

## Online Dispute Resolution Redress Systems in Consumer Matters

Nazura Abdul Manap, Sakina Shaik Ahmad Yusoff, Rahmah Ismail and Suzanna Mohamed Isa  
Faculty of Law, The National University of Malaysia, 43600 Bangi, Selangor, Malaysia

**Abstract:** Despite the rapid developments in the field of Online Dispute Resolutions (ODR), some major issues remain to be resolved especially in regard to the types of procedure that would best address consumer disputes. Main and critical issues such as what does online arbitration mean? What is the profile of users making use of ODR? And what mechanisms are used to address business and consumer disputes? This study discusses some clarifications that may impact the choice of procedure of ODR: mediation and arbitration as well as different types of ODR. It then raises issues related to the UNCITRAL ODR WG discussions on a redress system for cross-border consumer disputes and questions whether types of disputes and potential mechanisms are not confused with one another. Finally, the European Union's Regulation on ODR for consumer disputes may be the way forward.

**Key words:** Arbitration, disputes, potential, developments, clarifications, impact

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### INTRODUCTION

The internet has spawned e-Commerce that involves huge volumes of buying and selling through web-based platforms. The volume and novelty of internet transactions has made it difficult to apply traditional litigation or court annexed alternative dispute resolution processes to address disputes cause by the use of the internet in trade and commerce.

While e-Commerce is used extensively in domestic marketplaces, its cross-border counterpart has not grown as significantly. This could be due to the lack of regulations for such cross border transactions and the unsuitability of traditional court-based processes thus depriving consumers of efficient means of redress in disputes. As such, out of court means of redress on the Internet has led to the emergence of Online Dispute Resolution (ODR) as a logical solution to the number of small value disputes occurring daily (Katsh, 2012). Alternative processes to handle online disputes called ODR have arisen and refer to the use of Alternative Dispute Resolution (ADR) mechanisms on the internet (Blake *et al.*, 2012).

ODR involves three basic stages. At the initial stage, the parties agree to talk to one another electronically and in doing so, obviate issues such as venue, choice of applicable law, recognition of judgments, personal jurisdiction and travel inconvenience will be discussed. Moreover, the parties would agree to use ODR to resolve their dispute. Once the parties have agreed to ODR, the buyer completes an online form which includes a checklist

of types of claims (Which could include: Non-delivery of goods or non-provision of services, late delivery of goods or late provision of services, vendor sent wrong quantity, delivered goods were damaged, delivered goods or provided services were improper, vendor made misrepresentations about goods, vendor did not honor express warranty or vendor improperly charged or debited buyer's account) (Philippe, 2014).

Consumer redress in e-Commerce has been debated since 2000 by several organizations such as the Organization for Economic Co-operation and Development (OECD), the Hague Conference on Private International Law (HCPIL), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) and Consumers International. However, no consensus between the various stakeholders has yet been achieved on the appropriate system for handling low-value, high-volume claims. Despite, the developments in ODR there still remain issues on the most appropriate mechanism for handling procedures involved in consumer disputes (Rule *et al.*, 2010).

Since, 2010, UNCITRAL has been attempting to formulate rules to resolve low value, high volume cross-border consumer disputes, although an acceptable set of rules or model to be used in a private dispute resolution context are far from being attained. Even though emphasis was on the need for consumer disputes redress, the discussions moved to businesses and consumers or to conciliation and arbitration. On other occasions, it was suggested that no mention of B2B, B2C

or C2C or of consumer and business be made to avoid issues on defining parties and that “most consumers would choose to proceed by way of ODR rather than the costly and less attractive route of litigation in the courts”. This shows again that contributors were aware of the fact that consumers are a different species and so are the disputes involving them.

On the other side, the European Union (EU) parliament recently passed a regulation requiring its member states to make ODR available for cross-border dispute resolution within the ambit of the European Single market. Although, it will feature a single platform to initiate claims, most of the dispute resolution processes will be based on systems administered by private organizations or “ODR Entities”. Both initiatives try to implement a global framework for ODR which is challenging considering the disparities in the legal systems of individual countries especially in consumer law (Hanriot, 2015). The following study will elaborate on the definitions of ODR and its different types as well as its position in a comparative perspective in both the US and EU.

