

A SHOT IN THE ARM FOR HANDLING CONSUMER DISPUTES ACROSS THE EU: ALTERNATIVE DISPUTE RESOLUTION SYSTEM

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Abstract: The handling of disputes between consumers and traders is now evolving on a more consumer-friendly ground across Europe. Following the steadily stronger consumer protection laws, the growth of online mechanisms for alternative dispute resolution (ADR) bodies is further swinging the legal pendulum from the judicial protection to developing out-of-court structures that provide cheaper and effective relief. In this regard, the recent launch of a new online dispute resolution (ODR) platform by the European Commission is quite likely to contribute to the effort to avoid disputes reaching court, providing settlement of the millions of both domestic and cross-border e-commerce disputes using online technologies, as well as strengthening the EU's Digital Single Market Strategy. The disputes will be channelled to national ADR bodies in each Member State that are related to the platform of which online traders are required to provide notice.

Keywords: Alternative dispute resolution (ADR), Online dispute resolution (ODR), Consumer disputes, E-commerce

INTRODUCTION

Due to the growing use of the Internet across the Europe, the number of disputes arising from the Internet has increased exponentially. Becoming a new realm of commerce, the Internet has enabled businesses to expand their markets and offer a vast selection of products and services to cross-border customers. Geographical distance, time and language ceased to prevent trade, and, as a result, gave rise to e-disputes. In this regard, ensuring a safer participation of all parties in e-commerce transactions requires e-disputes be resolved in sufficiently certain ways. The reason is that the lack of legal certainty and online consumer trust may prevent consumers from entering into online transactions, as well as companies from participating in the electronic markets (Morris et. al., 2000).

Online dispute resolution (ODR) refers to the Alternative Dispute Resolution (ADR) mechanisms that use technology to facilitate the resolution of disputes between the parties. It mainly involves negotiation, mediation or arbitration, as well as a combination of all these alternative methods. Thus, it can be concluded that the ODR corresponds to the online version of the ADR. It can, however, expand these traditional ADR methods by using various online technologies during the process.

ODR covers vast fields of law, ranging from the disputes between private parties involving consumer to consumer (C2C) and business to consumer (B2C) disputes or marital separation, to court disputes and interstate conflicts (National Centre for Technology and Dispute Resolution, 2011). Without prejudice to having such a wide scope of application, the ODR is most importantly tailor-made for the resolution of B2C online transactions. The reason for the suitability of the ODR in the resolution of e-commerce disputes is that, the use of the Internet which is the same medium giving rise to disputes is ideal when parties reside in different countries (Bygrave, 2002).

ONLINE DISPUTE RESOLUTION

As abovementioned, ODR represents an innovative means for handling disputes, particularly those with the underlying contracts concluded between consumers and businesses in virtual space. Lacking the expertise and resources for the resolution of cross-border disputes, traditional courts may not be suitable in e-commerce. Moreover, where transactions are of low value and the parties are located in different countries, litigation is quite an unattractive option with disproportional costs and long proceedings.

As a collective term, the ODR covers different combinations of online dispute settlements by using the ADR methods. To put it simply, the ODR refers to the assistance of certain computer networks and applications to the settlement of disputes with the ADR methods. Depending on the extent of control over the process and outcome the parties and/or Information and Communication Technology (ICT) have, dispute resolution techniques vary (Cortes, 2009). Based on the cooperation of the ADR and ICT, the ODR requires the resolution process to be conducted mainly online.

Information management in the ODR is carried out by physical persons as well as computers and software. The complementation of the traditional ADR methods with the ICT was referred to as the so-called "fourth party",

since the ODR was considered as an additional party in the resolution process (Katsh and Rifkin, 2001). In addition to the two disputants and the neutral third party, addressing technology as the fourth party emphasizes its growing importance in a traditional trilateral dispute. Despite having the entitlements and capabilities of the third party, the fourth party will rather serve as a tool for assisting the process. Nevertheless, the fourth party may replace the third party as in automated negotiation. The fourth party may also manage information, send automatic responses, reorganize written communications in a politer manner, monitor performance, and organize meetings. The more technology enhances, the more the fourth party stands out, thereby diminishing the significance of the neutral third party (Gaitenby, 2006; Katsh and Wing, 2006).

Similar to the ADR, companies involved in the ODR process agree upon the out-of-court settlement with the difference of using the Internet. To contribute to this settlement process on the Internet, professionals lead the way by utilizing their ADR experiences. In order to best suit the needs of the Internet, the ADR rules and practices are adjusted when necessary. To this end, software tools are utilized and enhanced. Moreover, new web-based services have been developed to enable parties and arbitrators to meet online and work in secure, joint workspaces, access precedents, attain and manage important documents, and organize meetings with the services of voice and video conferencing, and with translation services as well (Katsh and Rifkin, 2001).

