

## Legal Issues Arising in Online Dispute Resolution Systems

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### ABSTRACT

*These days, the Internet activity has become one of the routines of everyday life of people around the world. Its growth has created an ideal platform for business transactions particularly between the parties far away from each other. Although business to consumer (B2C) e-commerce has been influenced positively by this trend, each online transaction might lead to transaction disputes as their offline versions. It has been recognized that Online Dispute Resolution (ODR) is helpful in solving online disputes. ODR combines the advantages of Alternative Dispute Resolution (ADR) and those of the new information technology to reduce the cost. Accordingly, there is no need for traveling and the parties can participate from different locations in ODR and present their documents in a written form including email attachments along with copies fees and postal charges avoidable. Moreover, there is no limitation in terms of time in ODR since it is available 24 hours a day, 7 days a week, around the world removing the potential problems of time zone descriptions. Although ODR has many advantages over traditional dispute mechanisms, some of its characteristics pose fundamental problems. In this study, in terms of methodology, content analysis as well as comparative and jurisprudence approaches have been used. It focuses on the legal issues in consumer ODR including the enforcement of outcomes, publication and confidentiality, the significance of trust and redress mechanism, and the security and inequality of bargaining power in B2C disputes. Based on the results, this paper will make recommendations on how to improve ODR systems and enhance consumer protection in online transactions.*

**Keywords:** Legal Issues, Online Dispute, Resolution Systems, Alternative Dispute Resolution, Enforcement of outcomes, Redress mechanism.

### INTRODUCTION

Online dispute resolution has created some difficulties for this mechanism which result from the weaknesses in the laws regulating ODR, due to the non-existence of a comprehensive and clear legislation in the ODR area. Some of these issues may be arisen through (i) the enforcement of outcomes; (ii) publication, confidentiality and security; (iii) access to justice in ODR procedure; (iv) significance of trust and redress mechanism; and (v) inequality of bargaining power in B2C disputes.

### ENFORCEMENT OF OUTCOMES

The global nature of the Internet and the principle of national sovereignty regarding jurisdiction are irreconcilable. The reason is the international rules regarding jurisdiction and choice of law for each state, while the Internet is a worldwide phenomenon. There have been many cases in different countries, where courts have tried to solve the issue of jurisdiction and the choice of law that the Internet makes on a national level (Johansson, 2006). Indeed, private

international law is a sophisticated construct with theoretical foundations that seem rather complex for solving online transaction disputes including consumer e-disputes. It is clear that private international law as deployed in national legislation, must also be applicable to the information transactions including foreign ones (Benyekhalif and Gelines, 2005). In addition, there is the question of enforcement regarding commercial and online disputes.

There is not much use in winning a case if there is no possibility of it being put to use. For example, in the *Licra v Yahoo case* (Licra v Yahoo case, 2005), a US court refused to apply and enforce the verdict of a French one (Johansson, 2006). This case was a French court case decided by the High Court of Paris in 2000 concerning the sale of memorabilia from the Nazi period by the Internet auction and the application of national laws to the Internet. The judgment has created a universal competence for French courts to decide the Internet cases. A related case before the United States courts concerning the enforcement of the French judgment reached the 9<sup>th</sup> US Circuit Court of Appeals, where the majority of the judges ruled to dismiss Yahoo!'s appeal.

The issue becomes even more complicated when parties enter into a contract over the Internet. The rules of the private international law guiding a competent court and any other applicable law are then not supplementary but imperative. With trade globalization, the European position, which has a great impact on the consumer regulations and practices globally and does not allow any significant accommodation for consumer rights, encourages the implementation and improvement of extra-judicial methods for solving disputes to help the growth of electronic commerce (Benyekhalif and Gelines, 2005).

Enforcement is one of the main obstacles for further development of ODR. Enforcement mechanisms are necessary when a party refuses to comply with a rule. The quality of justice in ODR is important and the outcomes must be made effective, whether these are settlements, agreements or final decisions through papers or electronic documents. When parties agree on a decision, compliance may be accepted but it cannot always be assured. Mediation and negotiation outcomes, as well as agreements, are the considered contracts which national courts may act. Yet, currently, there is no law case on how courts enforce online agreements (Cortes, 2011). Some ODR programs automatically enforce their outcomes such as ICANN, which may unilaterally change the domain name registrations in response to UDRP proceedings (Rule et al., 2010).

If the ODR, the provider is unable to gain compliance from traders or any party that has agreed upon resolution, then consumers may seek a judicial remedy to enforce the agreement. The exception for this is when the ODR provider is a trust mark or seal provider. If the trader refuses to comply with an agreement reached through dispute resolution, its seal or trust mark will be automatically revoked (American Bar Association, 2002). It is doubtful whether the arbitrated agreement made by the electronic means is valid under the current arbitration frameworks requiring it in written and signed form. Three issues are to be considered in the following: (i) Award, (ii) Writing, and (iii) Hearing.

#### i. Award

Award in an online arbitration is binding and final the outcome of which is usually sent to parties by ODR providers. By participating in the process, vendors indicate their consent to the award being enforced in any court with proper jurisdiction. Once a ruling is forwarded to the parties, the vendors have seven days to comply with it. Later, the winning party will be asked



whether the vendor has abided by it or not. If the vendor refuses to comply with a finding, the case may be referred to consumer protection agencies for enforcement (Rule et al., 2010).

