

## 7 ODR AND E-COMMERCE

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The Internet is a powerful technology that enables fast communication, both internationally and locally, and changes behaviors that involve the use and processing of information. Cyberspace, as a consequence, has become a new realm of commerce and a market with various kinds of transactions using acronyms such as: C2C, B2C, B2B, C2B or M2B.<sup>1</sup> It removes traditional barriers between “offerors” (producers, sellers, etc) and “offerees” (clients, users, consumers.). Time, geographical distance and language are no longer obstacles to trade and, consequently, cross border disputes have also increased. In this environment, courts have been losing effectiveness in handling the needs of parties because costs are too disproportionate and proceedings long and cumbersome. Online Dispute Resolution (ODR) mechanisms have emerged, therefore, as a natural response to this international process with the aim of providing an effective way to overcome the existing gap.

### 1 THEORETICAL FRAMEWORK

The European Union Communication from the Commission on *The Out-of-Court Settlement of Consumer Disputes* of 1998<sup>2</sup> clarified the scope of challenges consumers face. In brief, it recognized that there are three possible ways of improving access to justice: (i) simplification and improvement of legal procedures, (ii) improvement of communication between professionals and consumers, (iii) and the use of out-of-court procedures to settle consumer disputes. Most importantly, it indicated that “far from being alternatives, these three approaches are fully complementary”. However, a fundamental difference distinguishes the first approach from the other two. While the first approach remains within the traditional framework of the judicial settlement of disputes and aims to improve the existing systems, the other two remove these disputes from the judicial arena wherever possible. This approach can assist us in drawing the initial boundaries of ADR/ODR methods.

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1 C2C (Consumer to Consumer) is a model of e-commerce between consumers. On the other hand, C2B (Consumer to Business) trade is based on business transactions where the buyer or the user determine the terms of sale. Finally, the M2B (Mobile to Business) model refers to e-commerce through mobile technology.

2 Brussels, 30 March 1998. COM(1998) 198 final.

### 1.1 Description

There are various approaches used to accurately define and describe ODR mechanisms. For instance, Kaufmann-Kohler and Schultz describe three perspectives, namely cyberspace, non-adjudicative ADR and arbitration. These authors also consider that the important trait of a workable definition of ODR is that it focuses upon the issues raised by its overarching feature, being operated online, and thus, they adhere to the definition provided by the American Bar Association Task Force on e-commerce and ADR, extending the definition to include Cyber courts.<sup>3</sup> Another broad approach suggests that ODR methods encompass all the alternatives to court proceedings that are electronically developed (facilitative, evaluative and adjudicative or adversarial).<sup>4</sup>

While ADR and ODR mechanisms share some common traits, such as lower cost, greater speed, more flexibility in outcomes, less adversarial strategies, more informal flow, privacy and solution oriented methods (instead of blame-oriented techniques), it is also true that ODRs feature a host of unique features, which include: (i) the fact that disputants do not have to meet face to face; (ii) the dispute resolution process may occur at any time, regardless of geographical distance; (iii) the possibility of asynchronous communication.<sup>5</sup>

Other traits of ODRs are the number and the nature of the parties involved. In ODR processes, unlike off-line conflict resolution methods, information and communication technologies (ICTs) are always present. Therefore, it is possible to identify the following elements in any ODR system: (i) the parties involved; (ii) the “Third Party”, namely a neutral person or mediator, a conciliator or an arbitrator; (iii) the so called “Fourth Party”<sup>6</sup> which refers mainly to the technology involved in the process;<sup>7</sup> (iv) and the “Fifth Party”, the provider of ICTs, the technical player.<sup>8</sup>

3 See G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, The Hague, Kluwer Law International and Schulthess 2004, pp. 7-8.

4 A restrictive perspective considers ODR limited to consensual methods of dispute resolution online.

5 See E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001, p. 96

6 See Katsh & Rifkin (2001), p. 93.

7 To the extent that these methods evolve with technology, they also become “Fourth Party” processes where the “Fourth Party” assumes facilitative and consultative functions and helps to build consensus. See Katsh & Rifkin (2001), pp. 92-94.

8 S. Bol, “An Analysis of the Role of Difference Players in E-mediation: The Legal Implications”, in J. Zeleznikow and A.R. Lodder (eds.), *Proceedings of the Second International ODR Workshop*, Tilburg, Wolf Legal Publishers, 2005, pp. 23-30. Also in Centre for Information Technology and Dispute Resolution, Working Papers. Available <[www.odr.info/papers.php](http://www.odr.info/papers.php)>, p. 23. See also A.R. Lodder, “The Third Party and Beyond. An Analysis of the Different Parties, in Particular The Fifth, Involved in Online Dispute Resolution”, *Information & Communications Technology Law*, (2006) Vol. 15, No. 2, p. 144. Available at <<http://ssrn.com/abstract=1269562>>.

Finally, one more feature that identifies ODR mechanisms is their unique ability to extend their functionality at the level of conflict prevention by means of information managed to avoid misunderstanding and conflict.

Traditionally, out-of-court methods of dispute resolution (negotiation, bargaining, trade-off and agreements, etc.), unlike judicial processes, draw on the idea of maximizing the satisfaction of disputants, underlying their interests and reaching outcomes that are satisfactory for both parties involved in the conflict. Bentham's classical Principle of Utility [1789]<sup>9</sup> underpins the theory and mathematical algorithms applied to negotiation in order to obtain the best results for each disputant.<sup>10</sup>

On the basis of this principle, Fisher and Ury focused on how to promote a fair and successful negotiation and, consequently, on how to establish the "Principled Negotiation" criterion to assist experts in their problem solving tasks:<sup>11</sup> (i) by separating the people from the problem; (ii) focusing on interests rather than positions and rank them; (iii) developing options for mutual gain; (iv) using objective criteria to evaluate interests; (v) and making parties reflect on their BATNAs.

Fisher and Ury described three main decision making strategies commonly used in negotiation: (i) the *Interest-based Strategy* that draws from the technique of underlying interests; (ii) the *Rights-based Strategy* that relies upon accepted principles, rules, provisions or commonly recognized practices that may apply; (iii) and the *Power-based Strategy*, grounded in the power contest of the parties. According to these scholars, the *Interest-based Strategy*<sup>12</sup> is the best option in order to achieve long term outcomes and improved relationships as opposed to the *Right-based Strategy* that merely reproduces adversarial techniques and prolongs dissatisfaction.

Commerce disputes are commonly susceptible to be solved in terms of monetary (financial) agreements. Therefore, many ODR systems integrate technological game-theory strategies and negotiation analyses (based on statistical surveys of human behavior) focusing on

9 Utility, as a measure of relative satisfaction, explains the economic behavior of the parties. As it is well known, the theory of Utilitarianism [Bentham, 1748-1832] considers that systems should aim to maximize the utility of individuals in terms of happiness. It derives from the combination of commodities that an individual would accept to maintain a given level of satisfaction.

