



Doctoral Program in Information and Knowledge Society

**THE ROLE OF INFORMATION AND COMMUNICATION TECHNOLOGY AND
THE INTERNET IN THE ACCESS TO JUSTICE: EFFECTIVE ONLINE DISPUTE
RESOLUTION IN LOW-VALUE, HIGH-VOLUME BUSINESS-TO-CONSUMER
(B2C) CROSS-BORDER E-COMMERCE DISPUTES.**

A thesis submitted in fulfillment of the
requirements for the degree of
Doctor of Philosophy

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DEDICATION

To my treasured parents, Franco and Maria, and my brother, Arch. Davide, for believing in me and their support and encouragement through the program.

To my beloved uncles, Fr. Giacomo and Fr. Dr. Raffaele. Their teachings continue to guide me through life.

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Educate and inform the whole mass of the people. They are the only sure reliance for the preservation of our liberty.

Thomas Jefferson

Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. [...] The Federal Government--by nature the highest spokesman for all the people--has a special obligation to be alert to the consumer's needs and to advance the consumer's interests.

John F. Kennedy

THE ROLE OF INFORMATION AND COMMUNICATION TECHNOLOGY AND THE INTERNET IN THE ACCESS TO JUSTICE: EFFECTIVE ONLINE DISPUTE RESOLUTION IN LOW-VALUE, HIGH-VOLUME BUSINESS-TO-CONSUMER (B2C) CROSS-BORDER E-COMMERCE DISPUTES.

ABSTRACT

The rapid development of Information and Communication Technology (ITC) and the Internet have enormously impacted our society, with positive and negative effects on our civilization. This information and communication technology *revolution* has affected governments, economies, communication, and transportation.

This thesis investigates and discusses ICTs and the Internet's role in Access to Justice (A2J). It will analyze the various systems of remedies available to consumers and address the lack of regulations in cross-border e-commerce Business-to-Consumer (B2C) transactions. Additionally, this study will critically explore the use of Online Dispute Resolution (ODR) mechanisms. It will investigate whether ODR helps increase consumer trust in Electronic Commerce (e-commerce) and facilitate the resolution of low-value, high-volume cross-border B2C e-commerce disputes, specifically Business-to-Business-to-Consumer (B2B2C) disputes. Finally, this thesis will claim that the success of ODR processes in B2C cross-border e-commerce disputes depends on transparent, efficient, secure, assurance, and fair redress mechanisms that respect consumers' different dispute resolution needs.

KEY TERMS: Information and Communication Technology, Alternative Dispute Resolution, Online Dispute Resolution, Consumer Protection, Consumer Trust, Trust, B2B2C e-Commerce, B2C e-commerce, Cross-Border, Redress, Law.

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CHAPTER ONE

INTRODUCTION TO THE RESEARCH

1.1 INTRODUCTION

In the last few decades, we have assisted profound changes in our society, shifting from a post-industrial society to an information-based economy that has brought many opportunities and challenges. The Industrial Revolution (IR), which changed the face of our society and people's way of life only a hundred and fifty years ago, has given way to the information age that revolves around the advances made in Information and Communication Technologies (ICTs). The revolution in information technologies and its contribution to forming a global economy is "what most distinguishes the economic structures of the first and second halves of the twentieth century."¹ As remarked by the World Bank, "Digital innovation is in the process of transforming almost every sector of the economy by introducing new business models, new products, new services—and, ultimately, new ways of creating value and jobs."²

ICT refers to technologies that provide access to information through telecommunications and consists of hardware, software, and media for data collection, storage, processing, transmission, and presentation. It includes satellites, switches (phone exchanges), transmission lines, computers, modems, operating systems, and applications.

As well defined by sociologist Hugh Cline, "information is the content, communication is the process, technology is the vehicle, and social change is the outcome."³ ITCs have influenced social transformation, causing significant social institutions like the economy, polity, religion, and the law to adapt, change, and evolve into new forms⁴. The Internet and digital media have now reached most of the population of developing countries. According to the International Telecommunication Union (ITU), at the end of 2021, almost 4.9 billion people, 63 percent of

¹ Manuel Castells, *The Rise of the Network Society* (Malden, Mass: Blackwell Publishers, 2010), 7.

² *The World Bank*. <https://www.worldbank.org/en/topic/digitaldevelopment/overview>
<https://www.worldbank.org/en/topic/digitaldevelopment/overview> (accessed, July 12, 2019)

³ Hugh F. Cline, *Information Communication Technology and Social Change* (New York, NY: Routledge, 2014), 2.

⁴ Cline, *Information*, 2.

the global population, were using the Internet.⁵ It represents a 17 percent increase since 2019, with 782 million people estimated to have come online during that period. The robust global growth in Internet use was due to a ‘COVID-19 connectivity boost.’ The COVID-19 pandemic that began to spread worldwide in early 2020 has forced people online and changed their digital communication methods.⁶ Still, an estimated 37 percent of the world’s population, 2.9 billion people, are not connected to the Internet, 96 percent of whom live in developing countries.⁷

Many users access the Internet from work, schools, universities, or other shared public connections. The emergence of new ICT and the Internet has reshaped how people, businesses, and governments interact. Therefore, the demand for a "new system of ‘rules of interaction’"⁸ has added new challenges to the existing pluralism of national and international laws and legal systems. As the Internet continues to grow, "time, geographical distance and language are no longer obstacles to trade and, consequently, cross-border disputes have also increased."⁹ However, alternative forms of justice, such as Online Dispute Resolution (hereinafter ODR) mechanisms, have become available.

The United Nations Commission on International Trade Law (hereinafter UNCITRAL) defines ODR as "a mechanism for resolving disputes through which the full range of traditional forms of dispute resolution (including but not limited to negotiations, mediation, conciliation, arbitration, adjudication, and expert determination) where applicable, are facilitated by the use of electronic communications, other information and communication technology."¹⁰ ODR may

⁵ ITU, *Measuring digital development: Facts and figures 2021*, (Geneva, Switzerland: ITU Publications, 2021), <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2021.pdf>. According to ITU, in 2019, 4.1 billion people (or 54 per cent of the world’s population) were using the Internet. Since then the number of users has surged by 800 million to reach 4.9 billion people in 2021, or 63 per cent of the population. Between 2019 and 2021, Internet use in Africa and the Asia-Pacific region jumped by 23 per cent and 24 per cent, respectively. Over the same period, the number of Internet users in the least developed countries (LDCs) increased by 20 per cent and now accounts for 27 per cent of the population. Growth has been necessarily much weaker in developed economies, given that Internet use is already almost universal, at more than 90 per cent.

⁶ Minh H. Nguyen et al., “Changes in Digital Communication During the COVID-19 Global Pandemic: Implications for Digital Inequality and Future Research,” *Social Media + Society* 6, no. 3 (2020): 1-6, doi:10.1177/2056305120948255.

⁷ ITU, “Measuring Digital.” According to the ITU, those who remain unconnected face multiple barriers, including a lack of access: some 390 million people are not even covered by a mobile broadband signal.

⁸ Ruha Devanesan and Jeffrey Aresty, “An Evaluation of Online Dispute Resolution’s Interplay with Traditional Theories of Justice”, in *Online Dispute Resolution Theory and Practice*, eds. Mohamed S. Abdel Wahab, Ethan Katsch and Daniel Rainey (The Hague, NL: Eleven International Publishing, 2012), 263.

⁹ Aura Esther Vilalta, “ODR and E-commerce”, in *Online Dispute Resolution Theory and Practice*, eds. Mohamed S. Abdel Wahab, Ethan Katsch and Daniel Rainey (The Hague, NL: Eleven International Publishing, 2012), 125.

¹⁰ UNCITRAL Working Group III, Thirty-three session, A/CN.9/868, para. 57.

involve automated negotiation processes administered by a computer or more complex procedures like online arbitration, executive tribunals, or virtual juries.

Millions of transactions extending beyond regional borders occur online daily, and "cyberspace has become a new realm of commerce and a market with various kinds of transactions."¹¹ In 2021, retail e-commerce¹² sales worldwide amounted to 4.5 trillion US dollars, and e-retail revenues are projected to grow by 24.5 percent in 2025.¹³ With the Internet and digital payments spread, the number of digital buyers was expected to grow to over 2.14 billion worldwide by the end of 2021, up from 1.66 billion global digital buyers in 2016.¹⁴ In 2020, four trillion business transactions took place online.

Despite various marketplaces, such as PayPal, Amazon, Best Buy, eBay, and Airbnb, that help facilitate commercial transactions between third parties online, consumers still find it hard to access justice remedies and resolve disputes arising from online transactions. Many consumers and traders avoid engaging in e-commerce transactions because they lack trust in existing dispute resolution mechanisms.¹⁵ Additionally, due to a conflict of laws, many legal systems, national or international, may represent an obstacle to developing protection mechanisms for consumers and merchants operating in cross-border e-commerce. Pablo Cortés and Fernando Esteban De La Rosa stated, "the traditional approach in private international law is insufficient to provide the consumer redress in globalized e-commerce."¹⁶

The ordinary justice systems represented by local and national courts are too complex, slow, and expensive to offer appropriate and effective legal protection to consumers and merchants operating in e-commerce. It is more relevant when disputes arise from cross-border e-commerce transactions that may involve additional issues such as jurisdiction, the distance among the parties, and cultural expectations. As cross-border e-commerce transactions

¹¹ UNCITRAL Working Group III, Thirty-three session, A/CN.9/868, para. 57.

¹² The most well-known form of e-commerce is the Business to Consumer (B2C), which includes online retail or online shopping. According to [statista.com](https://www.statista.com), the country with the highest online shopping penetration rate as of Q2 2017 is China. Clothing is the most popular shopping category.

¹³ "Topic: E-commerce Worldwide," Statista, last modified July 8, 2021, <https://www.statista.com/topics/871/online-shopping/#dossierKeyfigures>.

¹⁴ *Ibid.*

¹⁵ David Gefen and Tsipi Heart, "On the need to include national culture as a central issue in e-commerce trust beliefs", *Journal of Global Information Management* 14, no. 4 (2008): 1-30.

¹⁶ Pablo Cortés, and Fernando Esteban De La Rosa, "Building a Global Redress System for Low Value Cross-Border Disputes," *The International and Comparative Law Quarterly* 62, n. 2 (2013): 408.

increase, ODR becomes more and more relevant. As online purchasing increases, the number of disputes between consumers and suppliers continues to grow.¹⁷ Although the Internet has empowered consumers with information about their rights,¹⁸ e-commerce disputes are rarely taken into public courts, and therefore ODR is becoming a consequent natural solution.¹⁹

Scholars and legal experts have long acknowledged that the most effective protection policy for consumers and businesses operating in e-markets should be based on monitored ODR mechanisms with prompt, enforceable decisions.²⁰ In the last decades, papers and protocols have been generated to support the claim that ODR represents the best mechanism to resolve cross-border e-commerce disputes.²¹ According to such a claim, consumers and traders can find adequate protection in ODR processes that may offer many advantages, such as accessibility, low costs, and technology.

The Technical Notes on ODR adopted by the UNCITRAL in 2016 observes that ODR "represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries."²² Although ODR is gaining legitimacy within the international legal and academic community, it is still for most consumers and businesses entrusted with dispute resolution methods. Therefore, to be trusted, ODR redress systems must rely on effective, trustworthy mechanisms and certification of ODR providers. That is why widespread cross-border ODR redress systems are required.

Due to regional and national jurisdiction state sovereignty limitations, international legal instruments are lacking for regulating legal issues related to cross-border e-commerce disputes. It means that the choice of law or jurisdiction and the recognition and enforcement of ODR decisions are all determined based on national law, which may often lead to complications in

¹⁷ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market* (Cambridge, UK: Cambridge University Press, 2018), 4.

¹⁸ Cortés, *The law of Consumer*, 6.

¹⁹ Rikka Koulu, "Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement," *Scripted: A Journal of Law Technology & Society* 13, n.1 (2016): 40-69.

²⁰ Cortés, and De La Rosa, "Building a Global Redress," 407-440.

²¹ Vikki Rogers, "Knitting the Security Blanket for New Market Opportunities," in *Online Dispute Resolution: Theory and practice: A Treatise on Technology and Dispute Resolution*, eds. Abdel Wahab, M. S., Katsh E. & Rainey, D., (The Hague, NL: Eleven International Publishing, 2012), 95-112.

²² UN General Assembly Resolution 13 December 2016 on the report of the Sixth Committee (A/71/507). 71/138. Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law, Preamble, para. 4.

cross-border situations. In response to these challenges, the European Union (EU) has created a union-wide ODR platform with translation services through the ODR Regulation 524/2013 and Alternative Dispute Resolution (hereinafter ADR) Directive 2013/11/EU. It should be noted that despite its nomenclature, the EU platform is not an ODR in a strict sense but rather a communication and information exchange tool and a clearinghouse that allows consumers to negotiate a solution with traders directly through a chat portal or submit a complaint to an ADR body. Also, UNCITRAL had attempted to draft uniform procedural rules for ODR. Still, the work had come to an end without general consent. Instead, in 2016 the Commission adopted Technical Notes to "foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings."²³

1.2 PURPOSE OF THE STUDY

This thesis deals with the role of Information and Communication Technology (hereinafter ICT) and the Internet in Access to Justice (hereinafter A2J). It analyzes various systems of remedies available to consumers and the regulations adopted worldwide to facilitate the resolution of cross-border e-commerce B2C disputes.

Additionally, this thesis critically explores the use of ODR mechanisms. It investigates the role of ODR in enhancing consumer confidence in e-commerce by helping resolve low-value cross-border Business-to-Consumer (B2C) disputes, specifically Business-to-Consumer (hereinafter B2B2C) e-commerce disputes. This thesis claims that the success of ODR processes in such disputes depends upon transparent, efficient, secure, assurance and fair redress mechanisms that respect consumers' and merchants' different dispute resolution needs.

Furthermore, this research supports the thesis that several online remedies available to consumers, including ODR, play a crucial role in improving access to justice in B2C cross-border disputes and enhancing consumer trust in e-commerce.

It will claim that to be efficient and provide adequate access to justice for consumers in online B2C and B2B2C disputes, online remedies must:

²³ UNCITRAL Working Group III, Thirty-third session, A/CN.9/WG.III/WP.140, para. 1.

- Meet consumer expectations and respond to the issues/problems consumers encounter when operating online.
- Include trust-based assurance mechanisms that, structurally combined, can help increase consumer confidence in e-commerce.
- Provide and guarantee effective mechanisms for the prevention and resolution of consumer disputes.

Finally, this research will propose a structural assurance (SA) model comprised of three trust-based pillars (preventive dispute mechanisms, security and data protection, complaint handling services, and ODR) that, when offered combined, can improve consumer access to justice in BC2 and B2B2C e-commerce and enhance consumer confidence in the online market.

1.3 RESEARCH OBJECTIVES

The main objectives of this research are:

- To investigate consumers' expectations and issues when using online remedies in B2C e-commerce transactions, specifically B2B2C, using quantitative and qualitative research methods.
- To give an overview of the current state of the regulatory framework for ODR and analyze the legal initiatives to adopt ODR consumer redress in the European Union, Northern America, Latin America, and Asia.
- To further investigate the potential of structural models embedding Preventive Dispute Mechanisms (PDMs), Security and Data Privacy (SDP), Complaint Handling Services (CHSs) and ODR in improving access to justice and enhancing consumer confidence in e-commerce.

1.4 RESEARCH SIGNIFICANCE AND CONTRIBUTION TO KNOWLEDGE

Most of the research in the field of ODR in B2C e-commerce disputes has mainly focused on analyzing the existing public and private redress mechanisms available to consumers and suggesting or proposing ODR systems that can meet the needs of consumers for adequate protection. However, little research has gone toward collecting quantitative and qualitative data

on what consumers need, expect, and experience when using ODR and other mechanisms to resolve low-value B2C e-commerce disputes, specifically B2B2C disputes. Furthermore, many authors have highlighted the role of ODR in helping increase consumer confidence in e-commerce while enabling adequate access to justice. Still, few authors have directed their research to investigate and establish a direct correlation between Trust and ODR.

This research attempts to contribute to the existing knowledge by:

- Collecting and analyzing data to identify and tackle some issues experienced by consumers when using ODR and other remedies.
- Emphasizing structural assurance (SA) mechanisms' role in enhancing consumer confidence in e-commerce and demonstrating a direct correlation between PDMs, SDP, CHSs, ODR, and Trust.

1.5 RESEARCH QUESTIONS

The main area of investigation of this study relates to the role of *Information and Communication Technology and Online Dispute Resolution in access to justice and consumer trust in B2C low-value high-volume e-commerce disputes*. Concerning the central area of investigation, this study seeks to answer the following research questions (RQ):

- **RQ1:** What are some of the issues consumers face when using online remedies and ODR in B2C, particularly B2B2C e-Commerce? And what are their expectations?
- **RQ2:** Can adopting ODR and other remedies regulations help enhance access to justice in B2C e-Commerce disputes worldwide? Is it possible to reach uniform international procedures for ODR?
- **RQ3:** Can ODR and other online remedies improve consumer trust in e-commerce? If so, how?

1.6 RESEARCH METHODOLOGY

In defining a theory, researchers should investigate and consider various research methods and measurement instruments that they can use to assess the effectiveness of their work.²⁴ There are many ways of doing this, but, as Blaxter et al. pointed out, the method is not just a practical matter because "different research approaches produce different kinds of knowledge about the phenomena under study."²⁵

The research employed a qualitative approach and *Grounded Theory* methodology. A quantitative research method was utilized to gather statistics from various government open data sites, research agencies, and institutions, providing empirical support for the research assertions.

Data for this study were acquired through interviews involving academics, ODR providers, and ADR practitioners, supplemented by consumer reviews from the Better Business Bureau (BBB) website. Adopting semi-structured interviews with open-ended questions emerged as the favored approach for qualitative data collection. This methodology allowed participants the freedom to articulate their thoughts organically. Employing open-ended questions facilitated a thorough exploration of participants' knowledge, experiences, and perspectives, enabling the extraction of unforeseen insights and diverse viewpoints. The study's global context was reflected in the inclusion of 15 participants from various countries, who engaged in interviews through diverse methods such as face-to-face interactions, telephone conversations, and synchronous and asynchronous online sessions. Virtual interactions were facilitated through email exchanges, Zoom meetings, and Google Meet interactions. Each interviewee responded to a tailored set of open questions, including a central research question, contributing to the comprehensive and varied data collection process. The questions were customized to align with the participants' proficiency, experience, and knowledge in ODR and ADR, taking into consideration the legal systems and cultural contexts of their respective countries.

- Central Research Question: *From your experience, in what ways might Online Dispute Resolution (ODR) improve accessibility to justice in B2C e-commerce disputes and contribute to enhancing consumer trust in the e-commerce sector?*

²⁴ Peter T. Coleman, Morton Deutsch, and Eric Colton Marcus, *The Handbook of Conflict Resolution: Theory and Practice* (San Francisco, CA: Jossey-Bass, 2014), 831.

²⁵ Loraine Blaxter, Christina Hughes & Malcolm Tight, *How to Research* (Berkshire, England: Open University Press, 2006), 8.

1.7 RESEARCH OUTLINE

The following research is divided into seven chapters, as illustrated in Figure A.

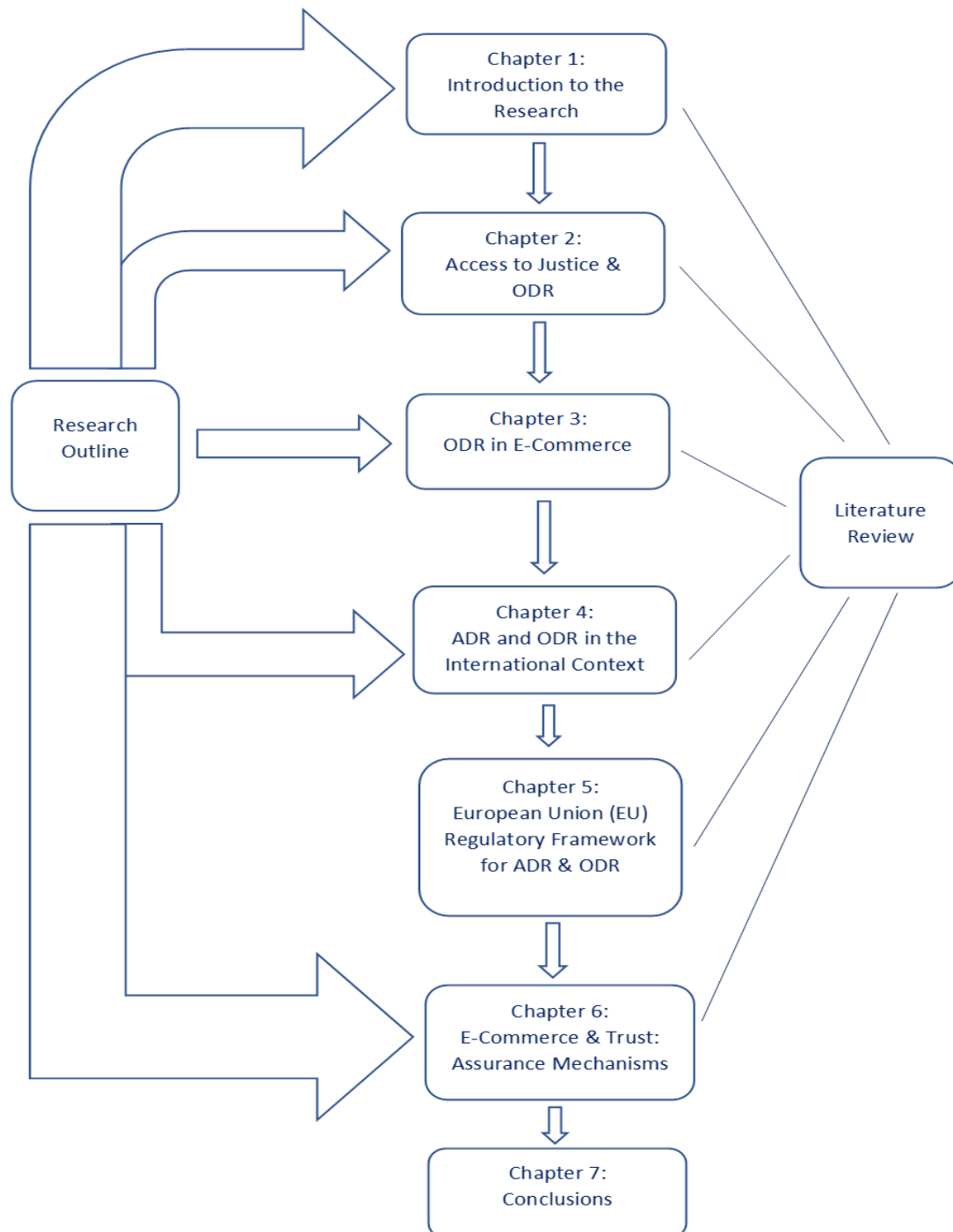


Figure A Research Outline

Chapter 1

Introduction to the Research

This chapter describes the conceptual basis for the research, outlines the purpose of this study, and identifies the main research objectives. It discusses the main areas of investigation and explains the significance of this research and its contribution to knowledge. It also presents the guiding research questions for the study and discusses the research methodology.

Chapter 2

Access to Justice, Information and Communication Technology, and Online Dispute Resolution

This chapter defines the fundamental principle of A2J and explains why it is central to promoting and protecting individual rights. It investigates the existing types of redress procedures to resolve disputes that may take place online. In this regard, the chapter discusses the role of ADR/ODR in the A2J and reviews different typologies of ODR.

Chapter 3

ODR in E-Commerce

This chapter describes how ODR can provide access to justice for consumers when shopping online. It discusses critical aspects that need consideration when designing ODR systems for B2C low-value e-commerce disputes, particularly B2B2C. It analyzes the consumer redress of two major e-commerce marketplaces, eBay and Amazon, and their role as integrated dispute resolution mechanisms platforms. Such dispute resolution systems are analyzed and examined in relation to the principles established by the UNICITRAL GROUP III on ODR. Next, it investigates key issues and expectations consumers experience using ODR. The investigation will try to answer the research question (RQ) 1.

The chapter concludes by highlighting the lack of quantitative and qualitative data on consumers' experience with remedies and ODR systems and invites scholars and ODR experts to reflect on the need to place consumers' needs and expectations at the center of the debate concerning the design of effective ODR systems.

Chapter 4

Alternative Dispute Resolution and Online Dispute Resolution in the International Context

This chapter describes and analyzes the state of the art in ADR and ODR in several different countries at an international level by geographic zones. The chapter is divided into four parts corresponding to four geographical areas: Northern America, Latin America, Africa, and Asia. It also explores the legal initiatives to adopt ODR consumer redress in Northern America (with a focus on the United States and Canada), Latin America (with a focus on Argentina, Brazil, Columbia, and Mexico), Africa (with particular attention to Kenya, Nigeria, and South Africa), and Asia (specifically China, Japan, and Singapore).

This chapter does not include an analysis of the state of the art in the EU. A separate chapter (Chapter Five) will discuss the ADR, ODR, and complaint-handling mechanisms the EU has promoted to ensure a high level of consumer protection and increase consumer confidence in the single internal market.

Additionally, the chapter discusses the work done by the UNCITRAL Working Group III to establish an international normative framework and argues that those attempts to adopt uniform international dispute resolution procedures for the online setting have proved problematic. The challenge for the Working Group lay in conceiving rules that would overcome the differences and restrictions imposed by national laws regarding pre-dispute agreements to use ODR. A disagreement arose between those jurisdictions like the US that allow pre-dispute agreements to arbitrate with consumers and those like the EU that deem pre-dispute agreements to arbitrate as non-binding upon consumers.

The chapter tries to answer the research question (RQ) 2 and argues that the lack of uniform standards does not facilitate the promotion and use of ODR and, ultimately, consumer trust in ODR.

Chapter 5

European Union (EU) Regulatory Framework for Alternative Dispute Resolution and Online Dispute Resolution

This chapter describes and evaluates the European regulatory system for ADR and ODR. It analyzes the European Union's (EU) legal initiatives to provide consumers with less costly and more efficient ways to solve their disputes with traders. Also, it critically examines the outcomes of the EU ODR platform's implementation by looking at EU reports on its functioning.

Chapter 6

E-Commerce and Trust: Assurance Mechanisms and a Structural Assurance (SA) Model Proposal

This chapter analyzes the importance of trust in e-commerce and investigates factors that can influence consumer confidence when shopping online. It discusses the role of Structural Assurance (SA) mechanisms in enhancing consumer trust in online e-commerce transactions. It will claim that ODR mechanisms are fundamental in providing consumers with the necessary assistance to seek effective extrajudicial remedies if their rights are violated. In doing so, ODR fulfills the dual role of settling disputes, building trust, preserving fairness, and promoting competition in e-commerce.²⁶ However, online traders must include ODR mechanisms in their 'toolbox' to gain consumer confidence.

This chapter addresses the issues posed in research question (RQ) 3. It provides an answer by proposing a Structural Assurance (SA) model that comprises several assurance mechanisms, including ODR. It claims that if developed and implemented by e-commerce businesses, this model could help enhance consumer confidence in e-commerce.

Chapter 7

Conclusions, Contributions, and Future Considerations

This chapter summarizes the research thesis and discusses the main findings of this research. It provides answers to the main and the four secondary research questions. The chapter explains

²⁶ See Ethan Katsh, "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace," *Lex Electronica* 10, no. 3 (2006): 1:12, and Amy J. Schmitz and Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (Chicago, IL: ABA Publishing, 2017).

how this research contributes to the body of work already performed in ODR and presents proposals for future research.

1.8 SUMMARY

This chapter introduced the research by providing an overview of the research field, methodology, and study objectives. Also, the chapter listed the research questions this study will seek to answer in the following chapters. Finally, the chapter provided an outline and an overview of the research chapters.

CHAPTER TWO

ACCESS TO JUSTICE, INFORMATION AND COMMUNICATION TECHNOLOGY, AND ONLINE DISPUTE RESOLUTION

2.1 INTRODUCTION

This chapter explores the definitions of Online Dispute Resolution (hereinafter ODR) and looks at ODR's role in improving access to justice. It discusses the role of Information and Communication Technology (hereinafter ITC) in re-engineering dispute resolution processes. It describes and examines different ODR mechanisms, including automated negotiation, online mediation, conciliations, recommendations, adjudications, and e-arbitration.

2.2 ONLINE DISPUTE RESOLUTION

The need for new forms of justice to help resolve e-commerce disputes has sparked a genuine interest in ODR among the legal, academic, and international communities. Institutions, such as the United States (US) Federal Trade Commission (FTC), US Department of Commerce, Organization for Economic Cooperation and Development (OECD), World Intellectual Property Organization (WIPO), and the European Union (EU) have recognized the importance of ODRs as effective dispute resolution systems.²⁷ ODR is often associated with resolving disputes arising in the context of electronic commerce, considering that the speed and complexity of the exchanges that take place online require the deciding authority to have specialized expertise relating to the technical means used rather than legal knowledge.²⁸ As pointed out by Maxime Hanriot, "Despite the existence of technical and legal obstacles in the implementation of ODR, this system represents a more promising solution than private litigation for the resolution of cross-border disputes arising from consumer contracts."²⁹

The term *Online Dispute Resolution* was coined in the mid-1990s during the advent of the Internet and the launch of the first e-commerce platforms.³⁰ It came from the idea of using

²⁷ Ethan Katsh, "Online Dispute Resolution: Some Lessons from the E-Commerce Revolution," *Northern Kentucky University Law Review* 28 (2001).

²⁸ Sara Tramarin, *Consumer Protection*, 2017, University of Bologna, PhD dissertation, *Amsdottorato*, <http://amsdottorato.unibo.it/7975/1/Tesi%20Tramarin%20La%20tutela%20del%20consumatore.pdf>

²⁹ Maxime Hanriot, "Online Dispute Resolution (Odr) As a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes," *McGill Journal of Dispute Resolution* 1, no. 2 (2015-2016): 2.

³⁰ See Colin Rule, *Online Dispute Resolution for Business* (San Francisco, CA: Jossey-Bass, 2002).

Alternative Dispute Resolution (hereinafter ADR) processes online instead of offline. The Internet began in 1969 as a way for US government researchers to share information. Still, it was only with the creation of the Transfer Control Protocol/Internet Protocol (TCP/IP) in 1983 that computers could have a standard way to communicate with each other.³¹ This led to the development of MCI Mail, the first commercial email service in the US that allowed users to send text-based electronic messages to other MCI Mail users. The MCI was immediately followed by CompuServe (CSI), a commercial online service provider, and ATTMail e Sprintmail. In the early 1990s, the first forms of online discussion also developed.

Nevertheless, as recalled by Andra Leigh Nenstiel, the very first modem ODR system was created in 1995 in the United States by the National Center for Automated Information (NCAIR).³² The pilot project program, called *Virtual Magistrate*, consisted of an internet-based arbitration system to resolve disputes. Unfortunately, the program did not last long and failed as only one arbitration occurred. A few years later, Professor Ethan Katsh of the University of Massachusetts Amherst (UMA) launched another pilot project program in partnership with eBay. The project objective was to resolve disputes between eBay buyers and sellers with the help of mediation. The program was so successful (over two hundred disputes handled in two weeks) that it evolved into a startup company named Squaretrade.com, which later became eBay's dispute resolution provider and the most successful online mediation service.³³

ODR has been discussed by scholars and included in many legal documents and national and international laws.³⁴ International institutions like the United Nations (UN) have encouraged alternative processes to resolve international cross-border disputes. The UNCITRAL has advocated using ODR platforms to help overcome the limits of traditional justice.

³¹ "A Brief History of the Internet," University System of Georgia, accessed March 25, 2021, [https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml#:~:text=January%20%2C%201983%20is%20considered,Protocol%20\(TCP%2FIP\)](https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml#:~:text=January%20%2C%201983%20is%20considered,Protocol%20(TCP%2FIP).).

³² Andra Leigh Nenstiel, "Online Dispute Resolution: A Canada-United States Initiative," *Canada-United States Law Journal* 32, no. 1 (2016): 315, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&art=1288&context=cuslj>.

³³ Amy J. Schmitz and Colin Rule, *The New Handshake*; Ethan Katsh, "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace1," *International Review of Law, Computers & Technology* 21, no. 2 (2007): 97-107, doi:10.1080/13600860701492096.

³⁴ Pablo Cortes, *The Law of Consumer Redress*, 44.

In the European Union (EU), various legislative initiatives have promoted the use of ODR, such as Directive 2000/31 on e-commerce,³⁵ Directive 2008/52 on certain aspects of mediation in civil and commercial matters,³⁶ and Directive 2013/11 on alternative dispute resolution for consumer disputes. Through Resolution (EU) No 524/2013, the European Commission has also created an ODR platform for consumers and traders seeking the resolution of out-of-court disputes. Although the platform is not an ODR process, European consumers can discuss a solution directly with a trader or electronically submit their complaints to an approved alternative dispute resolution body. Furthermore, there has been a progressive integration into the European Union legislation of the requirement to implement ODR services to resolve disputes arising out of online e-commerce transactions. In this regard, Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services introduces rules for regulating the relation between online platforms and their business users, including providing internal information systems for handling the complaints of business users.³⁷ More specifically, the Regulation requires online intermediation services providers to identify, in their terms and conditions, mediators who must be "easily accessible either physically in the place of establishment or residence of the business user or remotely using communication technologies."³⁸

Regardless of its popularity, ODR lacks a generally accepted definition.³⁹ The definition and concept of ODR may vary depending on the context where they are used and the type of processes employed.⁴⁰ Ethan Katsh and Colin Rule define ODR as applying ICT to prevent, manage, and resolve disputes.⁴¹ Pablo Cortes refers to ODR as a form of ADR that takes advantage of the speed and convenience of the Internet and ICT.⁴² Eric van de Heuvel defines

³⁵ Art. 17(1) of Directive 2000/31 recites, "Member States shall ensure that, in the event of disagreement between an information society service provider and the information recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means."

³⁶ Recital 9 of Directive 2008/52 recites, "This Directive should not in any way prevent the use of modern communication technologies in the mediation process."

³⁷ Regulation (EU) 2019/1150, art. 11(1).

³⁸ *Ibid.*, art. 12(d).

³⁹ Noam Ebner and Joan Zeleznikow, "Fairness, Trust, and Security in Online Dispute Resolution," *Hamline Journal of Public Law and Policy* 36, no. 2 (2015): 143-160.

⁴⁰ Pablo Cortes, *The Law of Consumer Redress in an Evolving Digital Market*, 65.

⁴¹ Ethan Katsh and Colin Rule, "What We Know and Need to Know about Online Dispute Resolution," *South Carolina Law Review* 67, no. 2 (2016): 329-344.

⁴² Pablo Cortes, "What should the ideal ODR system for e-commerce consumers look like? The Hidden World of Consumer ADR: Redress and Behaviour," *Journal of the Oxford Centre for Socio-Legal Studies*, 28 (2011), 1.

ODR as "the deployment of applications and computer networks for resolving disputes with ADR methods."⁴³ Generally speaking, ODR often refers to a synergy between ADR and ICT. As noted by Aura Esther Vilalta,⁴⁴ ICT is a distinct element of ODR mechanisms in contrast to offline dispute resolution methods that do not require the use of technology. Additionally, many ODRs are *ex-Novo* modalities that do not find a counterpart in classic ADR but result from algorithms, computational intelligence, and machine learning.

Furthermore, in 2001, Ethan Katsh and Janet Rifkin⁴⁵ referred to technology as the *fourth party*, claiming its critical role in dispute resolution. ODR may employ various technologies, from video conferencing to mediate between geographically distant parties to emails for asynchronous dispute resolution or sophisticated software for automated negotiation. According to Marta Poblet and Graham Ross, to qualify as ODR, a dispute resolution process has to fulfill at least one of two conditions:

- i) provide online technical assistance throughout the process to different parties, such as the disputing parties or the mediator
- ii) the subject matter must be either a grievance, complaint, or dispute.⁴⁶

Some online dispute resolution can be linked with public courts, while others can be part of an e-commerce website.⁴⁷ Many courts have introduced online systems, such as having judges conduct court hearings online in live streaming, allowing disclosures to be submitted through electronic platforms, claims filed, and fees paid through an online portal. In 2017, China established its first cyberspace court in Hangzhou, the focal point of the e-commerce business in China, also known as "China's Silicon Valley." The Court only hears internet-related disputes like contract disputes involving online shopping, services, and copyright infringement; all cases are tried online.

⁴³ Eric van den Heuvel, "Online Dispute Resolution as a Solution to Cross-Border E-Disputes: an introduction to ODR," (2000), 8.

⁴⁴ Aura Esther Vilalta, "ODR and E-commerce", 126.

⁴⁵ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco, CA: Jossey-Bass, 2001).

⁴⁶ Graham Ross and Marta Poblet, "ODR in Europe," in *Online Dispute Resolution Theory and Practice* (The Hague: Eleven International Publishing, 2013), 465-481.

⁴⁷ See eBay's Resolution Center <https://resolutioncenter.ebay.com/>.

ODR processes may change and evolve with the evolution of technology, and different types of ODR may emerge, especially in the e-commerce world. For this reason, it is not easy to come up with an inclusive definition and classification of ODR. To summarize, some forms of ODR are ADR procedures born offline and transposed into the online world. In this case, technology merely facilitates ADR procedures (e-ADR). However, second-generation ODR instruments do not need human intervention like automated negotiation and blind bidding. In this case, we could speak of ODR in a strict sense.

Generally speaking, the term ODR indicates procedures that take place for a significant part online and can be associated with resolving out-of-court disputes arising in e-commerce transactions, especially those involving consumers. The speed and technology and the global aspect involved in e-commerce define the characteristics of online transactions. They require adequate forms of justice that offer immediate relief to the needs of those operating in online marketplaces.

2.2.1 Legal Definitions of ODR

Although ODR may evolve with the constant innovation of ICT and digital technology, definitions of ODR can be found in legal documents and laws.

The UNCITRAL WORKING Group III Technical Notes on Online Dispute Resolution defines ODR as a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology."⁴⁸ In ODR systems, dispute resolution occurs through telematic communication channels (*Fourth Party*) offered by the online provider (*Fifth Party*) and facilitated by the intervention of a neutral third party or automated software (*Third Party*).⁴⁹

In the United Kingdom (UK), the Online Dispute Resolution Advisory Group of the Civil Justice Council defines in its 2015 report ODR as "the use of IT and the Internet to help resolve disputes (other than the computerization of the current court system)."⁵⁰

⁴⁸ UNCITRAL Working Group III, "UNCITRAL Technical Notes on Online Dispute Resolution."

⁴⁹ Enrico Minervini, *Le online dispute resolution (ODR)* (Edizioni Scientifiche Italiane, 2016).

⁵⁰ "Online Dispute Resolution for Low Value Civil Claims," judiciary.uk, accessed September 20, 2019, <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

In the US, the Supreme Court of the State of New Mexico, in its order that authorizes an ODR pilot program for New Mexico state courts, defines ODR as a method of ADR for the judicial system and the courts.⁵¹ In 2020, the Michigan Supreme Court (State Court Administrators Office), in its Considerations Implementing Court ODR Systems, defined ODR as an online process in which the parties themselves, or with the help of a neutral human or machine third party, resolve their issues to mutual satisfaction.⁵²

EU Regulation 524/2013, which establishes the EU ODR platform for consumer disputes, does not define ODR. Instead, it indicates in art. 2 (1) that the Regulation applies to "out-of-court resolutions of disputes concerning contractual obligations stemming from online sales or service contracts "[...]" which involves the use of the ODR platform." The EU legislator seems to consider online ADR (e-ADR) and offline ADR jointly.⁵³ This assumption would be confirmed by recital 12 of the ADR Directive, which states that "Regulation (EU) No 524/2013 provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures."

Although the Regulation does not define ODR, it describes what does not constitute ODR. For instance, in-house complaints handling mechanisms provided by e-commerce businesses, while they "can constitute an effective means for resolving consumer disputes at an early stage,"⁵⁴ should not be considered ODR in a strict sense. According to the ADR Directive, in-house complaints handling mechanisms are systems of internal procedures and processes operated by traders to manage customer complaints.⁵⁵ Since such procedures are operated by people employed or remunerated exclusively from the trader, they are exposed to a conflict of

⁵¹ "ODR Pilot Project Order," adr.nmcourts.gov, accessed September 27, 2019,

[https://adr.nmcourts.gov/uploads/files/ODR/ODR%20Pilot%20Project%20Order%20\(6_3_19\).pdf](https://adr.nmcourts.gov/uploads/files/ODR/ODR%20Pilot%20Project%20Order%20(6_3_19).pdf)

⁵² Michigan Supreme Court State Court Administrators Office Office of Dispute Resolution, "Considerations in Implementing Court ODR Systems," *State Court Administrative Office*, 2020, 1.

⁵³ In this regard also see art. 17 of Directive 2000/31/2000 which states, "Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means."

⁵⁴ Directive 2013/11/EU, Preamble 17.

⁵⁵ *Ibid.*, 23.

interest. They do not fall within the scope of the Directive since they lack the requirements of impartiality and independence laid down in Art. 1.⁵⁶

In Canada, the Civil Resolution Tribunal Act defined ODR as out-of-court services provided through electronic communication tools and intended to assist parties in resolving a dispute by agreement without the assistance of a tribunal officer or person engaged or retained by the tribunal to provide facilitated settlement.⁵⁷

The recent Collaborative Framework for Online Dispute Resolution of Cross-Border Business to Business (B2B) Disputes endorsed by the Asian-Pacific Economic Cooperation (APEC) in August 2019 defines ODR as "a mechanism for resolving disputes through the use of electronic communications and other information and communication technology."⁵⁸

There are many definitions in the laws and regulations of countries that, although coming from different cultures and legal systems, share the same understanding of ODR. ODR is generally considered a set of dispute resolution processes assisted by information and communication technology (IT) and facilitated by a neutral third party or automated software.

2.2.2 Related Mechanisms: B2C Complaint Handling and Prevention Mechanisms.

With the development of e-commerce and the growing number of electronic transactions, redress, and complaint-handling mechanisms have emerged to address problems experienced by consumers online. They seek to resolve customer dissatisfaction as closely as possible to the point of product or service delivery. Internet merchants have progressively integrated online customer handling services (i.e., customer services, help centers, returns, and refunds) and preventive complaint mechanisms (i.e., credit card chargebacks, escrow accounts, satisfaction guarantees, trust marks, and rating systems) to give consumers quick and effective redress.⁵⁹ They aim to resolve complaints early to save money and improve customer relationships.

⁵⁶ Ibid., Art. 2(1).

⁵⁷ Civil Resolution Tribunal Act [SBC 2012] Chapter 25, Part 1, Division 1(1).

⁵⁸ APEC Collaborative Framework for ODR of Cross-Border B2B Disputes, art. 2(1).

⁵⁹ Pablo Cortes, Aura Esther Vilalta, and Chittu Nagarajan, "ODR for E-Commerce: Legal Standards and Developments in Asia and Europe," in *Online Dispute Resolution: Theory and Practice* (The Hague: Eleven International Publishing, 2021), 125-149.

Although these mechanisms share similarities with ODR (i.e., the use of ITCs, simplicity, efficiency, and convenience) and help prevent and resolve disputes, they do not fall into the ODR category, as they lack the fundamental principles that distinguish ODR systems like transparency, independence, and neutrality.⁶⁰ The ADR EU Directive defines internal complaint-handling procedures as mechanisms that manage disputes between merchants and buyers.⁶¹ These mechanisms are operated by traders through their customer service or dispute resolution teams, exposing them to conflict of interest. According to the Directive, ADR entities must meet specific criteria, such as being independent, impartial, transparent, and effective in resolving disputes. Also, they should not be employed or remunerated exclusively by the trader.⁶² Therefore, such mechanisms fall out of the scope of the ADR Directive as they lack the requirements laid down in Art. 1. They should not be considered ODR platforms in a strict sense, either. An ODR platform is an online technology-based system operated by an independent administrator and designed to facilitate the resolution of disputes between consumers and traders through the intervention of a neutral third party or automated software. An ODR platform should provide a neutral and impartial forum for resolving disputes using ADR negotiation, mediation, or arbitration techniques. Under the ADR EU Directive, ODR platforms must meet specific requirements, including transparency, impartiality, effectiveness, and accessibility.⁶³ They must also provide clear information to consumers and traders about the resolution process, including the procedures involved, the resolution timeframes, and any applicable fees or costs.⁶⁴ Chapter Six discusses these dispute prevention and assurance mechanisms in more detail.

2.2.3 B2B2C E-commerce Intermediaries Dispute Resolution

E-commerce intermediaries are platforms or marketplaces that facilitate online transactions between merchants and buyers. Examples include Amazon, eBay, and Etsy. These intermediaries offer various complaint-handling mechanisms to help resolve conflicts between buyers and sellers and ensure customer satisfaction and loyalty. These mechanisms include customer service and support, escalation channels, refunds and returns, and feedback. E-commerce intermediaries have integrated ADR processes into their platforms. When a dispute

⁶⁰ UNCITRAL Technical Notes on ODR, Section II; Directive 2013/11/EU, Art. 1.

⁶¹ Directive 2013/11/EU, Preamble 17.

⁶² *Ibid.*, Art. 1 and 1(2).

⁶³ *Ibid.*

⁶⁴ *Ibid.*, Art. 7.

arises between a merchant and a buyer, the e-commerce intermediary may facilitate the resolution of the dispute. It may involve reviewing evidence provided by both parties and deciding how to resolve the issue. The intermediary may have specific policies and procedures for resolving disputes, such as a formal dispute resolution process or using a third-party mediator.

2.3 ONLINE DISPUTE RESOLUTION AND ACCESS TO JUSTICE

Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later. "It is possible," says the gatekeeper, "but not now."⁶⁵

In "Before the law,"⁶⁶ Kafka tells us the story of a countryman trying to get through a gateway that will let him enter into the law. Unfortunately, he meets a gateway keeper who denies him access. Kafka reminds us that law is not accessible and available to everyone through this eloquent story, especially in countries that lack democratic institutions.

Access to justice (hereinafter A2J) shall guarantee equal access to fair outcomes. It is considered a crucial element of the rule of law. A2J is linked with liberal democracy and values such as equality, liberty, human rights, and justice. It includes access to information, access to courts, legal representation, and equality before the law, particularly for disadvantaged members of society.⁶⁷ Where A2J is guaranteed, the quality of everyday justice for all community members is improved.

The concept of A2J has constantly been subjected to significant transformations following equally important political, social, and economic changes. These changes have made it possible to move from a formal idea of the right to access justice as primarily "the individual's formal right to litigate or defend a claim"⁶⁸ to a practical notion of access to justice. In this latter notion,

⁶⁵ Franz Kafka, *Trial* (Alma Books, 2018).

⁶⁶ "Before the Law" is a parable contained in the novel *The Trial*.

