

Redress and alternative dispute resolution in cross-border e-commerce transactions

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Table of Contents

Table of Contents.....1
Executive Summary.....2
Report.....3
Annex 1.....12
Annex 2.....17

Annex 3 – document available upon request

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Executive Summary

Effective dispute settlement is regarded as one of the means of enhancing consumer confidence in cross-border purchases over the Internet. Yet a recent Eurobarometer survey¹ shows that 41% of people who launched a formal complaint concerning cross-border purchases were not satisfied with the way their complaint was handled. Rather than going to the courts or elsewhere for settlement, most dissatisfied consumers took no further action, and only 6% brought the matter to an arbitration/mediation/conciliation body. Other studies of online dispute resolution (ODR) also show, on the whole, poor uptake by the public. Uptake of the EC's own publicly funded ODR provider, ECODIR, has been described as "disappointing"². Why do so few people resort to this kind of dispute settlement, and what are the implications of low uptake for consumer confidence in cross border e-commerce?

ODR can be divided into traditional or 'hard' ODR processes, such as online assisted and automated negotiation, mediation and arbitration, which look something like legal processes with less formality; and more novel 'soft' ODR processes, such as reliance on credit card guarantees by card issuers, and use of "negative feedback". Such processes look far less like traditional court-based dispute resolution, but have advantages in terms of consumer ease of use and access, and hence uptake.

Problems with 'hard' ODR processes are discussed at pp.6-9, and these include issues of due process, fairness, and enforceability of outcome. In both online arbitration and mediation, legal action is necessary to ensure that outcomes can be enforced as easily as court judgments. A greater underlying problem however is that it is not clear from empirical surveys either that consumers are motivated to enter 'hard' ODR processes and, connectedly, that access to such remedies may not, as often claimed, actually have significant impact on levels of consumer confidence. One reason for this may be that in typical low value e-commerce disputes, outcomes are extremely hard to enforce without the co-operation of both parties, especially in anonymous cross-border environments such as C2C (consumer to consumer) online auction sites. The outstanding success story in online quasi-arbitration, the domain name Uniform Dispute Resolution Policy (UDRP), see pp.14-16 and 17, is distinguished by the fact that the process is mandatory for all domain name registrants, and that the remedy (the cancellation, transfer or change of the domain name) is easily enforceable even where the loser declines to cooperate.

Actions that can be taken by the EC are set out at pp.9-11. In the short term, the EC can address barriers to 'hard' ODR uptake by resolving legal uncertainties and providing exemplars of due process in ODR. Publicising and assisting 'soft' ODR and solutions offered by the market such as aggregated trust metrics is also recommended. In the long term, the best way forward may be to take the public justice system for consumers, which already commands public trust and respect, on-line – creating "electronic small claims courts" which would have the trust and due process advantages of the current judicial system, but would also be as fast, cheap and as accessible as ODR processes.

¹ Consumer protection in the Internal Market - Special Eurobarometer 252/ Wave 65.1 - TNS Opinion and Social.

² Bonnici J P M and Mestdagh K de V "On the use of legal measures to entice participation in Online Dispute Resolution Systems for the settlement of online-related disputes" in Zeleznikow and Lodder (eds) *Second International ODR Workshop* (ordworkshop.info) (Tilburg: Wolf Legal Publishers, 2005).

Redress and alternative dispute resolution in cross-border e-commerce transactions *A Report by Lilian Edwards³ and Caroline Wilson⁴*

Effective dispute settlement is regarded as one of the means of enhancing consumer confidence in cross-border purchases over the Internet. What are the experiences with means of redress for consumers, enforcement of consumers' rights and online alternative dispute resolution - especially in the case of cross-border e-commerce?

A recent Eurobarometer survey⁵ shows that 41% of people who launched a formal complaint concerning cross-border purchases were not satisfied with the way their complaint was handled. Most dissatisfied consumers took no further action and only 6% brought the matter to an arbitration/mediation/conciliation body. Why do so few people resort to this kind of dispute settlement? What are the main models used for online dispute resolution (negotiation, arbitration, mediation, case appraisal, etc)? What are the experiences with ODR models based on the one hand on self-regulation and on the other hand on public intervention? Are existing methods of dispute resolution effective? What needs to be done to ensure the effective enforcement of consumer rights? How can the fairness and legitimacy of online dispute resolution be guaranteed? What basic legal ODR principles need to be adopted? What are the technical requirements necessary to increase trust in ODR? What means of redress are available in the case of cross-border e-commerce?

1.0 What is online dispute resolution (ODR)?

ODR is in simplest terms, alternative dispute resolution (ADR) transferred to the online environment. However the novel online environment has led the traditional forms drawn from ADR practice, of negotiation, mediation and arbitration, to mutate into new forms. In this report we will draw a distinction between 'hard' or traditional ODR which covers procedures intending directly to resolve conflicts and what we call 'soft' ODR, i.e. more novel processes that seek to prevent disputes, or to facilitate their resolution once disputes have arisen, without actually adjudicating them. This 'hard' and 'soft' ODR distinction is supported by the literature in this area, for example, Thornburg⁶, a leading US commentator on ODR and ADR, defines ODR as encompassing not just traditional resolute processes (what we term 'hard' ODR) but also newer 'preventative' processes such as the use of Digital Rights Management (DRM) by content owners to forestall copyright infringement. We do not discuss DRM in this report, both for reasons of space and because it is rarely regarded as a pro-consumer remedy, but we will highlight other 'soft' ODR processes which empower consumers by giving them information with which to make wise trading decisions, such as the use of "feedback" or trust metrics pioneered by sites like Slashdot and eBay. Here, a disappointed buyer/seller can rate a merchant site, or a particular buyer/seller as a bad risk ("negative feedback") and this information is not only communicated to subsequent consumers but aggregated with feedback provided by others to provide a generalised peer-produced metric of trust. Another ancillary 'soft' ODR mechanism frequently useful in the e-commerce environment is the reliance on EC statutory guarantees of protection by credit card issuers, where a card has been used to pay for items bought online. Merchant sites themselves, e.g. Amazon.com, sometimes provide small scale indemnities if the transaction proves unsatisfactory. Sites such as eBay are also beginning to offer escrow facilities to customers - the deposit of the purchase price with a safe neutral pending the satisfactory resolution of the sale - but these are so far rarely used.

Most ODR literature, especially that written in the heat of confidence in the dot.com boom prior to 2001, concentrates on 'hard' ODR - and full details of these more traditional forms of ODR are supplied in Annex 1: '*Hard*' ODR Processes. However there is some evidence that consumers generally find the newer 'soft' ODR processes more useful than 'hard' ODR - and that their actual uptake is higher. On the other hand, 'hard' ODR may still be effective in certain

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⁵ Consumer protection in the Internal Market - Special Eurobarometer 252/ Wave 65.1 - TNS Opinion and Social.

⁶ See Thornburg "Going Private: Technology, Due Process and Internet Dispute Resolution" (2000) 34 UC Davis L. Rev 151.

niche areas such as domain names. We explore these issues in more detail in Annex 2: *Success stories for ODR*.

2.0 The case for and against ODR in the B2C and C2C environments

2.1 Practical drivers towards and away from ODR

Kauffman-Kohler and Schultz⁷ state that the B2C environment is characterized by dematerialisation, desocialisation and dejudicialisation. By this they imply that as far as consumers are concerned there is no real world business environment in which transactions take place, no “bricks and mortar”; that the transaction takes place uninformed by a community and the norms and associated trust relationships, and that institutions other than state courts resolve most disputes generated by e-commerce. All of these factors are said to reduce consumer trust in and satisfaction with the online e-commerce environment. Governments and intergovernmental organisations, as well as commercial sectoral organisations are all interested in fostering e-commerce, and have thus seen promotion of ADR and ODR as part of this project. Accordingly organisations such as the EC⁸, the Federal Trade Commission, the OECD, and the Trans Atlantic Consumer Dialogue have all been active in the field.