10 See J. Neumann & O.J.V. Morgenstern, *Theory of Games and Economic Behavior*, Princeton University Press, 1944.

11 R. Fisher & Bill Ury, *Getting To YES: Negotiating Agreement Without Giving In*, Boston, Houghton Mifflin 1981.

12 Some traditional interest-based strategies are: (i) the *Expanding the Pie* technique; (ii) the *Compensation or Trade-off* technique; (iii) and the *Logrolling* technique, where parties collectively seek issues and proposals.

interest-based criteria that offer parties the means for emphasizing and optimizing interests that help them seek solutions within the Zone of Possible Agreements (ZOPA).<sup>13</sup>

## 1.2 Taxonomy

As mentioned earlier, ODRs operating in the field of e-commerce disputes, like ICTs, are continuously evolving. Therefore, it is difficult to develop a conclusive classification of the different types of ODR in the field of electronic trade as these are likely to expand. Several efforts are being undertaken in this regard in order to facilitate a better understanding of these methods, including the mapping and description of the various forms of electronic methods of resolution. The main difficulty in accomplishing this task derives from the fact that ODRs are continuously broadening boundaries and opening new horizons thanks to innovations and the changing nature of the ICTs. Although ODR was originally designed for the resolution of disputes, they have lately expanded their activities to encompass information services, prevention tasks and technology for accountability purposes. As pointed out by Katsh,<sup>14</sup> “programs online and their capabilities are all works in progress” and are meant to offer a tailored solution to each case. Another concern worth mentioning is the existing multi-tiered and hybrid formulas of ODR mechanisms.

The following are some of the most commonly used modalities of dispute resolution in business and trade.

### 1.2.1 Automated and Assisted Negotiation

Negotiation is a method devoted to reach the settlement of a dispute through equal bargaining. The parties reach an agreement and settle their claims either on their own or with the “assistance” of technological means. Some of the most significant developments in this field include a blind-bid negotiation, which involves the parties confidentially submitting to the ODR platform the amounts they would consider fair to reach an agreement. If one of the figures coincides with the amounts introduced by the other party, the ODR platform informs the parties that an agreement can be reached on such an amount. In this case, therefore, the ODR platform provides technical assistance to the negotiation, as the software enables parties to analyze their bargaining position and assess their expectations. The information is never disclosed to the counterpart or third parties, and both are free to settle an agreement or to use other means of resolution, instead. In e-commerce, negotiation

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<sup>13</sup> R. Lewicki, D. Saunders & J. Minton, “Zone of Potential Agreement”, *Negotiation* (3rd edn.), Burr Ridge, IL, Irwin-McGraw Hill 1999, pp. 71-74.

<sup>14</sup> See *id.*, p. 11.

is, by far, the more widespread and efficient extrajudicial means of conflict resolution between consumers and businesses.

### 1.2.2 Online Mediation

The term “mediation” encompasses a host of semantic variations. For instance, in those cases where negotiations have not been successful, ODR mechanisms usually scale into a second stage or level and parties step into a mediation process where a third party neutral assists them to create a climate of understanding in order to facilitate an agreement. In this method, two or more parties attempt to voluntarily reach an agreement with the help of a third party. The neutral party is asked to conduct the mediation in an effective, impartial and competent manner. During the mediation the rights of the parties are not assessed by the neutral, who is not entitled to make any decisions.<sup>15</sup>

The online mediation process follows a path or a set of stages regularly subjected to deadlines, record of events, flow processes and, sometimes, complex systems with algorithms that can optimize offers. Electronic systems “assist” the parties generating informal proposals or recommendations, and parties are assisted by mediators that participate online. Communications can be *synchronous* (e.g. cyber conferencing, chats) or *asynchronous* (e.g. e-mail). Platforms may also have incorporated private chats with the neutral – caucuses – and common areas where each party may assert arguments without showing their identity. These services often offer complementary phone support.

When the conflict affects a number of people, the third party is often referred to as “facilitator”. The role of the facilitator is to assist all of those involved in a case to participate freely, ensuring everyone has the possibility to express themselves without the added pressure of power imbalances. The expert party helps re-establish balance in skewed negotiations by managing the group dynamics and the individual power of participants.

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15 The distinction between mediation and other alternative methods of dispute resolution through consensus, such as conciliation, is far greater in Europe than in other geographical contexts. Mediation, in any case, is seen as a facilitative method, while conciliation is more evaluative, and the role of the third party is much more active, having the privilege to even suggest formal solutions to the parties. In some countries, like Spain, Italy or Slovenia, mediation is often implemented in practice as a first step in a process leading to arbitration (med-arb). In some European countries agreements reached through mediation may be enforceable, for instance: (i) in France, Art. 1441 of the Code of Civil Procedure provides that either party may request the judge that the agreement submitted be enforceable; (ii) in Slovakia, the mediation agreement is enforceable if it takes the form of a notarial deed; (iii) in Belgium, the judicial order approving a settlement is also enforceable; (v) Holland also provides enforceability effects to agreements approved by a judge. The distinction between mediation and other alternative methods of dispute resolution via consensus (like conciliation) is much sharper in Europe than in other geographical contexts.

### 1.2.3 Online Conciliation

Online conciliation, the third level in the table of scalability, involves the third party not only assisting in finding a solution but proposing formal solutions as well. In no event, however, does the third party impose an opinion or a solution. The main difference between online conciliation and mediation lies in the fact that conciliators actively assist in the process and build solutions that are then formally submitted to the parties.

### 1.2.4 Online Arbitration

Arbitration, the most popular amongst the decision-oriented methods of dispute resolution, rests on a key element, the arbitration agreement. Whether in the form of a clause embedded in a contract, or whether an independent document, the arbitration agreement should represent the genuine expression of the parties' self-determination and will. The *iter* through which the arbitrator/s will issue the "verdict" is subject to the rules of the arbitration court. In an *ad hoc* arbitration process instead, parties preserve the right to determine the process flow by means of an agreement. Therefore, there may be as many arbitration proceedings as arbitration courts or *ad hoc* arbitration agreements. All of them, nevertheless, are committed to the respect of the principle of adversarial process.

## 1.3 Current Legal Framework

### 1.3.1 International Framework

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of New York [1958] is recognized as one of the most important international instruments with an impact on international trade. According to this significant Convention, parties may agree to undertake and submit to arbitration all or any differences which may have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. In this case, courts of a contracting state shall, at the request of one of the parties, refer the parties to arbitration, unless they find that the said agreement is null and void, inoperative or incapable of being performed.

The UNCITRAL *Model Law on International Commercial Arbitration* [1985],<sup>16</sup> recognizing the value of arbitration as a method of settling disputes arising in international commercial relations, and in view of the desirability of uniformity of the law of arbitral procedures, sets out a legal framework to improve and facilitate the modernization of national laws on arbitration proceedings, taking into account their traits and special needs. The United

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<sup>16</sup> With amendments adopted in 2006.

Nations has also enacted the *UNCITRAL Model Law on International Commercial Conciliation* [2002] aimed at recognizing the value for international trade of methods for settling commercial disputes in which the parties request a third person to assist them in their attempt to settle the dispute amicably. The United Nations considers that these methods (conciliation, mediation and others of similar importance) deliver significant benefits such as reducing the cases where the dispute leads to the termination of a commercial relationship and reducing costs in the administration of justice by the states.

