

ONLINE DISPUTE RESOLUTION IN CONSUMER DISPUTES

Feliksas Petrauskas, Eglė Kybartienė
Mykolas Romeris University, Faculty of Law,
Department of International and European Union Law
Ateities 20, LT-08303 Vilnius, Lithuania
Telephone (+370 5) 271 4669
E-mail: feliksas.petrauskas@vvtat.lt, egler@mruni.eu
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Abstract. *Consumer disputes and their nature are changing very fast every day. E-commerce is promoted by the all relevant stakeholders such as European Commission, consumers associations, competent institutions, and business sector in order to achieve the main present goal—consumer confidence in business and full functioning of the internal EU market. Here the third parties are important—trade partners from all over the world. There is no legal relation or actions between disputes and searching for the most convenient, fast, cheap and comfortable. Because of that, this article sets out general views on online transactions and consumer protection in the context of e-commerce and possible online dispute resolution means. The authors of this article are chiefly concerned about legal uncertainty and the jurisdiction as well as applicable law in business-to-consumer (B2C) e-commerce. Online dispute resolution or in other words it is called the ODR is seen as a possibility to solve these barriers in dispute resolution using technology to facilitate the resolution of disputes between parties primarily involving negotiation, mediation or arbitration, or a combination of all three. In this respect it is often seen as being the online equivalent of alternative dispute resolution. However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.*

Keywords: *consumer, trader, business sector, alternative dispute resolution, online dispute resolution, arbitration, cancelation, mediation.*

Introduction

Due to the increasing use of the Internet worldwide, the number of disputes arising from Internet commerce is on the rise. Numerous websites have been established to help resolve these Internet disputes, as well as to facilitate the resolution of disputes that may occur offline. The explosive expansion of the use of the Internet makes it possible for businesses to expand their markets and render services to large groups of e-consumers. Where off-line transactions can lead to problems and disputes, the same is true for online transactions. In other words: e-commerce transactions will sometimes result in e-disputes. To ensure that all parties concerned will feel they can safely participate in e-commerce transactions it is imperative that e-disputes are resolved adequately, because uncertainty over the legal framework may inhibit both consumers from purchasing products or services over the Internet, and companies from entering into the electronic market place.¹

Online dispute resolution (hereinafter—ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect it is often seen as being the online equivalent of alternative dispute resolution (hereinafter—ADR). However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.

ODR is a wide field, which may be applied to a range of disputes; from interpersonal disputes including consumer to consumer disputes (C2C) or marital separation; to court disputes and interstate conflicts.² It is believed that efficient mechanisms to resolve online disputes will impact in the development of e-commerce. While the application of ODR is not limited to disputes arising out of business to consumer (B2C) online transactions, it seems to be particularly apt for these disputes, since it is logical to use the same medium (the internet) for the resolution of e-commerce disputes when parties are frequently located far from one another.³

So, lawyers, consumers or businesses as well as other stakeholders may ask why they should choose ODR as a method to solve their disputes. Could be several reasons why we may use ODR as an alternative dispute resolution method instead of some traditional litigation processes:

- People comfortable with online shopping don't suffer endless worries that the internet is not a safe place to transact through.

1 *Out-of-court dispute settlement systems for e-commerce*. Report of an exploratory study. Wilikens, M.; Vahrenwald, A.; Morris, P. Joint Research Centre, 20th April 2000, p. 2.

2 National Centre for Technology and Dispute Resolution, Standards of Practice [interactive]. [accessed 14-06-2011]. <www.odr.info>.

3 Bygrave, L. Online Dispute Resolution—What it Means for Consumers. *Paper presented at a conference entitled "Domain Name Systems and Internet Governance" Grace Hotel, Sydney, 7 May 2002*, p. 2.

- People comfortable with online dating have experienced complex and meaningful interactions in which they needed to make decisions regarding trust, risk, uncertainty, information-sharing and relationship.

- People experienced with online learning are used to spending a lot of their time engaging in different types of interactions (academic, social, administrative etc.) with others in a virtual space.

Full and timely disclosure and settlement of consumer disputes still remains a paramount concern for practitioners in the field of alternative dispute resolution (hereinafter—ADR). Ethical codes require arbitrators and mediators to disclose any relationships that may impact their impartiality. Procedural rules of ADR administering organizations call upon ADR neutrals to disclose conflicts of interest that may impair their objectivity.

However, the growth of the World Wide Web as a virtual market for business-to-business (B2B) and business-to-consumer (B2C) transactions requires a broader definition and application of traditional disclosure provisions. Some commercial web sites may place pre-dispute ADR clauses in their terms of use while others may direct customers to third-party ADR services after disputes have arisen. In the Internet context, the obligations of disclosure should be extended to include certain duties for e-businesses requiring or offering ADR as dispute resolution method.

In order to discuss all benefits of the ODR as a kind of ADR it is necessary to define what is ODR and what kind of methods are used investigating and settling consumer complaints online. Below are presented the most common and used most frequently in practice.

1. Defining Online Dispute Resolution

As it was already mentioned above, ODR or Online Dispute Resolution is an innovative way to resolve grievances, issues or disputes, especially now when both consumers and business started to use virtual space for concluding contracts and performing various transactions.

Legal action may not be the most suitable remedy for disputes especially so when such disputes are the outcome of e-commerce transactions or dealings on the Internet. The Internet exposes us to a variety of fields and in turn disputes too seem to be inevitable. It is best to resolve these grievances, issues or disputes arising as a result of the Internet in that very same environment, that is, the Internet.