## ONLINE DISPUTE RESOLUTION

**What is online dispute resolution?** Online Dispute Resolution (ODR) uses alternative dispute resolution processes to resolve claims or disputes arising from online, e-Commerce transactions or those not involving the internet, called an “offline” dispute. It is an alternative to the traditional legal process that usually involves a court, judge and possibly a jury and parties can resort to mediation, arbitration and negotiation. The internet can be used for this purpose in a variety of ways. ODR can be done entirely on the internet or “online,” through email, videoconferencing or both. The parties can also meet in person or “offline” or use a combination of both. Some e-Commerce companies provide ODR as a service to customers while many organizations online dispute resolution providers (ABA, 2002) offer such services for consumers and e-Commerce businesses.

**Different type of online dispute resolution:** There are various types of ODR and are briefly described. Generally, ODR supplements existing ADR methods as it is believed that they can resolve certain disputes quickly and adequately via the internet. Currently, there are four types of ODR systems namely, online settlement, online arbitration, online resolution of consumer complaints and online mediation. Of these, online settlement and online mediation are currently the most advanced (Anonymous, 2016a, b).

**Online settlement:** Online settlement of financial claims is already very well developed in the most countries such as US. Although, not a form of ODR, it is however the most developed form of online dispute resolution in the strict sense. The first website to offer such settlement of financial claims was Cybersettle followed by Clicknsettle. The former offers online settlement of insurance claims while the latter provides for settlement of monetary disputes through expert systems. The systems are such that parties remain unaware of the amounts being claimed or offered. An expert system matches double-blind offers and demands. The Cybersettle system allows claims representative to make three offers which the plaintiff can counter with three demands. Clicknsettle offers parties the possibility of submitting as many offers or demands during a 60 days period. Both sites guarantee the confidentiality of the transactions. Any dispute that satisfies an agreed-upon formula leads to the claim being automatically settled at a median amount. If no settlement is reached, parties can still negotiate without prejudice as they do not know the amounts involved during the settlement procedure. These websites help shorten the negotiation or litigation process and reduce expenses. Newer sites like ussettle and settlesmart apply similar concepts and mechanisms.

**Online arbitration:** Online arbitration works more with the internet corporation for assignment names and numbers. The ICANN has accredited e-Resolution for the settlement of disputes online based on its Uniform Domain-Name Dispute and Resolution Policy. Parties' claims will be handled by the arbitrator according to ICANN policy (Anonymous, 1999) and rules (Anonymous, 2016) and e-Resolution's own supplemental rules (Anonymous, 2013). After the parties have made their case, the arbitrator will issue a legally binding decision. Anyone registering a domain name is bound by the ICANN rules as they incorporated into the registration agreement which establishes the terms and conditions governing the dispute. The cybersquatting phenomenon and more generally, web conflicts per se are directly linked to the tremendous increase in e-Commerce.

**Online resolution of consumer complaints:** The Central Better Business Bureau (CBBB) handles online consumer complaints issues in the US and More than 132 Better Business Bureaus are part of the CBBB. The first Better Business Bureau was founded in 1912 and the BBB system of ADR to resolve consumer/business issues problems offline has been evolving since then (Underhill *et al.*, 2000). The CBBB's vast offline experience with ADR and its almost total name-recognition has facilitated its steps towards ODR through BBB

OnLine. However, while complaints can be submitted online cases are not yet handled completely online (Underhill *et al.*, 2000). Following receipt of a complaint, BBB OnLine will seek simple conciliation by approaching the right person within a company to help resolve the issue. If conciliation does not work, a simplified mediation process ensues through e-mail and telephone. If these informal, semi-online efforts do not lead to resolution, more formal options such as face-to-face mediation and several arbitration programs will be initiated (Underhill *et al.*, 2000).

**Online mediation:** The online possibilities for mediation have attracted much attention in the US while Europe has its Dutch e-Mediation and British e-Mediator initiatives. Researchers opt for online mediation over online arbitration as the latter encounter much difficulty in obtaining cases as disputants are not keen to consent to an arbitrator's decision making authority (Underhill *et al.*, 2000). This could also be the reason why there have been many successful launchings online mediation initiatives. Offline mediation requires face-to-face meetings while its online counterpart occurs in virtual reality allowing for the process to be employed on an international basis by using secure encrypted email or chatrooms or video conferencing. The Centre for Information Technology and Dispute Resolution of the University of Massachusetts is currently finalizing "The Third Party", a suite of software applications that will enhance the ability of parties and mediators to interact online. The system is provided by the mediator or in most case the mediation organization.