ONLINE DISPUTE RESOLUTION METHODS

1.1. Consensual Online Dispute Resolution

1.1.1. Automated Negotiation

Also known as the so-called “blind-bidding” method, automated negotiation involves the methods mostly used for the claims of monetary value, i.e. personal injury or a worker’s compensation claim. It is based on a software program to which the parties submit their offers and demands for settlement and determine a percentage range. The program organizes the communications between the parties. However, the offers, demands, and percentages concerned are not revealed to the other party. The offering party refers to the party who makes the offer or the party who is going to pay, whereas the demanding party makes the demand or seeks for the relief as the payment of a sum of money. The ODR algorithm calculates a settlement amount between the offer and demand ranges of the parties. When offer and demand match or fall within the determined range, the dispute is settled at the defined amount and the parties are informed. Parties are allowed to try to settle until their offers and demands match (Kaufmann-Kohler and Schultz, 2004).

1.1.2. Assisted Negotiation

Assisted negotiation is a dispute resolution process to which technology assists in an evaluative manner, i.e. providing communication facilities. The role of technology here is similar to that of the mediator in mediation, with the difference that the former is based on only technological tools while the latter may also use different electronic communication tools, ranging from e-mail and chat rooms to video conferencing. Unlike arbitration, the third party maintains its neutrality and does not give a binding decision on the parties through an enforceable award. Using information management skills and enabling more efficient communication by paraphrasing the arguments concerned, mediators help the parties reach an amicable settlement. Though the procedural similarity of conciliation to mediation, councillors can provide solutions for the parties before reaching a settlement. The primary objective of assisted negotiation is to enhance the communications of the parties with the assistance of a third party or software technology (Jacobs, 2007). When used online, these processes are informal, simple and user-friendly (Motion, 2005).

1.1.3. Mediation with Online Technologies

In order to facilitate the resolution of disputes, some websites such as Internet Neutral or SquareTrade have been established. These websites are equipped with online technologies, i.e. e-mail, instant messaging, chat rooms, as well as traditional communication methods. First, a party goes to the website and fills in an online form including the problem and potential resolutions. After reviewing this form, a mediator asks the other party whether or not he will participate in the mediation. If the response is affirmative, the other party can fill in a new form or answer the former form through e-mail. Thus, parties are more likely to grasp the dispute and reach a settlement.

1.2. Adjudicative Online Dispute Resolution

1.2.1. Online Arbitration

Arbitration is referred to the dispute resolution mechanism whereby parties agree to submit their disputes to an independent third party (arbitrator or arbitral tribunal), who in turn delivers a final and binding award on both parties. Arbitration relies on party autonomy, beginning as a private agreement and continuing with private proceedings as planned by the parties. Nevertheless, it is still characterized as a quasi-judicial process as the arbitral award substitutes for a judicial decision. Arbitration is less formal than litigation, yet it includes the most formal process compared to all other ADR methods. Confidentiality and fastness are key features of arbitration that attract

especially business parties in choosing arbitration over litigation. Another advantage of arbitration is the easy enforceability on the ground of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In order to limit the scope of application, online arbitration is assumed to cover only disputes that arise online. For a more efficient and broader resolution mechanism, however, disputes that arise offline may also be submitted to online arbitration with diverse online techniques, ranging from e-mail, chat groups or video conferencing. This wider approach relies on the qualification of online arbitration on the ground that submissions to the arbitral tribunal and the conduct of all proceedings takes place over the Internet, regardless of partly covering offline disputes. In doing so, disputes both in virtual and online medium can be handled efficiently via online arbitration (Piers, 2014).

ONLINE DISPUTE RESOLUTION IN THE EUROPEAN UNION

After the Recommendation 12/1986 of the Committee of Ministers at the Council of Europe on Measures to Prevent and Reduce the Workload of the Courts, the EU attempted to introduce the out-of-court dispute resolution mechanisms concerning civil matters. The European Commission Communication on Consumer Redress in 1985 and the Supplementary Communication from the Commission on Consumer Redress in 1987 illustrate these attempts. Publishing the Green Paper on Consumer Access to Justice and Dispute Resolution in Consumer within the Single Market in 1993, the EU Commission urged the Member States for collaboration to improve the settlement of disputes in cross-border commerce. The following enactments of various action plans, communications, and the Stockholm Program contributed to the current position of alternative dispute resolution mechanisms concerning consumer law in the EU.

