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Online Dispute Resolution in Business to Consumer E-commerce Transactions

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Abstract

A large number of Online Dispute Resolution (ODR) schemes are concerned with the resolution of consumer disputes arising from e-commerce transactions conducted on the Internet. Such schemes and the issues involved shall be discussed in this paper.

The first section will explain why e-commerce disputes involving a consumer are a challenge. The main focus is on the difficulty of pursuing cross-border disputes cost effectively and thereby increasing access to justice. Next the various ADR mechanisms deployed in dispute resolution will be discussed and this will illustrate how computer technology and distance communication can change these ADR procedures. Thirdly, the effectiveness of ODR and the related question of consumer confidence in redress mechanisms will be examined. The next section will look at the need for due process requirements in consumer ODR. The fifth section will discuss the efforts made regarding a regulatory framework. This paper will conclude that a careful regulatory framework should eventually be put in place to ensure due process, but that it might be too early to do this at present.

Keywords: Consumer protection, e-commerce, cross-border, alternative dispute resolution, arbitration, mediation, settlement, credit card charge back, online dispute resolution, due process, regulation of e-commerce, trustmarks, e-commerce marketplaces.

1. Introduction: The Nature of Consumer Disputes Arising from Electronic Commerce

E-commerce by its very nature results in an increasing number of distance (or even cross-border) interactions and thus, disputes between parties located far from each other. Litigating and enforcing such disputes through the courts can be disproportionately expensive for smaller and medium claims due to added costs (such as hiring local lawyers, travel and translation costs). This means that only redress for very large claims can be obtained in this way.

By contrast, at present, e-commerce transactions undertaken by consumers are often very small value, covering items such as books, music, software and other consumer goods, albeit this may change in the future if consumers feel confident to buy higher value goods such as cars or financial services over the Internet. Thus, at least for the time being, for most consumer e-commerce disputes the cost of legal redress by litigation is not proportionate to the value of the claim. Therefore, for such claims cost-effective Online Dispute Resolution (ODR) schemes are the only viable means of redress. A lack of trust in this area of redress may mean that consumers do not engage in e-commerce.

Another problem specific to cross-border transactions is the difficulty of determining the appropriate forum. There is an inevitable conflict between the forum of the claimant and the respondent. Being located in no particular geographical area, ODR mechanisms can provide a forum equally convenient and accessible to either party.

Furthermore especially for international consumer dispute resolution, cultural and linguistic differences must be taken into account. Although the consumer buys 'on the Internet' he/she may have the same expectation as to quality of service and consumer protection as he/she has when buying in his local real world shop. This is a factor to be considered when discussing consumer ODR.

Finally, another factor making consumer disputes different from other disputes is the (real or perceived) unequal bargaining power of consumers when compared to the seller of products and services. A balancing of unequal bargaining power is particularly necessary, where the supplier relies on standard terms and conditions and where, as is usually the case, the supplier demands pre-payment. Because of this latter factor, in many instances the claimant will be the consumer. To the extent that ODR provides affordable and effective dispute resolution mechanisms, it may contribute to achieving the aim of creating trust in e-commerce and viable redress for consumers. There are several different mechanisms for ODR to which we turn next.

2. ODR Mechanisms Used for Consumer Disputes

ODR can have several meanings. Here we shall take ODR to be information communication technologies (ICT) or 'online technology' applied to alternative dispute resolution. The term alternative dispute resolution (ADR) in this context refers to dispute resolution (other than litigation) in the courts, and includes arbitration.

The first experiments in extra-judicial ODR were made during 1996/1997 in the US and Canada. Most of these were initially university projects evolving into commercial ventures. In Europe, governments and most notably the European Commission have strongly advocated the use of ODR systems for consumer disputes. Recent years have also seen a considerable amount of private entrepreneurial activity. In addition, traditional off-line ADR providers are focusing on the possibilities raised by online technology. At the beginning of 2002 the author counted about 30 consumer ODR schemes in existence. There is an enormous variety in the emerging picture of ODR providers with varying experimentation and different degrees of formality. Various procedures are used. The following is an overview of the methods used:

2.1 Arbitration

Documents-only arbitration has been used for a considerable time to solve consumer disputes. Consumer documents-only arbitration being largely a fact-finding process, based on the written submissions of the parties, lends itself to ODR. However, although the online medium is very suitable to documents-only arbitration, online consumer arbitration, as opposed to online mediation (and other forms of ADR) is not very common.

