

8 ONLINE DISPUTE RESOLUTION FOR CONSUMERS

Online Dispute Resolution Methods for Settling Business to Consumer Conflicts

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1 INTRODUCTION

ODR in the consumer context refers to the use of ICT tools and methods (usually alternative to the court system) employed by businesses and consumers (B2C) to settle conflicts that arise out of economic transactions between the parties, particularly in e-commerce. It is often distinguished from other fields where ODR is used, such as in the commercial field (B2B), in the public sphere to resolve government and citizen (G2C) disputes, and in the resolution of disputes related to intellectual property. A consumer transaction (B2C), akin to a consumer dispute, will be one where an individual, acting on a personal capacity, buys goods or services for his or her personal use. Conversely, a business is an individual or an entity that acts on a professional capacity selling goods or services as part of their profession.

In a B2C dispute, the aggrieved party is frequently the consumer as they normally pay in advance for their purchased goods and services. Consequently, the consumer is the weaker party in a dispute where the business has the payment and the experience of dealing with similar disputes. Consumers will often get more involved in the dispute, taking it more personal, and thus requiring a more transformative solution, while the business is mostly interested in resolving the dispute as fast and inexpensively as possible.

In certain cases, businesses will be keen in resolving the dispute in order to maintain their reputation. This is relevant when, as it happens in eBay, the buyer leaves feedback after a transaction. When ODR is effectively used in this way, it has an added value for the parties; it increases the consumers' trust in those online sellers that provide ODR services. Greater trust means that reliable sellers would boost their trade and consumers will be protected from the potential abuse by the dominant party in the transaction. ODR services may be employed to ensure that consumers' rights are respected by the online vendor, hence enhancing consumers' confidence in the online transaction.¹ As a result, ODR would

¹ This is more needed in cross-border e-commerce. See "EC Staff Working Document Report on Cross-Border E-Commerce", SEC (2009) 283 final.

ultimately enhance the business's ability to sell while at the same time protecting the consumer's ability to participate safely in e-commerce.

E-commerce is thought to be one of the areas where ODR will flourish as it seems logical for parties that enter into disputes online to use the same medium, the Internet, to resolve their disputes. The resolution of small value disputes that inevitably arise out of millions of transactions taking place every day between parties located far from each other require the use of cost-efficient methods of dispute resolution. Examples of ODR providers that resolve high volume of consumer disputes are eBay and PayPal, which act as third neutral parties encouraging first business and consumers to reach amicable agreements through automated negotiation, and when parties cannot reach consensual agreements, they adjudicate the disputes.²

The expansion of ODR in the consumer context is not simply about reducing the cost of resolving disputes that could be settled face to face. It is mostly about finding innovative ways to settle niche disputes which otherwise would remain unresolved due to the high costs of litigation (not to mention cross-border challenges of conflict of laws) and face to face ADR methods. ODR for consumers should be characterised by being of easy access and user-friendly as well as being cost-effective. Yet, this is not an easy task, particularly in cross-border disputes, where new challenges enter into the paradigm of resolving disputes online.

This chapter starts in part 2 arguing that technology assisted dispute resolution methods are essential to increase consumer access to justice. The chapter does not intend to focus on particular jurisdictions, but many references made in this chapter examine the two largest economies with a relatively unified consumer law, *i.e.* the European Union and United States, since these two jurisdictions take different approaches to consumer protection. Part 3 of this chapter briefly argues that ODR methods and techniques should be employed first and foremost to avoid consumer complaints. Part 4 examines some of the challenges that face the growth of ODR, namely, obtaining sustainable funding to resolve small value disputes, ensuring due process guarantees and raising trust and awareness amongst its users. Part 5 analyzes some of the main ODR methods for resolving disputes; this part is divided into consensual and adjudicative methods, and it is followed by a critical analysis on what are the most suitable ODR methods for resolving consumer disputes. Lastly, Part 6 ventures some thoughts on what the future may hold for consumer ODR services.

2 See "Introducing the PayPal Dispute Resolution Process", available at <www.paypal.com>. Hereinafter all websites have been accessed 1 February 2011.

2 TECHNOLOGY AS A VEHICLE TO IMPROVE CONSUMER ACCESS TO JUSTICE

In some jurisdictions, such as in the 27 Member States of the European Union (EU), consumer protection law is very extensive; in fact European consumers have more rights when buying online than when they go to the local shop. Yet, the existing public enforcement mechanisms are not sufficient to guarantee their rights. When consumer protection law is not coupled with appropriate enforcement mechanisms, it does not increase consumer safety in the online market nor enhance consumer trust.

When consumers individually pursue remedies to their disputes, traditionally the most common forum for resolving them is consumer agencies and courts (especially when there is a small claims court available). In recent times, certain industry sectors are relying on ADR methods, which are increasingly being supported by ICT tools. It is believed that the expansion of these methods is necessary to give consumers appropriate access to justice.³

With regards to public enforcement, a number of national agencies assist consumers in resolving their disputes, although the cross-border co-operation between these bodies presently appears to be rather limited.⁴ The strategy, however, has been different across the world. For instance, the United States has facilitated the use of class actions to correct market abuses. Hence class actions appeared in the US in order to compensate for the lack of governmental support in enforcing consumer laws. By contrast, in the EU, only thirteen Member States currently allow class actions with certain restrictions under their domestic laws.⁵

The consumer protection policy in the EU is based on the intervention of the public authorities to stop market abuses, while in the US the public policy encourages attorneys to take more initiative in upholding consumer rights and correcting market abuses. One reason for this is that US attorneys may charge contingent fees, with the approval of the court. Recent legislative changes in some European Member States (*e.g.* the UK) tend to follow the US model permitting the charging of conditional fees which allow lawyers not to charge when they lose a case and to obtain an upscale premium (up to 100% of the

3 See generally SANCO 2009 *infra*.

4 See at global level econsumer.gov and at regional level the ECC. European Consumer Centre Ireland Report "The European Marketplace: Consumer Complaints 2005, A Summary Analysis of Consumer Complaints Reported to the ECC-Net" (June 2006).

5 Civil Consulting and Oxford Economics, European Commission, DG SANCO, "Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union", Final Report (26 August 2008) p. 6. The European Commission has highlighted the need for creating a communitarian instrument to address collective redress mechanisms at EU level with cross-border disputes. Currently, 10% of all collective claims have a cross-border element. See European Commission, "Green Paper on Consumer Collective Redress" (27 November 2008) COM(2008) 794 final.

original legal fee) if the case is won.⁶ Furthermore, the UK is now considering the introduction of contingency fees à la US in order to cut down on legal costs.⁷

A significant difficulty in class action procedures is the resources needed to reach and communicate with all the claimants. These types of disputes are good options to be managed through the use of ICT tools, particularly with the increase of e-commerce, where the number of disputes augments across borders.⁸ The use of technology to negotiate and resolve these disputes may help to overcome difficulties related to the use of litigation in various jurisdictions, and it will ease communications among the many consumer claimants.