In addition to this, the United Nations approved an *UNCITRAL Model Law on Electronic Commerce* [1996]<sup>17</sup> intended to facilitate the use of modern means of communication and information when bargaining. It creates a functional equivalent for electronic documentation and it adapts some basic traditional concepts such as the notion of “writing”, “signature” and “original”. Where the law requires information to be in writing, that requirement is considered to be met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. As to the originals, where the law requires information to be presented or retained in its original, that requirement is considered met by data messages if there exists a reliable assurance as to the integrity of the information from the time when it was first generated as a data message, and, where it is required that information be presented, that information can be displayed to the person to whom it is to be presented. This Model Law also determines that in the context of contract formation, an offer and the acceptance of an offer may be expressed by means of data messages and that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.<sup>18</sup> It also defines some rules to determine the legal status of e-mail communications<sup>19</sup> and contains provisions for electronic commerce.

More recently, the *United Nations Convention on the Use of Electronic Communications in International Contracts* [2005] sets out criteria for the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different states. It reinforced the idea that the fact that the parties have their places of business in different states is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

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17 Together with a guide to enactment and an important additional item (5 aa), adopted in 1998.

18 Of course, unless otherwise agreed by the parties. See Article 11.

19 As far as the acknowledgement of receipt is concerned, for example, it sets out that when the originator has not agreed with the addressee that the acknowledgement be given in a particular form or method, it may be given by any form of communication by the addressee, automated or otherwise, or any conduct of the addressee sufficient to indicate to the originator that the data message has been received. And if the offeror has stated that the data message is conditional on receipt of the acknowledgement, this data message is treated as never been sent until this acknowledgement is received.

The UNCITRAL *Model Law on Electronic Signatures* [2001] strengthens the legal certainty of trade via the use of electronic signatures by providing the presumption that an electronic signature that meets certain criteria of technical reliability is comparable to a handwritten signature. This Model Law adopted a criterion of technical neutrality to favor the use of any appropriate technology and also defines certain rules of conduct that are essential and may serve as guidance for assessing the duties and responsibilities of the signatories.

Currently, the United Nations, after noticing that small claims that take place in the context of transnational commerce need a legal framework that favors effective means of resolution, committed to this goal has given to Group III UNCITRAL the task to suggest specific rules and standards for ODR dealing in e-commerce.<sup>20</sup>

### 1.3.2 Europe

As far as civil matters are concerned, after the Recommendation 12/1986 of the Committee of Ministers at the Council of Europe on *Measures to Prevent and Reduce the Workload of the Courts*, the European Union has pledged to introduce extrajudicial mechanisms of dispute resolution, considering the fact that such methods are essential to improve efficiency in the case of small claims. Examples of these include the first *European Commission Communication on Consumer Redress* in 1985<sup>21</sup> and the *Supplementary Communication from the Commission on Consumer Redress* of 7 May 1987.<sup>22</sup>

In 1993, the Commission of the EU published the *Green Paper on Consumer Access to Justice and Dispute Resolution in Consumer within the Single Market*<sup>23</sup> which states that, according to the European Commission, member states must remove barriers to consumers and offer effective instruments of justice. The Commission, therefore, invited member states to work together to enhance the settlement of disputes in cross-border trade.

In 1996, the Commission enacted an *Action Plan on Consumer Access to Justice and the Settlement of Disputes in the Internal Market*.<sup>24</sup> This document outlined specific criteria for the creation of out-of-court procedures applicable to consumer disputes: (i) the impartiality of the body responsible for handling the disputes must be guaranteed; (ii) and the effectiveness of the procedure must be ensured by the existence of clear, simple

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20 See 43 session, NY, 21 June – 9 July 2010; ACE.9/710. See also General Assembly Official Report, 65 session, supplement no. 17 (A/65/17).

21 <<http://aei.pitt.edu/1596>>.

22 See COM (87) 210 final.

23 See COM 93-576 def. 16 November 1993. <[http://europa.eu/legislation\\_summaries/other/l32023\\_en.htm](http://europa.eu/legislation_summaries/other/l32023_en.htm)>.

24 <[http://aei.pitt.edu/1180/01/consumer\\_jsutice\\_gp\\_follow\\_COM\\_96\\_13.pdf](http://aei.pitt.edu/1180/01/consumer_jsutice_gp_follow_COM_96_13.pdf)>.



mechanisms for submitting claims, with establishment of time limits, and with attribution of appropriate investigatory powers to the body responsible.

After the *Action Plan* of Vienna [1998] and the Conclusions of the Tampere European Council [1999], the Council of Ministers invited the Commission of European Communities to the preparation of a *European Green Paper on Alternative Methods for Resolving Conflicts in Civil Law*. At the European Summit in Lisbon, in March 2000, on the topic *Employment and the Information Society*, the European Council<sup>25</sup> asked the Commission and the Council to consider how to increase consumer confidence in electronic businesses, in particular through alternative dispute resolution. This objective was reaffirmed at the European Council in Santa Maria da Feira in June 2000, at the *Global Action Plan e-Europe*. In 2000, the European Parliament stressed “the importance of expanding the methods of-court redress for consumers, particularly in cross-border conflicts”. A year later, in a *Communication on the Access to Alternative Dispute Resolution* [21 October 2001], the Commission highlighted the key role of extra-judicial methods in order to improve access to justice for consumers and the significant role of ICT in the provision of means for resolving disputes.<sup>26</sup> Also in 2001, the European Commission created a *Consumer Complaint Form* for consumer disputes. Since then, technology is seen as a central instrument in facilitating the resolution of disputes as it enhances the access, the speed and the control of the settlement process placed in the hands of the parties.

In 19 April 2002, the European Commission published the *The Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*. This paper highlighted the crucial role of ADR as an integral part of the policies aimed at improving access to justice. In 2005, the European Union promoted the creation of a network of European Consumer Centers (ECC-Net) that provides communication and support structure. It consists of national contact points with the “goal to incorporate all ADR and ODR mechanisms”. Since then, the European Council and the EU Commission have stressed that in order to avoid litigation it is best for the interests of both consumers and businesses to seek the resolution of conflicts in an amicable manner, and they have also highlighted the significance of devoting efforts to considering alternative methods.<sup>27</sup>

Today, the European Union continues to build on the results of prior programs and promotes the Program approved by the Stockholm European Council on 2 December 2009.

25 The European Council in December 2001 also stressed “the importance of preventing and resolving social conflicts, and more specifically transnational social conflicts by means of voluntary mediation mechanisms”.

26 Communication *Widening Consumer Access to Alternative Dispute Resolution* COM (2001) 161 final, of 4 April 2001. Available at <[http://ec.europa.eu/consumers/redress\\_cons/adr\\_en.htm#init](http://ec.europa.eu/consumers/redress_cons/adr_en.htm#init)>.

27 See Rec. 2001/310/EC.

This *Stockholm Program*<sup>28</sup> established a policy and a strategic priority for Europe in the coming years based on the interests and needs of citizens. It entailed: (i) eliminating “barriers to the recognition of legal acts in other member states”, (ii) giving priority to “mechanisms that facilitate access to justice, so that people can assert their rights throughout the Union”; (iii) ensuring trust, confidence and understanding; (iv) avoiding overlapping and inconsistency of standards; (v) enhancing horizontal and e-justice to ensure better access to justice; (vi) and also removing the obstacles to resolve civil law issues.

The Stockholm Program placed emphasis on the fact that efforts must continue in order to improve alternative dispute resolution mechanisms, particularly those in consumer law. It also considered that action is necessary to remove language barriers and to enhance electronic tools and modern means of electronic communication (ICTs) to the full extent.