The collective term “On-line Dispute Resolution (ODR)” is used internationally for different forms of on-line dispute settlement by means of ADR-methods. ODR supplements existing ADR methods based on the assumption that certain disputes (more specifically e-disputes) can also be resolved quickly and adequately via the Internet. ODR can be defined as the deployment of applications and computer networks for resolving disputes with ADR methods. Both e-disputes and brick and mortar disputes can be resolved using ODR. At the moment there are four types of ODR systems:

- Online settlement, using an expert system to automatically settle financial claims;
- Online arbitration, using a website to resolve disputes with the aid of qualified arbitrators;
- Online resolution of consumer complaints, using e-mail to handle certain types of consumer complaints;
- Online mediation, using a website to resolve disputes with the aid of qualified mediators;

Not all of these types of ODR are fully developed yet. Online settlement and online mediation are currently the most advanced.

Dispute resolution techniques range from methods where parties have full control of the procedure, to methods where a third party is in control of both the process and the outcome.⁴ These primary methods of resolving disputes may be complemented with Information and Communication Technology (ICT).⁵ When the process is conducted mainly online it is referred to as ODR, i.e. to carry out most of the dispute resolution procedure online, including the initial filing, the neutral appointment, evidentiary processes, oral hearings if needed, online discussions, and even the rendering of binding settlements. Thus, ODR is a different medium to resolve disputes, from beginning to end, respecting due process principles.⁶

ODR was born from the synergy between ADR and ICT, as a method for resolving disputes that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable⁷. The introduction of ICT in dispute resolution is currently growing to the extent that the difference between off-line dispute resolution and ODR is blurry. It has been observed that it is only possible to distinguish between proceedings that rely heavily on online technology and proceedings that do not⁸. Some commentators have defined ODR exclusively as the use of ADR assisted principally with ICT tools. Although part of the doctrine incorporates a broader approach including online litigation and other sui generis forms of dispute resolution when they are assisted largely by ICT tools designed ad hoc.⁹ The latter definition seems more appropriate since it incorporates all methods used to resolve disputes that are conducted mainly through the use of ICT.¹⁰

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- 4 Rule, C. *Online Dispute Resolution for Businesses: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*. San Francisco: Jossey Bass, 2002, p. 37.
 - 5 Cortes, P. A European Legal Perspective on Consumer Online Dispute Resolution. *Computer Telecommunications Law Review*. 2009, 15(4): 90–100.
 - 6 García Álvaro, J. A. Online Dispute Resolution Uncharted Territory. *The Vindobona Journal of International Commercial Law and Arbitration*. 2003, 7: 180.
 - 7 Katsh, E.; Rifkin, J. *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. San Francisco: Jossey-Bass, 2001, p. 9.
 - 8 Hörnle, J. Online Dispute Resolution: the Emperor's New Clothes. *International Review of Law, Computers & Technology*. 2003, 17(1): 27. See Cf. Hörnle, J. *Cross-Border Internet Dispute Resolution*. Cambridge: Cambridge University Press, 2009.
 - 9 Lodder, A. The Third Party and Beyond. An Analysis of the Different Parties, in Particular The Fifth, Involved in Online Dispute Resolution. *Information and Communications Technology Law*. 2006, 15(2): 144; Kaufmann-Kohler, G.; Schultz, T. *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague: Kluwer Law International, 2004, p. 5.
 - 10 Cortes, P. *Online Dispute Resolution for Consumers in the European Union*. Routledge, 2010.

Moreover, this concept is more consistent with the fact that ODR was born from the distinction with off-line dispute resolution processes.¹¹

In ODR, the information management is not only carried out by physical persons but also by computers and software. The assistance of ICT has been named by Katsh and Rifkin as the “fourth party” because ODR is seen as an independent input to the management of the dispute.¹² In addition to the two (or more) disputants and the third neutral party, the labelling of technology as the fourth party is a clear metaphor which stresses how technology can be as powerful as to change the traditional three side model. The fourth party embodies a range of capabilities in the same manner that the third party does. While the fourth party may at times take the place of the third party, i.e. automated negotiation, it will frequently be used by the third party as a tool for assisting the process.¹³

The fourth party may do many things such as organize information, send automatic responses, shape writing communications in a more polite and constructive manner e.g. blocking foul language. In addition, it can monitor performance, schedule meetings, clarify interests and priorities, and so on¹⁴. The assistance of the fourth party will increase the more technology advances, thus reducing the role of the third neutral party. Katsh and Wing argue that ICT advance is occurring exponentially since ICT advance speeds up over the time.¹⁵ As a result, ODR processes are increasing in efficiency providing their disputants with greater advantages in terms of time saving and cost reductions.

In general, ODR involves four components:

- Similar to ADR, companies agree to resolve their disputes outside the courts, the difference being to use the Internet to enhance the process;
- Professionals guide the parties and apply their ADR experience to support the Internet process;
- ADR rules and practices are adapted to the Internet environment, and
- Software tools are used to enhance Internet exchanges.

New Web-based services offering ODR are being tested and introduced which feature software that enables parties and arbitrators to:

- Meet online and work in shared, protected work spaces,
- Access databases with precedents,
- Retrieve and manage key documents, and

11 Schultz, T. An Essay on the Role of Government for ODR. Theoretical Considerations about the Future of ODR. *ADROnline Monthly*. 2003, August: 6.

12 Katsh, E.; Rifkin, J., *supra* note 7, p. 93–117.

13 Katsh, E.; Wing, L. Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future. *The University of Toledo Law Review*. 2006, 38: 31; Gaitenby, A. The Fourth Party Rises: Evolving Environments of Online Dispute Resolution. *The University of Toledo Law Review*. 2006, 38: 372; Bol, S. H. An Analysis of the Role of Different Players in E-Mediation: The (Legal) Implications [interactive]. *IAAIL Workshop Series—Second International Workshop*, p. 23–25 [accessed 12-05-2011]. <www.odrworkshoinfo/papers2005/>.

14 Katsh, E.; Rifkin, J., *supra* note 7, p. 129.

15 Katsh, E.; Wing, L., *supra* note 13, p. 27.

- Hold meetings with voice and video conferencing as desired and with translation services as needed.