The theory is, at the rational level, that without effective remedies in the “borderless marketplace”, consumers and businesses may decide not to transact. At a more instinctive level, consumer confidence is seen as generally enhanced by providing and publicising access to ADR and ODR, even if take-up rates (or dispute rates) are in practice low. Provision of effective ADR is thus both a practical solution and a rhetorical gesture. Founding fathers of ODR such as Katsh⁹ and Rule¹⁰ have long promoted the doctrine that “dispute resolution processes have a dual role, that of settling disputes and also of building trust. Those interested in attracting users to some online activity, whether for commerce or some other purpose, have understood that users must be provided with some measure of trust and safety in addition to convenience and cost benefits”¹¹.

The situation is aggravated further on consumer-to-consumer (C2C) sites - platforms where consumers trade directly with each other, rather than in the conventional commercial business/consumer relationship. The best known examples of these sites are the online auction sites such as eBay, QXL and Yahoo!, etc, but the C2C model is expanding and now covers, e.g., peer-to-peer lending of money¹² and peer-to-peer exchange of funds¹³.

Conventional businesses have incentives in terms of public relations and consumer trust to prevent and resolve disputes, but arguably, one-off consumer-traders on sites like eBay or Zopa have no such constraints; and also do not have corporate resources to investigate, police or generally engage with complaints. Consumers transacting on one-off bases have no prior or continuing relationships of trusts or reasons to trust each other. Such sites are therefore potentially highly dispute-prone. The C2C platforms themselves as a rule not only claim that they cannot control the business practices of their numerous clients, but are also not legally required to do so, given their status as “neutral intermediaries”¹⁴. Hence these sites have particular needs

⁷ Kauffman-Kohler and Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer, 2004).

⁸ See e.g. Art 17 of the EC Electronic Commerce Directive 2000/31/EC.

⁹ See Katsh, E. and Rifkin, J. *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001, Wiley).

¹⁰ Rule, C. *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance and Other Commercial Conflicts* (Jossey-Bass, 2002).

¹¹ Katsh, E. “Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace”, *Lex Electronica*, Vol.10 No.3, Hiver/Winter 2006 (available at <http://www.lex-electronica.org/articles/v10-3/katsh.htm>).

¹² See, e.g., Zopa at <http://www.zopa.com>.

¹³ See, e.g., PayPal UK at <http://www.paypal.co.uk>.

¹⁴ eBay, for example, has depended in Europe in several disputes on its status as a host exempt from liability under Art 14 of the EC Electronic Commerce Directive 2000/31/EC. See further See Guadamuz A, 'eBay Law: The legal implications of the C2C electronic commerce model' (2003) *Computer Law & Security Report* 19(6), pp. 468-473. However, national eBay sites do to some extent purport to control the behaviour of users since certain transactions e.g. sales of controlled drugs, firearms etc. are forbidden by eBay's terms and conditions. See, e.g., in the UK, <http://pages.ebay.co.uk/help/sell/questions/prohibited-items.html>. Interestingly in the US, eBay was denied the

for effective dispute resolution methods which are practically available to, and enforceable by, consumers.

Why do e-commerce customers not turn to the courts? Clearly, even conventional “high street” consumer disputes are rarely if ever litigated, due to (i) consumer ignorance and apathy as to legal remedies, (ii) the typically low cost of the items in dispute and (iii) the high cost of access to legal advice and judicial resolution. In online B2C disputes, additionally, transactions are as likely to be cross-border as not. Websites may appear to be of a certain national origin in state A, e.g. by language cues, but in fact be controlled from headquarters in state B with the server physically based in state C. It is likely none of this will be transparent to the consumer¹⁵.

Accordingly it is well recognised that difficult and unsettled legal problems relating to jurisdiction, choice of law, and in particular, enforcement would arise regularly if e-commerce disputes were to be litigated in conventional fora. Consumers furthermore are even more reluctant to litigate cross-border than they are to go to court in their home countries, for obvious reasons - of fear, language problems, lack of knowledge of the legal system, lack of access to free or priced legal advice and xenophobia as to the effectiveness of the process and the post-judicial enforcement means¹⁶. Tyler and Bretherton¹⁷, who carried out a major global study of ODR in 2004¹⁸, noted that “the difficulty of utilising traditional dispute resolution methods in low-value cross-border disputes has led to interest in low-cost, cross-jurisdictional dispute resolution methods”. All of these features lead to conventional dispute resolution via state courts being largely ineffective, and in practice, often wholly inaccessible, to the Internet consumer.

By contrast, ODR is often perceived as fast, cheap, efficient, and unthreatening. Litigation in the UK typically takes circa 20-35 months; ODR processes may last hours or days. Court costs are beyond the means of most consumers without legal aid which is often unavailable in civil disputes except to those at subsistence level without capital. If consumers will not go to court to resolve disputes over low cost items where the law is strange, threatening and unsettled, the defendant perhaps located in a foreign country (and where legal advice is inaccessible and/or expensive), perhaps they will instead engage with quasi-legal proceedings such as mediation. And since ODR takes place online, theoretically none of the temporal difficulties and resultant travel costs associated with cross-border disputes are present (although language, and indeed gender¹⁹, may still be an issue). ODR is good for document handling and information management and allows for asynchronous scheduling via email, discussion boards etc; useful where parties find it hard to synchronise schedules. Time wasted on looking for materials and arranging dates is minimized. Thus “ODR introduces very powerful and efficient tools to dispute resolution and thereby increases access to redress mechanisms”²⁰.

benefit of the equivalent statutory immunity for hosts under the Communications Decency Act 1996, in respect of a claim that eBay had published a libellous statement: see *Grace v. eBay* Cal.App.4th. [No. B168765. Second Dist., Div. Three. Jul. 22, 2004.]

¹⁵ EU Distance Selling rules have of course attempted to impose regulations requiring the physical address and other details of the website to be provided: see also the EC Electronic Commerce Directive, art 7. It is not known however how far these requirements are met by websites trading from beyond the EU area.

¹⁶ See Eurobarometer, *ibid*.

¹⁷ Tyler M and Bretherton D “Seventy-six and Counting: An Analysis of ODR Sites : Report of Research Conducted for the Department of Justice, Victoria, Australia Proceedings of the UNECE Forum on ODR 2003 available at <http://www.odr.info/une>.

¹⁸ Tyler M. C., ‘Online Dispute Resolution’ in Matti Malkia & Ari-Veikko Anttiroiko (eds) *Encyclopaedia of Digital Government*. (Hershey/Idea Group Reference, 2007).

¹⁹ Clark E, Cho G and Hoyle A “ODR: Present Realities, Pressing Problems and Future Prospects” (2003) 17 *International Review of Law Computers and Technology* 7, note that more research is required into the nature of online communication and that there is some evidence that users are more confrontational online which may alienate female or vulnerable users. On the other hand, the lack of cues as to race or colour or gender on-line might prevent unconscious discrimination.

²⁰ See Hornle, J. JISC Legal Briefing paper: Online Dispute Resolution (ODR), 12 October 2004, available at <http://www.jisclegal.ac.uk>.