Establishment of award is one of the obstacles in online arbitration. Contrary to the win-win situation in the online mediation and negotiation, in the online arbitration, only one party wins. Therefore, the issue of enforcement of the arbitral awards becomes more serious. As regards this issue, ICANN Domain Name Dispute Arbitration Program is an exception, in that ICANN handles enforcement and compliance easily, as several ICANN providers can issue orders for a domain name to be removed or transferred. Unless the domain name owners control the dispute, other parties would have to go to their national courts for enforcement. At this point, two significant questions are addressed: (i) Which court; and (ii) whose law is to apply?

The enforcement of the arbitral award is difficult because in order to enforce and recognize arbitral awards, a court has to decide whether it is competent in exerting jurisdiction. This depends on the venue and the fact that a court may acknowledge the validity of its format, forum and arbitrators. It must then evaluate its validity and scope with regard to the public policy of the chosen state. The complexity of the enforcement and recognition of the arbitral awards have been highlighted in the European Commission's Report on the Review of the Brussels I Regulation 2009. This document tends to the Interpret specific instances that are supportive of arbitration and cognizant of the need to enforce arbitral awards (Wang, 2010).

In addition, the National Administrative or Consumer Authority in a vendor's home country may take such steps, as it deems adequate to ensure that vendor's compliance with the arbitral awards rendered pursuant to the Model Law, including taking direct enforcement action. Non-governmental or private standards enforcement agencies may request assistance from payment networks, or refer the cases to the collection agencies (Rule et al., 2010).

## ii. Writing

A central issue regarding arbitration is the validity of arbitration agreements concluded by electronic means. Most countries require arbitration agreements to be in written form for validity and legal acceptance. At the international level, the New York Convention requires a written document for recognition of an arbitration agreement (Benyekhalif and Gelines, 2005). Article 2 of the New York Convention (1958 Convention on the Recognition and Enforcement of Foreign of Arbitral Awards) implies that the arbitration agreements should be in written form. Most countries have adopted the New York Convention, including the US, EU and China. This is considered as one of the most successful conventions, as it assures recognition and enforcement of cross-border arbitral awards. According to Article II of this Convention:

Each contracting state shall recognize an agreement in written format according to which the parties undertake to submit to arbitration of all or any differences which have been arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration (Cheng, C. J, and Cheng, J, 1990). Therefore, the Convention states that there is a writing requirement for arbitral awards and it does not say anything about electronic transmission and recognition of electronic arbitration agreements and awards. It may be sufficient to print and assign the digital arbitral awards in order to satisfy the writing requirement (Wang, 2010).



### iii. Hearing

In the online arbitration, the parties will have online hearings and will examine and cross-examine witness or hear experts, using teleconferencing or video-conferencing technology. According to Food (2010):

A major legal issue concerning electronic hearings in online arbitration concerns the legal significance of evidence produced online. Many practitioners and academicians have mooted for use of both online and offline methods for procuring or taking evidence on record. There can be online filing platforms where the parties to the online arbitration may file their documents and evidence through an independent and authorized third party provider. Such an online filing is a part of the institutional rules or necessary procedural orders passed by the Arbitral tribunal. The documents and evidence that are filed before the Arbitral tribunal may be the scanned copies of the originals or can be protected and authenticated with the help of digital signatures (Food, 2010).

## SECURITY, PUBLICATION AND CONFIDENTIALITY

The Internet that is a part of our lives has many implications because it is such a prominent way of communication. The Internet connects people, actually or potentially, from all parts of the world, without boundaries and intermediaries. The Internet is affecting our views about security and privacy issues. We can access all the information we need on the Internet; however, our privacy is at stake (Rabinovich-Einy, 2002).

Security is an important issue in ODR since it is related to reliability for technology users. There is no precise definition of security and it covers a variety of aspects, such as, confidentiality, transparency, secrecy, authentication, signature, integrity, privacy and control of information. The most important aspect of security is protecting the information, which involves its transmission and storage. Security leads to trust and confidence in the online space, yet no communication method is able to guarantee absolute security. Usually, B2B transactions require higher security standards, compared to B2C, because of the difference in terms of confidentiality, affordability, along with its ease of handling messages (Kaufmann-Kolher and Schultz, 2004).

To ensure security in arbitration, messages are exchanged and attached through email and, as we know, emails are not completely secure. There is a question on how to identify senders and how to prove that email was sent on what day and at what time. There is also doubt on how to protect e-mail messages against interception and hacking by unauthorized persons. Although, there are solutions in the form of digital signatures, or agreed-on procedures, such as acknowledgment of e-mail and encryption, still, the security of email is not completely assured (Hornle, 2003).

Although all jurisdictions accept digital signatures as valid, a hand-written signature must still be used, unless both originally applicable legislation and the law in place where the award is to be enforced, recognize digital signatures. However, other submissions by parties to the tribunal or to the administrator, where communications are affected through one such, can be made per e-mail, which is, in fact widely used for this purpose. Nevertheless, with the documents sent by this particular mode of communication, the sender frequently also sends a hard copy by a registered post or courier for documentation purposes. Other recent developments are



online filing platforms offered by, so far, only a few providers.