1.1. Alternative Definitions

In practice it is difficult to provide a self-contained definition of ODR, and given the pace of change it may not even be possible to do so. The use of technology usually involves the use of Internet-based communications technology at some stage, but ODR does not necessarily involve purely online processes—further, many could be replicated offline using pen and paper, or could be achieved using computers without Internet connections.

The range of terms and acronyms used to describe the field augments the confusion often felt by those unfamiliar with the new field of ODR. These terms include:

- Internet Dispute Resolution (iDR);
- Electronic Dispute Resolution (eDR);
- Electronic ADR (eADR);
- Online ADR (oADR).

ODR has emerged as the most used term in recent years. It is uncertain whether these processes form a new *discipline* of ADR or a *tool* to aid existing methods of dispute resolution. The most appropriate view would be to view ODR as an interdisciplinary field of dispute resolution.

2. ODR Methods

2.1. Consensual Methods

2.1.1. Automated Negotiation

Automated Negotiation relates to those methods in which the technology takes over a negotiation. Most of the ODR services in this area are so-called “blind-bidding” services. This is a negotiation process designed to determine economic settlements for claims in which liability is not challenged. Automated Negotiation is ideal for monetary value claims. It is simple, easy and straight forward with no other assistance needed. The parties enter their respective offer and demand. The parties also choose a percentage range. The offer, demand and respective ranges are not communicated to the other party. The ODR algorithm computes a settlement amount between the offer range and the demand range provided the figures are within the given range. The parties are informed of the settlement. If the bids do not match, parties are allowed to try again. Any number of attempts is permitted, for a given case, within a period of for example 30 days. The offers and demands are not revealed to the other party, or any other person. The figures are kept confidential regardless of whether the case settles or not.

Automated Negotiation usually has two parts:

1. *Offering Party* is defined as the party who makes the offer or the party who is going to pay.

2. *Demanding Party* is defined as the party who makes the demand or the party who is seeking payment.

2.1.2. Assisted Negotiation

Assisted Negotiation is a process where parties negotiate and settle their issues, disputes or grievances. In the Assisted Negotiation the technology assists the negotiation process between the disputes parties. The technology has a similar role as the mediator in mediation i.e. the role of the technology may be to provide a certain process and/or to provide the parties with specific (evaluative) advice without the direct involvement into the dispute of these two parties no matter who they are business and business or business and consumer.

Mediators or councillors use information management skills encouraging these parties of the dispute to reach an amicable agreement by enabling them to communicate more effectively through the rephrasing of their arguments. Conciliation online is very similar procedure to the mediation, but the conciliator can propose solutions for the parties to consider before an agreement is reached. It is worth mentioning that the assisted negotiation procedures are designed to improve parties' communications through the assistance of a third party or software. In fact, it has been argued that assisted negotiation, conciliation, and even facilitation, are just different words for mediation.¹⁶ The major advantages of these processes, when used online, are their informality, simplicity and user friendliness.¹⁷

2.2. Traditional Mediation Using Online Technologies

Mediation firms have established websites such as Internet Neutral¹⁸, SquareTrade¹⁹ and WebMediate²⁰ to facilitate the resolution of disputes. Although these websites rely primarily on online technologies such as e-mail, chat rooms, and instant messaging, they also incorporate more traditional communication methods into the negotiation process. Typically, a party contacts the service and fills out an online form that identifies the problem and possible resolutions. A mediator then reviews the form and contacts the other party to see if they will participate in the mediation. If the other party agrees to participate, they can fill out their own form or respond to the initial form through e-mail. This initial exchange of views may help the parties to understand the dispute better and

16 Jacobs, P. Mediation Now and Then. In: Barbee, M. P. *Newsletter, Mediation, International Bar Association Legal Practice Division*. July 2007, p.14.

17 Motion, P. Article 17 ECD: Encouragement of Alternative Dispute Resolution. On-line Dispute Resolution: A View from Scotland. In: *The New Legal Framework for E-Commerce in Europe*. Oregon and Portland: Hart Publishing, 2005, p. 145.

18 See Internet Neutral [interactive]. [accessed 12-05-2011]. <<http://www.internetneutral.com>>.

19 See SquareTrade [interactive]. [accessed 12-05-2011]. <<http://www.squaretrade.com>>.

20 See WebMediate [interactive]. [accessed 12-05-2011]. <<http://www.webmediate.com>>.

possibly to reach an agreement. If the dispute remains unresolved, the mediator will work with the parties to help determine issues, articulate interests, and evaluate potential solutions.

2.3. Adjudicative Methods

2.3.1. Online Arbitration

Arbitration is usually defined as a process where a neutral third party (arbitrator) delivers a decision which is final, and binding on both parties. It can be also defined as a quasi-judicial procedure because the award replaces a judicial decision. However, in an arbitration procedure parties usually can choose the arbitrator and the basis on which the arbitrator makes the decision. Furthermore, it is less formal than litigation, though more than any other consensual process. It is often used to resolve businesses' disputes because this procedure is noted for being private and faster than litigation. Once the procedure is initiated parties cannot abandon it. Another feature of arbitration is that the award is enforceable almost everywhere due to the wide adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²¹

Online arbitration is called cyber-arbitration, cybitration, cyberspace arbitration, virtual arbitration, electronic arbitration or arbitration online techniques have attracted the interest of legal scholars since the middle of nineties.²² Some authors have emphasized the distinction between arbitrations used to resolve disputes that arise online and offline, and tended to narrow the scope of the term online arbitration only as it has been in the past. Authors of this article think that also consumer disputes that arise offline or as it are called "old fashion disputes" may be submitted to the online arbitration by the exchange of mails, messengers and through other possible electronic communication means and then by virtue of the consent of parties resolved with the large involvement of diverse online techniques. Thus, following this line and perspective online arbitration is understood as a broader and more efficient way to solve arising disputes both in virtual and online space. The only difference is that this procedure is conducted at least partly using electronic means related to the advancement Internet connection can provide.