#### **ODR IN THE UNCITRAL ODR WORKING GROUP**

It is undeniable that issues on electronic communication transactions differ from purely business ones and classical arbitration does not feed in well with low-value, high-volume disputes (Philippe, 2014). The UNCITRAL ODR WG was entrusted with the drafting of generic rules for a global ODR system in low-value, high-volume, B2B and B2C cross-border disputes. The generic rules aim at providing a uniform template for easy understanding by consumers on the modalities to be followed and to better appreciate the mechanism for resolving disputes. The reports of the UNCITRAL ODR WG reveal a complicated process involved in simple, small-value, consumer disputes or refer to classical arbitration procedures. They seem to deviate from the original intention of offering consumers redress at low or no cost without having to resort to legal assistance. To address low-value, high-volume consumer disputes, there is clearly no need to merge pure business disputes with

consumer disputes and handled in a similar manner. UNCITRAL has agreed to establish a working group to develop ODR in cross-border electronic commerce transactions including Business-to-Business (B2B) and Business-to-Consumer (B2C) transactions. This is aimed at addressing the inadequacies of traditional judicial avenues for dispute settlement and to improve redress facilities by encouraging the use of ODR.

According to the UNCITRAL ODR WG, ODR means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology and an ODR platform is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR and which is designated by the ODR provider in the ODR proceedings. As such, whatever the mechanism and as long as information technology is used the service offered dispute settlement is ODR.

More specifically, the Working Group III (ODR) is responsible for developing a new legal framework to support the use of ODR. It has already developed a draft model set of procedural rules (rules) to deal with high-volume low-value cross-border disputes. The rules propose a tiered procedure beginning with negotiation and advances to the appointment of a neutral third party as a conciliator/facilitator subject to parties' agreement and unresolved disputes will be addressed through binding arbitration. This ODR procedure will be activated when both parties agree to it in their contractual agreement (Cortes and Rosa, 2013). The rules have been drafted for the resolution of transactions conducted through electronic communications particularly the sale of goods and provision of services including B2C and B2B deals.

The ODR WG deems consumer disputes submitted to state courts are difficult to handle due mainly to the low-value, high-volume claims and the high costs of litigation in relation to the transaction value. Consumers generally expect a consumer-friendly service and interface as well as to proceed seamlessly through online processes. eBay provides a good example of such a process to redress consumer complaints. The various protagonists may not act on the same basis especially since they come from varying backgrounds and cultures.

Further, the current draft procedural rules are clearly defined in the preamble as being the UNCITRAL ODR rules intended for use in the context of cross-border, low-value, high-volume transactions conducted by means of electronic communication. Hence, the rules for

business and consumer disputes should differ. Business disputes are usually of a higher value and involve parties that may be familiar with arbitration and not concerned by an ODR redress system designed for consumers.

The same applies to the enforcement of arbitral decisions. Although, arbitration may remain open for consumers such arbitration is unlikely to come to pass due to the high costs and amount of time involved as well as ensuring enforcement of decisions. Incidentally, the statement that it was generally agreed that ODR arbitral decisions should be final and binding with no appeals on the substance of the dispute is surprising as the arbitral decision principle applies to arbitral decisions whether conducted on-or off-line.

**What mechanisms are adapted to business disputes and consumer disputes?** As highlighted above, consumer and business disputes seem to be treated similarly although the issues are different. It is recommended that straightforward consumer disputes be solved through mediation rather than arbitration while that for business disputes both means can be employed.

In B2B disputes, the mechanism used under arbitration is usually based on the set of arbitration rules, like the ICC. The dispute resolution clause is normally negotiated by the institution to which the dispute is submitted or by an ad hoc arbitral tribunal. The procedures may last between a few months and a few years, may be costly and involve lawyers and end with an award.

