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Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions

LILIAN EDWARDS AND CAROLINE WILSON

ABSTRACT Effective dispute settlement is regarded as one of the means of enhancing consumer confidence in cross-border purchases over the Internet. Yet, studies of online dispute resolution (ODR) show, on the whole, poor uptake of ODR by the public. This paper is based on a research project carried out by the authors (funded by the European Parliament) which explored why so few people resort to ODR and what are the implications of low uptake for consumer confidence in cross-border e-commerce. The authors expand the traditional definition of ODR and introduce a distinction between what they term ‘hard’ or traditional ODR processes and the more novel ‘soft’ ODR processes. The low uptake of ‘hard’ ODR is critically considered, as are the theoretical advantages and disadvantages of ‘hard’ and ‘soft’ ODR. Successful examples of one ‘hard’ and one ‘soft’ ODR mechanism are reviewed. The authors conclude with considering the implications for EU ODR policy in the short, medium and long term.

Introduction

Effective dispute settlement is conventionally regarded as one of the key means of enhancing consumer confidence in buying and selling over the Internet. Consumers are in general known to be reluctant to pursue court-based action for small value purchases, and have problems of lack of finance, knowledge, experience and access to legal assistance, which impede their effective access to the legal system; and these problems are further aggravated by problems of jurisdiction, choice of law and enforcement in the cross-border world, and by the uncertain legal dimensions of Internet transactions.
Given this background, an obvious way forward in the promotion of e-commerce is to encourage consumers to turn to alternative dispute resolution (ADR). Cross-border and Internet transactions are indeed notoriously dispute-prone: a recent Eurobarometer survey\(^2\) shows that 41% of EC cross-border consumers who launched a formal complaint concerning their purchases were not satisfied with the way their complaint was handled. Yet despite this, most of the dissatisfied consumers took no further action, and only 6% brought the matter to any kind of ADR body. Why do so few consumers resort to this kind of dispute settlement, and in particular, why is more use not being made of online alternative dispute resolution (ODR) in Internet consumer transactions, even where, as we shall see, large amounts of money have been spent by online businesses to provide such redress options?

In this article, we shall briefly examine the main models used for online dispute resolution (negotiation, arbitration, mediation, etc) and discuss how effective (or not) they are both in raising consumer trust and confidence in the online medium, and in providing effective enforcement of consumer rights, along with the basics of due process. We analyse the traditional narrowly defined model of ODR and expand it to include two new ODR paradigms—‘hard’ ODR and ‘soft’ ODR. We consider two exemplars of successful ODR: the Uniform Dispute Resolution Process (hereafter, UDRP), a ‘hard’ ODR process, and eBay’s dispute resolution services which include both ‘hard’ and ‘soft’ techniques. We tentatively conclude that both paradigms have distinct niche advantages and that this should be taken account of if the EC is to successfully pursue a policy of encouraging the growth of ODR to promote trust and confidence online.

**What Is ODR?**

ODR is, in its 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. Arguably a distinction can be drawn between ‘hard’ or traditional ODR which covers procedures intending directly to resolve conflicts and what we have termed ‘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 concept is not without precedent: Thornburg,\(^3\) a leading US commentator on ODR and ADR, defines ODR as encompassing not just traditional resolutive processes (what we term ‘hard’ ODR) but also newer ‘preventative’ processes such as, for example, the use of Digital Rights Management (DRM) by content owners to forestall copyright infringement; and shrink wrap and browse wrap contracts to proactively regulate the terms of future dispute. We do not discuss DRM in this article, both for reasons of space and because it is rarely regarded as a pro-consumer remedy. Our focus is, instead, on other ‘soft’ ODR processes which empower consumers by giving them information with which to make considered trading decisions, such as the use of ‘feedback’ or trust metrics pioneered by consumer-to-consumer (C2C) websites like eBay.\(^4\) Here, a disappointed buyer or seller can rate a merchant site, or a particular buyer/seller as a bad risk (so-called ‘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 appear to be rarely used so far.

Most ‘traditional’ ODR literature, especially that written in the heat of the confidence in the dot.com boom prior to 2001, concentrates on ‘hard’ ODR. However below we present evidence that online consumers may find the newer ‘soft’ ODR processes more useful than ‘hard’ ODR—and that their actual uptake is higher. ‘Hard’ ODR may still however be the best option in certain niche areas such as domain names. We explore these issues in more detail below.

Revisiting ‘Hard’ ODR

The main forms of traditional or ‘hard’ ODR are summarized below:

(i) **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 ODR provider contacts party B, who can accept or refuse to submit to their jurisdiction. 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) or consumer-to-consumer (C2C) disputes. Examples of such sites include Cybersettle, and The ClaimRoom both of which claim to have processed large amounts of cases successfully.