One problem is to secure the agreement of the other party, usually the business, to binding arbitration after the dispute has arisen. However, in some schemes, the e-commerce provider subscribes to an ODR scheme (including online arbitration) in

advance and markets this fact to its customers in order to enhance trust and branding. For such e-commerce providers ODR is part of the customer services they offer to the consumer.

While such a commitment can be enforced against the subscribing supplier, it may not be binding on the consumer. It should be noted, that in most European jurisdictions, an arbitration clause contained in standard contract terms which binds the consumer to submit a dispute to arbitration is likely to be viewed as unfair. For this reason, a standard arbitration clause cannot be enforced against a consumer. Thus, the arbitration clause would only be binding on the business, but optional for the consumer.

By contrast, in the US, consumer arbitration clauses are usually enforceable. The US courts will only refuse to enforce a binding arbitration clause against a consumer where it would be unconscionable to do so. This would be the case if enforcing the arbitration clause deprived the consumer of access to a forum to vindicate his rights. The courts have held in several decisions that an arbitration agreement in a consumer contract that forces the consumer to incur excessive arbitration fees is unconscionable. For example, in the much-cited case of *Brower v Gateway Inc* involving the purchase of a computer and related software products, the arbitration agreement stipulated arbitration before the International Chamber of Commerce (ICC) Court of Arbitration. The ICC advance fee for the claim was the amount of US\$ 4,000, of which US\$ 2,000 were non-refundable. The New York Appellate Court held that the arbitration agreement was unenforceable and remanded the case back to a lower court to encourage the parties to find an appropriate arbitration procedure for their small claims dispute.

In the US, the American Arbitration Association (AAA) has introduced specific fee schedules for consumer disputes. Likewise the National Arbitration Forum has a special small claims fee.

As the US cases demonstrate, the fees for consumer arbitration must be proportionate to the value of the claim. Since arbitration requires the intervention of a qualified and experienced human decision-maker, but consumer claims are mostly of small value, this may be difficult to achieve. For this reason, too, arbitration may not be the first choice for small and medium value consumer disputes.

However, under some schemes, online arbitration is used as the last resort layer of a scaled approach to ODR. In such schemes the parties start with negotiation and if this fails they move on to mediation and only if this fails will they resort to arbitration.

2.2 Evaluation (non-binding)

Like arbitration, online evaluation is an ODR technique involving the neutral third party making a decision on the basis of the written submissions and documentary evidence provided by the parties. However in the case of evaluation this decision takes the form of a non-binding recommendation. This factor may make it easier to secure the participation of the other side after a dispute has arisen.

2.3 Mock Trials

Mock trials (also: summary jury trials) are an ODR technique whereby a jury of peers makes a non-binding determination of the issues via a web-based platform. Thus the neutral third party is replaced by a number of volunteers (Internet users) acting as if they were an online jury in a civil trial. All communications take place via the website, <<http://www.i-courthouse.com>>.