These allow all documents of the case to be stored in one place yet accessible to parties, arbitrators and administer anywhere who then communicate through one such. The question is whether parties will agree to use an online platform provided by independent providers, to be used under institutional rules, which may depend on administrators agreeing to such platforms and on a tribunal's discretion on the procedural matters (Hornle, 2003).

Another issue is the security of hearings in online arbitration. In ODR, hearings take place without anyone's physical presence. This hearing could be oral including videoconferencing or telephone conferencing or in written including using chat rooms. Such technology can be agreed on, at a procedural hearing, either informally, or in writing. Some very low level technology may also be used, such as producing a video tape of an examination and cross-examination of a witness and sending it by a registered post. The type of hearing to be convened is not always covered by rules and may be left to the parties or the discretion of the tribunal (Hornle, 2003).

It is arguable to what extent a witness can manipulate their oral or filmed testimony, such that one may stand in front of a witness, not captured by the camera and encourage or coach the witness on what to say, quite apart from the issue of witness identification. It may be appropriate that either a representative of each party or a member of the tribunal be physically present at the examination. The official facility of a trusted third party, such as that of a notary, a law firm, an arbitration institution or of a court must be used. High technology, such as video conferencing must be installed, making hearings an expensive process. However, most arbitration providers and major law firms such as MARS already have that technology (Hornle, 2003). Thus, security may be their main concern in online commercial exchanges and dispute resolution. The participants in ODR ought to be sure that the process is secure and their private and personal information is not publicly disclosed (Bidgoli, 2004).

For ODR security, confidentiality or secrecy is important. The issue of confidentiality is complex and varies according to the situation and the type of information exchanged between the parties. One main concern is whether dispute resolution processes are to be publicly disclosed. Usually, the parties prefer not to have the information during the process communicated, except with their permission. Indeed, non-disclosure establishes an environment of trust and confidence between the parties and protects their reputation (Pecnard, 2004). Yet, proceedings do not always have to be confidential. On some occasions, proceedings are made public, and the law may require disclosure of some information to protect consumers and provide legal certainty. In fact, the consumer organizations usually stress the point that the possibility to 'name and shame' untrustworthy suppliers, buyers and vendors should be provided, along with dispute resolution (Pecnard, 2004).

Generally, ODR providers have a policy on confidentiality of information. For example, the EC Directive on Mediation supports enhancement of confidentiality in mediation by not permitting mediators and other actors in the process to give information or evidence in civil and commercial judicial proceedings. Certain conditions, however, require total disclosure. World Intellectual Property Organization (WIPO), for example, has adopted transparency and has mandated the publication of resolutions on its website where all the Internet users can gain access to it (Pecnard, 2004). If decisions in the online consumer arbitration hinge on a matter of interpretation of a term used in an online standard form of the contract, then, as a matter of





public policy, the proceeding must be published (Tackbery et al., 2001). The concern is with the extent to which the publication of results is practicable. It is expected that suppliers resist the publication of results.

In the online mediation, because of the nature and informality of discussions and solutions reached, publication probably has to be limited to the general statistics such as the number and types of disputes. With online arbitration, however, decisions should be published (Hornle, 2002). In fact, most ODR providers do not implement the publication of results and are, definitely, not legally bound or obliged to do so. ODR, in fact, provides for the conventions of transparency, including rules, or standards of law, such as legal provisions, equity, codes of conduct, serving as the basis for any settlement or decision (Hornle, 2002). However, with the online dispute resolution becoming one of the main dispute-related mechanisms for e-commerce, the publication of rulings is crucial.

Adequate rules should be established to protect information and avoid publicity. In order to keep the matters confidential in ODR from being disclosed to unauthorized parties, technology can be implemented. Such tools need to protect the transmission of communications in ODR proceedings, as there will necessarily be an exchange of a lot of information, such as discussions regarding the issues, evidence to back up their arguments, and agreements or settlements resulting from the ongoing or previous negotiations or mediations (Pecnard, 2004).

The information could be transmitted through a variety of technological tools such as emails, chat rooms, discussion boards or video conferencing, which are not completely secure and trustable. ODR providers state, on the issue of confidentiality that this does not have to mean that such information cannot be transmitted, or acceded to, by the third parties. Ordinary emails, for example, are much more insecure than a postcard. Therefore, parties need to ensure that messages between them are kept confidential and safe from others, as well as the integrity of transmitted documents is guaranteed, apart from ascertaining that messages are from the right and proper person (Pecnard, 2004). Finally, Katsh and Rifkin (2001) believe that frankly, “trust is as important for the success of any web-based enterprise as convenience, but they also recognize that it is easily ignored and neglected” (Katsh and Rifkin, 2001). Overall, one of the ODR requirements is the publication of proceedings and their resulting decisions, all of which lead to transparency. However, an important issue in ODR is respecting the parties' right on confidentiality and privacy, which seeks to strike a balance between the security of the process and publicity of proceedings (Jhusiwala, 2010).

## **SIGNIFICANCE OF TRUST AND REDRESS MECHANISM**

Building trust in e-commerce is essential but often difficult. To develop a consumer's trust in the online environment is not the same as developing in the brick-mortar world. In e-commerce, business is based on virtual trust. According to Chin Eang Ong (2003), “It is the promise of trust that needs to restore affinity between business and consumers in this electronic environment with no proximity of distance as well as differences in culture, language, legislation and jurisdiction” (Ong, 2003).