Consumers, however, do not need such long and complicated procedures and may not follow up with the complaint if subject to such hurdles, rendering useless the redress system or worse, making them wary of using online transactions (Cortes, 2010). And even, in a case where the dispute resolution clause in the general conditions required the consumer to submit disputes to the ICC, a state court ruled that it was unconscionable and could not be imposed on consumer contracts.

As a result, arbitration is probably not the process desired for small-value, straightforward disputes requiring swift settlement. If arbitration is used, there is no need to create a new process as some of the contributors of the UNCITRAL ODR WG seem to suggest as such institutions already exist and have in place the necessary procedures. However, if the proposal is to offer a centralized system proposing mediation and arbitration to consumers with the possibility to file their claims and conduct the procedure online, then generic rules can be used for mediation as well as arbitration procedures. The latter may employ the simplified procedures used in small claims as offered by some arbitration institutions or a two-tiered procedure beginning with mediation can be offered. If mediation and arbitration is to be used, the

issue that needs to be addressed is whether the centralized system will be an ODR provider handling consumer disputes under both types of mechanisms or if it will act as a clearing house where disputes will be transferred to existing ODR providers who will apply generic mediation and arbitration procedure rules (Philippe, 2014).

**Are procedural issues for disputes resolved through mediation similar to those resolved through arbitration?**

Differences also arise when contributors and actors discuss issues such as choice of court, applicable law, place of arbitration and enforceable award. For arbitration, there is no difference whether the procedure is conducted online or offline as the choices will be interpreted the same way. The only benefit is that the online environment offers swift communications and instant access to information. As for mediation, there should be no debate over the same issues.

What is key is the redress mechanism offered to unsatisfied consumers whether it is assisted negotiation, automated mechanism or something else. Issues in consumer disputes are more of facts than law and where decisions are based on solutions that may be standard and adapted to typical problems.

If the discussions are about mediation, the decision rendered is not offered by an arbitrator overseeing the process and may not be binding on the consumer like an award and the consumer retains the right to submit a dispute to court. The purpose of an ODR redress system is to avoid overloading the courts with low-value, high-volume disputes and to bypass lengthy and costly proceedings. As consumers usually do not use this path efforts should be concentrated on offering ODR users friendly and fair redress mechanisms. This is offered to online consumers in Europe and is elaborated as.

**ODR IN EUROPE**

The European Union (EU) seeks to create an internal borderless consumer market with the free movement of goods and services. Nevertheless, almost twenty percent of consumers experience problems in such cross-border purchases of goods and services within the entity which it is hoped it decreases down by launching up the new platform for consumer redress. Efforts have been made to ease court procedures through simplified and less expensive processes for consumers in small claims. Among the measures is the introduction of legislation, namely Directive 2013/11 on consumer ADR and Regulation No. 524/2013 on ODR for consumer disputes. Both apply to domestic and cross-border situations even though it will be particularly useful in cross-border electronic commerce (e-Commerce). These

new legislations aim at providing low-cost, speedy dispute resolution to consumers and traders without recourse to the courts. All contractual disputes with traders are eligible except those related to health and higher education, irrespective of whether the product or service is purchased domestically or across borders, provided it is purchased online.

The European Commission established a European Online Dispute Resolution platform (ODR platform) aimed at assisting consumers having problems with their online purchase. The Consumer ADR directive provides for the establishment of a uniform system for out-of-court disputes resolution in EU member states. Through the platform consumers or businesses dissatisfied with a transaction can contact one another in online transaction matters irrespective of the language barrier as automatic translation as well as independent arbiters (ADR entities) are provided to help them resolve disputes. The platform caters to all 23 official languages of the European Union and transmits disputes to ADR bodies in the national lists that comply with the binding quality requirements established by the ADR Directive. It has been operational since 9 January, 2016 and made accessible in stages to consumers and traders as of 15 February, 2016. The EU ODR Regulation includes a requirement that all businesses offering goods or services online carry a link on their website (and in some cases in their contractual terms) to the ODR platform. This platform looking forward to ensure and creates a higher level of consumer protection in terms of solving low value-high volume cases which is hoped to result in enhancing cross-border e-Commerce within the internal market.