However, while governments and commercial bodies, as noted above, have thus made strenuous efforts to persuade consumers ODR is in their interests, consumers themselves, certainly since the dot.com implosion, and especially in Europe, have seemed reluctant to engage with it. In the Eurobarometer survey, only 6% of the disgruntled surveyed brought their disputes to an arbitration/mediation/conciliation body. Bonnici and Mestdagh²¹ report that ECODIR, set up by the EU to be a fair, transparent and impartial publicly-funded ODR provider has “failed to attract any significant number of users”. Sali²², reporting in 2005 on a publicly provided ODR mediation site created by the Arbitration Chamber of Milan, RisolviOnline, notes that uptake was “not very encouraging”, namely 90 requests since 2002 and 15 successful agreements resulting. By contrast, Bonnici and Mestdagh point out that ODR suppliers Square Trade (who provide ODR services for free or very little cost to eBay users) and those supplying resolution services for domain name disputes (see Annex 1, A1.5) have in fact attracted considerable numbers of participants, even though they may not meet all the standards of due process, confidentiality, impartiality etc., discussed in 2.2 below. Accordingly, in Annex 2 we have considered these alleged “success stories” in more detail and, below, we present what they have to teach us about what consumers really want out of ODR as opposed to what has so far been offered them as theoretically in their interests.

2.2 Theoretical disadvantages of ODR in the online consumer environment

The established literature highlights a number of clear disadvantages of ODR. Such systems are generally not suited to more complex negotiations. They tend to deal best with simple disputes over monetary sums or facts, such as delivery or non delivery. Many e-consumer disputes do however fit into these parameters. Historically, ODR has been text-based, thus lacking the body language and other non-textual interactions, which often smooth the way towards a settlement. In fact this issue may become less of an issue as a new generation of “Web 2.0” ODR services are developed which may make use of virtual reality environments, such as Second Life²³.

The main drawbacks of ODR for consumers in theory fall into two categories:

- Due process and fairness
- Enforceability

2.2.1 Due process issues

In the US, where consumer ADR often takes the form of mandatory arbitration or mediation clauses attached to standard form contracts, considerable criticism has been made of the fairness of such clauses and the possibly invidious consequences for consumers in terms of due process rights. Thornburg²⁴ sets out several questions that must be asked of every consumer ODR process:

- Is the process mandatory and if so for both parties or only the consumer?;
- Is the process final/binding and if so, for whom? In other words, is access to the courts barred?;
- Who chooses the mediator or arbiter and are they in any way biased? In cheap or free consumer ADR and ODR, almost invariably the mediator’s salary is in some way connected to or paid by the commercial party in the dispute;

²¹ Bonnici J P M and Mestdagh K de V “On the use of legal measures to entice participation in Online Dispute Resolution Systems for the settlement of online-related disputes” in Zeleznikow and Lodder (eds) *Second International ODR Workshop* (ordworkshop.info) (Tilburg: Wolf Legal Publishers, 2005), citing figures at <http://www.ucd.ie/alumni/html/connections9/2004ucdp38.pdf> as of 13 July 2004. These figures are no longer available and the ECODIR home page does not appear to give uptake figures.

²² Sali, R. “Crossing Dispute and Information Technology: the Experience of Risolvionline” in Zeleznikow and Lodder eds, *supra* n.19.

²³ Sali, R. “Crossing Dispute and Information Technology: the Experience of Risolvionline” in Zeleznikow and Lodder eds, *supra* n. 19.

²⁴ See Thornburg E “Fast, Cheap and Out of Control: Lessons from the ICANN Dispute Resolution Process” (2001) 7 *Journal of Small & Emerging Business* 191.

- Who pays the fees for the process and are they affordable? In some US case law²⁵, mandatory ADR clauses have been struck down as unconscionable because they tied consumers into processes more expensive than some small claims legal cases;
- Is legal representation available and if so, for whom?;
- Is the process transparent? E.g. are previous decisions published and made easily accessible? In some forms such as mediation however, publication of “decisions” may not be practical, and;
- Is imbalance of power addressed? E.g. is a consumer able to fully argue their case in an employment dispute, if the arbiter has a relationship with their employer.

Finally Thornburg emphasises that in private consumer ADR or ODR processes, justice is effectively being privatised too, and matters of public concern might be occluded in a way that is not possible in an accountable, accessible public justice system.

The EU has of course been active in defining due process standards in its Recommendation of 1998²⁶, defining seven principles very similar to Thornburg’s questions; impartiality, transparency, adversarial procedure, representation, consumer freedom to go to court, efficiency and accessibility and legality (i.e. no contractual exclusion of ADR/ODR). This work on defining due process standards in ADR continues in the Recommendation of 2001²⁷, and the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law of 2002²⁸. Other bodies have also done considerable work relevant to the setting of ADR/ODR standards of due process e.g. the American Bar Association²⁹ and the OECD³⁰.

Such due process issues are though arguably of much less concern in the EU, at least in consumer disputes, where there is fairly stringent control of unfair standard term contract clauses³¹. Mandatory ADR or ODR clauses which disfavour the consumer and oust access to the courts are unlikely to be included by traders, because it is well known they will be unenforceable (and bad PR). The issues both of privatised justice, close-down of issues of public concern, and of general imbalance of power, however, remain.

Furthermore, unenforceable ADR and ODR clauses may still operate until challenged. For this reason among others, the EU commissioned its own ODR provider, ECODIR, which was launched in 2001³². As noted above however, although ECODIR was designed to be free of the bias of ODR services provided by or funded by the commercial disputing party, and was furthermore to be available to all EU consumers (not just those buying from businesses which had entered a particular trust seal) and is both free and swift for the consumer, it has not attracted great numbers of cases. This seems perhaps to indicate that although due process is a prominent issue in the literature, in reality it neither particularly prevents nor impels e-commerce consumers to go to ODR.

²⁵ *Comb, et al. v. PayPal, Inc*, Cases No. C-02-1227 and C-02-2777 JF (N.D. Cal., August 30, 2002).

²⁶ Commission Recommendation of 30 March 1998 on the principles applicable to bodies responsible for out of court settlement of consumer disputes 98/257/CE (OJ L 115, 17.4 198, p 31).

²⁷ Recommendation 2001/310/EC.

²⁸ Brussels 19.04.2002 COM (2002) 196 final. See also the EC Code of Conduct for Mediators, available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf and the EC Draft Directive on certain aspects of mediation in civil and commercial matters, 2004/0251 (COD) available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0718en01.doc.

²⁹ ABA Task Force of E-Commerce and ADR Addressing Disputes in Electronic Commerce. Final Report and Recommendations available at www.law.washington.edu/ABA-eADR, 2002. There is also a best practices document available at <http://www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf> and a number of codes of conduct e.g. for mediators on the same site.

³⁰ OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999, available at http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1,00.htm.

³¹ See primarily the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC: L 95/29.

³² See <http://www.ecodir.org/>.

2.2.2 Enforceability

There are a number of key problems here.

2.2.2.1 Validity of ODR arbitral award

Agreements to arbitrate online face problems concerning their validity, their evidence and their enforceability. Many national laws and international conventions still require the arbitration agreement to be in writing³³. Under the New York Convention, Art. 4(1), as traditionally interpreted, the party moving for enforcement must provide an award that is in “writing”, signed by a majority of the arbitrators, and that is either the authenticated original or a duly certified copy thereof. Technically, these conditions could be met if electronic documents were legally deemed as constituting writing³⁴ and if digital signatures were used - because these can authenticate the sender and the content of the message - but these solutions do not correspond to the current wording of the New York Convention, nor to its common interpretation. One obvious solution however is to use an “e-watermarked” printed version of the arbitral award³⁵, which could be signed by the arbiter, and the signed print-out would clearly constitute the original award.