Consumer trust becomes more serious with cross-border transactions leading to the question of jurisdiction over the redress mechanism. The growth of e-commerce depends on the fair



and effective redress mechanisms for consumers, coupled with comprehensive consumer protection laws. Consumers are mainly encouraged to do online shopping so that they gain access to a million sources of goods and services from the comfort of their own homes, the risk that has, so far, remained outside our considerations notwithstanding in that the wrong or defective items are delivered. This issue happens to be more serious with the online transactions, because in offline dealings, consumers are aware of their legal rights and how these may be enforced through the courts (Hornle, 2002). For any transaction under a single jurisdiction, redress is available within its court system, whereas e-commerce is global and borderless. With any such dispute in international electronic trade transactions, it is difficult to find out whose laws should be applied and which authorities have the jurisdictional authority over this dispute. The main question is how a consumer can trust cross-border shopping when goods are not delivered or happen to be defective, and whether, and how, he or she will be able to seek redress (Ong, 2003).

One of the ways of managing these types of disputes at the international level is by way of dispute resolutions such as ADR and ODR. Redress mechanisms are controversial topics. The OECD Committee on Consumer Policy (CCP), through its work on dispute resolutions and consumer redress, has developed guidelines for consumer protection in the context of electronic commerce (OECD E-commerce Guidelines), initiated in 1999, and developed by the CCP. Consumers are to be provided with meaningful access to fair and timely dispute resolutions and redress, without undue cost or burden; while, the committee recognizes the need to devote special attention to the development of effective cross border redress systems (Consumer Dispute Resolution and Redress in Global Market, 2006).

The guidelines demand that business leaders, consumer representatives and governments pay more attention to, and develop fair, effective and transparent dispute resolution providers to resolve consumer conflicts. These consumer protection guidelines acknowledge the difficulty of defining 'redress' in ways which would do justice to consumers.

The OECD Guidelines for protecting consumers from fraudulent and deceptive commercial practice across borders were issued with regard to the fraudulent and deceptive commercial practices against the consumers calling on member countries to provide effective redress systems to protect consumers as potential victims of fraudulent and deceptive commercial practices (Consumer Dispute Resolution and Redress in Global Market, 2006). Other international instruments for consumer protection and development of effective redress mechanism and dispute resolutions are the United Nations' guidelines for consumer protection (UN guidelines), developed by the United Nations Conference on Trade and Development (UNCTAD) and, working in the cross-border context, the International Consumer Protection and Enforcement Network (ICPEN). In addition, the Organization of American States (OAS) committee on juridical and political affairs approved a development of a model law on monetary redress for the consumers in 2005 (Consumer Dispute Resolution and Redress in Global Market, 2006).

According to OECD Committee on Consumer Policy (CCP), in implementing the mechanisms stipulated in Section II, the member countries should take into account the need to improve awareness of, and access to, dispute resolution and redress mechanisms and enhance the effectiveness of consumer remedies in cross-border disputes. Particularly, member countries are to work towards:



1. Providing clear information to consumers and relevant consumer organizations on judicial and extra-judicial dispute resolutions and redress mechanisms available within their countries.
2. Participating, where possible, in international and regional consumer complaint, advice and referral networks.
3. Developing the awareness of justice system participants, including the judiciary, law enforcement officials, and other government officials, required by the foreign consumer harmed by domestic wrongdoers.
4. Encouraging greater use of technology, where practicable, to facilitate the dissemination of information, and the filing and management of consumer disputes, in particular, cross-border disputes.
5. Taking steps to minimize, when necessary and appropriate, the legal barriers to applicants from other countries having recourse to domestic consumer dispute resolutions and redress mechanisms.
6. Developing multi-lateral and bi-lateral arrangements to improve international judicial co-operation in the recovery of foreign assets and the enforcement of judgments in appropriate cross-border cases (Recommendation on Consumer Dispute Resolution and Redress, 2007).



## ONLINE DISPUTE RESOLUTION AND ACCESS TO JUSTICE

Access to justice is integral to policy in most countries. Its symbolic significance has made it into a 'pivot' for many proposed changes in court procedures and legal services. Access to justice is related to the growth of consumer protection and is noted in the United Nations Guidelines for Consumer Protection as:

Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers (United Nations Guidelines for Consumer Protection, 2003).

There must be easy access for everyone involved in any dispute, and redress mechanisms to provide effective remedies at a reasonable cost. This is stated in Article Six of Human Rights, under the provisions for fair trial:

In the determination of the civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The development of IT and electronic way of resolving disputes have opened up doors of opportunity for consumers to be provided with points of reference, land marks of justice in cyberspace indicating that they may return to the place where the transaction was concluded or could say where the dispute began and find a dispute resolution process related to their dispute. It is soon understood that one of the main advantages of ODR is access to justice for all small disputes especially when the parties are away from each other and in long distances, or even in different countries (Reinisch, 2000).