⁶⁷ Akin L. Ojelabi, *Improving Access to Justice Through Alternative Dispute Resolution: The Role of Community Legal Centres in Victoria, Australia*, (La Trobe University, 2010).

⁶⁸ Bryan G. Garth and Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective," *Art.s by Maurer Faculty*, 1142 (1979): 183.

A2J provides each individual with adequate tools to protect his interests and enforce his rights. However, the traditional court system cannot be considered the only means of access to justice and dispute resolution. Instead, other forms, such as ADR, could allow citizens to address disputes outside the state judiciary systems.

Technology has always played an essential role in delivering justice by facilitating the work of justice administrators and helping citizens access the justice system. The evolution of technology and the means of information and communication have also allowed ADR schemes to use increasingly advanced techniques to resolve disputes. Notably, the development of mechanisms such as ODR has facilitated A2J for consumers who can take advantage of the speed and convenience of the Internet to resolve disputes that take place online.

A2J is a basic principle of the rule of law and a fundamental right protected in the Charter of Rights of the European Union (EU).⁶⁹ A2J is essential to a state's stability and development.⁷⁰ People can exercise their rights, challenge discrimination, or hold decision-makers accountable through access to justice. The UN Declaration of the High-level Meeting on the Rule of Law recognizes "the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights."⁷¹ It also reaffirms the commitment of member states to take all necessary steps to provide fair, transparent, effective, non-discriminatory, and accountable services that promote access to justice for all.⁷² A state increases its legitimacy and promotes social, political, and economic development by providing access to justice. Therefore, as William Davis and Helga Turku stated, "a state must be capable of availing courts for dispute resolution, settlements, and enforcement of such decisions to all citizens, regardless of their class identity or geographical position."⁷³

Governments must provide citizens and communities the right to access and utilize legal institutions and processes to protect and enforce their rights and the opportunity to address their disputes outside of the justice system provided by the state. According to international and

⁶⁹ Art. 47 of Charter of Fundamental Rights of the European Union recites that, "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Art.."

⁷⁰ William Davis and Helga Turku, "Access to Justice and Alternative Dispute Resolution," *Journal of Dispute Resolution*, 2011, no. 1 (2011): 47.

⁷¹ UN General Assembly, Sixty-seven session, A/RES/67/1, para. 14.

⁷² *Ibid.*, para. 15.

⁷³ William Davis and Helga Turku, "Access to Justice and Alternative Dispute Resolution," 48-49.

European law, everyone has the right to a fair and public hearing by an independent and impartial tribunal within a reasonable time.⁷⁴ Everyone has the right to receive legal advice and be represented and defended during a case.⁷⁵ The state should guarantee adequate support to citizens to access court proceedings through legal aid, defense, and representation. It should also give individuals the right to alternative approaches to dispute resolution that are less formal, less costly, and more flexible than traditional legal systems.

Traditionally, courts and tribunals are state institutions with the authority to hear and resolve disputes and administer justice. However, A2J should allow citizens to address disputes outside the state judiciary systems.⁷⁶ ADR can provide an alternative to the traditional judicial system. It can help citizens resolve disputes in a cost-effective and timely manner and improve the efficiency of justice by reducing the courts' workload.

Formally recognized and vastly encouraged by international laws to resolve international disputes between states and physical and legal persons,⁷⁷ ADR entered the debate on the need to improve A2J through out-of-court proceedings. Fueled by dissatisfaction with the court system and high litigation costs, ADR gained popularity in the US and later in Europe.

In the 70s, scholars Brian Garth and Mauro Cappelletti⁷⁸ identified costs, organizational problems, and inadequate procedures as barriers to accessing justice. ADR seemed to provide a valuable option to overcome such obstacles. The EU has encouraged ADR use by adopting directives and other legislative initiatives to secure better access to justice through judicial and extrajudicial dispute resolution methods.⁷⁹ Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters was introduced to facilitate access to ADR, encourage mediation in cross-border disputes, and ensure a balanced relationship between

⁷⁴ United Nations Declaration of Human Rights (UNDHR), Art. 10; European Convention of Human Rights (ECHR), Art.s 6(1); European Union (EU) Charter of Fundamental Rights, Art. 47(2). Art. 47(2) recites "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

⁷⁵ EU Charter of Fundamental Rights, Art. 47(2).

⁷⁶ *Ibid.*, 50.

⁷⁷ See 1899 Convention for the Pacific Settlements of International Disputes (Hague I), Title II art. 1 and Title IV Chapter I art. 15; UN Charter, Chapter VI art. 33 (1) and (2), art. 36 (3); UN 1958 New York Convention; 1961 European Convention on International Commercial Arbitration; 1985 UNCITRAL Model Law on International Commercial Arbitration.

⁷⁸ Brian Garth and Mauro Cappelletti, *Access to Justice: a World Survey* (Milan, IT: Giuffrè, 1978), 49.

⁷⁹ Directive 2008/52/EC, preamble 5.

mediation and judicial proceedings.⁸⁰ Directive 2013/11/EU was adopted to regulate ADR in consumer protection and assure access to simple, efficient, fast, and low-cost systems to resolve domestic and cross-border consumer disputes.⁸¹

In England and Wales, The Civil Procedure Rules (CPR) were introduced in 1999 to improve A2J and promote the use of ADR. The CPR requires parties to consider ADR for resolving their dispute before commencing legal proceedings, and courts are encouraged to facilitate ADR where appropriate.⁸²

The evolution of technology and the means of ICT have allowed ADR systems to use increasingly advanced systems to enhance A2J and resolve disputes. Remarkably, the development of online consumer redress mechanisms has increased A2J for consumers who can take advantage of the speed and convenience of the Internet to resolve low-value, high-volume disputes.⁸³ As predicted by Colin Rule, ODR has become essential to how consumers worldwide resolve their disputes.⁸⁴ ODR has grown exponentially from the early stages of the eBay ODR pilot project and is now applicable in various areas.⁸⁵ However, despite the growth of ODR, there are still many disputes for which there is no effective redress. For many low-value disputes, the option available to consumers is reduced to one form of dispute resolution.⁸⁶

ODR represents an attractive alternative to traditional court procedures. It helps solve the problem of distance and the conflict of laws between consumers and merchants, especially in low-value, high-volume cross-border e-commerce disputes. However, as stated by Howells and Weatherill, "ODR also brings with it certain dangers as consumers may be drawn into accepting forms of justice whose quality and independence they may be unsure about."⁸⁷ Numerous online consumer contracts include mandatory arbitration clauses that oblige consumers to waive their legal rights to prevent them from looking for other forms of dispute resolution.

⁸⁰ Directive 2008/52/EC, art. 1(1) (2).

⁸¹ Directive 2013/11/EU, art. 5.

⁸² The Civil Procedure Rules 1988 No. 3132 (L.17) PART 1, Rule 1.4.

⁸³ In 2017, the average order value of U.S. online shopping orders was of 82 U.S. dollars. See <https://www.statista.com/statistics/304929/us-online-shopping-order-value/>

⁸⁴ Rule, *Online Dispute Resolution for Business*, vii.

⁸⁵ The application of ODR includes many areas such as e-Commerce, consumer, employment, commercial, real estate, insurance, transportation, and many other disputes.

⁸⁶ M. Ethan Katsh, , and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (New York, NY: Oxford University Press, 2017), 45.

⁸⁷ Geraint Howells, and Stephen Weatherill, *Consumer Protection Law* (Farnham, UK: Ashgate Publishing, 2005), 638.

Many large e-commerce companies and service providers require users to sign agreements requiring arbitration in case of a dispute. Such clauses are often used to prevent consumers from joining a class-action lawsuit. According to a survey conducted by Dasteel of the University of California of Los Angeles (UCLA) Law School,⁸⁸ of 200 websites offering consumer goods and services, 48% included binding arbitration in their terms and conditions. It is worth noting that EU laws forbid mandatory arbitration clauses in consumer contracts.

One of the major obstacles to increasing online cross-border transactions is a lack of commercial internet laws to resolve online disputes that undermine consumers' and businesses' confidence in online trade. In this scenario, ODR may represent a good option "for enhancing the redress of consumer grievances, strengthening their trust in the market, and promoting the sustainable growth of e-commerce."⁸⁹ ODR can overcome the issues represented by different legal systems and jurisdictions and offer practical, fast, and cost-effective redress, especially for resolving cross-border, low-value, high-volume e-commerce disputes. Consequently, as online commerce develops globally, businesses will need access to legal frameworks that are not sovereign-based. Hence, the need for a new *Lex Mercatoria*⁹⁰ can help overcome the emerging challenges to legal systems and provide traders and consumers with a fair, fast, and cheap resolution system to resolve cross-border transactions in electronic and mobile commerce⁹¹.

The lure of ODR in enhancing A2J for consumers may not come without risks. Consumers may be drawn into accepting forms of justice whose quality, independence, and certainty of enforcement may be unsure.⁹² Thus, if ODR can be a way to enhance A2J, especially in cross-border consumer disputes, it "must, therefore, evolve so as to provide more legal certainty."⁹³ The main obstacles to providing a uniform international legal framework for

⁸⁸ Jeffrey H. Dasteel, "Consumer Click Arbitration: A Review of Online Consumer Arbitration Agreements," *Arbitration Law Review* 9, no. 18 (2017).

⁸⁹ Cortes, "What should the ideal ODR system for e-commerce consumers look like?," 1.

⁹⁰ Although deeply rooted in ancient times, *Lex Mercatoria* refers to the body of commercial law used by traders and merchants throughout Europe during the medieval period. During 12th and 13th century, special courts were established in the areas where markets were held to solve trade disputes. Disputes were resolved through arbitrations provided by the most respected persons from among the traders.

⁹¹ Scott Cooper, Colin Rule, and Louis Del Duca, "From Lex Mercatoria to Online Dispute Resolution: Lessons from History in Building Cross-Border Redress Systems," *Penn State Law Legal Studies Research Paper*, n. 9 (2017): 1-16, <http://ssrn.com/abstract=1840572>.

⁹² Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Farnham, UK: Ashgate Publishing, 2005), p. 638.

⁹³ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague, NL: Kluwer Law International, 2005), 82.

ODR reside in functional and cultural differences in legal systems. Therefore, if we imagine a so-called new *Lex Mercatoria* for e-commerce, we need to consider how to build it to meet the needs of consumers involved in disputes arising out of online transactions.

2.4 TECHNOLOGY AND ODR

Like almost every other industry, expanding ICT has affected and transformed the world's legal and judicial systems. In the last decade, technological change has remarkably accelerated, putting pressure on every sector of our society. Consequently, more people, businesses, and public and private entities have integrated the Internet and other technologies into their daily lives and activities. New technologies such as artificial intelligence (AI) and algorithms, 5G, the Internet of Things (IoT), serverless computing, blockchain technology, and biometrics have replaced others that only a few years ago seemed unsurpassable.

The rapid development of new ICTs has also significantly opened new opportunities to improve administration and justice access. Mobile applications are now available to provide citizens with an easy and affordable way to access justice from their phones. For example, Squabble, a mobile application developed in California, offers a court filing service. It helps its users file any small monetary claims case and avoids the inconvenience of going to Court.⁹⁴ After downloading the application from the Play Store or App Store, the user starts a filing by entering the other side's information and answering a few questions about the dispute. Then, the system guides the user through a few additional steps and ensures a proper filing of the user's complaint in the Small Claims Court in the appropriate jurisdiction in the US. Once the forms are filed, the system sends the user an email confirming the case filing in the proper Court. The system sends another email when the Court accepts the case and schedules a hearing.⁹⁵ Squabble is linked with the small claims court systems around the country, and this helps users submit the proper forms to the correct Court. The defendant is notified through an automated email or text and served with a formal notice of initial legal action, the 'service of process.' If the party being sued is a business, Squabble helps the claimant locate and serve the proper legal agent. For all the filing, Squabble takes a flat fee of \$95. Squabble enables the user

⁹⁴ Squabble helps resolve any monetary dispute divided into four tiers based on the value of the dispute: \$250-\$1,000, \$1,000-\$5,000, \$5,000-Small Claims limit (by state), and civil claims over \$25,000. The most common disputes resolved by Squabble include landlord/tenant, personal injuries, debt collection, property damage, a broken promise, and auto repair disputes

⁹⁵ "FAQ," Squabble, last modified November 22, 2020, <https://www.squabbleapp.com/faq/>.

to file and does not offer legal representation, which is prohibited in small claims courts. However, it provides a document checklist for the court hearing and a guide to small claims courts with helpful information on collecting after winning a case and what to do in case of personal injury and breach of contract. Additionally, Squabble released an "Enforce" feature in late 2021 to help users enforce their judgment.⁹⁶ Squabble is an example of an app legal-based service provider that supports clients with filing and adjudication assistance in small claims court. It does not help resolve disputes but facilitates accessing and filing court claims, providing support, especially to citizens unfamiliar with small claims court procedures and needing help preparing and filing court documents.

Technology has dramatically impacted many other areas of dispute resolution, changing how conflicts and disputes are resolved. Technology can support or enable existing manual processes of administering dispute resolution or re-engineer the dispute resolution process, delivering solutions in new ways.⁹⁷ Existing technology supports different ADR processes, changing the "traditional three-sided model"⁹⁸ represented by the parties and the third neutral and adding what Katsh refers to as the *fourth party*.⁹⁹ The use of technology transforms ADR processes into online processes (ODR). ODR employs negotiation, mediation, or arbitration techniques to resolve disputes arising out of online transactions. Such interaction becomes, at times, fully automated (i.e., automated negotiation); at other times, it involves human intervention (i.e., online mediation). It can be asynchronous and text-based (i.e., emails, instant messaging) or synchronous (i.e., video conferencing, e-rooms), and it can rely on integrated platforms or sophisticated processes based on cutting-edge technology (i.e., smart contracts, AI, etc.).

The emergence of new technologies and new ways of using technology will facilitate the evolution of ODR processes and systems, creating the opportunity for even faster, easier, and more convenient access to justice.

⁹⁶ See Faq at <https://www.squabbleapp.com/faq/>.

⁹⁷ Lucinda Case, "The Impact of ODR Technology on Dispute Resolution in the UK," Thomsonreuters (blog), Spring 2016, September 13, 2019, https://blogs.thomsonreuters.com/legal-uk/wp-content/uploads/sites/14/2016/10/BLC_ODRwhitepaper.pdf.

⁹⁸ Cortés, *Online*, 85.

⁹⁹ Katsh, *Online Dispute Resolution: Some Implications*, 98.

This section describes some of the most common ODR processes and how they can help resolve disputes.

2.4.1 Automated Negotiation

Automated negotiation is how groups of actors communicate with one another to reach a mutually acceptable agreement on some matter. At least one of the actors is an autonomous software agent.¹⁰⁰ It is a widely used process to resolve e-commerce Business-to-Consumer (hereinafter B2C) and Consumer-to-Consumer (C2C) disputes. The parties use ODR platforms that provide technical assistance and help them find a solution. The negotiation is conducted electronically using soft computing techniques that improve decision-making efficiency and where intelligent agents negotiate on behalf of their owners. The parties are not required to learn specific tactics or have the skills to negotiate their disputes successfully. The platform exclusively performs the negotiation through autonomous agents¹⁰¹ that act without human supervision and the intervention of a neutral third party.

Cybersettle is the most known automated negotiation platform designed to settle monetary settlements. It helps parties resolve single-issue monetary disputes by providing a patented "double-blind" technology that allows them to submit confidential offers and demands, which are never disclosed to the opposing party unless and until a settlement is reached.¹⁰² Parties can submit up to three offers without revealing their bottom line. The system automatically compares the offers and demands and determines if they are in a mutually acceptable settlement range. If not, it prompts the parties to submit their subsequent request. Smartsettle provides another automated negotiation platform.

Created by iCan Systems,¹⁰³ Smartsettle is a secure eNegotiation system that uses patented optimization algorithms to achieve fair and efficient negotiation solutions.¹⁰⁴ Smartsettle offers two types of systems: Smartsettle ONE, a cloud-based platform for simple two-party formal

¹⁰⁰ See definition by IGI Global dictionary, <https://www.igi-global.com/dictionary/bilateral-multi-issue-e-negotiation-model-based-on-abductive-logic-in-e-commerce-using-dali/1944>.

¹⁰¹ Autonomous agents are artificial intelligence (AI) procedures having internal goals to achieve and able to make decisions on the actions to execute, without direct human intervention. See definition by IGI Global dictionary, <https://www.igi-global.com/dictionary/coder-creator-responsibility-issues-intelligent/2007>

¹⁰² See Cybersettle.com

¹⁰³ iCan Systems Inc. is a Canadian company founded by Dr. Ernest Thiessen.

¹⁰⁴ "About," Smartsettle, accessed November 4, 2020, <https://www.smartsettle.com/about-us>.

negotiations that can be reduced to a single numerical issue, and Smartsettle Infinity, which helps users resolve more complex negotiations. Smartsettle developed a "visual blind bidding" interface that allows the parties to negotiate along a grid between two endpoints. Each point on the grid is a possible solution to the negotiation. The visual blind bidding process allows parties to identify their reservation and target price safely, and through their bids, it creates a Zone of Possible Agreement (ZOPA). The system then rewards the party in, or closest to, the ZOPA at the beginning of the last session.

The advantage of visual blind bidding is that it is scalable to any quantitative and qualitative issues, and any number of parties can use it. Blind bidding systems have received some criticism, especially from those who see them as tools that can advantage expert negotiators such as company lawyers and disadvantage consumers in these automated processes.¹⁰⁵ As pointed out by Zheng, experienced users may abuse the system to gain an advantage over first-time users like consumers.¹⁰⁶ Also, blind-bidding methods may be appropriate for significant disputes and not for consumer disputes where the value of a consumer product is usually low. The dispute is often on whether a business should offer compensation or a refund. Despite some criticisms, blind bidding systems have contributed to settling thousands of disputes, helping users save money and years of litigation, and resolving even complex negotiations.

2.4.2 Online Mediation

Mediation is a process in which two or more parties meet with a third neutral, the mediator, who assists them in creating a climate of understanding to facilitate an agreement¹⁰⁷. Mediation is a voluntary and confidential process that is not bound by the rules of a formal proceeding. The mediator neither crafts solutions for the parties nor makes a final decision. Instead, he empowers the parties to develop their own mutually acceptable agreement. An agreement reached in mediation is generally not legally binding unless otherwise indicated by the parties.

¹⁰⁵ Russell Weiss, "Some Economic Musings on Cybersettle," *University of Toledo Law Review* 38, (2006-2007): 89-99; Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Portland, Oregon: Hart Publishing, 2015), p. 336.

¹⁰⁶ Tang, *Electronic*.

¹⁰⁷ Aura Esther Vilalta, "ODR and E-commerce," 129.

In the EU, the recognition and enforcement of mediation settlements in cross-border disputes are facilitated by a few regulations¹⁰⁸, including the Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of civil and commercial matters judgments. However, settlements must be embodied in a judgment, an authentic document (i.e., a notarial deed), or a court settlement to be recognized and enforced. The settlement reached by the parties is considered a binding contract. Suppose one of the parties does not comply with a settlement reached in a cross-border mediation (carried out within or outside the EU. In that case, the other party may at any time file a claim for breach of contract before the competent Court of any EU member state and have the settlement enforced.¹⁰⁹

In the US, parties can decide whether or not they wish to make their agreement legally enforceable. Not making an agreement binding comes from the idea that the parties work together to reach an acceptable agreement to both of them in mediation.

Therefore, the parties are motivated to respect this agreement without resorting to legally binding written agreements once this agreement is reached.¹¹⁰ Instead, in the case of a legally enforceable agreement, if one party does not abide by the agreement, it would be a breach of contract case, and the other party can take them to Court.

The 2018 United Nations (UN) Convention on International Settlement Agreements Resulting from Mediation (the ‘Singapore Convention’) allows the enforcement of international settlement agreements resulting from mediation and "concluded in writing by parties to resolve a commercial dispute."¹¹¹ The Convention also extends its application to online mediation settlement agreements reached electronically. Art. 2 of the Convention states, "A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a

¹⁰⁸ Council Regulation (EC) No. 44/2001 of 22 December 2000, on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (‘Brussels I’); Council Regulation (EC) No. 2201/2003 of November 2003 on Competency, Recognition and Enforcement of Judgments in Matrimonial Matters and of Parental Responsibility, Regulation (EC) No. 1347/2000 (‘Brussels II’).

¹⁰⁹ As pointed out by Esplugues and Iglesias, “The existing EU legal framework on recognition and enforcement of foreign judgments, authentic documents and court settlements is broad in scope and flexible as to the solutions provided. Despite the existence of different systems and solutions in each of the Member States, its application to the circulation of mediation settlements rendered in a Member State throughout the EU is feasible and in line both with Art. 6(1) of the Mediation Directive, according to which settlements that circulate abroad must be enforceable in their country of origin, and with the requirement of homologation of the mediation settlement for it to gain enforceability in many EU Member States.” See Carlos Aurelio, Esplugues and, José, Iglesias, “Mediation and Private International Law: Improving Free Circulation of Mediation Agreements Across the EU,” (November 29, 2016), 86.

¹¹⁰ Esther V. Heuvel, *Online Dispute Resolution as a Solution to Cross-border E-disputes: An Introduction to ODR* (1997), 1-30.

¹¹¹ 2018 Singapore Convention, art. 1.

settlement agreement is in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference."

In online mediation, a platform allows the parties and the mediator to exchange information and communicate virtually instead of face-to-face. The communication can be *synchronous* (the parties interact in real-time through video conferencing like Zoom, Google Meet, Skype, or instant messaging) or *asynchronous* (i.e., emails, text messaging). Currently, many providers offer online mediation through secure encrypted chat rooms or virtual rooms. Purpose-built platforms like the well-known Italian RisolviOnline of the Chamber of Commerce of Milan, the American Modria and Mediation Express, or the newly launched Spaces of the platform Modron provide online mediation through asynchronous and synchronous communication tools.

Online mediation provides an easier and more flexible way to resolve cross-border disputes, especially in low-value, high-volume e-commerce consumer disputes. In this context, mediation can help protect consumer rights by providing a speedy and cost-effective redress mechanism as an alternative to the traditional costly court hearing.¹¹²

Online mediation brings many advantages but also some risks. The use of free and open tools like emails, video calls, and other types of online communication in online mediation is a cause for concern. Such means may not guarantee the adequate protection of confidential and private information. Confidentiality is essential in mediation to establish a relationship of trust between the parties and the mediator and, at the same time, to allow the parties to speak freely and openly. Parties must be sure that their information is protected, and the mediator has an ethical obligation to safeguard the confidentiality of the information shared by the parties in mediation. In online mediation, communication and information exchange often occur through unsafe networks. Documents are shared through files stored on local servers or the cloud, and data is transferred from one computer to another, increasing the possibility of being intercepted and copied. Therefore, online mediators should rely on safe and secure technology like encryption to safeguard all data sharing (including case information and evidence), digital signatures that help protect identity, and blockchain technology.

¹¹² Saptarshi Das, "Consumer Redress through Online Dispute Resolution," 36.

Online mediation is becoming an attractive alternative to litigation, so it must rely on appropriate platforms to guarantee adequate confidentiality and data protection. The promotion of such media should go along with the advancement of online mediation and its regulations through national and international laws.

2.4.3 Online Conciliation

Like mediation, conciliation is a voluntary, confidential, and interest-based dispute resolution process to facilitate communication between the parties. In conciliation, the third neutral, who helps the disputing parties facilitate the dispute resolution, is also actively involved in finding and formulating a solution. Unlike the mediator, the conciliator can propose solutions to the parties before an agreement is reached. Often, the conciliator can suggest the terms of the agreement. However, a conciliator cannot impose his proposals or opinions on the parties. As noted by Cortes¹¹³, some commentators argue that conciliation, like assisted negotiation, is a different word for mediation.

2.4.4 Online Arbitration

Arbitration is generally defined as a private proceeding in which the parties submit a dispute to one or more experts who render a decision (called the award) on the controversy.¹¹⁴ Arbitration is a time-tested, cost-effective alternative to litigation and differs from mediation because the arbitrator has the authority to decide. Arbitration can be voluntary or mandated by an arbitration clause, including a contract between parties that have previously agreed to settle their dispute out of Court. Non-binding arbitration provides the same procedure as standard arbitration but with an informal hearing. The arbitrator decides the parties' rights to the dispute, but this determination results in a non-binding and non-enforceable award. Non-binding arbitration suits less complex B2B and B2C disputes and when the parties are looking to evaluate their respective positions.¹¹⁵ Arbitration is often regarded as a tribunal *ad hoc* as the parties are free to choose the place of arbitration. This neutral third party will decide their

¹¹³ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge, NY: New York, 2011), 66.

¹¹⁴ For a definition of arbitration see the World Intellectual Property Organization (WIPO) website at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> or the American Bar Association website at https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/.

¹¹⁵ For a definition of non-binding arbitration see the American Arbitration Association website at <https://adr.org/Arbitration>.

disputes through the arbitration process's laws. The final decisions or awards are usually binding and can be enforced by a court, and the rights of appeal arbitration awards are limited. Also, arbitration awards are enforceable in most countries through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹¹⁶ Currently, the Convention has 166 state parties.¹¹⁷ Arbitration is often used to resolve business disputes, especially B2B e-commerce disputes, and partially to resolve cross-border commercial disputes.

The arbitrator is called to decide on a dispute through an online platform in online arbitration. The entire process occurs online, with communications and notifications between the parties and arbitrators and document sharing. Also, the arbitration award is rendered online and is usually recognized unless national laws regulating arbitration require an award to be in a specific form. Due to the nature of its proceedings, arbitration is probably easier to conduct online than mediation,¹¹⁸ where direct communication between the parties and the mediator is key to the success of the process.

Although arbitration is not a popular method for resolving consumer disputes, arbitration clauses are often found in consumer contracts in the US. Many websites that offer consumer goods and services include such clauses in their terms and conditions of sale.¹¹⁹ By clicking 'I agree' on the terms and conditions, the consumer is bound to resolve any disputes arising from that contract to arbitration.

Generally, pre-dispute arbitration clauses in consumer contracts are enforceable in the US, even if they provide binding arbitration.¹²⁰ The Federal Arbitration Act (FAA) Title 9, US Code, section 2 regulates the enforcement of agreements to arbitrate.¹²¹ The FFA considers pre-

¹¹⁶ "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)," [newyorkconvention.org](http://www.newyorkconvention.org), accessed January 19, 2021, <https://www.newyorkconvention.org/english>.

¹¹⁷ For the complete list of the contracting states see <http://www.newyorkconvention.org/list+of+contracting+states>.

¹¹⁸ Cortés, *Online*, 68.

¹¹⁹ Dasteel, "Consumer Click Arbitration: A Review of Online Consumer Arbitration Agreement."

¹²⁰ Christopher R. Drahozal and Raymond J. Friel, "Consumer Arbitration in the European Union and the United States," *Northern Carolina Journal of International Law and Commercial Regulation* 28, no. 2 (2002): 374.

¹²¹ Title 9, US Code, Section 2 recites "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

dispute arbitration agreements "valid, irrevocable, and enforceable,"¹²² whether in business or consumer contracts. In the last decade, US Supreme Court decisions have rejected challenges to pre-dispute arbitration clauses in consumer contracts, stating the FAA's supremacy on state contract law.¹²³ Some authors and Supreme Court judges have argued that the Supreme Court, in its decisions, has expanded the scope of the FAA beyond its drafters' intentions.¹²⁴ They think such scope should be limited to restricting mandatory consumer contract arbitration. By strictly enforcing arbitration, the US jurisprudence has "allowed businesses to use arbitration and class waiver provisions to privatize justice."¹²⁵

On the contrary, EU laws restrict the validity of pre-dispute arbitration clauses in consumer contracts. Directive 93/13/EEC on Unfair Terms in Consumer Contracts considers "unfair" an agreement that has the object or effect of "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions."¹²⁶ Also, EU Directive 2013/11 on alternative dispute resolution for consumer disputes restricts arbitration clauses by nationally certified ADR entities.¹²⁷

Online arbitration agreements and awards are admissible and enforceable under the 1958 New York Convention. In many civil law countries, the laws governing arbitration have extended the formal requirements of the 1958 New York Convention to include electronic communications.¹²⁸ However, it would be necessary to amend the Convention to include the validity of arbitration awards issued through online procedures.¹²⁹

¹²² Ibid.

¹²³ See *DirectTV Inc. v. Imburgia*, 577 U.S. ___ (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

¹²⁴ Mindy R. Hollander, "Overcoming the Achilles' Heel of Consumer Protection: Limiting Mandatory Arbitration Clauses in Consumer Contracts," *Hofstra Law Review* 46, no. 1 (2018): 363-397; J. Maria Glover, "Disappearing Claims and the Erosion of Substantive Law," *The Yale Law Journal* 124 (2015): 3052-3092. In *DIRECTV, Inc. v. Imburgia*, 577 U.S. ___ (2015), Justice Thomas filed a dissent that states "I remain of the view that the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq., does not apply to proceedings in state courts." In the same US Supreme Court decision, Justice Ginsburg also filed a dissent and stated "this Court has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts."

¹²⁵ Amy J. Schmitz, "Consumer Redress in the United States," in *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press, 2016), 326.

¹²⁶ Council Directive 93/13/EEC, Annex 1(q).

¹²⁷ Directive 2013/11/EU, art. 10(2).

¹²⁸ See for examples Austria, France, Germany, Greece, Switzerland, and The Netherlands.

¹²⁹ Cortés, *Online*, 69; Ihab Amro, *Online Arbitration in Theory and in Practice: A Comparative Study of Cross-Border Commercial Transactions in Common Law and Civil Law Countries* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2019).

2.4.5 Online Mock Juries and Cyberjuries

Online mock juries (MOJs) are dispute resolution processes that use an online platform through which parties can present their dispute for trial before a jury of voluntary peers makes a non-binding decision on the issues in dispute. They resemble procedures found at traditional courthouses. Created to function as virtual courts,¹³⁰ these cyber juries present a series of limitations, including a lack of deliberation and enforcement mechanisms.¹³¹ However, OMJs have become helpful to lawyers who want to test the strengths and weaknesses of a case by previewing it to a pool of Internet jurors. They are economically accessible, and lawyers can use them with small cases or clients with limited budgets. Lawyers hire people to make up the jury of a mock trial with the same demographic as expected in an actual trial. Then, the lawyers present their case, arguments, and evidence to the jury, ultimately producing a verdict.

Several mock jury websites are available;¹³² ejury.com, for instance, offers mock trials where a minimum of 50 people try each case. It provides attorneys with feedback that can help them with the strengths and weaknesses of their evidence, improve jury selection, and discover the most compelling arguments. Jurytest.net instead gathers and analyzes jury reactions to case evidence, themes, arguments, and testimony. It then provides lawyers with an analysis that can give them essential guidance on valuation, liability, and trial strategy. OMJs operate more like online polls or focus groups rather than a traditional jury trial that resolves disputes through legally enforceable decisions. They cannot be considered ODR systems. However, online mock juries could develop over time into online juries that hear and decide on ‘real’ cases. Developing technological tools and adequate procedural rules and norms that guarantee minimum fairness requirements and due process could foster the creation of these crowd-sourced ODRs.¹³³ Online juries could be an alternative to the traditional jury trial and are

¹³⁰ See iCourthouse.com or eBay Community Court. The eBay’s Community Court resolved disputes between buyers and sellers over negative reviews left on the website. Buyers and sellers would submit their respective positions to a panel of 21 jurors made of eBay buyers and sellers, and the jury would make a decision on whether to remove the negative comment.

¹³¹ Cortes, *Online Dispute Resolution for Consumers in the European Union*, 72; Nancy S Marder, “Nancy Cyberjuries: A New Role as Online Mock Juries,” *University of Toledo Law Review* 38 (February 2006): pp. 239-269, https://scholarship.kentlaw.iit.edu/fac_schol/392

¹³² See also Onlineverdict.com, Jurysolutions.com, Jurytest.net, and Resolutionresearch.com.

¹³³ According to Van den Herik and Dimov, “CODR is a term that encompasses some forms of ADR and court proceedings using the Internet and crowdsourcing as parts of the dispute resolution process.” See Daniel Dimov, *Crowdsourced Online Dispute Resolution* (Laiden: E.M. MEIJERS INSTITUUT, 2017), 42.

particularly suited to resolve small claims.¹³⁴ They could also offer accessible, convenient, and fast decision-making processes for low-value business-to-consumer e-commerce disputes following the model adopted by the Chinese e-commerce platform Taobao. Since 2012, Taobao's dispute resolution center has adopted an adjudicatory mechanism. Users sign up as panelists in a public jury and make compulsorily enforced decisions on disputes between buyers and sellers.¹³⁵ Their use, especially in consumer disputes, could raise questions concerning the observance of peremptory norms on consumer protection and the applicability of overriding principles relating to the protection of consumer rights, such as the principles of legality, impartiality, fair treatment, and transparency.

2.4.6 Ombudsman

The modern term *ombudsman* traced its origins in Sweden with the Swedish Parliamentary Ombudsman. The Instrument of Government of 1809 was instituted to safeguard citizens' rights by establishing an independent supervisory agency of the executive branch.

Generally, an ombudsman is an official, usually appointed by the government or Ministry of consumer affairs, who investigates complaints against businesses, financial institutions, government departments, and other public entities. Ombudspersons exist in the private sector, universities, and non-profit organizations. For instance, industry ombudsmen, such as banking and insurance, investigate and help resolve complaints between consumers and financial companies. Media ombudsmen deal with complaints about news reporting, while in telecommunications, they handle consumer claims regarding unfair treatment received from companies operating in the sector.

An ombudsman attempts to resolve the conflicts or concerns raised by either mediation or making recommendations. Often—and especially at the government level—an ombudsperson will seek to identify systemic issues that can lead to widespread rights violations or poor quality of service to the public by the government or institution in question. For example, the European

¹³⁴ Nancy S. Marder, "Cyberjuries: A New Role as Online Mock Juries," *University of Toledo Law Review* 38 (2006): 239-269.

¹³⁵ 大众评审, accessed January 22, 2021, <https://pan.taobao.com/>; Wei Gao, "'Let the collective intelligence shine through,'" *Peking University Law Journal* 6, no. 2 (2018): 283-304, doi:10.1080/20517483.2018.1603645.

Ombudsman investigates complaints about maladministration by EU institutions and bodies. He works with a network of national and regional ombudspersons, the European Network of Ombudsmen (ENO), who deal with complaints against public authorities of the EU member states.¹³⁶

A consumer ombudsman is a neutral third party who deals with consumer complaints regarding unfair treatment consumers receive from a private company or a seller. Consumer ombudspersons investigate the complaints and help consumers settle them without going to Court. Unlike arbitration, an ombudsman scheme is informal, and evidence is not taken under oath. After evaluating the complaint and the evidence presented by both sides, the ombudsman makes a final decision that usually cannot be challenged. Ombudsman schemes provide dispute resolution services, advise consumers, and give feedback to businesses and regulators.¹³⁷

Internet-based Ombudsmen provide consumers with online platforms to submit complaints regarding price increases, delivery issues, delays, and product defects.

One of the biggest ombudsman schemes in the world is the Financial Ombudsman Service (FOS), which was established in 2000 in the United Kingdom (UK) by the Financial Services and Markets Act of the parliament to help resolve disputes between consumers and financial businesses based in the UK. The FOS provides free services to consumers regarding bank accounts, credit card payments, loans, debt collections, mortgages, pensions, and investments.¹³⁸ To submit a complaint with the FOS, consumers must first submit a complaint with the business directly and not have received a response within eight weeks or have received a response deemed unsatisfactory. Consumers can file a complaint by accessing the FOS website and completing an online form with their personal information, the information of the business, and a description of the complaint. Consumers can also attach file documents to the form.¹³⁹ After submitting the complaint, a case handler will contact the business, check the information provided by both parties, and make an initial impartial and fair assessment with a recommendation on how to resolve the case (e.g., reinstate an insurance policy canceled unfairly or pay compensation to the consumer). The complaint is settled if the business and

¹³⁶ “European Ombudsman,” European Ombudsman, accessed January 21, 2021, <https://www.ombudsman.europa.eu/en/home>.

¹³⁷ Cortés, *The Law of*, 33.

¹³⁸ “Who We Are,” Financial Ombudsman, accessed January 21, 2021, <https://www.financial-ombudsman.org.uk/who-we-are>.

¹³⁹ “Our Online Complaint Form,” Our Online Complaint Form | Financial Ombudsman Service, accessed January 21, 2021, <https://help.financial-ombudsman.org.uk/help>.

consumer agree with what the case handler has recommended. If the consumer or the business doesn't accept the case handler's assessment, they can ask to refer the case to an ombudsman. The ombudsman will look at the details of the complaint and make a final decision based on the facts and evidence available. If the consumer accepts the ombudsman's decision, the decision will be binding on the business. By accepting the decision, the consumer waives his right to pursue the business in court for the same complaint. The ombudsman's decision is final and cannot be appealed.

2.4.7 Early Neutral Evaluation

Neutral Evaluation,¹⁴⁰ or 'Early Neutral Evaluation' (ENE), is generally¹⁴¹ a confidential, informal process in which an independent, neutral third party examines the evidence presented by the parties, listens to their positions and arguments, and gives them an opinion on the merits of their case.¹⁴² Either a retired judge or a lawyer, the neutral evaluator provides the parties with an unbiased and objective dispute evaluation. ENE helps the parties assess the strengths and weaknesses of their case and assesses the probable outcome of a trial. A neutral evaluation may occur before or after a lawsuit has been filed in Court in an attempt to resolve the dispute at an early stage. Like other forms of ADR, ENE offers the possibility for the parties to a dispute to save time and money, avoid the costs and delays of a trial, and expedite the dispute resolution process.¹⁴³ It also provides the parties with an early opportunity to negotiate a settlement with the assistance of a third qualified neutral evaluator.¹⁴⁴ However, unlike arbitration or adjudication, it does not result in a final decision as the evaluator merely evaluates the case and does not decide the dispute. ENE is usually non-binding on the parties unless agreed otherwise. A binding evaluation can be used to settle the dispute. In this case, the evaluator acts as an arbitrator and makes a final and enforceable decision on the parties. ENE is commonly used in commercial but also private civil disputes.¹⁴⁵ Like the Chancery Division

¹⁴⁰ The literature refers to "Neutral Evaluation" or "Early Neutral Evaluation" without distinction. In this section, the expression "Early Neutral Evaluation" will be used.

¹⁴¹ Unless the parties agree otherwise.

¹⁴² Keith A. Ashmus, "Early Neutral Evaluation," *Ohio Law* 6, no. 16 (1992).

¹⁴³ Robert F. Peckham et al., "Early Neutral Evaluation: An Experiment to Expedite Dispute Resolution," *ADR and the Courts*, 1987, 165-182, doi:10.1016/b978-0-88063-124-2.50021-1.

¹⁴⁴ "Dispute Resolution Reference Guide," Language Selection - Department of Justice / Sélection De La Langue - Ministère De La Justice, last modified February 11, 2007, <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/eval.html>.

¹⁴⁵ Early Neutral Evaluation is suitable for different types of civil disputes including contract, product liability, labor, personal injury, banking, copyright, patent, trademark, and fraud, family and divorce.

of the High Court in the UK or the US Court Northern District of California, many courts worldwide offer court-annexed ENE programs to resolve disputes without litigation.¹⁴⁶ Despite the many advantages it provides, ENE can also have some disadvantages. It can be perceived as adding additional steps before getting to Court, and it might add some extra costs if the parties do not settle the case or if the process is used in bad faith.

As with other forms of ADR, technology can offer support to parties to a dispute by allowing them to refer the assessment of their case to a neutral evaluator through an online platform by simply filling out a form with the parties' information about the nature of the dispute.¹⁴⁷ The development of increasingly more sophisticated technology, such as artificial intelligence (AI), will facilitate judicial or non-judicial ENE by systems that provide processed digital insight into the case law based on accurate detail.¹⁴⁸ It is possible that in the future, the parties to a dispute may choose to resolve their case through an algorithmic system. Also, they may decide to use that same artificial intelligence for a neutral, non-binding evaluation of their case. In this sense, the parties would no longer exclusively rely on assessing a physical evaluator but on elaborating an algorithmic decision-maker.¹⁴⁹

2.4.8 Online Adjudicative Procedures: The UDRP

The Uniform Domain Name Dispute Resolution Policy (UDRP) was primarily conceived by the World Intellectual Property Organization (WIPO) at the behest of the Internet Corporation for Assigned Names and Numbers (ICANN).¹⁵⁰ It allows trademark owners to deal with cybersquatting, resolve internet-domain-name trademark disputes, and protect ICANN and registrars from trademark litigation.¹⁵¹ Cybersquatting refers to registering a domain name utterly identical to a well-known trademark. ICANN formally implemented the UDRP in 1999 following a WITO recommendation to establish a mandatory administrative procedure

¹⁴⁶ See <https://www.gov.uk/courts-tribunals/chancery-division-of-the-high-court>; <https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/early-neutral-evaluation-ene/>

¹⁴⁷ For instance, see the early neutral evaluation service offered by the Center for Effective Dispute Resolution (CEDR), <https://www.cedr.com/commercial/otherdisputeresolution/earlyneutralevaluation/>.

¹⁴⁸ Victoria McCloud, "Judicial Early Neutral Evaluation," *Amicus Curiae* 1, no. 3 (2020): 494.

¹⁴⁹ "Dispute Resolution in the Era of Big Data and AI," Lexology, last modified September 18, 2019, <https://www.lexology.com/library/detail.aspx?g=0badde0d-4554-42b4-9243-e03804049b8b>.

¹⁵⁰ ICANN is a nonprofit, private organization and the governing body for the Internet. It is responsible for the technical operation of the Domain Name System (DNS) and the policies that define how the names and addresses of the Internet work. <https://support.google.com/domains/answer/4544245?hl=en>.

¹⁵¹ Cortés, *Online*, 115.

concerning abusive registrations.¹⁵² The procedure's scope was intended for cases of abusive registrations but not for "disputes between parties with competing rights acting in good faith."¹⁵³ The UDRP Policy was based mainly on the Report on Management of Internet Names and Addresses of the WIPO.

The UDRP Policy provides a legal framework for resolving domain name disputes between the registrant (end-user) and the third party over an Internet domain name's abusive registration and use. It applies to generic top-level domains or gTLDs (e.g., .biz, .com, .info, .mobi, .name, .net, .org) and those country code top-level domains or ccTLDs that have adopted the UDRP Policy on a voluntary basis.¹⁵⁴ In 2009, the ICANN board amended the UDRP rules and made the UDRP a fully online process.¹⁵⁵ The following ICANN-accredited dispute resolution providers administrate the dispute resolution procedure:

- Arab Center for Domain Name Dispute Resolution Center (ACDR)
- Asian Domain Name Dispute Resolution Centre (ADNDRC)
- The Czech Arbitration Court of the Arbitration Centre for Internet Disputes (CAC)
- The Canadian International Internet Dispute Resolution Center (CIIDRC)
- National Arbitration Forum (NAF)
- World Intellectual Property Organization (WIPO)

The UDRP is a non-binding process similar to a document-only email-based arbitration. However, it defers arbitration because the decisions are not final, and either party can initiate legal action at any time during the procedure.¹⁵⁶ The UDRP is based on a contractual clause incorporated in all agreements between ICANN and the registrar (IPS) and between the domain name registrar and the domain name registrant. The clause states that an ICAAN-accredited dispute resolution provider will resolve certain trademark disputes. The proceedings are

¹⁵² The Final Report of the WIPO Internet Domain Name Process *The Management of Internet Names and Addresses: Intellectual Property Issues*, paragraph 152 recites "The present section recommends that a mandatory administrative procedure be adopted uniformly across open gTLDs. It discusses the means of implementing the procedure, its desirable features and its administration."

¹⁵³ *Ibid.*, para 153.

¹⁵⁴ "WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)," WIPO - World Intellectual Property Organization, accessed February 27, 2021, <https://www.wipo.int/amc/en/domains/guide/#a1>.

¹⁵⁵ As of March 1 2020, all complaints must be submitted online.

¹⁵⁶ Paragraph 4(K) of the UDRP Policy recites "The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded."

conducted before one of the administrative dispute resolution service providers by arbitrators with expertise in trademark law. The procedure begins with submitting a complaint by a trademark owner who believes that registering a domain name violates its trademark. However, the trademark owner must prove that the registration infringes his trademark rights in three aspects, which paragraph 4 (a) of the UDRP lists in the following:

- (i) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
- (ii) the registrant has no rights or legitimate interests in respect of the domain name; and
- (iii) the domain name has been registered and used in bad faith.

Paragraph 4 (b) sets out the factors determining bad faith registration and use of the trademark.¹⁵⁷ The complainant selects the provider from those approved by ICANN by submitting the complaint. The registrant has 20 days from the date of the submission of the complaint to respond and demonstrate his rights or legitimate interests in the domain name in accordance with paragraph 4(a)(ii). Usually, the administrative panel that decides the complaint consists of one or three members. In the case of a panel composed of only one member, the provider appoints the member. However, when a party requests a three-member panel, each party selects a panelist from the provider's list, and the provider nominates the third panelist. The panel delivers a decision within 40 to 50 days from the submission of the complaint.¹⁵⁸ It can decide in favor of the complainant and order the disputed domain name to be transferred or canceled. It can also choose in favor of the registrant and deny the complaint. According to paragraph 4(h), a domain name registrant who loses in the administrative proceeding has ten

¹⁵⁷ UDRP Paragraph 4(b) recites "For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

¹⁵⁸ *Ibid.*, para 15(b).

(10) days to challenge the panel's decision by filing a lawsuit in certain courts. After ten (10) business days from the date of notification of the decision, the registrar is obliged to enforce the UDRP decision.

The ICANN UDRP system represents an example of an online adjudicative procedure. Such a procedure offers the advantage of solving disputes related to cybersquatting quickly and cost-effectively. UDRP demonstrates how non-binding adjudication can effectively resolve disputes online through its enforcement system and is a successful substitute for expensive court litigation. As Cortés pointed out, this mechanism could show how online arbitration will develop in the future.¹⁵⁹

2.4.9 Online Smalls Claims Courts

Despite the advent of the Internet and the development of increasingly advanced technologies, citizens worldwide face many logistical difficulties and barriers to accessing the justice system every year. However, digital technologies can make legal processes more efficient and help alleviate the overhead of the courts, especially when it comes to small claims disputes, which often constitute the highest number of civil cases. For instance, more than three-quarters of civil cases in state and local courts involve claims of up to \$5,200.¹⁶⁰ Also, ODR can provide people with the necessary tools to access the justice system and help them settle their disputes. Nicolas Vermeys and Karim Benyekhlef stated, "ODR can be seen as both a competing and complementary tool to traditional in-court schemes and state-run judicial systems."¹⁶¹ ODR can allow greater engagement in the legal process, deliver a more effective and faster process, and improve the fairness of the civil legal system by reducing waiting times, procedural errors, and administrative inefficiencies.