2.4 Mediation

Online mediation seems to be the primary ODR method for small consumer disputes. There are four reasons for this primacy of online mediation. First, the process is flexible. The mediator essentially uses his skill to help the parties to communicate and reach their own solution. This high degree of party control means that the parties are likely to feel comfortable with the online procedure. Secondly, the fact that participation is voluntary means that the parties are more willing to participate as they do not compromise their position. Thirdly, redress is not limited to monetary awards. Online mediation allows the parties to find creative solutions to their dispute. By way of example, an adequate response to a consumer complaint could be a substantial discount from a future purchase or something similar. Finally, some consumer disputes, especially those arising from small value e-commerce transactions, are more a matter of customer services than a matter of conflicting rights. Frequently, the question in dispute will be purely factual and in some cases also trivial, so that a gesture of good will can solve the dispute. One of the disadvantages of online mediation is the lack of teeth of the non-binding procedure. To a large extent the effectiveness of the procedure depends on the business' wish to maintain good customer relations. For some, although not all consumers this might be the only instance in which they buy from this supplier. Thus if, as is sometimes argued, the success of mediation as a dispute resolution technique depends on the continuity of the relationship between the parties, online mediation may not be effective in one-off consumer disputes. Another issue with online mediation is that the involvement of a human mediator means that the procedure may be too expensive for very small value claims as generally speaking, the fees start in the range of US\$ 20-200.

2.5 Automated Settlement Systems

Automated Settlement Systems are a highly innovative form of ODR, suitable for monetary claims (i.e. where liability is not disputed, but only the amount of compensation is at stake, such as certain insurance cases). Automated Settlement Systems may also be used as a negotiation tool as part of another dispute resolution procedure. The process involves the parties making successive blind bids. This means that the bids are not disclosed to the other party. Once the bids are within a certain range of each other (e.g. 30%), settlement will automatically be reached, for the median amount. The process is driven by software so that no human third party is directly involved and is therefore particularly cost-effective. The software keeps offers confidential until they come within the range. Communication tools such as email and web-based platforms support the settlement process.

2.6 Complaints Assistance

Complaints Assistance provides the parties with tools allowing for effective communication. At a minimum, it allows a consumer to make a complaint and communicate a demand for redress to the respondent. Complaints Assistance also involves the provision of general assistance such as the provision of information (such as legal advice) for the purpose of self-help. Complaints Assistance works as kind of online law centre.

2.7 Credit Card Charge Back

Although credit card charge back mechanisms are not strictly speaking dispute resolution mechanisms, in the consumer context they fulfil this function and do so in an effective manner. A credit card charge back is a procedure set up by the credit card issuer allowing the consumer to cancel the payment of the purchase price effected by a credit card. If the bank considers the consumer's complaint justified, it will re-credit the consumer's account with the price paid and the business will not obtain payment. This in effect puts the credit card issuer in a position of a third party neutral arbitrating a dispute between the consumer and the business. The credit card issuer will investigate the consumer's complaint and assess the evidence for fraud or non-delivery. Thus it acts as an adjudicator between the parties. Many countries regulate when charge back mechanisms should be available to consumers.

Having briefly discussed the different mechanisms for consumer ODR, the next section will look at the effectiveness of these mechanisms in the e-commerce environment and examine what role these mechanisms have in increasing consumer confidence.

3. Online Dispute Resolution and Confidence in Consumer E-Commerce

ODR services are essentially provided in three different forms. The first one involves services generally accessible and provided by an independent provider, the second form comprises ODR services provided under a trustmark and thirdly ODR services provided in the context of a marketplace. This paragraph will examine the three different forms and argue that ODR services provided under a trustmark and/or in the context of a marketplace are more effective than open access ODR services.

3.1 Generally Accessible Services

Some of the ODR services are independent in the sense that any claimant can use them to seek redress. In other words, these schemes offer their services to claimants regardless of how the dispute has arisen and regardless of whether the respondent supplier is a member of that scheme. The main advantage of such schemes is their open access. On the other hand, this open access entails several disadvantages, the two principal ones are funding and enforcement. As to funding, if the service is not financed by membership fees but by the users of the service, the ODR service may be too costly for small consumer claims. The other main disadvantage relates to enforcement. If the respondent business is not a member of the ODR scheme it is harder to bring pressure to enforce any decision or

settlement resulting from ODR. Thus independent schemes are less effective than membership schemes.

3.2 Trustmark Schemes

Governments and stakeholders involved in consumer e-commerce alike have declared it as a priority to enhance consumer confidence in shopping 'on the Internet'. The intangible nature and anonymity of the Internet, coupled with the insecurity regarding payment mechanisms and problems of cross-border redress make trust building measures necessary and trustmark schemes support this aim by making redress more effective. Trust in redress mechanisms is an important aspect of consumer confidence. Therefore, consumer associations, trade associations, government and also the private sector have established trustmark schemes.