(ii) **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 eBay which has a business relationship with the ODR provider Square Trade, and thereby provides assisted negotiation to a large number of eBay users (see below) alongside other processes.

(iii) **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 lack of opportunities for parties to ‘vent’. 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 below).

(iv) 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 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 online, not limited to B2C e-commerce, e.g. for disputes relating to Wikipedia texts. However arbitration, in practice appears to be relatively underused in B2C disputes. A 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 an as yet unpublished eBay survey of 400 UK eBay users, it was found that around two-thirds of the respondents had encountered problems with one or more eBay transactions, but only 8% of sellers and 3% of buyers in the sample had gone as far as using the dispute resolution services provided by Square Trade, and email interviews indicated that few if any had gone as far as actual arbitration, rather than assisted mediation.

Vis-à-vis other forms of ‘hard’ ODR, 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 1958 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 below). 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-wrap, click-wrap or possibly a browse-wrap contract) or are incorporated by reference to internationally regulated sets of rules, e.g. the UNCITRAL rules. 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 also has advantages for consumers in terms of preservation of rights of due process. However it can be time consuming, costly, and as inimical to consumers as ordinary court litigation. It is notable that the most successful form of online arbitration—the Uniform Dispute Resolution Process (hereafter, UDRP)—is a niche application of online arbitration that addresses these very concerns (see below). 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 (see below). 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.

The Case For and Against ODR in the B2C and C2C Environments

Kauffman-Kohler and Schultz state that the B2C environment is characterised 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 EC, 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’, both 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 Katsh and Rule 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.

The lack of trust intrinsic to the online environment 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 money and peer-to-peer exchange of funds. Conventional businesses have incentives in terms of public relations and consumer trust to prevent and resolve disputes, since their customers are mainly potential ‘repeat players’, but arguably, consumer-traders in one-time relationships 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. C2C 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’. Hence such sites have particular needs 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 relative to (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 or currency 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 consumer.

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 means. Tyler and Bretherton, who carried out a major global study of ODR in 2004, 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 to traditional litigation, 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 legal advice perhaps inaccessible 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 gender, 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 minimised. Thus ‘ODR introduces very powerful and efficient tools to dispute resolution and thereby increases access to redress mechanisms’.

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/mediationconciliation body. Bonnici and Mestdagh 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’. Sali, 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 Mestagh 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 have in fact attracted considerable numbers of participants, even though they
may not meet all the standards of due process, confidentiality, impartiality, etc, discussed below. Accordingly, 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.

Disadvantages of ODR for Online Consumers

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 Life. Although these practical difficulties may be overcome in time, certain difficulties in principle are likely to persist. These fall into two categories: due process and fairness, and enforceability.

Due Process Issues

In the USA, where consumer ADR often takes the form of ‘hard’ ODR in the shape 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. Thornburg sets out several cogent questions that should 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.
- Who pays the fees for the process and are they affordable? In some US case law, 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.
- 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/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 been active in defining due process standards in its Recommendation of 1998, 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 2001, and the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law of 2002. Other bodies have also done considerable work relevant to the setting of ADR/ODR standards of due process, e.g. the American Bar Association and the OECD.

Such due process issues are arguably of less concern in the EU, at least in consumer disputes, since there is fairly stringent control of unfair standard term contract clauses. Unenforceable ADR and ODR clauses imported perhaps from US terms and conditions may however still exist and operate until challenged. For this reason among others, the EU commissioned its own ODR provider, ECODIR, which was launched in 2001. 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). Despite being both free and swift for the consumer, however, as already noted 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.

Enforceability
There are a number of key problems here.

(i) 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 writing. 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 writing 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.

(ii) 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 a full court action for 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 in our view if this provision was implemented in EC law.
(iii) Validity of standard form clauses referring parties to mandatory arbitration or mediation. As noted above, such terms may be unenforceable given EC consumer protection law and unfair contact terms law. Although this is mainly a positive outcome 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 below). 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 is 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 for domain names (see also below) may lie primarily in the fact that the subject of dispute—the domain name—is ultimately within the control of the arbiter. If a defender defaults in the UDRP, he loses the case because the domain name will be transferred to the complainant. In e-commerce disputes, more commonly, default means the complainant gets nothing for his or her pains. This ‘automatic enforcement’ is an important issue in consumer uptake of an ODR process.

Success Stories for ODR

The UDRP—a Success Story in Solving B2C and C2C Disputes via ‘Hard’ ODR?