The option of commencing legal proceedings for resolving e-commerce disputes of small value is only feasible when there is either the possibility of a collective action, or, if pursued individually, when a small claims procedure is complemented with ICT, e.g. Online Small Claims Court. However, these processes encounter difficulties in resolving cross-border disputes. The European Small Claims Procedure, which has been implemented in all the EU Member States since January 2009, uses online standard forms and encourages the use of ICT.⁹ If EU Member States incorporate effective ICT tools and flexibility in their use, the judicial process has the potential to become a fully-fleshed ODR process, which would make national courts in the EU more accessible and appropriate to deal effectively with cross-border claims, including those arising out of e-commerce.

When cross-border disputes are resolved in courts, there is an additional issue that must be contemplated: conflict of laws. Currently, there are two opposite approaches worldwide. This can be seen with rules employed in the EU and the US. In the EU, conflicts of laws are resolved according to the Brussels and Rome Regulations,¹⁰ which contrast with the position in US.¹¹ Under EU law, the tendency is to recognise consumers' habitual residence as the competent forum and consumers' domestic law as the applicable law (country of destination approach) even when there is a contractual clause stating otherwise.¹² Accordingly, it may be expected that if online businesses were susceptible to be sued at the consumers' forum, (regardless how rare this may be!) one would expect the business

6 W. Emos & N. Garoupa, "US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and Supply of Legal Services", (2006) 27(5) *Managerial and Decision Economics*, p. 379.

7 R. Jackson LJ, *Review of Civil Litigation Costs: Final Report*, 21 December 2009 p. 94.

8 C. Rule, *Online Dispute Resolution for Businesses. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, San Francisco, Jossey-Bass 2002, p. 216.

9 Regulation 861/2007/EC of 11 July 2007 establishing a European Small Claims Procedure OJ L199/1. P. Cortés, "Does the Proposed European Procedure Enhance the Resolution of Small Claims?", (2008) 27(1) *Civil Justice Quarterly*, pp. 83-97.

10 Regulation 593/2008/EC of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) OJ L177/6 of 4 July 2008; Regulation 44/2001/EC of 22 December on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, OJ L12.

11 *Carnival Cruise Lines, Inc. v. Shute*, 499 US 585 (1991).

12 See Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Article 15.1(c); Regulation 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) Article 6.

to prefer the use of ODR. In the US, however, the approach is the opposite, where there is a preference to favour the country of origin approach and to uphold pre-dispute contractual clauses.¹³ Consequently, US businesses may be less incentivised in incorporating accessible ODR. In any event, none of the above approaches seem to strike the right balance between the parties. Furthermore, in most cases recourse to the courts may neither be feasible nor desirable for one or both parties; thus, public and private ODR initiatives may be a solution for many B2C e-commerce disputes.

Although it is often assumed that one of the major advantages of ODR is that it avoids jurisdictional issues,¹⁴ it should be noted that ODR services cannot always rely on disputants to co-operate and to always have self-enforcement mechanisms. For this reason, there is a pending need to harmonise conflict of laws through an international convention achieving the necessary compromise to ascertain the jurisdiction for the resolution of consumer disputes.¹⁵

3 DISPUTE AVOIDANCE BEFORE DISPUTE RESOLUTION

As previously mentioned, this chapter focuses on dispute resolution methods used to deal with B2C disputes. ODR is generally understood as a number of more or less informal dispute resolution processes that take place mainly online and that are provided by independent entities rather than by one of the disputants, *i.e.* automated negotiation, assisted negotiation, mediation, arbitration and small claims court procedures. Moreover, ODR may be split into dispute avoidance and dispute resolution. Dispute avoidance mechanisms include internal complaint procedures, escrows, online payment services, reputation systems and trustmarks. Conflict prevention is of paramount importance and businesses should focus on how to improve it before investing on dispute resolution.¹⁶ ODR can offer added value to businesses that are interested in avoiding complaints from escalating to disputes. With these objectives in mind a number of public initiatives have been developed, such as the *econsumer.gov* and consumer complaint form, which were designed to standardise

13 J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge, Cambridge University Press 2009, pp. 180-182.

14 M. Philippe, "Now Where do We Stand with Online Dispute Resolution (ODR)?", (2010) 6 *International Business Law Journal*, p. 575.

15 See the failed attempts to achieve this in the Hague Convention. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention) October 1999 and its revision June 2001. T.P. Lester, "Globalize Automatic Choice of Forum: Where Do Internet Consumers Sue?: Proposed Article 7 of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters and Its Possible Effects on e-Commerce", (2003) 9 *New England Journal of International and Comparative Law*, p. 469.

16 See Consumer Focus, "Consumer Focus Response to the OFT Consultation on E-Consumer Protection Strategy" (October 2010), p. 8.

claims and clarify complaints, including those that are originated out of cross-border transactions.¹⁷

An efficient dispute resolution system needs to be built on solid dispute avoidance mechanisms, which in itself requires consumer empowerment. The latter is achieved by ensuring that businesses provide the necessary information, educating consumers about their rights and obligations, and how to engage in sensible shopping while avoiding transactions with unreliable online businesses.¹⁸ It is also necessary to provide mechanisms to ensure that online businesses recognise and comply with their obligations.¹⁹ Even when disputes arise, ODR providers ought to be used as the last resort to resolve those disputes which cannot be resolved at an early stage between the business and the consumer. This is well illustrated by eBay whose in-house ODR process has resolved hundreds of millions disputes, while its previous preferred ODR provider, SquareTrade (and now PayPal amongst other ODR service providers), resolved just over two million in its life time.²⁰ ODR providers should assist online businesses in building effective internal complainant procedures, and their disputes should therefore only be outsourced to external ODR providers in the most difficult cases to ensure impartiality and create trust amongst consumers.

4 CONSTRAINTS IN THE EXPANSION OF ODR

There have been many ODR initiatives that have not achieved market implementation. Studies have shown that many ODR providers have ceased operating, and many others have stopped updating their websites.²¹ This evidences the number of challenges that hinder the growth of ODR. This section focuses on four aspects that are believed to constrain the expansion of consumer ODR: financing ODR, lack of uniform procedural standards, reluctance to participate in ODR processes, and awareness.

17 See <<http://econsumer.gov>> <http://ec.europa.eu/consumers/redress/compl/cons_compl/acce_just03_en.pdf>.

18 See for example Howard, the ECC-Net's online shopping assistant. Available at <www.ukecc.net/sub.asp?id=209>, EC Communication COM(2007) 99 Final. p. 5.

19 M. Donnelly and F. White "The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market", in Twigg Flesner *et al.* (eds.), *Yearbook of Consumer Law 2008*, Ashgate, Surrey 2007, pp. 271-296.

20 Author's phone interview with Colin Rule, ODR Director of eBay and PayPal, 23 July 2008.

21 Consumers International "Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-Border Disputes", (2001) <www.consumersinternational.org>; M. Conley Tyler and Di Bretherton, "Seventy-six and Counting: An Analysis of ODR Sites", (2003) Report of Research Conducted for the Department of Justice, Victoria, Australia.