Many courts worldwide have incorporated ODR systems and introduced various 'remote court' forms like video conferencing, audio hearings, and paper hearings.¹⁶² They are not ODR

¹⁵⁹ Cortés, *Online*, 134.

¹⁶⁰ "Online Dispute Resolution Offers a New Way to Access Local Courts," *Pew* online, January 4, 2019, <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts>.

¹⁶¹ Nicolas W. Vermeys and Karim Benyekhlef, "ODR and the Courts," in *Online Dispute Resolution: Theory and Practice: a Treatise on Technology and Dispute Resolution*, ed. Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey (The Hague, NL: Eleven Publishing, 2012), 307.

¹⁶² Richard Susskind, "Our Purpose," *Remote Courts Worldwide*, last modified March 27, 2020, <https://remotecourts.org/>.

mechanisms in a strict sense but rather the integration of different modalities in a tiered system integrated into the judicial process. In the last few years, we have seen an exponential increase in the use of technology by many courts worldwide in response to the pandemic crisis caused by the Coronavirus COVID-19, which has forced courts and judicial justice systems to close or limit their services.

One of the first examples of ODR integrated into the court system is represented by The Civil Resolution Tribunal (CRT), launched in British Columbia, Canada, in 2016. It was established under the Civil Resolution Tribunal Act (2012), amended in 2015. The CRT is Canada's first online tribunal that provides end-to-end dispute resolution services for strata property disputes of any amount, small claims up to \$5,000, motor vehicle personal injury disputes under \$50,000, and disputes involving incorporated societies and cooperative associations.¹⁶³ In the first seven months of its implementation, the Canadian ODR system handled roughly 14,000 small claims cases.¹⁶⁴ The CRT provides users with free legal information, self-help tools, and dispute resolution services such as negotiation, mediation, and adjudication when necessary. See Chapter 4 for a more detailed explanation of the CTR.

The Money Claim Online (MCOL) program of Her Majesty's Courts & Tribunals Service (HMCTS) represents another important example of using ODR to promote greater justice access and efficiency.¹⁶⁵ The MCOL is an Internet-based portal for making or responding to a money claim online for a fixed amount.¹⁶⁶ Money claims issued through the MCOL must be for less than £100,000 and cannot be issued for more than one claimant and against more than two defendants (people or organizations). The HMCTS also offers digital settlement for money claims under £10,000 through the Civil Money Claim (CMC) program. Claims must be served to a defendant or defendants with an address in England or Wales. Users must sign up for an account through a secure credential platform to use the MCOL or the CMC. Before starting a claim, the Court encourages and expects both the claimant and defendant to take some 'pre-

¹⁶³ Civil Resolution Tribunal, 2020, <https://civilresolutionbc.ca/>.

¹⁶⁴ "British Columbia ODR System Handles 14,000 Cases in First 7 Months," American Bar Association, February 4, 2018, https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/british_columbiaodr/

¹⁶⁵ The HM Courts and Tribunals Service is the agency responsible for the administration of the courts of England and Wales.

¹⁶⁶ "MCOL," MCOL - Money Claim Online, accessed September 20, 2019, <https://www.moneyclaim.gov.uk/web/mcol/welcome>.

action protocols¹⁶⁷ to try to settle the disputes without going to Court. The MCOL's current pilot program has already processed over 300,000 small claims under £10,000,¹⁶⁸ proving an important instrument for greater access to justice.

When the Justice Technology Committee (JTC) released its first publication on online dispute resolution in 2016, only one Court in the US had implemented ODR. A handful of other courts had considered it.¹⁶⁹ Since then, hundreds of courts from large and small jurisdictions all over the US have implemented ODR systems. According to Rule, ODR initiatives are underway in more than 50 county and statewide court systems in the United States.¹⁷⁰ In 2018, the Legal Aid Society of Orange County created an online dispute resolution system for small claims cases filed in the Orange County Superior Court. The system was developed in collaboration with the Court and funded by a grant from the Legal Services Corporation.¹⁷¹

In 2019, the Judicial Branch in the Hartford and New Haven Judicial Districts of the State of Connecticut launched an ODR pilot program available in cases filed on or after January 2, 2019, to help parties resolve money disputes in contract collection cases. Once the parties agree to try to resolve their dispute through online dispute resolution, they can exchange evidence on paper or electronically, respond to the mediator, and participate in the mediation by phone, video conference, or in person.¹⁷²

In June 2019, the Supreme Court of New Mexico approved an ODR pilot project collaborating with Modria to help resolve Debt and Money Due cases online. The pilot project applies to "civil cases filed in the district court Pilot Courts under the contract/debt and money due to case type and to civil cases filed in the metropolitan and magistrate court Pilot Courts under

¹⁶⁷ Pre-actions protocols refer to any attempts taken by the parties to resolve the dispute. For instance, sending a letter to the opposing party providing sufficient information about the dispute and allowing them to respond and present their position.

¹⁶⁸ Pablo Cortes, "The English Online Court," *International Journal on Online Dispute Resolution* 9, no. 2 (2022): 138-144, doi:10.5553/ijodr/235250022022009002005.

¹⁶⁹ National Center for State Courts, "Case Studies in ODR for Courts," *JTC Resource Bulletin*, Joint Technology Committee, 2020, <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/2020-01-28%20ODR%20case%20studies%20v2%20FINAL.ashx>

¹⁷⁰ Colin Rule, "Online Dispute Resolution Moves from E-Commerce to the Courts," interview by Erika Rickard, Pew Trust, June 4, 2019, <https://www.pewtrusts.org/en/research-and-analysis/art.s/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts>.

¹⁷¹ ODR Home | Online Dispute Resolution, accessed April 30, 2020, <https://odr.legal-aid.com/>.

¹⁷² See <https://www.jud.ct.gov/ODR/>.

the general civil case type alleging a cause of action for debt and money due."¹⁷³ The pilot program offers those involved in a court case a safe, private, online space to negotiate a satisfactory resolution with the other party and quickly settle lawsuits over unpaid debts. Also, it includes the option of requesting the assistance of a mediator.

In August 2019, the Michigan Supreme Court launched MI-Resolve,¹⁷⁴ a new service supported by the Michigan Supreme Court's Administrative Office. MI-Resolve provides a free, quick, and easy means of resolving disputes filed as small claims or landlord/tenant cases in the district court. Initially available in 17 counties, the online service is one of the first of its kind in the nation.

The State of Utah is piloting online dispute resolution in small claims cases at select courts throughout the state. In the Utah Supreme Court Standing Order No. 13, in Paragraph 1 (a), it is stated that "in an effort to improve access to justice, the Utah Supreme Court has initiated an Online Dispute Resolution (ODR) pilot project. The West Valley City Justice Court will serve as the location for the pilot project. The project will include all small claims cases filed in that court beginning September 19, 2018, and shall continue until the Supreme Court rescinds this Standing Order."¹⁷⁵ The Utah Supreme Court believes ODR will assist the parties in resolving their disputes and dispense speedy justice between the parties.¹⁷⁶ In recent years, many other U.S. small claims courts have implemented ODR programs, allowing citizens to negotiate and mediate their disputes online.¹⁷⁷

¹⁷³ "ODR Pilot Project Order,"3.

¹⁷⁴ See <https://ci2.courtinnovations.com/MICMS>

¹⁷⁵ Utah Supreme Court Standing Order No. 13, effective September 19, 2018, <https://www.utcourts.gov/resources/rules/urap/Supctso.htm#13>

¹⁷⁶ "Utah Courts," Utah Courts, accessed April 30, 2020, <https://www.utcourts.gov/resources/rules/urap/Supctso.htm#13>.

¹⁷⁷ The list of other US courts implementing ODR includes the following:

- Fulton County Small Claims (Atlanta, Georgia)
- Ohio Court of Claims
- Travis County Small Claims (Austin, Texas)
- Faulkner and Van Buren County District Courts (Arizona)
- Sherwood District Court (Sherwood, Arizona)
- DeKalb County State Court – Traffic Division (DeKalb County, Georgia)
- Village of Ford Heights (Cook County, Illinois)
- Jefferson County District Court (Louisville, Kentucky)
- Cleveland Municipal Court (Ohio)
- Franklin County Municipal Court (Ohio)
- Farmers Branch Municipal Court (Texas)
- Hartford and New Haven (Connecticut)

2.5 MOBILE APPLICATIONS: EXPANDING DIGITAL DISPUTE RESOLUTION

An ever-increasing number of people worldwide are accessing the Internet and other online services through smart mobile phones. The number of smartphone users has been growing exponentially everywhere in the world. There are over 3 billion users worldwide, and China, India, and the United States have the highest number of smartphone users, with each country surpassing the 100 million user mark.¹⁷⁸ As new sophisticated technology continues to design and create smartphones, mobile applications have evolved since the Google Play Store launch in 2012. Statistics show that, in 2018, 6,140 mobile apps were released through the Google Play Store daily.¹⁷⁹ Among these, many apps use artificial intelligence to help settle disputes.¹⁸⁰

One example, among others,¹⁸¹ is the app PeaceGate. PeaceGate from the Indian Institute of Arbitration and Mediation (IIAM) helps users resolve disputes through negotiation, mediation, or arbitration. Once downloaded, the app provides users with an AI-assisted virtual guide that helps them analyze the dispute and suggest the best possible alternative. Through the app, parties can negotiate online in a secure chat room. If the negotiation fails or ends, the parties can refer the case to mediation. They can opt to mediate the dispute online with the assistance of a mediator or choose a mediation center and a mediator from a list of providers they can find on the app. Once the mediator accepts his appointment, the app will initiate the process and issue an "Invitation to Mediate" via SMS or email to the other side.

Similarly, the parties can decide their dispute by an online arbitrator or select an arbitrator and have their case heard at a local arbitration center. In the case of online arbitration, the arbitral award is generated through the app. PeaceGate is an ERP software.¹⁸² It manages all aspects of

¹⁷⁸ Statista.com. <https://www.statista.com/statistics/330695/number-of-smartphone-users-worldwide/> (accessed, November 25, 2019).

¹⁷⁹ Statista.com. <https://www.statista.com/statistics/276703/android-app-releases-worldwide/> (accessed, November 25, 2019).

¹⁸⁰ See also the following apps:

- Jury: Resolve Disputes Online
- Picture It Settled
- NYC Pay or Dispute
- coParenting App

¹⁸¹ Other examples of dispute resolution mobile apps are ADR4All (co-funded by the European Union and ADR point), Jury, and Special Ed Dispute Resolution.

¹⁸² Oracle defines an Enterprise resource planning (ERP) as “a type of software that organizations use to manage day-to-day business activities such as accounting, procurement, project management, risk management and compliance, and supply chain operations.”

the ADR process, from parties' communication to case administration, from the selection of neutrals to accounting management, and from the resolution process to the filing system.

Mobile applications can expand the digital resolution of disputes, providing citizens with a convenient and accessible tool for resolving disputes on their phones. They can help resolve disputes, especially in those countries where smartphone penetration is very high and access to personal computers remains challenging due to the costs associated with owning a PC.

2.6 ODR TAXONOMY

The classification included in this section takes a cue from the debate opened by the NCTDR regarding ODR in light of emerging technologies and related applications. The following is a proposed graphical continuum of ODR types available and a brief description of each.

ODR Continuum

A	e-ADR (Electronic Alternative Dispute Resolution)	ADR processes assisted with ICT (synchronous tools: real-time video conferencing or chats; asynchronous tools: emails, text messaging) to resolve on-line and off-line disputes (i.e., online mediation, online arbitration)
B	PA-ODR (Partially Automated ODR)	Technology and information systems performing specific tasks to support ADR/ODR processes (digital platforms that offer case management and support various ODR methods, including negotiation or mediation)
C	HA-ODR (Human Automated ODR)	Integrated technology and information systems automate many elements of the ODR process, but a physical third party carries out the information management (human-centered cognitive argumentation supported by Artificial Intelligence, e.g., Smartsettle Infinity)

D	FA-ODR (Fully Automated ODR)	Fully integrated technology systems that operate through software algorithms and do not require a third-party physical intervention (i.e., monetary claims resolved through software algorithms)
E	TD-ODR (Technology Directed ODR)	Fully integrated technology and information systems that do not require input from a physical third party, yet a physical party or neutral may influence the process (i.e., an advanced negotiation system that analyses and compares various options that parties or mediators can input into the system)
F	BC-ODR (Blockchain based ODR)	The ODR process is driven entirely by peers built on blockchain technology that any agent cannot control (i.e., blockchain-enabled dispute resolution platform, smart contracts dispute resolution).

2.7 SUMMARY

The rapid development of new and increasingly advanced technologies has significantly impacted society by transforming every sector, from the economy to health, from the climate to justice. New and emerging information and communication technologies have opened up innovative opportunities to improve administration and access to justice. Technology has also transformed existing out-of-court dispute resolution systems into online processes to help resolve offline and online disputes.

This chapter has discussed the various definitions of ODR and reviewed the different typologies of ODR. Several scholars have studied and written on ODR, and many legal documents include ODR. However, there is no general-accepted definition of ODR. Due to the continued advancement of technology, it is challenging to develop a comprehensive definition of ODR. As suggested by Cortes, the definition may depend on the context used and the type of technology employed¹⁸³.

¹⁸³ Cortes, *The Law of Consumer Redress*, 65.

CHAPTER THREE
ONLINE DISPUTE RESOLUTION IN E-COMMERCE

3.1 INTRODUCTION

This chapter is divided into four sections. The first section of the chapter starts with an introduction to e-commerce and discusses how ODR can play a role in resolving consumer e-commerce disputes.

Secondly, it describes and analyzes the dispute resolution schemes offered by two significant worldwide e-commerce retail intermediaries, eBay and Amazon. Since its creation, eBay has been at the forefront of creating and developing resources for supporting ODR processes. Its dispute resolution center is one of the most effective ODR systems globally and has been considered a successful example of online dispute resolution. Following the experience and success of eBay, Amazon has also adopted an ODR-based resolution scheme aimed at resolving a significant volume of cases and providing an effective online redress for consumer disputes.

In the third part, the chapter examines whether eBay and Amazon dispute resolution systems embody the principles of fairness, due process, accountability, and transparency set by the UNICTRAL in its Technical Notes on Online Dispute Resolution.

In the final part, the chapter investigates the expectations and key issues experienced by consumers in low-value, high-volume e-commerce disputes by analyzing a sample of reviews left by eBay users on the Better Business Bureau (BBB) website. The analysis of the consumer review sample of eBay users wanted to emphasize how it is necessary to collect more quantitative and qualitative data to understand consumers' needs, demands, issues, and expectations regarding ODR in low-value e-commerce disputes. Therefore, it will be claimed that it is necessary to place the consumer at the center of the debate regarding the design and development of ODR systems that can enhance consumers' access to justice and improve their trust in e-commerce. Lastly, the chapter concludes by noting the need to deepen the issue of consumer needs and expectations regarding online complaint-handling procedures and ODR in low-value consumer disputes.

3.2 ODR IN E-COMMERCE

The advent of the Internet and the growing evolution of technology have ensured businesses equip themselves with tools that allow them to increase the sale of their products and services and, at the same time, improve the efficacy of their business operations. The Internet, technology, and commerce combination has given rise to Electronic Commerce, commonly known as 'e-Commerce.' Generally speaking, e-commerce refers to buying and selling or exchanging goods, services, and information over computer-mediated networks such as the Internet.¹⁸⁴ Vladimir Zwass broadens the definition of e-commerce by including "sharing of business information, maintaining business relationships, and conducting business transactions by means of telecommunications networks."¹⁸⁵ Bashar Malkawi defines e-commerce as "the use of the Internet to conduct business transactions nationally or internationally."¹⁸⁶

E-commerce is a process that has profoundly changed human life.¹⁸⁷ The development of a global online market has allowed the exchange of products and information between businesses and businesses and consumers via computer networks. Furthermore, it has given consumers broader access to various goods and services that can be compared and purchased based on their value and price. E-commerce has changed the way of doing business by creating a new model that has generated new commercial opportunities and sets of global and national trading relationships.¹⁸⁸ There is greater transparency in the prices of services and goods offered by competing businesses, and trading is becoming highly efficient in these new digital markets.¹⁸⁹ E-commerce has affected all business areas, including advertising, marketing, and customer service. It can be applied to many areas, such as e-trade (banking, insurance, investments), tourism (hotels), education, consulting, and payment for utilities.¹⁹⁰ E-commerce benefits businesses and consumers. It enables companies to access domestic global markets and reach

¹⁸⁴ Tony J. Jewels and Greg T. Timbrell, "Towards a definition of B2C & B2B e-commerce," *ACIS 2001 Proceedings*, 2001; Ryan Deiss, "E-Commerce in Europe," *Statistics in Focus* 12, no. 4 (2002): 4-12; Mitra Kartiwi and Robert C. MacGregor, "Electronic Commerce Adoption Barriers in Small to Medium-Sized Enterprises (SMEs) in Developed and Developing Countries," *Electronic Commerce* 5, no. 3 (2007): 1441-1457; Abdul G. Khan, "Electronic Commerce: A Study on Benefits and Challenges in an Emerging Economy," *Global Journal of Management and Business Research: B Economics and Commerce* 16, no. 1 (2016): 18-22.

¹⁸⁵ Zwass Vladimir, "Electronic Commerce: Structures and Issues," *International Journal of Electronic Commerce* 1, no. 1 (1996): 3, doi:10.1080/10864415.1996.11518273.

¹⁸⁶ B. H. Malkawi, "E-Commerce in Light of International Trade Agreements: The WTO and the United States-Jordan Free Trade Agreement," *International Journal of Law and Information Technology* 15, no. 2 (2006): 155, doi:10.1093/ijlit/eal017.

¹⁸⁷ Yasser A. Nanekaran, "An Introduction to Electronic Commerce," *International Journal of Scientific & Technology Research* 2, no. 4 (2013): 190-193.

¹⁸⁸ Khan, "Electronic Commerce."

¹⁸⁹ Kenneth C. Laudon and Carol G. Traver, *E-Commerce: Business, Technology, Society* (Pearson Education Limited, 2019)

¹⁹⁰ Margarita Išoraitė and Neringa Miniotienė, "Electronic Commerce: Theory and Practice," *Integrated Journal of Business and Economics* 2, no. 2 (2018): 74.

consumers anywhere. It helps companies reduce operational and maintenance costs, transportation, and inventories, allowing them to increase revenues and improve the speed of the selling process. It raises customer loyalty and retention, develops customer and supplier relationships, and customizes products and services to the customer's requirements.¹⁹¹ E-commerce allows consumers to shop anytime and anywhere, from the comfort of their houses, offices, and even cars. Consumers can choose from a wide range of products from national and international suppliers at the most advantageous prices. They can compare prices and services in this online marketplace, choose based on their needs and financial resources, and choose a product or service that guarantees quality, efficient customer care, and faster delivery.

Along with benefits, there are also limitations and challenges to e-commerce. Some restrictions are due to the limited internet coverage in many areas, especially in developing countries, and the high connectivity costs. Today, the Internet has become an essential service for everyone due to the COVID-19 pandemic, which has changed how people live, socialize and work. People rely heavily on the Internet for work, school, and business. However, the Internet remains unaffordable for many of them.

Furthermore, there is a lack of consumer choice in markets where Internet service providers (ISPs) have little to no competition, and prices tend to increase. Consequently, consumers are forced to pay higher costs. For example, in the US, the market for internet service is dominated by just four companies: AT&T, Charter, Comcast, and Verizon. This market oligopoly affects the cost and quality of internet service. According to the New America's Open Technology Institute (OTI) 2020 Connectivity Report, US consumers, on average, pay higher prices than consumers in Europe or Asia.¹⁹²

One of the biggest challenges businesses and consumers must face is the lack of system security. Many websites do not have sufficient cybersecurity to prevent cyber-attacks and stealing, altering, or destroying data and information systems. In addition to the lack of security, there are concerns about personal data privacy. Consumers often do not know who collects the data shared in online transactions. Many countries do not have laws to protect the confidentiality of personal data collected through websites and the Internet. Another critical

¹⁹¹ Khan, "Electronic Commerce."

¹⁹² Becky Chao and Claire Park, *The Cost of Connectivity 2020*, (Open Technology Institute, 2020), newamerica.org/oti/reports/cost-connectivity-2020.

challenge is consumer trust's role in e-commerce and how the lack of confidence can negatively affect the proliferation of e-commerce. For a more detailed analysis of this topic, see chapter 6. It widely discusses the relationship between e-commerce and consumer trust.

Eight main models of e-commerce relationships can be categorized:

- **Business-to-Consumer (B2C):** this includes transactions between a business and a consumer (i.e., buying a book on Amazon, subscribing to Netflix T.V.).
- **Business-to-Business (B2B):** relates to e-commerce sales made between businesses (i.e., individual car parts sold by the manufacturer to an automotive company).
- **Consumer-to-Consumer (C2C):** consists of e-commerce transactions facilitated by a third intermediary, usually an online market or an auction website (i.e., eBay).
- **Consumer-to-Business (C2B):** consists of exchanging products, information, or services from an individual to a business (i.e., writing a review, a photographer offering stock photographs to businesses).
- **Business-to-Administration (B2A):** covers all electronic transactions between companies and public administrations or government agencies and refers to when a business provides an online service to the government (i.e., third-party platforms such as TurboTax).
- **Consumer-to-Administration (C2A):** relates to all electronic transactions between individuals and public administration (i.e., filing tax returns).
- **Business-to-Business-to-Consumer (B2B2C):** consists of businesses selling products or services to consumers through an intermediary (i.e., an online marketplace, an online retailer) (i.e., Uber Eats). In this model, businesses do not have an exclusive partnership with one intermediary. Still, they can sell through different channels, and the prices of their products and services will depend on the intermediary.
- **Direct-to-Consumer (D2C):** relates to e-commerce sales made by businesses directly to consumers via an online web store.

Business-to-Consumer (B2C) is one of the most widely used sales models in the e-commerce context. B2C is a commerce transaction in which businesses sell products or services directly

to consumers.¹⁹³ Traditionally, it refers to individuals shopping at the mall, dining out at restaurants, or subscribing to a pay-per-view tv. With the rise of the Internet in the 90s and the increasing use of online tools to accomplish business transactions, manufacturers and retailers began offering and selling their products and services online through websites, creating a new business channel in e-commerce.

Online shopping is growing worldwide, and websites offering various goods and services are multiplying. According to the United Nations Conference on Trade and Development (UNCTAD), the value of global B2C e-commerce is \$4.4 trillion, up by 16% from 2017, and cross-border B2C e-commerce sales amounted to \$404 Billion.¹⁹⁴ In 2016, the number of US consumers who shopped online grew to 209.6 million. These figures are projected to reach 321 million internet users in 2025, positioning the United States as one of the leading e-commerce markets based on online shopper penetration.¹⁹⁵ E-commerce revenue in Europe is expected to grow from 346.2 to 479.1 billion US dollars in 2023.¹⁹⁶ In 2018, global B2C e-commerce sales amounted to 3.33 trillion US dollars;¹⁹⁷ e-retail revenues were foreseen to increase to 6.54 trillion US dollars in 2022.¹⁹⁸ The United States dominates the overall e-commerce market, followed by Japan and China, while China leads e-commerce sales to consumers. Most of the leading B2C e-commerce companies are located in China and the US, with Alibaba (China) and Amazon leading the market.¹⁹⁹ Other top market companies include AirBridgeCargo Airlines, eBay, ASOS, ACES, BigCommerce, Jagged Peak, Pitney Bowes,

¹⁹³ The B2C idea was first used in 1979 by the British inventor and entrepreneur Michael Aldrich. Tired of going to the supermarket every week, he connected a television set to a computer with a telephone line, creating the first example of 'teleshopping' or remote shopping. B2C e-commerce can be defined as “an exchange between producers and end consumers of goods, services, and explicit knowledge about goods and services (or information about consumers) for available consumption in return for the actual or potential payment of monies.” B2C e-commerce is often used as a synonym for online shopping. However, it does include categories such as paid online services or paid content (i.e., digital video, music, books), travel services, online payment providers (i.e., PayPal), and websites offering coupons, deals, and cashback (i.e., LivingSocial, Groupon, Deal News). See “La Storia Del Futuro: La Nascita Dell'e-commerce (1979 - 1995) | News.srl,” News.srl, last modified June 3, 2020, <https://www.news.srl/la-nascita-delle-commerce-1979-1995/>.

¹⁹⁴ “Global E-Commerce Hits \$25.6 Trillion – Latest UNCTAD Estimates,” UNCTAD, accessed February 1, 2021, [https://unctad.org/press-material/global-e-commerce-hits-256-trillion-latest-unctad-estimates#:~:text=B2C%20e%2Dcommerce%20was%20valued,commerce%20market%20\(Table%201\)](https://unctad.org/press-material/global-e-commerce-hits-256-trillion-latest-unctad-estimates#:~:text=B2C%20e%2Dcommerce%20was%20valued,commerce%20market%20(Table%201).).

¹⁹⁵ Statista.com. <https://www.statista.com/statistics/183755/number-of-us-internet-shoppers-since-2009/#targetText=In%202016%2C%202009.6%20million%20U.S.,based%20on%20online%20shopper%20penetration> (accessed, August 14, 2019).

¹⁹⁶ Statista.com. <https://www.statista.com/statistics/715663/e-commerce-revenue-forecast-in-europe/> (accessed, September 5, 2019).

¹⁹⁷ “Global E-Commerce.”

¹⁹⁸ “Global Retail E-commerce Market Size 2014-2023,” Statista, accessed February 1, 2021, <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/>.

¹⁹⁹ According to the data reported by the UNCTAD, in 2018, Alibaba generated a GMV of \$866 billion while Amazon had a total GMV of \$277 billion.

Tmall, Eunimart Multichannel, JD.com, Vipshop, and Zalando.²⁰⁰ The following two tables present the latest estimates from UNCTAD that show the top ten countries for e-commerce sales (table 3.1) and the top ten countries for e-commerce B2C sales (table 3.2).

Table 3.1 E-Commerce Sales: Top Ten Economies in 2018

Source: Adapted from UNCTAD Press Release 2020/007

Rank	Economy	Total E-Commerce Sales (\$ Billion)
1	United States	8,640
2	Japan	3,280
3	China	2,304
4	Korea (Rep.)	1,364
5	United Kingdom	918
6	France	807
7	Germany	722
8	Italy	394
9	Australia	348
10	Spain	333
	10 above	19,110
	World	25,648

Table 3.2 Top Ten Economies by B2C E-Commerce Sales in 2018

Source: Adapted from UNCTAD Estimates of Global E-Commerce 2018

Rank	Economy	B2C E-Commerce Sales (\$ Billion)
1	China	1,361

²⁰⁰ “[2020-2026] Global Cross-Border B2C E-Commerce Market Size, Share & Trends Updated Research Report,” Market Research Reports and Business Consulting Services – FnF Research, accessed February 3, 2021, <https://www.fnfresearch.com/cross-border-b2c-e-commerce-market-by-category-852>.

2	United States	1,098
3	United Kingdom	266
4	Japan	163
5	France	109
6	Korea (Rep.)	102
7	Germany	101
8	Spain	72
9	Canada	44
10	Hong Kong (China)	38
	Ten above	3,354
	World	4,390

According to UNCTAD estimates, in 2018, cross-border B2C e-commerce sales amounted to \$404 billion representing almost 10% of total B2C e-commerce sales. The US, China, and the UK lead the cross-border B2C e-commerce sales. Also, UNCTAD estimates that 1.45 billion people shopped online in 2018, of which 330 million made cross-border purchases. A 2020 report from Research and Markets reveals that cross-border online shopper penetration is the highest in countries like Australia, China, Canada, and Mexico.²⁰¹ According to the same report, the product categories purchased in cross-border online commerce are clothing and electronics, followed by beauty and health products. A 2020 Eurostat survey reveals that clothes (including sports clothing), shoes, or accessories were the most popular online purchases.²⁰² Table 3.3 shows the top online purchases related to goods in the EU.

Table 3.3 Most Popular Online Purchases Related to Goods Among EU Buyers

Source: Eurostat 2020

Rank	Product Category	E-Buyers (%)

²⁰¹ Research and Markets Ltd, "Global Cross-Border B2C E-Commerce 2020," Research and Markets - Market Research Reports - Welcome, accessed February 4, 2021, <https://www.researchandmarkets.com/reports/4997074/global-cross-border-b2c-e-commerce-2020>.

²⁰² Eurostat, *E-Commerce Statistics for Individuals*, (Eurostat, 2021), <https://ec.europa.eu/eurostat/statisticsexplained/>.

1	Clothes, Shoes & Accessories	64
2	Food Delivery	29
3	Home Furniture & Garden Accessories	28
4	Cosmetics & Beauty/Wellness Products	27
5	Books & Printing Magazines	27

The table below shows the top ten merchandise exporters and the percentage of cross-border B2C e-commerce sales in merchandise exports.

Table 3.4 Top Ten Merchandise Exporters in 2018

Source: Adapted from UNCTAD Estimates of Global E-Commerce 2018

Rank	Economy	Cross-Border B2C E-Commerce Sales (\$ Billion)	Share of Cross-Border B2C E-Commerce Sales in Merchandise Exports (%)
1	China	100	4.0
2	United States	85	5.1
3	United Kingdom	40	8.2
4	Hong Kong (China)	35	6.2
5	Japan	21	2.9
6	Germany	15	1.0
7	France	12	2.0
8	Italy	4	0.8
9	Korea (Rep.)	3	0.5
10	Netherlands	1	0.2
	Ten above	317	3.2
	World	404	2.1

Today, when shopping online, consumers can rely on a series of information regarding their purchase, such as tracking when the product will be shipped and delivered, which gives them more confidence in the successful outcome of their transactions. However, as e-commerce continues to grow, consumers face various issues and new challenges when shopping online,

especially concerning protecting their rights. According to a 2019 Eurostat survey,²⁰³ the problems encountered most often by EU online shoppers are related to the following:

- Slower delivery than indicated at the time of the purchase
- Problems with a website when ordering or paying
- Delivery of wrong goods or services
- Goods or services that are delivered but are damaged
- Problems with making complaints and seeking redress
- Difficulties in finding information on guarantees and other legal rights
- Final costs higher than indicated
- Frauds (goods or services not delivered, misuse of credit cards)

Generally speaking, online shoppers experience problems with the delivery of goods and services, damaged products, website technical issues, online fraud, finding information on product and service warranties, and seeking redress. Payment security, privacy concerns, delivery issues, concerns about receiving or returning goods, and concerns about complaints and redress mechanisms are some of the most relevant reasons that prevent consumers from shopping online.²⁰⁴ The rapid growth of e-commerce has increased the frequency of disputes arising from e-commerce transactions between businesses and consumers.

Furthermore, the difficulty of filing a complaint or the lack of dispute resolution mechanisms discourages consumers from seeking remedies. In 2015, the Statista Research Department presented the results of a survey on the leading online cross-border shopping complaint recipients in selected EU countries.²⁰⁵ During the survey, 31.3 percent of responding EU residents reported never complaining after experiencing problems buying products and services from online retailers in other EU countries. Among those who made a complaint, 59.6% complained directly to the online retailer, 9.2% to the manufacturer of the product, 5% to a trade association, 3% to the European Consumer Center (ECC) in their country, 2.7% to an independent dispute resolution scheme (i.e., arbitrator or mediator), and 2.5% to other

²⁰³ Eurostat, “E-Commerce.”

²⁰⁴ Ibid.

²⁰⁵ “Who have you complained to after experiencing a problem with buying products and services from online retailers based in other EU countries?” statista.com, accessed September 21, 2019, <https://www.statista.com/statistics/681260/eu-main-recipients-of-cross-border-online-shopping-complaints/>.

consumer associations in their own country.²⁰⁶ Most consumers do not pursue purchase complaints because they do not have the necessary resources, are unaware of their rights, or lack essential information.²⁰⁷ As noted by Schmitz and Rule, "Most resolution options available to consumers resemble those available decades ago: a 1-800 number, a complaint form, or an unsatisfying online chat process."²⁰⁸ Customer services are often difficult to reach, with consumers spending time on the phone on hold and customer service representatives who may not have the authority to provide remedies.²⁰⁹ Also, some companies may restrict consumer remedies by adding arbitration clauses to purchase contracts.

Furthermore, in low-value purchases (which in the B2C online market represent the majority of transactions),²¹⁰ consumers who experience problems are reluctant to consider formal judicial proceedings as a forum for finding redress. Litigation is costly, slow, and stressful. Recent data suggests that the average value of global online shopping orders by device as of the 2nd quarter 2019 ranges between \$80.06 and \$128.08.²¹¹ It seems evident that more traditional forms of dispute resolution, including ADR such as arbitration, do not represent optimal solutions for low-value claims in e-commerce. B2C e-commerce needs dispute resolution options that consider the unique qualities of online cross-border transactions and provide alternatives and solutions to consumers when problems or disputes occur.²¹² ODR provides solutions, especially for low-value cross-border disputes. As noted by Ebner and Zeleznikow, "The unsatisfied purchaser of an item on eBay is more likely to prefer an online process for achieving redress rather than pursuing litigation with the seller, who may be based in another country."²¹³

Much innovation in ODR has come from the private sector due to the high maintenance cost and the difficulties of applying common national and international laws and jurisdictional.

²⁰⁶ "B2C E-Commerce," Statista, accessed January 9, 2021, <https://www.statista.com/markets/413/topic/457/b2c-e-commerce/>; "Digital Buyers Worldwide 2021," Statista, accessed January 9, 2021, <https://www.statista.com/statistics/251666/number-of-digital-buyers-worldwide/>.

²⁰⁷ Amy J. Schmitz, "Building trust in e-commerce through online dispute resolution," *Research Handbook on Electronic Commerce Law* (n.d.), 307-334.

²⁰⁸ Schmitz and Rule, "The New Handshake," 85.

²⁰⁹ Ibid.

²¹⁰ "Average Online Shopping Order Values by Device 2019," Statista, last modified November 24, 2019, <https://www.statista.com/statistics/239247/global-online-shopping-order-values-by-device/>.

²¹¹ Ibid.

²¹² United Nations Conference on Trade and Development, (New York: 2003), https://unctad.org/system/files/official-document/ecdr2003ch7_en.pdf.

²¹³ Ebner and Zeleznikow, "Fairness," 144-145.

Already large-scale online transaction providers such as eBay, Amazon, and Alibaba provide their low-cost dispute-resolution systems with the primary goal of not resolving many disputes but maximizing the number of successful transactions.²¹⁴ However, ODR platforms aimed at resolving B2C disputes and offering consumers convenient, efficient, and quick means to exercise their rights have also developed in the public sector. In the last few years, "more centralized public ODR portals have begun to flourish with considerable success"²¹⁵ in Brazil, Canada, Colombia, and Mexico. Such platforms offer consumers, especially those of low socioeconomic status, an essential tool for accessing alternative forms of justice, protecting their rights, and resolving B2C disputes. The government-hosted ODR platforms like *Consumidor* in Brazil or *Concilianet* in Mexico have been designed to resolve B2C disputes between merchants and their customers. Also, through the ADR Directive 2013/11 and the ODR Regulation 524/2013, the EU has moved toward providing consumers with ODR services by creating a web-based platform to resolve B2C cross-border online disputes. Chapters 4 and 5 will discuss these platforms more extensively.

In conclusion, in a global online economy that is constantly growing, ODR may represent "the only mechanisms capable of managing and resolving cross-border disputes"²¹⁶ and helping improve consumer trust in e-commerce.

3.3 ODR IN E-COMMERCE INTERMEDIARIES

Internet intermediaries play a crucial role in modern society and the structure of the Internet economy. Internet intermediaries refer to a broad and diverse range of service providers that bring together or facilitate transactions between third parties on the Internet.²¹⁷ They give access to, gather and transmit information and content, enable data processing, and provide internet-based services; they assist searches and facilitate the sale of goods and services. Internet Intermediaries include:

- Internet access and service providers (ISPs)
- Data processing and web hosting providers, including domain name registrars

²¹⁴ Katsh and Rabinovich-Einy, *Digital Justice*, 6.

²¹⁵ Schmitz, "Building Trust," 15.

²¹⁶ Vilalta, *ODR and e-Commerce*, 149.

²¹⁷ Karine Perset, *The Economic and Social Role of Internet Intermediaries* (OECD: April 2010), 9, <https://www.oecd.org/internet/ieconomy/44949023.pdf>

- Internet search engines and portals
- E-commerce intermediaries, where these platforms do not take title to the goods being sold
- Internet payment systems, and
- Participative networking platforms include Internet publishing and broadcasting platforms that do not themselves create or own the published or broadcast content.²¹⁸

As to e-commerce, intermediaries connect consumers and traders and facilitate Internet transactions. Some e-commerce platforms act as intermediaries connecting producers with consumers, facilitating the exchange of goods, services, or information. Others work as intermediaries but also offer products and services directly to consumers. Over the years, e-commerce platforms like eBay and Amazon have developed preventive tools and mechanisms to handle disputes between buyers and sellers during online transactions. While the specific details of the dispute resolution process may vary between different e-commerce platforms, some standard features may include:

- Direct negotiation: An internal messaging system allows the parties to communicate and negotiate a resolution.
- Mediation: A neutral third party (e.g., a mediator) may be brought in to help facilitate communication and negotiate a settlement.
- Multistep processes: If mediation fails, the dispute may be escalated to a higher authority within the e-commerce platform (e.g., a dispute resolution team or a customer service representative).
- Arbitration/adjudication: Some e-commerce platforms may require binding-as the final step in the dispute resolution process. This means the parties agree to abide by an expert's decision, who acts as a judge and finalizes the dispute.

Through these redress systems, e-commerce companies have tried to solve the legal complexity of cross-border disputes and, at the same time, increase consumer confidence in the online market.

3.4 EBAY AND AMAZON DISPUTE RESOLUTION

²¹⁸ Ibid.

As highlighted above, the private sector was the first to adopt ODR systems to partly respond to the need to resolve disputes arising from the high number of Internet transactions and increase consumer confidence. Companies understood the need to provide alternative mechanisms to the traditional court system to quickly and conveniently resolve low-value disputes arising from online transactions. The first ODR initiatives and platforms were established in the late 1990s and developed through modern technology, thus improving the services offered to users. They linked their services to external ODR providers, developed their internal resolution systems, or offered prevention tools and services.

As noted by Schmitz and Rule, large internet intermediaries like Amazon, eBay, and PayPal "realized very early that the consumer trust problem was creating friction on the internet and that solving it could provide a valuable market advantage."²¹⁹ Empirical research on the economic benefits of effective redress conducted at eBay²²⁰ confirmed that providing consumers with online solutions to their disputes enhances trust and increases marketplace usage regardless of the disputes' outcome. It is particularly true in online B2C transactions, where a well-recognized brand name does not support the business. The consumer might doubt the quality of goods or the legitimacy of the business itself.²²¹

This section analyzes the dispute resolution systems developed by two major e-commerce intermediaries, Amazon and eBay. It will examine the services and programs offered to buyers and sellers and the processes implemented to resolve e-commerce disputes.

3.4.1 The Amazon Dispute Resolution Program

Founded in 1996 by Jeff Bezos, Amazon is the largest online retail company globally.²²² Launched initially as an online bookstore, the company offers many products like books, music, computers, electronics, sporting goods, clothes, home and garden, and numerous other products. Its products include merchandise and content that Amazon purchases for resale from vendors and those offered by third-party sellers. Amazon also offers personalized shopping

²¹⁹ Amy J. Schmitz and Colin Rule, "The New Handshake: Where We Are Now," 97.

²²⁰ Colin Rule, "Quantifying the Economic Benefits of Effective Redress," *University of Arkansas Little Rock Law Review* 34, no. 6 (2012): 767-776.

²²¹ Janice Nadler, "Electronically-Mediated Dispute Resolution and E-Commerce," p. 336.

²²² As reported by Statista.com, Amazon generated total net sales of over 63.4 billion U.S. dollars during the second quarter of 2019. See <https://www.statista.com/statistics/273963/quarterly-revenue-of-amazoncom/>.

services, advertising,²²³ and Amazon Prime, a membership program that includes free shipping and access to streaming of movies and television (TV) series. The company focuses on e-commerce, cloud computing, digital streaming, and artificial intelligence. Amazon has separate retail websites in the United States (US) and Canada in North America. Many other countries, like the United Kingdom, France, Germany, Italy, Spain, Australia, Brazil, Japan, China, India, and Mexico, have their own Amazon websites. In December 2018, Amazon.com's total global visitor traffic reached its peak with 2.97 billion combined desktop and mobile visits.²²⁴ It is the most visited platform in the US, followed by Walmart and eBay.²²⁵ As reported by Statista.com, during the third quarter of 2019, Amazon generated total net sales of almost 70 billion US dollars, up from 63.4 billion US dollars in the preceding quarter.²²⁶

Like other major internet marketplaces, Amazon has developed a dispute resolution program to handle disputes arising from online transactions. Amazon's ODR model is based on an internal communication system that facilitates negotiating between buyers and merchants. Amazon allows the buyer to easily contest an order from a third-party seller through the Amazon marketplace. The buyer can go to the "My Orders" section, trace the disputed order, request its cancellation, contact the merchant, or file a claim. Although Amazon does not have a specific dispute center like eBay, the buyer can contact customer service through the customer service page and report problems related to an order. On the customer service page, the buyer can choose between various options that include the traceability of the order, its modification or cancellation, late deliveries, and the status of refunds.

Moreover, the buyer can contact the seller directly before or after placing an order by submitting a form with detailed information sent to the seller. The seller has two (2) business days to reply. Suppose the seller does not respond within two days. In that case, the buyer can take advantage of the Amazon A-to-z Guarantee program that protects purchases for items sold and shipped by marketplace sellers: It allows buyers to obtain full reimbursement for their purchase or cancel their authorized payment if they are not satisfied with a purchase made on a third-party site using Amazon Payments. Buyers can also file an A-to-z Guarantee claim if

²²³ "Amazon.com Inc," Bloomberg, accessed September 28, 2019, <https://www.bloomberg.com/profile/company/AMZN:US>.

²²⁴ "Combined Desktop and Mobile Visits to Amazon.com from February 2018 to July 2019 (in millions)," Statista, accessed September 28, 2019, <https://www.statista.com/statistics/623566/web-visits-to-amazoncom/>.

²²⁵ "Most Popular E-Commerce Properties in the United States," Statista, accessed September 28, 2019, <https://www.statista.com/statistics/324321/us-retail-site-desktop-audience-reach/>.

²²⁶ "Net revenue of Amazon from 1st quarter 2007 to 3rd quarter 2019 (in billions U.S. dollars)," Statista, accessed November 29, 2019, <https://www.statista.com/statistics/273963/quarterly-revenue-of-amazoncom/>.

the received item is damaged, defective, or does not conform to the description on the site, the item has been returned, but the buyer has not received the relevant refund, or the refund amount was wrong. In these cases, the buyer must contact the seller within 30 days from the delivery date to request a refund and return the item within 14 days. If the buyer's claim is not accepted, the buyer has 30 days to challenge the decision. It can take up to a week for Amazon to decide, and the decision is communicated by email to the address associated with the buyer's account. In this case, Amazon is a third-party intermediary that handles the dispute through an adjudication mechanism. The parties can contest the decision issued by Amazon by resorting to a tribunal, but this happens in rare cases. Too many claims (like negative reviews) can severely damage the seller's account's quality and negatively impact the ability to sell.

Amazon Pay is an online service provider owned by Amazon. Amazon allows its customer base to make payments on external merchant websites using the information already stored in their Amazon account. There are many reasons why a transaction can be disputed when shopping through Amazon Pay. Amazon lists the following reasons for making a claim:

- An error in the Pay with Amazon transaction statement
- Unauthorized charges on a credit card or bank account
- The amount charged to a credit card or bank account is different than the amount displayed on the Pay with Amazon screen or confirmation email
- The item paid for was not received
- The item received was materially different than described.

If one of the above situations arises, the buyer can file a claim and address the issue with the merchant or Amazon Pay. Generally, when a buyer and a merchant dispute occurs, Amazon encourages the buyer to contact the merchant to find or negotiate a solution. The buyer must wait 15 business days to submit a claim and has 75 days to submit the complaint.²²⁷ This procedure applies to received goods (included under the Amazon A-to-z Guarantee program) that were either damaged, defective, or materially different as described during the transaction.

²²⁷ "Buyer Dispute Program," Amazon pay, accessed August 20, 2020, <https://pay.amazon.com/help/201751580>.

Different waiting times for filing a claim are requested to the buyer in case of delivery of services (14 business days) or digital items (one business day) with a 30-day limit to submit the claim. Buyers can file claims on Amazon Payments, but they must provide evidence that the merchant did not cooperate in resolving the dispute or that they could not resolve the dispute even with the merchant's cooperation. Suppose the parties cannot resolve the dispute on their own. In that case, the Amazon Payments Buyer Dispute Program provides a mechanism to address the buyer's complaint,²²⁸ allowing the buyer to seek remedies. For instance, the buyer can obtain a reimbursement for a purchase or cancel an authorized payment if the buyer is unsatisfied with a purchase made on a third-party site using Amazon Payments.²²⁹ It is a scaling mechanism that allows a negotiation between buyers and traders, which can lead to a decision by Amazon if not resolved.

The Amazon Payments Buyer Dispute Program applies to purchases of items or services from a merchant that were paid but did not arrive or purchases of goods materially different from how the merchant described them.²³⁰ In these situations, the dispute is sent to the Amazon Pay investigations team for review after a buyer submits a complaint. An Amazon agent conducts the investigation and is assisted by the platform for synchronous (via message) or asynchronous (via chat) communications with the buyer.

Amazon Pay contacts the merchant and helps facilitate a resolution. Again Amazon acts as a neutral third-party intermediary facilitating communication and negotiation between the parties in a dispute-prevention manner. Usually, it takes Amazon 45 days to reach a conclusion and resolve a claim from the submission date.²³¹ However, suppose the merchant fails to cooperate in good faith. In that case, Amazon applies penalties and restrictions to the merchant's account, including termination of the account itself. The resolution is not automated but consists of a human evaluation process. Amazon provides an appeal process within 30 calendar days of the

²²⁹ Ibid.