Currently, most arbitration providers allow parties to carry out online only part of the arbitration process, e.g. parties may download claim forms, the submission of documents through standard email or secure web interface, the use of telephone hearings etc.²³

21 The New York Convention has currently more than 150 signatories [interactive]. [accessed 12-05-2011]. <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html>; Cf. Matthews, J. M. Consumer Arbitration: Is it Working Now and Will it Work in the Future? *The Florida Bar Journal*. 2005, 79: 1.

22 Schultz, T. Online Arbitration: Binding or Non-Binding? [interactive]. *ADR online Monthly*. 2002, 11 [accessed 12-05-2011]. <www.ombuds.or/center/adr2002-11-schultz.html>.

23 Ponte, L.; Cavenagh, T. *Cyberjustice, Online Dispute Resolution for E-Commerce*. New Jersey: Parson Prentice Hall, 2005, p. 84; European Commission, SANCO, The Study Centre for Consumer Law, Centre for European Economic Law Katholieke Universiteit Leuven, Belgium. *An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings*.

3. ODR in the European Union

In 1999 the OECD has published “Guidelines for Consumer Protection in the Context of Electronic Commerce.”²⁴ These guidelines encourage businesses, consumer representatives and governments to work together to provide consumers with meaningful access to fair and timely alternative dispute resolution and redress, without undue costs or burden. Special attention is given to cross-border transactions. Special emphasis is placed on the innovative use of information technologies in implementing ADR systems.²⁵

The EU has addressed this issue in the European “Directive on electronic commerce” (98/0325 (COD)).²⁶ The first part of article 17 of the directive states: “Member States shall ensure that, in the event of disagreement between an Information Society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, ‘including appropriate electronic means’”. In March of 2000 an EU Workshop on out-of-court dispute settlement systems for e-commerce was held in Brussels. This resulted in a report that also addresses online variants of dispute settlement in an e-commerce environment.²⁷

Lately the European Commission is more and more active on ODR. The development of ODR has been included among the actions of the European Commission’s Digital Agenda.²⁸ On page 13 of this Agenda, it is mentioned: “Explore by 2011, via a Green Paper, initiatives on consumer Alternative Dispute Resolution in the EU with a view to making proposals for an EU-wide Online Dispute Resolution system for eCommerce transactions by 2012.”

Similarly, in the European Commission’s work programme it is mentioned that one of the tasks of the European Commission is to “develop an EU wide strategy to improve ADR systems and propose an EU wide online redress tool for e-commerce transactions by 2012 to improve access to justice online.”

The United States National Report, Leuven, January 2007. p. 7. Currently the AAA provides Webfile and Neutrals’ eCentre web-based platform to parties and neutrals for the management of the procedures [interactive]. [accessed 12-05-2011]. <www.adr.org>; See Davis, B. Symposium Enhancing Worldwide Understanding through Online Dispute Resolution: Walking Along in the Mission. *The University of Toledo Law Review*. 2006, 38: 2.

24 Guidelines for Consumer Protection in the Context of Electronic Commerce [interactive]. [accessed 12-05-2011]. <http://www.oecd.org/document/51/0,2340,fr_2649_34267_1824435_1_1_1_1,00.html> (under electronic commerce).

25 The Guidelines for Consumer Protection in the Context of Electronic Commerce, principle VI under B (sub iv).

26 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’). *Official Journal* L 178, 17/07/2000, P. 0001-0016.

27 *Out-of-court dispute settlement systems for e-commerce. Report of an exploratory study*, supra note 1.

28 A Digital Agenda for Europe [interactive]. [accessed 12-05-2011]. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245R%2801%29:EN:NOT>>.

In proposing the new EU-wide system we should try to encourage and promote the development of a new global ODR e-commerce system of which the EU-wide ODR would be an integral part. Internet is global and e-commerce is becoming more and more global as well. It would be very difficult to meet the requirements of the key players (i.e. businesses and consumers, for cheap and efficient multi-lingual cross-border ODR, easy to use by businesses and consumers and encouraging global cross-border commerce) if the ODR system is built as European-only or American-only or Asian-only.

Multi-lingual EU with its long tradition of ADR/ODR and established network of national consumer organizations and recognized ADR/ODR providers can actively contribute to the establishment of the global ODR system.

It seems that the current European, American and other initiatives related to ODR which have been discussed broadly on this website—e.g. in a detailed manner in the preceding blog by Vikki Rogers and Christopher Bloch may-can-should be merging into a single flexible but robust global initiative.

3.1. Online Dispute Resolution in EU Member States

Authors of this article exercised the survey in order to clarify how many and what type of alternative dispute resolution systems exist in EU Member States. From responses to the presented questionnaire it is possible to state that in 12 European Union Member States: Sweden, Slovenia, Slovakia, Czech Republic, Romania, Norway, Luxemburg, Latvia, Ireland, Cyprus, Belgium and Lithuania, there is no such option for online dispute resolution or ODR system. However Germany, Italy, Netherlands and Austria have and use alternative consumer disputes resolution systems online and use them very successfully, efficiently.