The system covers disputes between consumers and businesses on sales or service contracts including those concluded via the internet and performed across borders. The consumer establishes an electronic platform for cases to be submitted to an ADR entity via the internet without the parties being present. Therefore, there is no concern of the venue of the sessions, time table and schedule for each parties, disputant's attendance at the same time. Parties may easily, at any time in their own place log into the website and process with the system as it is. This is considered as one of the positive points of this platform which is serving parties 24/7 per week. As with the EU's other consumer legislation, the directive and regulation seek to stimulate growth of the internal market and its smooth operations will go far in encouraging e-Shopping in the unified market by providing easy avenues to seek redress for purchases (Bogdan, 2015) a matter of fact, this system is designed to be as simple, fast, useful and user friendly as possible by cutting short the paper works and other procedures.

Liberty is another advantages of this platform. Despite the fact that it is compulsory and obligatory for all

business website runners and vendors to inform their consumers of the availability of this platform, it is optional for consumers to take it. Under the directive, traders who commit to using the ODR platform to resolve disputes with consumers are legally obliged to put their details/links on their websites or in their terms and conditions, however, buyers have liberty and freedom in using this system as an alternative dispute resolution if there is possibility they can use other alternative systems. Like so many forms of ADR, use of ADR entities and the ODR platform require consensus of the parties. As such, agreement will be needed by both consumer and trader before ADR can be attempted. The ADR Directive merely provides that traders should be encouraged as far as possible to participate in ADR procedures. This may limit the practical application of both the ADR directive and ODR platform.

This also should be noted that despite the fact that this platform is a very informational platform, the fact that all the parties' information and personal data are kept strictly confidential is inevitable. The directive guarantees confidentiality and data protection and it encourages ADR entities to join European networks and to cooperate with the bodies entrusted with the enforcement of consumer protection laws. This is crucial as consumers may not be aware of competent ADR schemes or whether they are dealing with honest or rogue traders (Cortes, 2012).

## CONCLUSION

A redress system for consumer disputes has been discussed for a decade and is a critical part of the modern trading infrastructure. The various initiatives taken in this area demonstrate that the ODR field continues to develop and include new services that will go a long way in promoting and facilitating online transaction processes.

Parties to any transaction should have easy access and recourse to redress mechanisms that offer timely, cost-effective and simple resolutions to disputes. In any social contract people transfer their natural right to self-help in return for a state's guarantee to provide mandatory dispute resolution mechanisms that provide speedy and uncomplicated resolution procedures. If the mechanism is complicated and the redress system has an onerous arbitration procedures, consumers may not resort to it thus making such a system offered by merchants redundant as well as discouraging online transactions. As discussed, the US has in place online redress systems although the former may need to improve its services to make them more in line with that of the latter.

On the contrary, the EU has established a very productive redress system in order to address and solve

the consumer issues in both domestic and inter-board online purchase. The new created platform is pretty much informative as all traders are required to mention about the availability of the ODR system on the website, it also keeps the information between parties confidential, there is liberty for consumers to take this system, there is a variety of languages that consumers can run the arguments in their own preferred language, the process goes as fast and simple as possible, the award would be enforceable between the disputants and it is expected the number of satisfied consumers would be the number of unsatisfied and unhappy consumers.

In short, it is now common for mediators to intervene in a multistep process that ends in some form of resolution for the disputants. Mediation requires certain legal norms to ensure fairness and efficiency in the process such as impartiality and independence of the mediator, confidentiality of the process and enforceability of settlements. The use of online mediation for resolving consumer disputes is challenging the traditional notions of litigation and ADR. The potential for online mediation lies in the fact that it reduces barriers in accessing justice by avoiding conflicts of laws and a lengthy adversarial process, thus reducing costs and time. Mediation often results in better satisfaction among the adversaries compared to adjudicative processes. Although, it is an invaluable addition to adjudicative processes, it cannot always substitute the judicial process where parties need to uphold their legal rights (Jackson, 2009). However, it should not be neglected that regulators, lawyers, counsellors, vendors and buyers should keep eye on this platform in order to be up to date with it in terms and the redress system in favour of consumers.

#### **ACKNOWLEDGEMENT**

Model Penguuna dispute resolution model cross-border online for ASEAN: Malaysia's Blue Print FRGS/2/2014/SS110/UKM/02/1.

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