²³⁰ Amazon considers an item to be "materially different" in the following circumstances:

- Wrong version or edition
- Item condition or details not as described
- Wrong item
- Missing parts or components
- Defective item
- Damaged item

²³¹ "Disputing Transactions," Amazon pay, accessed August 20, 2020, <https://pay.amazon.com/help/201754740>.

decision.²³² Harsh criticism has been leveled at Amazon by third-party sellers concerning its strict and confusing policies and a *Kafkaesque* bureaucracy of decision appeals that can make sellers "more worried about a case being opened on Amazon than in actual court."²³³

3.4.2 eBay Customer Service and eBay Dispute Resolution Center

Founded in 1995 in San Jose, Calif., eBay is a multinational e-commerce corporation and one of the world's largest marketplaces²³⁴ for selling goods and services by individuals and businesses. There are 100 million eBay registered users who operate in 23 countries.²³⁵ In 2016, eBay enabled \$83 billion of gross merchandise volume (GMV). It delivered for the quarter that ended September 30, 2017, a GMV of \$21.7 billion, increasing 8% on an as-reported basis and 7% on a foreign exchange (F.X.) neutral basis.²³⁶ The company was expecting net revenue of \$10.99 billion for the entire 2022 year.

eBay operates through its Marketplace, StubHub, and Classifieds platforms. The company connects buyers and sellers worldwide and has 164 million active buyers.²³⁷ Its platforms enable sellers to organize and offer their inventory for sale and buyers to find and purchase it. The company's platforms are accessible through an online experience (desktop and laptop computers), from mobile devices (smartphones and tablets), and by application programming interface (API) (platform access for third-party software developers). Born as an auction website, eBay now offers a variety of products, from electronics to collectibles, from sporting goods to heavy equipment. Unlike Amazon, eBay does not sell its own branded commodities but only products from third-party sellers. Although both eBay and Amazon are shopping

²³² Amazon, "Appeal a Denied A-to-z Guarantee Refund - Amazon Customer Service," Amazon.com. Spend Less. Smile More, last modified 2022,

<https://www.amazon.com/gp/help/customer/display.html?nodeId=G9VEMT3X4FQET5DH>.

²³³ Josh Dzieza, "Dirty Dealing in the \$175 Billion Amazon Marketplace," The Verge, last modified December 19, 2018, <https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement>; Bloomberg News, "After Going All-in on Amazon, a Merchant Says He Lost Everything," Digital Commerce 360, last modified October 27, 2020, <https://www.digitalcommerce360.com/2020/10/27/after-going-all-in-on-amazon-a-merchant-says-he-lost-everything/>.

²³⁴ Joyce Chepkemoi, "The 25 Largest Internet Companies In The World," WorldAtlas, last modified February 13, 2017, <https://www.worldatlas.com/art.s/the-25-largest-internet-companies-in-the-world.html>.

²³⁵ *BBB Accredited Business Profile*. <https://www.bbb.org/losangelessiliconvalley/business-reviews/internet-shopping/ebay-in-san-jose-ca-204015> (accessed November 30, 2017).

²³⁶ *eBay Inc.* Reports Third Quarter 2017 Results. <https://www.ebayinc.com/stories/news/ebay-inc-reports-third-quarter-2017-results/> (accessed November 30, 2017).

²³⁷ *eBay Inc.* eBay Q2 2016 Company Fast Facts.

<https://static.ebayinc.com/static/assets/Uploads/PressRoom/eBay-Q22016FactSheet-Investor-Site.pdf> (accessed November 30, 2017).

platforms, eBay acts as an auction and marketplace site, while Amazon operates like a traditional retail store. Along with goods, eBay sells certain services, such as artistic work (e.g., interior design, photography), website development, and media editing.

Since its creation, eBay Resolution Center has resolved millions of disputes, becoming the second-largest dispute resolution provider in the world.²³⁸ Through the years, eBay has developed an efficient automatic process that enhances online negotiation helping buyers and sellers to communicate more effectively when there is a problem with a transaction. eBay allows buyers and sellers to solve transaction issues between themselves before escalating to a level where eBay must intervene. Nevertheless, suppose buyers and sellers cannot find a solution independently. In that case, eBay users can bring their claim to the eBay Resolution Center, which eBay defines as the most secure way for sellers and buyers to communicate when they have a transaction problem.²³⁹ The eBay Resolution Center offers a multifaceted approach to resolving issues. To begin the process, the eBay user can visit the eBay Resolution Center page and select one of the following options:

- Action for sellers
- Action for buyers²⁴⁰

To continue the process, the buyer can go to the Purchase History to report an item that has not arrived, start a return, or view past requests."²⁴¹ Suppose the problem is not among those listed in the Purchase History. In that case, the eBay buyer can visit the Customer Service page that provides additional information about contacting a seller, handling feedback disputes with sellers, reporting an item or issue, and avoiding seller fraud.²⁴² On the eBay Resolution page, the seller can choose between canceling a paid or unpaid order or managing buyers' requests

²³⁸ In 2012 eBay Dispute Resolution handled over sixty million disputes with an 80 percent satisfactory outcome second only to Alibaba's Dispute Resolution system that handles over hundreds of millions of disputes. See M. Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (New York, NY: Oxford University Press, 2017).

²³⁹ *eBay Seller Center*. <http://pages.ebay.com/seller-center/service-and-payments/case-resolution.html> (accessed February 8, 2018).

²⁴⁰ eBay, Security Measure, last modified 2022, <https://resolutioncenter.ebay.com/>.

²⁴¹ eBay, "Resolving Issues with Sellers," eBay, last modified 2022, <https://www.ebay.com/help/buying/resolving-issues-sellers/resolving-issues-sellers?id=4011>.

²⁴² eBay requires users to sign into their accounts or register to view the purchase history. See eBay, "Sign in or Register," Electronics, Cars, Fashion, Collectibles & More | eBay, last modified 2022, <https://www.ebay.com/mye/myebay/purchase>.

or disputes. In both situations, the seller must go to the My eBay Sold.²⁴³ Like buyers, sellers can still visit eBay's Customer Service page to get more information about canceling orders, managing returns and refunds, resolving unpaid items with buyers, replying to feedback received, or leaving feedback for buyers.²⁴⁴

EBay has recently changed how users can report and resolve issues with orders. Customer Service has de facto replaced the Resolution Center. Although the Resolution Center still has its web page directly accessible at resolutioncenter.ebay.com, it is no longer accessible from the home page. Before, users could visit the homepage, access their account, and easily hover their mouse on 'Customer Support' and click 'Resolution Center.' The best way to contact eBay is through the Help & Contact page, which can be found at the top or bottom of almost any eBay page.²⁴⁵ This page provides users with different sections (i.e., Return an item for a refund, Get help with an item that hasn't arrived), information, and links. By clicking on any of the links, users will access helpful articles that eBay's written on how to solve most fundamental issues. If more help is needed, users can scroll down to the bottom of the page and click 'Contact us.'²⁴⁶ They will be prompted to pick from a list of categories (i.e., Getting paid for items you sold, How to handle a return request as a seller), and the system will suggest support articles related to the issues. If the articles do not help, users can chat with an automated assistant by clicking on a link on the left side of the page. It will open a chat window where users can talk to an AI agent who provides them with related information. If unable to resolve the issue, users can contact an eBay customer service agent who will take the call, usually within half an hour. It remains the only way for users to talk to an eBay representative about their issues with a purchase or sale. Alternatively, users can contact the eBay Community Forum, where a regular user ('Mentor') can help troubleshoot their problems.²⁴⁷

EBay Customer Service provides users with helpful information about their buying or selling activities. However, one gets the impression that navigating through all this information ultimately becomes daunting for users, especially those unfamiliar with the platform. Suppose

²⁴³ Ebay, "Security."

²⁴⁴ Ebay, "Selling," Electronics, Cars, Fashion, Collectibles & More | EBay, last modified 2022, <https://www.ebay.com/help/selling>.

²⁴⁵ Ebay.com, "EBay Customer Service," Electronics, Cars, Fashion, Collectibles & More | EBay, accessed April 18, 2022, <https://www.ebay.com/help/home>.

²⁴⁶ Ebay.com, "EBay Customer Service," Electronics, Cars, Fashion, Collectibles & More | EBay, accessed April 18, 2022, https://www.ebay.com/help/call_us?type=ContactUs&initFrom=HOME&topicId=4000.

²⁴⁷ Ebay.com, "Ask a Mentor," The EBay Community, last modified April 18, 2022, <https://community.ebay.com/t5/Ask-a-Mentor/bd-p/ask-a-mentor>.

a user has not found an answer to his question or problem after reviewing the information in these art.s. He will have to rely on an AI agent or wait on the phone for an average of half an hour to talk to a representative. This process can frustrate users who need to quickly solve their questions or issues. eBay's move from the Resolution Center to Customer Service as a place to address and resolve users' problems has undoubtedly created confusion. For example, some reported on the eBay community that they were informed that they had an open case but could not find any information about the Resolution Center on the site.²⁴⁸

As mentioned, the Resolution Center page still exists but is not advertised on the eBay home page. Although different from the previous one in terms of contents and functions, the new page of the Resolution Center is nevertheless clear and easily accessible. It would be advisable for eBay to have a reference to this page available and visible on the website's home page. It would avoid the current confusion of users who used to access the Resolution Center and now find themselves browsing much information on the Customer Service pages. It would also help, given the simplicity and clarity of its main interface, users to better understand how to navigate the system and get information about the actions they need to take regardless of whether they are sellers or buyers.

eBay Money Back Guarantee

Since eBay is primarily a forum that connects buyers to sellers rather than an online retail site, it has struggled to maintain the same reputation for safety and good customer service as retail platforms like Amazon.com. eBay has taken steps to enforce some basic seller requirements regarding return policies to address this problem.²⁴⁹

The eBay Money Back Guarantee was created to help facilitate refunds and the return of defective, damaged, or otherwise 'Not as Described' items. Under the eBay Money Back Guarantee, the seller has three business days to respond to the buyer with a solution (either a replacement, a return, or a refund). If the seller does not offer a solution or the buyer is

²⁴⁸ The eBay Community, accessed April 19, 2022, <https://community.ebay.com/t5/Ask-a-Mentor/to-close-a-dispute/m-p/32826066>; Ebay.com, "Why Did Ebay Discontinue the Resolution Center?," The eBay Community, last modified June 27, 2021, <https://community.ebay.com/t5/Ask-a-Mentor/Why-did-Ebay-discontinue-the-Resolution-Center/qaq-p/32010371>.

²⁴⁹ Aron Hsiao, "How eBay's Buyer Protection Works", *Thebalance.com*, January 23, 2018, <https://www.thebalance.com/how-ebay-s-buyer-protection-program-works-1140370>, (accessed February 8, 2018).

unsatisfied with the answer, the buyer has 30 days to ask eBay to step in and help otherwise. In this case, eBay reviews the case and decides within 48 hours. The process provided by eBay offers and encourages the first negotiation phase between buyers and sellers. If not resolved, it will lead to a second phase in which eBay will act as a third arbitrator deciding on the dispute. The parties will then be allowed to appeal the decision issued by eBay within 30 days by providing appropriate documentation.²⁵⁰ If eBay decides in the buyer's favor, eBay will issue a refund through the original payment method (i.e., credit card or debit card) or PayPal. Suppose eBay's resolution is not in the buyer's favor. In that case, eBay does not have the coercive authority to induce the buyer to pay other than negatively exposing its reputation on the platform.

The Money Back Guarantee program does not constitute a warranty on a product but rather a guarantee that the conditions exist to protect the transaction. A binding contractual relationship exists between buyers and sellers; eBay as an intermediary ensures that conditions are in place for users to receive protection in their transactions on the platform.

To be covered by the eBay Money Back Guarantee, the buyer has certain obligations. Generally, the buyer is responsible for accepting the purchased item when it arrives. If the buyer does not receive the art., the buyer must report that the item has not arrived by submitting a form. The buyer has 30 days from the estimated delivery date to inform the seller that the item was not received. Once notified, the seller has three business days to provide a delivery update, offer a replacement, or give you a refund.²⁵¹ If the item received does not match the seller's description or is damaged, the buyer must request a return no later than 30 days after the actual (or the latest estimated) delivery date. If the seller does not respond within three business days, the buyer must ship the item back to the seller within five business days from when the buyer starts the return. Suppose the seller sent a replacement or exchange, and the buyer has not shipped the original item back within 20 business days of the buyer starting the recovery. In that case, eBay charges the buyer's PayPal for the replacement or exchange.²⁵² The cost of return shipping depends on the seller's return policy and the reason for the return.

²⁵⁰ Ebay, "EBay Money Back Guarantee Policy," EBay, last modified 2022, <https://www.ebay.com/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210>.

²⁵¹ EBay, "Get Help with an Item That Hasn't Arrived," EBay, last modified 2022, <https://www.ebay.com/help/buying/returns-refunds/get-help-item-hasnt-arrived?id=4042&st=7#section2>.

²⁵² Ibid.

The seller pays for return shipping if they offer a free returns policy or if the item was damaged, faulty, or does not match the listing description. The buyer pays for return shipping if they return the item because they changed their mind, and the seller's return policy states that buyers are responsible for return shipping.²⁵³

Because eBay is now selling quite a few very high-priced items, including significant equipment and cars, it has instituted specific buyer protections for such items. Under the eBay Business Equipment Purchase Protection (BEPP) program for items purchased on or after September 1, 2016, a buyer's capital equipment purchase is protected for up to \$100,000. For items purchased before September 1, 2016, the capital equipment purchase is protected for up to \$50,000.²⁵⁴ eBay Vehicle Purchase Protection (VPP) protects against certain losses associated with fraud, up to a maximum amount of a buyer's purchase price (not exceeding \$100,000).²⁵⁵ eBay also offers a protection policy for sellers to assure them that they operate in a marketplace they can trust. eBay protects the seller from many events outside the seller's control, such as the following:

- an item that arrives late but was shipped by the seller on time
- a returned item that was opened, used, or damaged
- issues relating to carrier disruptions;
- bugs, or severe weather;
- problems with a buyer that retracts their bid or does not pay.

eBay supports sellers in dealing with eBay Money Back Guarantee requests.²⁵⁶ Lastly, the eBay Security Center allows users to report buyer or seller concerns, possible scams, and fraudulent activities. A security team investigates these issues.²⁵⁷

²⁵³ eBay, "Return Shipping for Buyers," eBay, last modified 2022, <https://www.ebay.com/help/buying/returns-refunds/returning-item/return-shipping?id=4066#:~:text=who%20pays%20for%20return%20shipping,t%20match%20the%20listing%20description>.

²⁵⁴ eBay, "Business Equipment Purchase Protection," eBay, last modified 2022, <https://www.ebay.com/help/buying/paying-items/ebay-business-equipment-purchase-protection?id=4637>.

²⁵⁵ eBay, "Motors - Purchase Protection - Overview," last modified 2022, <https://pages.motors.ebay.com/buy/purchase-protection/>.

²⁵⁶ eBay, "Seller Protections," last modified 2022, <https://www.ebay.com/help/policies/selling-policies/seller-protection-policy?id=4345>.

²⁵⁷ eBay, "Security Center," last modified 2022, <https://pages.ebay.com/securitycenter/>.

To conclude, Amazon and eBay offer a series of tools to quickly and easily prevent and resolve B2C disputes arising from transactions on their platforms. Amazon's model consists of a communication/negotiation facilitated by the platform between buyers and merchants, which can lead to change or replacement, return, or refund of the purchased item in case of issues with an order. Buyers are always encouraged to contact the merchant. Still, if this does not respond, Amazon offers buyers a guarantee program (Amazon A-to-z) which allows them to obtain full reimbursement for their purchase or cancel their authorized payment if they are unsatisfied with a purchase. These can be considered a set of customer handling services and preventive dispute mechanisms, which allow Amazon users to resolve transaction problems and prevent dispute escalation. Also, an Amazon feedback and rating system enables users to evaluate a product before purchasing, acting as dispute prevention mechanisms that promote good practices and integrity and provide consumers with more information about sellers' reliability. Finally, by intervening as a third arbitrator if the negotiation between the parties is unsuccessful, Amazon offers its users the possibility of resorting to a quick dispute-resolution tool.

eBay offers a dispute prevention and resolution tiered system. It consists of an automatic process facilitated by the platform that enhances asynchronous online communication helping the parties negotiate and find a solution. The platform allows parties to explore different alternatives, such as returns, refunds, replacement items, or transaction cancellations. The eBay Money Back Guarantee helps facilitate the return of defective, damaged, or 'not as described' items and, ultimately, a refund. These represent a range of customer service and dispute prevention tools allowing parties to resolve their issues before resorting to a third party's decision. The eBay platform also enables users to file a claim when negotiation fails. Users can escalate the dispute through the eBay Resolution Center and ask eBay to intervene, acting as an arbitrator. eBay offers its users an efficient dispute resolution tool. Such a tool, however, does not provide an enforcement mechanism in the event that eBay decides in favor of the seller other than negatively exposing the buyer's reputation on the platform.

3.5 EBAY AND AMAZON DISPUTE RESOLUTION SYSTEMS AND THE UNCITRAL PRINCIPLES FOR ODR

The 2015 report from the United Kingdom’s Civil Justice Council on the potential of ODR for low-value civil claims²⁵⁸ includes eBay as an example of a working ODR system. Furthermore, eBay’s Dispute Resolution Center has gained the attention of researchers and entrepreneurs in the ODR world.²⁵⁹ Its dispute resolution system is built around a model of problem diagnosis, starting with an automated negotiation, then mediation, and ending with adjudication or arbitration.²⁶⁰ Amazon employs a similar resolution model that encourages the parties to resolve standing issues by negotiating before intervening. The Technical Notes identify three-stage that an ODR process should contain. As previously described, the ODR process offered by eBay encourages the first negotiation phase between buyers and sellers. If not resolved, it will lead to a second phase in which eBay will act as a third arbitrator deciding on the dispute. The parties will then be allowed to appeal the decision issued by eBay within 30 days by providing appropriate documentation.

This section investigates whether the ODR procedures applied by eBay’s Dispute Resolution and Amazon Dispute Programs comply with fairness, due process, accountability, and transparency principles that underpin any ODR according to the UNCITRAL Technical Notes on Online Dispute Resolution.²⁶¹ It will conclude by claiming that such principles are crucial to the success of online marketplaces. Also, it will argue that eBay’s and Amazon’s preventive and complaint-handling mechanisms and dispute resolution programs represent an actual example to follow by other platforms offering online products or services.

3.5.1 The UNCITRAL Technical Notes on ODR

The UNCITRAL Technical Notes (hereinafter The Notes) on ODR were adopted to "foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings."²⁶² They are expected to contribute significantly to developing systems that resolve disputes arising from cross-border low-value sales or service contracts

²⁵⁸ Civil Justice Council’s Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, (2015), accessed November 22, 2020, <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

²⁵⁹ “Access to Information and Justice: Where Does ODR Lead Us To?,” Mediate.com - Find Mediators - World's Leading Mediation Information Site, last modified August 3, 2017, <https://www.mediate.com/art.s/ZhengJ1.cfm>.

²⁶⁰ “ODR Platforms: EBay Resolution Center,” The 15th ODR Conference, 23-24 May 2016, The Hague, last modified April 14, 2016, <https://2016odr.wordpress.com/2016/04/14/odr-platforms-ebay-resolution-center/>.

²⁶¹ See Section II, para. 7 of UNCITRAL Technical Notes on Online Dispute Resolution

²⁶² UNCITRAL Working Group III, Thirty-third session, A/CN.9/WG.III/WP.140, para. 1.

concluded using electronic communications.²⁶³ The notes are not intended to be used "as rules for any ODR proceeding and do not impose any legal requirement that is binding upon the parties or the people/entities involved in administering or facilitating an ODR proceeding."²⁶⁴ Instead, they propose to be of assistance regardless of the structure and framework of an ODR system, which may offer a variety of dispute resolution mechanisms such as conciliation, negotiation, mediation, facilitated settlement, and arbitration. Moreover, the Notes describe practices and procedures of ODR mechanisms that should be based on principles of fairness, due process, accountability, and transparency and be simple, fast, and efficient.²⁶⁵

The Notes describe ODR as a three-stage process that may include: negotiation, facilitated settlement, and a third final stage. In the first stage of proceedings — a technology-enabled negotiation — the parties negotiate directly through the ODR platform.²⁶⁶ If that negotiation fails, the process may move to a second, "facilitated settlement" stage. The ODR provider assigns a third neutral who helps the parties reach an agreement.²⁶⁷ If, for any reason, the facilitated settlement stage fails or one or both parties to the dispute request to move directly to the next step,²⁶⁸ a third and final phase may commence. The ODR administrator informs the parties or sets out possible process options to choose for the parties.²⁶⁹ Regarding the proceedings, the Notes also indicate that the ODR process requires a platform for generating, sending, receiving, storing, exchanging, or otherwise processing communications.²⁷⁰ Ultimately, the notes provide specific direction on the commencement of the proceedings, the first two stages, appointment, power and functions of the neutral, language to be used, and governance of the proceedings.

3.5.2 Principles of Fairness and Due Process in eBay and Amazon ODR

The Notes suggest that ODR mechanisms' procedures should be based on fairness and due process principles.²⁷¹ It is necessary to define fairness and due process principles to understand whether eBay Dispute Resolution complies with such principles. In explaining the concept of

²⁶³ Official records of the General Assembly, Seventy-first session, A/RES/71/138.

²⁶⁴ UNCITRAL Working Group III, Thirty-third session, A/CN.9/WG.III/WP.140, para. 5.

²⁶⁶ *Ibid.*, para. 19.

²⁶⁷ *Ibid.*, para. 20.

²⁶⁸ *Ibid.*, para. 41.

²⁶⁹ *Ibid.*, para. 21.

²⁷⁰ *Ibid.*, para. 26.

²⁷¹ Section II, para. 7.

fairness, we could say that a dispute resolution mechanism should provide participants with a fair and equal process. However, we must consider the due process concept to determine if a process is fair and produces equitable outcomes.

Due process is " a course of formal proceedings carried out regularly and in accordance with established rules and principles, also called *procedural due process*."²⁷² The right to due process guarantees individuals the right to fair and equal treatment by an impartial third party. Art. 6 (1) of the European Convention on Human Rights (ECHR) states that everyone is "entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The same right is recognized by Art. 8 of the UN Universal Declaration of Human Rights: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."²⁷³ Also, parties in a proceeding should be informed of the nature of the accusation and have the right to defend themselves in person or through a legal representative's assistance. A third independent and unbiased neutral should decide based on the evidence presented by both parties. Parties should also be allowed to appeal the case of the opponent.

Due process is composed of two fundamental principles. The first principle, *Nemo iudex in parte sua*, can trace its origin to Roman law.²⁷⁴ It means no person should be a judge in a case in which they have a personal vested interest to ensure fairness in the judgment. The principle applies to any appearance of a possible bias to guarantee a judgment-bias free. The second principle, *Audi alteram partem* or fair hearing, means that each party should have an equal opportunity to present evidence and law.²⁷⁵ The first concept ensures that the third side in a dispute resolution process treats each party equally and impartially and does not have any bias that prevents them from evaluating a case in a fair and objective matter. The second concept ensures that each party can participate in the process, present their case, and have the right to appeal the opponent's case.

²⁷² Merriam-Webster. <https://www.merriam-webster.com/dictionary/due%20process> (accessed February 8, 2018).

²⁷³ On the right to due process see also Amendment V of the Constitution of United States of America 1789 (rev. 1992).

²⁷⁴ A Latin Brocard that can be found in the *Codex Iustinianus Repetitae Praelectionis* (534 C.E.), C. 3.5.1. The Codex, formally *Corpus Juris Civilis* ("Body of Civil Law"), is a collection of laws and jurisprudence developed and issued by order of the Byzantine emperor Justinian I from 529 to 565 C.E.

²⁷⁵ Jaap van den Herik and Daniel Dimov, "Can the eBay's Community Review Forum Fairly Resolve Disputes," *Proceedings of the 23rd Benelux Conference on Artificial Intelligence* 4, (November 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1955505 (accessed December 2, 2017).

As described in Chapter 3.4.2, eBay gives equal opportunities to the users to initiate the resolution process by going to the Resolution Center page and choosing among the options given to the buyer or the seller. The automated process offered by eBay seems to be designed to provide no systemic benefit to one party over the other.

Additionally, eBay allows the parties to negotiate directly before stepping in when a dispute regarding a transaction arises. If one of the parties opens a claim, eBay notifies the other. The seller has three days to respond to the buyer, and the buyer has four days to respond to the seller. Therefore, we may conclude that eBay guarantees that each party participates in the resolution process by providing equal and fair opportunities to report a problem, open a claim, and assist the parties through customer service.

Suppose the parties cannot resolve the dispute independently, and eBay must intervene and render a decision. In that case, the seller and the buyer have the right to defend themselves by sending information to support their claims and challenge the evidence presented by the other side. Once a decision is made, both parties have 30 days from the day the case is closed to appeal the decision by providing the appropriate documentation. The right guaranteed to sellers and buyers to defend their case and refute the opponent's claim may suggest that eBay applies the second principle of due process.

However, many have argued that eBay does not guarantee an unbiased decision-making process and would have a vested interest in favoring buyers over sellers. Data reported in section 3.6.4 reveals significant seller concerns regarding eBay's impartiality, which would not guarantee a fair resolution of disputes between buyers and sellers. According to some sellers, eBay would not seriously consider the evidence presented by sellers, which would not guarantee a fair hearing. Sellers would argue eBay would always side with buyers because of a direct business interest.²⁷⁶ The eBay "Buyer is Always Right" policy appeared in the

²⁷⁶“Why is Buyer always right?,” The EBay Community, last modified 2019, <https://community.ebay.com/t5/Selling/Why-is-Buyer-always-right/td-p/29693988>; “If the Buyer is Always Right, Who is Protecting the Seller?,” The EBay Community, last modified June 10, 2019, <https://community.ebay.com/t5/Selling/If-the-buyer-is-always-right-who-is-protecting-the-seller/td-p/27277238#:~:text=According%20to%20eBay%2C%20the%20buyer,in%20favor%20of%20the%20buyer.>

Campbell vs. eBay, Inc. lawsuit. eBay responded in court that under the terms of its user agreement, buyers and sellers permit eBay to make a final decision at its sole discretion.²⁷⁷

Like eBay, Amazon provides its users with equal opportunities to resolve disputes when they occur. Buyers and merchants are allowed to negotiate their disputes, and when they cannot resolve them via negotiation, Amazon provides a mechanism to address buyers' complaints. It guarantees buyers to file a claim against a merchant if goods were not received or were not as described. Equally, it allows merchants to respond and address the buyers' claims within a reasonable time. Amazon guarantees buyers to appeal if their claims are denied. Similarly, if sellers lose their complaints, they have the right to appeal. This may suggest that also Amazon applies the second principle of due process.

Amazon's dispute resolution policies and practices have drawn criticism from many sellers. One of the criticisms made by Amazon sellers is that they hold to high standards to ensure that buyers receive authentic, undamaged products. Yet, they risk having their account suspended in case of a complaint from a reputable buyer. Amazon frequently updates its policies, often vague and contradictory, making it more difficult for sellers to comply.²⁷⁸ Many sellers prefer to admit rather than dispute a complaint to avoid running the risk of having their account suspended. This would put sellers on an unequal footing in handling and resolving buyer disputes. Recently, prosecutors have investigated Amazon's treatment of third-party sellers, claiming that Amazon would penalize sellers for personal gain and control competition over products sold through its platform. This may result in concerns regarding Amazon's impartiality when deciding on seller-buyer disputes.²⁷⁹ However, more empirical data is needed to determine whether Amazon's dispute resolution complies with fairness and due process principles. Although the analysis of Amazon's mechanisms and policies for resolving disputes would suggest compliance with those principles, it would be advisable to investigate the feedback from Amazon's users and learn about their concerns and issues when dealing with disputes through Amazon.

²⁷⁷ "CAMPBELL V. EBAY, INC. | Case No. 13-CV-2632 YGR. | 20130906696 | Leagle.com," Leagle, last modified September 5, 2013, <https://www.leagle.com/decision/infcco20130906696>.

²⁷⁸ Bloomberg News, "After going," See also, <https://sellercentral.amazon.com/seller-forums/discussions/t/87d43784-11c1-4891-bcab-b440a9ab9369>.

²⁷⁹ Kim Lyons, "Prosecutors Are Investigating Amazon's Treatment of Third-party Sellers," The Verge, last modified August 3, 2020, <https://www.theverge.com/2020/8/3/21352990/new-york-california-ftc-amazon-investigation-marketplace>.

3.5.3 Accountability and Transparency in eBay and Amazon ODR

As suggested by the Notes, any ODR schemes must be transparent and clear on the process used to pursue dispute resolution. Users should rely on transparent and accountable resolution mechanisms to trust online dispute providers. Consumers cannot gain sufficient insights regarding the alternatives offered without transparency and adequate knowledge of the steps they need to take and the process to resolve their dispute. The principle of transparency makes available the information that parties need to know when participating in a resolution proceeding.

To find information on how to resolve a problem with a transaction, eBay users need to go through the Help & Contact page, which can be found at the top or bottom of almost any eBay page. This page provides users with different sections (i.e., Return an item for a refund, Get help with an item that hasn't arrived), information, and Help Art.s. By clicking on any of the links, users will access useful art.s on solving most issues related to their transactions. Additionally, users can find details about returns and canceled orders by going to the Purchase History. As previously mentioned, customer service has replaced the eBay Dispute Center. Although the Dispute Center still exists, users cannot easily access it. Many users have wondered what happened to the Dispute Center and how to access it.²⁸⁰ Instead, through the customer service page, they are provided with lots of information through a series of art.s that require an average of 3-5 minutes of reading. Navigating through all this information may become difficult and frustrating for users, especially new users unfamiliar with the platform. Suppose users cannot find responses to their issues in these art.s. In that case, a chatbot is available to answer their questions and resolve buying, selling, or account issues, including appealing a decision on a case. They can also contact eBay by phone but may risk waiting an average of half an hour to talk to a representative. This process can frustrate users who need to quickly solve their questions or problems.

Transparency refers to an environment where the administrator's website policies and information related to buying or selling products should be available in a user-friendly,

²⁸⁰ Ebay, "Where's the Resolution Centre Gone?," UK EBay Community, last modified December 5, 2022, <https://community.ebay.co.uk/t5/Business-Seller-Board/Where-s-the-Resolution-Centre-gone/td-p/6985473>.

accessible manner.²⁸¹ eBay's move from the Resolution Center to Customer Service as a place to address and resolve users' problems has undoubtedly created confusion.

A crucial step for increasing transparency in ODR processes is ensuring parties know of any disputes against them. When an eBay buyer or seller files a claim or disputes a transaction or a payment, the other party is immediately notified via email or a mobile notification and can solve the problem before eBay intervenes. However, some users have reported on the eBay community having issues receiving notifications regarding a claim.²⁸²

Another critical factor for the dispute resolution process to be transparent is that users can access information throughout the various stages of the proceeding. In this regard, on their account, eBay sellers and buyers can find and track open requests or cases or retrieve information regarding submissions and claims that have been closed. Finally, to trust that an outcome is fair, disputants need to know who decides their dispute (a human decision vs. a computer decision). They also need to understand how the documentation used to support their case is evaluated and whether the decision process is uniform and predictable. Under the My eBay or the Requests and Disputes pages, buyers and sellers can get the information needed to know how and when a decision is made and what documentation they may need to upload to defend or appeal a case. They can also check the status of payment disputes.

When transparency exists, it provides a powerful tool for allowing sellers and buyers to hold the opposing side accountable. eBay holds sellers accountable through a public reputation system, allowing buyers to leave sellers positive, negative, and neutral reviews. However, sellers are not allowed to leave negative or neutral feedback for buyers. Many sellers think this is unfair and that such a restriction leaves sellers unprotected from delinquent buyers.²⁸³ eBay used to let sellers leave negative feedback for buyers, but it created a retaliatory issue. When unhappy buyers left negative reviews, sellers would leave negative feedback in revenge. However, eBay has argued that new policies and tools were implemented to help sellers protect their reputations and hold buyers accountable. Such policies include stricter buyer requirements that allow sellers to remove buyers with many policy violation reports or unpaid items. At the

²⁸¹ See Section II, para. 12.

²⁸² eBay Community, Community.ebay.com, accessed February 2, 2022, <https://community.ebay.com/t5/Share-eBay-Technical-Issues/Do-not-receive-Email-Notifications-Related-to-Claims-Submitted/m-p/30489737>.

²⁸³ See for examples comments let by sellers at <https://community.ebay.com/t5/Selling/Why-is-there-zero-accountability-for-Buyers/td-p/30421788>.

same time, eBay holds buyers accountable through private reporting from sellers; it relies on sellers to inform when a buyer has violated policy. It has also made it easier to remove negative feedback from suspended buyers. eBay protects and awards sellers and buyers through its feedback system and other tools, making them accountable for possible unprofessional and dishonest behaviors.

To find information on resolving an issue related to a transaction, Amazon users can go to their account or the Return and Purchase section, check their order status, and report a problem with their order.²⁸⁴ The system allows users to request a refund, return or replace the item, or contact the seller, depending on the problem's nature and payment method. Users can also contact customer service through their account and get help with a recent transaction. Amazon can provide users with the information needed to resolve their problems through the platform or a chatbot. Accessing information about resolving a problem with an order appears simpler, faster, and more accessible than eBay. It is an automated process but still allows the user to contact the seller if he is not satisfied with the answers provided by the system. The information and procedures that Amazon provides are easily accessible and available in a user-friendly manner.

As previously stated, increasing transparency in ODR processes must ensure that platform users are informed of any claim submit it again them. In this regard, Amazon notifies sellers via email for every claim and lists each claim in the Seller Central portal. Amazon sends sellers an email with details and requests a response, allowing them to present their side of the issue. Sellers can respond to a claim by replying to the email notification with the requested information. Buyers can view the status of their claims by going to their account and selecting Get help with the order.

Similarly, sellers with a Seller Central account can manage their claims by visiting the A-to-Z Claims page under the Performance tab in Seller Central. The Amazon messaging system also updates buyers and sellers on their claims and notifies them in case more information is needed during the claim investigation. Amazon's resolution process appears transparent, allowing buyers and sellers to access information and receive updates about their claims throughout the resolution process. Complications may arise when a given seller receives many claims from several consumers. It may be challenging to follow up on each claim and provide the

²⁸⁴ "Return Items You Ordered," Amazon.com. Spend Less. Smile More, accessed February 15, 2023, <https://www.amazon.com/gp/help/customer/display.html?nodeId=G6E3B2E8QPHQ88KF>.

documentation needed for each investigation. In recent years, Amazon has also increased the number of third-party sellers using its platform, raising concerns and issues about reliability and competence in resolving consumer complaints.

Amazon addresses sellers' accountability through a feedback system. Buyers can leave comments, feedback, and ratings concerning an order from a third-party seller.²⁸⁵ They have 90 days from the order date to do so. Amazon has the right to remove feedback that is not about the buying experience, is inappropriate, or violates one of Amazon's guidelines.²⁸⁶ Sellers can request a customer review on their products after orders are delivered through the Amazon messaging system. This seller feedback system allows buyers to identify trustworthy sellers and for Amazon to monitor and evaluate sellers' performance. In 2021, Amazon removed the ability for sellers and vendors to comment on reviews generating criticism among sellers, who saw this as a way to address both positive and negative feedback from buyers.²⁸⁷ However, sellers can send a direct message to buyers who leave low ratings and offer to fix the issue. They also allow reporting abusive reviews that do not abide by Amazon's guidelines and request to delete them.²⁸⁸

One avenue for further research would be to investigate the transparency of Amazon's complaint mechanisms in more detail. This would allow for a comparative analysis of the dispute resolution system of two of the world's leading e-commerce companies, eBay and Amazon.

3.6 ODR IN E-COMMERCE: CONSUMER EXPECTATIONS AND KEY ISSUES

²⁸⁵ Amazon.com, "Leave Third-Party Seller Feedback - Amazon Customer Service," Amazon.com. Spend Less. Smile More, accessed February 15, 2023,

https://www.amazon.com/gp/help/customer/display.html?ref_=hp_left_v4_sib&nodeId=G5346HRPNJFYRA4.

²⁸⁶ "Comments, Feedback, and Ratings About Sellers," Amazon.com. Spend Less. Smile More, accessed February 15, 2023,

https://www.amazon.com/gp/help/customer/display.html?ref_=hp_left_v4_sib&nodeId=G5T39MTBJSEVYQWW.

²⁸⁷ Kiri Masters, "A Short History Of Amazon's Product Review Ecosystem, And Where We Are Today," Forbes, last modified March 22, 2021, <https://www.forbes.com/sites/kirimasters/2021/03/22/a-short-history-of-amazons-product-review-ecosystem/?sh=290653da2b86>.

²⁸⁸ "Remove Marketplace Seller Feedback - Amazon Customer Service," Amazon.co.uk: Low Prices in Electronics, Books, Sports Equipment & More, accessed February 15, 2023, <https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=GL8DXVU3MMGKKXT7#:~:text=Go%20to%20Your%20Submitted%20Feedback,Select%20Remove>.

Consumer expectations are an essential aspect to consider for the success of an online business. Often, if not addressed, these expectations create conflicts and problems that require a strategy and a resolution model that can give fast and precise answers to the consumer. Expectations and effectiveness are closely linked. The more a system can meet consumers' expectations, the more effectively it will prevent and resolve disputes. We need data to understand if an ODR system can meet consumers' expectations, be effective, and generate consumer trust.

Furthermore, suppose we limit ourselves to collecting data showing the total number of disputes referred to ODR or the number of disputes resolved in a given period. In that case, this may not be sufficient to establish a direct relationship between the effectiveness of an ODR system and consumer satisfaction. We need data to indicate the type of problems, concerns, and issues experienced by consumers when using complaint-handling procedures or ODR and relate them to their expectations. As suggested by Kulp and Schmitz, ODR designers and researchers should talk with those "who are not connected with the court or the law before they use a dispute resolution or ODR process"²⁸⁹ to understand what they think about the process and what they expect from it. However, the lack of data and quantitative and qualitative analysis in the literature makes this task difficult.

This section tries to respond to the need for data. It stimulates a reflection on the importance of putting the consumer at the center of the debate. Consequently, the consumer's needs, concerns, and expectations regarding complaint handling procedures and the resolution of e-commerce disputes must be identified and investigated. For this purpose, this research analyzed the complaint-handling system provided by eBay.

It was necessary to carry out quantitative and qualitative data analysis. Secondary data were generated manually by gathering eBay user feedback on the Better Business Bureau (BBB) website, including over 500 eBay-verified customer reviews.

For over 100 years, the Better Business Bureau (BBB) has been one of the go-to resources for evaluating a company's performance and reliability. It must be noted that the BBB collects revenue through corporate memberships, which allows consumers to access its directory and search for specific business profiles at no cost. Each profile contains the business' information

²⁸⁹ Heather Kulp and Amy J. Schmitz, "Real Feedback from Real People: Emphasizing User-Centric Designs for Court ODR," *Dispute Resolution Magazine* 26, no. 2 (2020): 7.

and shows its BBB grade (A to F grading system), customer reviews, and information about consumer complaints. Critics have argued a conflict of interest as the BBB gets most of its revenue from companies it grades. According to some, this conflict of interest would undermine the neutrality of the grading system.²⁹⁰

The study involved cross-sectional research based on a content analysis of secondary data generated from eBay customer reviews. The study did not require ethical approval as the data were generated from a publicly available source. Also, data extraction did not identify any individual users and maintained the anonymity of the responses.

3.6.1 Data Extraction

A detailed search was conducted on the Better Business Bureau (BBB) website for the investigation. Five hundred (500) reviews were revised from December 2016 to December 2017. A quota of 229²⁹¹ eBay user reviews was collected. Of the 229 reviews, 215 were negative, eight were positive, and six were neutral. Sellers left 57% of the reviews and buyers 43%. The collected reviews centered on various issues, including *transaction problems, items not delivered, items refunded but not returned to the seller, defective items, shopping or selling frauds and scams, protection policies, and customer service*. As of December 2017, eBay Inc. had received 3.74 out of 5 stars and a BBB Rating of A+.²⁹² It is worth noting that, as of March 2022, eBay has 1.05 stars, averaging 1063 customer reviews. However, it still maintains an A+ rating.²⁹³

Table 3.5 Description of Data

²⁹⁰ In 2010, ABC News did a piece proving that paying membership fees would guarantee an A+ rating to businesses. See ABC News, “Terror Group Gets ‘A’ Rating From Better Business Bureau?,” ABC News, last modified November 12, 2010, <https://abcnews.go.com/Blotter/business-bureau-best-ratings-money-buy/story?id=12123843>. In a 2015 investigation, CNNMoney found that approximately 100 businesses had ratings of A- or higher despite being subject to regulatory actions by the government. See Blake Ellis and Melanie Hicken, “Slammed by the Government, A-rated by the Better Business Bureau,” CNNMoney, last modified September 30, 2015, <https://money.cnn.com/2015/09/30/news/better-business-bureau/index.html?iid=EL>.

²⁹¹ This represents the actual number of reviews that were posted on the BBB’s website by eBay customers from December 1, 2016 to December 31, 2017.

²⁹² *BBB Accredited Business Profile*. <https://www.bbb.org/losangelessiliconvalley/business-reviews/online-shopping/ebay-in-san-jose-ca-204015/reviews-and-complaints> (accessed February 24, 2018).

²⁹³ BBB ratings represent the BBB’s opinion of how the business is likely to interact with its customers. The BBB rating is based on information BBB obtained about the business, including complaints received from the public. Customer Reviews are not used in calculating the rating.

Investigation Site	BBB
Investigation Period	12/2016 - 12/2017
Number of Reviews	
Examined	500+
Quota Collected	229
Negative Reviews	215
Positive Reviews	8
Neutral Reviews	6

3.6.2 Data Analysis

The data were analyzed using a thematic analysis method. The data collected were examined considering the research objectives. Consumer reviews were read several times to obtain a sense of the overall data. At the same time, memos were written, such as short phrases, ideas, or keywords, in the margins to facilitate later analysis.

3.6.3 Results

This section presents the findings resulting from 229 eBay consumer reviews. The analysis synthesized the eBay buyers' and sellers' comments and is organized around the following central thematic units: *fairness and due process* (3.8.4), *consumer protection* (3.8.5), and *customer service efficiency* (3.8.6). These themes allowed careful analysis of the perspectives of eBay buyers and sellers. Table 3.6 shows the three central thematic units and the percentage of negative reviews.

Table 3.6 Thematic Units

Main Thematic Units	% of Total Negative Reviews	Buyers %	Seller %
Fairness and Due Process	33	28	5
Consumer Protection	30	51	49
Customer Service	20	50	45
Other	17		

3.6.4 eBay Consumer Perception of Fairness and Due Process

The first theme explored by the data was the eBay user perception of fairness and due process applied by the eBay Resolution system.

*Due process*²⁹⁴ represents a fundamental principle in all legal matters and proceedings. It guarantees that all legal procedures set by statute and court practice are followed for everyone so that no prejudicial or unequal treatment will result.²⁹⁵ It is based on the principles explored in chapter 3.8.2 of impartiality and fair hearing. Parties in a proceeding should receive fair and equal treatment by an impartial third party. A third independent and unbiased judge should decide based on the evidence presented by both parties. Parties should also be allowed to appeal the case of the opponent. The Technical Notes on ODR adopted by the UNCITRAL commission encourage providers to implement practices and procedures of ODR mechanisms based on fairness and due process principles.

In that regard, analyzing the data collected from reviews left by eBay users reveals significant concerns regarding impartiality. Among the users who left a negative review on the BBB eBay webpage, 33% (28% sellers vs. 5% buyers) believe that eBay's adjudication process is not impartial (Table 3.7). Concerns were raised primarily by sellers²⁹⁶ who felt that eBay "[They] always side with the buyers when called to intervene and decide a claim." Other sellers commented that eBay representatives "[They] will always rule in favor of the buyer when a

²⁹⁴ The universal guarantee of due process can be found in the Fifth Amendment to the United States Constitution, <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-6.pdf>

²⁹⁵ *Dictionary Law*. <https://dictionary.law.com/Default.aspx?selected=595> (accessed February 24, 2017).

²⁹⁶ 22% of sellers left comments stating that eBay favorites or sides with buyers when deciding claims.

dispute arises." "Unfortunately, eBay always favors the buyer's word over the word of the seller 100% of the time."²⁹⁷ Only a few buyers left reviews claiming that eBay sides with sellers.²⁹⁸ A fair and equal resolution process may concern the sellers more than the buyers. Sellers are concerned with the "cost of doing business," consisting of insertion, final value, shipping,²⁹⁹ and PayPal fees. If they lose a claim opened by a buyer, there might be the risk of having to issue a refund without the certainty of receiving their items back. However, some buyers claimed to have lost many disputes because eBay "takes kindlier their merchants than their buyers."

On the principle of fair hearing, some sellers claimed that "eBay decides in favor of Buyer without hearing the Seller" and "believes Buyer's statement without verifying facts." Another seller reported his personal experience and dissatisfaction with the eBay dispute resolution process. In his review, he stated, "I have sent pictures to eBay, but they still insist they made the right decision of refunding the buyer. eBay rule is not fair to me and all other honest sellers." Most sellers felt like eBay would not consider the evidence presented by the sellers or would not review the facts of the case to arrive at a fair dispute resolution. Most cases dealt with the return of items by buyers as not described or defective. The issue of eBay's "Buyer is Always Right" grievance policy concerning disputes between buyers and sellers³⁰⁰ appeared in one of the plaintiff's claims in the *Campbell vs. eBay, Inc.* lawsuit. Also, it has been at the center of a debate that may suggest an economic interest behind eBay's dispute resolution decisions in favor of buyers.³⁰¹

Table 3.7 eBay's Adjudication Process

Primary Issue	% of Total	Buyers	Seller
	Negative	%	%
	Reviews		

²⁹⁷ 50% of seller's negative reviews were about eBay's "unfair" resolution process.

²⁹⁸ 0.05% of the total reviews.

²⁹⁹ Aron Hsiao, "How Much You Pay to Trade on EBay," The Balance Small Business, last modified May 29, 2009, <https://www.thebalance.com/what-does-it-cost-to-trade-on-ebay-1140175>.

³⁰⁰ "CAMPBELL V. EBAY, INC. | Case No. 13-CV-2632 YGR. | 20130906696 | Leagle.com," Leagle, accessed February 25, 2018, <https://www.leagle.com/decision/infcco20130906696>.

³⁰¹ David Segal, "Lesson From a Doughnut Fryer Debacle: Let the EBay Seller Beware (Published 2016)," The New York Times - Breaking News, US News, World News and Videos, last modified July 30, 2016, <https://www.nytimes.com/2016/07/31/your-money/lesson-from-a-doughnut-fryer-debacle-let-the-ebay-seller-beware.html>.

Concerned with eBay's	33	5	28
Adjudication Process			

3.6.5 Consumer Protection

The second central theme in this study's conceptual framework and findings was eBay users' perception of sellers' and buyers' consumer protection. As noted by Neacsu, the "fast and easy development of e-commerce has led to the necessity of consumer protection in cyberspace, where trade takes place, to ensure consumer safety and security matters."³⁰² For e-commerce providers, maintaining the trust and confidence of customers is a critical factor in business success. Therefore, providing the best possible consumer protection is paramount.

The data collected in this study investigate eBay users' issues with eBay protection policies (Money Back Guarantee, Seller Protection) offered to sellers and buyers. In this regard, 30% of reviewers (51% sellers v. 49% buyers) expressed concerns regarding the eBay protection policy (Table 3.8).

