

2019

## Online Dispute Resolution

Ronald A. Brand

*University of Pittsburgh School of Law, rbrand@pitt.edu*

Follow this and additional works at: [https://scholarship.law.pitt.edu/fac\\_articles](https://scholarship.law.pitt.edu/fac_articles)



Part of the [Commercial Law Commons](#), [Conflict of Laws Commons](#), [Consumer Protection Law Commons](#), [Contracts Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [European Law Commons](#), [International Economics Commons](#), [International Law Commons](#), [International Relations Commons](#), [International Trade Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Litigation Commons](#), [Political Economy Commons](#), [Social and Cultural Anthropology Commons](#), and the [Transnational Law Commons](#)

---

### Recommended Citation

Ronald A. Brand, *Online Dispute Resolution*, Unpublished: A paper based on the author's presentation at the Summer School in Transnational Commercial Law & Technology, Verona, Italy, May 30-June 1, 2019 (2019).

Available at: [https://scholarship.law.pitt.edu/fac\\_articles/457](https://scholarship.law.pitt.edu/fac_articles/457)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship@PITT LAW. It has been accepted for inclusion in Articles by an authorized administrator of Scholarship@PITT LAW. For more information, please contact [leers@pitt.edu](mailto:leers@pitt.edu), [shephard@pitt.edu](mailto:shephard@pitt.edu).

## **Online Dispute Resolution**

Ronald A. Brand

A paper based on the author's presentation at the Summer School in Transnational Commercial Law & Technology, Verona, Italy, May 30-June 1, 2019

(scheduled for publication by the University of Verona School of Law, Marco Torsello, editor)

### **Abstract**

This chapter was prepared from a presentation given by the author at the 2019 Summer School in Transnational Commercial Law & Technology, jointly sponsored by the University of Verona School of Law and the Center for International Legal Education (CILE) of the University of Pittsburgh School of Law. In the paper, I review online dispute resolution (ODR) by considering the following five questions, which I believe help to develop a better understanding of both the concept and the legal framework surrounding it:

- A. What is ODR?
- B. Who does ODR?
- C. What is the legal framework for ODR?
- D. What are the developing legal issues regarding ODR?
- E. What is the future of ODR?

I give particular consideration to the negotiations that led to the 2017 UNCITRAL Technical Notes on Online Dispute Resolution,<sup>1</sup> as well as recent developments across the globe. I also consider whether the development of ODR is likely to occur most usefully in the private sector, as compared to development through national or international legal process.

**Key words:** online dispute resolution; ODR; private international law; UNCITRAL; European Union; alternative dispute resolution; arbitration; mediation; conciliation; international litigation; international economic law; comparative law; international law; consumer protection

**Online Dispute Resolution**

Ronald A. Brand

A paper based on the author's presentation at the

SUMMER SCHOOL IN

TRANSNATIONAL COMMERCIAL LAW &amp; TECHNOLOGY

Verona, Italy, May 30 – June 1, 2019

Introduction.....	3
A. What Is Online Dispute Resolution?.....	4
B. Who does ODR? .....	5
C. The Legal Framework for ODR.....	9
1. The Effort at UNCITRAL .....	10
2. The European Union .....	13
3. China .....	17
4. France .....	18
5. The International Council for Online Dispute Resolution (ICODR).....	20
6. State-Level Small Claims ODR Programs .....	21
D. Developing Legal Issues Regarding ODR.....	24
1. Dealing with Conflicting Approaches to Consumer Protection .....	24
2. The Difficult Issues for ODR in the UNCITRAL Negotiations.....	28
E. What is the Future of Online Dispute Resolution? .....	29
1. The CILE Effort to Define a Way Forward.....	30
2. Some Final Thoughts.....	35

## Online Dispute Resolution

Ronald A. Brand\*

### INTRODUCTION

Online dispute resolution (ODR) has received much attention from both lawyers and business persons. In order to understand ODR in a legal context, however, it is necessary to begin with a focus on what the term includes and just how it is addressed. In this paper, I review ODR by considering the following five questions, which I believe help to develop a better understanding of both the concept and the legal framework surrounding it:

- A. What is ODR?
- B. Who does ODR?
- C. What is the legal framework for ODR?
- D. What are the developing legal issues regarding ODR?
- E. What is the future of ODR?

In considering these questions, I give particular consideration to the negotiations that led to the 2017 UNCITRAL Technical Notes on Online Dispute Resolution,<sup>1</sup> as well as recent developments across the globe. I also consider whether the development of ODR is likely to occur most usefully in the private sector, as compared to development through national or international legal process.

---

\* Chancellor Mark A. Nordenberg University Professor, and Director, Center for International Legal Education, University of Pittsburgh. This paper is based on my presentation at the Verona Summer School in International Law and Technology on May 31, 2019, co-sponsored by the University of Verona School of Law and the Center for International Legal Education at the University of Pittsburgh School of Law. I thank Allison Bustin and Christopher Anderson for their excellent research and editorial assistance. Any errors are my own.

<sup>1</sup> UNCITRAL Technical Notes on Online Dispute Resolution (2017) (“UNCITRAL Technical Notes”), available at [https://www.uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf).

### A. What Is Online Dispute Resolution?

There are many different definitions of ODR. In its 2017 Technical Notes, The United Nations Commission on International Trade Law (UNCITRAL), said the following in this regard:

ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others), and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.<sup>2</sup>

This allows some definitions of ODR to be very broad, while some are very narrow. This definition is in part a recognition that the 2017 UNCITRAL Technical Notes on ODR were the result of a failed effort to develop an ODR system, or at least ODR guidelines, for global use. The fact that the Working Group efforts concluded with only “Notes” indicates the problems of state-sponsored ODR, which will be discussed further below.

I believe a narrower definition of ODR is most appropriate. This choice can be explained in part by the problems that arise when an overly-broad definition is used. Rather than state what ODR is for purposes of a narrow definition, however, it is easier to define the term by stating what it is not. I believe it is not helpful to include matters such as those in the following list in the concept of ODR because they simply use electronic communication to accomplish tasks that would normally be accomplished by other means:

- 1) e-Negotiation - to the extent that term means simply using email to negotiate rather than using other forms of communication;
- 2) e-Mediation - to the extent that term means simply using email with a third-party intermediary for consensual dispute resolution, rather than using other forms of communication; and
- 3) e-Arbitration - to the extent that term means simply using email with a third-part intermediary for binding dispute resolution, rather than using other forms of communication.

---

<sup>2</sup> *Id.* at 1.

Part of the rationale for an exclusion of these types of electronic dispute resolution communication from the definition of ODR comes from the conclusions drawn by those who would include them as ODR. When authors like Julio César Betancourt and Elina Zlatanska included such communication in their definition of ODR, they concluded that

The virtues of technological advances in the area of dispute resolution have perhaps been overestimated . . . Dispute resolution mechanisms, in general, are a means of maintaining social order. These mechanisms are intended to deal with conflicts and disputes—on the basis of the rule of law—and it is doubtful that such a function can be fully and effectively performed in cyberspace.<sup>3</sup>

I believe that including too much in what we call ODR results in expecting too much of ODR. That problem can be avoided by limiting the definition of the concept to platforms specifically designed to resolve disputes resulting from transactions explicitly connected with those platforms.

## **B. Who does ODR?**

The UNCITRAL Working Group that created the 2017 Technical Notes was originally convened to create a state-sponsored framework for ODR.<sup>4</sup> When the discussions began, representatives from the private sector who had created successful ODR systems were present; but they became disinterested as the Working Group process moved forward without an apparent desire to construct a workable ODR system.