The sui generis Uniform Dispute Resolution Process (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. Much of the standard ODR literature makes approving reference to the UDRP. However, we must question how far it provides an exemplar for B2C or C2C dispute resolution, given that the parties to UDRP disputes are not consumers as such, but domain name registrants and trade mark proprietors, who may be natural or corporate persons. However, the UDRP does have potentially valuable 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 important areas such as volume of uptake, fairness and due process, and ease of enforcement of award. The success of the UDRP seems to show that niche ‘hard’ ADR process can work in the online environment.

What does the UDRP do? Domain names, e.g. www.soton.ac.uk, are the easy-to-remember names linked to Internet Protocol (IP) numbers; IP numbers being unique numbers that identify each computer site connected to the Internet. Like telephone numbers, domain names are hierarchical and, via intermediary registrars, domain names are granted by the individual registry responsible for the relevant top hierarchical level, the relevant Top Level Domain—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 policies, 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) and it also has been adopted by more than forty of the two hundred and fifty country-specific TLDs (known as ccTLDs).

The legal basis of the UDRP therefore lies in the contract between the registrar 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 of 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 where:

(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 services. Currently there are four approved UDRP providers—ADNDRC, CPR, NAF and WIPO. A total of 12,122 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 registered, 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 panellists (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 decision. The whole process is essentially conducted online; there are no in-person hearings, except in extraordinary cases. 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 occurs. 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 itself provides for some flexibility as to the language of UDRP proceedings and, as noted above, UDRP providers are providing multi-lingual services. It is fair to note, however, that despite this the majority of parties to UDRP disputes are domiciled in the USA. 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 $US5,000, 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 all informed of UDRP decisions and UDRP decisions are published online by the individual providers.

Empirical research on the UDRP seems to show a superficial appearance of bias towards large company complainants 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 ‘hard’ ODR. In fact, a 2002 research project led by Mueller, 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 stakeholders. 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.

There are several other reasons 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. So, 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. However, perhaps given the niche nature of the UDRP, this does not seem to result in undue unfairness in practice.

Crucial, to the success of the UDRP is enforcement. 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’ as where a complainant succeeds under the UDRP, the contractual nexus between the registrant and registrar 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 claimant will obtain nothing for his or her pains.

eBay: The Success of ‘Soft’ ODR?

Most standard ODR texts indicate eBay, and its relationship with Square Trade as a tied ODR provider, as a major ‘hard’ ODR success story of the B2C environment. eBay is one of the giants of the C2C landscape, operating in over twenty-four countries, including China, India and South Korea. Its UK site, eBay.co.uk has 11.6 million UK users. eBay is clearly well regarded by UK consumers: according to January 2006 statistics, people in the UK spend more time on eBay than any other website and eBay is the most positive brand name on the Internet for UK consumers. Yet as noted above, C2C sites such as eBay are inherently dispute-prone. eBay therefore promotes a panoply of ODR solutions, including access to negotiation and mediation (‘hard’ ODR) via Square Trade as an important part of its ‘trusted’ brand. Other ‘soft’ ODR forms of redress are also available on the eBay site itself such as notably the leaving of negative feedback. 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 2000–2002, the majority of which emanated from eBay disputes.

In an as yet unpublished eBay survey carried out in 2005, Edwards and Theunissen carried out research into (a) the uptake of ‘hard’ and ‘soft’ 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 they attempted to find out empirically if the provision of ODR did have a causal relationship in instilling confidence in consumers in the use of eBay, and e-commerce generally.

First, it was found that very few respondents made use of ‘hard’ ODR (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 various 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 conventional means of obtaining redress: only 5% had approached outside bodies such as Citizens Advice Bureaux or the police and none had been to court.

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 transactions. 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 via a ‘soft’ ODR mechanism—leaving negative feedback. When all respondents were asked if they regarded eBay ‘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’ that 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 led 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 ease of access on eBay and online in general, simply seem to outweigh the risks, although further empirical research in this area is needed to investigate this.

In general then, this UK eBay survey does not support the much-accepted hypothesis that the provision of ‘hard’ ODR processes promotes more than marginal consumer confidence and it does provide limited evidence that ‘soft’ ODR processes are more popular with consumers. This must lead to questions as to whether the EU is acting efficiently if it expends public funding on ‘hard’ ODR providers such as ECODIR.83

Finally, the eBay survey investigated why some respondents chose not to participate in the ‘hard’ ODR 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 ODR 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 ODR, or did not know such processes existed. Only a very very few chose to turn to legal advice, or to bodies outside eBay such as the police, trading standards, or credit card companies. Even though many may have used PayPal to pay for transactions rather than credit cards or other means such as cheques or money orders, this seems to show a lack of awareness among consumers of their rights under European law in where credit card transactions go wrong (which is the source of another key mechanism of ‘soft’ ODR).