Two were the main issues of complaints indicated by sellers regarding buyers' Money Back Guarantee policy. First, sellers claimed this policy promotes buyers' dishonesty and fraudulent behaviors.³⁰³ A seller's comment states, "I sold a pair of Prada shoes that were in excellent condition. When the buyer got them, they falsely claimed they were defective. A case was opened against me. The buyer sent me a pair of shoes similar to but not the same as the ones I sent. [...]" "eBay refunded the buyer and also charged me for the return shipping." Another seller claims that "eBay's policies are unfair to sellers and make it easy for dishonest buyers to defraud them. [...] I don't recommend eBay for selling or buying. Their rules are not fair to sellers. You have people that use items for the last moment then request a return."

Many sellers reported their experience with returning items as not described or defective. Some claimed that buyers used the items and then returned them; others said they issued a refund,

³⁰² Nicoleta A. Neacsu, "Consumer Protection in Electronic Commerce," *Bulletin of the Transilvania University of Braşov* 9, no. 1 (2016): 301.

³⁰³ 10% of sellers reported similar experiences with the Money Back Guarantee program.

but buyers never returned the purchased item. One seller comments, "Policies as of 2016 December are set to be buyer-centric only. Seller policies do not prevent any abuse/fraud by customers as their return policy is strictly accepting all returns on the trust of the customer." Even though eBay's rules require³⁰⁴ buyers to send disputed items back, refunds are sometimes released before this happens. Sometimes buyers are refunded even when they send back used, damaged, or in certain instances, substitute items. These scenarios bring up sellers' second issue with the Money Back Guarantee Policy.

A seller can ask eBay to intervene before issuing a refund when a buyer returns a damaged or substitute item by eBay's rules. A seller has a week to resolve the dispute with the buyer before eBay intervenes and gives a refund. However, a dishonest buyer can ignore contact and open a claim directly with eBay. Reviews left by sellers may suggest that, in some cases, eBay will issue an automatic refund without considering the sellers' evidence. In his review, a seller states, "You can order anything and within 30 days, say it was not as described and open a claim to get a full refund. The judge and jury for the claim: eBay! And they assume the buyer is telling the truth, no matter who the buyer is." Another says, "I sold an item on eBay. It was working without any issues when I packaged it and sent it. However, the buyer stated it did not work and opened a claim. eBay decided to side with the buyer with no input from me, merely taking their word over mine." The overall seller's experience raises issues about buyers' accountability and how eBay may enforce or apply policies to prevent buyers' dishonest behaviors.

Many buyers also left negative reviews regarding eBay's buyer protection policy. One buyer argues that "eBay is quick in refunding but does not address issues related to packaging and shipping." Another buyer feels that eBay "is quick to send a refund if problems occur instead of addressing the real issues." Other buyers shared their negative experiences with items that were purchased but never delivered or items that were returned to the seller, but a refund was not issued. Other buyers were victims of scams, such as purchasing non-existing items from reputable sellers. One buyer stated, "eBay allows fraudulent activities from Sellers to take place without protecting Buyers." Fraudulent activities may suggest a lack of transparency of the seller, which may sometimes appear to have a legitimate reputation.

³⁰⁴ "eBay Money Back Guarantee Policy," eBay, accessed February 28, 2018, <https://www.ebay.com/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210>.

Another specific complaint regarded the feedback system and policy. Sellers argue that the eBay Feedback policy is unfair to sellers and favors buyers' abusive behaviors. Since 2008, eBay does not allow sellers to leave negative or neutral feedback for buyers.³⁰⁵ They are only allowed to leave positive feedback. Instead, buyers can leave both positive and negative feedback for sellers on any item sold until seven days after purchase. One seller commented, "[they] won't even allow sellers to leave negative or even neutral feedback on a buyer's account, yet will allow buyers to leave negative feedback on a seller's account, even if it is unwarranted." Sellers argue that buyer can ruin their reputation by leaving untruthful feedback. One seller stated, "the buyer had left me a terribly negative review which ruined my entire eBay account. No one is currently bidding on my items ever since, due to her negative feedback." Complaints regarding the eBay feedback policy also come from buyers. One buyer in his review said, "eBay allows sellers to defraud buyers, and when the buyer complains and asks eBay to step in, eBay removes any trace of the fraud by deleting the feedback." Another buyer complained that he could not leave neutral or negative feedback for seven days because the seller was a Power Seller.³⁰⁶

The data analysis suggests that buyer accountability and seller transparency should be considered to make eBay a safer marketplace. Also, the research reveals that both sides have concerns and issues with the eBay feedback system. Overall, eBay users demand more transparency and fairness in consumer protection and feedback policies.

Table 3.8 eBay's Protection Policy

Primary Issue	% of Total	Buyers	Seller
	Negative	%	%
	Reviews		
Concerned with eBay's Protection Policy	30	51	49

³⁰⁵ Ebay, "Buyer Accountability," accessed February 28, 2017, <https://pages.ebay.com/services/forum/sellerprotection.html>.

³⁰⁶ To become a Top-Rated Seller, also known as 'Power Seller', one must have an eBay's account that has been active for at least 90 days and have at least 100 transactions and \$1,000 in sales during the last 12 months.

3.6.6 Customer Service Efficiency

The third theme explored by the data was eBay users' problems with eBay Customer Service. Lu, Berchoux, Marek, and Chen noted that customer service quality is an important driver and predictor of customer satisfaction.³⁰⁷ Customer satisfaction measures customers' happiness when they do business with a company.³⁰⁸ It gives business owners a metric to understand how well a product or service meets or exceeds customer expectations. Several studies³⁰⁹ have investigated the relationship between service quality and satisfaction, suggesting that customer service influences consumers' choice of retailers and other service providers. Often consumers make their choices based on their perception of the level of customer service they expect to receive after the sale in case a problem arises.³¹⁰ Retailers and service providers should strive to provide customer service that helps dissatisfied customers by listening to their complaints and offering solutions to their problems. Consumers who receive fair and respectful treatment when a problem arises are more likely to purchase again from the same seller³¹¹ and may even engage in positive word-of-mouth.³¹² The quality of customer service is critical to long-term profitability and growth.

The data collected in this study show that 20% of the reviews left by eBay users (50% buyers and 50% sellers) regarded issues with Customer Service (Table 3.9). Of this 20%, the clear majority (95%) reported a negative experience with customer service. In this study, eBay sellers and buyers often described their dissatisfaction regarding interactions with eBay representatives.

³⁰⁷ Carol Lu, Celine Berchoux, Michael W. Marek and Brendan Chen, "Service Quality and Customer Satisfaction: Qualitative Research Implications for Luxury Hotels," *International Journal of Culture, Tourism, and Hospitality Research* 9, no. 2 (2015): 170. doi:10.1108/ijcthr-10-2014-0087.

³⁰⁸ "Customer Satisfaction," Cambridge Dictionary | English Dictionary, Translations & Thesaurus, accessed February 28, 2017, <https://dictionary.cambridge.org/us/dictionary/english/customer-satisfaction>.

³⁰⁹ Gordon H.G. McDougall and Terrence Levesque, "Customer Satisfaction with Services: Putting Perceived Value into the Equation," *Journal of Services Marketing* 14, no.5 (2000): 392-410; Steven A. Taylor and Thomas L. Baker, "An Assessment of the Relationship between Service Quality and Customer Satisfaction in the Formation of Consumers' Purchase Intentions," *Journal of Retailing* 70, no. 2 (1994): 163-168; Jeffrey G. Blodgett, Kirk L. Wakefield and James H. Barnes, "The Effects of Customer Service on Consumer Complaining Behavior," *Journal of Services Marketing* 6, no. 4 (1995): 31-42.

³¹⁰ Jeffrey G. Blodgett, Kirk L. Wakefield, and James H. Barnes, "The effects of customer service on consumer complaining behavior," *Journal of Services Marketing* 9, no. 4 (1995): 31, doi:10.1108/08876049510094487.

³¹¹ Ibid, 32.

³¹² Ibid, 31.

Let us consider reviews such as:

- "customer service was rude,"
- "customer service talked to me like I was no more valuable than the dirt beneath their feet,"
- "no apology, no concern over the loss of my package [...] and rudely telling me just to suck it up."³¹³

These reviews suggest that dissatisfied customers expect to receive a fair solution to their problems and be treated with courtesy and respect. Another issue was the time users spent dealing with customer service on the phone.

Many eBay users,³¹⁴ sellers, and buyers reported long waits before talking to a representative or making several calls before getting some help. Comments like "customer service takes forever and is little more than an answering service" or "huge waste of time and energy" express the frustration experienced by eBay users when dealing with eBay customer service. Some consumers reported having spent many hours on the phone with eBay representatives. Others were transferred from department to department without a resolution ("five calls, totaling over 2 hours on the phone, did not resolve the problem"). Difficulties talking to a supervisor were also described: "I beg them to talk to a supervisor, and then someone higher than a supervisor. Most of the time, everyone is too busy"; "I requested a supervisor, and they told me they were all tied up on other calls." Many eBay users complained about the overall professionalism of the customer service representatives.³¹⁵ Users thought representatives did not have enough training and were unprofessional and unhelpful,³¹⁶ unknowledgeable of eBay policies, misleading and contradictory. Some comments suggest that users questioned eBay customers' service professionalism, knowledge, and ability to help resolve their problems. Here are some examples: "customer service representatives make up rules that are not even in their policies" or "when I spoke with eBay on three separate occasions, I was told three different outcomes,"

³¹³ Of the 20% of eBay users who complained about customer service, 27% described customer service as "rude".

³¹⁴ 31% reported long waits and phone calls.

³¹⁵ 77% described eBay customer service as unprofessional, unhelpful, not trained, misleading, and uninformed about eBay policies.

³¹⁶ In 35% of the reviews, the word "unhelpful" was used when complaining about eBay customer service.

The data analysis indicates that when eBay users seek help through customer service, two main factors may determine their satisfaction with the service:

1. Remedy offered is quick, professional, and helpful;
2. Customer service treats them with courtesy and respect.

Table 3.9 eBay's Customer Service

Primary Issue	% of Total Negative Reviews	Buyers %	Seller %
Problems with eBay's Customer Service	20	50	50

3.6.7 Research Findings

Data analysis revealed common issues among eBay users when resolving disputes through the Dispute Center. The main problems experienced are shown in Table 3.10. The analysis also reveals central themes, "Emerging Themes," concerning areas that need consideration and that users expect should improve.

Table 3.10 Reported Issues with eBay Dispute Resolution.

Thematic Units	Reported Issues	Emerging Themes
Fairness and Due Process	Fairness Equality Neutrality	Impartiality
Consumer Protection	Abusive Behaviors Fraudulent Activities	Accountability and Transparency Fairness

	Frauds	Trust
	Unfair Policies	
Customer Service	Competency	Efficiency
	Professionalism	
	Policies	
	Knowledge	
	Respect	

3.6.8 Study Limitations

This study has some limitations. The first limitation is the number of reviews examined. The 229 customer reviews in this study represent only a small percentage of eBay users and do not represent the global population of online consumers.

The second limitation is the timeline of the data collected. This study refers to reviews left by eBay users from December 2016 to December 2017. Due to e-commerce's continuous and fast changes, the findings risk being outdated. The third and significant limitation of this study was the inability to fully explore expectations and issues experienced by consumers in resolving e-commerce B2C low-value disputes.

This study's limitations have an impact on the generalizability of the findings. However, the data collection aimed to tackle some critical issues eBay consumers experienced when resolving low-value e-commerce disputes. It also aimed at understanding their needs and concerns. The investigation revealed critical findings on resolving low-value e-commerce disputes and showed a correlation between ODR and trust.

3.7 SUMMARY

In the last two decades, the rapid growth of e-commerce has radically changed the global market and drastically influenced how consumers shop. The development of an increasingly vast and borderless marketplace has allowed many businesses to reach distant consumers and has given consumers access to various products and services, which have become more affordable thanks to the growing competition.

However, alongside many advantages and benefits, e-commerce has also brought challenges related to cybersecurity, processing sensitive data, and protecting consumer rights. The rapid growth of e-commerce has also increased the frequency of online disputes between merchants and consumers. New forms of alternative justice have become necessary to provide consumers with accessible, efficient, and cost-effective means of resolving low-value disputes unsuitable for the traditional justice system provided by the courts. ODR has proven vital in B2C disputes and represents an alternative to the online marketplace's lack of access to justice.

This chapter examined the relationship between e-commerce and ODR and the type of dispute resolution mechanisms offered by internet intermediaries. In particular, it analyzed the complaint handling and dispute mechanisms provided for consumers by two of the largest and most well-known e-commerce intermediaries, eBay and Amazon.

First, it described how eBay and Amazon help users solve their problems with e-commerce transactions of goods. Specifically, it analyzed the complaint handling and dispute resolution systems offered and tried to classify them from a legal perspective.

Second, it investigated whether the ODR procedures applied by eBay's Dispute Resolution and Amazon Dispute Programs comply with the principles of fairness, due process, accountability, and transparency adopted by the UNICTRAL in its Technical Notes on Online Dispute Resolution. It concluded that respect for these principles is essential to eBay's and Amazon's success.

It argued that the complaint and dispute resolution mechanisms adopted by eBay and Amazon represent an actual example to follow by other platforms offering online products or services.³¹⁷

³¹⁷ Policies of newer companies like Airbnb (really, the eBay of travel) or Uber3, or TaskRabbit reflect the lessons from eBay's experience. See Colin Rule, "Designing a Global Online Dispute Resolution System: Lessons Learned from eBay," *University of St. Thomas Law Journal* 13, no. 2 (2017): 369.

Adopting ODR processes by online marketplaces can give consumers adequate tools to resolve disputes and encourage loyalty and trust.

Moreover, this chapter tried identifying consumers' overall issues and expectations using complaint and dispute resolution processes. Many ODR experts and scholars have proposed design systems for ODR to help resolve B2C e-commerce disputes efficiently, quickly, and securely. However, little data is available to understand what consumers expect from ODR, the problems and issues they experience when navigating through an online complaint handling and ODR system, and what works and needs improvements. More quantitative but, above all, qualitative research is necessary to address these issues to develop complaint-resolution processes that respond to market needs and provide adequate consumer protection. Understanding consumers' problems, concerns, and needs is essential to designing and implementing ODRs that consumers can trust. In this way, ODR can, in turn, contribute to improving consumer confidence in the digital market and, at the same time, offer instruments of justice that protect their rights.

This study investigated and tackled some critical issues experienced by users when resolving low-value e-commerce disputes. To this end, a share of reviews left by eBay users on the BBB website was collected and analyzed. Data indicates that eBay users, especially sellers, perceive the complaint handling and dispute resolution processes as biased. Also, the investigation reveals a lack of trust in protection policies and issues and concerns about feedback systems. Users reported that feedback ratings and reviews often led to both buyers' and sellers' unfair practices and fraudulent actions. Finally, data show that eBay users expect customer service to respond quickly, give consistent answers, and provide fair solutions. They also expect customer service representatives to be knowledgeable about policies and listen to and treat them respectfully. The findings suggest that customer services are critical in determining users' satisfaction, building trust in dispute resolution mechanisms, and, ultimately, in e-commerce.

The research findings indicate that five main areas require consideration and improvement: impartiality and fairness, transparency and trust, and efficiency. This study has shown that e-commerce vendors must consider the abovementioned elements when designing, implementing, and offering ODR for resolving e-commerce disputes.

Finally, the research verified how large electronic platforms for intermediation between suppliers of goods and services and consumers - the most exemplary, Amazon and eBay - have evolved to offer an environment of greater trust for their customers. They have spontaneously integrated into their platforms different prevention, assurance, and resolution tools such as feedback and rating systems, reputation tools, purchase protection programs, protection policies for sellers and buyers, and tools to quickly and easily prevent and resolve B2C disputes arising from transactions on their platforms. They have also combined communication and customer handling services, negotiation between buyers and merchants, Money-Back Guarantees for refunds, assurance programs to obtain a complete reimbursement, ODR tiered systems that may include third-party arbitrators when negotiation between parties is unsuccessful.

CHAPTER FOUR

ADR AND ODR IN THE INTERNATIONAL CONTEXT

4.1 INTRODUCTION

This part offers an overview and analysis of the existing worldwide legal framework regulating alternative dispute resolution (hereinafter ADR) and online dispute resolution (hereinafter ODR). It is worth noting that ODR can be considered a direct outgrowth of ADR and, therefore,

operates in the legal landscape already created for ADR.³¹⁸ However, ODR has grown further, giving rise to pioneering ways to resolve disputes beyond the traditional ADR categories.³¹⁹

The analysis aims to evaluate the legislative initiatives that have tried to facilitate the implementation of out-of-court dispute resolution processes, particularly those that have used technology to enhance access to justice and promote consumer trust. The goal is to identify the strengths and weaknesses of each initiative and proceed with a global vision of the ADR and ODR legal frameworks that considers the experiences and successes achieved by each country.

Attempts to harmonize international dispute resolution procedures for the online setting have proved problematic. This chapter argues that the lack of uniform procedures does not facilitate the promotion and use of ODR and ultimately affects consumer trust in ODR. Intergovernmental initiatives and organizations such as the Singapore Convention and ASEAN can encourage and promote the adoption of ADR and ODR systems and cooperation between states in seeking and implementing common regulations and standards.

This chapter also discusses the state of the art in ADR and ODR in different countries at an international level by geographic zones. The chapter is divided into four parts corresponding to four geographical areas: Northern America, Latin America, Africa, and Asia. The chapter does not include the European Union (EU). A separate chapter (Chapter Five) has been dedicated to discussing ADR, ODR, and complaint-handling mechanisms that the EU has promoted to ensure a high level of consumer protection and increase consumer confidence in the single internal market.

4.2 NORTH AMERICA

North America has always been a point of reference in ADR and ODR. ADR grew in popularity throughout the twentieth century as an alternative to litigation. Particularly in the 1960s, the proliferation of disputes and increasing discontent with the judicial system resulted in the development of alternative dispute mechanisms like mediation. Federal and state governments started utilizing and including ADR in many programs to facilitate the resolution of matters.

³¹⁸ Colin Rule, "ODR Around the World," Tylertech, last modified August 14, 2019, <https://www.tylertech.com/resources/blog-art.s/odr-around-the-world>.

³¹⁹ Michael Legg, "Online Alternative Dispute Resolution," *Precedent AULA* 46 (2017).

The legal community recognized the importance of ADRs in dispute resolution, and many legal firms began to offer mediation and arbitration services to individuals and businesses. ADR as an alternative to courts is firmly established in both the US and Canada.

As mentioned in Chapter 1 (2), the first ODR initiatives began in the United States (US) and Canada with the advent of the Internet and the development of online commerce. Initially, these initiatives mainly concerned the private sector, which adopted technological tools to deal with disputes relating to online commerce. Other initiatives have involved research centers such as the National Center for Technology and Dispute Resolution at the University of Massachusetts at Amherst, the Center for Research in Public Law (CRDP) of the University of Montreal, and the InterNeg Research Center of Concordia University. More recently, ODRs have also found the interest of public and government institutions, which have seen technology as an essential means of improving access to justice. Many courts have adopted ODR programs to resolve administrative and small claims disputes. According to a recent study conducted by Schmitz and Martinez, 55 self-identified ODR providers offer services in the US.³²⁰ In recent years, Mexico has paid particular attention to consumer protection, with initiatives to improve access to justice through out-of-court dispute resolution mechanisms and technology.

4.2.1 The United States of America

ADR developed in the US as a cultural movement around the early 1970s. This movement stems from the need to make justice more accessible and guarantee judicial protection to all citizens, especially the less well-off, by offering fast, efficient, and cost-effective out-of-court dispute resolution mechanisms. Furthermore, concerns were expressed by jurists and lawyers about the increasing costs and delays of crowded federal courts.³²¹ In the late 1980s, several groups began working on reform proposals, including the Federal Courts Study Committee and

³²⁰ Amy J. Schmitz and Janet Martinez, *ODR Providers in the U.S.* to be included in their book chapter, ODR in the United States, in *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey Eds. 2020).

³²¹ In this regard, it is important to remember the work done to promote ADR by a group of judges and university professors, among whom the then Chief Justice of the Supreme Court Warren Burger and the Harvard University professor Frank Sander. At the 1976 *National conference on the causes of popular dissatisfaction with the administration of justice* (Pound Conference) organized by Judge Burger, Professor Sander proposed the idea of a “Multi-door Court House,” a court that included a dispute resolution center where parties would be directed to the process (litigation, conciliation, mediation, arbitration, and ombudspeople) most appropriate for a particular type of case. See SANDER, *Address before the national conference on the causes of popular dissatisfaction with the administration of justice: varieties of dispute processing*, in 70 Federal rules decisions, 1976, p. 111.

the Council on Competitiveness.³²² One of these proposals generated, in 1990, the Civil Justice Reform Act (CJRA). The CJRA was created as a pilot program to require specific procedural changes in United States district courts³²³ to promote the just, speedy, and inexpensive determination of civil actions.³²⁴ The CJRA required pilot districts to adopt alternative dispute resolution programs and other districts to consider adopting them. Since then, many alternative methods and ADR programs have been developed and implemented into the public justice system. Since the 1980s, many courts have introduced procedural requirements requiring parties to use or consider resolving their dispute through ADR, especially in low-value disputes.³²⁵ For example, Oregon has a mandatory ADR provision for cases under 50,000, while New Hampshire requires mediation in small claims cases in which the jurisdictional amount is more than \$5,000. Some jurisdictions like Charleston County (South Carolina), New York, Maricopa County (Arizona), Clark County (Nevada), Multnomah County (Oregon), and California classify certain summary jury trial programs as ADR programs.³²⁶

The US does not have a centralized form of regulation of dispute resolution. Instead, there are sources of regulation in case law, statutes, and local procedural rules at both federal and state levels.³²⁷ In 1998, with the adoption of the Alternative Dispute Resolution Act (ADRA), several alternative mechanisms were institutionalized by requiring all federal district courts to authorize and promote the use of alternative dispute resolution programs.³²⁸ The ADRA requires federal district courts to implement local rules permitting ADR processes such as early neutral evaluation, mediation, minitrial, and arbitration.³²⁹ The act allows each court to exempt specific cases or categories of cases where the use of ADR would not be appropriate.

³²² Terence Dunworth and James S. Kakalik, *Evaluating the Civil Justice Reform Act of 1990* (Santa Monica, CA: RAND Corporation, 1995) https://www.rand.org/pubs/research_briefs/RB9022.html.

³²³ There are 94 district courts, 13 circuit courts, and one Supreme Court throughout the U.S. For more information of the U.S. Federal Court System see <https://www.justice.gov/usao/justice-101/federal-courts>.

³²⁴ U.S. Congress, House, *Civil Justice Reform Act of 1990*, S 2027, 101st Cong., 2nd sess., introduced in Senate January 25, 1990, <https://www.congress.gov/bill/101st-congress/senate-bill/2027/text>.

³²⁵ National Center for State Courts, "The Landscape of Civil Litigation in State Courts," *State Justice Institute*, 2015, https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf.

³²⁶ Paula L. Hannaford-Agor, "Short, Summary, & Expedited: The Evolution of Civil Jury Trials," The National Center for State Courts, last modified 2012, https://www.ncsc.org/__data/assets/pdf_file/0014/27230/shortsummaryexpedited-online-rev.pdf.

³²⁷ Carrie Menkel-Meadow, "Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal'," in *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, ed. Felix Steffek and Hannes Unberath (Oxford, UK: Hart 2013), 419-454.

³²⁸ U.S. Code, title 28, sect 651 (b).

³²⁹ U.S. Code, title 28, sect 651 (a).

Furthermore, the law requires that each district court designate an employee or a judicial officer knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's ADR program. This person should also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's ADR program.³³⁰ Finally, each court must adopt appropriate processes and criteria for selecting neutrals on its panel to administer its ADR programs and make them available to the parties.³³¹ Forty years after the federal district courts started experimenting with alternative dispute resolution, virtually every federal court in the US has some form of ADR, typically mediation, arbitration, or early neutral evaluation (ENE).³³² The most authorized form of ADR across the district court is mediation, authorized by 63 of the 94 districts, while 23 authorized arbitration.³³³ Other efforts to improve and standardize the regulation of some forms of ADR were made by the National Conference of Commissioners on Uniform State Laws (NCCUSL) with the adoption of the Revised Uniform Arbitration Act (RUAA) of 2000 and the Uniform Mediation Act (UMA) of 2003. The RUAA was adopted to modernize, revise, and clarify arbitration law and update the Uniform Arbitration Act (UAA) of 1955. The RUAA governs state arbitration.³³⁴ It was created to allow each US State to adopt a uniform arbitration law and ensure the enforceability of agreements to arbitrate in each State. The UAA also addressed other issues, such as the appointment of arbitrators and the review of arbitration awards, but did not deal with many issues that arise in modern arbitration cases. In particular, the UAA did not provide guidance concerning the constitution of an arbitral tribunal, provisional remedies, arbitration proceedings, consolidation of arbitration proceedings, disclosure of conflicts of interest by arbitrators, non-monetary remedies, discovery, punitive damages, attorney's fee, arbitral immunity, jurisdiction, and the use of electronic information and other modern means of technology in the arbitration process.³³⁵ The RUAA examines these issues and provides state legislatures with an updated statute for resolving disputes through arbitration. The revision of the UAA is based on some essential principles taken into consideration by the RUAA Committee in the act's promulgation. First, the Committee recognized arbitration as a consensual process "in which the autonomy of the parties who enter

³³⁰ U.S. Code, title 28, sect 652 (d).

³³¹ U.S. Code, title 28, sect 653 (a).

³³² For a list of ADR programs in the Federal District Courts see <https://www.justice.gov/archives/olp/file/827536/download>

³³³ "Alternative Dispute Resolution Now an Established Practice in Federal Courts," *United States Courts*, June 25, 2012, <https://www.uscourts.gov/news/2012/06/25/alternative-dispute-resolution-now-establishedpractice-federal-courts>.

³³⁴ The Federal Arbitration Act (FAA) governs federal arbitration.

³³⁵ Uniform Arbitration Act (Last Revisions Completed Year 2000), Preparatory Note, para. 2.

into arbitration agreements should be given primary consideration."³³⁶ In this sense, the RUA provides the parties with a default mechanism when the parties do not have an agreement on a particular issue.³³⁷ Second, the Committee wanted to provide a model for arbitration that was fast, efficient, and cost-effective. Finally, the Committee recognized the contractual nature of arbitration by limiting the provision to vacate awards.³³⁸

In 2001, the Uniform Law Commission (ULC)³³⁹ completed the Uniform Mediation Act (UMA) to standardize the US's mediation process and uniform mediation practice. One of its primary purposes is to create a privilege that provides confidentiality throughout the mediation process³⁴⁰ and protects mediation communications against disclosure. The UMA defines a "mediation communication" as a "statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."³⁴¹ The UMA's privilege against disclosure allows the parties to speak freely and candidly and prevent mediation communications from "being subject to discovery or admissible in evidence in a proceeding."³⁴² Per section 8 mediation communications are "confidential to the extent agreed by the parties or provided by other law or rule of this State."³⁴³ The UMA also provides that the parties to mediation may waive the privilege against disclosure.³⁴⁴

Other statutes like the Administrative Dispute Resolution Act of 1990 (ADR Act), the Administrative Dispute Resolution Act of 1996 (ADRA of 1996), and the Contract Disputes Act (CDA) have laid the foundation for the use of ADR in the public sector and specifically in the field of federal contracts. From this brief and essential regulatory framework, it is clear that the United States is rich in ADR mechanisms, the use of which can be requested by parties outside the court system based on a discretionary choice or referred by the judge. Particular attention is also paid to using ADR in consumption matters. Indeed, the US Federal Trade Commission encourages consumers who have issues purchasing a product or service to consider ADR mechanisms. It invited them to consult local consumer agencies, the Better

³³⁶ *Ibid.*, para. 3.

³³⁷ *Ibid.*

³³⁸ Uniform Arbitration Act (Last Revisions Completed Year 2000), Section 23.

³³⁹ Established in 1892, the ULC is also known as the National Conference Of Commissioners On Uniform State Laws.

³⁴⁰ Uniform Mediation Act § 4.

³⁴¹ *Ibid.*, § 2(2).

³⁴² *Ibid.*, § 4(b).

³⁴³ *Ibid.*, § 8.

³⁴⁴ *Ibid.*, § 5.

Business Bureaus, nonprofit dispute resolution organizations, the small claims courts, and the court system.³⁴⁵ However, some forms of ADR and other traditional remedies have decreased consumer disputes due to the strict enforcement of pre-dispute arbitration clauses and other restrictions on class actions. The proliferation of pre-dispute arbitration clauses in US consumer contracts flowed from the US Supreme Court's application of the Federal Arbitration Act (FAA) to mandate the strict enforcement of these clauses.³⁴⁶ In 2011, the United States Supreme Court, in *AT&T Mobility LLC v. Concepcion*, held that the Federal Arbitration Act (FAA) preempts "state laws that forbid agreements that forestall class-action arbitration rules."³⁴⁷ In *American Express Co. v. Italian Colors Restaurant* (2013), the Supreme Court held that the FAA "does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."³⁴⁸ As a result, businesses that include pre-dispute arbitration clauses with class waivers in consumer contracts can require consumers to bring claims only in individual arbitrations and not in court through a class action. Such strict enforcement of pre-dispute arbitration clauses has incentivized businesses to use mandatory arbitration agreements in consumer contracts to save costs in lengthy litigation. A 2019 study found that eighty-one of the top 100 domestic United States companies, ranked by Fortune magazine, used arbitration agreements to deal with consumers.³⁴⁹ Of these companies, seventy-eight also include class waivers in their arbitration agreements. The same study reported that more than sixty percent (60%) of retail e-commerce sales in the US were covered by broad consumer arbitration agreements.³⁵⁰ Based on information from a few companies, the study estimated that 826,537,000 consumer arbitration agreements were in force in 2018. But the number was probably much higher, considering the US population is around 328,000,000.³⁵¹

Past and recent empirical research has shown that arbitration in business-to-consumer (B2C) disputes is an efficient method of dispute resolution faster and cheaper than going to court.³⁵²

³⁴⁵ "Alternative Dispute Resolution," Federal Trade Commission Consumer Information, accessed August 7, 2020, <https://www.consumer.ftc.gov/art.s/0162-alternative-dispute-resolution>.

³⁴⁶ See Amy J. Schmitz, "Consumer Redress in the United States," in *The New Regulatory Framework for Consumer Dispute Resolution* (New York: Oxford University Press, 2016), 326.

³⁴⁷ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)

³⁴⁸ *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

³⁴⁹ Imre S. Szalai, "The Prevalence of Consumer Arbitration Agreements by America's Top Companies," *UC Davis Law Review Online* 52 (February 2019): 233-259.

³⁵⁰ *Ibid.*, 234.

³⁵¹ *Ibid.*

³⁵² Sarah R. Cole and Kristen M. Blankley, "Empirical Research on Consumer Arbitration: What the Data Reveals," *College of Law, Faculty Publications* 127 (2009): 1051-1079.

The latest report from NDP Analytics³⁵³ shows that arbitration is quicker and more favorable to consumers than litigation in consumer-initiated disputes. The research is based on a data set of 101,244 disputes involving consumers that terminated between 1 January 2014 and 30 June 2020 and analyzed the difference between arbitration and litigation.³⁵⁴ The research compared the outcomes of arbitrations and litigation involving consumers, the win rate, award amount, and dispute processing time. The report highlights four key findings: a) Consumers are likelier to win in arbitration than in court. Consumers initiated and prevailed in 44% of consumer arbitrations terminated with an award, while 33% initiated and prevailed in consumer litigation cases closed with judgments; b) consumers receive higher awards in arbitration than in litigation; c) consumer arbitration is a faster process than litigation. It took a mean of 299 days for consumers to initiate and terminate a dispute with an award in arbitration compared to 429 days in litigation; d) the majority of all consumer disputes, whether in arbitration or litigation, were settled, but more cases were settled in litigation (84.9%) than in arbitration (56.4%). Arbitrations were more likely to result in a decision on the merits (20.8%).³⁵⁵ Although research has shown that arbitration is an efficient process for resolving B2C disputes, the proliferation of arbitration clauses with class relief waivers causes consumers to forego claims rather than individual arbitration.³⁵⁶ Forced arbitration clauses prevent consumers from seeking relief, especially in low-value claims, precluding them from access to small claims courts. Consumers involved in small-dollar disputes may choose not to pursue claims because the costs associated with arbitration are more significant than the amount in controversy. To address this issue, both the American Arbitration Association (AAA) and JAMS provide special arbitration fees for consumers. At AAA, consumers pay a \$200 fee for cases they initiate while paying a \$0 fee if the business files the claim.³⁵⁷ JAMS will charge consumers a

³⁵³ NDP Analytics is a strategic economics research firm based in Washington, Dc.

³⁵⁴ Data came directly from the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS). 21,562 consumer arbitrations came from AAA and 3,067 consumer arbitrations from JAMS, totaling 24,629 arbitrations. Consumer litigation cases came from Public Access to Court Electronic Records (PACER) and included 76,615 federal court cases that terminated between January 1, 2014 and June 30, 2020. See NDP Analytics, "Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration," Institute for Legal Reform, last modified November 2020, <https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf>.

³⁵⁵ During January 2014 – June 2020, 14,024 consumer arbitration cases (56.9%) were settled; 5,476 cases (22.2%) were dismissed, abandoned, or withdrawn; and 5,129 cases (20.8%) resulted in decisions with monetary and/or non-monetary elements. During the same period, 65,038 cases (84.9%) were settled in litigation, 6,890 cases (9.0%) were dismissed or ended with other procedural resolutions, and 4,687 cases (6.1%) were terminated by court or jury determinations.

³⁵⁶ Schmitz, "Consumer Redress," 330.

³⁵⁷ "CONSUMER ARBITRATION RULES," American Arbitration Association | ADR.org, last modified November 1, 2020, https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf.

\$250 fee but nothing if the company files the claim.³⁵⁸ Although these fees may be considered low, we must think that the average value of online shopping orders ranges between \$84 to \$120.³⁵⁹ As a result, consumers are still left with limited access to remedies for low-value claims.

Although arbitration may effectively resolve disputes, including higher-value consumer disputes, consumer arbitration clauses have made it difficult for consumers to access the justice system.

Online Dispute Resolution

The development of technology and the internet in an already technologically advanced country like the United States has made it possible to integrate technology into the day-to-day practices of ADR. Furthermore, the growing development of electronic commerce in the 1990s made it necessary to identify effective resolution systems that could quickly and economically deal with increasing Internet transactions. The consequence of all this was the birth and development of the ODRs. As has already been said in section 5.2, in the United States, the development of ODR processes started in the private sector, which tried to equip itself with tools that met consumer needs and found faster and more efficient remedies to resolve disputes between consumers and businesses. However, in recent years, the debate on the use, usefulness, and necessity of ODR systems has also entered the public debate. It has attracted the attention of the legal and judicial community. In the past few years, several courts³⁶⁰ in the US have adopted ODR, which allows citizens to negotiate arrangements and resolve disputes easily and flexibly from their computers, tablets, or smartphones.³⁶¹ However, regarding adopting ODR policies and regulations, the US lags well behind Europe. The EU has recognized the importance and benefits of ODR by promulgating an ODR Regulation and has encouraged merchant adoption of ODR programs by creating an EU ODR platform. Instead, the US has not yet adopted policies and regulations to advance the promotion and use of ODR programs to resolve disputes, especially in the consumer sector. Instead, ODR in the US is driven by the private sector. Many internet intermediaries like eBay, PayPal, Amazon, Facebook, and Airbnb

³⁵⁸ “Arbitration Schedule of Fees & Costs | JAMS Mediation, Arbitration, ADR Services,” JAMS: Mediation, Arbitration and ADR Services, accessed January 18, 2022, <https://www.jamsadr.com/arbitration-fees>.

³⁵⁹ “Average Online Shopping.”

³⁶⁰ For a list of courts using ODR see <http://odr.info/courts-using-odr/>.

³⁶¹ See for example <https://sc.courtinnovations.com/OHFCMC/newRequest>

have developed their own online complaint and dispute resolution mechanisms. Also, private companies like Tylertech and Modria, or organizations such as the American Arbitration Association (AAA), have long been providing dispute resolution services through their platforms. One might ask whether the lack of a public development strategy for ODRs in the US is due to political issues aimed at favoring and protecting the interests of private businesses. Businesses have long since acquired market power and are unwilling to sell their market shares in favor of public initiatives such as creating an ODR platform. Businesses have long since acquired market power and are unwilling to sell their market shares in favor of public initiatives such as creating an ODR platform. In this case, perhaps the answer could lie in greater collaboration between the public and private sectors to develop a network of accredited ODRs followed by policies that, along with public initiatives, would also favor economically sustainable private ODRs.

4.2.2 Canada

Canada has a long tradition in ADR. It was undoubtedly influenced by its proximity to the United States and the American “ADR movement”³⁶² and driven by an *institutional* vision of access to justice.³⁶³ Several programs and services have been developed to facilitate citizens’ access to justice and promote the peaceful settlement of disputes. In *Hryniak v. Mauldin, 2014 SCC 7*, the Supreme Court of Canada has recognized that “Ensuring access to justice is the greatest challenge to the rule of law in Canada today.” Therefore, as stated by the court, “a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system.”³⁶⁴ The federal government and many provincial governments have recognized that “the increased use of ADR such as mediation will enhance access to justice by helping to alleviate problems of costs, delay, and complexity in the civil justice system.”³⁶⁵ In Canada, the approach to dispute resolution is characterized by a unique court system that consists of a network of courts in each of the ten provinces and three territories, including federal courts. Each province has exclusive jurisdiction for all matters

³⁶² Archie Zariski, “Judicial Dispute Resolution in Canada: Towards Accessible Dispute Resolution,” *Windsor Yearbook of Access to Justice* 35, (2018), 434.

³⁶³ Jean-François Roberge, “Perspectives on Access to Justice and Dispute Prevention and Resolution: The Canadian Experience,” *Dutch-Flemish Mediation and Conflict Management Journal* 17, no. 2 (2013): 13-27.

³⁶⁴ *Hryniak v. Mauldin, 2014 SCC 7* (CanLII), [2014] 1 SCR 87, accessed November 3, 2020, <http://canlii.ca/t/g2s18>.

³⁶⁵ M. Jerry McHale, “Uniform Mediation Act: Discussion Paper. Paper for the *Civil Section of the Uniform Law Conference of Canada*,” *Victoria, BC, August 2000*, 2, https://cfcj-fcjc.org/sites/default/files/docs/hosted/17494-uniform_mediation.pdf.

regarding civil rights and property.³⁶⁶ ADR has been institutionalized in all provinces to improve the administration of justice and provide a more efficient way to access the justice system.³⁶⁷

Arbitration is regulated by statute. Every province and territory has its separate arbitration legislation. Each province and territory of Canada has enacted domestic and international commercial arbitration legislation.³⁶⁸ All jurisdictions have adopted the UNCITRAL Model Law into their domestic law, except for Québec. The UNCITRAL Model Law provisions are tacked within the Civil Code of Québec and the Code of Civil Procedure.³⁶⁹ Commercial arbitration is regulated by the Commercial Arbitration Act (CAA) at the federal level. The CAA came into force on August 10, 1986, and introduced the Commercial Arbitration Code (CAC) based on the model law adopted by the United Nations Commission on International Trade Law on June 21, 1985.³⁷⁰ The CAC provides a basic procedural framework for commercial arbitration and applies only to matters where at least one of the parties to the arbitration is Her Majesty in the right of Canada, a departmental corporation or a Crown corporation, or to maritime or admiralty matters.³⁷¹ Many of the procedural provisions contained in the CAC are not mandatory, and the Code leaves the parties significant control over the arbitral proceedings. The Code defines an arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship”³⁷² of contractual nature or not. The arbitration agreement can be in the form of an arbitration clause included in a contract or a separate agreement, but must be in writing.³⁷³ Arbitration clauses are generally included in many commercial and consumer contracts. However, most provincial statutes recognize the consumer’s right to court even when an arbitration clause is present.

Canada has no comprehensive legal framework regulating private out-of-court federal or

³⁶⁶ Matthew J. Latella, Christina Doria, and Glenn Gibson, “Arbitration Procedures and Practice in Canada: Overview,” accessed November 2, 2020, [https://ca.practicallaw.thomsonreuters.com/0-5021672?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/0-5021672?transitionType=Default&contextData=(sc.Default)&firstPage=true).

³⁶⁷ Roberge, “Perspective.”

³⁶⁸ See for example the Ontario Arbitration Act, 1991, S.O. 1991, c. 17, British Columbia Arbitration Act, S.B.C. 2020, c. 2 (the “New Act”), which will repeal and replace the old Arbitration Act, R.S.B.C. 1996, c. 55.

³⁶⁹ Latella, “Arbitration Procedures.”

³⁷⁰ Commercial Arbitration Act R.S.C., 1985, c. 17 (2nd Supp.), Schedule 1 (Section 2).

³⁷¹ *Ibid.*, art. 5(2).

³⁷² *Ibid.*, art. 7(1).

³⁷³ *Ibid.*, art. 7(1) (2).

provincial mediation. However, court-mandated and ad hoc mediation have become alternative methods for court disputes. Since the 1990s, the Canadian federal legislature has amended thirty-one (31) national acts to introduce the possibility of referring disputes to mediation.³⁷⁴ At a provincial level, some provinces like Alberta,³⁷⁵ Ontario,³⁷⁶ and Quebec³⁷⁷ have a system of mandatory court-annexed mediation or mandatory dispute resolution requirements. Under rule 24.1 of Ontario's Rules of Civil Procedure, most civil actions in Toronto, Windsor, and Ottawa are subject to compulsory mediation.

In contrast, specific civil actions, such as family law cases, are excluded from mandatory mediation. In 2016, Quebec enacted a new Code of Civil Procedure to improve access to justice and require parties to consider alternative forms of dispute resolution like negotiation, mediation, and arbitration.³⁷⁸ However, most provinces prefer a voluntary system of complementary or judicial mediation. Also, in some jurisdictions, the mediation requirements include private mediation, while others require mediation conducted by court-appointed mediators or judges. Some provinces also have mandatory mediation programs in Small Claims Courts.³⁷⁹

As for technology, arbitration in Canada has long been using electronic systems such as audio and video conferences, online collection and production of documents, electronic management, transfer of arbitration data, etc. Technology has also allowed Canada's arbitration institutions

³⁷⁴ Klaus J. Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

³⁷⁵ Effective September 1, 2019, the Court of Queen's Bench of Alberta commenced a one-year pilot project to lift the suspension of the enforcement of Rules 8.4(3)(a) and 8.5(1)(a) of the Alberta Rules of Court ("the Mandatory ADR Rules"). In order to book a Judicial Dispute Resolution ("JDR") for a civil action during the pilot period, parties will be required to complete an amended version of Forms 37 or 38 which will state, in place of paragraph 5(a) of Form 37 or paragraph 2 of Form 38, that the parties "will participate in at least one of the dispute resolution processes described in R. 4.16(1) to be completed prior to trial." See Notice to the Profession & Public – Enforcement of Mandatory Alternative Dispute Resolution Rules 8.4(3)(A) and 8.5(1)(A).

³⁷⁶ See the Ontario Mandatory Mediation Program (Rules 24.1 and 75.1). Rules of Civil Procedure, RRO 1990, Reg 194, Rule 24.1.01, recites "This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes."

³⁷⁷ Art. 1 of the Code of Civil Procedure, CQLR c C-25.01 recites "Parties must consider private prevention and resolution processes before referring their dispute to the courts."

³⁷⁸ Code of Civil Procedure, CQLR c C-25.01, art. 1, "To prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process. The main private dispute prevention and resolution processes are negotiation between the parties, and mediation and arbitration, in which the parties call on a third person to assist them."

³⁷⁹ For example, the British Columbia Small Claims Court Mediation Program (Rule 7.2) operates in five Small Claims registries: Nanaimo, Surrey, North Vancouver, Victoria and Robson Square, Vancouver for claims up to \$10,000. The program is funded by Ministry of Attorney General and administered by BC Dispute Resolution Practicum Society.

to continue offering their services during the quarantine phases that have forced many courts worldwide to close due to the COVID-19 pandemic. Indeed, the government and judicial institutions have encouraged consultants and the public to use alternative dispute resolution systems like arbitration and mediation that are more accessible and adaptable to the new demands imposed by the pandemic and can guarantee citizens the fundamental right of access to justice. The Court of Queen's Bench of Alberta announced at the end of March 2020 that:

In the context of the current suspension of hearings, except for those that are an emergency or urgent, the Court is encouraging counsel and the public to access alternative dispute resolution mechanisms, including mediation and arbitration. These processes will reduce delays in resolving family, civil and commercial disputes in light of the backlog that will seriously challenge timely scheduling of these matters in the Court once the suspension is lifted.³⁸⁰

Also, concerning mediation, the competence is left to the individual provinces.

Online Dispute Resolution Programs and Platforms

Innovation and the advent of the digital era have made it possible to use technological tools and instruments to support alternative dispute resolution systems, leading to the development and implementation of Online Dispute Resolution (ODR). In Canada, as in the United States, ODR initially originated from private internet providers' initiatives that understood the importance and strength of technology in offering citizens services that could improve the quality of life. Smartsettle and Cyberjustice represent two critical examples of private ODR providers. Smartsettle is an automated negotiation platform that generates potential agreements based on party preferences through optimization algorithms. Created by two professors from the Université de Montréal and McGill University, Cybersettle is a laboratory that analyzes the impact of technologies on justice and the application of information technologies to the justice system.³⁸¹

³⁸⁰ "News & Announcements," Alberta Courts, accessed November 3, 2020, https://albertacourts.ca/qb/resources/announcements/alternative-dispute-resolution-consent-orders-and-applications-to-enforce-arbitration-awards?utm_source=QB+Announcements&utm_medium=newsletter&utm_campaign=A.

³⁸¹ "The Laboratory," Laboratoire De Cyberjustice, accessed November 4, 2020, <https://www.cyberjustice.ca/en/laboratoire/presentation/>.

In recent years, the public sector has also started adopting information technologies and ODR systems to meet the needs of citizens and enhance access to justice in a vast territory. Interesting ODR initiatives have involved the courts. In 2012, the British Columbia legislature passed the Civil Resolution Tribunal Act.³⁸² The Act authorized the creation of a new, primarily online, administrative tribunal with the jurisdiction to hear small claims and strata (condominium) disputes. The Civil Resolution Tribunal was launched in 2016 as Canada's first online tribunal. At first, the CRT online dispute resolution system handled only strata (condominium) disputes, but starting in June 2017, it began resolving most small claims up to \$5,000.³⁸³ Today, the CRT resolves motor vehicle injury disputes (under \$50,000), small claims disputes such as roommates, short-term and vacation rental, loans, and debts, construction, sale or purchase of goods and services, strata (condominium) disputes of any amount concerning issues between strata owners, tenants, sections of strata, and strata corporations, and disputes of any amount regarding companies and housing and community service cooperative associations incorporated in British Columbia.³⁸⁴ The CRT tribunal offers users a convenient and cost-effective alternative to the traditional courtroom model and helps reduce the cost and delay of the justice system. The online tribunal encourages the early resolution of disputes through a collaborative approach and provides users with online information, negotiation, and facilitation services. The process involves a multi-stage procedure (three stages) inspired by the process outlined in Section III of the Technical Notes of the UNCITRAL.³⁸⁵ The first stage starts with one of the parties submitting a claim with the CRT through its online platform. Once the application is accepted, the parties can negotiate an agreement through a secure and confidential platform. If they are to settle their dispute, the parties can turn their agreement into an enforceable order for free. If they do not reach an agreement, a CRT manager is appointed to help the parties settle their dispute through a facilitation process that can take place over the phone or online (stage 2). If the dispute is not resolved through facilitation, a member of the CRT decides the dispute, and the decision is final and binding (stage 3).³⁸⁶

³⁸² Civil Resolution Tribunal Act [SBC 2012].