2.2.2.2 Enforcement of agreements arising from mediation

Traditionally agreements reached in mediation have only been given enforcement “teeth” by being incorporated into contracts, which then require court enforcement. The EC Draft Directive on certain aspects of mediation in civil and commercial matters, Art 5, provides that “upon request of the parties, a settlement agreement reached as a result of a mediation can be confirmed in a judgment, decision, authentic instrument or any other form by a court or public authority that renders the agreement enforceable in a similar manner as a judgment under national law”. It would be helpful if this provision was implemented in EC law.

2.2.2.3 Validity of standard form clauses referring parties to mandatory arbitration or mediation

As noted above, these may be unenforceable given EC consumer protection law and unfair terms law. Although positive for consumers, this general uncertainty may in theory deter e-commerce businesses from putting resources behind providing ODR solutions.

More generally however, a major problem remains, especially in the C2C environment, that consumers will be unwilling to go through ODR or ADR processes if they doubt the other party will take part in or honour any agreement reached. Such scepticism pervaded the email interviews carried out in the Edwards/Theunissen eBay project (see Annex 3, which is available upon request). Many experienced eBay users expressed a preference for using the PayPal dispute resolution service instead of eBay’s because PayPal had the power to freeze the account of a recalcitrant seller or buyer – assuming, of course, he had not already emptied it of any credit. The eBay/Square Trade negotiation and mediation processes allow for “default” judgments, but in such cases extracting satisfaction from the defaulting defendant was largely impossible unless escrow arrangements had been made, which is almost unheard of in low value transactions. By contrast, the generally acknowledged success of the Uniform Dispute Resolution Policy process

³³ Only the UNCITRAL Model Law (Art. 7 (2)), the German Arbitration Act (§ 1031 (1)), the English Arbitration Act (s 5 (6)), and the Swiss Private International Law Act (Art. 178 (1)) consider that the agreement is in “writing” when recorded by electronic means.

³⁴ Arguably this requirement is introduced into law in the EU by the Digital Signatures Directive. However there remains the problem that different EU member states have implemented this Directive in various ways, see e.g. in the UK, the Electronic Communications Act 2000, s 7. See further in much more detail than is possible here, Kauffman-Kohler and Schultz, *ibid* at Chap 3.

³⁵ See <http://www.watermarkingworld.org>; <http://www.abathorn.com>.

for domain names (see Annex 1, A1.5) may lie primarily in the fact that the subject of dispute - the domain name - is ultimately within the control of the arbiter. In e-commerce disputes there is rarely such access to “automatic enforcement”.

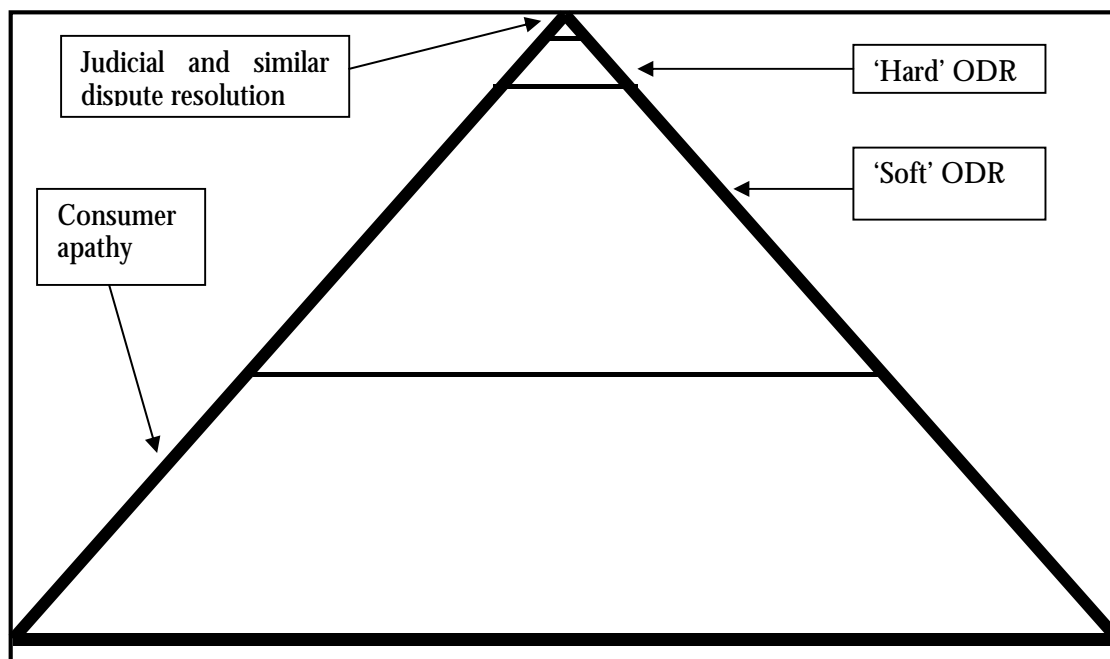
3.0 What can the EU do?

3.1 Short term actions

In the short term, there are several actions signposted in this paper which the EU could undertake:

- Resolve the legal uncertainties as to enforcement of ADR awards, in both arbitration (2.2.2.1) and mediation (2.2.2.2), and;
- Provide guidance, model clauses or a Code of Conduct to clarify what constitutes equitable ODR clauses in standard term consumer contracts.

But there may be little point to such activity to promote consumer rights if consumer uptake of ‘hard’ ODR remains so low. Consumer engagement with ODR can currently be portrayed diagrammatically thus:



Accordingly:

- Further empirical research is necessary to identify if other niche areas, akin to the UDRP domain name situation, exist where ‘hard’ ODR can be successful (see Annex 1, A1.5 and Annex 2, A2.1); and in what areas pro-consumer ‘soft’ ODR mechanisms may be more useful (see Annex 2, A2.2);
- Uptake, outcomes and satisfaction rates of ECODIR and other EU state publicly funded ODR providers should be audited and published on a regular basis, and;
- Efforts should be made to educate consumers as to the availability of ‘soft’ ODR, such as rights against credit card issuers, as well as access to ‘hard’ ODR providers like ECODIR. This may involve publicising “privatised rights” offered by individual merchant sites e.g. eBay, Amazon etc ; and there needs to be a debate about the ethics of this, the competition law implications, etc.

3.2 Medium term actions

In the medium term, Schultz, one of the key figures in the University of Geneva project on ODR, has suggested that (exclusive?) state (or EU) accreditation of what we have termed 'hard' ODR providers meeting certain minimum standards of due process, etc, would be desirable³⁶. To date, private and public trustmarks have competed in the e-commerce and ADR/ODR marketplaces, but this has led to a confusing multiplicity of trustmarks, most of which, surveys show, inspire no consumer confidence or recognition, especially in cross-border shopping. Trustmarks on websites, as usually constituted, are furthermore easily faked; there is evidence from US economic studies³⁷ that because of this, a trustmark is in fact more likely to signal a fraudulent site than a "genuine" trusted one. As a result, large trusted players like Google now prefer to rely on their own "trusted name" rather than trustmarks. This option is not however available to small or new entrants into the market. A single EC public accreditation scheme might overcome the confusion factor, but would not prevent the trustmark being fraudulently added to the website (although digital watermarking might be employed).