Germany. For example, in Germany using such system are exclusively settled just e-commerce nature.²⁹ It is dealing with e-commerce cases where the trader or the consumer is based in Baden-Württemberg (region in the South-West of Germany). Since 18 June 2009 i.e. date when this system was launched and started to operate till 31 December 2010 442 cases were registered. 60,19% of all these cases were so called “internal“ cases i.e. when consumer and trader live in the Federal Republic of Germany and only 39,81% of all received claims and disputes were of the cross border nature when one of the relevant persons (consumer or trader) lived and acted both in Germany and in another EU Member State. Usually such cases were transmitted from the European Consumer Centre in Germany.³⁰ Even 72,66% of all cases were settled in this system very successfully. Usually the value of the claim varies from 50 to 100 Euros, but in some cases there are and some extremely interesting cases when the consumer applied and for 2,4 Euros damage. The maximum value of the claim registered in the ODR system was 3399 Euros. It is less time consuming method, because the average term for the dispute settlement is 49 days.

29 Der Online Schlichter [interactive]. [accessed 12-05-2011]. <<https://www.online-schlichter.de/de/index.php>>.

30 European Consumer Center [interactive]. [accessed 12-05-2011]. <<http://www.eu-verbraucher.de/en/>>.

Italy. Italian alternative dispute resolution system online is available even in 24 different languages as well and in Lithuanian.³¹ This system has been created by the Chamber of Arbitration of Milan. It is designed for the settlement of disputes between clients and (or) companies in their trade conflicts, giving the priority to the claims related to the internet and e-commerce. Disputes can be solved independently from the nationality of the dispute's parties or value of the dispute object value. The mediator or councillor in majority of cases does not have to decide who is right and who is wrong. He or she simply helps, assists the dispute parties to find the common agreement and works with them in order to seek and find the contract between these persons.

Procedure is divided into these bellow listed phases:

3.1.1. Activation

In order to start the procedure the interested party has to fill in a form presented in the website and sent it to the Administrative bureau via internet. After that the Administrative bureau seeks to reach another party of the dispute as soon as it is possible inviting to meet and start the consolation procedure within 15 days period after this electronic invitation—e-mail is received. If another party agrees to participate in the online dispute resolution procedure the Administrative bureau in due time informs the applicant about that and selects the mediator or conciliator for this dispute. On the other hand of another pat of the dispute does not agree to participate in the alternative dispute resolution online the procedure is finished and the plaintiff can use or try other legal remedies.

3.1.2. Behaviour

Parties represent in the procedure themselves. They can be advised and assisted by consultants, lawyers or other persons. If the parties decide that they must be represented by a third party, the parties shall forward the documents to the Administrative bureau, which approves the powers and legal obligations of the representative and his or her identity. The parties must comply with the requirements and requests of the online mediator and his instructions for the procedures in its fulfilment. Online mediator who is involved in the conciliation shall have the right to communicate with each party individually and confidentially. If the parties request so, the mediator may make recommended original contract projects.

3.1.3. Conclusion of the Procedure

Procedure is finished in one of these bellow mentioned ways:

- a) Counsellor or Administrative bureau thinks that further actions are not necessary or useful;
- b) when both sides reach the agreement.

31 Risolvionline [interactive]. [accessed 12-05-2011]. <http://risolvionline.com/?lng_id=36>.

If the agreement is successfully reached there document is prepared and signed by these two parties and sent by fax or by post to the Administrative bureau.

3.1.4. Confidentiality

The Chamber of Arbitration of Milan guarantees confidentiality during the online dispute resolution procedure. Administrative bureau and online participating mediator is obliged not to disclose information he received during the online dispute resolution procedure to the third parties. Parties are obliged not to disclose facts, circumstances and other relevant information they received during the online dispute resolution procedure to the third parties and not to do or not to make copies in all possible formats of such communication. The obligation of confidentiality shall be valid only if, when both sides participating in the dispute resolution procedure express their agreement in a written form. Further more, parties of the dispute commit not to use any information they have obtained during this alternative mediation and reconciliation procedure in other legal actions or processes and not to invite the party (usually it could be the mediator or conciliator) of the online dispute resolution procedure to witness about some circumstances or facts, related to the online dispute resolution and its object.

The expenses of the procedure are proportional to the value of the claim according to the list of prices. For example, if the value of the dispute's object is up to 500 Euros, you can be requested to pay 25 Euros; if your object is worth more than 250 000 Euros—3000 Euros. It is necessary to pay for the provided assistance and procedure when the counsellor is able to reach another party of the dispute and he or she agrees to participate in the dispute's resolution procedure. In to the price of the service are included all expenses, payment to the mediator and added value tax.

Within 2010 Italian alternative dispute resolution system online received 151 disputes and claims between consumers and traders (B2C), 15 business-to-business (B2B) claims. Talking about the nature of them, 80 of all disputes had a national nature and 86 disputes were cross border cases.

3.2. The European Small Claims Procedure

Talking about other initiatives in the field of a better and faster consumer disputes settlement it is worth mentioning the European Small Claims Procedure which is an alternative method of commencing and dealing with civil and commercial matters in respect of a small claim in cross-border cases. It is provided for in Regulation (EC) No. 861/2007.³² A cross-border case is one where at least one of the parties lives in a Member State of the European Union (excluding Denmark) other than the Member State of the Court dealing with the claim.

The service will be provided in Ireland through the District Court by the District Court Clerk, called the Small Claims Registrar (“the registrar”). You cannot make a European

32 Regulation 861/2007/EC of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. *Official Journal* L. 199, 1.

Small Claim on-line. The procedure will be mainly dealt with by correspondence although a hearing before a court can be held if the court thinks it is necessary.

Where possible, the registrar will negotiate a settlement without the need for a court hearing. You do not need to involve a solicitor. It is applicable in all EC Member States from 1st by January 2009. The European Small Claims Procedure, for which no lawyer is necessary, follows a series of steps:

Filing the claim. To file a claim for a sum less than Euro 2 000, the claimant fills in a standard claim form (Form A, provided in Annex I to the Regulation), giving details of the claim, the sum demanded, etc., and lodges it with the competent court by any means of communication acceptable to the Member State in which the action is taken. If the claim is outside the scope of the Regulation (see below), the court will notify the claimant to that effect; if the claim is not withdrawn, the court will proceed with it in accordance with the relevant applicable procedural law in that Member State.