³⁸³ Canadian dollars.

³⁸⁴ Civil Resolution Tribunal, last modified October 14, 2020, <https://civilresolutionbc.ca/>.

³⁸⁵ Pablo Cortés, *The Law of*, 59.

³⁸⁶ Note that claims for a minor injury determination in motor vehicle injury disputes do not go through the negotiation or facilitation process but are directly decided by a CRT member.

Over the past two years, the number of CRT applications for dispute resolution has grown steadily as more people are informed of and become familiar with the services the online tribunal provides. Also, the expanded jurisdiction over motor vehicle injury disputes and cooperative association and non-profit society disputes have increased the number of people seeking to resolve their disputes through the CRT online platform. The latest data presented in the 2019-2020 CRT report³⁸⁷ show that from April 1, 2019, to March 31, 2020, the online tribunal received 5,880 dispute resolution applications, representing an increase of 7.5 compared to the same period in 2018/2019.³⁸⁸ Most applications concerned small claims disputes (4,926) and several strata disputes (793). The CRT closed six thousand seventy-nine (6,079) disputes, of which 38.2% were resolved by consent or withdrawn, 29% resulted in a default decision and 21% were determined with a binding decision after a hearing. 4% were closed because the CRT refused to resolve the dispute since the applicant did not provide the requested information or refused to comply with the CRT's direction. Finally, 3.8% of applications were outside the CRT jurisdiction at the time of the application. Another exciting piece of data from the report shows the median time to resolve all types of disputes was 45 days, with 90% of disputes resolved within 183 days. The results relating to the feedback from users who participated in anonymous surveys conducted by the CRT are also exciting and demonstrate how the services offered by the online tribunal are pretty accessible and easy to use. Aggregate survey results included in the CRT 2019/2020 report show that users were satisfied with the CRT services, and 83% would recommend it to others, while 83% thought the online services were easy to use, and 80% felt that their dispute was handled in a timely matter.³⁸⁹

Another public ODR system active in Canada is the one offered by the Office de la Protection du Consommateur (consumer protection office) of Québec through the Platform to Assist in the Resolution of Litigation Electronically (PARLe) that Université de Montréal's Cyberjustice Laboratory developed. PARLe offers consumers and merchants free and fast services to resolve their disputes. Unlike the process employed by the Canadian Civil Resolution Tribunal of BC, PARLe allows the parties to negotiate a solution. Also, it gives an online mediation service where a mediator facilitates discussions between consumers and participating merchants to

³⁸⁷ Civil Resolution Tribunal 2019/2020 Annual Report, accessed November 4, 2020, <https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf>.

³⁸⁸ The number of applications in 2018/2019 were 5,468.

³⁸⁹ Civil Resolution Tribunal 2019/2020 Annual Report, 29.

settle consumer disputes.³⁹⁰ To access the platform and its services, the consumers must have one of the following problems or issues:

- Did not receive the goods and services
- There were delays in the delivery
- Defected items
- The goods or services were not as described or advertised by the merchant.

The process is relatively simple and allows the consumers to settle a dispute with a merchant independently. To begin the process, the consumer must open an account, create a file describing the problem, propose a solution to the merchant, and upload all relevant documents, such as invoices, photos, and contracts. After receiving the consumer's proposal, the merchant can accept it or submit a counter proposal and negotiate a solution with the consumer for a maximum of 20 business days. If the parties cannot find a solution within that time frame, a mediator is assigned to help the parties settle the dispute. Once the parties reach an agreement, a document with the agreement's details is uploaded to the consumer file. Only the consumer can access the information contained in the file, as that information is strictly confidential.³⁹¹ According to the PARLe Office, the settlement rate has been nearly 70% since the platform's launch, and the user satisfaction rate is almost 90%. The critical point is that at the moment, the platform is not available in English but only in French; therefore, the platform may not be accessible to those, especially cross-border consumers who have purchased products or services from merchants resident in Quebec.

4.2.3 General Considerations

The United States has historically been essential in promoting an ADR culture in North America and worldwide. Since the 1970s, ADR has changed the view of businesses and legislators on how best to resolve legal disputes. Courts nationwide have implemented ADR, and federal district courts have been required to establish ADR programs to address increased

³⁹⁰ "Online Mediation Service at the Office De La Protection Du Consommateur – PARLe," Ministère De La Justice, accessed November 4, 2020, <https://www.justice.gouv.qc.ca/en/your-disputes/dispute-prevention-and-resolution-dpr-processes/mediation/online-mediation-service-at-the-office-de-la-protection-du-consommateur-parle>.

³⁹¹ "PARLe - Overview of the Process," Office De La Protection Du Consommateur, accessed November 4, 2020, <https://www.opc.gouv.qc.ca/en/opc/parle/process/>.

delays and litigation expenses arising from an overcrowded court system. Since adopting the ADR Act in 1998, virtually every federal court in the US has had some form of ADR, typically mediation and arbitration. ADR has become an integral part of the American legal system, and mediation and arbitration have risen exponentially in the business sector as effective and efficient alternatives to litigation. In consumer disputes, some forms of ADR have been restricted by the rigorous enforcement of pre-dispute arbitration clauses, incentivizing businesses to use mandatory arbitration in consumer contracts to save costs in lengthy litigation. Despite efforts to standardize some forms of ADR through adopting the RUAA and the UMA, there is no centralized form of ADR regulation. Instead, there are sources of regulation in case law, statutes, and local procedural rules at both federal and state levels.

In the US, ODR has grown as a response to the needs of internet intermediaries and marketplaces to resolve disputes arising out of online transactions. Internet companies have created *in-house* ODR schemes to provide quick and affordable dispute resolutions to their users. Hence, in the US, the demand for the development of ODR came from private companies and consequently underwent a less stringent legislative regulation, allowing more flexibility and freedom in the dispute resolution mechanisms of choice offered to consumers. In recent years, there has been a growing interest in ODRs by the legal community and the judicial system. Many courts nationwide have adopted ODR, allowing citizens to negotiate and resolve disputes virtually. However, unlike the EU, the US has not yet adopted policies and regulations to advance the promotion and use of ODR, especially in the consumer sector. Greater collaboration between public governments and private companies would be desirable. It could lead to adopting federal regulation on ODR on the EU model and favor the development of a platform for resolving B2C disputes between consumers and companies residing in different states.

The American ADR movement of the 1970s has undoubtedly influenced Canada's long ADR tradition. Provincial and federal governments have long recognized the importance of ADRs in facilitating and increasing access to justice. Forms of ADR have been institutionalized in all provinces to improve the administration and access to justice. The most common forms of ADR are mediation and arbitration. While the Commercial Arbitration Act (CAA) regulates arbitration, there is no comprehensive legal framework regulating out-of-court mediation. Certain provinces have mandatory court-annexed mediation programs, but most prefer a voluntary complementary or judicial mediation system.

Like in the US, ODR in Canada originated from private initiatives and internationally renowned internet providers like Smartsettle and Cyberjustice. However, in recent years, the public sector has adopted ICTs and ODR, recognizing the role of digital and technological tools in improving citizens' access to justice. In 2016, Canada launched its first online court, the CRT, to handle strata and small claims disputes. Today, the online tribunal has extended its jurisdiction to resolve other disputes, including motor vehicles. Over the past few years, the number of CRT applications for dispute resolution has grown steadily, as has the degree of applicants' satisfaction. Recent reports have shown that the median time to resolve all types of disputes was 45 days, with 90% resolved within 183 days. It demonstrates the online court's success in ensuring more comprehensive access to justice and more efficient and less costly justice.

4.3 LATIN AMERICA

In recent years, the increased dissatisfaction with the judicial system due to the workload and slowness of national courts has led to an interest in many Latin American countries in out-of-court dispute resolution mechanisms. Many ADR centers and programs have developed in Argentina, Brazil, and Colombia, promoting arbitration and mediation. ADR is also growing in Colombia, Chile, Ecuador, Paraguay, Peru, Venezuela, and Uruguay. New arbitration laws have been enacted in Peru and Ecuador, while arbitration courts in Chile manage significant amounts of cases.

The global COVID-19 pandemic has accelerated the use of information technology in the judicial system of many Latin American countries, recognizing the role of technology in improving the efficiency and quality of the public service of justice. Exciting and vital initiatives such as Concilianet in Mexico and Consumidor in Brazil highlight how technology is also gaining ground in resolving consumer disputes and how ODR provides consumers with an additional instrument to access the justice system.

This section provides an overview of the regulatory ADR/ODR framework in Argentina, Brazil, Chile, and Mexico. It also looks at the use of technology in delivering out-of-court dispute resolution, specifically in B2C low-value disputes.

4.3.1 Argentina

As in many other Latin American countries, the use and adoption of ADR mechanisms in Argentina have increased over the last three decades, following the impetus given by the development of ADRs in the early 90s in the United States, especially within the court systems. Argentina has recently worked to develop, promote, and improve ADR methods by providing citizens with out-of-court tools for resolving civil, family, commercial, and labor disputes. It has also developed a consumer protection infrastructure by providing fast, cheap, and easy-to-access alternatives to the court.

Argentina is a federation of twenty-three provinces and the autonomous city of Buenos Aires. As a federal country, the legislation on mediation is left to each province. However, mediation is governed by the “Mediation and Conciliation Law,” enacted in 1995 by Federal Law 24573 and replaced by Law 26589 in 2010. This law establishes the mandatory nature of mediation for formal legal complaints³⁹² and requires litigants to attend mediation before filing a lawsuit. Art. 5 excludes specific cases from the compulsory mediation provision, including criminal disputes, divorce proceedings, labor disputes, etc. A licensed mediator carries out the mediation.³⁹³ The agreement entered by the parties and the mediator is enforceable as a final judgment following the provisions of art. 500 paragraph 4) of the national civil and commercial procedure code.³⁹⁴ The mandatory nature of pre-trial mediation has been the subject of extensive debate, and provincial states have adopted different solutions. Pre-trial mediation is compulsory in the Autonomous City of Buenos Aires and some provincial states. Concerning arbitration, Argentine law distinguishes between international and domestic arbitration. International commercial arbitration is exclusively governed by Law 27.449, enacted in July 2018, based on the UNCITRAL Model Law. The international treaties signed and ratified by Argentina, such as the New York Convention (1958) and the Panama Convention (1975), regulate the recognition and enforcement of foreign arbitral awards. Domestic arbitration is regulated in Book VI, “Arbitration Process” of the Code of Civil and Commercial Procedure of the Nation (CCCPN), adopted by provincial states. Chapter 29, Title IV of the Civil and

³⁹² See art. 1 of Law 26589 of 3 May 2020.

³⁹³ *Ibid.*, art. 11.

³⁹⁴ *Ibid.*, art. 30.

Commercial Code of the Nation (CCCN), enacted by Law 26,994, regulates the “Arbitration Contract.” It establishes that an arbitration agreement may be included in a contract.³⁹⁵

Of particular note in consumer protection is the so-called *Arbitraje de Consumo* (Consumer Arbitration), which offers an alternative procedure for resolving consumer disputes. In 1998, with decree No. 276, the *Sistema Nacional de Arbitraje de Consumo* (SNAC) (National System of Consumer Arbitration) was created to assist and resolve consumer binding and enforceable effects of user claims concerning the rights and obligations stemming from the consumer protection Law No. 24,240.³⁹⁶ The institution of consumer arbitration goes in the direction indicated by art. 42³⁹⁷ of the Constitution, which protects consumer rights and creates effective procedures to prevent and resolve consumer disputes.³⁹⁸ Consumer arbitration can only be requested free of charge via email, by presenting the necessary documentation to the SNAC, or online by submitting a claim to the *Ventanilla Única Federal de Defensa del Consumidor* (the single federal platform of consumer protection). The business is notified once the claim has been submitted and has five (5) days to accept or reject the consumer’s arbitration request. Per art. 45 of the Consumer Protection Law No. 24,240, if the company does not accept the arbitration request, the claim will be sent to the respective enforcement authority and processed as an administrative complaint. This measure is important because it seeks to address and resolve the issue of businesses’ lack of collaboration.

An arbitration tribunal is formed if the arbitration is accepted or the business is already part of the SNAC. An institutional arbitrator will hear and decide on the case if the claim amount is equal to or less than \$500. A panel of three arbitrators is required if the claim exceeds that amount. The panel will include one institutional arbitrator, one representing the Consumer Associations, and a third representing the Chamber of Commerce, which guarantees and

³⁹⁵ CCCN States, art. 1651.

³⁹⁶ See art. 1 of Decreto 297/98.

³⁹⁷ In Argentina, the constitution recognizes consumers and users of goods and services basic consumer rights such as the protection of their health, safety, and economic interests, the right to an adequate and truthful information, the freedom of choice, and the right to a fair and dignified treatment. See art. 42(1).

³⁹⁸ Art. 42(3) recites, “La legislación establecerá procedimientos eficaces para la prevención y solución de conflictos, y los marcos regulatorios de los servicios públicos de competencia nacional, previendo la necesaria participación de las asociaciones de consumidores y usuarios y de las provincias interesadas, en los organismos de control.” (The legislation will establish effective procedures for the prevention and solution of conflicts, and regulatory frameworks for public national services, foreseeing the necessary participation of consumers and users and the interested provinces, in the organisms of control).

preserves the balance between the parties.³⁹⁹ The claim with the related documentation is sent to the business for ten business days to present its counterclaim and attach the evidence in its possession. After ten days, the arbitrator or the panel of arbitrators will set a hearing date to hear the parties. If the parties find an agreement, the panel will issue an award by consent. If one of the parties does not attend or an agreement is not reached, the arbitrator (or the arbitrators) will issue a binding and enforceable arbitration award. The arbitration procedure has a maximum duration of 120 days, which the parties can only extend by mutual agreement. The entire claim submission process occurs online if the consumer submits a claim through the *Ventanilla Única Federal de Defensa del Consumidor*. Once the platform has been accessed, the consumer is required to fill out a digital form (*formulario de denuncia*)⁴⁰⁰ with personal data, data of the company from which the product or service has been purchased, the data of the product or service, reasons for the complaint, and type of solution expected. The consumer must also inform if the company or government body has already initiated a complaint. Once the complaint has been sent, the National Directorate for Consumer Defense (NDCD) will designate the most appropriate method to resolve the conflict (provincial jurisdictions, national consumer arbitration system, or protected consumption) and send the claim to the competent body. Next, the consumer will be contacted by phone or email with an answer. A claim number will be sent to the consumer via email to keep track of the claim. The system offered by the *Ventanilla Única Federal de Defensa del Consumidor* is only partially digital as the procedure is activated through the platform. Still, the resolution process requires the physical presence of the parties. However, it represents a step forward in offering consumers fast and convenient alternative means of accessing justice online. A complete digital dispute resolution system is now offered to consumers by the *Servicio de Conciliación Previa en las Relaciones de Consumo* (COPREC).⁴⁰¹ The COPREC was created in 2014 with *Ley 26.993*, establishing a national system to resolve consumer disputes.⁴⁰² The law provides for two phases: conciliation and litigation. Conciliation can have a maximum length of thirty (30) days with a possible

³⁹⁹ “Sistema Nacional De Arbitraje De Consumo,” Argentina.gob.ar., accessed October 29, 2020, <https://www.argentina.gob.ar/produccion/consumidor/sistema-nacional-de-arbitraje-de-consumo>.

⁴⁰⁰ “Formulario de denuncias Ventanilla Única federal de Defensa del Consumidor”, Argentina.gob.ar, accessed October 29, 2020, <https://www.argentina.gob.ar/produccion/defensadelconsumidor/formulario>.

⁴⁰¹ *Reclamar a UN proveedor en el Servicio de Conciliación Previa en las Relaciones de Consumo (COPREC)*, (2020, October 7), Argentina.gob.ar. <https://www.argentina.gob.ar/reclamar-un-proveedor-en-el-servicio-de-conciliacion-previa-en-las-relaciones-de-consumo-coprec>.

⁴⁰² See art. 1, *Ley 26.993, Sistema de Resolución de Conflictos en las Relaciones de Consumo* of September 17, 2014.

extension of another fifteen (15) at the parties' request.⁴⁰³ If the parties reach an agreement, this will be submitted to the competent authority within five (5) days to grant the approval.⁴⁰⁴ Once permission is granted, it is communicated to the parties via email or mail. From this moment, the business has ten (10) days to pay the conciliation fees. If the conciliation concludes without an agreement, the conciliator prepares a document that includes the process results. The document must be signed by the appearing parties and sent to the competent authority within two (2) days.⁴⁰⁵ In this case, the consumer can file a claim before the *Auditoría en las Relaciones de Consumo* (the audit in consumer relations) or, when appropriate, before the ordinary national court in accordance with the provisions of Titles II and III of the present law.⁴⁰⁶ The law allows consumers to start the procedure free of charge. It allows them to suggest to the other party a conciliator from the national list (art.4). Art. 11 requires the parties to attend the hearings in person without prejudice to the right to legal representation. Although the law expressly requires the parties to attend the conciliation hearings in person, hearings can only occur electronically. In May 2020, due to the global health emergency, the *Secretaría de Comercio Interior del Ministerio de Desarrollo Productivo* (ministry of development) enacted Resolution 137/2020.⁴⁰⁷ The Resolution established that conciliation hearings provided by COPREC would occur only through the *Sistema de Conciliación por Medios Electrónicos* (SICOME). Any electronic means is allowed as long as it consents to identify the parties adequately. Likewise, both parties must agree to the use of this medium. The electronic conciliation will last a maximum of fifteen (15) working days, starting from the date on which the conciliator formally accepts the request. The consumer can file a claim by filling out a form through the COPREC website. Once the system accepts the complaint, the consumer can choose the date and time of the meeting with the conciliator. The resolution establishes the obligation for the supplier to establish an electronic address within ten (10) working days of receiving the hearing notice from the COPREC. Within thirty (30) days, the supplier must attend a hearing with the consumer before a conciliator facilitates a resolution. If the business does not attend the meeting, a penalty is issued. The process is free of charge for the consumer, who is not required to attend the conciliation with legal counsel.

⁴⁰³ Ibid., art. 6(4).

⁴⁰⁴ Ibid., art. 12.

⁴⁰⁵ Ibid., art. 17.

⁴⁰⁶ Ibid., art. 17(2).

⁴⁰⁷ Ministerio de Desarrollo Productivo Secretaría de Comercio Interior, Resolución 137/2020 of May 19, 2020.

Online Community Mediation Pilot Program in Argentina

In August 2019, the Ministry of Justice and Human Rights, with the participation of nine Federal Network of Community Mediation Centers organizations, launched a pilot program to implement the *Mediación Comunitaria Online* (Online Community Mediation) platform.⁴⁰⁸ The platform aims to provide a means of resolving disputes online and improving access to justice. The online community mediation program is part of a broader project of *Mediación Comunitaria* of the Ministry of Justice and Human Rights of Argentina aimed at facilitating access to justice and promoting dialogue in resolving family, neighborhood, and community conflicts. Through the *Centros de Acceso a Justicia* (CAJ) (Access to Justice Centers), citizens can have free access to mediation and resolve their disputes through the help of an expert mediator. The CAJs are the Ministry of Justice and Human Rights offices that provide free primary legal care services concerning social security, family, housing, employment, and other matters. More than 250 offices are distributed throughout the country, attended by professional teams of lawyers, psychologists, mediators,⁴⁰⁹ and social workers. According to the CAJ's website data,⁴¹⁰ 75% of mediations regard family law conflicts; 18% are related to landlord/tenant, neighbor, and rental disputes; 5% regard consumer and money debts disputes; and 2% health and employment conflicts. The online community mediation project is offered within the Community Mediation program in collaboration with *ODR Latinoamérica*,⁴¹¹ a private non-profit social network and academic research forum in conflict resolution and new technologies. *ODR Latinoamérica* will oversee the creation of the online mediation platform available to the CAJs to develop and implement online community mediation services. The first part of the project consists of training the operators and mediators of the CAJs in online community mediation and digital technology skills.

Online Mediation Program of the Autonomous City of Buenos Aires

⁴⁰⁸ “Mediación Comunitaria Online: Comenzó La Prueba Piloto,” Argentina.gob.ar, last modified August 27, 2019, <https://www.argentina.gob.ar/noticias/mediacion-comunitaria-online-comenzo-la-prueba-piloto>.

⁴⁰⁹ Currently there are 129 community mediators in CAJs across the country.

⁴¹⁰ “Mediación Comunitaria,” Argentina.gob.ar, last modified October 23, 2020, <https://www.argentina.gob.ar/justicia/afianzar/caj/mediacion-comunitaria>.

⁴¹¹ “Quiénes Somos – ODR Latinoamérica,” ODR Latinoamérica – Un Espacio Académico Y De Investigación En La Articulación De Las Nuevas Tecnologías Y La Resolución De Conflictos, accessed November 9, 2020, <https://odrlatinoamerica.com/quienes-somos/>.

The development of technology and digital has given way to some exciting experiments in the ODR field. The ongoing pandemic has helped accelerate this process of adapting technology to ADR. Mediación en Línea (MEL), the Online Mediation Program of the City of Buenos Aires, is an important program that opens the way to greater use of technology applied to ADR in Argentina. MEL is a free service provided by the Ministry of Justice and Security of the City of Buenos Aires that offers an alternative to traditional face-to-face mediation in resolving conflicts between neighbors.⁴¹² Online mediation is part of the City of Buenos Aires community mediation program aimed at improving residents' quality of life through participation in mechanisms accessible to everyone and creating a culture of collaboration and involvement between community members. Parties interested in mediating their dispute online can do it through the *Tramitación a Distancia* (TAD)⁴¹³ platform designed to assist citizens in carrying out and managing their procedures before the public administration in a virtual way. To activate the process, the parties must provide a cell phone number and an email to the case manager of the community mediation office. They will then receive information and instructions on connecting with the mediator on the day scheduled for the mediation. On the day of the mediation, the parties will receive a link via email to access the virtual mediation room. The online mediators consist of lawyers, psychologists, or social workers trained in digital technology and specialized in specific areas.

Online mediation has become one of the ways preferred by the residents of the city of Buenos Aires to seek collaborative solutions. The MEL program has grown remarkably in the last nine months, mainly due to the COVID-19 pandemic, forcing the country to adopt severe restrictive measures such as lockdowns and isolation quarantines and preventing regular conduct of public and commercial activities. In 2020, of the 1,197 cases initiated, 1,090 reached the mediation table, and 935 (87%) settled. Of these 935 mediations, 68% concluded in a complete agreement between the parties, and 32% in a partial agreement. Furthermore, 92% of the people complied and followed up with the agreement reached in mediation.⁴¹⁴ The statistics provided by the

⁴¹² The list of conflicts between neighbors that can be resolved through community mediation is very extensive and includes among others: maintenance, modification and repair of buildings, unauthorized construction and construction damage, misuse and modification of the use of common space, damage caused to neighbors' homes by trees and plants, garbage disposal, waste pollution, noise, improper or unauthorized possession of animals, as well as personal issues and many other issues that can generate conflicting situations.

⁴¹³ "Tramitación a Distancia," Buenos Aires Ciudad - Gobierno De La Ciudad Autónoma De Buenos Aires, accessed November 9, 2020, <https://www.buenosaires.gob.ar/tramites/tramites-distancia-tad>.

⁴¹⁴ "Aumenta El Uso De La Mediación Online Para Solucionar Conflictos Entre Vecinos," Buenos Aires Ciudad - Gobierno De La Ciudad Autónoma De Buenos Aires, accessed November 10, 2020.

Registry after the end of April 2020 showed the variety and parity regarding the number of disputes addressed: 71 files (15%) referred to problems of leaks and humidity; 68 (14%) to dirt; 58 (12%) to annoying noise; 55 (12%) to conflicts with administration; 47 (10%) to personal disputes between neighbors and 39 (8%) to conflicts generated by irresponsible, improper or prohibited possession of animals.

4.3.2 Brazil

In the last 20 years, ADRs in Brazil have undergone a profound change and development due to the need to reduce the number and duration of judicial proceedings and provide a rapidly developing economy with fast and practical tools to resolve disputes. The new civil code was issued in 2015 and entered into force in 2016 to help lighten the judicial burden and cut the backlog of pending cases before the Brazilian courts.⁴¹⁵ The new civil code also highlights the importance of mediation and conciliation in resolving civil disputes, given their success in reducing the number of court cases in the recent past⁴¹⁶. This modernization of the Brazilian dispute resolution framework has allowed the consolidation of arbitration and other out-of-court systems as fast and effective means of dispute resolution.

Arbitration in Brazil had a significant evolution after the adoption of Law 9.307 of September 23, 1996 (the Arbitration Act) that governs and regulates the institute of arbitration⁴¹⁷ especially after the ratification of the 1958 New York Convention⁴¹⁸ and the declaration of the constitutionality of arbitration by the Brazilian Supreme Court in 2001. The 1996 Arbitration Act is partially based on the UNCITRAL Model Law, and its provisions apply equally to international and domestic arbitration. The 1996 Act was amended by Law No. 13.129 of May 26, 2015, which expanded the scope of arbitration, allowing cases involving “state entities” to

<https://www.buenosaires.gob.ar/justiciayseguridad/noticias/el-uso-del-servicio-de-mediacion-en-linea-de-la-ciudad-aumento-un-158#>.

⁴¹⁵ According to the *Conselho Nacional de Justiça* (National Council of Justice), over 78 million lawsuits were pending before the Brazilian courts in 2018.

⁴¹⁶ Gilberto Giusti and Ricardo Dalmaso Marques, “Brazil,” in *The Dispute Resolution Review*, ed. Jonathan Cotto (London: Law Business Research, 2016), 74-92.

⁴¹⁷ The 1996 Arbitration Act was recently amended through the Law 13,129 of May 26, 2015 (the 2015 Arbitration Act). Some important contribution that the 2015 Arbitration Act makes are that it brings some clarity as far as the subject matter that can be arbitrated in Brazil and further restricts the participation of national courts in arbitral proceedings. See Erica Franzetti in *Arbitration in Brazil*, Lexology, 2019, <https://www.lexology.com/library/detail.aspx?g=ad2085a8-020b-49d4-bd4e-5b5d2ada12e1>.

⁴¹⁸ The New York Convention was ratified with Decree No. 4311 on 23 July 2002 by the President of the Republic Fernando Henrique Cardoso.

be resolved through arbitration.⁴¹⁹ Arbitration can be used to determine any civil and commercial dispute. Art. 1 declares, "Those who are capable of entering into contracts may use arbitration to resolve conflicts regarding freely transferable property rights." Interested parties can submit their dispute to arbitration using an arbitration agreement, either in the form of an arbitration clause or an arbitration agreement.⁴²⁰ The Act allows the parties to agree on the place or places where the arbitral proceedings should be held⁴²¹ and to adopt the rules of an arbitral institution or specialized entity, whether domestic or international.⁴²² Arbitration in Brazil is now widely used mainly in construction and infrastructure (oil, gas, electricity), corporate contracts, insurance contracts, and commercial and financial agreements.⁴²³

Mediation, conciliation, and dispute boards are also gradually spreading and becoming essential tools for dispute resolution.⁴²⁴ Most significant contracts contain arbitration and mediation clauses, and many professionals are trained in mediation. However, mediation as a legal institution has only recently been regulated by adopting Federal Law No. 13.140 / 15 (The Brazilian Mediation Act). The law recognizes mediation as a means to settle disputes between private parties and for the self-resolution of disputes in public administration.⁴²⁵

The Civil Procedure Code represents a regulatory framework for developing ODR in Brazil. 236, § 3º permits the performance of procedural acts by videoconference and other real-time audio-visual transmission technology. 198⁴²⁶ requires the judiciary to keep the equipment for procedural acts by electronic means free of charge for all interested parties.⁴²⁷ Other recent regulatory interventions adopted in response to the crisis caused by the COVID-19 pandemic regulate the adoption of hearings through videoconferencing.⁴²⁸ The *Alto Conjunto* (Joint Act)

⁴¹⁹ Brazilian Arbitration Act, Law No. 9.307, art. 1(1).

⁴²⁰ Law No. 9.307, art. 3.

⁴²¹ Law No. 9.307, art. 11.

⁴²² Law No. 9.307, art. 5.

⁴²³ See the Arbitration Guide of the International Bar Association.

⁴²⁴ Giusti and Dalmaso Marques, "Brazil," 92.

⁴²⁵ Brazilian Mediation Act, Law No. 13,140, of June 26, 2015, art. 1.

⁴²⁶ Art. 198 recites, "As unidades do Poder Judiciário deverão manter gratuitamente, à disposição dos interessados, equipamentos necessários à prática de atos processuais e à consulta e ao acesso ao sistema e aos documentos dele constantes."

⁴²⁷ "A COVID-19 E a Prática De Videoconferências Nos Atos Processuais," Consultor Jurídico, accessed April 7, 2021, <https://www.conjur.com.br/2020-mai-10/marco-buzzi-videoconferencia-atos-processuais>; Beatriz Arruda and Renata Porto Adri, "The Brazilian Law System and Some Reflections on the Use of Technology," *International Journal on Online Dispute Resolution* 9, no. 1 (2022): 65-73, doi:10.5553/ijodr/235250022022009001006.

⁴²⁸ "ODR E Resolução De Disputas Em Tempos De Pandemia," Consultor Jurídico, accessed April 7, 2021, <https://www.conjur.com.br/2020-mai-18/rogerio-neiva-odr-resolucao-disputas-tempos-pandemia>.

No. 6 of May 5, 2020, of the *Conselho Superior da Justiça do Trabalho* (Superior Council for Labor Justice) art. 5 temporarily prohibits face-to-face hearings that can instead be carried out by virtual or videoconferencing means.⁴²⁹ Also, art. 16 establishes that hearings in the judicial units or the CEJUSCs-JT (Judicial Centers of Consensual Conflict Resolution), through video conferencing means, should be resumed gradually.

Law 13,994 of April 24, 2020, which amends Law 9,099 /1995, admits non-face-to-face conciliation through technological means that allow for the real-time transmission of sounds and images in special civil courts.⁴³⁰ Finally, Ordinance No. 61 of March 31, 2020, of the *Conselho Nacional de Justiça* (National Council of Justice) creates the *Plataforma Emergencial de Videoconferência para Atos Processuais*, an emergency video conferencing platform for all procedural acts.

Consumer Protection and ODR in Brazil

Brazil has a robust legal framework for consumer protection. In Brazil, consumer protection has been given a constitutional value. The Constitution recognizes the consumer's right as a fundamental right of the individual. The Federal Constitution of 1988 provides for the defense of consumer rights in two critical parts. Art. 5 establishes and governs the fundamental rights of each individual. It states that "all citizens are equal before the law, without distinction of any kind, guaranteeing all Brazilians and foreigners residing in Brazil the inviolability of the right to life, liberty, equality, security, and property, ensuring compliance with [...] XXXII - The State will promote, in compliance with the law, the defense of the consumer."

Furthermore, in art. 170, the Constitution establishes consumer protection as one of the basic principles of "Economic and Financial Order."⁴³¹ These principles are reflected in the

⁴²⁹ See Art. 5 Ato Conjuncto No. 6, "Está temporariamente vedada a realização de audiências e sessões presenciais, podendo ser realizadas por meio virtual ou telepresencial, observando-se, no pertinente, o disposto nas Resoluções nºs 313 e 314 do Conselho Nacional de Justiça."

⁴³⁰ See Art. 22 § 2º Lei No. 13.994, "É cabível a conciliação não presencial conduzida pelo Juizado mediante o emprego dos recursos tecnológicos disponíveis de transmissão de sons e imagens em tempo real, devendo o resultado da tentativa de conciliação ser reduzido a escrito com os anexos pertinentes."

⁴³¹ Art. 170 of the 1988 Brazilian Constitution recites, "The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: 1. national sovereignty; 2. private property; 3. the social function of property; 4. free competition; 5. consumer protection; 6. environment protection; 7. reduction of regional and social differences; 8. pursuit of full employment; 9. preferential treatment for small enterprises organized under Brazilian laws and having their head-office and management in Brazil."

Consumer Protection Code (CPC) issued in 1990 with Law 8078.⁴³² This law deals with various consumer protection rights and establishes fundamental consumer rights.⁴³³ The Consumer Protection Code instituted the National Consumer Defense System (SNDC), a network of Federal, State, Municipal, and Federal District agencies and private consumer defense entities.⁴³⁴ Additionally, the CPC established the National Consumer Defense System (SNDC), coordinated by the Protection and Defense Department of the Secretariat of Economic Law (Ministry of Justice).⁴³⁵

At the heart of this consumer protection system are the Procons.⁴³⁶ Procons are consumer protection and defense federal and municipal agencies that help consumers enforce their rights and mediate disputes. These agencies are located throughout Brazil and operate adjunctly to the judicial system by resolving disputes between consumers and businesses over goods or services outside the courtroom. The complaint is referred to the appropriate civil court if the PROCON cannot resolve or mediate a dispute.

Another tool for protecting and defending consumer rights is represented by the platform Consumidor.gov.br., also known as “Consumidor.” Consumidor is a free public service offered by the Brazilian National Consumer Secretariat (SENACON) of the Brazilian Ministry of Justice. The platform allows a direct dialogue between consumers and traders and offers quick and efficient alternative solutions to internet consumer disputes, bypassing the Procons’ intermediation.⁴³⁷ The platform was institutionalized by Decree N. 8.573 of November 19, 2015, at the National Consumer Secretariat (SENACON) initiative within the National Consumption and Citizenship Plan (PLANDEC) of 2013 to encourage the self-settlement of consumer demands between consumers and traders.⁴³⁸ From its implementation and for the first three years, the platform was developed by Banco do Brasil under the supervision of the Ministry of Justice⁴³⁹ and monitored by PROCONS, Public Defenders, Public Prosecutors, regulatory agencies, and other bodies with the objective and purpose of improving consumer

⁴³² Law 8078 of September 11, 1990.

⁴³³ Art. 6 of Law 8078.

⁴³⁴ Law 8078, art. 105.

⁴³⁵ Law 8078, art. 106.

⁴³⁶ There are 27 state PROCONS and many municipalities have PROCONS that offer consumer protection services to local consumers.

⁴³⁷ See <https://consumidor.gov.br/pages/conteudo/sobre-servico>.

⁴³⁸ Presidência da República Secretaria-Geral Decreto N. 8.573, De 19 De Novembro De 2015, Art. 1.

⁴³⁹ See the technical cooperation agreement signed between the Ministry of Justice (MJ), through the National Consumer Secretariat, and Banco do Brasil on June 10, 2014.

protection policies. The direct collaboration between Banco do Brasil and SENACON ended on June 10, 2017. From that date, the Ministry of Justice, through the SENACON, has managed the entire platform, including its data system.

Officially launched on June 27, 2014, the platform has registered 4.7 million complaints and has a base of over 3 million registered users and more than 1100 accredited companies.⁴⁴⁰ The Southeast, which is composed of the states of Espírito Santo, Minas Gerais, Rio de Janeiro, and São Paulo, is the region with the most significant proportion of complaints with 48.4%, followed by the South, which includes the states of Paraná, the Rio Grande do Sul, and Santa Catarina with 20.4%. Currently, 78% of complaints registered with Consumidor.gov.br are resolved by participating companies, which respond to consumer demands within an average of 8 days.⁴⁴¹ Such a fast and free-of-charge service represents a big incentive for consumers to use the platform. In 2019, the complaints completed were 780,189, the registered user was 555,168, and 131 were accredited companies. As of March 2021, the number of complaints completed through the platform is 4,748,561, the registered users are 3,317,588, and 1131 are registered companies.⁴⁴² In this period, the most complained segments concerned the banking, financial, and credit card administration sectors (26.8%) and telecommunication (26.6%), followed by electronic commerce (10%), air transport (5.5%), consumer databases, and personal data (4.4%).⁴⁴³ According to a survey launched by Consumidor in 2019, 79.4% of consumers said they had their problem solved (totally or partially), 73.3% had a great experience using the platform, and 96.4% said they would recommend it to others.⁴⁴⁴ The survey shows a high degree of overall satisfaction among the platform users. However, more data are needed to assess the consumers' satisfaction with the ODR process. Consumers' satisfaction could be measured by incorporating a satisfaction survey in the platform⁴⁴⁵ to evaluate the efficiency and quality of the platform and the process. The number of complaints completed, albeit high (compared to those of the EU ODR platform as shown by the data provided by the European Commission), is nevertheless considered low for a population of

⁴⁴⁰ As of November 2021, the number of complaints completed through the platform is 4,785,957, the registered users are 3,317,588, and 1131 are the registered companies. See "Consumidor," Consumidor, accessed November 10, 2021, <https://www.consumidor.gov.br/pages/indicador/infografico/abrir#parana>.

⁴⁴¹ See *Consumidor.br.gov Boletim*. 2020. <https://www.consumidor.gov.br/pages/publicacao/externo/>

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*

⁴⁴⁴ See *Consumidor.br.gov Pesquisa*. 2019.

⁴⁴⁵ M. J. Schmidt-Kessen, R. Nogueira, and M. Cantero Gamito, "Success or Failure?—Effectiveness of Consumer ODR Platforms in Brazil and in the EU," *Journal of Consumer Policy* 43, no. 3 (2020): xx, doi:10.1007/s10603-020-09448-y.

about 215 million. Such a number suggests that there is still a low degree of awareness among consumers and could represent a limit to the platform's success. According to a 2019 survey, consumers believe the platform should be promoted through several channels *in primis* social media, followed by television, radio, newspaper, and public institutions.⁴⁴⁶ More marketing surveys and questionnaires aimed at consumers or even ordinary citizens could help identify promotion strategies to increase consumer awareness about the platform.

Consumidor offers an alternative for consumers to resolve their problems with registered companies. The company registration on the Consumidor platform is regulated by Ordinance No. 15 of March 27, 2020, of SENACON within the scope of powers conferred by art. 3, letters II and X, and art. 9 of Decree No. 2.181 of March 20, 1997. The object of registering companies on the platform is to facilitate the online mediation of consumer disputes notified electronically. A great merit of the Ordinance, promoted by the then secretary of SENACOM, is having imposed a duty of registration for specific categories of companies within 30 days of the publication, which took place on April 1, 2020. The companies that must proceed with the registration are the following: (a) Companies acting nationally or regionally in sectors involving public services and essential activities (per Decree No. 10.282 of March 20, 2020); (b) Digital internet service platforms dedicated to the individual or collective transport of passengers or the delivery of food, or that carry out promotions, offer, sales or intermediation of owned or third-party products, commercialization of advertisements, publicity, as well as connection, application, content providers and other social networks for-profit purposes; (c) Economic agents listed among the two hundred companies with most complaints annually registered in the National Consumer Protection Information System ("SINDEC"), according to a survey from the General Coordination of the SINDEC of the National Consumer Secretariat of the Ministry of Justice and Public Security. In addition, the Ordinance specifies that the obligation to register applies to companies indicated by letters (a) and (c) only when: (i) they had gross sales of at least 100,000,000 Brazilian Reais in the last fiscal year; (ii) reached a monthly average equal to or greater than 1000 (one thousand) complaints in their customer service channels in the last fiscal year; (iii) are claimed in more than five hundred lawsuits that involve consumer relations⁴⁴⁷. With this Ordinance, the Ministry of Justice, through the

⁴⁴⁶ See *Consumidor.gov.br. Pesquisa*. 2019. When asked 'Through which channels do you think Consumidor can be more widely disclosed', consumers replied as follows: 85.9% Social Media, 67.5% TV, 40.1% Radio, 39.3% Newspapers and Magazines, 37.2% Institutional Bodies.

⁴⁴⁷ Nacional, Imprensa. "Imprensa Nacional." Accessed November 11, 2021. <https://www.in.gov.br/web/dou/-/portaria-n-15-de-27-de-marco-de-2020-250710160>.

SENACON, wanted to promote further the use of the platform as an alternative system for resolving conflicts and guarantee and improve consumers' access to justice during the phase of social isolation created by the COVID-19 pandemic. On April 8th, 2021, the SENACON issued Ordinance No. 12/2021, which revoked Ordinance No. 15/2020. Ordinance No. 12/2021 does not allow waiving the registration obligation included in the previous Ordinance. Companies were exempted from the duty if there were low demands before the Consumer Protection authorities, or the registration would not have facilitated the online dispute resolution with consumers.

The process provided by the platform follows several steps. Consumers who want to file a complaint with Consumidor can do it by registering on the platform and checking whether the company against which they want to complain is one of the participating companies registered on the website. Once the consumer submits a complaint, the company has ten (10) days to address it and respond. During this period, the company can request additional information from the consumer. It begins a negotiation phase where the consumer and the supplier can try to resolve the claim. After the company sends a response, the consumer has 20 days to assess whether the complaint has been resolved and assign a satisfaction score to the assistance provided by the supplier. The score level is between one and five, with one being the lowest level of satisfaction and five the highest. Lastly, the consumer can enter a final comment. After the evaluation, the complaint is finalized and closed, and interacting with or changing the registered evaluation is no longer possible.⁴⁴⁸ Suppose the complaint is not resolved through the platform. In that case, the consumer can take the complaint directly to the PROCON or resort to other National Consumer Defense System bodies like the Public Defender's Office, the Public Prosecutor's Office, and the Special Civil Court.⁴⁴⁹

The Consumidor platform offers a simple ODR scheme based mainly on a direct dialogue between consumers and suppliers who, through direct negotiation, can resolve their disputes quickly and without any cost. An exciting aspect of the platform is represented by the evaluation system with which the consumer evaluates the supplier's performance in handling the complaint. These ratings are recorded on the platform and are visible to the public. In this way, the performance of the participating companies can be monitored by consumers. At the

⁴⁴⁸ "Consumidor," Consumidor, accessed April 7, 2021, <https://www.consumidor.gov.br/pages/conteudo/publico/1>.

⁴⁴⁹ Ibid, 13.

same time, the companies can demonstrate their commitment to resolving consumer complaints through the rankings published on the platform. It is worth noting that companies are ranked according to their dispute resolution rate, consumer satisfaction level, average response time, and rate of complaints answered.⁴⁵⁰

Although the agreements reached through Consumidor are not binding, the ranking system can still be used as a deterrent for companies. Companies are encouraged to resolve consumer disputes and demonstrate their commitment to satisfying their consumers.

Consumidor offers consumers an online alternative to the ADR services provided by the PROCONS. According to the data, consumers decidedly prefer the online platform to resolve their disputes with the dispute resolution offered by government agencies.

The Consumidor.gov.br platform presents many positive features: user-friendly, easy to navigate, free of charge for users, easy access to the process, direct negotiation between traders and consumers, and a time-effective response mechanism. Such characteristics allow us to conclude that the ODR process provided by the Consumidor platform offers an effective alternative for consumers to the traditional court system. However, a different assessment is needed to establish whether the Consumidor ODR mechanism enhances consumer protection and access to justice. As suggested by Schmidt-Kessen, Nogueira, and Gamito, the platform's effectiveness should be assessed in terms of decreasing the number of cases filed in courts and providing a similar level of consumer protection as the one provided by the traditional court system.⁴⁵¹ More data and data analysis are needed to make this assessment and establish a correlation between the decrease in court cases and the enhancement of consumer access to justice through ODR.

Table 4.1 Consumidor.gov.br Procedural Design

CONSUMERS	Registration required
SUPPLIERS	Registration required
TYPE OF ODR	Technology-enable Negotiation
RESPONSE DEADLINE	Ten days

⁴⁵⁰ "Consumidor," Consumidor, accessed April 8, 2021, <https://www.consumidor.gov.br/pages/indicador/geral/abrir>.

⁴⁵¹ M. J. Schmidt-Kessen, R. Nogueira, and M. Cantero Gamito, "Success or Failure?"

FEES	None
TYPE OF TRANSACTIONS	Online and offline
INTERMEDIARY	None
NATURE OF DECISION	Non-binding
REGULATORY LAW	Decreto N. 8.573, 11/21

*Table adapted from M. J. Schmidt-Kessen et al. 2020.

4.3.3 Chile

Chile is one of the leading economies and also one of the most effective legal systems in South America. ADR has gained popularity during the past two decades as an alternative to the outdated proceedings established in the Civil Procedure Code of 1943. Chilean law supports alternative dispute resolution mechanisms mainly promoted through private institutions and state agencies that provide mediation and arbitration services. ADR is mandatory for certain disputes, such as public works concessions or energy laws.⁴⁵² Mediation is compulsory in some procedures, such as family law, labor law, and tort claims brought by patients against health providers. Chile's most common ADR mechanisms are arbitration, mediation, and dispute boards. Among these, the most popular is arbitration. In recent years, arbitration has grown along with the most well-known ADR institution in the country: the Arbitration and Mediation Centre of the Santiago Chamber of Commerce (CAM Santiago).

International and domestic arbitrations are subject to different legislation; the Chilean Civil Procedure Code governs domestic arbitration, while international arbitration is governed by Law No. 19,971 of 2004, which is almost entirely based on the 1985 UNCITRAL LAW model. In 1975, Chile ratified the 1958 New York Convention and the 1975 Panama Convention that allowed for enforcing foreign arbitration awards. Domestic arbitration is mandatory in some commercial disputes, and most complex commercial agreements contain arbitration clauses. In August 2019, Chile signed the Singapore Convention on Mediation but had not yet ratified it.

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⁴⁵² Aninat, Francisco, and Carlos Hafemann, "Chile - The Dispute Resolution Review - Edition 12 - TLR - The Law Reviews," The Law Reviews, last modified 2020, <https://thelawreviews.co.uk/edition/the-dispute-resolution-review-edition-12/1214341/chile>.