The fact is that ODR exists, and it works quite well. What exists and works, however, is mostly market-driven and privately controlled. Perhaps the best example is the eBay PayPal system designed to resolve disputes between buyers and sellers on the eBay platform. That system now avoids language that suggests any type of adversarial relationship, and goes under the rubric of the eBay “money back guarantee policy.”<sup>5</sup> The framework for

---

<sup>3</sup> Julio César Betancourt & Elina Zlatanska, *Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?*, 79 *ARBITRATION* 256, 263 (2013).

<sup>4</sup> UNCITRAL Technical Notes, *supra* note 1.

<sup>5</sup> *Customer Service*, EBAY (last visited Dec. 4, 2019) <https://www.ebay.com/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210>.

dispute settlement is streamlined as a result of past experience, and allows buyer claims if an item is not received or an item is received but is not as it was described; and seller claims for unpaid item fees (which occur when the buyer fails to pay but the seller was charged a fee by eBay because a sale was agreed upon).<sup>6</sup> The eBay PayPal system handles over 60 million disputes per year, demonstrating true success in the use of ODR.<sup>7</sup> The process begins with online negotiation between the parties; followed by facilitated settlement; followed by a binding decision, most often enforced automatically through a charge-back on the PayPal financial system.<sup>8</sup>

Alibaba has created an ODR system similar to the eBay three-step model. It is diagrammed on the Alibaba website,<sup>9</sup> as set out on the following two pages:

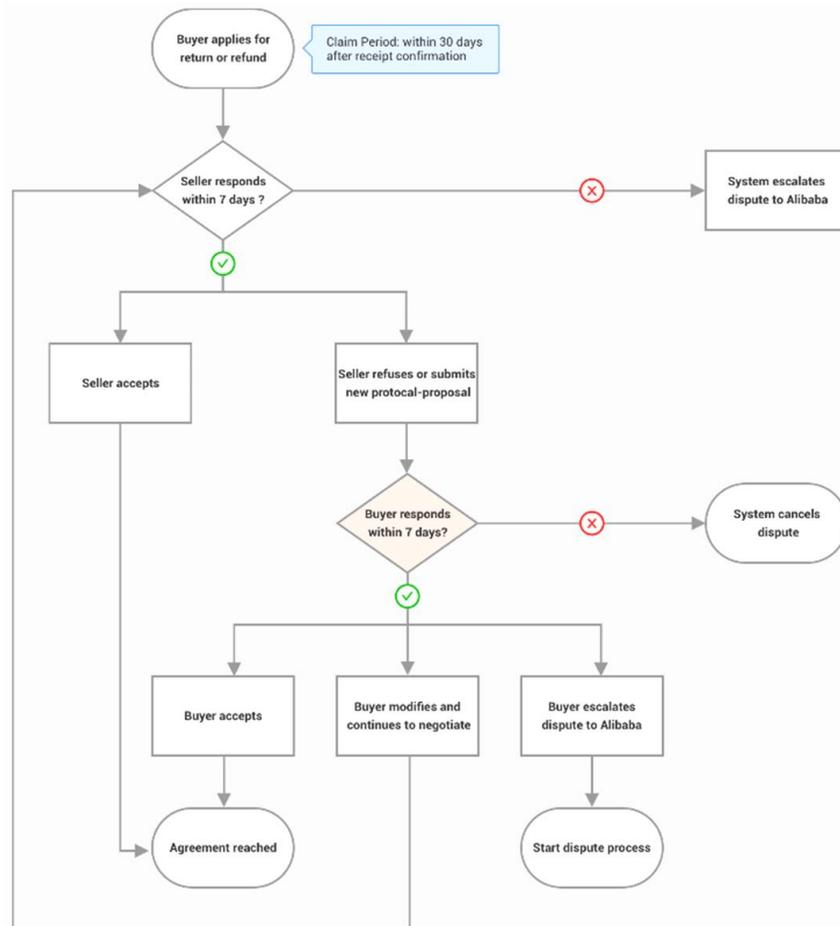
---

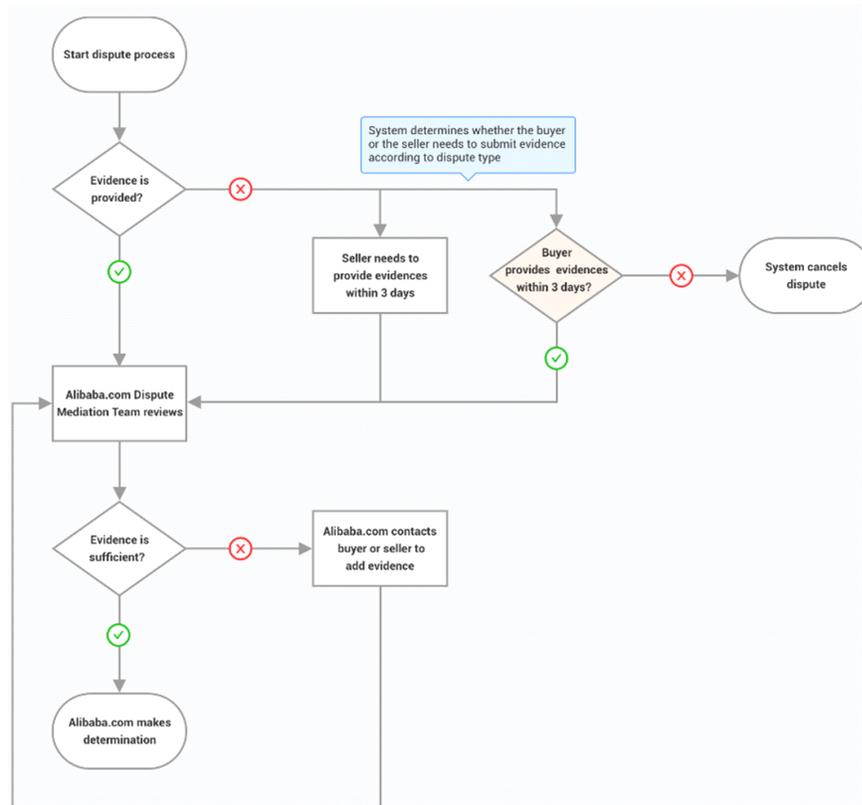
<sup>6</sup> *Id.*

<sup>7</sup> Louis F. De. Duca, Colin Rule, & Kathryn Rimpfel, *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 YEARBOOK ON ARBITRATION AND MEDIATION 204 (2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Help Center*, ALIBABA (last visited Dec. 3, 2019) [https://service.alibaba.com/buyer/faq\\_detail/10609493.htm](https://service.alibaba.com/buyer/faq_detail/10609493.htm).





Colin Rule, who designed and implemented the eBay ODR system makes a point of noting that adversarial language has a detrimental effect on the system.<sup>10</sup> Thus, in order to provide a positive tone to the system, he recommends that an ODR system

- 1) avoid giving the buyer making a claim an open text box; this avoids the natural expression of frustration and negative sentiments; and
- 2) use a rating process by which parties can be excluded from the exchange system if they achieve a negative reputation; this gives the seller an incentive to post in a more positive tone when replying to the buyer's claim.

---

<sup>10</sup> Colin Rule, *Designing a Global Online Dispute Resolution System: Lessons Learned from eBay*, 13 U. ST. THOMAS L.J. 354 (2017).