Under such schemes, the supplier undertakes to co-operate in the dispute resolution process offered by a particular ODR provider whose services the supplier subscribes to as a member.

In addition, some trustmark schemes make their members adopt a Code of Conduct. Such a Code imposes certain obligations and guarantees of good practice on the supplier, such as to disclose the supplier's identity (including contact details) on its website, to deliver within a certain time or not to abuse the inexperience of children in its marketing. Thus, under some schemes the supplier undertakes additionally to comply with certain standards of good practice set out in the Code.

In consideration of such undertakings, the ODR provider licenses the supplier to use a logo (or 'trustmark', also called a 'seal' or 'label') on its website. This trustmark signifies to the consumer that the supplier has undertaken to take part in a dispute resolution scheme (and, as the case may be, that it adheres to a Code of Conduct). In this way, the trustmark is intended to increase consumer confidence and enhance the supplier's branding. The supplier pays a fee covering membership of the scheme and the licence for the use of the trustmark. This fee also covers the costs of the dispute resolution process, so that the use of ODR is free (or at very low cost) to the consumer. Businesses not complying with their obligations under the scheme ultimately risk losing membership and the licence to use the trustmark. Therefore a trustmark puts the business under pressure to comply with the Code, to co-operate in any dispute resolution procedure and to comply with its outcome.

At present the ODR services offered by such trustmark schemes are mainly limited to mediation. One interesting exception is the scheme set up jointly by the Which? Consumer Association and the UK Chartered Institute of Arbitrators. Suppliers subscribing to the Which?Webtrader scheme comply with a Code, and in case of a dispute, the consumer is asked in the first place to negotiate directly with the supplier. If this does not resolve the dispute, the consumer can avail himself of the consumer association's assistance in mediating the dispute. Finally, if this does not solve the dispute, the consumer can initiate online, documents-only arbitration proceedings administered by the Chartered Institute for a very small filing fee, covering claims for up

to £10,000. The proceedings use email and a web-based platform. The online arbitration is binding on the trader but not so on the consumer. This incremental approach to dispute resolution is a very sensible one, as the bulk of cases will be solved at the first two stages, so that only the most serious cases will be filtered out for arbitration, making the system cost-effective.

The ODR provider may additionally offer insurance ('money back guarantee') where ODR fails. This means that an insurance company vets and backs the supplier, further enhancing trust in the service. The insurance will typically compensate the consumer for the loss in the case of non-delivery of goods or where the consumer's credit card details have been used fraudulently.

Therefore one very important factor for the effectiveness of consumer ODR services is the establishment of membership or so-called trustmark schemes.

3.3 ODR Schemes Provided by Marketplaces

Finally, Internet marketplaces frequently provide dispute resolution services. There are many different types of Internet marketplaces for consumers, however, generally speaking, consumer marketplaces are websites aggregating various suppliers of goods or services. Marketplaces can take the form of portals, Internet auctions or Internet shopping malls.

Frequently such marketplaces provide ancillary services such as dispute prevention mechanisms. An example for such an Internet marketplace is an auction site allowing consumers to search and bid for items sold by business and private sellers. For the purposes of dispute prevention, auction sites such as Yahoo! or E-bay provide for rating systems. Each buyer is invited to give the seller a rating and to register any feedback. This rating and feedback for each seller is made available to subsequent buyers on the auction site. This helps the consumer to select trustworthy suppliers and thereby prevents (some) disputes caused by unreliable suppliers. Furthermore, marketplaces may offer escrow or insurance services ('money back guarantee') protecting against non-delivery or non-payment. All of these measures will help to avoid disputes in the first place and enhance consumer confidence.

In addition to dispute prevention mechanisms, such marketplaces sometimes also provide ODR for their customers, usually mediating between the supplier and the consumer. E-bay, for example has engaged the services of the ODR provider Squaretrade to mediate any dispute between supplier and buyers. Other dispute resolution mechanisms used are complaints assistance and arbitration.