Correcting and/or completing the claim form. If the claimant has not provided enough information, the court will send him a Form B (Annex II) asking for the missing information. The claim will be rejected if the claimant fails to complete or correct the claim in the time specified, or if it is manifestly unfounded or inadmissible.

Notifying the defendant. Once the court has received the properly filled in claim form, it prepares a standard answer form (Form C, Annex III). This, together with a copy of the claim and, where applicable, the supporting documents, is served on the defendant by post with dated acknowledgement of receipt within 14 days.

The defendant replies within 30 days. The defendant then has 30 days to prepare and return his response, counting from the date of service of the answer form.

The defendant's response is forwarded to the claimant. Within 14 days of receiving the defendant's response, the court forwards a copy of it to the claimant, with any relevant supporting documents.

Any counterclaim submitted by the defendant (using Form A) is served on the claimant in the same way as the original claim was served on the defendant (see above). The claimant has 30 days to respond. If the sum of the counterclaim is more than Euro 2 000, both claim and counterclaim will be dealt with in accordance with the relevant procedural law applicable in the Member State in which the action is taken (and not in accordance with the European Small Claims Procedure).

Judgment is given in 30 days. The court must give judgment within 30 days of receipt of the response from the defendant (or claimant, if there is a counterclaim). It can, however, decide to ask for further information (the parties have 30 days to reply) or to take evidence in the matter or to summon the parties to an oral hearing (within 30 days: see also below); in these cases, the court gives its judgment within 30 days of receiving the information or holding the hearing. If the parties do not reply in time, the court will still give its judgment. Judgments are recognised and enforced in the other Member States, and cannot be reviewed as to substance in the Member State of enforcement. At the request of one party the court will issue a certificate of judgment (without further cost), using Form D (Annex IV).

Taking evidence. The court determines the extent of the evidence necessary for its judgment and the means of taking it, using the simplest and least burdensome method.

Enforcement of the judgment. This is governed by the law of the Member State in which the judgment is enforced. The party seeking enforcement produces an original copy of the judgment, and of the certificate (Form D) translated by a qualified person into the language, or one of the languages, of the Member State of enforcement. The party is not required to have an authorised representative or a postal address in the Member State of enforcement, other than with agents competent to carry out the enforcement procedure. The authorities cannot require any security, bond or deposit on the grounds that the claimant is a foreign national or is not domiciled or resident in the Member State of enforcement.

In terms of the online dispute resolution methods, great expectations are put on the ESCP, which in order to deliver a cost effective process will have to rely on ICT. This will be a significant challenge, because unlike the UDRP, which is becoming a fully online process for dealing with specific complaints, the ESCP will deal with a variety of civil and commercial disputes. The objective of the ESCP is the creation of a cost efficient procedure applicable to small value claims in cross-border disputes. This objective could only be achieved by using a written procedure, assisted by electronic forms such as emails and videoconferencing as foreseen by the ESCP.³³

The Regulation allows the use of new technologies in transferring information and evidence between the courts of the different member states. But, it will be the EC Member States who will decide, through their own regulations, which specific means of communication are acceptable in their courts. Given that the ESCP is a regulation and not a directive, it is arguable whether it has left too many aspects to the discretion of member states, which could call into question the legal certainty expected from a European regulation. Nevertheless, it can be expected that, in due time, electronic communications will reach every possible and reasonable aspect of the judicial procedure to assist in the resolution of online as well as off-line B2C disputes.

Many disputes can be solved by judges communicating with parties through the Internet. It is expected that the ESCP will contribute to mitigate the legitimacy problem which also hampers the emergence of ODR. Perhaps, within the EU, where we have concern for the fairness of private procedures (i.e. restrictions in consumer arbitration) the ESCP may contribute to increase trust in ODR processes.³⁴

4. Advantages of the ODR

As with traditional mediation, online mediation allows the mediator to adapt the process to address the particular needs of the disputants.³⁵ In addition to enhancing some of the benefits of traditional mediation, there are also advantages to resolving disputes

33 Cortés, P. Does the Proposed European Procedure Enhance the Resolution of Small Claims? *Civil Justice Quarterly*. 2008, 27(1): 94–95.

34 *Ibid.*, p. 97.

35 Lide, E. C. ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation. *Ohio State Journal on Dispute Resolution*. 1996, 12: 208.

over the Internet: “The process will allow for greater flexibility, more creative solutions and quicker decisions.”³⁶ In particular, the benefits of cyber-mediation discussed below include cost savings, convenience and the avoidance of complicated jurisdictional issues.

Cost Savings and Convenience

As with traditional mediation, a benefit of mediation over the Internet is that it can provide substantial savings when compared with traditional litigation, which can be extremely costly.³⁷ In fact, cyber mediation may be the only feasible option for individuals who are unable to afford travelling long distances, or for those involved in e-commerce disputes for low dollar amounts.³⁸ Perhaps the most recognized benefit of online mediation is that the disputants do not have to travel lengthy distances to negotiate.³⁹ Since online disputes can arise between individuals from great distances, and even different countries, at least one of the parties will be required to travel far if they decide to rely on a traditional dispute resolution procedure. Since parties can participate in cyber-mediation from their respective business locations or residences, this may lead to reduced costs and the expenditure of less time. There is no need to rent a neutral facility to conduct the mediation and relevant documents and materials are readily available and do not have to be transported great distances.⁴⁰

Concluding above mentioned facts it could be said that a key advantage of resolving disputes through the use of cyber-mediation is that it avoids the issue of whether a particular court has jurisdiction over the dispute. Since disputants can bind themselves to resolution through an agreement, jurisdictional issues can be avoided altogether.⁴¹

5. Disadvantages of the ODR

“Electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation.”⁴²

Impersonal. “There is almost universal agreement that mediation is most effective if the parties to the dispute are physically present before the mediator.”⁴³ The principal practical criticism aimed at ODR involves the lack of face-to-face encounters. “There is richness in face to face meetings because interaction can occur quickly and spontaneously and often on a non-verbal level.”