According to Rule, a positive tone enhances the likelihood of success by promoting “accountability, empathy, and reasonableness.”<sup>11</sup> In describing the eBay approach, he notes that:

- 1) “The bottom line is the users want the process to be simple to use, fair to all participants, and easy to understand;”<sup>12</sup>
- 2) “It’s very important to pay attention to power differentials . . . . sellers are repeat players;”<sup>13</sup> and
- 2) “Tone matters. Language shapes the way we see the world and it shapes the way we think about resolutions. . . . If your language promotes empathy and reason, then that’s a big step toward encouraging resolutions.”<sup>14</sup>

Not only has Alibaba developed a system similar to that established by eBay, but other online sites such as Airbnb, Uber, and TaskRabbit have created ODR systems modeled on the eBay format. Given the size and impact of eBay, Rule notes that if users were citizens, eBay would be the fifth largest country in the world.<sup>15</sup> He goes so far as to suggest that “[i]t may turn out that the justice systems of the future will resemble the designs we crafted for eBay more than the geographically-bound systems of today.”<sup>16</sup>

### C. The Legal Framework for ODR

The success of eBay, Alibaba, and others in providing market-based ODR systems raises the question of whether states should be involved in the ODR game at all, other than providing regulation necessary for public oversight to prevent overreaching. While the effort at UNCITRAL failed to produce an international framework for ODR, both the European Union and China have chosen to establish legal rules for ODR, with China moving forward with special courts operating in an online framework. In order to

---

<sup>11</sup> *Id.* at 364.

<sup>12</sup> *Id.* at 368.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 368-69.

<sup>16</sup> *Id.* at 369.

understand these developments, it is useful to provide a bit more background to the UNCITRAL process that resulted in the 2017 Technical Notes. It is also useful to consider the various ways in which states and international organizations have sought to develop and regulate ODR.

### 1. The Effort at UNCITRAL<sup>17</sup>

In the summer of 2009, the United States proposed that the UNCITRAL Secretariat “be asked to prepare . . . a study on possible future work that UNCITRAL might engage in on the subject of online dispute resolution in cross-border e-commerce transactions.”<sup>18</sup> In July 2010, the Commission directed one of its Working Groups “to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.”<sup>19</sup> Working Group III took up the task and held 12 Working Group Sessions (sessions 22-33) between December 2010 and March 2016.<sup>20</sup>

The original plan within Working Group III was to develop four instruments. One would contain a set of procedural rules, providing for three phases of ODR: negotiation, facilitated settlement, and arbitration. The second would contain a list of substantive principles to be applied in that ODR process. The third would contain guidelines and minimum requirements for ODR providers and arbitrators. The fourth would provide

---

<sup>17</sup> The author was a participant in the UNCITRAL Working Group III negotiations, representing the Center for International Legal Education of the University of Pittsburgh, which was also invited by the UNCITRAL Secretariat to contribute specific documents to help further those negotiations. The comments in this section are based on the author’s participation in that process.

<sup>18</sup> UNCITRAL, Report on the Work of Its Forty-Second Session, U.N. Doc. A/CN.9/681/Add.2, at 1 (Vienna, 29 June-17 July 2009).

<sup>19</sup> Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010), U.N. Doc. A/CN.9/716, at 2, ¶ 4 (17 Jan 2011), available at [https://uncitral.un.org/en/working\\_groups/3/online\\_dispute](https://uncitral.un.org/en/working_groups/3/online_dispute).

<sup>20</sup> The reports of the sessions of Working Group III, along with related documents, may be found at [un.org/en/working\\_groups/3/online\\_dispute](https://uncitral.un.org/en/working_groups/3/online_dispute).

a cross-border mechanism for enforcement of the resulting ODR decisions on a global basis.<sup>21</sup>

The Multinational Goal of the UNCITRAL effort was to set up a system for ODR that would be simple, efficient, effective, transparent, and fair, thus providing a practical dispute resolution alternative where none currently existed. The underlying premise of the negotiations was that, particularly for low-value, high-volume online transactions, access to courts did not provide access to justice. It simply does not make sense to seek a court judgment for an amount that may be a few hundred dollars or less, and then have to take that judgment abroad for recognition and enforcement.

Each country involved in the negotiations,<sup>22</sup> of course, desired a system that would remain as consistent with that country's existing law as possible. Three issues became particularly troublesome as a result of diverging national legal positions. The first was determining what law would apply to a cross-border transaction subject to ODR. If the system had to begin with a complicated determination of applicable law, the goal of simplicity would be lost at the outset. The second was how to deal with national and regional rules of private international law designed to carry out goals of consumer protection. The European Union and other countries came into the negotiations with the idea, based on established law, that a consumer had to be protected by preventing that consumer from entering into any pre-dispute binding choice of forum agreement. The third issue was the manner in which the ODR system could lead to an enforceable decision. While some, like the United States, favored tying the system to the New York Convention through binding arbitration, the consumer protection rules of the European Union and others prevented this by prohibiting pre-dispute binding choice of forum agreements.<sup>23</sup>

The great irony of the UNCITRAL negotiations was that the opening premise—that access to courts is not always access to justice in low-value, high-volume online transactions—ran counter to the efforts of those desiring to hang on to national rules that prohibited the parties who would most benefit from the ODR system from being able to use that system because

---

<sup>21</sup> UNCITRAL, Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-Third Session (New York, 23-27 May 2011), ¶ 140.

<sup>22</sup> Including regional federal systems such as the European Union.

<sup>23</sup> See *infra* notes 97-98 and accompanying text.

they would not be allowed to agree in advance to any kind of binding dispute resolution. Access to courts was not access to justice, but states wanted to prohibit parties from choosing binding ODR because those parties had to have access to courts. Thus, with states prohibiting the parties who most needed the system from agreeing to participate in that system, the system simply could not exist. Such was the vicious circle of conflicting premises advanced as necessary companions in discussing ODR.

The result of the UNCITRAL negotiations was the 2017 Technical Notes on Online Dispute Resolution, an effort to save some of the discussion while at the same time achieving no real substantive result.<sup>24</sup> It is worth listing some of the content of the Technical Notes. The Technical Notes' overview of online dispute resolution includes the following statements:

1. In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.
2. One such mechanism is online dispute resolution (“ODR”), which can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing.<sup>25</sup>

. . . .

ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.

The “Principles” included in the Technical Notes included the following:

7. The principles that underpin any ODR process include fairness, transparency, due process and accountability.
8. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.

---

<sup>24</sup> UNCITRAL Technical Notes, *supra* note 1.

<sup>25</sup> *Id.* at 1.

9. ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.
17. The ODR process should be based on the explicit and informed consent of the parties.<sup>26</sup>

The Technical Notes close by returning to the three-stage process contemplated at the outset of the negotiations. Rather than include a form of binding decision, however, they state:

18. The process of an ODR proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.<sup>27</sup>

Rather than provide for a binding outcome, the Technical Notes fudged on its elaboration of the “third (final) stage,” stating:

45. If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take.<sup>28</sup>

Of course, with no reference to any kind of binding final stage of dispute settlement, even the Technical Notes become of little value. There simply is no “dispute resolution” unless there is a result that “resolves” the dispute.