Conclusions: Reforming EU ODR Policy

We are left with something of a paradox. In the fourth section of this paper, we identified due process and enforceability as two key issues regarded as essential in the literature for an effective and fair ODR process. Yet uptake of ‘hard’ ODR mechanisms designed specifically around these constraints such as ECODIR is depressingly low. On the other hand, tens of thousands of consumers every day are using simple reputation feedback
mechanisms on sites like eBay in a bid to avoid disputes by going to trusted traders. What can we learn from this? Why does the UDRP have a successful track record in domain name disputes when in other areas of law ‘hard’ ODR has failed to attract clientele?

In the short term, there are several actions signposted in this paper which the EU could undertake: e.g., resolve the legal uncertainties as to enforcement of ADR awards, in both arbitration and mediation, 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. Current consumer engagement with ODR might be portrayed diagrammatically as shown in Figure 1.

Accordingly we suggest that 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; and in what areas ‘soft’ ODR mechanisms may be more useful. Uptake, outcomes and satisfaction rates of ECODIR and other EU state publicly funded ODR providers should be audited and published on a regular basis. Furthermore 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.

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 desirable. 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 studies 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 trust, 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’ 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 interoperability. 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.

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 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.

Notes and References

1 This article is based on the findings of a research project carried out by Edwards and Wilson and funded by the European Parliament in January 2007.


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

www.theclaimroom.com


www.squaretrade.com

See P Motion ‘ODR: a view from Scotland’ in L Edwards (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.


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12 See L Edwards and A Theunissen ‘Creating trust and satisfaction online: how important is ADR: the UK eBay experience’, BILETA Conference, 2005, Malta. This project was funded by the Arts and Humanities Research Council Centre for Research into Intellectual Property and Technology Law. A copy of this unpublished survey may be obtained by contacting Lilian Edwards and is forthcoming 2007, Web Journal of Current Legal Issues.

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

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

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

16 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 that indicates acceptance.

17 Available at http://www.adrchambersinternational.com/arbitrules.htm


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


23 See e.g. Zopa at http://www.zopa.com

24 See e.g. PayPal UK at http://www.paypal.co.uk

25 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 A Guadamuz ‘eBay law: the legal implications of the C2C electronic commerce model’, Computer Law & Security Report Vol 19, No 6, pp 468–473, 2003. 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 USA, eBay was denied the 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).

26 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.

27 See Eurobarometer, op cit, note 2.


30 E Clark, G Cho and A Hoyle ‘ODR: present realities, pressing problems and future prospects’, 17 International Review of Law Computers and Technology Vol 7, pp. 7–26, 2003, 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 online might prevent unconscious discrimination.


33 R Sali ‘Crossing dispute and information technology: the experience of Risolvionline’ in Zeleznikow and Lodder (eds), supra note 32.

34 Ibid.


38 Recommendation 2001/310/EC.


42 See primarily the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC: L 95, 17.4 198.

43 See http://www.ecodir.org/

44 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.

45 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, *op cit*, note 18 at ch 3.

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 registry. 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.

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.

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.

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

According to T 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).

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


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.


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

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

See http://www.icann.org/cgi-bin/udrp/udrp.cgi (as of 15 January 2007).

Which are usually easily established with reference to online WHOIS data (see note 31 *supra*).

UDRP para 7.

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

UDRP para 13.

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 USA (see Bettinger, *op cit*, note 50 at p 984).

UDRP para 11.

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

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

$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.

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

E.g. A 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

Namely that domain name transfer is ordered by the UDRP Panel in the majority of proceedings. Kur’s study (op cit, note 70) found that transfer was ordered in 76.68% of proceedings. A later study by Bettinger (op cit, note 50) found that transfer had been ordered in 80% of proceedings.


E.g. see Bettinger op cit, note 50 at p 939.

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

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

Number as of January 2006. Ibid.


Ibid.

See note 12, supra.

See note 2, supra.

See Bonnici and Mestdagh op cit, note 32.

T Schultz ‘Does online dispute resolution need governmental intervention? The case for architectures of control and trust?’, North Carolina Journal of Law & Technology Vol 6, p 71, 2004. It may be questioned if an EU ODR kitemark that does not displace other competitors from the market will do anything other than further confuse consumers. Notably, the attempt to implement a general EU trustmark for e-commerce has already failed.


Supra note 12.

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/)