In Chile, the relationship between suppliers of goods or services and consumers is governed by Law No. 19.496 of 1997, the Chilean Consumer Protection Act (CCPA), which establishes basic rights and obligations for consumers and businesses and the general rules on consumer protection. The law also establishes the consumer's right to receive reparation and compensation for the damage suffered from the breach of contractual obligations from the supplier. Specifically, art. 3 (e) recites, "The right to an adequate and timely reparation and compensation of all material and moral damages in case of breach of any of the contractual obligations from the supplier and the duty to act according to the means that the law allows." The law also sets up the Consumer National Service (SERNAC), a state agency responsible for protecting consumer rights.⁴⁵³ Through the Ministry of the Economy, Development, and Tourism, the President of the Republic oversees the SERNAC. The agency's mission is to protect, inform, and educate consumers, strengthen a culture of respect for their rights, and monitor the behavior of companies in the markets.⁴⁵⁴ Through the SERNAC, consumers can file claims against companies that may have violated their rights and request a solution. The consumer has three ways to file a complaint: through the consumer portal available on the SERNAC website,⁴⁵⁵ by submitting a request to the regional SERNAC offices, or by calling a free number. Once the complaint is entered, the SERNAC solicits a response from the company to resolve the problem. The company may not respond to the request presented by the consumer, contest the complaint, or accept in whole or in part the consumer's complaint. If the consumer is unsatisfied with the company's response, he can file a complaint with the competent court and request compensation for the infringed right.⁴⁵⁶ Through the SERNAC, it is also possible to activate collective mediation. Collective mediation is a pre-judicial tool that seeks to solve collective consumer claims.

In 2011, Law No. 20.555 was enacted to strengthen the rights of consumers of financial products and services. This law, which reforms Law No. 19.496, introduces the concept of ADR for resolving consumer disputes. It also adds art. 16, which establishes the possibility for

⁴⁵³ Ley No. 19.496 de 7 de marzo de 1997, art. 57 "El Servicio Nacional del Consumidor será un servicio público funcionalmente descentralizado y desconcentrado territorialmente en todas las regiones del país, con personalidad jurídica y patrimonio propio, sujeto a la supervigilancia del Presidente de la República a través del Ministerio de Economía, Fomento y Reconstrucción."

⁴⁵⁴ "El SERNAC." SERNAC: Portal Institucional, accessed October 24, 2020, <https://www.sernac.cl/portal/617/w3-propertyname-586.html>.

⁴⁵⁵ www.sernac.cl.

⁴⁵⁶ "Reclamo," SERNAC: Protección, accessed March 18, 2021, <https://www.sernac.cl/portal/618/w3-propertyvalue-22029.html>.

the consumer to resort to arbitration in case of financial products or services disputes.⁴⁵⁷ Following the tradition of the United States, the law also provides for a system of consumer protection of collective rights through the so-called "class actions."⁴⁵⁸

A more significant promotion of ADR in consumer disputes comes from Law No. 21.081 of 2018, which amends Law No. 19.496. The new law allows consumer associations to use mediation to resolve consumer disputes, thus extending the use of ADR in consumer matters. The enacted art. 8 concerning the responsibilities of consumer associations includes in the additional letter *h* the possibility for the consumer associations to carry out individual mediations at the consumer's request.⁴⁵⁹

Currently, no ADR or ODR options are available to online traders and their customers. Furthermore, no real ODR systems are available for resolving consumer disputes, including e-commerce. Despite the recent initiatives to adopt ADR, the present legal framework does not constitute a sufficient legal basis for developing and implementing ODR systems. Even the SERNAC online platform is considered a rudimentary ODR that only offers online administration support to the complaint procedure and does not allow direct negotiations between the consumer and the company. A step in building an efficient ODR could be to improve the SERNAC platform to include online negotiation and mediation, thus providing the consumer with an effective tool for resolving disputes.⁴⁶⁰ In addition, the Consumer Protection Act would need to be enacted to include provisions regarding the use of technology to facilitate alternative resolution of consumer disputes.

4.3.4 Colombia

Colombia is the fourth-largest economy in Latin America and the Caribbean, with a gross domestic product (GDP) of \$271.46 billion.⁴⁶¹ It is also one of the most attractive economies in Latin America for international trade and foreign investment.⁴⁶² However, one of the biggest

⁴⁵⁷ Rodolfo Marcone Lo Presti, *Justicia Digital Para El Consumidor. Ideas, dilemas y premisas del ODR de consumo en el espacio U.E y Chile* (Santiago de Chile: Editorial Demokratia, 2020).

⁴⁵⁸ Ley No. 19.496, Art. 51.

⁴⁵⁹ See Ley No. 21.081 2018 de reforma a la Ley No. 19.496, Art. 1(3).

⁴⁶⁰ Marcone Lo Presti, *Jutizia Digital*.

⁴⁶¹ "Latin America & Caribbean: GDP by Country 2020," Statista, last modified April 6, 2021, <https://www.statista.com/statistics/802640/gross-domestic-product-gdp-latin-america-caribbean-country/>.

⁴⁶² Lloreda Camacho, "Litigation and Alternative Dispute Resolution in Colombia, Mexico, Panama, and Brazil," Association of Corporate Counsel, accessed December 6, 2021,

challenges of doing business in Colombia is represented by a slow judiciary and the extensive duration of judicial proceedings that reduce trust in the economy. It can take up to 1288 days to enforce a contract through the courts, and ordinary civil proceedings can last 6 to 10 years.⁴⁶³ As a result, many domestic and international companies prefer to resort to alternative dispute resolution mechanisms to resolve their disputes. Above all, it has favored the growth and use of arbitration and mediation.

Arbitration is recognized as a method of dispute resolution by the Constitution of 1991 in Title V, Chapter I, Art. 116, which allows individuals to be temporarily entrusted “with the function of administering justice as jurors in criminal proceedings, as mediators or as arbitrators authorized by the parties to issue verdicts in law or in equity in the terms defined by an Act.” Arbitration was regulated in 1989 by Decree 2279, which established basic arbitration rules after the enactment of the Constitution by Law 21 of 1991. Law 21 was later modified by Decree 1818 of 1998, which became the statute for ADR mechanisms. The need to make the Colombian legal environment more attractive to international parties “interested in taking their disputes before a tribunal with a seat in Colombia”⁴⁶⁴ pushed the Colombian government to adopt a new law on international and domestic arbitration. On July 12, 2012, the government enacted Law 1563 (“New Statute”), which came into force on October 12, 2012. The New Statute abrogates the arbitration regime laid out in Decree 1818 of 1998 and establishes a new regime partially based on the UNCITRAL Model Law on Arbitration. The statute collects the regulations relating to domestic and international arbitration. Sections I and II regulate domestic arbitration, while Section III deals with international arbitration, which fully adopts the 2006 revised UNCITRAL Model Law. Art. 62 of the New Statute indicates the conditions under which arbitration should be considered international.⁴⁶⁵ Also, it establishes that the

<https://www.acc.com/sites/default/files/resources/upload/Litigation-and-Alternative-Dispute-Resolution-in-Colombia-Mexico-P.pdf>.

⁴⁶³ TMF Group, “Top 10 Challenges Of Doing Business In Colombia - Corporate/Commercial Law - Colombia,” Welcome to Mondaq, last modified October 27, 2021, <https://www.mondaq.com/contracts-and-commercial-law/1125142/top-10-challenges-of-doing-business-in-colombia>.

⁴⁶⁴ Nicolás Lozada Pimiento, “The Colombian Arbitration Statute: Towards an Export-Quality Service for Colombia,” *IUSTA*, no. 50 (2019): 68.

⁴⁶⁵ “Se entiende que el arbitraje es internacional cuando:

- a) Las partes en un acuerdo de arbitraje tengan, al momento de la celebración de ese acuerdo, sus domicilios en Estados diferentes; o
- b) El lugar del cumplimiento de una parte sustancial de las obligaciones o el lugar con el cual el objeto del litigio tenga una relación más estrecha, está situado fuera del Estado en el cual las partes tienen sus domicilios; o
- c) La controversia sometida a decisión arbitral afecte los intereses del comercio internacional.

provisions in Section III only apply to arbitrations having their seat in Colombia. Art. 58 allows the parties to a domestic arbitration to agree on the rules of the procedure.⁴⁶⁶

Arbitration is commonly used to resolve large and complex multi-party and multi-contract disputes between private parties, including supply and distribution contracts. Some matters cannot be subject to arbitration, including administrative acts (*actos administrativos*),⁴⁶⁷ antitrust cases, criminal matters, tax obligations, and matters relating to civil status,⁴⁶⁸ worker's rights,⁴⁶⁹ and other non-disposable rights.

According to the data collected by the *Sistema de Información de la Conciliación, el Arbitraje y la Amigable Composición (SICAAC)* of the ministry of justice, the new arbitration cases lodged in 2021 were 1214 in comparison with those commenced in 2020 (253), demonstrating a significant increase in arbitration requests. Most new arbitration cases were related to civil and commercial disputes (1045), and 140 involved a public entity.⁴⁷⁰ Regarding the type of requests, most arbitrations deal with contracts and contractual disputes.⁴⁷¹

In Colombia, the law distinguishes between mediation and conciliation. Art. 64 of Law 446 of 1998⁴⁷² provides a definition of conciliation that corresponds to the definition of mediation. However, Colombian law only regulates conciliation. Conciliation is regulated by Law 23 of 1991, Law 446 of 1998, Decree 1818 of 1998, and Law 640 of 2001. An important aspect that distinguishes the two processes concerns the confidentiality of the procedure. While art. 16 of Decree 1818 of 1998⁴⁷³ recognizes the confidential nature of conciliation, the law does not protect confidentiality in mediation even if the parties and the mediator agree. Such agreement

⁴⁶⁶ En los arbitrajes en que no sea parte el Estado o alguna de sus entidades, los particulares podrán acordar las reglas de procedimiento a seguir, directamente o por referencia a las de un centro de arbitraje, respetando, en todo caso los principios constitucionales que integran el debido proceso, el derecho de defensa y la igualdad de las partes. En el evento en que las partes no establecieran reglas o el centro seleccionado para adelantar el trámite no tuviere reglamento de procedimientos debidamente aprobado, se aplicarán las reglas establecidas para cada caso en la presente ley.

⁴⁶⁷ See art. 88 of Law 1437 of 2011.

⁴⁶⁸ See art.s 2473 and 2472 of the Colombian Civil Code.

⁴⁶⁹ See Colombian Labor Code.

⁴⁷⁰ "Estadísticas Arbitraje," SICAAC, accessed December 22, 2021, <https://www.sicaac.gov.co/Informacion/EstadisticaArbitraje>.

⁴⁷¹ Ibid.

⁴⁷² Art. 64 of Law 446 of 1998 defines conciliation as a conflict resolution mechanism through which, two or more people manage the solution of their differences, with the help of a neutral and qualified third party, the conciliator.

⁴⁷³ "The Conciliation will be confidential. Those who participate in it must maintain due confidentiality, and the agreement formulations that are proposed or discussed will not affect the subsequent process when it takes place."

does not prevent the parties from submitting evidence documents shared at the mediation table or any conversation during the mediation in subsequent court proceedings or arbitration. Also, Law 640 of 2001 has made conciliation compulsory for most proceedings. Art. 35 of Law 640 states that conciliation is mandatory for family, civil, labor, and administrative matters.⁴⁷⁴

According to art. 4 of Decree 1818 of 1998, conciliation can be judicial or extrajudicial. Extrajudicial conciliation can occur before any licensed conciliator. In contrast, judicial conciliation can be carried out only before the Inspector's General Office (*Agente del Ministerio Público*).⁴⁷⁵ In Colombia, extrajudicial conciliation (*Conciliación Extrajudicial en Derechos*) has grown in the last ten years (see figure 4.1). According to data provided by the SICAAC, in 2016, the total number of conciliation requests handled was 93.164, and 172.475 in 2019.⁴⁷⁶ However, in 2020, as figure 4.1 shows, there was a significant decrease in conciliation requests. Such a drop could be due to the restrictions adopted to combat the COVID-19 pandemic and the lack of technology and administrative support to provide conciliation services in virtual mode.

Gráfica 1. Total de solicitudes de Conciliación Extrajudicial en Derecho atendidas, 2010 a 2020



Fuente: Ministerio de Justicia y del Derecho – Dirección de Métodos Alternativos de Solución de Conflictos – SIC – SICAAC – Corte de la información: 31 de agosto de 2021. Nota: Las estadísticas que se muestran en esta gráfica corresponden a las solicitudes de Conciliación Extrajudicial registradas por los operadores de conciliación que reportaron la información en los sistemas de información SIC hasta el año 2015 y SICAAC a partir de enero de 2016.

Figure 4.1 Number of Extrajudicial Conciliation Requests Handled (2010-2020)

The data concerning conciliation outcomes between 2019 and 2020 shows that 49% - 50% of conciliations resulted in an agreement, 20% non-agreement, 0.17% failure to appear, and

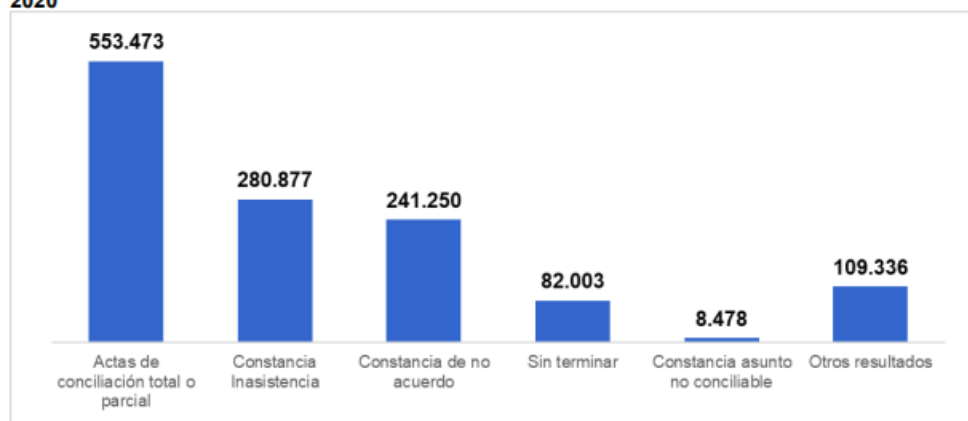
⁴⁷⁴ See art.s 37, 38, 39, 40 of Law 640 of 2001.

⁴⁷⁵ See art. 6 of Decree 1818 of 1998.

⁴⁷⁶ “Estadísticas De Conciliación Extrajudicial En Derecho,” SICAAC, accessed December 22, 2021, <https://www.sicaac.gov.co/Informacion/Estadistica>.

0.035% - 0.04% in a partial agreement.⁴⁷⁷ Data for 2010-2020 confirm the trend (see figure 4.2), although there has been an increment in the number of agreements reached in conciliation in the last three years. Of 1,275,417 conciliations handled, 43.4% reached an agreement, 22% failed to appear, 18.9% ended in non-agreement, and 6.4% were not completed.

Gráfica 71. Total de solicitudes de Conciliación Extrajudicial en Derecho según resultado, 2010 a 2020



Fuente: Ministerio de Justicia y del Derecho – Dirección de Métodos Alternativos de Solución de Conflictos – SIC – SICAAC - Corte de la información: 31 de agosto de 2021

Figure 4.2 Number of Extrajudicial Conciliations by Outcome (2010-2020)

The conciliation requests that registered the highest participation regarded family disputes at 51.3%, civil at 14.7%, labor at 8.9%, and criminal at 0.2%. Lastly, it should be noted that conciliation requests represented 9.8% of the overall effective income of the ordinary jurisdiction for the year 2020.⁴⁷⁸

Technology, ADR, and ODR

In Colombia, the emergency caused by the COVID-19 pandemic has accelerated the application of new technologies in different areas, including the use of technologies within the legal system. In March 2020, the sanitary emergency forced the Judiciary Council to order the courts' closure. Consequently, the Colombian government and the Judiciary Council issued a

⁴⁷⁷ Ibid.

⁴⁷⁸ “Comparación entre los casos atendidos por la Conciliación Extrajudicial en Derecho y la Jurisdicción ordinaria en Colombia,” Ministerio De Justicia Y Del Derecho, last modified September 5, 2021, https://www.minjusticia.gov.co/programas-co/MASC/Documents/ANALISIS%20DE%20CONTEXTO%202020_V4.0_05092021.pdf?csf=1&e=Mvumg0.

series of decrees to implement the use of technology in judicial proceedings. Decree 491 of 28 March 2020, which adopts urgent measures to ensure the provision of services by public authorities and by individuals performing public functions in a state of emergency, supports technology in conciliation, arbitration, and other ADR mechanisms. In particular, Art. 10 of the Decree states that to maintain continuity in providing alternative justice services, arbitration proceedings, and out-of-court conciliation procedures, amicable settlement and insolvency procedures for non-merchant individuals will be carried out through communication technologies and information.

Furthermore, the art. states that public entities and centers will make available to parties, representatives, arbitrators, and conciliators the electronic and virtual means necessary for receiving documents and holding meetings and hearings.⁴⁷⁹ Likewise, Decree 806 of 2020 provided some general guidelines for two years to reactivate the administration of justice through technology in judicial proceedings. The decree has as its objective the implementation of information and communication technologies to accelerate the processing of legal proceedings before the ordinary jurisdiction in civil, labor, and family matters, before the administrative and constitutional jurisdictions, and in arbitration proceedings.⁴⁸⁰ The use of technology is also aimed at facilitating and accelerating access to justice and protecting judicial officials and users of the justice system.⁴⁸¹

Following the favorable context given by implementing technologies in the administration of justice under Decrees 806 and 491 of 2020, on May 31, 2021, the Colombian Congress presented a new Bill (584). The Bill aims to promote the adoption of information and communication platforms for resolving disputes in an accessible, efficient, independent, impartial, transparent, and safe way.⁴⁸² The Bill defines the ‘ODR platform,’ in the text referred to as REC (*resolución electrónica de controversias*) platform,⁴⁸³ and identifies the service that can be provided and the quality of those who intervene in resolving the conflict.⁴⁸⁴ The scope of the Bill extends to all REC platforms implemented in the public and private sectors.⁴⁸⁵ In

⁴⁷⁹ Dichas entidades públicas y centros pondrán a disposición de las partes y apoderados, árbitros, conciliadores, amigables componedores los medios electrónicos y virtuales necesarios para el recibo de documentos y de realización de reuniones y audiencias.

⁴⁸⁰ Decreto 806 de 2020, Artículo 1.

⁴⁸¹ Ibid., artículo 2.

⁴⁸² Proyecto de ley No. 584 de 31 de Mayo del 2021 (Texto Propuesto Para Primer Debate), Art. 1.

⁴⁸³ Ibid., art. 2 (d).

⁴⁸⁴ Ibid., art. 4.

⁴⁸⁵ Ibid., art. 3.

particular, it authorizes administrative entities and public officials to adopt free and adequate REC platforms for resolving disputes within their area of competence.⁴⁸⁶ Also, it promotes the adoption of REC platforms by private companies to prevent and resolve consumer, e-commerce, and Business-to-business (B2B) disputes.⁴⁸⁷ The Bill assigns a term of 18 months from the promulgation of the law, within which arbitration and conciliation centers will have to adopt REC platforms for the electronic management of negotiation, conciliation, arbitration, and amicable dispute resolution services.⁴⁸⁸ The Bill proposes *Sandboxes*⁴⁸⁹ as a regulatory tool for the gradual implementation of ODR. Sandboxes are mechanisms that allow administration authorities and public officials to conduct experiments relating to the procedural and operational functions of REC platforms.⁴⁹⁰ They will be used to verify the design, functioning, maintenance, ease of use, financing, security of data, and implementation of each REC Platform. For the development of the Sandboxes, the international standards on ODR will be applied, including those adopted by the International Council for Online Dispute Resolution (ICODR).⁴⁹¹

Within one year of the Law's entry into force, the Ministry of Information and Communication Technologies will launch a single portal for REC platforms authorized and implemented in Colombia.⁴⁹²

Regarding the development of ODR platforms, the closest development that the Colombian legal system adopted took place in 2015, when the Superintendency of Industry and Commerce (hereinafter SIC) launched the SIC Facilita. This virtual platform, which represents Colombia's first public ODR platform, allows for resolving consumer rights disputes between suppliers and consumers through information and communication technologies and facilitating a mediator. The process begins when a consumer files a claim through the SIC Facilita platform. First, the consumer must verify that the supplier is enrolled in the SIC Facilita program. Then, the consumer will fill out a form with basic contact information and describe the claim along with information about the product and the supplier. Once the claim has been submitted, the

⁴⁸⁶ Ibid., art. 6.

⁴⁸⁷ Ibid., art. 8.

⁴⁸⁸ Ibid., art. 9.

⁴⁸⁹ Ibid., art. 2 (e). Sandbox: Mecanismo de regulación que permite realizar experimentos en relación con el procedimiento y funcionamiento operativo de la Plataforma REC, en vivo, dentro de un entorno controlado y bajo la supervisión del regulador.

⁴⁹⁰ Ibid., art. 4.

⁴⁹¹ Ibid., art. 7.

⁴⁹² Ibid., art. 4.

platform forwards the request to the supplier, allowing the supplier and consumer to negotiate directly. The supplier can accept the claim, reject it, or make a counterproposal. After seven days, if the complaint is not resolved, the system schedules a mediation session between the consumer and the supplier. Suppliers and consumers will meet through a virtual chat directed by a mediator of the Superintendency of Industry and Commerce to solve the dispute and achieve a solution.⁴⁹³ If the parties reach an agreement, they will sign a transactional contract in accordance with Art. 4 of Law 1480 of 2011⁴⁹⁴ and Art. 2469 and subsequent of the Colombian Civil Code⁴⁹⁵ that will have the effect of *res judicata* as per Art. 2483 of the Civil Code.⁴⁹⁶

Currently, there are 158 suppliers registered with SIC Facilita, including department and clothing stores, travel agencies, telecommunications companies, dealerships, and gyms.⁴⁹⁷ The total claims submitted through the platform from February 15, 2015, to February 2018 were 32,400, of which 59 % were closed with an agreement.⁴⁹⁸

The SIC Platform is also used to resolve disputes concerning personal data between data holders and data controllers. Data holders who have any inconvenience in light of Statutory Law 1266 of 2008 (data protection law)⁴⁹⁹ could file a claim directly through the platform or in a second instance if they did not have a satisfactory response from the data controller.

Table 4.2 SIC Facilita Procedural Design

⁴⁹³ Superintendencia de Industria y Comercio, “Manual Usuario SIC Facilita,” , last modified July 2019, https://sicfacilita.sic.gov.co/SICFacilita/docs/SIC_FACILITA_MANUAL_CONSUMIDOR.pdf.

⁴⁹⁴ Ley 1480 de 2011, Art. 4, Las disposiciones contenidas en esta ley son de orden público. Cualquier estipulación en contrario se tendrá por no escrita, salvo en los casos específicos a los que se refiere la presente ley. Sin embargo, serán válidos los arreglos sobre derechos patrimoniales, obtenidos a través de cualquier método alternativo de solución de conflictos después de surgida una controversia entre el consumidor y el proveedor y/o productor.

⁴⁹⁵ Código Civil, Art. 2469, La transacción es un contrato en que las partes terminan extrajudicialmente un litigio pendiente o precaven un litigio eventual. No es transacción el acto que sólo consiste en la renuncia de un derecho que no se disputa.

⁴⁹⁶ Ibid., Art. 2483, La transacción produce el efecto de cosa juzgada en última instancia; pero podrá impetrarse la declaración de nulidad o la rescisión, en conformidad a los artículos precedentes.

⁴⁹⁷ For a complete list of suppliers registered in SIC Facilita, see <https://sicfacilita.sic.gov.co/SICFacilita/index.xhtml>

⁴⁹⁸ “La Herramienta ‘Sic Facilita’ Celebra Dos Años Solucionando La Vida De Consumidores Y Proveedores | Superintendencia De Industria Y Comercio,” accessed December 28, 2021, <https://www.sic.gov.co/noticias/la-herramienta-sic-facilita-celebra-dos-anos-solucionando-la-vida-de-consumidores-y-proveedores>.

⁴⁹⁹ Statutory Law 1266 of 2008 regulates the processing of financial data, credit records and commercial information collected in Colombia or abroad.

CONSUMERS	Registration required
SUPPLIERS	Registration required
TYPE OF ODR	Facilitated settlement
RESPONSE DEADLINE	Seven days
FEES	None
TYPE OF TRANSACTIONS	Online and offline
INTERMEDIARY	SIC Facilita Mediator
NATURE OF DECISION	Binding

*Table adapted from M. J. Schmidt-Kessen et al. 2020.

4.3.5 Mexico

Although Mexico lies in North America, it is commonly included in the group of Latin American states.⁵⁰⁰ It can also be argued that, due to its geographic location, commercial and trade links, and emerging role as a regional and global power, Mexico has much more to share with the United States (US) and Canada than with its peers Argentina and Brazil.⁵⁰¹

Despite its vicinity and ties with the US and Canada, the culture of alternative dispute resolution in Mexico has followed a different path from North America's Anglo-Saxon and common law countries. While in the other two states of the North American continent, the ADR phenomenon was initially mainly driven by the private sector. In Mexico, ADRs have followed a more institutional trend. The use of ADR is encouraged to relieve the pressure on the courts from the overwhelming number of disputes that require a solution and promote a more collaborative approach to justice.

⁵⁰⁰ Mexico shares colonial roots, language, some elements of culture, and the Catholic religion with Latin American States.

⁵⁰¹ Allison Fedirka, "Why Mexico Belongs in North America," Geopolitical Futures, accessed November 10, 2020. <https://geopoliticalfutures.com/why-mexico-belongs-in-north-america/>.

In Mexico, the right to access ADR mechanisms is now recognized as a human right by Art. 17 (5) of the Political Constitution that was reformed in 2017, which recites, “The laws shall provide alternative mechanisms to resolve controversies. In criminal matters, they shall regulate its application, ensure reparations, and establish the cases in which judicial supervision shall be required.”⁵⁰² In this regard, in jurisprudence 1a./J. 103/2017 (10th),⁵⁰³ the *Suprema Corte de Justicia de la Nación* (SCJN) indicated that from the Political Constitution of Mexico and the American Convention on Human Rights, the right to effective access to justice. It includes, along with socio-economic and political factors, the right to effective judicial and extra-judicial protection mechanisms that must be effective but constitutionally and legally justified.⁵⁰⁴ This critical recognition establishes ADRs on the same constitutional level of judicial protection and as part of the Mexican judicial system, setting an important precedent for Mexico and Latin America.

Mexico is a federal republic comprising 31 states and the Federal District with federal and local courts. Regarding ADR, local courts have created a specific mediation body, the *Centro de Justicia Alternativa* (Center for Alternative Justice). The most common ADR procedures are arbitration, mediation, and some forms of conciliation during the proceedings. Arbitration is commonly used in commercial matters and disputes between public entities and private investors. Various provisions in Mexican legislation regulate arbitration according to the field of law (i.e., Labor, finance, commercial).⁵⁰⁵ Commercial arbitration is governed by the *Código de Comercio* (Code of Commerce) of 1889, Title IV, which contains a set of procedural rules. The Code incorporates the Model Arbitration Law of the UN Commission on International Trade Law (UNCITRAL) of 1985 in art.s 1415 to 1463.⁵⁰⁶ It was amended in 2011 to

⁵⁰² Constitución Política de los Estados Unidos Mexicanos, Última Reforma DOF 09-08-2019, artículo 17 (5), “Las leyes preverán mecanismos alternativos de solución de controversias. En la materia penal regularán su aplicación, asegurarán la reparación del daño y establecerán los casos en los que se requerirá supervisión judicial.”

⁵⁰³ “De los artículos 14, 17 y 20, apartados B y C, de la Constitución Política de los Estados Unidos Mexicanos y 8 de la Convención Americana sobre Derechos Humanos, deriva el derecho de acceso efectivo a la justicia, el cual comprende, en adición a determinados factores socioeconómicos y políticos, el derecho a una tutela jurisdiccional efectiva y los mecanismos de tutela no jurisdiccional que también deben ser efectivos y estar fundamentados constitucional y legalmente.”

⁵⁰⁴ Alfredo Sánchez-Castañeda, Daniel Márquez Gómez, and Beatriz Camarillo Cruz, “Desafíos de los Medios Alternativos de Solución de Controversias en el Derecho Mexicano Contemporáneo,” Defensoría UNAM, accessed November 13, 2020,

<https://www.defensoria.unam.mx/publicaciones/Desafios-medios.pdf>.

⁵⁰⁵ Elvia Arcelia Quintana Adriano, “Marco Jurídico Del Arbitraje Nacional, Regional e Internacional,” Instituto de Investigaciones Jurídicas - UMAN, accessed September 11, 2021,

<https://archivos.juridicas.unam.mx/www/bjv/libros/6/2776/16.pdf>.

⁵⁰⁶ Mexico adopted the UNCITRAL Model Arbitration Law on 22 July 1993.

incorporate changes from the UNCITRAL Model Law of 2006. According to art. 1415, the provisions in the Code of Commerce govern national and international arbitration of a ‘commercial’ nature whenever the seat of arbitration is in Mexico.⁵⁰⁷ Art. 1416 (I) of the Code defines ‘arbitration agreement’ as the agreement by which the parties decide to submit all or certain disputes arising or potentially arising from a specific contractual or non-contractual legal relation. The arbitration agreement can include an arbitration clause in a contract or a separate agreement. Mexican law does not impose specific substantive requirements for the arbitration proceeding but allows the parties to decide the type of procedure to use.

In Mexico, mediation in commercial and civil matters is not regulated at the federal level except in the constitution,⁵⁰⁸ while it is at the local level.⁵⁰⁹ For example, regarding ordinary Federal District laws, the mediation finds support in the *Ley de Justicia Alternativa del Tribunal Superior de Justicia para el Distrito Federal de 2008* (Alternative Justice Law of 2008 of the Superior Court of the Federal District). The Law has as its object the regulation of mediation as a method of conflict management for resolving civil, commercial, and family disputes.⁵¹⁰ Although art. 73 of the Mexican constitutional reform the Congress of the Union to enact a general law on ADR, the constitutional mandate has not yet been satisfied.⁵¹¹ However, a federal bill on alternative justice has been presented to the Senate by the Partido Acción Nacional, which aims to regulate the principles and standards regarding alternative dispute resolution mechanisms, except for criminal matters.⁵¹² Art. 6 of the above bill recognizes mediation as an alternative mechanism for parties to manage, prevent, and resolve a common dispute.

In commercial matters, there is a new center for mediation in the Federal District, and most states of the Mexican Republic have followed this trend. To this date, there are at least 56 mediation centers in Mexico.

Consumer Protection in Mexico

⁵⁰⁷ Código de Comercio, art. 1416 (II).

⁵⁰⁸ Constitución Política de los Estados Unidos Mexicanos, Última Reforma DOF 09-08-2019, artículo 17 and 18.

⁵⁰⁹ For example, the Distrito Federal and the states of Aguascalientes, Chihuahua, Sonora, and Yucatán all have legislation on ADR.

⁵¹⁰ Ley de Justicia Alternativa del Tribunal Superior de Justicia para el Distrito Federal de enero de 2008, art. 1.

⁵¹¹ Constitución Política de los Estados Unidos Mexicanos de 2021, Artículo 73. Facultades del Congreso.

⁵¹² Initiative with Draft Decree by which the General Law of Dispute Resolution Mechanisms is issued, LXIV Legislature of the Congress of the Union. Publication in the Senate Gazette, April 30, 2018.

Mexico was the second Latin American country to pass a Federal Consumer Protection Law, *Ley Federal de Protección al Consumidor (LFPC)*, representing Mexico's most relevant consumer protection legislation. Other laws regulate consumer protection in specific industries, like the *Ley de Protección y Defensa al Usuario de Servicios Financieros*, which concerns the protection and defense of users of financial services.

The Consumer Protection Law aims “to promote and protect the rights and culture of consumers, and to seek fairness, assurance, and legal certainty in relations between suppliers and consumers.”⁵¹³ Basic principles of consumer relations are identified and recognized in art. 1. They include the protection of the consumer's safety, life, and health, the right to education, the right to information, effective prevention and repair of damages, access to administrative bodies, and the right to create associations of consumers. The law extends its protection to all goods and services provided by suppliers, and both the consumers and suppliers must comply with this law's provisions.⁵¹⁴ Chapter VII Bis of the Consumer Protection Law regulates the rights of consumers in transactions carried out by electronic means. Specifically, art. 76 Bis establishes certain obligations for suppliers when performing online transactions. The obligations include:

- using consumer information on a confidential basis;
- using any technical means available to offer security and confidentiality regarding consumer information;
- providing the consumer with a physical address, telephone numbers, and other means by which the consumer can file claims;
- avoiding misleading commercial practices regarding the characteristics of the products;
- honoring the consumer's decision regarding the quantity and quality of the products the consumer wishes to receive, as well as the decision not to receive any advertising;
- and abstaining from using sales or advertising strategies that do not provide the consumer with clear or sufficient information on the services offered.

⁵¹³ Ley Federal de Protección al Consumidor, art. 1.

⁵¹⁴ Ibid., art. 6.

Also, the art. recognizes the consumer's right to be informed about the terms, conditions, costs, additional charges, and forms of payment for the goods and services offered by the supplier.⁵¹⁵

The Procuraduría Federal del Consumidor (PROFECO) is the agency enforcing consumer protection law.⁵¹⁶ PROFECO ('The Agency') is the national consumer protection agency of the Ministry of Economy of the Mexican Federal Government. It was created in 1976 with the LFPC to promote and protect consumer rights, encourage smart consumption, and seek equity and legal certainty in supplier-consumer relationships.⁵¹⁷ The Agency also has the function and authority to promote the resolution of disputes between consumers and suppliers and, "if applicable, to render rulings wherein the contractual obligations of the supplier are assessed."⁵¹⁸ All consumers can file a claim or complaint against a supplier before any of the PROFECO regional offices located in all the federal states or through its online portal. Claims and complaints can be submitted in writing, by phone, electronically, or through any other adequate means and must meet specific requirements.⁵¹⁹ Once the claim has been submitted, the Agency gives notice to the supplier within fifteen days and requests a written report related to the facts.⁵²⁰ After at least four days of giving notice to the supplier, the Agency schedules a settlement hearing and tries to settle the dispute through a conciliation procedure⁵²¹, which is not in any case mandatory. However, if the supplier does not attend the conciliation hearing(s) as per art. 112,⁵²² the agency can fine the supplier or issue an enforceable opinion in favor of the consumer. If a settlement cannot be reached, the conciliator can urge the parties to appoint either the Agency or an independent arbitrator to settle the dispute.⁵²³ Unless otherwise agreed, the arbitral award shall be enforced within fifteen days from the date of its notification to the parties.⁵²⁴

⁵¹⁵ Ibid., art. 76 Bis(V).

⁵¹⁶ Ibid., art. 2(IV).

⁵¹⁷ Ibid., art. 20.

⁵¹⁸ Ibid., art. 24(XVI).

⁵¹⁹ Ibid., art. 99.

⁵²⁰ Ibid., art. 103.

⁵²¹ Ibid., art. 111.

⁵²² Art. 112 recites "En caso de que el proveedor no se presente a la audiencia o no rinda informe relacionado con los hechos, se le impondrá medida de apremio y se citará a una segunda audiencia, en un plazo no mayor de 10 días, en caso de no asistir a ésta se le impondrá una nueva medida de apremio y se tendrá por presuntamente cierto lo manifestado por el reclamante. En caso de que el reclamante no acuda a la audiencia de conciliación y no presente dentro de los siguientes 10 días justificación fehaciente de su inasistencia, se tendrá por desistido de la reclamación y no podrá presentar otra ante la Procuraduría por los mismo hechos."

⁵²³ Ibid., art. 116.

⁵²⁴ Ibid., art. 121.

Concilianet Platform in Mexico

The numerous complaints received by local agencies have made the conciliation procedure longer and less attractive to consumers. To deal with these problems, in 2008, PROFECO created *Concilianet*, a synchronous platform for online conciliation, contributing to streamlining the procedure and reducing the length of the proceedings.

Concilianet was created as part of an effort by *Procuraduría* to include information technologies in conflict resolution processes⁵²⁵ and provide consumers with a cost-effective way to resolve online claims or complaints against providers of goods and services with a collaboration agreement with PROFECO. The idea behind the development of Concilianet was to transfer the traditional conciliation process to the cyber environment and design a platform for the online resolution of all types of disputes resulting from online and offline transactions.⁵²⁶ In 2004, the Federal Consumer Protection Act was amended to fit the context of e-commerce and the use of electronic means to resolve disputes, allowing consumers to file complaints on the Internet.⁵²⁷

Consumers can file complaints about disagreements with terms previously agreed to in the sale or supply of the product or service but cannot claim damages. However, the process does not prevent consumers from filing claims for damages in competent courts.⁵²⁸

On a procedural level, the platform facilitates communication between the parties using a third conciliator. Consumers can access the platform services by registering and filling out an online form with their email addresses and other personal data. Once registered, the consumer can file a complaint form and attach the related documents, which the conciliator will review. A hearing is scheduled after the conciliator has concluded to be competent to hear the complaint and the consumer has submitted all the necessary documentation. The time and date are communicated to the consumer, who must appear at the hearing through the platform.⁵²⁹ The conciliator will

⁵²⁵ Arley Amada, "Online Dispute Resolution en el Comercio Electrónico Transfronterizo B2C en la Región de America," (PhD diss., Universidad Nacional Autónoma de México, 2019), 79.

⁵²⁶ Wendolyne N. González and Jorge A. Pérez, "México en el contexto internacional de solución de controversias en línea de comercio electrónico," *Anuario Mexicano de Derecho Internacional* 15, no. 1 (2015): 727, doi:10.1016/j.amdi.2014.09.014

⁵²⁷ *Ibid.*, 728.

⁵²⁸ "Preguntas Frecuentes," Inicio, accessed April 3, 2021, <https://concilianet.profeco.gob.mx/Concilianet/faq.jsp>.

⁵²⁹ "Concilianet," Concilianet, accessed April 1, 2021, <https://concilianet.profeco.gob.mx/Concilianet/comoconciliar.jsp>.

email the consumer a request if more documentation is needed. The conciliator will end the process if the consumer does not respond and provides additional documentation. If the provider does not attend the hearing, the conciliator can reschedule it for three times. If the supplier does not follow the hearing without a justified reason, the conciliator can initiate an infringement procedure, which may result in a fine against the supplier. The settlement hearing occurs online through synchronous text chat, where the consumer, the supplier, and the conciliator work together to resolve the complaint.

The agreement is drafted and signed online with an electronic signature if the parties reach an agreement. The whole procedure is free of charge. The number of complaints submitted through the Concilianet platform has grown steadily since its implementation in 2008. An analysis of data provided by PROFECO shows that more than 31,000 complaints were filed through Concilianet from 2008 to 2017.⁵³⁰ However, the percentage of complaints submitted through Concilianet represents only a tiny percentage of the total complaints filed with PROFECO. We remind that consumers can also try to resolve their complaints through an in-person conciliation process held in one of the PROFECO agencies. For instance, in 2017, the number of complaints that were processed through the traditional procedure in PROFECO was 103,702, while the total of complaints handled online through Concilianet was 6367.⁵³¹ Other data provided by Concilianet shows that during 2014-2017, about 90% of the complaints submitted through the platform were resolved in conciliation.

From the analysis of the data listed above, some interesting elements emerge. It was noted that local suppliers are much more collaborative in resolving complaints than transnational ones since a lousy reputation in handling complaints impacts local suppliers more than transnational ones.

Although the Concilianet platform has achieved significant results by providing consumers with an additional tool to exercise their rights and by facilitating conciliatory proceedings, some critical elements may emerge. First, the platform's software is considered a "passive" system as it simply facilitates communication between the parties without intervening in an automated way.⁵³² For example, the software does not provide an algorithm to evaluate and

⁵³⁰ See the research conducted by Amada Alrey in "Online Dispute Resolution," pp. 330 – 343.

⁵³¹ Alrey, "Online Dispute Resolution," 332.

⁵³² Alrey, "Online Dispute Resolution."

suggest the best alternatives or agreements to the parties. Second, the agreement reached in conciliation between the parties does not have executive force, as PROFECO is an administrative authority with no jurisdictional powers. The success of the agreement and its compliance, therefore, depends on the supplier's will; in case of non-compliance, the consumer will have to resort to the competent court to enforce the agreement. The third element of criticism concerns the conciliator's lack of professionalism. The number of conciliators employed in Concilianet is decidedly low compared to the amount of work and the number of complaints received. Furthermore, conciliators are often young graduates with computer skills and information knowledge but little experience.⁵³³

Table 4.3 Concilianet Procedural Design

CONSUMERS	Registration required
SUPPLIERS	Registration required
TYPE OF ODR	Facilitated settlement
RESPONSE DEADLINE	Ten days
FEES	None
TYPE OF TRANSACTIONS	Online and offline
INTERMEDIARY	Concilianet Conciliator
NATURE OF DECISION	Non-binding

*Table adapted from M. J. Schmidt-Kessen et al. 2020.

4.3.6 General Considerations and Conclusions

The increasing dissatisfaction with the judicial system has led many Latin American countries to develop out-of-court dispute resolution mechanisms. Most constitutions in Latin America guarantee the right to access justice. However, the slow and bureaucratic administration of court proceedings has made the justice system more expensive, complex, and inaccessible to many people. In this context, ADR has emerged as an effective, quick, and economical alternative to the ordinary judicial system. Many countries in Latin America have worked to develop, promote, and improve ADR mechanisms to provide citizens with additional tools for

⁵³³ Alrey, "Online Dispute Resolution."

resolving civil, family, commercial, and labor disputes. They have also developed consumer protection infrastructure to provide easy-to-access dispute resolution alternatives.

Argentina has established a national system (COPREC) to resolve consumer disputes through conciliation and litigation and instituted a consumer arbitration program.

Brazil has a robust legal framework for consumer protection. As federal and municipal agencies that help consumers enforce their rights and mediate disputes, the PROCONS are at the heart of the Brazilian consumer protection system.

In Chile, the Consumer National Service (SERNAC), a state agency responsible for protecting consumer rights, allows consumers to file claims against companies that may have violated their rights and request a solution. Through the SERNAC, consumers can activate collective mediation, a pre-judicial tool that seeks to solve collective consumer claims.

In Mexico, the Procuraduría Federal del Consumidor (PROFECO) is a national agency of the Ministry of Economy responsible for enforcing consumer protection law. The PROFECO also facilitates the resolution of disputes between consumers and suppliers through a conciliation-arbitration process.

The crisis caused by the COVID-19 pandemic has accelerated the adoption of technology within the courts and ADR processes by introducing real-time audio-visual transmission technology. In many Latin American states, the use of technology in administering and delivering justice has allowed greater access to justice and faster resolution of disputes, especially low-value and consumer disputes.

In Argentina, the Ministry of Justice and Human Rights launched a pilot program to implement an online community mediation scheme to facilitate access to justice and resolve family, landlord/tenant, and neighbor disputes. The online mediation platform created by the Autonomous City of Buenos Aires has become a popular program to resolve neighbor-to-neighbor disputes. The platform has met with some initial success and achieved significant results with a high settlement rate.

In Brazil, the platform Consumidor implemented by the National Consumer Secretariat (SENACON) that facilitates direct negotiations between traders and consumers has met with a high satisfaction degree among its users. Many consumers have shared a great overall experience with the platform and reported that their problems had been resolved.

In Colombia, Congress has proposed a new Bill to promote the adoption of ODR platforms (REC) in the public and private sectors. The Bill also encourages private companies to adopt such platforms to prevent and resolve consumer and e-commerce disputes. In 2015, the Colombian Superintendency of Industry and Commerce (SIC) launched a virtual platform for resolving disputes related to consumer rights between suppliers and consumers. Parties can negotiate directly on the platform; if an agreement is not reached, a mediator of the SIC is nominated to help them achieve a solution. The SIC platform has achieved significant results, with over 32,000 claims filed in 2015-2018, of which 59% were positively settled.

In Mexico, PROFECO has developed Concilianet, a synchronous platform for online conciliation designed to resolve consumer disputes resulting from online and offline transactions. It was designed to facilitate the administration of the numerous complaints received by PROFECO's local agencies and reduce the length of conciliation proceedings. The platform has achieved significant results, with more than 31,000 complaints filed between 2008 and 2017, reporting a high rate of online settlements.

The analysis of the state of ADR and ODR in Latin America demonstrates that:

- The dissatisfaction with the judicial system, the slow and bureaucratic administration of justice, and overloaded courts have led many Latin American countries to develop and promote ADR in civil, commercial, labor, family, and consumer disputes.
- Many Latin American countries have created national and federal systems and agencies for consumer protection and promoting the use of ADR to resolve consumer disputes.
- The COVID-19 pandemic has accelerated the adoption of technology within the courts to administer and deliver justice, allowing greater access to justice and faster resolution of disputes, especially low-value and consumer e-commerce disputes.
- The growing advancement of technology and a greater propensity for consumer protection has led the most economically advanced Latin American countries to

develop public platforms for resolving consumer disputes with significant efficiency and user satisfaction results.

- The presence of different legal systems and frameworks for ADR and ODR in Latin America represents a primary challenge to resolving cross-border disputes, including those arising from e-commerce transactions. Harmonizing legal practices and promoting common frameworks for ADR and ODR could help mitigate this challenge. The adoption of common legislation regulating ADR and ODR practices, quality standards, and enforcement mechanisms would promote regional trade, facilitate cross-border transactions and dispute resolution, and improve consumer trust.

4.4 AFRICA

Generally speaking, ADR is widespread in most African countries. Several jurisdictions have incorporated mandatory mediation or conciliation procedures of some form into specific civil litigation processes (such as Algeria, Chad, Equatorial Guinea, Gabon, Ghana, Malawi, Namibia, Nigeria, Republic of Congo, Rwanda, Senegal, Sierra Leone, Tanzania, and Uganda). In the last decade, the internet and mobile technologies have become part of everyday life for African citizens, especially those of sub-Saharan areas.⁵³⁴ Consequently, many African regions have profoundly changed the economic system and communication. Electronic commerce has experienced an exponential increase in recent years, as in many other countries. Revenue in the e-commerce market was projected to reach US\$18,420m by the end of 2020, with an annual growth rate (CAGR⁵³⁵ 2020-2024) of 17.1%, resulting in a projected market volume of US\$34,662m by 2024.⁵³⁶ ODR could represent a significant step toward promoting cross-border trade and strengthening Africa's e-commerce. However, Africa is a developing continent with numerous economic and technological challenges. Many parts of the continent still lack the necessary infrastructure, and the technology available is often rudimentary.⁵³⁷ Also, many African countries lack adequate e-commerce regulations. This section examines African countries, specifically Kenya, Nigeria, and South Africa, that have successfully implemented ADR regulations and developed ODR programs.

⁵³⁴ Morenike Obi-Farinde, "ODR in Africa: The Emergent Face of Dispute Resolution Post COVID 19," Mediate.com, April 2020, <https://www.mediate.com/art.s/obi-odr-africa.cfm>.

⁵³⁵ Compound Annual Growth Rate.

⁵³⁶ For more data on e-commerce in Africa see <https://www.statista.com/outlook/243/630/ecommerce/africa>.

⁵³⁷ Robin Cupido, "Online Dispute Resolution: An African Perspective," paper presented at the 2nd International Conference on Social Sciences, Scientific Cooperation, Istanbul, Turkey, April 2-3, 2016, http://ase-scoop.org/papers/IWLP-2016/3.Cupido_IWLP.pdf.