## 2. The European Union

In the European Union, a series of Directives and Regulations have begun to develop a framework for ODR. Article 5 of the 2013 Directive on Consumer ADR provides that:

Member States shall facilitate access by consumers to ADR procedures and shall ensure that disputes covered by this Directive and which involve a trader established on their respective territories

---

<sup>26</sup> *Id.* at 2–3.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 7.

can be submitted to an ADR entity which complies with the requirements set out in this Directive.<sup>29</sup>

On the same day in 2013 that the ADR Directive was issued, the Consumer Regulation on ODR was promulgated.<sup>30</sup> Article 1 of that Regulation states that:

The purpose of this Regulation is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market, and in particular of its digital dimension by providing a European ODR platform ('ODR platform') facilitating the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online.<sup>31</sup>

Article 5 of the ODR Regulation provides for the establishment of an ODR platform:

1. The Commission shall develop the ODR platform (and be responsible for its operation, including all the translation functions necessary for the purpose of this Regulation, its maintenance, funding and data security. The ODR platform shall be user-friendly. The development, operation and maintenance of the ODR platform shall ensure that the privacy of its users is respected from the design stage ('privacy by design') and that the ODR platform is accessible and usable by all, including vulnerable users ('design for all'), as far as possible.<sup>32</sup>

The EU Institutions have provided online information on procedures for the use of the ODR platform. This includes the following instructions:

---

<sup>29</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>30</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

<sup>31</sup> *Id.* art. 1.

<sup>32</sup> *Id.* art. 5.

### Using the ODR platform

- The ODR platform is designed to facilitate communication between you, your customer and a dispute resolution body. A dispute resolution body is an impartial organization or individual that helps consumers and traders resolve disputes without going to court.
- Under European law, alternative dispute resolution (ADR) can be used for any dispute arising from a contract between a trader and consumer, whether the product was bought online or offline or whether you and your customer live in the same or in different EU countries.
- The ODR platform only uses dispute resolution bodies approved by their national governments for quality standards relating to fairness, transparency, effectiveness and accessibility.

### Complain against a consumer

- If you are a trader based in the EU or Norway, Iceland and Liechtenstein, you can also use the ODR platform to send your online consumer dispute to an approved dispute resolution body.
- You can only complain against a consumer if they reside in Belgium, Germany, Luxemburg or Poland.<sup>33</sup>

The online instructions provide guidelines for instituting a complaint:

#### How to make a complaint

##### 1. Make a complaint

- To create a complaint the consumer and trader both have to be based in the EU or Norway, Iceland, and Liechtenstein.
- Start by filling in the online complaint form. Enter a few details about yourself, the trader, your purchase and what your complaint is about. Upload any relevant documents (e.g. invoice, purchase order).

---

<sup>33</sup> *Why the ODR Platform Matters for Traders*, EUR. COMM'N ODR (last visited Dec. 3, 2019) <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register#inline-nav-1>.

- You can submit your complaint right away, or save it as a draft.
  - You have 6 months to submit your complaint if you do save it as a draft. After that, all drafts are automatically deleted for data protection reasons.
2. Choose a dispute resolution body
- Once the trader has agreed to use the dispute resolution procedure to address your complaint, you will have 30 days to agree on the dispute resolution body that will handle your dispute.
  - The trader will send you, via the platform, the name(s) of one or more dispute resolution bodies able to deal with it. It's advisable to read the information provided about these dispute resolution bodies (fees, geographical coverage, procedures, etc.) to make sure they handle complaints like yours.
  - You can agree to one of them to handle your complaint or request a new list. If you created your complaint without registering, you must now sign into the system to register. If necessary, create an ODR account.
  - If you cannot agree on a dispute resolution body within 30 days, your complaint will not be processed further through the platform.
3. Get an outcome
- Your complaint will be sent to the dispute resolution body you agree to use.
  - If the dispute resolution body can handle your case and reaches an outcome, you will receive an alert through the platform.
  - If the dispute resolution body cannot handle your case, you will also receive a notification with the reason why.

You can view our detailed user guide for a step-by-step tutorial for using the ODR platform.<sup>34</sup>

---

<sup>34</sup> *Find a Solution to Your Consumer Problem*, EUR. COMM'N ODR, last visited Dec. 3, 2019) <https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks>.

### 3. China

On September 7, 2013 Chinese President Xi Jinping delivered a speech at Nazarbayev University in Kazakhstan, in which he proposed building a “Silk Road Economic Belt.”<sup>35</sup> The concept has become the guiding policy initiative of the Xi presidency. On Oct. 3, 2013, in a speech at the Indonesian parliament, President Xi expanded the geographic scope of the Silk Road in the initiative to include a “Maritime Silk Road.”<sup>36</sup> This “Belt and Road Initiative” (BRI) has grown to include more than just the infrastructure necessary to recreate the land route from China to Europe and a separate sea route with a similar purpose.<sup>37</sup> It has become a comprehensive program for the extension of Chinese influence throughout the region covered by the Initiative. It also includes developments in law that are described as enhancing international trade, but which are clearly designed as well to improve China’s image in the global community and to enlarge China’s economic and political role in the countries on the BRI routes.

In October 2017, the BRI process moved into the online realm, when President Xi announced plans at the 19th Communist Party Congress to transform China into a “cyber superpower.”<sup>38</sup> When matters like this move into the realm of law in China, the Supreme People’s Court (SPC) becomes involved, but not in a way in which we are accustomed in other countries. In China, the SPC does not wait for cases to come to it, but rather reviews cases that are in lower courts and comments on them, and issues special statements that then become guidance for future decisions in all of the courts. In 2018, the SPC issued “Provisions on Several Issues Concerning the Trial of Cases by the International Courts.”<sup>39</sup> This document called for

---

<sup>35</sup> Zhang Luhu, Chronology of China’s Belt and Road Initiative, [http://www.china.org.cn/china/2017-01/05/content\\_40044651.htm](http://www.china.org.cn/china/2017-01/05/content_40044651.htm).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Sophie Hunter, *China’s innovative Internet Courts and their use of blockchain backed evidence*, CONFLICTOFLAWS.NET, available at: <http://conflictoflaws.net/2019/chinas-innovative-internet-courts-and-their-use-of-blockchain-backed-evidence/>.

<sup>39</sup> Provisions on Several Issues Concerning the Trial of Cases by the International Courts (Sept. 2018 Supreme People’s Court) <http://www.court.gov.cn/zixun-xiangqing-116981.html>.

the creation of “Internet Courts” in Hangzhou, Beijing, and Guangzhou. Those courts were to:

focus on disputes involving: the online sale of goods and services, lending, copyright and neighboring rights ownership and infringement, domains, infringement on personal rights or property rights via the Internet, product liability claims, and Internet public interest litigation brought by prosecutors. The litigation process is conducted solely online, including the service of legal documents, the presentation of evidence, and the actual trial itself.<sup>40</sup>

The three Internet Courts have been established, and are operating. They appear to have proved to be efficient. The average duration of online trials in Hangzhou in 2017-18 was reported to be 28 minutes, and the average processing period from filing to trial and conclusion was 38 days.<sup>41</sup> This process has not been without difficulty, and the Hangzhou Internet Court, in particular, has been criticized for its lack of impartiality, since it is technically supported by Alibaba and its subsidiaries, entities which are involved in most of the disputes in the region.<sup>42</sup> At the 2019 Forum on China Intellectual Property Protection, the president of the Beijing Internet Court (established in September 2018, and having processed 14,904 cases by the summer of 2019) reportedly said that the court employs technologies such as artificial intelligence (AI) and blockchain in rendering judgment in its cases.<sup>43</sup>

#### 4. France

Some countries, instead of launching a publicly-run ODR platform themselves, are focusing on regulation and certification of actors in the private ODR marketplace. This is the route pursued by France in its law on justice reform passed on March 23, 2019, and completed by decree on October 25, 2019.<sup>44</sup>

---

<sup>40</sup> Hunter, *supra* note 38

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Loi 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice [Law 2019-222 of March 23, 2019 on planning 2018-2022 and

