural mechanisms in his GTC. The GTC may also refer to the applicable arbitration rules of the assigned online arbitration board and so include them as part of the GTC. The parties are also entitled to agree on the procedure even after the disputed transaction. It is therefore also possible to refer in the GTC to the arbitration rules of the arbitration board in the version of the actuality.

If the parties have not agreed on the procedural rules the German law transfers according to Section 587 para. 1 ZPO the power to determine the procedural rules to

12) Zivilprozessordnung, Act on Civil Procedure, retrieved September 1, 2015 at: http://www.gesetze-im-internet.de/zpo/

the arbitrators at their discretion. The arbitrators can therefore determine the arbitration rules of the online arbitration as the authoritative rules of the proceedings even without the consent of the parties.

The borderline for the freedom to determine the procedural rules of the parties and the arbitrator lies in cases listed in Article V New York Convention especially in b) where it is stipulated:

"The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." This Article contains the principle of denial of a fair hearing or denial of the rights of the defense.

In this context, the question arises whether the rights of the defense can be violated by the conduct of the arbitration proceedings without oral hearing or personal presence of the person involved.

The rights of the defense principle is not so strictly applied to the arbitration proceedings compared to proceedings before state courts in Germany. So the judicial hearing must take place by no means in the presence of all persons involved nor is there a compulsive oral hearing duty prescribed. It is sufficient if the parties exchange their pleadings in writing. The other party must be granted the opportunity to reply if changes to the substantive arguments occur.

The personal presence of all the arbitrators during arbitration proceedings is generally regarded as not being a prerequisite for the granting of fair hearing. Here we see again the great discretion of the parties or the arbitrators in the determination of rules of procedure. Under special circumstances it may be that a fair hearing can only be granted at an oral hearing to a certain extent. However, this will only rarely be the case for example, if in a factually and legally very complex issue a party that has little writing skills and without a legal representative is granted only the right to submit a written statement then this could represent a violation of the right to be fairly heard[13].

The rights of the defense are also influenced by the essential requirement of equal and impartial treatment of the parties. A violation of due process occurs however, only if one of the parties is not granted the opportunity to express his opinion but not if he did not use this opportunity.

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13) See Jud/Högler-Pracher, ecolex 1999, p. 604.

Using the Internet in the course of the arbitration proceedings could serve the principle of fair hearing in so far as the parties must not travel to the place of the arbitration in order to be heard. If the parties are able to use a video conference system then they can present their testimony orally. Submitting the written statement would be possible either via email or even approximated to the oral statement if the parties and the arbitrators communicate in a text chat or via a messenger system to each other, thus enabling them to put intermediate questions immediately. Especially in overseas disputes the implementation of an arbitration proceeding on the Internet would result in decisive time and cost saving advantages and thus enable small and mid value ADR.

3. Admissibility of Conferencing of the Arbitral Tribunal via Internet

If the arbitration tribunal consists of several arbitrators the arbitrators must consult each other prior to voting for the award. The arbitration award is established after counting of all the vote of the arbitrators according to Section 590 ZPO by the absolute majority of the votes. The method of consulting and voting is not regulated by law which in turn means that in the case of absence of party agreement with this regard, the arbitration rules may determine the method (Section 587 para. 1 ZPO). The arbitration rule may therefore determine that discussions and voting shall be carried out via Internet using online communication systems such as video conference, messenger system or text chat.

It follows further that the arbitrators are permitted to carry out a voting in the circulation. In the course of the voting, each of the arbitrators has already determined his opinion and the voting process is no more than collection of the votes and determining the result. The personal presence of all the arbitrators is even less necessary than in the course of consultation so that one may rightly assume that both the consultation as well as the voting may be carried out via Internet.

However, the arbitral award must be produced in writing and the personal signatures of all arbitrators must be placed on the document. The signatures of the arbitrators must be on copies for the parties as well as on the original of the award

document. But it is not necessary that all arbitrators have to sign the arbitration award in the presence of the other arbitrators. The signing in the circulation is also possible.

Ⅵ. Conclusion

1. The EU has paved the way for an ADR via Internet through the ADR Directive and ODR Regulation. The ADR scheme established by the ODR Regulation is designed for disputes between e-commerce businesses and consumers. However, the ODR platform has no exclusive jurisdiction. Participation in the ODR scheme is on voluntary basis and cannot be agreed prior to entering into a binding transaction.

2. In Germany there is already a well-established ADR culture which now gets even more support. In the B2C sector first online ADR scheme has already been successfully installed by German governmental agencies (Online-Schlichter.de).

3. Online arbitration in the B2B sector could be successfully established if e-commerce companies begin to actively choose it as a means for dispute resolution. They are in a driving position because in the B2B sector an arbitration clause with exclusive jurisdiction may be enclosed in their GTC.

4. Material obstacles for an online arbitration procedure do not exist. In particular, an arbitration proceedings without personal presence of the parties and arbitrators at the place of arbitration is admissible.

5. If the e-commerce companies start to make use of the opportunity to determine online arbitration schemes as an exclusive dispute resolution means through their GTC, this can mean a breakthrough for international online arbitration schemes. The mass of influx of even smaller cases will lower the costs of a single arbitration procedure. International online arbitration would then be in fact an alternative to the state courts to establish an effective legal protection in the area of cross-border e-commerce.

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