36 Lide, E. C. ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation. *Ohio State Journal on Dispute Resolution*. 1996, 12: 219.

37 Friedman, G. H. Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities. *Hastings Communications and Entertainment Law Journal*. 1997, 19: 712.

38 Gibbons, L. J.; Kennedy, R. M.; Gibbs, J. M. Frontiers of Law: The Internet and Cyberspace: Cyber-mediation communications Medium Massaging the Message. *New Mexico Law Review*. 2002, 32: 42.

39 Bordone, R. C. Electronic Online Dispute Resolution: A Systems Approach – Potential Problems and a Proposal. *Harvard Negotiation Law Review*. 1998, 3: 176.

40 Gibbons, L. J.; Kennedy, R. M.; Gibbs, J. M., *op cit*.

41 Lide, E. C., *supra* note 35, p. 200.

42 Eisen, J. B. Are We Ready for Mediation in Cyberspace? *BYU Law Review*. 1998, 4: 1308.

43 D’Zurilla, W. T. Alternative Dispute Resolution. *Los Angeles Business Journal*. 1997, 45: 352.

Negotiations are certainly more effective when the parties are able to communicate with one another freely. For example, helping parties to listen and understand concerns, empathize with each other, vent feelings and confront emotions is considered to be an important part of mediation.

Limited Range of Disputes. Some disadvantages are specific to the method of cyber-mediation chosen. For example, fully automated cyber-mediation can only be used to resolve specific types of disputes and, even then, can only handle disputes where the amount of the settlement is the only unresolved issue. In fact, for fully automated cyber-mediation to work properly, it would seem that the parties would need to have undertaken initial discussions, agreed to the basic facts surrounding the dispute and have determined that one of the parties is responsible for damages. The parties would then seemingly have to have agreed to limit further discussions to the single issue of an appropriate amount of monetary compensation. Limiting the final stage of negotiations to determining a dollar figure for compensation seemingly leaves out the possibility for innovative, interest-oriented, out-of-the-box negotiating that is the hallmark of many successful negotiations.

Potentially Inaccessible. Access to online computers may pose a problem for some individuals, especially those involved in disputes that result from off-line transactions.⁴⁴ Continuous Internet access for the length of time it takes to resolve a dispute (which may vary from hours, to days, to weeks) may also pose a problem for those with limited access or those who would find doing so uncomfortable or inconvenient. It may also disadvantage those who are less familiar with computers and their use or those who are incapable of undertaking detailed written communications.

Confidentiality Concern. Whereas traditional mediation does not create a physical record, online mediation creates an electronic record.⁴⁵ This could potentially enable a party to print out and distribute e-mail communications easily and without the knowledge of the other party.⁴⁶ This may hinder the development of open and honest exchanges in cyber-mediation.⁴⁷

Cross-cultural issues. Language barriers are also challenging in a cross-cultural context whether it be in traditional ADR or an ODR. Some expressions or idioms may not translate correctly from one party in one country to someone in another. The impact of an email can also be underestimated. "Somebody may dash off quickly an email message without thinking but recipient can take the message very seriously. This can create misunderstandings and even full blown arguments."⁴⁸ Online negotiators/mediators/arbitrators need to be aware of that and if they do not speak the languages involved, they should be assisted by professional translators. But working a dispute through a translator tends to be more complicated. Cultural differences are also an issue in international disputes. This is especially true in business-to-consumer dispute

44 Eisen, J. B., *supra* note 42, p. 1336.

45 Katsch, M. E. Dispute Resolution in Cyberspace. *Connecticut Law Review*. 1996, 28: 971.

46 *Ibid.*, p. 971–72.

47 *Ibid.*, p. 971.

48 Helie, J. Technology creates opportunities and risks [interactive]. [accessed 12-05-2011]. <<http://www.mediate.com/articles/helie2.cfm>>.

resolution. In her paper Nora Femenia⁴⁹ infers that collective high context societies such as Italy, Japan or Mexico, have a greater need than individualistic low context societies such as the United States for maintaining a positive image (face maintenance) and therefore may not wish to participate in a process where face may not be maintained or where there is a perception of loss of face.

Conclusions

In conclusion, online dispute resolution is a recent phenomenon and will likely become an increasingly effective mechanism for resolving disputes as technology advances. In the future, as online video conferencing becomes increasingly available, it will become easier for disputants to undertake face-to-face negotiations. This will address the major claimed disadvantage of cyber-mediation: that it is impersonal. Online arbitration can be through submission of documents only or via videoconferencing—synchronous transfer of video information. There are also many providers of online arbitration, including Nova Forum, Private Judge and Word&Bond. Nowadays, there exist forty-three ODR sites from the USA, twenty from Europe, four from Canada, and five from Australia and four from the rest of the world. In total, there are 76 ODR sites.

The characteristics that have encouraged increased computer use among contracting parties are the same justifying the adoption of ODR systems. Internet is a resource that extends what we can do, and where and when we can do it. In this context, the communication tools used in online ADR have changed as online technology has developed. For example, while early online ADR sites tended to rely mainly on email, meaning that communication was text-based and insecure, the services launched in the last years use secure web sites with encryption technology. With encryption parties are given a password to access the web site area dedicated to their dispute. This allows synchronous communication through real time chat facilities. Moreover, ODR mechanisms should not be limited to disputes of cyberspace. There should not be objections to its use by companies geographically distant from each other in need of a fast, efficient, and cheap dispute settlement. To do this ODR uses the power that computer technology has, to support the storage and dissemination of information. For instance, simultaneous translation software¹⁰² can facilitate participation of multicultural companies in a real-time videoconference process. While language barriers have often blocked the engagement on both ADR and traditional adjudication procedures, ODR has the potential to ensure efficient procedures for the parties in dispute¹⁰³. In this context, ODR is meant to have an immense impact on the facilitation and organization of dispute resolution.