The French ODR law sets parameters for commercial ODR platforms.<sup>45</sup> Those platforms, whether used for mediation or for arbitration, must comply with legal obligations concerning the protection of personally identifiable data.<sup>46</sup> They are forbidden from relying exclusively on AI or algorithms.<sup>47</sup> When ODR platforms include any AI components, users must explicitly consent to their use.<sup>48</sup> People involved in providing ODR services are held to a standard of professional secrecy and must exercise impartiality, independence, competence, and diligence.<sup>49</sup> Finally, the law contemplates certification of platforms by an accredited organization.<sup>50</sup>

The French ODR decree defines the certification process for ODR platforms.<sup>51</sup> Certification entities must be accredited by the Comité français d'accréditation or by another accreditor within the scope of multilateral European cooperation in accreditation.<sup>52</sup> There may be multiple certifiers on the market, but a given ODR service can only apply for certification by one of them.<sup>53</sup> Simply put, the certification is to ensure compliance with the provisions of the ODR law<sup>54</sup> Certifying organizations must maintain oversight and make regular reports to the Ministry of Justice about certification issuances, denials, and suspensions.<sup>55</sup> The Ministry of Justice

---

judiciary reform], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE (J.O.) [OFFICIAL GAZETTE OF FRANCE], March 24, 2019, No. 0071.; Décret 2019-1089 du 25 octobre 2019 relatif à la certification des services en ligne de conciliation, de médiation et d'arbitrage [Decree of October 25, 2019 relating to the certification of online services for conciliation, mediation, and arbitration], [Journal Officiel de la République Française (J.O.) [Official Gazette of France], October 27, 2019, No. 4.

<sup>45</sup> *Id.* art. 4.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*; Code Pénal [C. Pén.] [Penal Code] art. 226-13.

<sup>50</sup> LOI 2019-222, *supra* note 44, art. 4.

<sup>51</sup> Décret n° 2019-1089, *supra* note 44.

<sup>52</sup> *Id.* art. 2.

<sup>53</sup> *Id.* art. 3.

<sup>54</sup> *Id.* art. 1.

<sup>55</sup> *Id.* art. 8.

will then maintain a publicly available register of certified ODR platforms.<sup>56</sup>

### 5. The International Council for Online Dispute Resolution (ICODR)

The International Council for Online Dispute Resolution (ICODR) was established in 2017 as an international nonprofit consortium that advocates for and assists in developing international standards for ODR.<sup>57</sup> The ICODR does not itself engage in ODR, but rather supports the adoption of open standards across borders in a global effort to resolve disputes using information and communications technology.<sup>58</sup> It appears to base its activities on a very broad definition of ODR.<sup>59</sup>

The ICODR, formed by the National Center for Technology and Dispute Resolution (NCTDR)<sup>60</sup> and its international Fellows, is a relatively new voice in the international ODR conversation. It was created in 2017 in response to the “recent, rapid and widespread adoption of technology-supported systems for dispute resolution that have been taking place in China, India, England, Canada, the U.S. and elsewhere, both in the private as well as the public sector.”<sup>61</sup> Its primary goal is to serve as a formal governance structure to develop and promote adherence to international standards that foster trust and provide support for ODR ventures.<sup>62</sup> The

---

<sup>56</sup> *Id.* art. 9.

<sup>57</sup> INT’L COUNCIL FOR ONLINE DISPUTE RESOLUTION, <https://icodr.org> (last visited, Nov. 20, 2019) [hereinafter ICODR].

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> NAT’L CENTER FOR TECH. AND DISPUTE RESOLUTION, <http://odr.info> (last visited Nov. 20, 2019) [hereinafter NCTDR]. Founded in 1998, the NCTDR “has cultivated the theory and practice of online dispute resolution throughout the world. . . hosts the International Journal of Online Dispute Resolution, and two annual conferences, the International ODR Forum and ODR Cyberweek.” *About*, INT’L COUNCIL FOR ONLINE DISPUTE RESOLUTION, <https://icodr.org/sample-page> (last visited, Dec. 3, 2019).

<sup>61</sup> ICODR, *supra* note 57.

<sup>62</sup> *Id.*

parts of its website that are open to public view (it is a membership-based platform) broadly defines ODR as “all forms of technology-assisted dispute resolution, including diagnosis, negotiation, mediation, arbitration and courts.”<sup>63</sup>

The ICODR has developed standards designed to promote ODR systems that are accessible, accountable, competent, confidential, equal in treatment of parties, fair, impartial, neutral, legal, secure, and transparent.<sup>64</sup> Through these standards, ICODR suggests that its work may lower the cost of ODR internationally, stimulate more innovation in the field, help “protect consumers and citizens, and protect the right of free access to justice.”<sup>65</sup> While it does not publicly share its membership list, it does state that its membership is made up of public and private sector organizations that resolve disputes, including “online dispute resolution service providers, consumer protection agencies, and government regulators.”<sup>66</sup> The potential impact of the ICODR and its ability to achieve different aspects of its mission remains to be seen.

## 6. State-Level Small Claims ODR Programs

ODR systems are also being explored and implemented by various sub-national jurisdictions. Three examples come from the Canadian province of British Columbia, the Australian state of Victoria, and U.S. state of Utah. Rather than creating true ODR platforms,<sup>67</sup> however, these systems simply use technology replicate traditional offline judicial and dispute resolution processes.<sup>68</sup> These systems also lack the international character of most of the legal frameworks discussed so far. The limited scope of these platforms nonetheless are designed to increase access to justice for specific segments of the population in certain kinds of claims.

---

<sup>63</sup> *Id.*

<sup>64</sup> *Standards*, INT’L COUNCIL FOR ONLINE DISPUTE RESOLUTION, <https://icodr.org> (last visited, Nov. 20, 2019).

<sup>65</sup> ICODR, *supra* note 57.

<sup>66</sup> *Id.*

<sup>67</sup> *See supra*, note 3 and accompanying text.

<sup>68</sup> *See* Vivi Tan, *Online Dispute Resolution for Small Civil Claims in Victoria: A new Paradigm in Civil Justice*, 24 DEAKIN L. REV. 101, 114 (2019).

The British Columbia Civil Resolution Tribunal (CRT) is limited to small claims under 5,000 Canadian dollars and to property disputes arising in the context of multi-unit housing developments.<sup>69</sup> It follows the familiar three-stage design. First, users interface with an AI platform that helps them to narrow the scope of their dispute and reach a negotiated resolution.<sup>70</sup> Pressure for early resolution comes from the fact that fees increase as users continue to subsequent stages.<sup>71</sup> The second stage adds a third-party human facilitator who communicates digitally with the parties in order to achieve a consensual resolution.<sup>72</sup> If a resolution is achieved, the facilitator can issue a court-enforceable order.<sup>73</sup> If the facilitator is not successful, the dispute moves to the final stage: adjudication. In adjudication, a member of the Tribunal will weigh the claims and may hold a hearing through telephone or videoconference.<sup>74</sup> Adjudication, and thus the CRT process, ends in the Tribunal member issuing a binding judgement.<sup>75</sup>

The ODR effort in Victoria, Australia is much less developed. The Victoria Civil and Administrative Tribunal (VCAT) tested a pilot ODR system in the fall of 2018.<sup>76</sup> While VCAT's proposed ODR platform follows the three-stage process of (1) technology-facilitated communication between the parties, (2) human-assisted mediation, and (3) adjudication, the pilot program tested only the adjudication stage,<sup>77</sup> and was targeted at small claims arising in the context of small business.<sup>78</sup> As a system that simply replaces existing processes with digital versions of the same processes, the VCAT ODR system's main goal is increased access through greater

---

<sup>69</sup> Tan, at 116.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 118.

<sup>72</sup> *Id.* at 117.

<sup>73</sup> *Id.* at 117-18.

<sup>74</sup> *Id.* at 118.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 101.