One of the reasons why ODR annexed to a particular marketplace is more effective is that marketplaces create a common context for transactions. In other words, such transactions are governed by their own pertinent set of rules (Code of Conduct, etiquette, business practices) providing for standards accepted and observed by the parties in this particular context. Such rules may provide for the applicable law in the resolution of any disputes. Thus the parties involved in the marketplace share common standards and norms. This

makes any dispute resolution easier and more effective. As was the case for trustmark schemes, non-conforming suppliers risk being excluded from the marketplace. This creates pressure on the supplier to comply with the rules and to co-operate in any dispute resolution procedure.

Thus, generally speaking ODR services provided in the context of a marketplace or under a trustmark are more effective. However effectiveness is only one of the criteria against which to measure ODR. Equally important is that the procedure is fair and we will now look at the due process requirements.

4. Legal Issues Arising From Consumer ODR - Due Process

This section of the paper examines which requirements of due process consumer ODR should comply with. The first part focuses on identifying these requirements, whereas the second part discusses whether these requirements should always apply to consumer ODR.

4.1 Requirements of Due Process

The starting point for the discussion is the standards contained in two EC Commission Recommendations. These are the Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (98/257/EC) and the Recommendation on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (2001/310/EC). The 1998 Recommendation only applies to binding arbitration procedures, whereas the 2001 Recommendation is applicable to consensual, non-binding forms of consumer dispute resolution.

Also worth mentioning in this context is the Due Process Protocol for Mediation and Arbitration of Consumer Disputes drawn up by the AAA. This Protocol sets minimum standards of due process in consumer disputes.

The main issues in this respect can be summarised as follows.

4.1.1 Independence and Impartiality

This is a concept at the very heart of civil justice: both the ODR service provider and the individual arbitrator/mediator must be, and must be seen to be, independent and impartial, free from any vested interests.

For the ODR service provider, this means in particular that its funding and board structure should be neutral. In practice this might be difficult to achieve. The business usually pays directly (subscription fees, user fees for the actual dispute) or indirectly (membership fee) for the dispute resolution service, as schemes imposing significant fees on users may not be proportionate to the value at stake. Therefore, it is unavoidable that the supplier provides the funding. This factor should be compensated by additional safeguards, such as an independent third party supervising the scheme and representation of consumer interests on the board of the scheme. Unfortunately, these requirements are rarely implemented in the existing schemes.

Furthermore, the individual arbitrators or mediators should be obliged to observe a code of professional ethics. Such a code should oblige them to disclose any personal interests and to avoid conflicts of interest. The job security and pay of third parties must be sufficient to guarantee impartiality. Information as to compliance with these requirements should be provided to the user.

Finally, the allocation of third party arbitrators/mediators should be made randomly. One party should not be allowed to choose the individual arbitrator or mediator.

4.1.2 Publicity and Transparency

Traditionally, secrecy and confidentiality have been an important factor in favour of the parties' choice of an out-of-court procedure. By the same token, therefore, the parties may expect that the ODR proceedings are kept confidential. To the extent that ODR enables the settlement of private disputes and no adverse public interests are involved, ODR should equally allow for secrecy and confidentiality.

However in the consumer context, there may be wider public policy concerns involved. For example, in cases of widespread business malpractice on the mass consumer e-commerce market, the public should have a right to know. Equally, looking to the future, if ODR becomes the dominant form of dispute resolution in e-commerce disputes, ODR arbitration decisions should form a body of law as there will be few court decisions and otherwise the rights and obligations of parties in e-commerce will be uncertain. It can be argued that the law governing e-commerce will not develop further and be not transparent, unless decisions are published. Obviously this argument only applies to binding online arbitration, as online mediation does not produce authoritative rulings. By way of illustration, if the issue decided in online consumer arbitration is the interpretation of a term in a widely used online standard form contract, as a matter of public policy, such precedent should be published. The author concedes that this argument will probably be more important in the future if and to the extent that ODR develops as the predominant form of dispute resolution for e-commerce. A good illustration of this point can be found in the procedure promulgated by ICANN for the resolution of disputes arising from the registration of top-level generic domain names, such as .com. This is the Uniform Domain Name Dispute Resolution Procedure (or UDRP). Under the UDRP all decisions rendered by the arbitration panels are published on the ICANN website. As a consequence, a body of caselaw has been developed and panels regularly quote the decisions of their sister panels for authority, albeit there is no system of precedent.