From a regulatory point of view, it is worth noting some European Union legal initiatives undertaken in recent times. Some of these have taken the form of directives, other of mere recommendations. Although recommendations are not legally binding instruments for member states, they have significant political weight and have been used extensively for a soft harmonization in this area of policy. The following are only two examples:

1. As one example, after the Recommendation (98)1 of the Committee of Ministers of the Council of Europe on *Family Mediation*, the European Union enacted a very significant legal instrument, the Recommendation 98/257/EC of the European Commission, of 30 March 1998, on the *Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes*. This instrument proposed a set of recommendations that all bodies with active intervention of a third party that formally proposes or imposes a solution for the out-of-court settlement of consumer disputes respect the following principles: liberty, independence, transparency, effectiveness, legality, adversarial principle and representation.
2. On 4 April 2001 the Commission also approved the Recommendation 2001/310/EC on the *Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes*. This instrument was specifically addressed to any procedure which facilitates the resolution of a consumer dispute by bringing the parties together and assisting them in reaching a solution by common consent. It is designed to stress that electronic commerce facilitates cross-border transactions, which are frequently of low value, and that the resolution of any dispute needs to be simple, quick and inexpensive. Therefore, it considers that technology can contribute to the development of electronic dispute settlement systems, providing mechanisms to effectively settle disputes across

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28 <[www.se2009.eu/en/the\\_presidency/about\\_the\\_eu/justice\\_and\\_home\\_affairs/1.1965](http://www.se2009.eu/en/the_presidency/about_the_eu/justice_and_home_affairs/1.1965)>.

different jurisdictions without the need for face to face contact. The principles that should inspire these methods are: impartiality, transparency, effectiveness and fairness.

As to directives, the first of general scope was the Directive 2000/31/EC of the European Parliament and Council of 8 June 2000, *on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market*, which requires that member states encourage courts, particularly for disputes concerning consumer products, to act in order to provide adequate procedural safeguards for the parties. It emphasizes that member states should ensure that laws do not impede ADR mechanisms, including those using electronic channels. This directive stresses some aspects that are very relevant to e-commerce, such as the place where a service provider is established. According to it, this place should be determined in conformity with the case-law of the European Court of Justice, according to which the concept of place involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period of time. In the case of companies providing services via internet websites, the actual location is not considered to be the place where the technology is found nor the place where the company's website is accessible but the place where the company pursues its economic activity. It also establishes that member states shall ensure that their legal systems allow contracts to be concluded by electronic means and that in cases where recipients of the service place their order through technological means, service providers must acknowledge receipt of the order without undue delay and by electronic means.<sup>29</sup> In addition, the directive finally sets out that member states shall ensure also that their legislation does not hamper the use of out-of-court schemes, "including appropriate electronic means" (Article 17). Finally, the Commission Directive 2008/52/EC of the European Parliament and the Council on *Certain Aspects of Mediation in Civil and Commercial Matters*, of 21 May 2008, seeks to expand the use of mediation in cross-border disputes.<sup>30</sup>

### 1.3.3 Latin America

The legal systems of Latin American countries have inherited the patterns of Spanish and Portuguese legal systems. Their legal traditions respond, therefore, to continental or civil law. Many of these countries have developed legal frameworks for out-of-court mechanisms and are very receptive to these new opportunities. One issue of particular concern for these nations seems to be the independence of the bodies that carry out extrajudicial resolution processes.

<sup>29</sup> Article 11 also mentions that the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

<sup>30</sup> <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:IT:PDF>>. See also Regulation CE No. 861/2007, of European Parliament of 11 July 2007, that sets out a judicial procedure for small claims in transnational trade between member states.

In many Latin American countries mediation agreements have an enforceable character.<sup>31</sup> In these countries the terms mediation and conciliation are often used interchangeably to refer to both practices and procedures (*e.g.* Colombia, Bolivia, Chile, Argentina). Chambers of Commerce have been very active and have taken several initiatives in the field of arbitration and mediation, in order to promote business and investor's confidence. Many centers offering arbitration and mediation services are attached to Chambers of Commerce that enact specific regulations to comply with. Also worth mentioning are the services provided by the Inter-American Development Bank (IDB) aimed at the resolution of commercial disputes, and also a recent regional initiative from ILCE designed at implementing online dispute resolution schemes in the region for transnational commerce.<sup>32</sup>

#### 1.3.4 Asia

The most widespread form of conflict resolution in the Asian continent is negotiation, because the idea that interpersonal and professional relationships should be preserved at all costs is deeply rooted in all the cultures of this continent. Recent comparative studies show, however, that the influence of European countries and the United States is increasingly significant in Asia and in their legal systems in general. In China and Japan negotiation, mediation and arbitration are prerequisites before referring a case to the courts in civil and commercial disputes. Mediation in China and in Japan is similar to the western concept of reconciliation because the mediator plays a more active role. On the other hand, mediators in these countries can generally play the role of arbitrators if the parties do not reach an agreement without generating ethical problems. India has also developed in recent times the Consumers Coordination Council (CCC) and its CORE center, an online mechanism designed to resolve consumer-related disputes.

Although there are no regional legal initiatives, some of the Asian countries have enacted laws and provisions to provide a legal framework for e-commerce and extrajudicial means

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31 For example: (i) in Argentina, mediation agreements are reflected in minutes and communicated to the Ministry of Justice. If the agreement is breached, it may be executed via the procedure of execution of sentence; (ii) in Peru, the Mediation Center verifies the legality of the resolutions adopted by the mediators and the record is straight title run; (iii) in Ecuador, the act of mediation has the effect of a sentence and is therefore enforceable; (iv) also in Colombia, Costa Rica, Nicaragua, Bolivia and Panama, the settlement does result in *res judicata* and the act is enforceable; (v) in some federal states of Mexico, agreements reached are presented by the mediator to the Director of the Center for Mediation, so that in their presence, the parties ratify its contents and recognize the signatures. And agreements approved by the Director shall have the value of public documents and become enforceable. If the agreement is breached, compliance may be required through enforcement proceedings before the competent judge.

32 <[www.einstituto.org/?tag=odr](http://www.einstituto.org/?tag=odr)>.

of resolution.<sup>33</sup> Also, it is worth noting a significant regional initiative, the ICA-Network,<sup>34</sup> where several participants from ASEAN and some East Asian countries, including Malaysia, Singapore, Vietnam, Republic of Korea, Philippines and Japan, are implementing a common frame to enhance transnational trade and online disputes resolution mechanisms in the region.

### 1.3.5 African Countries

Most of the ADR/ODR initiatives in this continent are implemented in countries from the Mediterranean basin: (i) in Egypt, the Cairo Regional Center of Commercial Arbitration has established a set of self-regulatory rules of mediation with detailed references to confidentiality and the obligation to disclose any information that could compromise the independence or impartiality of the mediator; (ii) in Morocco, the Chamber of Commerce of the International Arbitration and Mediation Center (CIMAR) of Rabat and also the Casablanca Chamber of Commerce (CCISCO) and the Conciliation and Arbitration Center of Marrakech offer mediation services; (iii) in Tunisia, the Centre de Conciliation et Arbitrage has its own rules of mediation and conciliation that integrate interesting provisions such as: the prohibition of the mediator or conciliator to carry out the functions of arbitrator in an arbitration concerning the same dispute; or the prohibition to enforce arbitral or judicial proceedings on the views expressed by the parties.