One of the most frequently encountered problems for consumers is that of money. Reforms have been based on the paradigm, which includes individual consumers in a dispute with



individual businesses. Efforts have been done to balance this relationship by subsidizing procedural and information costs for the consumer or by providing more convenient, less costly, risky or frightening legal actions. In B2C cases, consumers are the claimants because consumers with adhesion contracts are at risk since there is usually no equivalent alternative (Kaufmann-Kolher and Schultz, 2004). All ODRs, in some way, improve access to justice by decreasing access barriers and reducing costs. In ODR, the Internet facilitates access to all kinds of information and reduces information at low cost, and those of travel and meeting space simply does not exist.

The only additional cost in ODR is that of technology; if certain software or uncommon communication tools are used, these may generate certain expenses; as a rule, inexpensive software tends to be used. Thus, the cost of ODR is reduced and there is better and easier access to information and to providers than with other types of dispute resolutions (Kaufmann-Kolher and Schultz, 2004).

The very accessibility of online dispute resolution mechanisms means that, while easy to get to, certain obstacles, such as geographical and language barriers are being more rapidly encountered. ODR systems should put much effort into developing themselves as a 'neutral' medium, independent from such considerations to encourage the widest possible access. ODR developed technology must be easily applicable by all system users. ODR platforms should involve help content with simple, and understandable terminology and its technology should create better access to justice, so as not to impose upon those who have no means of interacting with it, yet discourage those who might improperly profit from the use of the ODR. The providers should consider all types of individuals and their needs. The users with poor knowledge of technology, let alone English, and without having the Internet access ought not to be discriminated against by being made to employ unknown and unfamiliar electronic means. The law should not constrain those dispute resolution providers and parties in conflict who feel confident in using Online Dispute Resolution systems and could benefit from their use either. Harmonizing International Private Law at the global level will have greatly enhanced access to justice (Cortes, 2011).



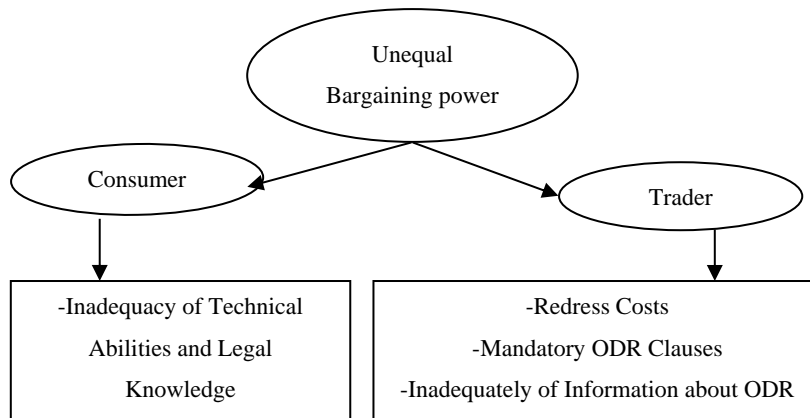
## INEQUALITY OF BARGAINING POWER IN BUSINESS TO CONSUMER DISPUTES

Bargaining power means the ability of a party to achieve a preferred outcome in an exchange relationship (Coteanu, 2005). In the case of *Lloyds Bank v Bundy* (Bank v Bundy, 1975), the defendant -Mr. Bundy- 'hypothecates' his farm, owned and inherited by several generations of his family, to back his son's business. Mr. Bundy and his son had banked with the same branch of the plaintiff's bank for a long time and relied on the advice given by the bank. That bank had let the son run up an overdraft exceeding the security it had been given; and it was this fear that his company could go bankrupt, leaving them with unsecured debt that made the bank act, with its branch bank manager and the son calling in at the farm, with forms already filled in. The father was told of the amount of the charge, which was £11,000 and exceeded the value of the farm, and he was required to give a guarantee. The father accepted to help his son and was not given the time and opportunity to think about it or obtain legal advice. It was held that, between the bank manager and the father, there had been a relationship of trust and confidence, giving rise to a Presumption of Undue Influence under Class 2 b. Both the charge

and guarantee were set aside. The typical banker and customer relationship were not one of trust and confidence but a business one whereby the bank is looking for its own interests.

However, the bank manager, in giving evidence, admitted that the father relied implicitly and solely on the advice given by him, and the father stated that he had trusted the bank, had had a long relationship with the bank and had generally acted on the advice given. So, in the words of Trebilcock, in the case *Loyds Bank v Bundy*, quoting Lord Denning, “many of the traditional defenses to contract enforcement, for example, duress, undue influence, breach of fiduciary, were probably seen as merely exemplary of the general doctrine of inequality of bargaining power, all of which provided testimony to the fact that the age of ‘laissez faire’ was wearing out its judicial welcome” (Trebilcock, 1976).

Unequal bargaining power in ODR is related to consumers’ weak position, being coerced to accept the trader’s compromise. In e-commerce and cross-border transactions, pursuing complaints in another country is more difficult for consumers because of the redress costs; whereas, traders complain about the mandatory ODR clauses, inadequacy of information about ODR, lack of local legal knowledge, and the language constraints. The causes of the inequality of power between consumers and businesses are illustrated in Figure 1 (Coteanu, 2005).