Unless decisions are published, the person who uses the system only once, the 'single-shot player' has no way of finding out what the law is. By contrast, the 'repeat-player', having first-hand and repeated experience of online arbitration may gain an unjustified advantage. By and large it will be the consumer who will be the 'single shot player', whereas suppliers and especially larger business will have repeated experience of dispute resolution and/or legal representation. This is unacceptable in the consumer context, due to (factually) limited access to the courts and limited access to legal representation.

Also, unless there is sufficient transparency through publication of results it is impossible to check the quality and impartiality of dispute resolution.

Nevertheless the question arises to what extent publication of results is practicable. It is to be expected that suppliers will resist the publication of results. For online mediation, because of the informality of the discussions and solutions reached, publication probably has to be limited to general statistics such as the number and kind of disputes. In the ideal world, in the case of consumer online arbitration, however, the decisions should be published.

In practice, most ODR providers have not implemented publication of results and, of course, there is no legal obligation on them to do so.

Finally, for the purposes of transparency, the ODR scheme should also make clear the type of rules, standards or law (such as legal provisions, equity, codes of conduct) serving as the basis for the settlement or decision.

4.1.3 Language Barriers

Only few ODR providers have given sufficient attention to the problem of cultural and linguistic differences. At present, most ODR services on offer are conducted in English and only very few offer a bilingual or multilingual service.

4.1.4 Right to be Heard, Right to Respond, Fair Hearing

The right to a fair hearing means that each party must be given an opportunity to state their case and to hear and respond to the other party's submissions. Online Dispute Resolution schemes usually rely on written (web-based or email) submissions by the parties. The parties should also be given a fair time in which to respond. To the extent that the 'hearing' is conducted in writing only, signs of non-verbal communication will be lost. The inexperienced or inarticulate claimant may be disadvantaged against the professionally presented case of the respondent. This may have an impact on the fairness of the evidence and fact-finding process and is a factor the arbitrator or mediator has to take into account in consumer disputes.

4.2 Applicability of the Due Process Requirements

This part looks at the essential question whether it is realistic to demand that high standards of due process be observed in all cases. In many instances, consumer disputes are trivial and factually straightforward, so that ODR has to be very low cost and efficient. For access to justice to be ensured, the cost of dispute resolution should be proportionate to the amount at stake. The cost factor is clearly one of the important advantages of ODR compared to offline litigation or ADR. The use of networked technology and general accessibility (i.e. avoidance of travelling costs) makes dispute resolution much cheaper. However, for consumer disputes over very small amounts even ODR (involving a human mediator or arbitrator) might still be too expensive, since, obviously, skilled and experienced mediators and arbitrators will charge for their services. In these instances, simple forms of online mediation and Complaints Assistance are apposite to solve the dispute. Highly automated complaints procedures and some form of

‘money back guarantee’ with an insurance company backing the supplier may be the only viable solution for very small value consumer disputes.

Thus, for the determination of due process standards the procedure has to comply with, a distinction must be made between on the one hand simple, low value disputes and more factually complex or high value disputes. Whereas the former can and should be highly automated and informal, the latter should comply with stricter standards as to the criteria of due process and fairness. In higher value or complex disputes, more quality may be needed.

Thus, the approach to consumer ODR has to be scaled: the higher value or the more complex a consumer dispute is, the more strictly the ODR mechanisms should comply with certain standards of due process set out in this paper. Having come to the conclusion that at least some consumer ODR procedures should comply with standards of due process, the next question arises as to how these standards should be implemented.