<sup>77</sup> *Id.* at 124.

<sup>78</sup> *Id.* at 126.

convenience, especially with regard to small business owners, people with disabilities, and people in remote parts of the state.<sup>79</sup>

Also in the fall of 2018, the U.S. state of Utah introduced an ODR platform in a select number of small claims courts.<sup>80</sup> This system resembles the CRT in British Columbia in its three-stage structure and in the fact that it can handle disputes from start to finish.<sup>81</sup> It is limited to claims up to 11,000 U.S. dollars.<sup>82</sup> Justice Deno Himonas of the Supreme Court of Utah, in a speech before the program rollout, cited ODR's potential to remove geographic barriers between claimants through digital communication, and to level the playing field through the use of AI in the early stages of the system.<sup>83</sup> He also sees ODR as contributing to the public's perception of a modern and relevant judiciary.<sup>84</sup> One unique aspect of the Utah system is that at the end of the adjudication stage, a losing party is able to appeal the result to the Utah district (trial-level) court.<sup>85</sup> The approach is thus to replace or augment traditional systems and not to provide a paradigm shift in the delivery of justice.

Without the hurdles to international recognition that stymied the efforts of the UNCITRAL working group, these state-based ODR platforms have the advantage of providing a binding judgement at the end of the dispute. On the other hand, their use of technology as a way to simply move offline activities into a digital sphere is only a shadow of ODR's innovative potential.

---

<sup>79</sup> *Id.* at 129-32.

<sup>80</sup> *Id.* at 120.

<sup>81</sup> *Id.* at 121.

<sup>82</sup> *Id.* at 120.

<sup>83</sup> Deno Himonas, *Utah's Online Dispute Resolution Program* 122 DICKINSON L. REV. 875, 880 (2018).

<sup>84</sup> *Id.* at 876.

<sup>85</sup> *Id.* at 882.

## D. Developing Legal Issues Regarding ODR

### 1. Dealing with Conflicting Approaches to Consumer Protection

The legal issues surrounding ODR often result from rules established for dispute resolution prior to the contemplation of ODR. For example, the EU legal instruments dealing with private international law (jurisdiction, applicable law, and the recognition and enforcement of judgments), as well as with alternative dispute resolution (and arbitration in particular), set up the obstacles that resulted in the failure of the UNCITRAL ODR effort.

The basic problem with the EU system for ODR described above,<sup>86</sup> at least from the perspective of an outsider, is that it is not clear how it fits with other EU rules of private international law. None of the ODR-related instruments describes a system that allows pre-dispute choice of the system (*i.e.*, in the original transaction contract), and none of those instruments makes clear how a binding decision will result. Because few, if any, disputes result in agreement on the dispute resolution mechanism *after* the dispute arises, this is a fundamental flaw.

This basic problem is reflected in, and exacerbated by, other EU legal instruments. The Brussels I (Recast) Regulation prohibits consumers (those most likely to benefit from a workable ODR system) from entering into binding pre-dispute choice of court agreements,<sup>87</sup> and other instruments have resulted in Member State rules prohibiting consumers from entering into binding pre-dispute arbitration agreements.<sup>88</sup> This use of private international law rules for substantive consumer protection purposes may look good on paper, but as a practical matter it leaves consumers with no real protection once a dispute arises. Moreover, these rules put the

---

<sup>86</sup> See *supra* notes 29-34 and accompanying text.

<sup>87</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), OJEU L 135/1 (2012), (Brussels I (Recast) Regulation), art. 19. While Article 23 provides a general rule respecting choice of court agreements, this is adjusted in special rules for consumer contracts in Articles 18 and 19 in particular. The result is that a choice of court agreement in a consumer contract will not be effective unless entered into after to dispute arises.

<sup>88</sup> Council Directive 93/13/EEC, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29-34 (EC) Annex, (q).

consumer in a position of disadvantage at the time the parties enter into the transaction.<sup>89</sup>

EU rules on applicable law provide similar restrictions for consumers. The Rome I Regulation on the law applicable to contractual obligations, generally prevents an effective pre-dispute choice of law clause in consumer contracts.<sup>90</sup>

The problem in the UNCITRAL negotiations arose in part because the type of consumer-protection-through-private-international-law rules in the EU—which are common as well in other countries around the globe—create a very different system than that of, in particular, the United States. In regard to choice of forum, U.S. law has taken an approach favoring freedom of contract. Thus, consumer protection is not accomplished in the United States through rules of private international law. A series of U.S. Supreme Court cases makes this very clear. In the 1972 case of *Bremen v. Zapata*,<sup>91</sup> the Court upheld a choice of court clause choosing the courts of London in a contract involving German and U.S. parties. Stating that “[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts,”<sup>92</sup> the Court determined that forum selection clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.”<sup>93</sup>

*Bremen* was followed in 1985 by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,<sup>94</sup> in which the Court upheld an agreement to arbitrate in Japan, even though the Puerto Rican party involved had alleged violations

---

<sup>89</sup> See *infra* notes 97-98 and accompanying text.

<sup>90</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, O.J. L 177/6 (2008), (Rome I Regulation), art. 6(2). Like the Brussels I Regulation, *supra* note 88, the Rome I Regulation has a basic rule respecting party autonomy in choice of law in Article 3, but this rule is changed for consumer contracts in Article 6, making an effective a pre-dispute choice of law clause difficult at best.

<sup>91</sup> 407 U.S. 1 (1972).

<sup>92</sup> *Id.* at 9.

<sup>93</sup> *Id.* at 10.

<sup>94</sup> 473 U.S. 614 (1985).

of U.S. antitrust laws. This resulted, in part, from the determination of a strong policy favoring arbitration when chosen by the parties. Together with the *Bremen* case, *Mitsubishi Motors* demonstrated an across-the-board policy favoring binding pre-dispute choice of forum clauses, particularly in international contracts.

The strong policy in favor of choice of forum clauses was applied in a consumer case in the 1991 Supreme Court decision in *Carnival Cruise Lines, Inc. v. Shute*.<sup>95</sup> The Court upheld a small print choice of court clause on the back of a consumer cruise ticket, thus requiring the plaintiff in Washington state to bring suit against the cruise line only in a court in Florida. Justice Blackmun, writing for the majority, justified such a merchant-imposed choice of court clause on economic grounds, noting that the result furthered:

- (1) the merchant's interest in litigating all similar disputes in a single forum;
- (2) joint party interests of predictability; and
- (3) the general (public) interest of all consumers of such cruises in the lower price that results from upholding such clauses on the basis of the first two interests.<sup>96</sup>

At first glance, it is easy to conclude that the EU approach offers consumer protection where the U.S. approach does not. That, however, is not the case. Each system offers a different kind of protection. In that sense, each is paternalistic, providing a pre-determined result for the consumer, without really gauging whether that is the result the consumer prefers. Each system simply protects different interests of the consumer

The EU approach focuses on the consumer at the stage of the transaction where a dispute has already arisen. Here, the EU government(s) have concluded that the consumer's interest is in having their own forum and own law when litigation occurs. The US approach, on the other hand, focuses on the transaction when the contract is first established. At that point, the US legal system has concluded that the consumer's interest is in having a lower price and greater access to goods and services.

---

<sup>95</sup> 499 U.S. 585 (1991).

<sup>96</sup> *Id.* at 593-95.