Many African countries have enacted laws to provide a legal framework to protect the practice of arbitration, the best known amongst ADR/ODR mechanisms.<sup>35</sup> Some of the pilot programs implemented in African countries to promote mediation and other alternative methods for the resolution of commercial disputes and for the promotion of trade

33 In Indonesia, for example, Law No. 30/1999 on Arbitration, requires the arbitration body to first ensure that parties try to reach an amicable settlement. The same law also regulates other forms of alternative dispute resolution. Mediation agreements reached before an arbitral tribunal are contained in an award and become binding and enforceable in court. Also in Japan, mediation agreements that take place before a judge have the same force that a court ruling. Also in Sri Lanka mediation is a necessary step before referring to courts and the outcome, once "ratified" becomes executive. The Arbitration Act, amended in 1995 host a pre-mediation phase. In Pakistan there is an Arbitration Act from 1940, a Conciliation Court Ordinance of 1961 and a Family Court Act of 1964. In China, mediation in trade is articulated by consumer associations and the Rules of the International Committee of China International Economic Arbitration (CIETAC), the center that offers an arbitration that is preceded by mediation attempt; (iii) in Malaysia, the mediator is expected to take an active role and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has largely driven the use of this modality.

34 <[www.eria.org/research/y2009-no6.html](http://www.eria.org/research/y2009-no6.html)>.

35 By way of illustration: (i) in Mozambique, Law 11/1999, of 8 July 1999, of Arbitration, Conciliation and Mediation; (ii) in Cabo Verde, the 76/VI/2005 Act, of 16 August, on arbitration, and the Decree 31/2005 of 9 May 2005, on Mediation; (iii) in Angola, Law 16/03, of 25 July, on voluntary arbitration; (iv) in Malawi, there is a pilot mediation project started in 2008 for its implementation among the rural population (85% are farmers); (v) in Nigeria, the Arbitration and Conciliation Act of 14 March 1998; (vi) or in South Africa, the Law 42/1965, governing arbitration agreements.

and small and medium businesses, also deserve to be mentioned. By way of example, the International Association for Development of the World Bank finances a project called International ADR Technical Assistance Center which is aimed at improving investment climate in the states of Abia, Kaduna and Lagos, to facilitate access to justice and to reduce time and costs involved in resolving trade disputes. Also The Union for the Mediterranean (UpM) promotes an economic integration among EU member states, North African countries and Middle Eastern countries. The European Arbitration Court for the Mediterranean and Middle East aims to cooperate in transnational disputes in this region.

#### 1.4 *General Principles and Standards*

At the international level, ADR mechanisms applied to the field of electronic commerce are subject to recommendations of a number of international non-governmental entities and organizations. Very recently, moreover, some of these entities have also issued a set of standards affecting ODR platforms that have often taken the form of guidelines and codes of conduct, namely: (i) the Global Business Dialogue on e-Society (GBDe) in conjunction with Consumers International generated a guideline for e-commerce disputes called *the GBD Agreement*<sup>36</sup> that describes principles for ADR and refers to the need to adjust these requirements to the online context; (ii) the Organization for Economic Cooperation and Development (OECD) issued guidelines for consumer disputes in e-commerce in 1999; (iii) also the TABD (Transatlantic Business Dialogue;<sup>37</sup> and the TACD (Transatlantic Consumer Dialogue);<sup>38</sup> (iv) the European Committee of Standardization (CEN) issued guidelines containing a classification of ODRs; (vii) the International Chamber of Commerce (ICC) has provided a set of guidelines and describes standards for using websites, e-mails and electronic tools for communication, submission of documents, evidence and filing purposes; (viii) and the American Bar Association (ABA) has released a report on the behavior of players in e-commerce and associated controversies.

Some of these organizations, associations and chambers of commerce have even proceeded to put into practice regulations, standards, guidelines and principles. From the international arena to the various domestic legal systems, organizations and states have acknowledged a range of commonly accepted principles and standards in ADR processes as applicable to ODR. These include the following:

- freedom or private autonomy;
- confidentiality;

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36 In November 2003. See <[www.gbd-e.org/pubs/ADR\\_guideline.pdf](http://www.gbd-e.org/pubs/ADR_guideline.pdf)>.

37 See <[www.tabd.com](http://www.tabd.com)>.

38 See <[www.tacd.org](http://www.tacd.org)>.

- impartiality and independence;
- fairness of procedure;
- efficiency (effectiveness, speed, low cost);
- transparency;
- legality;
- and in some of them, the principle of neutrality and adversarial process.

## 2 TECHNICAL AND LEGAL ISSUES

The following identifies several significant technical and legal challenges that ODR service providers face currently.

### 2.1 *Identification and Authentication of Parties in ODR Mechanisms*

The identification of the parties involved at the beginning of any ODR proceeding is generally verified by means of electronic identity authentication and electronic signature.<sup>39</sup> Currently, the most commonly used electronic authentication mechanisms are electronic signatures such as personal identification numbers (PINS), public key cryptography (PKC), digitalized signatures, or the OK-box, consisting of a click wrap agreement. Electronic signatures provide identification for persons accessing the system and offer certainty as to their personal involvement in the act of signing. They also associate that person with the content of the documents and communications that he/she issues, including an acceptance to initiate an ODR process.<sup>40</sup>

Another important task performed by electronic signatures is to verify that the person appearing online is real and not a mere digital identity. This is also a common problem of e-commerce transactions, which, as stressed by Buti,<sup>41</sup> has been resolved by the market, as the reliability of the “offeror” in an electronic transaction becomes even more important than the physical identity. Therefore, although digital certificates issued by third parties and authorized by state authorities would be the ideal, they are not used in transactions of low value made by non-serial players and in the small claims derived, as the cost of such mechanisms of authentication could be too high.

39 See *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods*. United Nations publication, N. E.09.V.4.

40 See UNCITRAL Model Law on *Electronic Signatures*, 2001. See also the European Directive 1999/93/EC on *Electronic Signature*.

41 See “Identification of Parties, Verification and Liability for Actions in ODR Systems”, in *2009 International Workshop onADR/ODR: Building Bridges: Legal Framework and Principles*, UOC-IN3, Barcelona, Spain, 15 September 2009. Available at <[www.uoc.edu/symposia/adr](http://www.uoc.edu/symposia/adr)>.

As for the certification of the site through which ODR services are offered, the service rendered by a trust mark using a secure connection (SSL) allows the “offeree” to verify the real identity of the supplier.

## 2.2 *Integrity of Communications and Documents*

Given the fact that most electronic documents can become evidence in online adversarial platforms like arbitration, protecting these documents from access and alteration is a key concern. As such, many ODR service providers offer virtual secure environments such as the Net-Case at the International Chamber of Commerce (ICC) or the Web-File at the AAA’s online arbitration.

ODR platforms are also committed to provide secure mechanisms for the storage and destruction of information. Documents, databases and other types of information are protected by securing access and storage at the web server and at the local network and local computers (with backups, firewalls, etc.). However, only few ODR mechanisms currently offer such high standards of protection of the integrity of the process because of the high costs associated.