5. Emergence of Standards for Consumer ODR

One of the questions emerging in the discussion of consumer ODR is whether and how to develop standards for consumer ODR schemes. As has been seen, existing consumer schemes raise concerns relating to consumer protection and due process, in particular concerning independence, transparency and effectiveness of the proceedings. On the other hand, the cost of the ODR procedure must be proportionate to the value of the claim. Thus, the first conclusion has been that any emerging standards must balance the quality of the ODR procedure with its cost-effectiveness.

As has also been seen, the types of procedures and standards used by consumer ODR procedures vary enormously. Diverse parties have created multiple protocols and standards in a rapidly changing ODR world. This makes it hard for the parties to understand what types of procedures and protocols are being used in a particular procedure. Concomitantly the use of trustmarks has proliferated in such a way that makes it hard to discern what each trustmark stands for. Thus, it is difficult for the parties to appreciate the mechanisms and safeguards involved under each scheme.

Therefore it would be helpful if there was some kind of categorisation of the different schemes and the safeguards they provide. This could be achieved by the development of international standards and uniform criteria. The Recommendations issued by the European Commission and the AAA Due Process Protocol mentioned above may be a starting point for such an exercise.

The American Bar Association (ABA) Taskforce on Electronic Commerce is working on how to develop a global approach to common standards and an overarching framework. The ICC is also developing an inventory of different ODR schemes to make the plethora of consumer schemes more transparent.

Different standards should be developed according to the value and complexity of the claim. The main question is who will create the standards and protocols and who will

enforce them. This task requires an international body in which the various stakeholders are represented. International bar associations or business organisations such as the ICC or intergovernmental organisations such as the OECD spring to mind. However equally important and unsettled is the issue of funding for such a project.

Finally another question deserves some thought: this is the question as to what is the subject matter of regulation. Are we regulating legal professional services or consumer protection? To the extent that we are dealing with questions of due process and professional ethics it seems that the regulation of legal services should be applied to consumer ODR. In fact the argument that consumer ODR is to enlarge access to justice and should therefore be subject to at least a degree of due process requirements, as has been argued above, calls for the application of legal ethical standards. Some commentators, however argue that consumer ODR is primarily a consumer product and that therefore the approach should be that of consumer protection. Consumer laws on fair commercial practices and their enforcement should be applicable rather than professional legal ethics. The reasoning behind this argument is that this is a more feasible approach, as the regulation of legal services is even more fragmented than that of consumer protection.

Maybe the answer to this question is a typical lawyer's answer. 'It depends' - namely on the value and the nature of the dispute. As has been argued above, a distinction should be made between high and low value and complex and simple disputes. Accordingly, the due process requirements should be proportionate to the value and complexity of the dispute. Maybe it could likewise be argued that the resolution of simple and/or low value disputes is more in the nature of an e-commerce customer service, whereas the same cannot be said of more complex or high value disputes, which in the offline world would be solved before the courts.

6. Conclusion

Two conclusions from an examination of consumer ODR are clear. Firstly, it can be concluded that ODR schemes forming part of the guarantees given by a trustmark or ODR schemes forming part of the services of a marketplace are more effective. Secondly low value e-commerce consumer disputes cannot be solved by expensive dispute resolution procedures and certainly for disputes up to a value of £100 a highly automated procedure and one more akin to customer complaints services should be used. However in the higher value consumer sector, ODR should incorporate certain procedural requirements to guarantee due process as described above. The more difficult and yet unresolved question is who should formulate and enforce these standards. It is probably less difficult than it might appear at first to reach broad international consensus on minimum due process requirements. A precedent for such a consensus has been achieved in the related area of consumer protection in the OECD Consumer Guidelines. Although the Guidelines only set minimum standards, they represent consensus among 29 states and illustrate that such consensus can be found at an international level. However it should equally be pointed out that it is premature to talk about regulating something which has not fully emerged. The existing consumer ODR schemes are at an experimental stage and it is probably too early to define a regulatory framework at

present.