A merchant under the EU system could reasonably decide not to engage in transactions online. The risk of such transactions, even if only within the EU's 28 Member States, would be that the merchant could be sued in the courts of each of the 28 Member States, and subject to the law of each of those States. That risk increases transaction costs. The result is either that those costs are then passed on to the consumer through higher prices, or a decision is made simply to avoid higher transaction costs by not engaging in such online sales. The result for the consumer is either or both of higher prices and reduced access to goods and services online. If a dispute arises, however, the consumer gets their home court and their home law; assuming, of course, that the transaction is of sufficient value to justify going to that court, under that law, and then taking the resulting judgment to the merchant's home state for recognition and enforcement.

A merchant under the US system would be able, through "freedom of contract," to have a single choice of forum and choice of law for all of its contracts in an online framework. This would reduce the risk of lawsuits in multiple courts under multiple laws, thus reducing transaction costs and allowing the merchant in a competitive economy to reduce the price to the consumer. The result to the consumer is greater access to goods and services and lower prices. If a dispute arises, however, the consumer is subject to the choice of forum and choice of law clauses "offered" by the merchant and "accepted" by the consumer, and is less likely to travel to the merchant's home court to pursue litigation—if that litigation would be an economically viable alternative.

Interestingly, a Committee of the European Parliament has concluded that the EU system of consumer protection through private international law has limited, if any benefits, stating that "the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings."<sup>97</sup> This suggests that the benefits of providing for consumer protection at the dispute stage, through rules of private international law, do not make up for the lost benefit of lower prices and enhanced access to goods and services at the contract stage. That is clearly the conclusion embraced by the U.S. Supreme Court in its approach toward choice of forum clauses, whether those clauses choose courts or arbitration.

---

<sup>97</sup> European Parliament, Committee on Legal Affairs, Rome I Regulation, Final Compromise Amendments, DT\Rome IEN.doc, Recital 10a (new), 14 Nov. 2007.

## 2. The Difficult Issues for ODR in the UNCITRAL Negotiations

The UNCITRAL negotiations demonstrated three issues in particular which stood in the way of agreement on a global ODR system:

- 1) Determining the law applicable to the transaction;
- 2) Dealing with national (and regional) rules of consumer protection;  
and
- 3) Reaching an enforceable decision.

Regarding applicable law, if an ODR system does not work with a single set of rules for the transactions involved, then a decision must be made at the outset about what law does govern the relationship. That decision itself can prevent accomplishing the goals of economy and efficiency. Thus, the answer must be to avoid the need for a decision on applicable law by having a self-contained, limited set of available claims and remedies. Private ODR systems such as eBay-PayPal have demonstrated that this is possible.

Regarding rules of consumer protection, the conclusion of the Committee on Legal Affairs of the European Parliament suggests that the choice between consumer protection at the contract stage (the U.S. approach) and consumer protection at the dispute resolution stage (the EU approach) should be settled in favor of the former. But, it seems that an ODR system should be able to have the best of both worlds. If the fear is that the merchant will impose a “bad” dispute resolution system on the consumer through a non-negotiated choice of forum clause, it would seem that the solution is to establish a dispute resolution system that is in fact balanced between both consumer and merchant interests, and to allow all parties to enter into binding pre-dispute agreements to go to that dispute resolution system. This would avoid the either-or conundrum in dealing with differing systems of consumer protection.

Regarding reaching an enforceable decision, once there is agreement on the fairness of the chosen forum, and the ability of parties to choose it, then an ODR system may have a final stage of dispute resolution that results in a binding decision. Given that more than 160 states are now party to the New York Convention,<sup>98</sup> it would seem logical to make that third stage

---

<sup>98</sup> *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”)*, UNCITRAL (last visited Dec. 3, 2019)

arbitration, for which recognition and enforcement under the New York Convention is possible. Article II of the New York Convention would require contracting states to send the parties to the system;<sup>99</sup> Article III would require the recognition and enforcement of the award;<sup>100</sup> and Article V would provide limited by accepted grounds for non-recognition in egregious cases.

### E. What is the Future of Online Dispute Resolution?

If past is prologue, the development of true ODR systems will continue to occur largely in the private sector, and governmental efforts to advance ODR will lag far behind the marketplace. It is unfortunate that efforts to advance ODR on an international level have been unable to break the shackles of laws designed for 19<sup>th</sup> century problems and move on to providing advances for 21<sup>st</sup> century dispute resolution.

---

[https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

<sup>99</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II (New York, 1958) [hereinafter New York Convention]:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

.....

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

<sup>100</sup> *Id.* art. III:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

### 1. The CILE Effort to Define a Way Forward

During the UNCITRAL negotiations that led to the 2017 Technical Notes, the University of Pittsburgh Center for International Legal Education (CILE) prepared two papers in an effort to assist the UNCITRAL process. The first was an unofficial document circulated at the twenty-third session of UNCITRAL Working Group III (Online Dispute Resolution), which was held in New York, on May 23-27, 2011. That document was in memo form and was titled “Draft Substantive Legal Principles for Deciding Cases Through Online Dispute Resolution (ODR).”<sup>101</sup> It included a review of the system of dispute resolution provided under U.S. consumer protection law, including the Fair Credit Billing Act,<sup>102</sup> and Regulation Z,<sup>103</sup> which establish a system by which consumers may seek redress through the credit card company and obtain a charge-back if their claim is found to be sufficient in a given transaction. This review of the charge-back systems administered under U.S. consumer protection laws by Visa, Master Card, American Express, and Discover demonstrated three common characteristics of these systems: (1) dispute resolution was tied to the finance chain (both the merchant and consumer had accounts with the relevant credit card company); (2) the available claims that could be asserted were both limited and simple; and (3) the remedies were simple and limited (primarily a charge-back crediting the consumer’s account when a claim was found to be substantiated).<sup>104</sup>

After reviewing the credit card charge-back system in the United States, the CILE Draft Substantive Legal Principles set out three assumptions on which a set of substantive legal principles for a workable ODR system should be based, followed by a set of six basic principles for such a system:

#### **Assumptions on Which these Principles are Based:**

1. These Principles apply only when the contract, leading to the dispute for which ODR is instituted, was concluded online.

---

<sup>101</sup> UNCITRAL Working Group III (Online Dispute Resolution), Twenty-Third Session, New York, 23-27 May 2011, Draft Substantive Legal Principles for Deciding Cases Through Online Dispute Resolution (ODR) (copy on file with the author) [hereinafter CILE Draft Substantive Legal Principles].

<sup>102</sup> 15 U.S. C. § 1666i.

<sup>103</sup> 12 C.F.R. § 226.12(c).

<sup>104</sup> CILE Draft Substantive Legal Principles, *supra* note 102.

2. These Principles assume that the payment method results in an automatic credit to the seller's account, and a corresponding debit to the buyer's account, upon the online conclusion of the contract. In other words, at the conclusion of the contract, the seller retains no risk of non-payment. Thus, the Principles are designed primarily to deal with buyer's risks.
3. These Principles apply to disputes between the seller and buyer, and not to disputes between a payment card issuer (whether credit or debit) and its customer.

**Principle 1 – Buyer's Right to Receive Goods, Services or Other Legal Rights**

- The seller must deliver the goods, services, or other form of legal rights that are described in the contract.
- The buyer has a right to receive the goods, services, or other form of legal rights that are described in the contract.

**Principle 2 – Buyer's Right to Receive Conforming Performance**

- The seller must deliver goods, services, or other form of legal rights which are of the quantity, quality and description required by the contract.
- The buyer has a right to receive goods, services, or other form of legal rights which are of the quantity, quality and description required by the contract.

**Principle 3 – No Payment for Cancelled Recurring Transactions**

- The seller may not receive payment for recurring transactions that have been cancelled by the buyer.
- The buyer has a right not be charged for recurring transactions after cancellation by the buyer.