4.1 *Financing ODR Services*

Private funding may secure sufficient income, but it may also jeopardise the independence of an ODR service provider, especially in B2C transactions where a unilateral fees model from the business seems to be the most common way to encourage consumer's participation.²² In order to avoid a perception of bias, Katsh and Rifkin suggest that the ODR provider should clearly admit if there is any funding given by the business.²³ Transparency should be complemented with additional mechanisms to ensure impartiality, such as systems to handle complaints when procedures were not followed.²⁴

Consumers International argues that ODR services should be provided for free or for a moderate cost. Rule suggests the charge of a low fee to discourage frivolous claims, but he warns that if fees are too high, parties may not use ODR.²⁵ Frivolous claims can also be avoided by charging an administration fee that could be returnable if the consumer succeeds wholly or partly in the claim.

Some successful ODR providers, such as the Austrian Internet Ombudsman, benefit from public funding.²⁶ This removes bias concerns of private financial support,²⁷ yet this may result in a heavy burden for taxpayers.²⁸ In some jurisdictions, dispute resolution is seen as a necessary public service. An example of this would be Spain, where legislation does not allow the operation of dispute resolution services for-profit.²⁹ This approach, however, discourages the development of the private and competitive ODR industry.³⁰ It can be argued that for-profit ODR services, as a form of e-commerce, could be allowed as long as they provide transparent services that are monitored by public authorities. This is particularly necessary when ODR services are used for resolving disputes between parties with unequal bargaining power (B2C disputes) and when the costs of dispute resolution (and due process) are reduced in order to deliver a cost-effective ODR process.

22 Consumers International 2001.

23 E. Katsh and J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001, p. 41.

24 Consumers International 2001.

25 Rule (2002), pp. 119 and 294. United Nations Conference on Trade and Development, "Online Dispute Resolution: E-Commerce and Beyond" in *E-Commerce and Development Report*, (2003) p. 190.

26 For more information see Hörnle (2009), p. 76.

27 CEN/ISS Workshop Agreement on Standardization of Online Dispute Resolution Tools prCWA XXX, 2009 p. 68 at 9.1.

28 J. Hill, *Cross-Border Consumer Contracts*, Oxford University Press, Oxford 2008, pp. 318, 391.

29 See Article 4 of Ley 44/2006 of 29 December of Consumer Protection; Ley 7/1998 of 13 April of General Conditions and Clauses for Consumer Contracts, Ley 60/2003 of 23 December of Arbitration, Real Decreto (Royal Decree, RD) 636/1993 of 3 May 1993 of the Consumer Arbitration System, RD 231/2008 of 15 February of the Consumer Arbitration System.

30 F. Esteban de la Rosa, "Régimen Europeo de la Resolución Electrónica de Litigios (ODR) en la Contratación Internacional de Consumo", in F. Esteban de la Rosa y G. Orozco Pardo, *Mediación y Arbitraje de Consumo. Una Perspectiva Española, Europea y Comparada*, Valencia, Tirant Monografías 713, 2010, p. 204.

Public institutions as well as ODR initiatives seek the creation of a self-financing ODR scheme which does not depend on public funding. It is not clear whether this can always be a workable option, particularly at the beginning when consumers and businesses may not value sufficiently the cost of ODR services. For this reason it has often been proposed public financing to build an ODR network, but expecting to be self-financed once it starts operating.³¹ This is not an easy task. In fact there have already been a number of failed attempts. For instance, Electronic Consumer Dispute Resolution (ECODIR) was initially funded by the European Commission, but it did not succeed in becoming a self-financed ODR provider. This may be due to a number of reasons, the major of which was that it failed to get the co-operation of large ecommerce vendors. This was indeed the key strategy of successful ODR providers, such as CyberSettle partnerships with public and private institutions or the Internet Corporation for Assigned Names and Numbers (ICANN) approved Uniform Domain Names Dispute Resolution Policy (UDRP) providers.

Self-financed schemes are more likely to appear when a particular market is highly regulated, for example financial services, travel industry and telecommunications. In many jurisdictions, there are industry ombudsmen or other ADR/ODR services attached to these economic sectors.³² Consumer law is also increasing in many countries with the growth of the welfare state. It is a question of time before these jurisdictions will be more willing to develop ODR services to ensure the enforcement of the substantive consumer law.

4.2 *Uniform Procedural Standards*

In ODR, consumers are one-shooters while businesses are repeat players, dealing with dozens of cases at any given time. This increases the imbalance where businesses are likely to make more informed choices than consumers. For this reason it may be preferable if outside bodies set standards ensuring procedural fairness in B2C processes.³³ Due process rights need to be respected, but that is not sufficient, consumers need to perceive that their rights are being respected too.³⁴ Hence, due process requirements and counterpoise are paramount when there is power imbalance between the disputants. In this regard, key

31 This is the funding scheme employed by major trust marks and current ODR initiatives. See C. Rule, V. Rogers & L. Del Duca, "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims, OAS Developments", A Fresh Look at ODR & Global E-Commerce 29-30 March 2010, United Nations Office, Vienna. See also European Commission Digital Agenda for Europe COM(2010), 245 p. 14.

32 E.g. the UK has the Financial Ombudsman, the Office of the Telecommunication Ombudsman and the Energy Ombudsman.

33 Rule (2002), p. 111.

34 *Ibid.*, p. 237. Regarding the importance of perception in the resolution of a dispute see R. Fisher, W. Ury, and B. Patton, *Getting to YES: Negotiating Agreement Without Giving In.*, (2nd ed.) London, Random House Business Books, 1999, pp. 22-30.

procedural issues should be taken into account, such as the need for impartiality, the selection of third neutral parties, legality, fair procedures and the supervision of ODR providers. Fast and inexpensive judicial enforcement when available or self-enforcement mechanisms are also required for the success of ODR services.

During the past decade, a number of recommendations and guidelines were issued with the objective of promoting fair and efficient ADR and ODR participation. Among the existing initiatives from international governmental bodies the most influential is the OECD's Guidelines for Consumer Protection in the Context of Electronic Commerce and the subsequent report on Consumer Dispute Resolution in the Global Market Place.³⁵ These guidelines were complemented in 2007 by a recommendation on B2C dispute resolution.³⁶ The OECD has consistently encouraged the promotion of ODR, and it has suggested that the main obstacle for the development of ODR is national differences in existing legal frameworks on ADR, such as differences as to the validity of ADR clauses, enforceability of settlements, procedural principles and so on.³⁷ The National Center for Technology and Dispute Resolution has issued standards of practice for ODR providers.³⁸ The United Nations Commission on International Trade Law (UNCITRAL) is now working on uniform legal provisions for consumer ODR.³⁹

In addition, business organisations have taken initiatives in this area with the aim of promoting e-commerce and shielding themselves from liability and court procedures.⁴⁰ The most relevant initiatives were issued by the Alliance for Global Business,⁴¹ the Global Business Dialogue on Electronic Commerce⁴² and the International Chamber of Commerce.⁴³ Consumer organisations have also contributed to the development of ODR policies, notably the Trans-Atlantic Consumer Dialogue,⁴⁴ Consumers International⁴⁵ and the

35 9 December 1999, 4 July 2002 and 11 April 2006. Committee on Consumer Policy, "Consumers in the Online Marketplace: The OECD Guidelines Three Years Later", OECD Publications (3 February 2003) DSTI/CP/(2002) 4/Final available at <www.oecd.org>.