Moving on, the EU has issued Directive 2013/11 of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes (the ADR Directive) and Regulation No 524/2013 of 21 May 2013 on Online Dispute Resolution for Consumer Disputes (the ODR Regulation), which is applicable since 15 February 2016.

The ODR Regulation is to be read in conjunction with the ADR Directive, which functions as a complement to the Regulation. It is, thus, appropriate to touch upon the main features of the ADR Directive. Laying down minimum standards, it does not impede the consumers to apply for a more extensive consumer protection. The scope of application of the Directive is both domestic and cross-border disputes arising from the contracts concluded between a trader established in the EU and a consumer resident in the EU. On the other hand, it does not stipulate an enforcement mechanism for recognition and enforcement of binding ADR decisions in the other Member States. The Directive requires the Member States to ensure that consumer disputes with a trader established in their countries can be submitted to an “ADR entity” that meets the conditions in the Directive, i.e. sufficient accessibility, effectiveness, fairness, transparency, impartiality, and expertise.

Moreover, each Member State is required to designate a “competent authority” that will determine, on the ground of the information received from entities wishing to become an ADR entity, whether they meet the abovementioned conditions in the Directive. Then approved entities are notified to the Commission, which in turn will publish and keep updated the list of them with their contact details, fees, languages they use, the disputes they handle. Each competent authority in the Member States will demonstrate in its website the link to this list of entities.

Building on the structure of the ADR Directive, the ODR Regulation is related to the out-of-court settlement of disputes based on contractual obligations arising from online sales or service contracts concluded between a consumer resident in the EU and a trader established in the EU. Such settlement is conducted through the intervention of an ADR entity approved and listed according to the criteria in the ADR Directive. Similar to the ADR Directive, the ODR Regulation covers cross-border e-commerce disputes. However, the Regulation applies only to the disputes arising from the contracts concluded online, where the trader or the trader’s intermediary offers the goods or services on a website or other electronic means by which the consumer makes an order. Therefore, whether the Regulation covers certain disputes depends on the online conclusion of the contract, but not the online performance.

The key feature of the Regulation is the establishment of an online platform, which is an interactive website to provide access to the consumers and traders free of charge, and to facilitate contacting with an approved ADR entity under the ADR Directive. The Commission will be in charge of the establishment and development of the platform, which will in turn provide an electronic complaint form to be filled and submitted online, inform the other party of the complaint, assist the parties to determine the competent ADR entities and transmit the complaint to the agreed entity, and offer a free of charge electronic case managing tool that enables the parties and the ADR

entity to conduct the dispute resolution online. The platform will give assistance in all official languages of the EU, including the electronic translation of the exchanged information required for the settlement of the dispute. The relative link about the platform is to be provided in the general terms and conditions and on the websites of all traders established in the EU and dealing with online sales of goods and services. This requirement is also sought for the contract offers made by e-mails.

The Regulation stipulates, among the detailed provisions on the submission, transmission, and processing of a complaint, that “only data which are accurate, relevant and not excessive in relation to the purpose for which they are collected shall be processed through the electronic complaint form and its attachments.” As parties are disputants, they are likely to have different views on the relevance and accuracy of the submitted data. Therefore, leaving the decision of whether the submitted data meet the abovementioned criteria to the electronic ODR platform would not serve to the purpose of this provision. Another interesting point is that, after determining the competent ADR entity, the ADR procedure does not necessarily have to be conducted through the online ODR platform. In other words, the ADR entity can proceed with traditional methods under its national law. Nevertheless, it would undermine the online nature of the procedure if it requires the physical presence of the parties. The Regulation also highlights the significance of a user-friendly platform appealing to everyone, particularly the vulnerable consumers. In line with this approach, the Member States are required to provide an “ODR contact point” with at least two advisors giving assistance to the parties who are resident in different countries and wish to use the platform.

CONCLUSION

The ICT has recently transformed traditional trade, leading to new terminology, actors and innovative ODR techniques. Equally important is ensuring confidence in e-commerce and the ODRs. The use of out-of-court means of settlement does not necessarily diminish legal certainty or protection. Contrary to litigation, these alternative methods provide more effective, fast, and generally free of charge resolutions to consumers. In order to promote the use of these extra-judicial means, the European legislators have been undertaking many initiatives, including the ADR Directive and the ODR Regulation. The assistance of technology to the ADR proceedings as a fourth party in the ODR Regulation diminishes the burden of secretarial management and facilitates the submission, transmission, and processing of a complaint. Furthermore, the ODR contact points will make the platform more user-friendly.

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