Schultz also recommends EC or state backing for a public "clearinghouse" i.e. some kind of publicly available site where reputation metrics accumulated on a variety of private sites (e.g. eBay, Yahoo!, Slashdot) could be collected and made available. "A clearinghouse could in other words be used as a reputation management system for ODR providers." Given the popularity of feedback as a 'quick and dirty' method of establishing trust³⁸, this proposal has merit. The fact that current private trust metrics cannot be "carried" by a user or trader from site to site is a problem that could be solved; indeed, given EC backing, academic attempts to devise something like "Reputation 2.0"³⁹ could be accelerated. Connectedly, both research and regulation could be employed to improve the quality of private trust metric schemes. Rietjens, for example, points to a considerable literature demonstrating that eBay's feedback model can be "gamed" by fraudsters and suggests tentatively that a model feedback process could be prescribed by law, as could interoperability⁴⁰. Thus, consideration should be given to institutional and legal mechanisms for ensuring the portability and integrity of reputation metrics in order to support 'soft' ODR and as a resource for 'hard' ODR providers.

Finally Schultz also suggests that where ODR processes provide unsatisfactory privatised justice, an online appeal process run by the state would be appropriate. Even though most EC ADR clauses do allow recourse to the courts, the same problems arise that consumers are as unlikely to litigate on "appeal" as at first instance.

3.3 Long term solutions

This points to, perhaps, the most satisfactory long term solution to the problem of dispute resolution online and in cross-border consumer disputes. Instead of pushing unwilling

³⁶ Schultz, T. "Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust?" (2004) 6 North Carolina Journal Of Law & Technology 71, available at http://www.jolt.unc.edu/Vol6_I1/pdf/Schultz%20v6i1.pdf.

³⁷ Edelman, "Adverse Selection in Online 'Trust' Certifications", 5th Workshop on the Economics of Information Security (WEIS 2006), Cambridge, 2006, available at <http://weis2006.econinfosec.org/docs/10.pdf>.

³⁸ See Edwards and Theunissen (Annex 3: available upon request).

³⁹ The idea follows on from the "Web 2.0" concept of distributed identity management or "Identity 2.0". In simple terms, if I am recognised as "rainbowgirl" on site A, I should be able to use that identity and its reputation wherever I go. Early attempts at this ideal included "digital wallets" of personal details handled by a single central party, such as Microsoft's discredited Passport scheme. Modern research into this area attempts to create a transferable distributed identity that is nonetheless not owned by, or accessible to, a single commercial party who may or may not be trusted: see Kim Cameron's ongoing CardSpace project as chronicled at Identity Weblog at <http://www.identityblog.com/>. Sites investigating portable reputations as opposed to identities include <http://www.opinity.com/> and <http://www.ikarma.com/> (see discussion at <http://mashable.com/2005/11/11/actually-mary-reputations-are-portable/>.)

⁴⁰ Rietjens, B. "Trust and reputation on eBay: Towards a legal framework for feedback intermediaries" 2006 (15) Information & Communications Technology Law, 55.

consumers towards private, untrusted 'hard' ODR processes - or even towards a public but largely unknown and untrusted 'hard' ODR provider such as ECODIR - Schultz has suggested another approach. The public justice system - courts and judges - already has the trust and respect of consumers and commerce. If those courts were slowly to be transformed into online cyber-courts at least in some, simpler, B2C disputes, the advantages of speed, cheapness and access could accrue to the existing court system, finally making it consumer-friendly. Essentially, this would involve creating cheap, national "electronic small claims courts". Although a long term solution, with jurisdictional issues that would need resolving, this might in the end be an easier project than inspiring consumers to use and trust novel 'hard' ODR solutions. We would be returning to public not privatised justice, with all the advantages of respect and trust that has acquired over centuries, but losing its baggage of in-person appearance requirements, high costs, low access, slow procedure, poor document handling and the public fear of litigation. Such a solution however clearly requires much further research.

Annex 1: 'Hard' ODR Processes

A1.1 Automated Negotiation or "Blind Bidding"

Here, typically party A contacts an ODR provider and presents his or her case against a second party B. A common example would be a dispute between two insurance companies as to who pays out in what proportions in relation to a motor accident. The Automated Negotiation provider contacts party B, who can accept or refuse to submit to the jurisdiction of the institution. The parties then enter a "blind bidding" procedure. Each of them in turn offers or demands a certain amount of money. The proposed figures are confidential; they are neither made public nor communicated to the other party. When the amounts of the offer and the demand are sufficiently close, e.g. at 30%, the case is settled for the arithmetic mean of the two figures. The number of bids varies between three and unlimited. Most sites offering automated negotiation also impose a time limit for the parties to reach an agreement. Automated Negotiation ODR is mainly applicable only to purely monetary disputes and cannot deal with factual or legal disputes of any complexity. It is therefore probably more applicable to business to business (B2B) disputes than business to consumer (B2C) disputes. Examples of such sites include Cybersettle⁴¹, and The ClaimRoom⁴² both of which claim to have processed large amounts of cases successfully.

A1.2 Assisted Negotiation

Here, the ODR provider supplies facilities such as a secure site, communication facilities, and possibly storage for documents and other such facilities, but no third party neutral/mediator. Parties reach agreement (or do not) without any external entity empowered to make a decision against their will. The main service provided is thus assistance in developing agendas, engaging in productive discussions, identifying and assessing potential solutions, and writing agreements. A well known example is the Internet auction website eBay⁴³ which has a business relationship with the ODR provider SquareTrade⁴⁴, and thereby provides assisted negotiation to a large number of eBay users (see below) alongside other processes.

A1.3 Mediation

Mediation is dispute resolution assisted by a neutral third party, the mediator. The mediator has no decision making power. Confidentiality and trust in the mediator is crucial to mediation, which often produces better results than unassisted negotiation. In ODR mediation, real time as opposed to asynchronous discussion and common and private communication rooms are desirable but not always available. The main challenge in conducting online mediation is the need that parties have to "vent"⁴⁵. Lack of face to face contact may inhibit development of trust, deny clients their "chance to tell their story" and thus inhibit the reaching of solutions. Enforcement of mediation outcomes can also be a problem (see Report at 2.2.2).

A1.4 Arbitration

Arbitration offline is usually conceived as a flexible substitute for court litigation. Effectively, arbitration is the privatised equivalent of a court. While courts are bound by established rules of court and the general law of the forum, parties to arbitration can choose their own forum, rules

⁴¹ www.cybersettle.com. Cybersettle's Automated Negotiation system was used, for example, in 2003 to settle a USD\$12.5 million product liability claim.

⁴² www.theclaimroom.com.

⁴³ www.Ebay.com, www.ebay.co.uk etc.

⁴⁴ www.squaretrade.com.

⁴⁵ See Motion P "ODR: A View from Scotland" in Edwards L (ed) *The New Legal Framework for E-Commerce in Europe* (Hart, 2005), noting that solicitor mediation in the offline world is often successful primarily because of personal relationships of trust between the solicitors, extensive use of telephone as well as text communication, and ability of clients to tell their story to their lawyer if not the other party.

of procedure, arbiter(s), governing law etc. Online arbitration will usually differ from offline arbitration in lacking a chance for oral hearings, although “web 2.0” technologies e.g., improved webcam, videocast and podcast technologies, might change this in the future. The ability to choose arbiters with particular specialist knowledge, and to specify a governing law (which might be not the law of a country but a form of soft law such as “the law of eBay”, or the general customs of “netiquette”) makes it in some ways highly appropriate to a specialised domain like e-commerce, especially in trans-national disputes. Online arbitration is available in a very wide range of consumer-related domains on line, not limited to business-to-consumer (B2C) e-commerce, e.g., for disputes relating to Wikipedia texts⁴⁶. However arbitration, in practice appears to be relatively underused in B2C disputes. As noted above, the recent Eurobarometer survey shows that although some 41% of cross border shoppers had unresolved complaints, only 6% went to an arbitration or mediation body. In the Edwards/Theunissen eBay survey of 400 UK eBay users⁴⁷, around two thirds of whom had encountered problems with one or more eBay transaction, only 8% of sellers and 3% of buyers in the sample had gone as far as using the mediation and arbitration services provided by Square Trade, and email interviews indicated that few if any had gone as far as arbitration. Further empirical research on a larger sample is required in this area.