36 OECD Recommendation on Consumer Dispute Resolution and Redress (12 July 2007).

37 G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, The Hague, Kluwer Law International 2004, pp. 92-93.

38 Recommended by Advisory Committee of the National Centre for Technology and Dispute, "Standard of Practice", July 2009. Available at <www.icann.org/ombudsman/odr-standards-of-practice-en.pdf>.

39 UNCITRAL, Note by the Secretariat: "Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Transactions" (July 2010).

40 Kaufmann-Kohler & Schultz (2004), p. 104.

41 Alliance for Global Business, "A Global Action Plan for Electronic Business" (July 2002).

42 E.g. the Global Business Dialogue on Electronic Commerce, Consumer Confidence Working Group "Alternative Dispute Resolution – The Miami 2000 Recommendations and the Tokyo 2001 Recommendations".

43 The International Chamber of Commerce Best Practices for ODR in B2C Disputes.

44 Global Business Dialogue on Electronic Commerce (GBDe) Recommendations on Alternative Dispute Resolution (September 2000).

45 Consumers International 2001.

International Consumer Protection and Enforcement Network.⁴⁶ Also, dispute resolution providers have contributed to the development of ODR standards, e.g. the American Bar Association Taskforce on E-Commerce and ADR Recommended Best Practices for ODR Providers.⁴⁷ This chapter does not intend to discuss these initiatives in detailed since they have already been discussed elsewhere.⁴⁸

With regards to future normative changes, it seems that the regulation of ODR is going to be slow, particularly at regional and global level. However, there are currently a number of initiatives that examine the possibility of regulating ODR in order to ensure and guarantee that (at least some) ODR service providers comply with minimum due process requirements. With regards to forthcoming initiatives it is important to highlight in the EU the Digital Agenda 2010 which proposes the creation of a pan-European Trustmark.⁴⁹ The new aspect of this proposal is that it may consider the possibility of designing a public trustmark that may cohabit with private ones. In November 2011, the European Commission is due to issue to important legislative instruments in the field of consumer ODR. The first one is a directive requiring the provision of ADR services for cross-border B2C disputes and setting minimum standards for ADR methods. The second initiative is a Regulation on consumer ODR setting coordinating.

In this regard, the European Commission is closely following the international developments in the field of ODR, especially the outcome of UNCITRAL working group on ODR. UNCITRAL has the role of harmonising commercial and trade law at international level.⁵⁰ Currently, UNCITRAL is examining a set of recommendations, which may include the possibility of creating a model law. The model law would then be employed to indicate the regulation of national laws. Another proposal that is being considered by UNCITRAL is that which has been presented by Organisation of American States (OAS) for the design of a global network of ODR providers.⁵¹ In addition, UNCITRAL is expected to issue a number of recommendations on the contractual use of ODR and the online enforcement of settlements reached through an ODR process.

46 <www.econsumer.gov>.

47 American Bar Association (ABA) Task Force on E-Commerce and ADR, "Addressing Disputes in Electronic Commerce: Final Report and Recommendations" (2002).

48 B.G. Davis, "Building the Seamless Dispute Resolution Web: A Status Report on the American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution", (2002) 8 *Texas Wesleyan Law Review*, p. 529; L.M. Ponte and T.D. Cavenagh, *Cyberjustice, Online Dispute Resolution for E-Commerce*, New Jersey, Parson Prentice Hall 2005, Appendix A examining the ABA Task Force initiative.

49 Digital Agenda (2010) *supra*.

50 UNCITRAL (2010) *supra*.

51 Rule *et al.* (2010).

4.3 *Reluctance to Participate in ODR Processes*

Another major identifiable challenge faced by ODR is convincing parties to trust and use an ODR service. When an individual has submitted a complaint to an ODR service that is not linked to the other party, the real challenge is to convince the party to participate. This is particularly difficult when there is an imbalance of power between the parties. Participation may also vary depending on the chosen ODR procedure. In case of arbitration, it would be easier to use it when parties have agreed before the dispute arises. This, however, may present legal problems in certain jurisdictions, such as in the EU, where pre-dispute B2C arbitration is only permissible if it is non-binding arbitration, or binding only for the business and not for consumers.⁵²

By contrast, other countries, such as the US, allow the use of pre-dispute mandatory arbitration under the national law for the resolution of consumer disputes. Conversely, policy makers in the EU believe that allowing private dispute resolution systems might be introduced at the cost of decreasing the level of consumer protection within the EU.⁵³ However, this policy could change in the EU if a co-ordinated legal initiative ensures that private ODR services meet sufficient procedural standards and grant the enforcement of consumer rights.⁵⁴

In the case of mediation, it would be less problematic to obtain parties' participation, especially when there is no significant imbalance of power between the parties, where there is an interest in maintaining the relationship and when the dispute is not highly confrontational. Additional incentives can be created in order to encourage parties' participation. In eBay for example, buyers' feedback encourages a seller's participation since the seller wants to avoid negative reviews. Also intermediaries, such as lawyers, consumer organisations and chambers of commerce, may influence the type of dispute resolution mechanisms sought by the parties.⁵⁵

Katsh and Rifkin observe that businesses may be reluctant to offer ODR in case their customers would interpret that disputes arise often.⁵⁶ They suggest that ODR may enhance trust in a transaction if consumers are well informed, not just about their rights, but assuring them that they have also the tools to enforce them.⁵⁷ For ODR to be trust building, it needs to be advertised appropriately. ODR is frequently offered in the context of affiliation

52 See Recommendation 98/257/CE of the Commission on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes 1998 O.J. (L. 115) VI principle of liberty. See also Annex [q] Directive 1993/13/EC.

53 Hörnle (2009) pp. 174-9.

54 Hill (2008), pp. 318-319 and Cortés (2010), pp. 1-28.

55 I. Ramsay, "Consumer Redress and Access to Justice", in *International Perspectives on Consumers' Access to Justice*, New York, Cambridge University Press 2006, p. 34.

56 Katsh and Rifkin (2001), p. 87.

57 *Ibid.*

programs *i.e.* trustmarks. Traders generally affiliate to these schemes on a voluntary basis to enhance consumer confidence. In this context, the goal of ODR is not just to settle disputes but also to increase consumer confidence in e-commerce.⁵⁸

4.4 Awareness

An additional barrier in the growth of ODR is the lack of awareness. A way of increasing trust and awareness of ODR providers is by an accreditation system.⁵⁹ Accredited ODR providers (presumably of those providers that offer the most fair and cost-efficient ODR processes) could obtain certain privileges: they could be publicly endorsed with a trustmark; and as they would be monitored, thus ensuring fair and efficient services.

When ODR is proposed by the consumer, it often happens that the business will refuse its participation.⁶⁰ Hence, to ensure the use of ODR businesses must agree in advance to use it and offer it to the consumer when disputes arise.