**Figure 1.** The causes of unequal bargaining power in relation to ODR (Coteanu, 2005)

Figure 1 shows the causes of the unequal power of consumers versus business, lack of technological and legal knowledge of ODR mechanisms, redress costs, mandatory ODR clauses and lack of information about ODR. Lack of technological knowledge of ODR affects the consumers’ ability to negotiate. The necessity for legal and practical knowledge to choose ODR and its wide range of expertise can affect the balance in the online environment related to negotiating power. Coteanu believes that, due to the inequality of technological ability and computer knowledge between traders and consumers, the use of ODR mechanisms impairs the consumers’ ability to conduct adequate ODR procedures. To overcome this, consumers need to reach a higher level of knowledge on technical issues (Coteanu, 2005).

An imbalance in the legal knowledge may occur in the ‘pre-dispute stage’ when consumers are to consider the most suitable ODR process in dealing with their transactions, as well as in the ‘dispute stage’ where consumers need to be circumspect, without overlooking fundamental requirements of procedural justice and due process. Indeed, understanding ODR procedures

constitutes the practical and legal knowledge about specific ODR procedures. It is hard, even for the experienced consumers, to consider which form of ODR is suitable to the potential dispute. According to Coteanu, “the appropriateness of ODR to a specific dispute depends on the need to provide conclusive proof or lighten the burden of proof by the requirement of extensive and costly technological expertise, or by the need to demonstrate the unfairness of a commercial practice in the grounds of particular facts” (Coteanu, 2005).

With cross-border transactions, consumers should anticipate whether to solve their conflicts based on the particular local law, rather than advance their interests, using their own domestic version. Therefore, a consumer agreeing to follow a specific form of ODR before the dispute changes the balance of power between him and a trader, it tends towards the trader rather than him. Another factor that contributes to the unequal bargaining power in ODR is related to the communications of consumers with traders and arbitrators, typically spontaneous and in writing, which renders an unfair advantage to the party who can structure its case. Customers’ lack of legal representation further diminishes their bargaining power in ODR (Coteanu, 2005).

Moreover, the technical standards are circumscribed in cyberspace, in the ODR process. The parties with sufficient knowledge about the information technology limits gain yet another advantage because technology is not by itself ‘neutral’. The third-party neutral agents working online being the main field of electronic dispute resolution may favor people with high levels of information technology knowledge. The neutral agents acting as the third party are not only to be technical experts in the field of computer software and communication technology, but also they should be able to transfer this knowledge to contending parties and educate them in the process. Consequently, ODR providers should know the ‘typical’ Internet users’ limits. Rapidly changing technology almost ‘guarantees’ that the Internet users are dissimilar and unequal (Haloush and Malkawi, 2008).

The disputants may be more technically adapt than the third party sense, so that the trade mediators and arbitrators have to develop matching technological competence since the success of ODR depends very much on the easy use of the ODR process. The more user-friendly the ODR system is designed, the more balanced will be the parties’ approach to, and use of, information, so that, if one of the parties can prove that he or she is unable to participate in ODR proceedings because of lack of technological competence, he or she may challenge the outcome, rather than comply with it. Obviously, equal access to information implies ‘equality in arms’ with ODR schemes (Haloush and Malkawi, 2008).

The emergence of information technology has achieved very far-reaching changes in our lives, including in consumer styles and buying patterns; while, the Internet itself has led to a new type of business being conducted online called electronic commerce or e-commerce. In e-commerce, consumers order products and services over the computer from all around the world, with no barriers of time and space, creating a competitive marketplace which benefits consumers, offering them a wide range of high quality products at low cost, so that, in recent years, consumers have become accustomed to purchasing products and services online.

The main type of ‘online transaction’, geared as it is to the relationship between buyer and seller, is the ‘business to consumer’ (B2C) online transaction where consumers purchase goods or services from a retailer or organization for his or her own use. Online transactions, like offline ones, may lead to problems and disputes. In other words, e-commerce can lead to e-



disputes. It is, therefore, necessary to ensure that online transactions happen with minimal risks to the safety, financial or otherwise, of participants in e-commerce. The informal nature of the Internet, the absence of face-to-face contact between consumers and sellers and geographic distance has created serious problems for consumers in cross-border online transactions. E-disputes range from the enforceability of terms of contract, delivery complaints, unsafe products, loss of private information through online payment, fraud and deception.

## RECOMMENDATIONS

ODR is a new development, with its problems having arisen because of insufficient and weak laws and regulations in the area. These problems include legal and cultural issues. Among the legal ones are enforcement of outcomes, security, confidentiality and publication, trust and redress mechanisms, access to justice and the unequal bargaining power between parties in B2C in ODR. Cultural issues also have challenged ODR, including language barriers, absence of face-to-face encounters, text communication and different time zones. A brief summary with regard to the related problems and possible solutions is presented in the following sections.

### *Enforcement of Outcomes*

Enforcement is one of the most important legal concerns in ODR, with its outcomes having to be made to work. In negotiation and mediation, these are settlement agreements in the form of a contract; while, the outcome in arbitration is an Arbitral Award.

#### i. Issues

- 1) The problems of enforcement of the ODR outcome agreement, online arbitral award enforcement, appropriate jurisdiction and the relevant law.
- 2) The requirement for valid and legal effective arbitration agreement to be in writing, although this can be performed with the electronic tools.
- 3) The electronic hearings concern, and the legal admissibility of evidence produced online.
- 4) Parties in the international disputes have to bear significant expenses and inconvenience when initiating court action in multiple jurisdictions to compel compliance with a resolution obtained through, or an agreement to submit to the ODR.