**Principle 4 – No Duplicate Processing**

- The seller may not charge a buyer more than once for any single transaction.
- The buyer has a right not to be charged more than once for any single transaction.

**Principle 5 – Correct Amount Debited/Credited**

- The seller is entitled to receive the contract price.
- The buyer has a right not to be charged more than the contract price.

**Principle 6 – Fraudulent and Counterfeit Transactions**

- The seller has a right to receive payment only for a transaction that was contracted for by the buyer, or a person authorized by the buyer.
- The buyer has a right not to pay for a transaction that was not contracted for by the buyer, or a person authorized by the buyer.<sup>105</sup>

For the twenty-fifth session of UNCITRAL Working Group III in 2012, CILE prepared a document distributed as Working Paper 115 of the negotiations, titled “Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules.”<sup>106</sup> This paper reviewed the progression of the negotiations prior to the twenty-fifth session, and then followed with a set of “Core Principles Underlying a Global ODR System.” Those Core Principles are as follows:

- 1) **The ODR system must recognize that alternatives for efficient and effective dispute resolution do not currently exist for cross-border, high volume, low value electronic transactions.**
- 2) **The ODR system will not work unless it is simple, efficient, effective, transparent, and fair.** Only a system that has these characteristics will invite the trust of both merchants and purchasers (including consumers) to enter into cross-border, high volume, low value electronic transactions that otherwise create risks that keep both sellers and buyers from entering into such transactions. The process of developing the system must recognize that both sellers and buyers require insurance that their interests will be protected in order to generate the proper level of trust in that

---

<sup>105</sup> *Id.*

<sup>106</sup> UNCITRAL Working Group III (Online Dispute Resolution), Twenty-fifth session, New York, 21-25 May 2012, Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules, A/CN.9/WG.III/WP.115.

system. If either sellers or buyers opt out of, or are inadequately protected by, the system, then it simply will not work.

- 3) **Simplicity and efficiency require as few exclusions from scope as possible.** A system that begins with computer-based communication and analysis will not easily allow determinations that require human discretion or the application of difficult definitions designed to distinguish between types of parties to a dispute. As has been repeatedly recognized in the Commission and in Working Group III, it is practically and theoretically difficult to make a distinction not only between business-to-business and business-to-consumer transactions but also between merchants and consumers. *See* July 2010 Report of the United Nations Commission on International Trade Law, A/65/17, at para. 256; 3 June 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011), A/CN.9/721, at para. 37.
- 4) **Simplicity, efficiency and effectiveness require that the ODR system be self-contained and avoid the need for reference to national rules of private international law.** A uniform system that relies on the differences that exist in national rules of private international law will create disparate results depending on factors such as the location of parties and the need to “locate” the transaction. This would create difficulties that should not occur in the system. Additionally, there is no clear understanding internationally on how such determinations of applicable national law should be made (*e.g.* country-of-contract, country-of-origin, country-of-destination, or most significant relationship approach). Stated more simply, efficiency and effectiveness require that the system avoid the trap of thinking that rules of private international law can be used to protect the weaker party in cross-border, high volume, low value electronic transactions.
- 5) **Efficiency, effectiveness, and transparency require that the ODR system encourage dispute resolution that results in a binding decision.** It does little good to provide dispute settlement that still allows parties to relitigate what has already been decided. This is very different, however, from the question of retaining the option to go to national courts or utilize other dispute resolution mechanisms for resolution of claims that are outside the ODR system. (*See* Principle 9, below).

- 6) **Efficiency, effectiveness, and transparency require that the ODR system allow ODR providers to incorporate automatic methods for the enforcement of decisions** (*e.g.*, charge-back methods or automatic payment reversal).
- 7) **Transparency and fairness require** that a party to a cross-border, high volume, low value electronic transaction receive **clear notice of the dispute resolution option and a separate opportunity to choose not to engage in a transaction** if that party decides to avoid the dispute resolution process that is offered.
- 8) **Fairness requires that the ODR system be designed so that states may agree that the system itself is simple, efficient, effective, and transparent.** Private international law rules that exist to protect “weaker” parties from unfair procedures are not necessary when states agree at the outset that the system of dispute resolution operates to provide adequate protection of the weaker party. Thus, the fairness of the system itself is the ultimate test of the simplicity, efficiency, effectiveness, and transparency required to replace protective rules of private international law. If states find the system to meet these tests, then the system itself will replace the need for “protective” rules of private international law, and will itself result in the type of consumer (and other) protection often sought by such rules of national law. This is one of those instances where a uniform system of rules applied on a comprehensive basis is much better than reliance on national rules of private international law or national rules of consumer protection. Simplicity, efficiency, effectiveness, and transparency can only result if there is a single, self-contained system, with as few opportunities as possible for divergence from that system through national law.
- 9) **Simplicity and effectiveness require** that, at the outset, the substantive legal principles to be applied in the ODR process relate to **a focused and limited set of fact-based claims** that may be brought and **a focused and limited set of remedies** that may be assessed. Existing ODR systems for online transactions have demonstrated that the vast majority of disputes in high-volume, low-value online transactions lend themselves to a small, discrete set of claims and remedies. More complex issues and claims (*e.g.*, bodily harm, consequential damages, and debt collection) should be excluded from the ODR system. See 21November 2011 Report of

Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 November 2011), A/CN.9/739, at paras. 18-19 and 76.

At the time Working Paper 115 was circulated, the Working Group had prepared a draft setting forth a list of what a claim should include when initiating dispute resolution under the projected ODR system. The Working Paper took a different approach. Based largely on the earlier CILE paper and review of credit card charge-back procedures (and the eBay-PayPal system), it instead proposed a set of simple forms with limited available claims and limited available remedies. This approach was seen as addressing the problem of applicable law by simply avoiding reference to any existing law and instead using a set of simple claims and remedies, thus effectively establishing an autonomous “applicable law.” This is what has worked well in private sector ODR systems. By tying the ODR system to the finance system, the problem of a binding result was also addressed. The ODR system would thus be tied directly to the enforcement mechanism, resulting in automatic enforcement with the announcement of the binding decision that could be enforced through a charge-back arrangement at the end of the process. Of course, the system could work only if states would not prohibit those within their borders from entering into binding pre-dispute agreements to submit to the system. If a party would have the ability to opt out of the system to which it had agreed, that system simply would not work.

## **2. Some Final Thoughts**

Online Dispute Resolution has the potential to revolutionize the way in which small claims are dealt with in the global marketplace. This, in turn, can open up commerce to many who have been at a disadvantage because of their business size and location. ODR can be particularly important on an international scale for consumers and for small, medium, and micro enterprises. Reliable ODR can significantly reduce transaction costs, making transnational transactions more accessible in the electronic age.

Unfortunately, efforts by states have generally been mired in rules designed for brick and mortar dispute resolution systems and rules designed for large commercial disputes. These systems and rules simply are not appropriate for an ODR system designed to encourage participation in the global economy by those now left out. Fortunately, the marketplace has realized the failures of governments, and has provided a number of successful ODR systems. Those systems increase trust in the markets to

which they are attached, and facilitate involvement in transnational commerce by millions of persons who otherwise might well not engage in a purchase from halfway around the world with a party they have never met.

Someday, those in governments who make decisions on ODR may finally be able to agree that they can both provide a better system and take pressures off existing judicial systems by facilitating ODR that is more broadly available. Only time will tell if Colin Rule was correct when he stated that “[i]t may turn out that the justice systems of the future will resemble the designs we crafted for eBay more than the geographically-bound systems of today.”<sup>107</sup>

---

<sup>107</sup> Rule, *supra* note 10, at 369.