There is a need to clarify the legal status of ODR decisions and contractual clauses. Thus far ODR has relied on self-regulation leaving many legal questions unanswered, such as the enforceability of decisions and clauses referring parties to an ODR process. This is why, unsurprisingly, enforceability and a mandatory nature are key factors for the success of ODR providers, (*e.g.* the UDRP). How many domain name disputants would otherwise voluntarily agree to use the UDRP if they were not compelled to do so? How many disputants would voluntarily comply with a decision from an adversarial ODR process? Even consensual ODR providers, such as eBay and PayPal, relied on the provision of strong incentives for parties to use ODR: buyers want to obtain economic compensation and sellers want to receive positive feedback from buyers. It must be noted that two of the most successful ODR processes to date (UDRP providers and eBay/PayPal) appeared in a market where disputes were referred to them, and where the market administrator (ICANN and eBay) wanted to avoid being sued by disputants. In addition, in most of these cases parties could not access an offline dispute resolution mechanism for a reasonable cost.

58 J. Nadler, "Electronic Mediated Dispute Resolution and E-Commerce", (2001) 17 *Negotiation Journal*, p. 333.

59 See P. Cortés, "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers", (2011) 19(1) *International Journal of Law and Information Technology*, pp. 1-28.

60 DG SANCO, Study on the Use of Alternative Dispute Resolution in the European Union, Final Report submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC) Framework Contract Lot 2, 16 October 2009.

5 ODR METHODS EMPLOYED IN THE SETTLEMENT OF CONSUMER CLAIMS

5.1 Consensual ODR Methods

Consensual ODR includes mainly negotiation, mediation, and conciliation when taking place with bespoke software whereby parties communicate through the Internet. This section focuses on online mediation because it comprises the majority of the features of the above methods. The goal of mediator is to shift parties focus on legal entitlements towards problem-solving stance in order to maximize the interests of both parties when reaching an agreement.

According to Wissler, there are three types of disputes that are more likely to settle in mediation: disputes where the defendant admits partial or total liability; disputes where parties seek resolution rather than self-recognition; certain categories of disputes are more likely to be settled in mediation, *e.g.* disputes related to the payment of goods or services.⁶¹

In order to assess the type of cases that would be suitable for online mediation, it is clear to start by referring to those which are unsuitable for online mediation. These are cases involving criminal matters (at least when the victim so decides), disputes where an important legal precedent is sought, or where there is a matter of policy which needs to be addressed. In addition, a major difficulty is to mediate with someone who does not want to be in the mediation process.⁶² Online mediation is more appropriate when the disparity of power between the parties is not great, *i.e.* B2B, C2C, B2C (with Small and Medium Enterprises – *i.e.* SMEs). Also, when parties ‘want’ to resolve the dispute though they are unable or reluctant to physically meet, such as e-commerce disputes.

The use of online mediation for resolving consumer disputes is challenging the traditional notions of litigation and ADR. The potential for online mediation lies in the fact that it reduces barriers in accessing justice by avoiding conflicts of laws and a lengthy adversarial process, thus reducing costs and time. In mediation, both parties are often more satisfied with the outcome and consider the process fairer than adjudicative processes.

It has been suggested elsewhere that under certain circumstances mandatory online mediation has the potential to increase consumer access to justice.⁶³ Mandatory mediation could request parties to attend in good faith an online meeting with a mediator. This could only be achieved with greater public awareness, removing legal restrictions,⁶⁴ increasing

61 R.L. Wissler, “Mediation and Adjudication in the Small Claims Court: The Effects of Processes and Case Characteristics”, (1995) 29(2) *Law and Society Review*, pp. 332-334.

62 S. Prince, “Mandatory Mediation: The Ontario Experience”, (2007) 26(1) *Civil Justice Quarterly*, p. 84.

63 P. Cortés, “Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues”, (2008) 35(1) *Rutgers Computer & Technology Law Journal*, pp. 1-41.

64 In *Rosalba Alassini (C-317/08)* para. 67 the European Court of Justice held that mandatory mediation may only take place if electronic means are not the only means to carry out the mediation. The Court in this case

public funds, facilities and trained mediators,⁶⁵ and greater incentives on disputants to participate in online mediation. Mandatory online mediation should have clear limits if used to resolve B2C disputes. For instance, it should be free for the consumer or provided at a low cost; where a mediation settlement is not achieved and the dispute escalates to an online adjudicative process (a judicial process or arbitration), the costs, if any, could be considered as part of the legal costs.

When participants have unequal powers, it should be mandatory to the stronger party to attend an online session, but the option should be given to the consumer to opt out, particularly when a small claims process is available. Conversely, if clear limits are not well defined, mandatory mediation could create new barriers for consumer redress by encouraging them to settle for less than their legal rights. In order to avoid this, consumers should be empowered by being unequivocally informed that they cannot be pressured to settle and being reminded of their right to refuse any offer.

5.1.1 Norm-Educating Model

A number of models can be adopted by the mediator. These models determine how interventionist would be role of the mediator in informing parties about the norms that apply to their dispute. When there is an imbalance of power, it may be desirable to have a mediator who employs a norm-educating model and thus informs the parties, particularly the consumer, about their legal rights. The norm-educating model seems appropriate for consumer mediation as it enhances the autonomy and power of the consumer and ensures a greater level of fairness in the final result.⁶⁶ When the mediation is conducted online, this could be carried out in a more impartial manner, by for instance including links to websites that contain information on consumer rights.

5.2 *Adjudicative ODR Methods*

This section briefly examines some issues regarding the inquisitorial nature of consumer adjudicative methods and two online extra-judicial procedures: the institutionalised Spanish consumer arbitration system, which is currently moving towards the online sphere;⁶⁷ and the dispute resolution system for domain names, which is a bespoke administrative process similar to arbitration that might be used as a model for B2C ODR.

was empathetic with the digitally excluded – *i.e.* consumers who may have limited or no access to the Internet, as they may find their rights difficult to exercise if they could only access to them by electronic means.

65 CEN [Draft] Workshop (2009), pp. 68-69.

66 C. Irvine, “Mediation and Social Norms: A Response to Dame Hazel Genn” (June 2009). Available at <www.mediate.com/articles/irvineC1.cfm>.

67 See Royal Decree 231/2008 of 15 February 2008 of the Consumer Arbitration System.

5.2.2 Inquisitorial Processes

The resolution of consumer disputes through ODR would often require the use of an adjudicative method – *i.e.* a process where the settlement is imposed by the third neutral party. In adjudication, each party has to present his case; but when parties do not have legal representation, it is often preferred the use of an inquisitorial process where the third neutral party carries out a more interventionist role. The inquisitorial role of the third party is generally described as opposed to the adversarial role. A brief explanation of these two roles is considered here pertinent.

Traditionally, in common law systems litigation, as the prime type of adjudication, has been informed by the adversarial principle where parties research the law, present the case, find the evidence and challenge the views of the other party. Parties do all this without the assistance of the judge, who acts as a mere umpire. This feature of common law systems has changed throughout the time in all jurisdictions. In jurisdictions such as the US and those influenced by the American court system, judges have a more interventionist function. However, it must be noted that the role of the judge in the English civil procedure has changed significantly during the last decade with the new managerial powers given to the judiciary after the Woolf Reforms.⁶⁸ Despite that some of the differences in approaches have been diluted in England and in other common law jurisdictions with an increasingly interventionist judge,⁶⁹ there are still some features inherent in the adversarial nature of the common law tradition that increase costs. One of these typical features is the use of disclosure (or discovery in the US) which, unlike in civil law jurisdictions, is a key feature that may drive up the cost of the proceedings.