#### ii. Recommendations

- 1) With online agreements, parties can gain legally binding outcomes by having them enforced as a contract. They may be unilateral in nature meaning that vendors, for instance, may have merely promised to be bound by them, or bilaterally, that is, binding on both parties. Examples of the countries applying bilateral contracts are France, the US, and the UK, with parties to an agreement bound as if by a contract and, if there is a failure to comply, they can be sued under national law.
- 2) ODR outcome enforcement may hinge on monetary compensation, technical control and reputation. Pecuniary approaches range from financial guarantees, escrow, and insurance, to charge-back agreements with credit card companies. In the rare situations, the technical control is a self-enforced, such as through UDRP procedures



for domain disputes; for instance, where ten days after outcomes have been released, domain names are canceled or transferred to the winning party, to be implemented by the registrar of the domain name who exercises technical control over the process. Reputation is another form of advantage to make businesses to comply with ODR outcomes voluntarily (Aksen, 2005).

As an another example, if a business site is granted a Trustmark indicating that a product or service provider has met the requirements of the identity ecosystem as determined by an accreditation authority and the participants should be able to both visually and electronically validate its authenticity (Reiniger, 2011). The Trustmark should be abide by a certain code of ODR conduct and in case of failing to comply, it will be suspended or removed, which would do damage to the Trustmark holder who would endeavor to comply or to avoid losing business. These methods are usually known as self-enforcement (Aksen, 2005). In most cases, parties agree to be bound to outcomes and there is no need for enforcement. An online agreement is easier to enforce if consumer protection law is harmonized.

- 1) As to arbitral awards, most of the countries tend to use the e-watermarked printed version, to be signed by the arbitrator. Other ways of overcoming the problems of enforcement are establishing preconditions so that the outcomes serve as the enforceable settlement agreements, to have a user education program, to prescribe the choice of law and forum in advance, to proceed to formal binding arbitration or other authoritative measures, to establish international organizations, and to establish recognition of the autonomy of disputing parties through strictures imposed in advance.
- 2) Parties to the online arbitration may file documents and evidence through an independent and authorized third party provider.



### ***Security, Publication and Confidentiality***

Security is another important issue for consumers in ODR related to information protection. Security creates trust and confidence in the online space but it is impossible to bring about in an absolute sense. Even though parties in the conventional arena usually exchange large amounts of information, it is easier to keep it secure in the offline dispute resolutions, yet, to ensure the workings of ODR, the confidentiality of information is equally of extreme importance.

#### ***i. Issues***

1. Transmission and storage of information
2. Information protection
3. Email issues
4. Hacking
5. Disclosure of identifiers and passwords
6. Digital signature
7. Confidentiality
8. ODR strictures against publication of resolution.



## ii. Recommendations

- 1) Most protocols on the Internet related to the communication have to include the all-important security issues. According to Raghu, ODR security may be achieved by, “providing ODR participants with authentication credentials and encrypting data through the use of public key cryptography. The use of digital signatures by parties to an online dispute can further assist in verifying the integrity of communications. Digital signatures also help each disputant verify the identity of the other party to the dispute, use of ‘split-key’ encryption, in which data exchanged during proceedings is encrypted using a key, with each party to the dispute retaining a portion of the code that comprises the key” (Raghu, 2007).
- 2) An example of ODR provider using technology tools for security is Cyber Settle which is prepared to state that data is continuously backed up and that the site is monitored twenty-four hours a day by a team of security experts, firewalls and other preventive technologies (Cyber Settle, 2017).
- 3) Confidentiality in ODR can be achieved by providing parties with authentication credentials and encrypting data using public key cryptography. The integrity of the transmitted data should be guaranteed, with parties in the online dispute resolution being able to use digital signatures to verify the communication integrity. ODR providers should be conscious of the possibility of one of the disputants attempting to compromise the integrity of the process by distributing confidential information to the third parties. The solution is split-key encryption, in which the data exchanged during proceedings is encrypted using a key, with each party to the dispute retaining a portion of the code that comprises the key, with the consent of all parties required for decryption (Raghu, 2007).
- 4) ODR provider tends to have the confidentiality related policies. In Smart Settle, for instance, the issues and agreement with regard to mediation and facilitation purposes state that all information is confidential, to be disclosed only to a facilitator, unless it is within the public domain. Another example is the World Intellectual Property Organization (WIPO), which adopted a policy for transparency mandating the publication of resolutions on its website, where all the Internet users can gain access to it (Pecnard, 2004).
- 5) One may also create more legal instruments, especially in cyberspace concerning the publication of resolutions, which may lead to more people to be engaged in e-commerce, yet the requirement to publish decisions to establish a semblance of legal certainty must be balanced against the need to develop the Internet users’ confidence in ODR. To put it brief, one may stipulate that the resolutions reached through ODR must be kept confidential, with only overall statistical data to be published.
- 6) ODR providers may alternatively publish the solution details, without giving any personal information of the parties, to prevent any of them from being identified.

For ODR providers to bring about a satisfactory level of trust among consumers, they ought to implement the technological security tools and employ the privacy policies. In order to ensure online confidentiality and data security, the online dispute resolution schemes must be provided and made mandatory under the regional, national, and international law. To increase



the public confidence in ODR, the confidentiality of its processes must be guaranteed, and it can be done by providers taking the initiative to implement the appropriate security measures. ODR security can be ensured using encryption, password protection, closed chat rooms, digital identifiers, and information filters.