## 2.3 *Nature of the Parties Involved*

Several difficulties arise when attempting to formally define a theoretical distinction between a “merchant” and a “consumer” at international level. Examples of such complexity are the diverse legal definitions or descriptions of the concept “consumer” that can be found only in Europe. The European Union does not agree on a single uniform definition of the term consumer, although the different definitions provided by the rules consider a consumer to be a person acting outside of his/her professional activity. For the *Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [1968; *Brussels II*, now Regulation EC No. 44/2001] a consumer is an individual acting for a purpose, which can be considered a non-professional activity. The *Rome Convention on the Law Applicable to Contractual Obligations* [1980; now *Rome I*, Regulation No. 593/2008] follows the same line of thought. In the field of Secondary Community Law, several directives have included a specific definition of the consumer in similar terms.<sup>42</sup>

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42 By way of illustration: (i) Directive 85/577/EEC *on the Protection of Consumers in respect of Contracts Negotiated away from Business Premises*. 1. (“Doorstep Selling Directive”) define consumer as “any individual who [...] acting for purposes which may be regarded as outside their professional activities”; (ii) in Council Directive 87/102/EEC of 22 December 1986 *for the approximation of the laws, regulations and administrative*



European Union laws tend to limit the scope of such a concept to the field of natural persons, therefore, excluding companies.<sup>43</sup> The Court of Justice of the European Union has also provided a definition of the term consumer that is somewhat restricted if compared to some of the domestic laws of member states,<sup>44</sup> as it only considers consumers to be individuals who contract a service outside of their profession or employment to meet their personal or family needs and stresses the fact that companies shall not be treated as consumers.

Nevertheless, the definition of consumer is closely intertwined with the evolution experienced by the consumer protection movement in recent decades. Broadly speaking, “consumers” have been defined as a general category used to identify individuals who purchase and use products or services as opposed to “producers”, who introduce a product or a service in the market, or as opposed to “distributors”, who offer these products or services to interested parties. Historically, and up until the twentieth century, negotiations for the purchase of goods for personal, family or household use were considered to take place between equals. After World War II and with the expansion of large scale markets, this notion changed as there was a significant structural asymmetry in the decision making power between parties and thus, countries began to enact many diverse provisions in order to protect the consumer.

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*provisions of the Member States concerning consumer credit*, the consumer is a natural person “[...] acting for purposes which can be regarded outside his trade or profession”; (iii) Directive 90/314/EEC on *Package Travel*, defines consumer as “the person who buys or agrees to purchase travel combined (the principal contractor), the person on behalf of which the principal contractor agrees to purchase the package (the other beneficiaries) or person to whom the principal contractor or other beneficiaries transfer the package (assignee)”; (iv) Directive 93/13/EEC of 5 April 1993 on *Unfair Terms in Consumer Contracts*, defines consumer as a natural person that “[...] acts for a purpose unrelated to his duties”; (v) in the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997, on the *Protection of Consumers in respect of Distance Contracts* consumer is any individual “[...] acting for purposes outside his trade professional”; (vi) The Directive 98/6/EC on *Indication of Prices of Products offered to Consumers* describes consumers as “any person who purchases a product for purposes outside his trade or professional”; (vii) Directive 1999/44/EC *Concerning Certain Aspects of the Sale and Guarantees*, a consumer is a “natural person who [...] acts for purposes that fall within the scope of its professional activity”; (viii) The Directive 2000/31/EC on *Electronic Commerce*, “any person acting for a purpose outside his trade, business or profession”; (ix) The Regulation 178/2002 *Concerning the Principles and Requirements of Food Law* provides a definition of the final consumer as “the ultimate consumer of a food product that does not use food as part of any operation or business activity in the food sector”; (x) also the Directive 2002/65 on *Marketing Range of Financial Services to Consumers*, as “any individual who, in contracts distance, acting for purposes outside his trade or profession”; (xi) And also the Directive 2005/29/EC, *Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market*, describes consumer as “any natural person who, in commercial practices covered by this Directive, is acting outside his trade, business, trade or profession”.

43 Recently, there are exceptions, however, as neither the Commission Directive 90/314/EC, nor the latest EU Commission Directive on *Misleading Advertising* does refer specifically to natural persons.

44 Some states have chosen to extend the boundaries of this concept (France and Spain).

The concern about the structural imbalance of decision making power between parties in traditional commerce has generated a vast body of rules designed to protect consumer rights. It is understood that states should also refrain from any invasive behavior that could lead to a loss of individual freedom as a result of their legislative activities. Consequently, welfare states have attempted to combine the rule of law with social justice in the context of bargaining and, as a result, today there are a plethora of specific provisions that introduce legal distinctions, depending on the nature of the parties involved (B2B, B2C). The challenge is to discern, from the diversity of legal descriptions, who is a “consumer”. The goal of uniformity in this field is difficult challenge to achieve. Moreover, new actors like small and medium size businesses are currently entering the e-market and suffering from a similar inequality of bargaining power when dealing with big companies or serial players.

In the electronic arena, the structural unbalance of contractual bargaining power between parties makes the traditional contract law system inadequate. The weakness of offerees in electronic transactions has become common. In many agreements, the strongest company may unilaterally establish the terms of the contract – e.g. consumer standard form contract, SFC – which the weaker party – consumer or enterprise – is forced to accept.<sup>45</sup>

Schemes and theories of legal invalidity in traditional contract law system are not a useful approach because the asymmetry is permanent and structural. Remedies need to enable the protection of needs and interests of the weakest party. It is clear that today, the so-called status of the consumer is not sufficient to define an area of protection, as the entrepreneur may also be considered the weaker party in relationships with other companies. As a result, the boundaries between players and the distinction between B2B and B2C transactions are not appropriate in electronic commerce. From our view, and from a technical standpoint, it may help the contract law system to grant protection to all players in asymmetric bargaining power contexts in order to prevent the violation of freedom and autonomy of will in electronic commerce.

The European Parliament, concerned about the negative impact of such issues on the internal market, is working on overcoming traditional approaches through the design of an optional instrument (OI) by the Commission of Legal Affairs 2011/2013, of 25 January 2011. Applicable to all participants in transaction B2B and B2C and in national and transnational disputes, this optional instrument would involve one single body of rules with a high level of protection of the rights to all operators.

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<sup>45</sup> Data and ideas expressed by the author for the *ODR International Forum* under the title “Global ODR Schemes for B2B, B2C, and C2C Redress”, Chennai, India, 7-9 February 2011. Available at <[www.odr2011.org/](http://www.odr2011.org/)>.

#### 2.4 *Time of Dispatch of Electronic Communications in ODRs*

According to Article 10 of the *UNCITRAL Convention on the Use of Electronic Communications in International Commerce* of 2007, when parties have not otherwise stated and do have a designated electronic address, the time of receipt of a communication is deemed to be the time when it becomes capable of being retrieved by the addressee at the designated address.<sup>46</sup> In the event that the communication is sent to a non-designated electronic address by the party concerned (e.g. in the case of the first ODR communication from the service provider to the company that is claiming), the time of receipt of such communication is deemed to be when the addressee becomes aware that it has been sent to that address. In practice however, an acknowledgment of receipt is a common practice that parties agree to comply with.