On the contrary, in civil law jurisdictions courts (as well as more informal forms of adjudication elsewhere, such as tribunals) employ an inquisitorial approach, thus assisting the parties in presenting their case. Inquisitorial judges have greater discretion in assisting disputants during the civil process, particularly helping with the procedural niceties to those parties without legal representation. This enabling role of judges⁷⁰ allows them to investigate on their own volition in order to facilitate the reaching of a more cost-efficient way of resolving disputes. The inquisitorial approach does not place as much stress as the adversarial approach on oral presentations. Furthermore, in the adversarial system the parties have greater control over the process, accordingly, parties, and not the court, call witnesses.⁷¹ This is because the emphasis on the inquisitorial process is on access to justice, while in adversarial process is on the justice on the merits.

68 Lord Woolf, *Access to Justice*, Final Report (1996) chapter 1.

69 O. Chase *et al.*, *Civil Litigation in Comparative Context*, Thomson West 2007, p. 592.

70 The “enabling role” is a hallmark of judges of modern tribunals. This role is most evidence in disputes between citizen and the State.

71 A. Gillespie, *The English Legal System*, Oxford, OUP 2009, p. 13

Online adjudication for consumers, (e.g. online arbitration) should make an emphasis on access to justice. The third neutral party, be the technology alone (as the fourth party) or the third neutral party assisted with ICT tools, must carry out when necessary an inquisitorial role, ensuring that the power imbalance between the consumer and the business will not allow an unfair result. The inquisitorial role of the neutral party may affect its impartiality, thus it is important for these processes to be monitored by public or accreditation entities. It must be highlighted that the power imbalance between the parties will not only be related to the resources of consumers, but it is also related to the fact that the business is more likely to be a repeat player, dealing with a number of disputes on any given time.

5.2.3 The Spanish Consumer Arbitration Boards

The Spanish Act on the Services of the Information Society opens the possibility of using consumer arbitration and other ADR methods, either offline or online.⁷² Spanish law, however, only allows the use of online consumer arbitration when it is provided by the public authorities under the national law.⁷³ The online procedure is promoted by the government and may take place online, from start to end. The law states all the necessary aspects for the functioning of the online service, such as the determination of the competent arbitration board, the place of arbitration, and the use of electronic signatures and notifications.⁷⁴

The Spanish Consumer Arbitration Boards provide with a voluntary procedure that is characterised for being quick (maximum of four months),⁷⁵ confidential, binding, free and flexible – there is no economic limit and parties choose if they want the arbitration to be based on law or equity.⁷⁶ Consumer arbitration cannot be used in those cases where there is intoxication, injury, death or reasons to believe that there is a crime involved in the dispute. The Spanish Consumer Protection Act considers a clause that refers consumers to arbitration different to the Public Consumer Arbitration illegal, unless the arbitration institution has been created by statute for a specific sector.⁷⁷ This excludes not only private arbitration but any international arbitration.⁷⁸

72 Ley de Servicios de la Sociedad de la Información 34/2002, Article 32 and para. 2 of *disp. adic.* 3.

73 See Articles 51-55 and fourth final disposition RD 231/2008. See also RD 863/2009.

74 *Ibid.* Currently the videoconference has been implemented in a number of places, including Madrid, Valencia and Murcia.

75 Article 14.1 RDAC. See Spanish Clearing House *Instituto Nacional de Consumo* Memoria del Sistema Arbitral de Consumo (8 April 2005) 109. Available at <www.consumo-inc.es>.

76 Article 1 RD 231/2008.

77 Ley 7/1998, LGDCU disp. adic. 1.26. J. M. Busto Lago, N. Álvarez Lata, F. Peña López, *Reclamaciones De Consumo. Derecho Del Consumidor Desde La Perspectiva Del Consumidor*, Navarra, Aranzadi 2005, p. 125.

78 M. Gonzalo Quiroga, *La Protección Jurídica de los Consumidores*, Madrid, Dykinson S.L. 2003, p. 120.

Only consumers can initiate the procedure by submitting a claim at the closest Arbitration Board to the consumer's domicile. In order to use consumer arbitration, both parties must agree to the use of arbitration after the dispute arises. However, Spanish businesses may be incorporated in the Consumer Arbitration Scheme before the dispute arises. Adhered businesses are registered in a public list and display the official trustmark. In those cases it will only be required that the consumer accepts arbitration after the dispute arises. In other words, there is a pre-dispute arbitration clause which is binding on the business, but not on the consumer.⁷⁹ Yet, some businesses adhere only partially to the Consumer Arbitration Scheme, leaving some restrictions regarding economic threshold or the type of disputes that consumers may take to the arbitration board. When the use of arbitration is restricted, businesses will have to include the expression of "Limited Offer" together with the trustmark logo.

Under the new law, mediation is introduced as a prior step before arbitration. Parties automatically participate in mediation unless one of them expressly opposes to it.⁸⁰ If the mediation fails, the arbitrators meet the parties at the hearing to evaluate their evidence. The arbitral process may be carried out with an oral hearing (which now can be online) or by submitting documents. There is a preference for meeting the parties rather than conducting an only written procedure because the meeting often facilitates settlements.⁸¹ In the event that an agreement cannot be obtained during the hearing, arbitrators will resolve the dispute based on equity, except the parties expressly agree to request the arbitral award to be based on law. In both cases, the arbitral award is required to be reasoned. A written opinion helps to demonstrate that the procedure is fair and rational, and it can also help to guide the future conduct of the parties. Decisions are binding and enforceable but may be appealed in the higher court on a number of grounds, such as violation of due process rules.

5.2.4 The Uniform Domain Name Dispute Resolution Policy

The UDRP, unlike traditional arbitration, is not intended to supplant court proceedings, but merely to afford an additional forum for dispute resolution, allowing parties to commence legal actions at any stage. Some of the features of the UDRP may be a good model for ODR providers that target B2C disputes.⁸² There are nonetheless significant differences between the domain name disputes and e-commerce disputes. Edwards and Williams observe that consumer disputes in the context of e-commerce are often about the expecta-

⁷⁹ Article 31.4 of Ley 44/2006 of 29 December 2006 on Consumer Protection.

⁸⁰ Article 38 RD 231/2008.

⁸¹ A. Hernández Fernández, "Una Experiencia Paradigmática: El Arbitraje de Consumo On Line en el Marco del Sistema Español de Protección de los Consumidores", Universidad de Valencia (2003) 2 *Revista de Derecho*, p. 13.

⁸² S. Donahey, "The UDRP Model Applied to Online Consumer Transactions", (2003) 20 *Journal of International Arbitration*, p. 475.

tions of the parties; it is harder, they argue, to assess evidence in e-commerce disputes than in domain name disputes.⁸³ According to Hörnle, the UDRP model would need to increase due process standards in order to be used for cross-border disputes where parties have unequal bargaining power.⁸⁴

The success of the UDRP as an ODR model for domain names rests on getting disputants to use the UDRP and its efficient self-enforcement mechanism. This self-enforcement mechanism may not be available for some types of disputes, such as mainstream disputes arising out of a transaction between an online vendor and a buyer; except if there is the collaboration of entities that could enforce the outcome, for instance, the payment service (e.g. VISA or PayPal) or if a dispute arises on a third party platform or other intermediary, such as disputes arising out of market places (e.g. eBay) or disputes originated from information posted on mass collaboration sites (e.g. Facebook and Wikipedia).