Disputes over the Internet are not different from disputes in the physical world. They involve people and they will use whatever mechanism for resolving their disputes

49 Femenia, N. Online Dispute Resolution and the global management of customers' complaints: how could Online Dispute Resolution techniques be responsive to different social and cultural environments? [interactive]. *Paper presented at the Joint Conference of the OECD, HCOPI, ICC, The Hague, Holland, December 2000* [accessed 12-05-2011]. <www.mediate.com/articles/femenia/cfm>.

if it meets their needs. When a field is new, such as ODR, and the road marks are few, there is often a greater need for public precedents that can show the way. But because ODR is private and contractual it cannot generate a decision which has the same strength than a court order.⁵⁰ Furthermore, like traditional ADR, it cannot bring together unwilling parties.⁵¹ Consequently, it seems that the courts will never be replaced totally by ODR as they were not by ADR.⁵²

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50 Especially in common law countries where the decision of the highest court constitutes a binding precedent.

51 In certain circumstances, courts in common law countries can deprive somebody of his or her freedom through injunction for a personal debt.

52 ADR was even influenced by the judicial decision: they follow the same path than arbitration see Fouchard, Ph., who talks about “processualisation of ADR”, Arbitrage et modes alternatifs de règlement des litiges du commerce international. In: *Mélanges en l’honneur de Philippe Kahn*. Edition Litec, 2000, p. 113.

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ALTERNATYVUS VARTOTOJŲ GINČŲ SPRENDIMAS INTERNETU

Feliksas Petrauskas, Eglė Kybartienė

Mykolo Romerio universitetas, Lietuva

Santrauka. *Vartotojų skundai ir jų pobūdis kinta kasdien ir labai greitai. Šį reiškinį lemia tai, jog elektroninė prekyba yra skatinama ir reklamuojama labai gausaus suinteresuotų asmenų būrio, tokių, kaip Europos Komisija, vartotojų organizacijos, kompetentingos nacionalinės institucijos ir verslo sektorius, siekiant pagrindinio ir vieno svarbiausių Europos Sąjungos tikslų – vartotojų pasitikėjimo verslo sektoriumi bei tinkamo ir efektyvaus Europos Sąjungos vidaus rinkos veikimo. Nevalia pamiršti ir trečiųjų šalių svarbos. Verslo partneriai ir potencialūs pardavėjai, iš kurių ES vartotojai gali įsigyti prekes ir paslaugas elektroninės prekybos būdu, taip pat yra svarbūs. Tačiau būtina pažymėti, kad nėra teisinių santykių ar veiksmų, kuriuose nekiltų ginčų ar nesusipratimų, todėl yra ieškoma patogiausių, greitų, pigių ir priimtinausių ginčo šalims ginčo sprendimo priemonių. Dėl šios priežasties šiame straipsnyje pateikiamas bendrasis požiūris į elektroniniu būdu sudarytus sandorius ir vartotojų teisių apsaugą šioje srityje, galimus ginčų sprendimo internetu (GSI) būdus, priemones ir metodus, jų taikymo patirtį pasaulyje ir ES valstybėse narėse. Šio straipsnio autoriai taip pat išreiškia susirūpinimą dėl situacijų, kai pasireiškia teisinis netikrumas ir nėra aišku, kurios valstybės jurisdikciją ar teisę reiktų taikyti virtualioje erdvėje sudarytų sandorių metu kilusiems ginčams spręsti, kaip spręsti brangaus teismo proceso klausimus verslas vartotojams (B2C) elektroninės prekybos santykiuose. Alternatyvi priemonė – ginčų sprendimas internetu yra viena iš patraukliausių galimybių ar priemonių, galinti pašalinti ar bent jau sumažinti šiuos minėtus nepatogumus bei problemas, šalims sprendžiant ginčą tiesiog naudojant*

atitinkamas technologijas, taikant mediacijos ar arbitražo metodus ir principus arba juos sujungiant į vientisą visumą. Dėl visų minėtų veiksnių ginčų sprendimo internetu metodas yra laikomas vienu iš patraukliausių ir perspektyviausių.

Reikšminiai žodžiai: *vartotojas, prekybininkas, verslo sektorius, alternatyvus ginčų sprendimas, ginčų sprendimas internetu, arbitražas, taikinimas, mediacija.*

Feliksas Petrauskas, Mykolo Romerio universiteto Teisės fakulteto Tarptautinės ir Europos Sąjungos teisės katedros lektorius; Valstybinės vartotojų teisių apsaugos tarnybos direktorius. Mokslinių tyrimų kryptys: vartotojų teisių apsauga, alternatyvaus ginčų nagrinėjimo procedūros.

Feliksas Petrauskas, Mykolas Romeris University, Faculty of Law, Department of International and European Union Law, Lecturer; the State Consumer Rights Protection Authority of the Republic of Lithuania, General Director. Research interests: consumer rights protection, alternative dispute resolution.

Eglė Kybartienė, Mykolo Romerio universiteto Teisės fakulteto Tarptautinės ir Europos Sąjungos teisės katedros doktorantė. Mokslinių tyrimų kryptys: Europos Sąjungos Teisingumo Teismas ir institucijos, galinčios kreiptis į jį, vartotojų teisių apsauga.

Eglė Kybartienė, Mykolas Romeris University, Faculty of Law, Department of International and European Union Law, Doctoral Student. Research interests: Court of Justice of the European Union and the bodies which can apply to it, consumer protection.