Notwithstanding, the European Union Directive No. 2000/31/EC, on *Electronic Commerce* sets out that member states shall ensure that in cases where the recipient of the service – the consumer – places his order electronically: (i) the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means<sup>47</sup> and (ii) the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.<sup>48</sup>

#### 2.5 *ODR Process Flow*

The ODR systems currently used in the field of e-commerce have become fast, cost effective, multi-tiered methods of dispute resolution. ODR methods offer very speedy and inexpensive services, as time and distance are no longer obstacles to the process flow and these qualities become, undoubtedly, motivating factors for clients. Many of these ODR mechanisms provide tailored-made, simple processes where in-person hearings are replaced by online communications (with similar functions also designed to ensure parties are heard)<sup>49</sup> and deadlines are very short. While arbitration is the most commonly accepted and disseminated method for high value disputes in e-commerce (B2B), mediation and conciliation prior

<sup>46</sup> The anti-spam filters causes additional concerns, as they may impede that the addressee receives the communication.

<sup>47</sup> This provision shall not apply to contracts concluded exclusively by Exchange of electronic mail or by equivalent individual communications. See Article 11.

<sup>48</sup> This Directive does not apply to services supplied by service providers established in a third country.

<sup>49</sup> Oral hearings in arbitration depend on the different rules that exist under national arbitration laws. See Kaufmann-Kohler & Schultz (2004), p. 202: there is either no right to an oral hearing (e.g. under English and Swiss laws), or the hearing is held by request of a party (like in Dutch or Italian laws), or the right exists but it can be waived (like in Belgium, France, Swedish laws and the UNCITRAL Model Law).

to an arbitration phase are very popular for low value but high volume claims (B2B and B2C).

The commitment to the principle of freedom or party autonomy is a crucial matter. In multi-tiered processes, where the flow begins with a negotiation and/or mediation phase, one primary concern and prerequisite is to obtain the agreement of the parties to initiate the ODR process. This consent should be informed – informed decision making processes based on transparency – which means that parties may agree on initiating a facilitative and/or evaluative process fully online, and drawing on information<sup>50</sup> such as: (i) contact details, functioning and availability of the procedure; (ii) procedure flow and rules that may be applicable (legal provisions, industry best practice, considerations of equity, codes of conduct); (iii) preliminary requirements that the parties may have to meet, if so; (iv) language in which the procedure will be conducted; (v) the cost, if any; (vi) the timetable applicable to the procedure; (vii) the status of any agreed solution for resolving the dispute; (viii) and their right to refuse to participate or to withdraw from the procedure at any time.

Before agreeing to a suggested solution, ODR platforms should provide the parties with extensive information on the following facts:<sup>51</sup> (i) that they are allowed a reasonable period of time to consider the solution; (ii) that the suggested solution may be less favorable than an outcome determined by a court applying legal rules; (iii) that they have the right to seek independent advice and also to refer the case to another out-of-court dispute resolution mechanism or seek legal redress through their own judicial system.

In practice, the agreement reached through mediation or conciliation, is commonly prepared by the ODR neutral upon the request of the parties. Signing the agreement is generally done by means of any of the electronic signature methods above described. As to the enforcement of the outcome, ODRs addressing e-commerce disputes do not deal with public enforceability aspects. These platforms are most commonly based on achieving consensus and high rates of settlement in the first phase of the process by means of a mutually acceptable agreement. In those cases that are not resolved in the initial phase and escalate to an adjudicative phase, it is necessary to deploy more private, aggressive forms such as pressing to chargeback from the payment intermediary, or communicating negative reviews on public websites, or removing labels. Some states do recognize the enforceability of ODR.<sup>52</sup>

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50 Many of these information requirements are been compiled in the European Union by means of the Recommendation 98/257/EC.

51 According to some regional requirements, e.g. the EU Recommendation No. 98/257/EC.

52 In some European countries the agreement reached in a mediation process can become enforceable. Namely: (i) in France, Article 1441 of the Code of Civil Procedure provides that either party may request from the

Should the process escalate to an arbitration phase, by reason of the above mentioned principle of party autonomy, an arbitration agreement would also be necessary. In the event that parties may not have included an arbitration agreement clause in the contract concluded or on a separate document,<sup>53</sup> this additional consent may be obtained by means of an online acceptance to submit the case to arbitration and its general terms and conditions. The written form that is required under in-person arbitration processes is satisfied in practice by an electronic communication of acceptance, as stated in the *UNCITRAL Recommendation [2006] Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958]* which were established to promote a flexible interpretation of the written form requirement for the process of arbitration.

## 2.6 *Applicable Rules*

One of the main difficulties still faced by ODR bodies responsible for procedures with decision making power (e.g. arbitration) is how to determine the applicable law and jurisdiction to issue an award based on grounds of law, or in order to grant interim judicial measures when necessary. Although decisions involving cross border disputes in the field of e-commerce are usually based on equity grounds, some states require that decisions on consumers' claims shall be based on the grounds of law (e.g. in Brazil). The European Union accepts the fact that the bodies responsible for adversarial extrajudicial means of resolution may make decisions on the basis of equity and codes of conduct and that these decisions shall always guarantee the level of consumer protection established by existing provisions.<sup>54</sup> ODR service providers, therefore, must also take into account, when dealing with consensual mechanisms, some regional legal provisions.

The above mentioned challenges pose a number of important questions to ODR developers in relation to (i) the way the decision is issued, in practice made electronically; (ii) the basic grounds of the ODR decision, in practice commonly agreed on the basis of equity; (iii) the

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court that the agreement be enforceable, (ii) in Slovakia, the mediation agreement is enforceable if it takes the form of a public act; (iii) in Belgium, the court order approving an agreement is enforceable; (iv) in The Netherlands agreements also have enforceability if approved by a judge; (v) in Italy, the Decree provides that the verbal agreement, the contents of which are not contrary to public policy or mandatory rules, it is tested on application well before a formal investigation, by decree of the President of the Tribunal. In addition, in cross-border disputes minutes must be approved by the presiding judge in the district where the agreement has to be enforced and shall be enforceable to the forced expropriation, for specific performance and registration of mortgage claims.

53 Some consumers' protection laws impede to include *ex ante* arbitration clauses among general terms and conditions applicable to the transactions and, in general, any agreement concluded before a dispute arises.

54 See Rec. 98/257/EC.

awareness of the applicable mandatory laws and public policy requirements; (iv) the means by which it is acknowledged the consumer's residence in any claim, in practice through the information supplied by clients to ODR platforms; (vi) the awareness of the applicable procedural law when judicial assistance is needed during the process or for enforcement purposes. In this regard, also the place or seat of the defendant and also of the ODR service provider is an important issue and a challenge yet to be met.<sup>55</sup>

## 2.7 *Neutrality in Multi-Step Mechanisms*

Many ODR service providers (*e.g.* Chambers of Commerce) in e-commerce offer multi-tiered processes of dispute resolution based on arbitration procedures combined with mediation or conciliation elements. Conducted by arbitrators who mediate or conciliate the parties at a first initial stage, the structure and flow of these processes have spawned some concerns closely connected with the principles of neutrality. Currently, waivers of due process rules are accepted both in practice and these are expressed *ex-post*,<sup>56</sup> or even *ex-ante*,<sup>57</sup> provided there has been an informed consent. Therefore, it is a common practice to refer the case to a med-arb ODR mechanism where the neutral will be vested with the authority to decide the outcome of the dispute should the parties not reach an agreement.