Under the UDRP, parties do not sign an arbitration agreement; they submit to the procedure separately: the complainant by filing his complaint, the respondent by registering his domain name. However the UDRP is far from perfect. It has been suggested that the time is right to make a number of amendments to the UDRP policy and rules in order to attain, not only an efficient, but a fairer ODR process.⁸⁵ Despite its imperfections, the UDRP illustrates that the success of adjudicative ODR processes depends upon their self-enforcement mechanisms and mandatory participation. When deciding which adjudicative ODR process, judicial or arbitral, is more suitable for B2C disputes, it is necessary to take into account which procedure ensures greater accessibility and fairness, as power imbalance between the parties is likely to be considerable.

6 APPROPRIATE ODR METHODS

It is not possible to single out an ODR method that could be suitable for all type of consumer disputes. It is possible, nevertheless, to extract certain parameters from successful ODR providers that could assist in informing how ODR methods need to be tailored in order to be effective.

Assisted negotiation and online mediation (e.g. SquareTrade, eBay and PayPal) have been successful in niche markets by targeting large numbers of similar disputes with highly

83 L. Edwards and C. Wilson, "Redress and Alternative Dispute Resolution in Cross-Border E-Commerce Transactions", DG Internal Policies of the Union, Policy Department Economic and Scientific Policy, Briefing Note (IP/A/IMCO/IC/2006-206), p. 15.

84 Hörnle (2009), pp. 186-219.

85 Cf. S. Donahey, "Divergence in the UDRP and the Need for Appellate Review", (2002) 5 *Journal of Internet Law*, p. 1. P. Cortés, "The UDRP Reviewed: The Need for a 'Uniform' Policy", (2008) 14(6) *Computer and Telecommunications Law Review*, pp. 133-139 and "An Analysis of the UDRP Experience: Is It Time for Reform?", (2008) 24 *Computers Law and Security Report*, pp. 349-359. Hörnle (2009), pp. 186-219.

automated ODR models that recognise patterns from comparable disputes matching them with proposed resolutions.⁸⁶ These processes have great advantages because they are fast and involve relatively little cost. The limit of these platforms is that they deal only with repetitive and simple disputes. The success of automated processes for consumer disputes depends on the nature of the dispute, the accuracy of the information provided, and the capability of the software or the fourth party in assessing the dispute.

Consensual processes avoid conflicts of laws, hence allowing parties to focus on their respective interests, rather than on what rights they have under the law. The main constraint of these consensual processes is that require all parties to be motivated in resolving their disputes. This begs the question of which situations are the most appropriate for parties to seek compromise? Consensual processes seem appropriate for resolving disputes in high context cultures, where people have close connections over a long period of time, (e.g. family disputes). Furthermore, online mediation may be suitable in low context cultures, such as in e-commerce⁸⁷ when the mediator adopts a more interventionist role (the norm educating model), if parties are motivated and when the imbalance of power between the parties is not too great – *i.e.* when consumers are dealing with SMEs that encounter seldom disputes.

When the power imbalance is significant, when the consumer is not aware of his legal entitlements and when there is a “genuine social need for an authoritative interpretation of the law”, adjudicative public processes may be more adequate for correcting possible abuses of power.⁸⁸ Notwithstanding, this is not just a question of power imbalance, but it is also a question of the nature of the rights. Accordingly, in some disputes parties may find a solution without compromising their interests, while in other cases a settlement would only be possible if both parties compromise. Therefore, it would be necessary to identify under which circumstances one party may renounce a right for the sake of compromise. In the consumer context, it would be necessary to distinguish between the rights that should not be waived by the parties (e.g. human rights) while other rights could be considered dispositive rights (e.g. right to return the goods).⁸⁹ In order to uphold these rights it is necessary not only the use of an adjudicative process, but also the provision of a public appeal system that ensures the application of public mandatory laws, including consumer protection laws.⁹⁰ However appeals increase costs and time in the resolution of

86 See <<http://pages.ebay.com/services/buyandsell/disputeres.html>> and <www.paypal.com/cgi-bin/web-scr?cmd=xpt/cps/general/PPDisputeResolution-outside>.

87 Recommendation 2001/310/EC of 4 April 2001 on Principles of for Out-of-Court Bodies Involved in Consensual Resolution of Consumer Disputes 2001 O. J. (L. 109) 56 whereas 2 and 6.

88 O. Fiss, “Against Settlement”, (1984) 93 *Yale Law Review*, p. 1087.

89 In the EU the right to a fair trial is contained in Article 6 of the European Convention of Human Rights, and the cooling off period allowing consumers to return goods bought by methods of distance selling, including e-commerce, is contained in Article 6 of the Distance Selling Directive 97/7.

90 Hörnle (2009), p. 161.

disputes, hence, it should be limited to the most deserving cases.⁹¹ Another option to avoid abuses from the business would be the establishment of a supervisory body that monitors ODR service providers. This could be done either through an accreditation system or when an independent institution refers cases to trusted ODR service providers.

Adjudicative procedures may be useful methods for resolving online consumer disputes. Online judicial processes are particularly appropriate for dealing with disputes where parties cannot reach consensus through any other ODR method, when a large disparity of power exists between the parties and when it is necessary to review decisions. Conversely, online arbitration has other advantages: it is custom-tailored to the dispute at hand, it is conclusive and it can replace the jurisdiction of the courts, though online arbitration may also be non-binding or appealable. This is illustrated by the adjudicative UDRP system, which framework is supported by the following three pillars: (i) the UDRP deals only with blatant disputes, which are abusive registrations of domain names made in order to take advantage of the reputation of existing trademarks; (ii) the referral to the UDRP is included through a mandatory contractual clause; and (iii) the UDRP has incorporated a self-enforcement mechanism, even though its decisions are non-binding if the dispute is brought to court.

Similarly, chargebacks and refunds by payment service providers offer a valuable remedy for consumers when using credit cards. Chargebacks reverse all transactions when a fraudulent use has occurred or when there is a violation of the contractual terms. According to the OECD, credit cards are the most common form of payment by consumers in e-commerce transactions.⁹² For instance, in the UK consumers have the right to claim damages from the credit card issuer when the purchase value is within the range of GBP 100-GBP 30,000.⁹³

Finally, it must be noted that online consumer disputes tend increasingly to be resolved through a tiered process: the first step is a company's internal customer service; the second step, consensual ODR (*i.e.* assisted negotiation, automated negotiation and online mediation); the third step, online arbitration; or a judicial process (when this is an option). The connection between consensual and an effective adjudicative method is essential, because it is often the latter which is an important incentive to bring the parties to the negotiation table.⁹⁴ Multi-step dispute resolution processes may become predominant. This approach emphasises the parties' prerequisite to consider consensual processes during the initial stage of their dispute in order to promote less formal, less costly and more efficient dispute

91 *Ibid.*

92 Organization for Economic Co-operation and Development "Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes" (20 December 2006) Available at <www.oecd.org/dataoecd/26/61/36456184.pdf>.