The greatest advantage of arbitration is the near global enforceability of arbitral awards, provided certain formalities are met, since most countries subscribe to the New York Convention 1958⁴⁸ which guarantees mutual recognition and enforcement of arbitral awards. However there are recognised difficulties attached to the enforcement of ODR arbitral awards under the 1958 Convention, discussed in the Report at 2.2.1. Formal rules of arbitration are laid down in advance either as part of the agreement to arbitrate (which in a B2C environment will usually be imposed as a clause which forms part of a standard term shrink-wrap⁴⁹, click-wrap⁵⁰ or possibly a browse-wrap⁵¹ contract) or are incorporated by reference to internationally regulated sets of rules e.g. the UNCITRAL rules⁵². The decision in arbitration is usually binding on both parties. It is possible for arbitral rules to allow or ban subsequent access to the ordinary courts.

The relative formality of arbitration has advantages for consumers in terms of preservation of rights of due process, and enforceability of the award, but has potential disadvantages for consumers in comparison to niche ‘hard’ ODR and ‘soft’ ODR, namely that it is time-consuming, costly and involves potentially alienating procedure. It is notable that the most successful form of online arbitration - the Uniform Dispute Resolution Process (hereafter, UDRP) - addresses these very concerns (see A1.5 below and Annex 2). In online B2C contracts, a main issue is whether the arbitration clause can fairly be imposed on the consumer unilaterally or if it is voidable under consumer protection law. The ODR environment does however have the distinct advantage in arbitration that documentary evidence can be easily shared and referred to. It lacks however the opportunity for lengthy oral hearings which experts say often help offline arbitration to succeed.

⁴⁶ See http://en.wikipedia.org/wiki/Wikipedia:Arbitration_policy.

⁴⁷ See Edwards L and Theunissen L “Creating Trust and Satisfaction Online: How Important Is ADR: The UK eBay Experience”, BILETA Conference, 2005, Malta attached in Annex 3 (Annex 3 is available upon request).

⁴⁸ See http://www.hartwell.demon.co.uk/nyc_text.htm for full text.

⁴⁹ Shrink-wrap contracts are those where acceptance is indicated by opening the shrink-wrap packaging that encloses a product subject to the agreement.

⁵⁰ Click-wrap contracts are those where acceptance is indicated by clicking on a button or hyperlink.

⁵¹ Browse-wrap contract is the term used to refer to a contract formed over the Internet simply by the process of browsing through a website; this passive browsing activity is taken to imply agreement to all the terms and conditions of the contract. This contrasts with a click-wrap contract where it is the active clicking on a button or that indicates acceptance.

⁵² Available at <http://www.adrchambersinternational.com/arbitrules.htm>.

A1.5 The UDRP Process

The *sui generis* Uniform Dispute Resolution Process (hereafter, UDRP) is an online arbitration-influenced administrative process available for the most serious types of trade mark-related domain name disputes - those involving so-called cybersquatting (which is the actual or attempted appropriation of a domain name in bad faith). Although operating in an environment different to that of classic e-commerce B2C and C2C, the UDRP does have lessons for possible ODR solutions in e-commerce given its relative longevity (seven years) and the fact that the UDRP has been relatively successful in terms of volume of uptake, fairness and due process, and ease of enforcement of award (see below).

Domain names – e.g. www.soton.ac.uk, are the easy-to-remember names linked to Internet Protocol (IP) numbers⁵³; IP numbers being unique numbers that identify each computer site connected to the Internet. Like telephone numbers, domain names are hierarchical⁵⁴ and, via intermediary registrars, domain names are granted by the individual registry responsible for the relevant top hierarchical level – the TLD (Nominet is the registry for .uk, for example). There are approximately two hundred and sixty-six active top-level domains and in most cases the contractual process of registering for a domain name, which takes place with one of a variety of competing domain name registrars, binds the applicant (subsequently known as the registrant) to one or more administrative dispute resolution policies. There are a wide range of such policies⁵⁵, but the most popular, influential and well-known of these is the UDRP, the ambit of which is restricted to certain abusive domain name disputes involving all generic TLDs (the non-country-specific TLDs, known as gTLDs)⁵⁶ and it also has been adopted by more than forty⁵⁷ of the two hundred and fifty⁵⁸ country-specific TLDs (known as ccTLDs).

The legal basis of the UDRP therefore lies in the contract between the registrar⁵⁹ and the domain name registrant. Put simply, under the standard dispute clause of the Terms and Conditions for the registration of a gTLD domain name (or for a domain name under one of the forty or so ccTLDs that use the UDRP), the registrant expressly submits to the UDRP and the Procedural Rules by which it is implemented. This means that the UDRP is not voluntary, but it does also mean that: (i) ODR is integral to the domain name registration process and (ii) the existence of the UDRP (or any other applicable dispute resolution policy) is brought to the attention to individual domain name registrants, thus educating the registrant as to its existence. The UDRP itself is phrased relatively simply and it provides for the cancellation, transfer or change of domain name registrations where⁶⁰:

⁵³ 154.78.128.14 in the case of www.soton.ac.uk. The so-called process of resolution of domain names and IP numbers is managed by the Domain Name System. The current identity of the registrant of each domain name (with other details pertaining to their registration) is recorded and publicly available in online databases, called WHOIS databases, held and controlled by each top-level domain register. It is also possible to search WHOIS data across different TLDs – e.g. see <http://www.whois.net/>. Thus there is both transparency re. domain name information and centralised control of registrations.

⁵⁴ Unlike telephone numbers, the highest hierarchical level, the so-called top-level domain (TLD) is to be found at the end, not the beginning of the domain name. So in the www.soton.ac.uk example given above, .uk is the TLD.

⁵⁵ The authors of this report calculate that, including so-called 'sunrise' dispute resolution mechanisms (these are time-limited dispute resolution procedures used when new TLDs are launched), there are approximately two hundred such mechanisms that have been active in the last seven years.

⁵⁶ Namely, .aero, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, .tel and .travel (see <http://www.icann.org/udrp/>).

⁵⁷ According to Bettinger (ed) *Domain Name Law & Practice. An International Handbook*. OUP 2005 at p.42. One of the UDRP providers - WIPO – has made particular efforts in ccTLD dispute resolution. Currently WIPO provides domain name dispute resolution services for forty-seven ccTLDs (see <http://www.wipo.int/amc/en/domains/cctld/index.html>).

⁵⁸ <http://www.iana.org/root-whois/index.html>.

⁵⁹ Registrars are accredited by the Internet Corporation for Assigned Names and Numbers (ICANN), the body also ultimately responsible for gTLD registers, the UDRP and the approval of both accredited registrars and UDRP providers.

⁶⁰ UDRP para 4a. See <http://www.icann.org/udrp/udrp-policy-24oct99.htm>. These three factors are cumulative.

- (i) The registrant's domain name is identical or confusingly similar to the complainant's trade mark;
- (ii) The registrant has no rights or legitimate interests in the domain name;
- (iii) The domain name has been registered and is being used in bad faith.

There is a choice of dispute resolution providers and, increasingly such providers offer multilingual services⁶¹. Currently there are four approved UDRP providers - ADNDRC⁶², CPR⁶³, NAF⁶⁴ and WIPO⁶⁵. A total of 12,122⁶⁶ proceedings have been brought under the UDRP with the majority of these having utilised WIPO as the UDRP provider.