### ***Significance of the Trust and Redress Mechanism***

Creating trust in e-commerce is also an important issue, such a trust in e-commerce, by its nature, is 'virtual'. Moreover, fair, effective redress mechanisms and consumer protection laws will lead to increased e-commerce, with consumers enjoying the benefits of online shopping by accessing many products and services of good quality at low prices.

#### **i. Issues**

- 1) One risk yet to be dealt with is the delivery of wrong or defective goods; the underlying concern is that, with online shopping, consumers are not aware of their legal rights.
- 2) Consumer trust becomes a more serious issue when there is a cross-border transaction leading to the question of competent jurisdiction regarding the redress mechanism, whose law was capable of solving the dispute, whether that of the country of origin or of the intended destination, and which authorities may independently be in charge of the dispute.
- 3) The absence of clear jurisdiction has contributed to the growing lack of trust of consumers in the online business.
- 4) In the absence of global collaboration, there tend to be no uniformity of compromise deals and no uniform general solutions.
- 5) Fair and effective cross-border redress systems have yet to be devised.



#### **ii. Recommendations**

- 1) It is almost impossible to comply with every potentially relevant jurisdiction. In the EU, a heated debate has compelled the Union to allow having laws determining the respective competence of the country of destination and that of origin, for cross-border disputes in e-commerce (Ong, 2003). While this does not regulate the issues, it will further restrain the business to consumer e-commerce transactions, merely to avoid the risk of mutually exclusive rules and regulations.
- 2) Governments, business and consumer organizations should work together on the expeditious as well as fair and inexpensive redress mechanisms.

### ***Online Dispute Resolution and Access to Justice***

The main advantage of ODR is access to justice for all disputed values, monetary or otherwise, and all types of disputes, especially those whose parties are remote from each other, such as living in different countries. ODR creates access to all kinds of information and reduce, if not, eliminate costs of information, travel and venue.

#### **i. Issues**

- 1) ODR systems must be found and used by all users easily
- 2) ODR platforms must be simple and easy to read.
- 3) Technology in ODR must increase access to justice.

## ii. Recommendations

ODR systems are to encourage worldwide access by being ‘media- neutral’.

ODR providers need to consider all types of users concerning their needs. Some of the providers may have limited knowledge or no access to electronic technology. Therefore, they should not be compelled to use unfamiliar or unavailable electronic tools.

### *Inequality of Bargaining Power between Business and Consumers*

Bargaining power means the ability of a party to achieve a preferred outcome in an ‘exchange relationship’. Unequal bargaining power means, in this context, that the consumer’s position is weaker, compared to that of the trader. As mentioned before, it is not always easy for consumers from another country, to file complaints concerning cross-border transactions, due to lack of local legal knowledge or language constraints. In e-commerce cross-border transactions, pursuing complaints in another country is even more difficult, because of redress costs, mandatory ODR clauses, and inadequate information about ODR, in addition to the previously mentioned constraints. The level of required legal and practical knowledge to choose a suitable form of ODR and its attending range of expertise may affect the outcome of a dispute in an online environment.

#### i. Issues

- 1) For consumers, a lack of technical and legal knowledge.
- 2) For business, the issues of redress costs, mandatory ODR clauses and insufficient information about ODR.

#### ii. Recommendations

- 1) For the issue not to arise, ODR systems ought to be conceived in a proactive manner; providers should elicit from consumers their levels of competence, and basic abilities, the knowledge that supports those resolving disputes in interactions with a virtual online space.
- 2) ODR providers are to give consumers the opportunity to choose the process that is the most appropriate to enable them to introduce and clearly claim their complaints. Rendering pertinent legal advice to consumers may alleviate some of the disparities in degrees of legal sophistication between consumers and traders but may not affect other areas of unequal bargaining power.

As a rule, it is better to rely on regulatory intervention than on mere technology for it is easier to teach systems designers to focus on principles of law, instead of explaining the notions of computer networks to lawyers.

## CONCLUSION

Consumers buying online should be protected as if they were doing so offline, to ensure their confidence in e-commerce. For the last decade, there has been a felt need for a proper dispute resolution of online activities, including e-commerce. The combination of information technology and Alternative Dispute Resolution, in particular, has turned Online Dispute Resolution, or ODR, into a proper mechanism for resolving consumer cross-border disputes, by



taking advantage of the Internet. ODR is timely, inexpensive, confidential, transparent, accessible and rather more flexible than ADR and traditional court systems.

While there are different categories of ODR, methods may generally range from full control over the process resting with the parties concerned, as in negotiation, to where a neutral third party controls the process and solution, such as in mediation and arbitration. ODR can be done entirely on the Internet using communication methods such as email, video conferencing or a combination, but it may also combine offline and online methods. Moreover, the existence of different national legal frameworks on ODR and the variety of international agreements, rules and standards, along with the uncertainty of the value of the ODR outcomes and the absence of global practice, result in the emergence of an ODR system with a complex and problematic nature.

There is the need for an ODR legal framework at the international level, encompassing standard rules and regulations on enforcement, security, confidentiality and redress mechanism, with the cooperation of e-commerce stakeholders such as governments, the business industry and consumers.

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