93 Section 75(3)(b) of the Consumer Credit Act 1974.

94 H. Genn, *The Hamlyn Lectures 2008: Judging Civil Justice*, Cambridge, Cambridge University Press, 2010, p. 80. Cf. book review P. Cortés (2011) 31(1) *Legal Studies*, pp. 162-166.

resolution methods.⁹⁵ However, such an approach should not consider consensual ODR just as a first step before adjudication, but as an alternative and invaluable tool for the resolution of disputes that is offered in conjunction to adjudication.⁹⁶

7 CONCLUSION: FUTURE TRENDS IN CONSUMER ODR

In the developed world, most consumers with Internet connection trade online, from groceries to transport and accommodation. Many consumers have done this for a few years already, but it is in recent times that Internet connection has become a common feature in most households. In the developing world, even though most consumers do not have continuous Internet connection, increasingly many have access to cybercafés and mobile phones, which are used for certain financial transactions, such as to facilitate payments. With online (mis)communications inevitably appear online disputes. It seems that the most obvious field for the development of ODR will have to be e-commerce. If the conflicts arise online, it seems logical that they should be resolved online. This is already happening in a number of areas, such as domain name disputes resolved by ICANN approved UDRP providers, and traditional B2C and B2B disputes in eBay and PayPal. It is very possible that these types of ODR services will augment first with the large digital providers, such as iTunes, or large corporations with a high number of online transactions, such as airlines.

The development of ODR, as with ADR, will probably be sector specific. Whether consumer disputes will be fully centralized remains to be seen, but it seems more likely that ODR providers will develop expertise in specific fields rather than dealing with all types of consumer disputes. Thus, the development of ODR will start to consolidate in certain sectors, such as transport, motor vehicles, and financial disputes.

Another sector where technology will start to develop very soon in countries with widespread Internet connection will be the courts of justice. Currently there are an increasing number of courts that admit online claims through their websites. The implementation of ICT tools in courts is starting to be applied to streamlined processes, such as small claims and money claims procedures. These processes generally make for the largest number of dockets in many courts, so streamlining these processes would help significantly with the administrative load. The development of e-justice will be implemented slowly, but it is not far from the day when certain types of civil cases might benefit from being litigated from the beginning to the end without parties stepping into the court house.

95 T. Stipanowich, "The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution", (2007) 8 *Nevada Law Journal*, p. 427.

96 Hörnle (2009), p. 58.

There will be an increase of online management and online communications which will transform face to face processes into fully institutionalised ODR processes, such as the Spanish online arbitration systems, the money claim online in the UK and the online small claim courts. Online judicial processes will be used when parties are located in different jurisdictions, such as the European Small Claims Procedure (ESCP) which could become the first judicial procedure to incorporate ODR technology to deal with cross-border claims. National courts will start providing e-filing and using case-management technology.⁹⁷ The resolution of disputes will be mostly attempted by consensual processes at first, regardless of the amounts of money involved. When consensual processes are not attempted, the courts will start to consider systematically whether these disputes should be first mediated. Hence mediation will become part of the litigation system. Accordingly, legal professionals will advise on the appropriateness of each dispute resolution method.

An important change that will promote the use of ODR services, as it is now happening in the US and the UK, is the loss of monopoly by attorneys in the resolution of disputes. Now, in the UK for instance, lawyers (*i.e.* solicitors and barristers) can enter into partnerships with businesses, accountants and other professionals, which undoubtedly have a more practical (as opposed to legalist) approach when resolving disputes.⁹⁸ Mediators, arbitrators, conciliators, and other ADR professionals will be more open to incorporate (as they already do with email) a number of ODR tools to aid in the resolution of their clients' disputes. Also lawyers will be more knowledgeable of conflict management skills and techniques.⁹⁹

There will be a greater interest in the development and implementation of dispute avoidance techniques.¹⁰⁰ ODR providers will develop *ad hoc* ODR mechanisms for online vendors so they can minimize the number of disputes that may arise out of their transactions with consumers. These ODR prevention mechanisms will be highly automated and will resolve the majority of complaints. Only a small number of complaints that are not resolved by these mechanisms will then be outsourced to external ODR providers, which in its majority would be either public or private bodies approved or certified by a public entity. Once a dispute escalates to an external ODR services, disputants will be assisted with a human third neutral party, who will seek for the consensual resolution of the disputes, and failing that, it will issue a recommendation that may be binding on the business but not on the consumer, who would still be able to pursue the judicial avenue.

Consumers will therefore retain the right to go to court. Some jurisdictions will offer a streamlined B2C online small claims procedure; yet this process will likely be more costly

97 R. Susskind, *The End of Lawyers?*, Oxford, OUP, 2008, pp. 201-210.

98 The (UK) Legal Services Act 2007 allows for the creation of Alternative Business Structures (ABS). The Law Society anticipates starting to license ABS in the second half of 2011.

99 J. Macfarlane, *The New Lawyer*, British Columbia, University British Columbia Press 2009.

100 Susskind (2008).

and slower than the previous accredited ODR providers. Furthermore, these judicial processes will increasingly require both parties to have previously attempted the consensual resolution of their disputes; and if they have not tried it, then they will have to justify why; otherwise they will face the payment of legal costs or a fine if the courts consider that one of the parties has acted unreasonably in refusing to participate in consensual processes. Hence consensual ODR would be quasi-mandatory.

The future of ODR is undeniable. Susskind describes ODR as a disruptive legal technology which will liberate a latent market of low value disputes that today remain largely unresolved.¹⁰¹ According to Katsh, ODR might not have taken over the world the first time around, but technology has gotten to the point where it just does not make sense to not use the Internet to handle disputes.¹⁰² Some of the essential ingredients for the growth of ODR are laying the ground for its market expansion: there is a constant increase in the use of ADR, transnational e-commerce, and online social networking.

ODR might not always provide a perfect solution to resolve all B2C disputes, but it could certainly deliver a satisfactory resolution to many disputes, including those that arise out of the B2C sphere, such as disputes amongst SMEs, or even outside the commercial and online realm, such as citizen to government (C2G) disputes. The need for ODR increases when parties face certain circumstances, such as limited economic resources, vast geographic distance and urgency in the resolution of disputes. It is also an ideal process for isolated B2C transactions where parties prefer less formal legal proceedings and are content to avoid face to face interactions.

This chapter cannot give a definite forecast on how ODR methods for consumer disputes will advance in the next few years. However, it is clear that ICT is developing increasingly faster while ODR service providers are becoming more sophisticated, intuitive and professional. It can be argued that the ODR of the future will be of greater quality, will cater for specific types of consumer disputes, will be predominantly public-operated or monitored, it will be compulsory, largely automated and it will be able to provide many of the functions that currently only a human neutral party can do. Such a system would have to be supported by artificial intelligence, economic incentives and legal standards.

101 Susskind (2008), p. 223.

102 E. Katsh and L. Wing, "Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future", (2006) 38 *University of Toledo Law Review*, p. 26.