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55 Currently the United Nations *Convention on the Use of Electronic Communications in International Contracts* which is applicable to electronic communications in connection with the formation or performance of a contract between parties whose places or business are in different states, regardless the civil or commercial character of the parties or of the contract, sets out that a party's place of business: (i) is presumed to be the location indicated by that party, unless another party demonstrates otherwise; (ii) if one party does not indicate it and has more than one place of business, is that which has the closest relationship to the relevant contract having regard the circumstances known at any time before or at the conclusion of the contract; (iii) and finally, if is a natural person and do not have a place of business, reference is to be made to his habitual residence. The relevance of this international instrument, which is only binding to contracting states that ratify, accept and approve the convention, derives from the fact that offers practical solutions for these issues and highlights the idea that Internet Protocol addresses, domain names or the geographic location of information systems have little value for determining the physical location of the contractual parties. Regarding ODR service providers responsible of adversarial mechanisms such arbitration, is not quite clear that the existing provisions for arbitration may be of any help, specially when it comes to small claims that require simple, fast, cost effective mechanisms of dispute resolution.

56 The *ex ante* waivers are more controversial. See Kaufmann-Kohler & Schultz (2004), p. 204.

57 See in Europe, Judgment of 23 February 1999 in case No. 31.737/96, *Suovaniemi and others v. Finland*. The European Court of Human Rights accepts *ex ante* waivers regarding the right to an independent tribunal. In that case, the claimant expressly accepted an expert as arbitrator that acted as counsel for the opponent (informed consent).

## 2.8 *Ex-Ante Clauses to Mandatory Adjudicative ODR Mechanisms*

Mandatory arbitration clauses in consumer contracts have been a common concern and subject of debate in the European Union. Some countries consider this practice to be illegal as it could deprive those consumers within their jurisdiction from access to courts. Similarly, a number of voices have expressed doubts about the legitimacy of an arbitration clause agreed *ex-ante* precluding parties in dispute from having access to a judicial process while leading them towards a mechanism that issues final binding decisions.

From a regulatory viewpoint, the Directive No. 93/13/EEC on *Unfair Practices* contains an *addendum*, or list of terms considered to be unfair and includes those deemed to have the purpose or effect of excluding or limiting the legal remedies available to the consumer, particularly by requiring the consumer to follow only a single mechanism, arbitration. The purpose of the Directive is to prevent limitation in the defense of the consumer. In addition, Recommendation 98/257/EC states that if the procedures lead to a resolution of the dispute through the active intervention of a third party, according to the principle of freedom, the decision of the body may be binding provided parties were previously informed and accepted explicitly. Following the above mentioned Recommendation, consumers cannot be prohibited from going to court because of a commitment made prior to the origin of the dispute, especially when this commitment has the effect of depriving them of their rights to appeal to a court.

In any case, in our view, it seems clear that *ex-ante* clauses to a “conditional” arbitration for the settlement of a dispute may not be considered illegal where the award is binding on the “offeror” but not on the “offeree” until his/her acceptance. Likewise, the clause or agreement made by the parties, with full knowledge of rights and effects once the dispute has arisen may be considered legal and binding, provided that such process and result does not infringe the rights and the provisions of mandatory laws or public policies of the state where the award shall be enforced.

## 2.9 *Provisions That Impose a Mandatory Attempt at ODR*

Similarly, some concerns have been raised over *ex ante* clauses to non-adjudicative online dispute mechanisms. Notwithstanding, a recent European Court decision on the interpretation of the principle of effective judicial protection – Judgment of 18 March 2010 in Case 317/08, *Telecom Italy SpA* – maintains that regarding national provisions setting out a mandatory attempt to settle the dispute as a procedural condition of prosecution of legal proceedings it is legal and it can be achieved, provided that such proceedings do not: (i)

mean a binding decision on the parties, (ii) involve long delays for a trial before the court, (iii) generate disproportionate costs, (iv) constitute the only form of access to conciliation and other alternative means of resolution, (v) or, finally, prevent access to court.

### 2.10 *Determining the Location of the Offeror*

As far as determining the location of service providers, Article 6 of the *United Nations Convention on the Use of Electronic Communications in International Contracts* [2005] establishes a certain number of presumptions and default rules aimed at facilitating a determination of a party's location. It attributes primary importance to a party's indication of its relevant place of business.<sup>58</sup> A party's place of business is presumed to be the location indicated by that party, unless another party demonstrates otherwise.<sup>59</sup> Only in case of natural person without place of business, reference is to be made to the person's habitual residence.

According to this significant international legal instrument, it is irrelevant for the purposes of the e-commerce (i) where the location of the equipment and technology supporting an information system used by a party is; (ii) where the information system may be accessed; (iii) or whether the domain name or electronic mail address is connected to a specific country. Likewise, the *UNCITRAL Model Law on Electronic Commerce* [1996] intends to reflect the fact that the location of information systems is irrelevant and sets forth a more objective criterion, namely, the place of business of the parties. References to "place of business", "principal place of business" and "place of habitual residence" are adopted also to bring this Model Law in line with Article 10 of the *United Nations Convention on Contracts for the International Sale of Goods* [1980].

In Europe, the EU Directive 2000/31/EC on *Electronic Commerce* states that in the case of companies providing services via internet websites, the actual location attributed to the process is not considered to be the place where the technology is found nor the place where the company's website is accessible but the place where the company pursues its economic activity. For purposes of determining the site of an ODR, traditional criteria still seem to be applicable. In this regard, the United Nations is considering the elimination of the concept of location and any connection to a domestic law. The *International Centre for Dispute of Investment Convention, Regulation and Rules* [2006] is a good example of this

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<sup>58</sup> The Convention does not contemplate a duty for the parties to disclose their places of business.

<sup>59</sup> If a party has not indicated a place of business and has more than one place of business, is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.



approach. The fact is that ODR platforms need to rely on simple, fast, and low cost processes that offer an equitable balance of parties' interests.

### 3 CONCLUDING INSIGHTS. OVERVIEW OF FUTURE CHALLENGES AND PROSPECTS

Information and Communication Technology (ICTs) is revolutionizing traditional trade. New terminology is used to describe emerging activities, actors participating in them and innovative dispute resolution mechanisms (ODRs). Equally important is the fact that transnational electronic commerce tends to increase and ODRs are the only mechanisms capable of managing and resolving cross-border disputes.

Confidence and trust are key issues in e-commerce and ODRs. To that end, it seems essential to consolidate a legal framework and some of the key principles and standards that are already being applied internationally by a number of stakeholders. In other words, it is necessary to develop a common regulatory framework for all parties regardless of their nature, given the fact that structural asymmetries occur in electronic B2B transactions.

The use of extrajudicial means of resolution does not necessarily imply a reduction of legal protection or a limitation to the access to justice. The use of these mechanisms provides a new level of effectiveness to such recognized rights.

Many initiatives are currently being undertaken to harmonize processes and outcomes in the field of ODR. In the international arena, the United Nations (UNCITRAL) considers it is essential to fill the gap in online cross-border disputes in order to overcome some concerns and the relative stagnation of transnational trade, so that offerors and offerees are given an effective option to resolve conflicts. Accordingly, the UNCITRAL Commission has recently agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to low value cross-border electronic commerce transactions, including B2B and B2C, in order to create an easy and appealing framework for ODRs devoted to cross-border e-commerce.<sup>60</sup>

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<sup>60</sup> <[www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>.