A complainant will file a case with one of the UDRP providers, specifying the domain name(s) in question, the domain name registrant and the registrar with whom the domain name was registered⁶⁷, as well as the grounds for the complaint. The registrant is then offered the opportunity of defending itself against these allegations and the UDRP provider then appoints a neutral and independent panellist or panellists⁶⁸ (who cannot be contacted directly by either party to the dispute) who will decide whether or not the domain(s) at issue should be transferred. The parties to the dispute are required to provide written submissions, upon which the UDRP panel will base its decision⁶⁹. The whole process is essentially conducted online; there are no in-person hearings, except in extraordinary cases⁷⁰. Under the UDRP, either party retains the option to take the dispute to a court of competent jurisdiction for independent resolution - in practice, this rarely occurs⁷¹. Accredited registrars are contractually bound to take the necessary steps to enforce a UDRP decision, such as transferring the name concerned, and this is relatively easy to achieve given the centralised nature of the domain name system.

The UDRP itself⁷² provides for some flexibility as to the language of UDRP proceedings and, as noted above, UDRP providers are providing multi-lingual services⁷³. It is fair to note, however, that despite this the majority of parties to UDRP disputes are domiciled in the US⁷⁴. All the UDRP providers aim for the duration of any single UDRP proceeding to take approximately two months and fees are relatively low; for example, for disputes concerning one domain name fees ranging from \$US1 000 to \$US5 000⁷⁵, depending on the UDRP provider and whether a one or three-person panel has been requested. Temporal, geographic, linguistic and financial barriers to bringing or defending proceedings under the UDRP are thus relatively low. There is also a reasonable degree of transparency inasmuch as the parties, relevant registrar(s) and ICANN are

⁶¹ See Wilson, C. Internationalised Domain Names: Problems and Opportunities [2004] *Computer and Telecommunications Law Review* 174 at 179.

⁶² The Asian Domain Name Dispute Resolution Centre (<http://www.adndrc.org/adndrc/index.html>). Here there is a further choice - UDRP claims can be administered by ADNDRC offices in Hong Kong, Beijing or Seoul.

⁶³ The International Institute for Conflict Prevention and Resolution (http://www.cpradr.org/ICANN_Menu.asp?M=1.6.6).

⁶⁴ The National Arbitration Forum (see <http://domains.adrforum.com/>).

⁶⁵ The WIPO Arbitration and Mediation Center (see <http://www.wipo.int/amc/en/domains/>).

⁶⁶ See <http://www.icann.org/cgi-bin/udrp/udrp.cgi> (accessed on January 15, 2007).

⁶⁷ Which are usually easily established with reference to online WHOIS data (see note x supra).

⁶⁸ UDRP para 7.

⁶⁹ UDRP para 15. There is no provision in the UDRP for panel members to undertake their own investigation.

⁷⁰ UDRP para 13.

⁷¹ In the first five years of the UDRP, approximately seventy losing registrants went on to file a court case; most of these being filed in the US (see Bettinger, *ibid*, at p.984).

⁷² UDRP para 11.

⁷³ E.g. WIPO has managed UDRP proceedings in 12 languages (see http://www.wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_464.html). See also ⁷³ above.

⁷⁴ E.g. see <http://www.wipo.int/amc/en/domains/statistics/cumulative/countries.html>.

⁷⁵ \$US1 000 is the cost of a one-person UDRP panel provided by ADNDRC and \$US5 000 is the cost of a three-person UDRP panel provided by WIPO. The complainant will bear the cost of a one-person panel (which costs between \$US1 000 - \$1 500, depending on the UDRP provider). Where the complainant has requested a three-person panel the complainant pays for this and where requested by the domain name registrant, the fee is split equally between the complainant and the registrant. Irrespective of the number of panel members, all UDRP providers charge higher fees when more than one domain name is in dispute.

all informed of UDRP decisions and UDRP decisions are published online⁷⁶ by the individual providers.

Empirical research⁷⁷ on the UDRP seems to show a superficial appearance of bias towards large company complainants⁷⁸ in decision outcomes. This has variously been blamed on inequality of financial or legal resources. If true, this would not appear to make the UDRP a good model for B2C ODR. In fact, a 2002 research project⁷⁹ provides some explanation for the seemingly high proportion of UDRP decisions where the complainant is successful. This study noted that 52% of UDRP decisions were issued following a default by the domain name registrant (i.e. where the complainant is unopposed by the registrant). The Mueller study also noted that whilst complainants won 96% of cases where the registrant defaults, this is assumed to be because in such cases the registrant in fact has no good defence to the charge of cybersquatting. Therefore this more detailed consideration of UDRP decisions does not support the view that the UDRP is biased towards complainants. Further, there would appear to be little reason for any such bias to arise. Inequality of financial resources between the parties to the dispute is unlikely to be significant given the fact that the UDRP procedure is relatively simple and low-cost, with the cost largely being borne by the complainant. Further, the UDRP has a specific and specialised ambit - applying only to the worst examples of bad faith domain name disputes involving trade mark rights - and it is usually clear to the panel which party is in the right regardless of who can pay for the best legal advice.

The key point is that the UDRP is a niche ODR scheme for selected disputes in a highly centralised environment, and, it is an arbitration system that was developed following extensive consultation with a wide variety of stakeholders⁸⁰. Having an ODR system of such a limited scope and an effective consultation process as part of the development of a new ODR system might be difficult to replicate in the more diffuse B2C and C2C environments.

⁷⁶ E.g. the WIPO UDRP decisions can be found at <http://www.wipo.int/amc/en/domains/search/index.html>.

⁷⁷ E.g. Kur, UDRP. A Study by the Max-Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich, available at www.zar.uni-karlsruhe.de/admin/get_data.php?resID=95.

⁷⁸ Namely that domain name transfer is ordered by the UDRP Panel in the majority of proceedings. Kur's study (supra) found that transfer was ordered in 76.68 % of proceedings. A later study by Bettinger (supra) found that transfer had been ordered in 80% of proceedings.

⁷⁹ Mueller, Success by Default. A New Profile of Domain Name Trademark Disputes under ICANN's UDRP. Convergence Center, Syracuse University School of Information Studies, June 24, 2002. Available at <http://dcc.syr.edu/markle/markle-report-final.pdf>.

⁸⁰ E.g. see Bettinger *ibid* at p.939.

Annex 2: Success stories for ODR

A2.1 The UDRP – an exemplar for B2C and C2C disputes from ‘hard’ ODR?

Much of the standard ODR literature makes reference to the UDRP. The UDRP does not operate in a classic B2C or C2C e-commerce environment; the parties to UDRP disputes are domain name registrants and trade mark proprietors, who may be natural or legal persons. However it is regarded as a highly successful form of ODR both in terms of volume of uptake, fairness and due process, and enforcement of award - all, as we have seen, problematic in most cases of traditional ‘hard’ ODR. The UDRP seems to show that niche ‘hard’ ADR process can work in the online environment.

Volume: This is relatively high, and we have already noted in Annex 1 both the relative longevity of the UDRP and its general effectiveness in combating so-called cybersquatting. Since UDRP services are provided competitively, competition by multiple providers, low-cost and time-efficient ODR has emerged, as well as multi-lingual services, all of which should improve uptake and access (see Annex 1, A1.5).

Due process: Although the UDRP initially appears to be well-designed to implement standard due process requirements - having independent arbiters, transparency in process, published decisions etc., it should also be noted that it is a mandatory process and large company complainants are likely to have greater financial and legal resources than individual domain name registrants (see Annex 1, A1.5). However, given the niche nature of the UDRP, this does not seem to result in undue unfairness in practice.

Enforcement: Crucially, the only UDRP remedies are the change, retention or transfer of the domain name - no pecuniary remedies are awarded. The UDRP is hence sometimes described as “self-enforcing”. Where a complainant succeeds under the UDRP, the contractual nexus between the registrant and registrar (see further Annex 1, A1.5) means that the winning party will invariably obtain what they want, i.e., the domain name. This contrasts with typical B2C disputes, about money paid or owed, or non-delivery, where on default of the defendant, the plaintiff will obtain nothing for his or her pains.

There are several reasons though why the UDRP may not be a good general exemplar for B2C and C2C ODR. The UDRP is directed to factually simple disputes - where, in most cases, one party who has in bad faith exploited the ‘first come, first served’ registration rule vis-à-vis a trade mark proprietor. In e-commerce, consumer disputes tend to be factually more divergent and complex; consumer disputes frequently involve disputes over facts as well as law (indeed, they may be at the heart of the dispute), whereas with the UDRP, in practice, there is rarely need for significant debate over evidence. Consumer e-commerce disputes, especially C2C, are often about resolving differing expectations between parties rather than obvious bad faith activity. Most importantly, the UDRP is not voluntary, either in submission to jurisdiction or in enforcement of award – all relevant domain name registrants are bound to it by contract.

A2.2 Square Trade/eBay: the success of ‘soft’ ODR?

Most standard ODR texts cite eBay, and its relationship with Square Trade as a tied ODR provider, as a major success story of the B2C environment. eBay is one of the giants of the B2C landscape, operating in over twenty-four countries, including China, India and South Korea⁸¹. Its UK site, eBay.co.uk⁸² has 11.6 million UK users⁸³. eBay is clearly well regarded by UK consumers: according to January 2006 statistics, people in the UK spend more time on eBay than

⁸¹ Found at: <http://pages.ebay.com/aboutebay/thecompany/companyoverview.htm>.

⁸² Found at: <http://pages.ebay.co.uk/aboutebay/thecompany/companyoverview.html>

⁸³ Number as of January 2006. Ibid.

any other website⁸⁴ and eBay is the most positive brand name on the Internet for UK consumers⁸⁵. Yet as noted above, C2C sites such as eBay are inherently dispute-prone. eBay therefore promotes panoply of ODR solutions, including access to negotiation and mediation via Square Trade as an important part of its “trusted” brand. Square Trade/eBay do not release public figures as to numbers of cases handled, or resolved in Europe, but according to Katsh, Square Trade handled nearly 200,000 disputes from 2000-2002⁸⁶, the majority of which emanated from eBay disputes⁸⁷ and presumably numbers have grown since then as eBay usage has soared.

Edwards and Theunissen carried out research in 2005⁸⁸ into (a) the uptake of ODR solutions in disputes on eBay by a sample of 400 UK eBay users and (b) the correlation between access to ODR solutions and confidence and trust in the eBay C2C environment. In particular the attempt was to find out empirically if the provision of ODR did have a causal relationship with instilling confidence in consumers in the use of eBay, and e commerce generally.

First, it was found that very few respondents made use of “full-scale” Square Trade mediation or assisted negotiation - only 8% of sellers and 3% of buyers in the sample of 400. Most disputants used what we term ‘soft’ ODR - the methods being offered by eBay here including the leaving of negative feedback, or alternative means of non-litigative non-eBay redress, such as going to PayPal’s dispute resolution scheme. Backing up the findings of the 2006 Eurobarometer survey, even fewer used other conventional means of obtaining redress: only 5% had approached outside bodies such as Citizens Advice Bureaux or the police.

Secondly, there was a very high degree of satisfaction with eBay transactions - 93% were very or fairly satisfied with the majority of their eBay transactions. Yet less than 50% were very or fairly satisfied with eBay’s handling of disputes. And these were not a minority of complainants - around 66% of the survey had had problems with one or more eBay transaction. Furthermore when asked about their satisfaction with Internet transactions generally, levels of satisfaction remained extremely high - 96% reporting they were very or fairly satisfied.

In terms of getting what they wanted via ODR on eBay, a mixed but not very positive picture emerged. Of buyers, over a third got no satisfactory result and only 40% got the result they wanted (i.e. - their money back). Of sellers, again around a third reported no successful outcome and the most popular means of “revenge” on “bad buyers” seemed to be to leave negative feedback. When all respondents were asked if they regarded eBay as “as safe a place to shop as the high street” only 4% agreed with this statement.

If consumers are as satisfied with general transactions online, as with transactions on eBay, then ODR does not appear to be a “silver bullet” which dispels consumer fears and instils trust. Instead, consumers seem to be keen on the experience of shopping online, and on online auction sites over high street shopping, despite the risks of disputes. The simplest hypothesis that seems to emerge is that both prevalence of disputes, and dispute handling, via ADR or ‘hard’ ODR, are not that important in relation to general levels of satisfaction with online and C2C site shopping. It also seems to indicate that the eBay sample were more robust about dealing with the tribulations of the online environment and, in particular, the C2C environment, than general surveys about consumer trust (or more relevantly, consumer fears) have generally lead us to believe. 96% of the eBay sample did not think eBay was as safe as the high street but it does not seem to have put them off shopping there. The advantages of range of goods, cheapness, and

⁸⁴ Nielsen / Netratings, January 2006. See http://www.nielsen-netratings.com/news.jsp?section=new_pr&thetype=date&theyear=2006&themoth=0.

⁸⁵ See calculations by net monitoring company Envisional published in 2005: <http://news.bbc.co.uk/1/hi/technology/4468745.stm>.

⁸⁶ Ethan Katsh, “Online Dispute Resolution: The Next Phase”, *Lex Electronica*, Vol. 7, No.2, Spring 2002, available at: <http://www.lex-electronica.org/articles/v7-2/katsh.htm>.

⁸⁷ *Ibid*.

⁸⁸ See Edwards L and Theunissen L “Creating Trust and Satisfaction Online: How Important Is ADR: The UK eBay Experience”, BILETA Conference, 2005, Malta. The project was funded by the Arts and Humanities Research Council Centre for Research into Intellectual Property and Technology Law. This paper is available, upon request, as Annex 3.

ease of access on eBay and online in general, simply seem to outweigh the risks, although further empirical research in this area is definitely needed.

In general then, the UK survey neither backs up the claims that Square Trade is used in high volumes by UK as opposed to US consumers, nor does it more generally back up the much-accepted hypothesis that the provision of 'hard' ODR processes promotes more than marginal consumer confidence. This must lead to questions whether the EU is acting efficiently if it expends public funding on ODR providers such as ECODIR⁸⁹.

Finally, the eBay survey investigated why some respondents chose not to participate in any of the dispute resolution processes eBay offered. This may shed some light on why consumer 'hard' ODR and ADR uptake is so poor. Of the one-third of users with problems who chose not to use any ADR mechanisms, nearly 52% resolved their disputes by contacting the other party directly, without the help of eBay. Around 20% thought that it was worth more than the value of the item in question to enter a dispute, and a similar percentage said they either couldn't be bothered to use ADR, or did not know such processes existed. Only a very few chose to turn to legal advice, or to bodies outside eBay such as the police, trading standards, credit card companies, or the courts. Even though many may have used PayPal to pay for transactions rather than credit cards or other means such as cheques or money order, this seems to show a lack of awareness among consumers of their rights under European law in where credit card transactions go wrong.

⁸⁹ See Bonnici J P M and Mestdagh K de V "On the use of legal measures to entice participation in Online Dispute Resolution Systems for the settlement of online -related disputes" in Zeleznikow and Lodder (eds) *Second International ODR Workshop* (ordworkshop.info) (Tilburg: Wolf Legal Publishers, 2005).