4.4.1 Kenya

In Kenya, ADR methods are increasingly being accepted as alternatives to litigation. In contrast, ODR is yet to be acknowledged by the law and the business community. Several legal instruments provide for and regulate the use of ADR, including the Constitution of Kenya,⁵³⁸ the Civil Procedure Act,⁵³⁹ the Civil Procedure Rules,⁵⁴⁰ the Arbitration Act,⁵⁴¹ the Small Claims Court Act,⁵⁴² and the Consumer Protection Act.⁵⁴³ Art. 48 of the Constitution guarantees access to justice. It states, “the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” Additionally, art. 159 invites the courts and tribunals to exercise their judicial authority to promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.

Both the CPA and the CPR promote and encourage the use of ADR. Section 1 (a) of the CPA states that the overriding objective of the Act is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. Section 1(b)(d) requires all courts to guarantee the timely disposal of the proceedings and all other proceedings in the Court at a cost affordable by the respective parties and the use of suitable technology. Section 59 mandates the establishment of a Mediation Accreditation Committee to determine the criteria and rules for the certification of mediators, maintain a register of qualified mediators, and set up appropriate training for mediators. According to Section 59B, the court may refer any dispute to mediation upon request of the parties, when it deems it appropriate, or when the law requires it. The CPR Order 11 Rule 3 (b) stipulates that a case management conference shall allow the parties to use ADR to resolve their case.

Arbitration is governed by the Arbitration Act of 1995, which regulates the arbitral proceedings and the recognition and enforcement of arbitral awards by Kenyan courts. Notably, section 9 of the general provisions recognizes the use of emails and facsimiles in any written

⁵³⁸ The Constitution of Kenya (2010).

⁵³⁹ Civil Procedure Act (2010).

⁵⁴⁰ Legal Notice No. 22, 2020.

⁵⁴¹ Arbitration Act (1995).

⁵⁴² Small Claims Court Act (No 2 of 2016).

⁵⁴³ Consumer Protection Act (No. 46 of 2012).

communication between the parties made pursuant to or for an arbitration agreement. In this way, the legislator acknowledges the value of using technology in dispute resolution procedures, thus creating a space for using ODR.

The use of ADR is well outlined in Section 18 (2) of the Small Claims Act, which mandates the court to adopt and implement any other appropriate means of dispute resolution, including ADR mechanisms. The Act also requires that any agreement reached through ADR be recorded as a binding court order.⁵⁴⁴ Section 29 (1) permits the court to conduct the proceedings via telephone, videophone, or any other electronic means. It also allows the parties to submit their claims or defenses electronically.⁵⁴⁵ This provision again demonstrates the legislator's attention to technology and leaves room for applying ODR to facilitate dispute resolution and access to justice. Finally, section 88 (2) of the Consumer Protection Act consents the consumer, the supplier, and any other person involved in a dispute concerning a consumer agreement to resolve the dispute using any procedure available in the law allowing *de facto* the use of ADR methods.

Kenya has long recognized the importance of ADR systems in promoting access to justice. New challenges related to the development of trade and technologies will require further legislative action. The economy and e-commerce are growing in Kenya. As the United Nations Conference on Trade and Development (UNCTAD) reported in 2017,⁵⁴⁶ e-commerce accounted for six percent (6%) of all purchases made in Kenya. It demonstrates the need to provide consumers with efficient and inexpensive tools for resolving disputes arising from e-commerce transactions. One could foresee that using ODR will soon be necessary for Kenya.

An example of how the use of ODRs is slowly gaining ground in Kenya is the new platform implemented by the Utatuzi Center. Based in Nairobi, the Center provides ADR services such as arbitration, mediation, and conciliation to businesses, firms, and clients through a web-based digital platform. It also offers an online video conferencing platform that allows for virtual sessions.⁵⁴⁷ In its first six months of operation, the platform processed eleven cases and

⁵⁴⁴ Small Claims Court Act (No 2 of 2016), section 18 (3).

⁵⁴⁵ Small Claims Court Act, section 23 (7).

⁵⁴⁶ United Nations Conference on Trade and Development (UNCTAD), "Beyond Austerity: Towards a Global New Deal," *Trade and Development Report*, 2017. https://unctad.org/en/PublicationsLibrary/tdr2017_en.pdf.

⁵⁴⁷ Utatuzi Center, Home - Utatuzi Center [2021] - Preemptive Dispute Resolution, accessed November 29, 2021, <https://www.utatuzicenter.com/>.

resolved eight. However, it is important to note that the number of cases processed does not allow for representative results. The Utatuzi center has partnered with the Kenya Judiciary Court Annexed Mediation Secretariat and licensed the platform to two other ADR centers in Kenya. As a result, 120 cases were submitted through the platform.

4.4.2 Nigeria

The Nigerian constitution recognizes ADR as a means of settling disputes. Section 19 (d) of the Constitution encourages “the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration, and adjudication.” In recent years, several laws, acts, regulations, and guidelines⁵⁴⁸ have encouraged and promoted the adoption of ADR processes and regulated their procedures, especially concerning disputes arising from commercial interactions. Order 24 (1) of the National Industrial Court of Nigeria Civil Procedure Rules consents the court president or judge to refer any matter filed in any court registries to conciliation or mediation to be administered by an ADR center. The center has twenty-one (21) days to conclude the mediation or conciliation.⁵⁴⁹ If the mediation or conciliation ends with an agreement, the center submits a report with the settlement terms to the court president or judge to enter it as a court judgment. If the dispute is not settled, the center submits a report without recording the mediation or conciliation session(s).⁵⁵⁰ The Court then set the matter down for hearing and determination on its merits.

Nigerian Courts are closely connected to ADR centers.⁵⁵¹ The Lagos Multi-Door Courthouse (LMDC)⁵⁵² was Africa’s first court-connected ADR center that opened in Nigeria in 2002. The LMDC is an independent non-profit ADR center with its main office located within the Lagos

⁵⁴⁸ For other regulations and guidelines that include provisions for ADR proceedings see for examples the Regulation for Direct Debit Scheme in Nigeria 2018 (revised) issued by the Central Bank of Nigeria (CBN). Art. 9.3 of the Regulation states that “Any dispute, controversy or claim arising out of or relating to this Regulation or the breach, termination or invalidity thereof shall be settled in accordance with the CBN’s dispute resolution mechanism and if unresolved, may be referred to an arbitral panel, as provided under the Arbitration and Conciliation Act Cap. A18 LFN 2004.”

⁵⁴⁹ National Industrial Court of Nigeria Civil Procedure Rules 2017, order 24 (2).

⁵⁵⁰ Civil Procedure Rules 2017, order 24 (7) (1).

⁵⁵¹ Morenike Obi-Farinde, “ODR in Africa.”

⁵⁵² The multi-door courthouse idea was first conceived by Harvard Law Professor Frank E. A. Sander in April 1976 at Dean Roscoe Pound Conference convened by Chief Justice Warren Burger to address the problems faced by judges in the administration of justice. Prof. Sander envisioned the Courthouse of the future with multiple doors and many methods of dispute resolution available behind those doors. Litigation would be one options among many including alternative dispute resolution.

State High Court and any other suitable locations within Lagos State.⁵⁵³ The center allows disputing parties to settle disputes through ADR methods like mediation, conciliation, neutral evaluation, and arbitration.⁵⁵⁴ The Lagos Multi-Door Courthouse initiative was designed to address the backlog of court cases, the justice system delays, and the high litigation costs. In 2007, the LMDC Law was enacted to provide the LMDC operations with a legal framework, making the LMDC a vital part of the Lagos State Judiciary.⁵⁵⁵ The LMDC's objectives are described in Art. 1(2) (b) of the LMDC Law 2007 as follows:

- (a) Enhance access to justice by providing alternative mechanisms to supplement litigation in the resolution of disputes;
- (b) Minimize citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through ADR;
- (c) Serve as the focal point for the promotion of ADR in Lagos State; and
- (d) Promote the growth and effective functioning of the justice system through ADR methods.

The Law encourages parties to appear before the LMDC to resolve their disputes. It requires the High Court of Justice Judges to persuade disputing parties to use ADR and mandatorily refer them to ADR if one party is willing to do so.⁵⁵⁶

Since 2002, sixteen (16) of the thirty-six (36) Nigerian states have established court-connected ADR centers replicating the LMDC model. In June 2012, empirical studies were conducted to evaluate the efficacy of the LMDC scheme. The research findings showed that between 2002 and 2011, 1,136 civil disputes were filed before the LMDC, of which the courts referred 662 cases (58.3%), while 467 cases (41.1%) were walk-ins. One thousand seventy-one (1071) cases (94.3%) went to mediation, while 65 cases (5.7%) went to arbitration. Of the 1,071 mediations, 321 (30%) resolved positively, 467 (43.6%) did not settle, and in 327 (29%) cases, the parties

⁵⁵³ High Court of Lagos State (Civil Procedure Rules) 2007, Section 2 (a)(b).

⁵⁵⁴ Lagos Multi-Door Courthouse – Alternate Dispute Resolution, accessed November 23, 2021, <https://lagosmultidoor.org/>.

⁵⁵⁵ The LMDC Law was revised in 2015.

⁵⁵⁶ High Court of Lagos State (Civil Procedure Rules) 2007, Section 16 (1)(a)(b).

withdrew from the mediation.⁵⁵⁷ Additional statistics show that since 2002, the LMDC has handled 17,364 civil disputes, of which 14,250 were filed between 2015-2021. Of the 14,250 cases filed, the courts referred 11,468, and 2,782 were walk-ins. Seven thousand eight hundred twenty-two cases (7822) were mediated, of which 4,760 were settled, 3,062 were unresolved, and 6,428 were pending or withdrawn.⁵⁵⁸ These data show substantial progress in the number of cases handled by the LMDC, especially in recent years. It might be due to increased awareness among citizens about the ADR services offered by the LMDC. The mediation settlement rate has also increased from 30% in 2011 to 59% in 2021, showing that court-annexed mediation programs work positively and help reduce the number of disputes handled by the court system.

Due to the COVID-19 pandemic and the lockdown measures taken by the government, the LMDC launched an ODR mediation program called ODR PRE-Mediation Session. The program allows disputants to participate in online mediation through the video conference platform ZOOM. The entire session is held online and facilitated by the mediator with the technical assistance of a case manager. When the parties reach an agreement, the Terms of Settlement (TOS) are sent to them via email and WhatsApp. The parties are expected to print, sign, and scan them back to the case manager.⁵⁵⁹ The LMDC online mediation program falls within the provision of Art. 12 (a) of The Lagos State Multi-Door Court Practice Directions on Mediation and Art. 15 (4) of the 2007 LMDC Law.⁵⁶⁰ The LMDC's ODR Pre-Mediation Session initiative represents a significant step in developing ODR in Nigeria.

In December 2020, the LMDC, in conjunction with the Lagos State Government and the Lagos State Judiciary, held the first Online Settlement Month in Africa to reduce the courts' caseloads and ensure access to justice despite the challenges presented by the COVID-19 Pandemic. The Online Settlement Month offered free mediation services to disputants who were encouraged

⁵⁵⁷ Emilia Onyema, "The Multi-door Court House (MDC) Scheme in Nigeria: A case study of the Lagos MDC," *Apogee Journal of Business, Property & Constitutional Law* 2, no. 7 (2013): xx, <https://eprints.soas.ac.uk/id/eprint/14521>.

⁵⁵⁸ "Access to Justice and Multi-Door Courthouse in Nigeria: Challenges and Prospects," The Loyal Nigerian Lawyer, last modified November 13, 2021, <https://loyalnigerianlawyer.com/access-to-justice-and-multi-door-courthouse-in-nigeria-challenges-and-prospects/>.

⁵⁵⁹ "ODR PRE- Mediation Session," Lagos Multi-Door Courthouse – Alternate Dispute Resolution, accessed November 28, 2021, <https://lagosmultidoor.org/odr-pre-mediation-session/>.

⁵⁶⁰ LMDC Law 2007 art. 15 (4) provides that "ADR proceedings will take place in the premises of the LMDC or the regular court of the ADR Judge." The Lagos State Multi-Door Court Practice Directions on Mediation art. 12 (a) states, "The mediation shall be held at the appropriate office of The LMDC, or any other convenient location agreed by the mediator and the parties."

to submit their cases through a Google form. Mediations took place online for a month in two running sessions, one in the morning and one in the afternoon.

Despite these important and exciting initiatives, there is still low awareness of mediation and ODR. Most people are still largely unaware of online mediation as an alternative to face-to-face mediation. Furthermore, internet connection and access are still limited in many areas of Nigeria, and digital literacy and the internet divide can represent a disparity factor between disputing parties.⁵⁶¹ Finally, the absence of a regulatory framework for ODR represents an additional challenge to the development of ODR in Nigeria. The Arbitration and Conciliation Act that regulates dispute resolution does not contain a provision on ODR. It would be necessary to amend this act to recognize and validate dispute resolution in the digital space.⁵⁶²

Another critical and recent normative initiative that includes provisions for ADR is the Federal Capital Territory High Court Civil Procedure Rules of 2018. The 2018 Abuja Rules require the court or the judge to encourage the settlement of disputes through ADR and provide a procedural framework for using ADR processes. Order 19 (1) of the Abuja Rules mandates that it is the duty of a court or a judge to encourage the settlement of matters either by arbitration, conciliation, mediation, or any other method of dispute resolution. Where a matter is suitable for ADR and parties agree to settle a dispute, the court or the judge must refer the case to the Abuja Multi-Door Court House (AMDC) for resolution within 21 days.⁵⁶³ If a party refuses to submit to ADR and loses the case in court, the court may determine a penalty the party must pay.⁵⁶⁴

The most crucial legislation on ADR is the Arbitration and Conciliation Act. Enacted in 1998, the Act provides a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation, modeled on the UNCITRAL Model Law on International Commercial Arbitration. Thus, such a law may not reflect the current trends in society. Even though today in Nigeria, many commercial disputes are resolved through arbitration and conciliation, it should be necessary to update legislation that regulates

⁵⁶¹ “Mediation in Nigeria,” Mediate.com - Find Mediators - World's Leading Mediation Information Site, last modified April 2021, <https://www.mediate.com/onlinetraining//Mediation%20in%20Nigeria>

⁵⁶² Rahul J. Nikam and Nongthombam B. Singh, “An Analytical Study on Legal validity of Online Dispute Resolution (ODR) System in India and Indonesia,” *Indonesia Law Review* 12, no. 2 (August 2022): 41-59, doi:10.15175/1984-2503-202214308.

⁵⁶³ High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018, order 19 (2) (1).

⁵⁶⁴ Rules 2018, order 19 (2) (3).

arbitration and ADR. Also, there may be a need for legislation that covers other forms of ADR, including online dispute resolution.⁵⁶⁵ The legislation could allow court-connected ADR centers to use technology to facilitate the resolution of disputes. It would also encourage the development of ODR platforms for the resolution of B2C e-commerce disputes.

Recent initiatives were taken to facilitate the use of technology within the court system. The first among such initiatives was the *Practice Direction for Remote Hearing of Cases*, issued by the Lagos State Judiciary on 4 May 2020. This practice direction was issued to address the need “to guarantee continued access to justice and expeditious disposal of cases”⁵⁶⁶ during the COVID-19 pandemic emergency. It provides for electronic filing of court processes, remote hearings through platforms like ZOOM and Skype, and the notice of delivery of Judgment and/or ruling via email and WhatsApp. Also, the National Judicial Council (NJC), through a circular dated May 2020, laid down some guidelines for virtual or remote court sittings. Courts and counsels should encourage online court sittings as well as judgments and rulings.

Other courts have passed similar practice directions, including the High Court of Federal Capital Territory, Abuja, which issued the COVID-19 Practice Direction 2020 on 11 May 2020. The Federal High Court issued its practice directions on 18 May 2020.⁵⁶⁷

4.4.3 South Africa

Since the end of the apartheid, South Africa (SA) has seen an increase in ADR systems thanks to the efforts made by NGOs, multiple donors, and the government. In SA, ADR has allowed the weakest, poorest, and most illiterate sections of society access justice and avoid the high cost of court litigation.⁵⁶⁸ ADR, like mediation and arbitration, has been used to resolve

⁵⁶⁵ As of July 2020, Nigeria has a population of 206,139,589 people of which 126,078,999 Internet users in December 2019 with a penetration rate of 61.2%, according to internetworldstats.com. The revenue in the e-Commerce market is projected to reach US\$4,556m in 2020. With an emerging e-commerce and a large growing population, it is expected that the number of disputes arising out of internet transactions will grow. Nigeria, like many other countries, would benefit from integrating technology in ADR.

⁵⁶⁶ Practice Direction for Remote Hearing of Cases in the Lagos State Judiciary, Art. 2. See <https://lagosjudiciary.gov.ng/Viewnews.aspx>

⁵⁶⁷ “Federal High Court Practive Direction,” Welcome to the Official Website of Federal High Court Nigeria, accessed December 5, 2021, <https://fhc-ng.com/virtual.htm>.

⁵⁶⁸ Petrina Ampeire Bireije, “ADR in South Africa: A Brief Overview,” *International Mediation Institute*, July 24, 2020, <https://www.imimmediation.org/2017/12/09/adr-south-africa-brief-overview/#:~:text=The%20modes%20of%20dispute%20resolution,forms%20being%20arbitration%20and%20conciliation.>

labor,⁵⁶⁹ land,⁵⁷⁰ family, and community disputes. Arbitration is the most commonly used ADR mechanism regulated by the Arbitration Act of 1965 (Domestic Arbitration Act). Most civil disputes can be referred to arbitration except for any matrimonial cause or matter relating to status.⁵⁷¹ The popularity of Arbitration has significantly increased with the enactment of the South African International Arbitration Act 15 of 2017 (International Arbitration Act). The International Arbitration Act incorporates the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law) into South African law. It applies to any international commercial dispute⁵⁷² in which the parties have agreed to submit to arbitration under an arbitration agreement.

South Africa does not have legislation that governs mediation. However, section 34 of the Constitution of the Republic of South Africa Act No. 108 of 1996 guarantees everyone the right to have any dispute that the application of the law can resolve decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. In 2014, the Rules Board, directed by the Minister of Justice and Constitutional Development, enacted the Rules of Voluntary Court-Annexed Mediation for the lower courts to help reduce the number of disputes and promote access to justice.⁵⁷³ The rules apply to the voluntary submission to the mediation of a dispute before the commencement of litigation in the Magistrate's Courts and current litigation in the Magistrates' Courts.⁵⁷⁴ A dispute can be referred to mediation by a) any party before the commencement of potential litigation, b) by any party after the commencement of litigation but before judgment with the authorization of the court, and c) by a judicial officer at any time after the commencement of litigation if the judicial officer believes that there is a good reason for doing so.⁵⁷⁵ Before litigation, a party who wants to submit a dispute to mediation must request the resolution officer of the court in writing, which would have jurisdiction to hear the case.⁵⁷⁶ The officer must then inform all other parties to the dispute that mediation is being sought and schedule a conference within ten

⁵⁶⁹ Following the Relations Act 660 of 1995, the Commission for Conciliation, Mediation and Arbitration (CCMA) was created to resolve labour disputes and promote greater co-operation, industrial peace and social justice.

⁵⁷⁰ In 1994, the National Land Reform Mediation and Arbitration Panel (NLRMAP) was established to resolve land disputes claims.

⁵⁷¹ Arbitration Act 42 of 1965, art. 2.

⁵⁷² The Act does not apply to arbitral proceedings which commenced before 20 December 2017.

⁵⁷³ Grégor Wolter, Jac Marais, Andrew Molver and Renée Nienaber, "South Africa," in *The Dispute Resolution Review*, ed. Jonathan Cotton (London, UK: Law Business Research Ltd, 2016), 578–596.

⁵⁷⁴ The Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts of 2014, chapter 2, section 1 (a) and (b).

⁵⁷⁵ *Ibid.*, section 3.

⁵⁷⁶ *Ibid.*, section 5 (1).

(10) days from the request to determine whether all or some of the parties agree to submit the dispute to mediation.⁵⁷⁷ After the litigation has begun but before trial, any party at any stage can submit a request for mediation to the dispute resolution officer⁵⁷⁸. After the commencement of the trial but before judgment, any party can request mediation by applying directly to the court.⁵⁷⁹ Parties can be referred to mediation by the court before or during a trial but before judgment.⁵⁸⁰ The mediator facilitates the discussions between the parties and helps them reach an agreement that, if reached, can be enforceable, admissible, and ordered by the court.⁵⁸¹ The development of technology and e-commerce has made South Africa an important marketplace in the continent. Many shoppers from other countries in Africa shop on South African e-commerce sites, helping the country reach a projected revenue of US\$3,690m by the end of 2020. This growth in e-commerce will make disputes arising out of internet transactions more likely. The development of laws regulating e-commerce and consumer protection makes South Africa an ideal candidate for the development of online dispute resolution.

Two initiatives have included some forms of e-dispute resolution: the ZA Domain Name Dispute Resolution Regulations⁵⁸² (ZA DRR) and the Consumer Goods and Services Ombud (CGSO).⁵⁸³ The ZA DRR was created to resolve disputes relating to domain names registered in the co.za domain, and it was then extended to domain name disputes in Org.za, Net.za, and Web.za. The ZA DRR process comprises five stages: the complaint and response, mediation, adjudication, appeal, and the final stage. A complainant can file a dispute with an accredited dispute resolution service provider in case of a domain dispute.⁵⁸⁴ The ADR provider sends a copy of the complaint to the registrant, who has a set time (20 days) to submit a response.⁵⁸⁵ In case of an answer, the dispute resolution provider refers the complaint to the .za Domain Name Authority (.ZADNA) to resolve the dispute through a free mediation service. If there is no response or the dispute is not settled at the mediation, the complainant can pay a fee to appoint

⁵⁷⁷ Ibid., section 5 (3).

⁵⁷⁸ Ibid., section 6 (1).

⁵⁷⁹ Ibid., section 6 (2).

⁵⁸⁰ Ibid., section 7 (1).

⁵⁸¹ Ibid., section 8 and 10.

⁵⁸² "Domain Disputes." .za Domain Name Authority (. ZADNA). Accessed December 1, 2020. <https://www.zadna.org.za/content/page/domain-disputes/>.

⁵⁸³ CGSO, accessed July 1, 2020, <https://www.cgso.org.za/>.

⁵⁸⁴ In terms of the ADR Regulations, the .ZA Domain Name Authority (ZADNA) is mandated to accredit suitable service providers to provide ADR services, and to receive fees from the providers for each resolved dispute. See "What is .za Alternative Dispute Resolution (ADR)?" <https://www.zadna.org.za/content/page/domain-disputes/>

⁵⁸⁵ Alternative Dispute Resolution Regulations 2006, section 18.

an independent adjudicator to decide on the case.⁵⁸⁶ Once a decision is made, either party has four (4) days to appeal.⁵⁸⁷ If the adjudicator awards a transfer, cancellation, or suspension of the domain name, the registry operator will change the domain name registration records. The entire process is conducted online. Of particular interest is the Consumer Goods and Services Ombud (CGSO), which is the consumer goods and services industry's compulsory Ombud scheme. It was set up online to implement the Consumer Protection Act 68 of 2008. The site allows consumers to file online and, free of charge, a complaint against all suppliers in the supply chain of the consumer goods and services industry. When submitting a complaint, consumers are encouraged to check if their preferred supplier is a member of the CGSO by reviewing the list of participants available on the organization's website.⁵⁸⁸ The dispute resolution scheme offered by CGSO allows consumers to resolve their disputes online within 60 (sixty) business days of submitting the complaint. A third neutral who applies the law, especially the Consumer Protection Act, makes the decision to resolve the dispute. The Ombudsman's decision is final, although not binding, and does not affect the consumer's legal rights. If he is not satisfied with the decision, the consumer can still approach the National Consumer Tribunal or go to court.⁵⁸⁹

According to the CGSO 2021 Annual Report, as of February 2021, the number of registered participants rose 19.7% yearly, from 804 to 963.⁵⁹⁰ The CGSO also saw a 52% increase in complaints, from 9,529 in 2019/20 to 14,438 cases in 2020/21.⁵⁹¹ This rise was due to a combination of factors, including increased consumer awareness of the CGSO and delivery issues caused by the COVID-19 pandemic. In the same period, the CGSO closed 12,775 cases. 62.6% (4,949) were positively resolved, and of these, 43% (3,076) were fully resolved in favor of the consumer. 16% (1,188) were resolved directly between supplier and consumer within 15 business days. 13% of cases were dismissed due to the lack of cooperation from the supplier.⁵⁹² The average time that was taken to deal with a complaint was raised from 42 days in 2019 to 57 days in 2020.⁵⁹³ It was probably due to the increase in complaints and the challenges presented by the COVID-19 pandemic (i.e., remote working arrangements)—90% of the

⁵⁸⁶ *Ibid.*, section 20.

⁵⁸⁷ *Ibid.*, section 32.

⁵⁸⁸ "Registered Participants," CGSO, accessed November 18, 2021, <https://www.cgso.org.za/cgso/participants-2/registered-members/>.

⁵⁸⁹ For more information about the process see <http://www.cgso.org.za/>.

⁵⁹⁰ *CGSO 2020-21 Annual Report*, (2021), <https://www.cgso.org.za/cgso/download/cgso-2020-21-annual-report/>.

⁵⁹¹ *Ibid.*, 10.

⁵⁹² *Ibid.*, 8.

⁵⁹³ *Ibid.*, 12.

complaints submitted through the scheme were related to goods, services, and agreements. E-commerce accounted for the most significant complaints (27%) per sector. It reflects the shift in consumer behavior in the wake of lockdown measures adopted by the government during the pandemic. Before the lockdown, online shopping accounted for 6% of complaints by sector for 2018/19 and 4% in 2019/20. The most common complaints (45%) were related to the online delivery of products.⁵⁹⁴ In 2020, the GCSO launched a survey among 7897 consumers to receive feedback on the scheme and the services provided, and 1920 people responded. 91% of respondents agreed they were treated with respect during the process, 63% were happy with the outcome, and 73% would recommend the GCSO to others.⁵⁹⁵ From the survey's data, it is clear that the consumer satisfaction rate with the outcome of the process is fairly high. It would be interesting to see if the satisfaction rate was higher in cases resolved directly between the consumer or in those resolved by the ombudsman. In September 2020, GCSO introduced a supplier survey to ensure that feedback was received from all stakeholders. The results show that suppliers were highly satisfied (92%) with the complaints facilitation and the assistance received with their response.⁵⁹⁶

Although the two initiatives described above represent a step towards using ODR, much more must be done. It is conceivable that as e-commerce grows in South Africa, the number of online disputes will increase. Therefore, legislation regulating ODR in South Africa will be necessary.

4.4.4 General Considerations and Conclusions

Due to case backlogs and lack of access to justice, ADR in Africa has become an increasingly popular and recognized alternative to the formal justice system. Several legal initiatives have promoted and encouraged the use of ADR to facilitate the expeditious and affordable resolution of civil disputes.⁵⁹⁷ Many jurisdictions have incorporated some forms of mandatory or voluntary mediation or conciliation into their civil litigation systems.⁵⁹⁸ The institutionalization of ADR in Africa has bolstered security and development while increasing the sense of

⁵⁹⁴ Ibid., 12.

⁵⁹⁵ Ibid., 19.

⁵⁹⁶ Ibid., 20.

⁵⁹⁷ Catherine Price, "Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?," *Pepperdine Dispute Resolution Journal* 18, no. 3 (May 2018): 392-417.

⁵⁹⁸ See for example, Algeria, Chad, Gabon, Ghana, Malawi, Namibia, Nigeria, Republic of Congo, Rwanda, Senegal, Uganda.

justice.⁵⁹⁹ Court-connected ADR schemes have developed successfully, providing citizens with broader access to justice, especially in lower-value disputes. The Lagos Multi-Door Courthouse experience in Nigeria has demonstrated that court-annexed mediation programs can help reduce the number of disputes handled by the courts, enhance access to justice by providing an alternative to litigation, and promote the efficiency of the justice system through ADR.

The COVID-19 pandemic has accelerated the process of modernization of the legal system forcing the adoption of technological tools to keep court systems available to the public and guarantee participation despite the challenges presented by the pandemic. Online mediation programs have ensured access to justice and dispute resolution and have laid the foundations for the future development of ODR. Despite an increase in the use of dispute-resolution technology and the success of e-dispute programs like the CGSO scheme in South Africa or the Utatuzi platform, there is still low awareness of ODR. Furthermore, internet access is still limited in many areas of Africa, and digital literacy and the internet divide can represent a disparity between disputing parties.

The rapid growth of e-commerce, due to a greater diffusion of the internet and mobile technology, has posed the problem of providing consumers with adequate and inexpensive dispute resolution to resolve B2C controversies arising from e-commerce transactions. It will require further legislative action.

The analysis of the state of ADR and ODR in Kenya, Nigeria, and South Africa demonstrates that:

- The development and integration of ADR into the judicial system have led to greater access to justice by facilitating the resolution of disputes and easing the court's caseload.
- The increasing expansion and development of ITC and AI have made evident the need to reform laws to keep up with the changes and advances in technology to ensure greater access to justice and expedite the resolution of disputes, especially low-value and consumer disputes.

⁵⁹⁹ Ernest E. Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability," *African Security Brief*, no. 16 (November 2011): 1-6.

- As in many other countries, e-commerce is growing fast in Africa. Reforms in consumer laws and implementing ODR systems may prove beneficial for resolving B2C consumer disputes arising from e-commerce transactions.

4.5 ASIA

Despite the global economic crisis resulting from the COVID-19 pandemic, Asia still represents the fastest-growing global economic region and the largest e-commerce marketplace. According to the International Monetary Fund (IMF) forecasts, India and China were the fastest-growing trillion-dollar economies in 2021.⁶⁰⁰ Japan and South Korea rank among the ten largest e-commerce markets globally.⁶⁰¹ However, the Asian market remains very diverse, especially in e-commerce. Areas with high technological development are contrasted with poor regions with low technological investments.⁶⁰²

Over the past two decades, Asia's growing consumption and integration into global trade flows have attracted capital and investment, favoring increased international trade transactions in the region. In many parts of Asia, this rapid development of commercial transactions has also meant an increase in the number of disputes, often causing an overload of the court system and a slow adjudication of disputes.⁶⁰³ As a result, alternative out-of-court dispute resolution processes have become fundamental to help not only reduce the burden on the courts but also provide legal certainty in resolving business disputes and, therefore, attract foreign investments in the region. Many Asian countries have adopted a legal framework on ADR, favoring out-of-court procedures such as arbitration, mediation, and conciliation to resolve commercial and civil disputes. Most countries in Asia have ratified the New York Convention, and over a dozen have recently signed the Singapore Convention on Mediation. Furthermore, the use of ODR systems and technology in dispute resolution is continuously growing as "the next guardian" of access to justice in Asia.⁶⁰⁴ Many ODR programs and providers have emerged in Singapore, Japan, China, India, South Korea, Malaysia, and the Philippines.

⁶⁰⁰ According to IMF projections in 2021 India grew by 11.5% and China by 8.1%. See <https://www.imf.org/en/Countries/IND>

⁶⁰¹ Business.com editorial staff, "10 Largest E-commerce Markets in the World," Business.com, last modified February 26, 2016, <https://www.business.com/art.s/10-of-the-largest-ecommerce-markets-in-the-world-b/>.

⁶⁰² See for example Afghanistan, Cambodia, and Nepal.

⁶⁰³ Kun Fan, "International Dispute Resolution Trends in Asia," *Transnational Dispute Management* 10, no. 4 (September 2013): 1-16.

⁶⁰⁴ Pui-ki Emmanuelle Ta, and Rachel So. "Online Dispute Resolution: The Next Guardian of Access to Justice in Asia," *Asian Dispute Review* 24, no. 4 (2022), 173-180.

4.5.1 China

ADR and ODR are growing in China and becoming essential to resolving disputes. They mainly respond to the growing need for fast and efficient dispute resolution methods. In recent decades, the Chinese economy has grown rapidly and incrementally, leading the country to become the world's second-largest economy by nominal GDP after the United States.⁶⁰⁵ With economic growth and the greater complexity of international markets, there have been increased commercial, civil, and consumer disputes in China. This growing number of disputes has put pressure on the traditional court system, increasing caseloads in Chinese courts. Furthermore, the desire to attract international investments and create a more business-friendly environment has led the Chinese government to consider promoting and developing more efficient, rapid, and cost-effective out-of-court dispute resolution mechanisms. ADR and ODR can help reduce litigation costs and uncertainties, making China a more attractive place to do business.

The legal framework for ADR and ODR in China consists of several laws and regulations. The Civil Procedure Law of the People's Republic of China (CPL) is ADR's primary law. The CPL was amended in 2012 to promote the use of ADR.

The CPL and the *Arbitration Law of the People's Republic of China* (the Arbitration Law) provide the legal framework for arbitration. Chapter XVIII of the CPL provides for the recognition and enforcement of arbitral awards, and the Arbitration Law applies to domestic and international arbitration. The Arbitration Law regulates the arbitration of disputes over economic matters. Any contractual disputes and disputes concerning property rights and obligations can be subject to arbitration.⁶⁰⁶ Instead, disputes arising from marriage, adoption, guardianship, support, and inheritance cannot be subject to arbitration.⁶⁰⁷ The Arbitration Law requires parties to have a valid arbitration agreement (arbitral clause in a contract or any arbitration agreement in other writing forms) before submitting a dispute to arbitration.⁶⁰⁸

⁶⁰⁵ China's GDP in 2021 increased to USD 17.73 trillion. China's economy is poised to rebound to 5.2% growth in 2023. See the International Monetary Fund (IMF) for more information about China's economy, at <https://www.imf.org/en/Countries/CHN>.

⁶⁰⁶ Arbitration Law of the People's Republic of China, Art. 1.

⁶⁰⁷ Ibid. Art. 3(1).

⁶⁰⁸ Ibid., Art. 21(1) and 16.

Arbitration awards are final and binding; courts enforce them under the 1958 New York Convention. In 2021, 270 arbitration commissions were operating across China, which accepted 400,711 cases, of which 261,047 were traditional commercial arbitration cases with amounts in dispute totaling 718.7 billion yuan.⁶⁰⁹

Mediation in China has a long and ancient tradition and is part of the Chinese conflict resolution culture. Today, China recognizes mediation as an essential alternative to litigation. There are five types of mediation: Civil mediation, court mediation, administrative mediation, and arbitral mediation. Civil mediation, or People's Mediation, is carried out by community mediators belonging to People's Mediation Committees (PMCs).⁶¹⁰ PMCs are established under the Chinese Constitution as community-based organizations whose mission is to mediate civil disputes. They are independent and supplement the judicial system by helping citizens resolve their disputes free of charge. People's Mediation Law regulates Civil Mediation, setting rules and standards for the PMCs and their activities and the community mediators.⁶¹¹

Court mediation is performed by judges, usually before a trial. Art. 35 of the CPL requires courts of law to mediate civil cases.⁶¹² If parties do not agree to mediate or if the mediation results in a no agreement, the same judge who acted as a mediator should adjudicate the case.⁶¹³ It is the most controversial form of mediation since judges undertake dual roles as mediators and adjudicators in the same dispute.⁶¹⁴ Judicial mediation is regulated by Chapter VIII of the CPL, which provides basic principles and procedural rules.

Administrative mediation is carried out by government officials or administrative bodies like township governments in ordinary civil disputes or environmental protection agencies in environmental disputes.⁶¹⁵

⁶⁰⁹ Qian Zhou, "Dispute Resolution in China: Litigation, Arbitration, and Mediation," China Briefing News, last modified September 7, 2022, <https://www.china-briefing.com/news/dispute-resolution-in-china-litigation-arbitration-and-mediation/>.

⁶¹⁰ Constitution of the People's Republic of China, Art. 111.

⁶¹¹ People's Mediation Law of the People's Republic of China, Art. 1.

⁶¹² Art. 35 of the CPL recites, "When handling civil cases, courts of law should, based on consent of the litigants, mediate the cases on the merits of the cases themselves."

⁶¹³ Art. 91 of the CPL states, "If no agreement is reached through conciliation or if either party backs out of the settlement agreement before the conciliation statement is served, the people's court shall render a judgment without delay."

⁶¹⁴ Jeffrey K. Lee, "Mediation in Mainland China and Hong Kong: Can They Learn from Each Other?," *Asian-Pacific Law & Policy Journal* 16, no. 1 (2013): 101-121.

⁶¹⁵ *Ibid.*

Finally, arbitration mediation is performed by arbitration bodies in arbitration cases. It consists of a unique mediation-arbitration process where mediation is integral to the arbitration. If the parties settle through mediation, the mediation settlement will be enforced as an arbitral award. If there is no mediation settlement, the arbitral tribunal will revert to arbitration proceedings. The People's Republic of China Law regulates this combined mechanism. Other provisions can be found in the Arbitration Law, CPL, and Foreign Economic Contract Law.⁶¹⁶

As mentioned above, mediation is integral to Chinese culture and serves an important social function. However, there is no shortage of critical issues in a system of different types of mediation with millions of mediators who are often not professionally trained. Think, for example, of People's Mediations, where the mediators are often volunteers or underpaid who have not received appropriate training. The need to train professional mediators and set up professional mediation centers is emerging. The growing development of the Chinese and international markets requires effective, fast, and less expensive dispute resolution systems. China has moved in this direction by institutionalizing mediation through the People's Mediation Law, which has amended the CPL, providing for forms of mediation, standards and requirements for mediators, and procedures for judicial confirmation of mediation agreements. Another step forward has been to embrace technology. In 2017, the Supreme People's Court established a national platform for online mediation. Since its creation, the platform has handled more than 13 million disputes, and 32,900 mediation organizations and 165,000 mediators have participated in proceedings on the platform. 3,502 courts have opened mediation services on the platform. According to the Supreme People's Court report, pretrial mediation successfully resolved 4.24 million civil and commercial disputes through the platform.⁶¹⁷ Through the online mediation platform, parties can submit requests for mediation, select mediators, participate via video, and sign settlements through their computers, smartphones, or tablets. Parties have 30 days to mediate online; otherwise, a court trial might ensue.⁶¹⁸

⁶¹⁶ Edwin H. Chan, "Amicable dispute resolution in the People's Republic of China and its implications for foreign-related construction disputes," *Construction Management and Economics* 15, no. 6 (1997): 539-548, doi:10.1080/014461997372746.

⁶¹⁷ China Daily 张文芳, "13.6 Million Disputes Mediated Online," Global Edition, last modified March 10, 2021, <https://global.chinadaily.com.cn/a/202103/10/WS604816e5a31024ad0baae13a.html>.

⁶¹⁸ Shine, "China's Online Mediation Platform Faces Surging Applications," SHINE, last modified February 21, 2021, <https://www.shine.cn/news/nation/2102214885/>.

Digital and artificial technology development has changed how disputes are managed and resolved. In China, the growing development of technology has impeded the promotion of ADR and ODR due to the Coronavirus pandemic, which has forced courts and bailiffs to close and postpone hearings and trials. However, Chinese courts ICT to resolve disputes long before the coronavirus outbreak began in China. The spread of coronavirus has forced the Chinese courts to take full advantage of ICT across the country. In recent years, three Internet courts have been created in the major cities, Hangzhou, Beijing, and Guangzhou, as part of China's 'Smart Justice' campaign.⁶¹⁹ The three courts have handled over 120,000 disputes since their establishment.⁶²⁰ In 2018, the Hangzhou Internet Court accepted 14,134 Internet-related cases and concluded 11,620 cases.⁶²¹ In all cases, the parties were heard online. The rate of satisfactory settlements without appeal was 98.59%, while the corresponding rate for offline procedures was 90%.⁶²² In 2012, the same court concluded 81,443 cases.⁶²³

Unlike digital litigation,⁶²⁴ the entire litigation process in Internet courts occurs online, including case management, mediation, evidence exchange, pretrial preparation, trial, and judgment. The Hangzhou Internet Court deals with Internet disputes and e-commerce claims. The Court had jurisdiction over cases related to e-commerce in the whole city of Hangzhou, the most developed e-commerce area in China.⁶²⁵ The processes for the Hangzhou court take place entirely online. Parties can register through their mobile phones, and hearings are conducted remotely, via videoconference or phone.⁶²⁶ After filling the case, disputants are required to participate in a pre-litigation mediation. Within fifteen days, the mediator contacts the parties over the phone, online, or via video. The case is submitted to the court for adjudication if the mediation fails. The Guangzhou and Beijing Internet Courts follow the

⁶¹⁹ Launched in 2016, the 'Smart Justice' aimed to improve access to justice and judicial efficiency through technology. One of the results of this campaign was the creation of a Smart Court System which led to the creation of the first Internet Courts. The Hangzhou Court was established in 2017 followed by the Beijing Court in 2018, and Guangzhou Court in 2019.

⁶²⁰ Ballesteros, "International Perspectives," 92.

⁶²¹ Meirong Guo, "Internet court's challenges and future in China," *Computer Law & Security Review* 40 (2021): 5, <https://doi.org/10.1016/j.clsr.2020.105522>.

⁶²² Ibid.

⁶²³ "Hangzhou Internet Court's 5th Anniversary: Making Virtual Society More Orderly," Zhejiang, China | Official Site of Zhejiang Province, China, last modified August 23, 2022, https://www.ezhejiang.gov.cn/2022-08/23/c_804705.htm.

⁶²⁴ "Digital litigation refers to a litigation method in which litigation subjects use electronic technology to carry out litigation activities." See Guo, "Internet court's," 2.

⁶²⁵ Guodong Du and Meng Yu, "China Justice Observer," China Justice Observer, last modified November 3, 2019, <https://www.chinajusticeobserver.com/a/a-close-look-at-hangzhou-internet-court>. For example, Alibaba, the largest e-commerce company in China, has its headquarter in Hangzhou.

⁶²⁶ Cortés, Vilalta, Nagarajan, "ODR for E-Commerce."

structure of the Hangzhou Internet Court. However, the Beijing Court has a greater inclination toward AI, where AI assistant judges help human judges with different tasks. The presence of an AI judge has raised concerns about their independence as they are designed and programmed by individuals who may have conflicts of interest.⁶²⁷ The Rules of Online Litigation of the People's Court of China, established by the Supreme People's Court of China, regulate the three Internet courts.

E-commerce businesses have successfully integrated ODR and complaint-handling systems into their platforms. China is the leading e-commerce market in the world, with a turnover of 1.3 trillion U.S. dollars and more than 710 million digital buyers, followed by the US with 856.77 billion.⁶²⁸ Internet sites like Alibaba's Taobao, Tmall, and JD.com dominate China's e-commerce market and are among the largest e-commerce platforms in the world.⁶²⁹ This fast and dynamic development of e-commerce has also led to the growth of B2C disputes and dissatisfied customers looking for quick dispute resolution. ODR development in China can be traced to the private sector with the creation of internal ODR mechanisms hosted by e-commerce platforms and institutions and e-ADR supported by the e-commerce industry.⁶³⁰ Taobao developed the first and most important internal ODR platform. Taobao, owned by Alibaba, is an online shopping platform that offers C2C services. It is the world's most popular online marketplace based on gross merchandise value (711 billion U.S. dollars in 2021).⁶³¹ Taobao modeled its ODR system on eBay's Dispute process, providing mechanisms for submitting complaints and resolving disputes between buyers and sellers. If a transaction dispute occurs between a buyer and seller, the Taobao dispute resolution process allows the parties to first find a solution through a text-based negotiation program. The buyer also has the option to submit a claim against the seller and ask a designated Taobao ODR specialist to adjudicate or use a jury-like panel of public assessors to arbitrate.⁶³² In the first scenario, the ODR specialist makes a decision within ten days based on the evidence submitted by both

⁶²⁷ Ibid.

⁶²⁸ Statista, "Global: E-commerce Revenue by Country 2022," Statista, last modified May 17, 2023, <https://www.statista.com/forecasts/1283912/global-revenue-of-the-e-commerce-market-country>.

⁶²⁹ According to eMarketer Alibaba's Taobao and Tmall represent 50.8% of the market share, followed by JD.com (15.9%) and Pinduoduo (13.2%). See <https://www.trade.gov/country-commercial-guides/china-ecommerce#:~:text=China%20is%20the%20largest%20e,reach%20%243.56%20trillion%20by%202024>.

⁶³⁰ Shu Shang and Wenli Guo, "The Rise of Online Dispute Resolution-Led Justice in China: An Initial Look," *ANU Journal of Law and Technology* 1, no. 2 (September 2020): 25-42.

⁶³¹ Ballesteros, "International Perspectives."

⁶³² Lizhi Liu and Barry R. Weingast, "Taobao, Federalism, and the Emergence of Law, Chinese Style," *Minnesota Law Review*, no. 111 (2018): 1563-1590.

parties. If the case is referred to the jury system, thirteen Taobao public assessors review the evidence submitted by the disputing parties and decide by majority vote within forty-eight hours, providing written comments about the case. Public assessors are chosen randomly from a pool of four million volunteered experienced users with high online ratings.⁶³³ However, this adjudication model presents a problem of respect for the principle of legality. Although the decision is made by a randomly selected panel of public assessors who decide by majority vote, there is no guarantee that the decision complies with the consumer protection legislation.

Whether a Taobao ODR specialist or a jury of assessors decides the claim, in both cases, Taobao can enforce the decision by freezing the payment in dispute, withdrawing money from the seller store deposit, lowering the user's rating, or denying the losing party privileges to use the platform.⁶³⁴ Almost all disputes are resolved through negotiation without the intervention of a Taobao ODR representative or jury. Parties might be incentivized to negotiate to avoid reducing their reputation rating if their dispute requires a Taobao representative's involvement.⁶³⁵

Despite the legal framework and policy initiatives in place to support ADR and ODR in China, these mechanisms still face many challenges. One challenge is the general public's lack of awareness and understanding of ADR and ODR. Many people are still not aware of the benefits of ADR and ODR and may not be willing to use these mechanisms to resolve disputes. Another challenge is the lack of qualified ADR and ODR practitioners. China's ADR and ODR industries are still in the early stages of development, and there is a shortage of experienced practitioners who can provide high-quality services. Finally, the increasing use of AI and digital technology has raised concerns about information privacy and the safety and security of personal data. Also, AI has the potential to discriminate, perpetuate biases, and produce unequal treatment.

4.5.2 Hong Kong

Under the "One Country, Two Systems" principle, the Hong Kong Special Administrative Region maintains a common law system and represents China's only common law

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ Katsh and Rabinovic-Einy, "*Digital Justice*."

jurisdiction⁶³⁶. Hong Kong is a leading center for dispute resolution in Asia. The strategic geographical location, the increasing economic integration with Mainland China under the Closer Economic Partnership Arrangement (CEPA), an independent and high-quality judiciary, and a common law legal culture⁶³⁷ make Hong Kong an ideal venue for international dispute resolution and Mainland-related disputes.

The two most common forms of ADR are arbitration and mediation. The Hong Kong government has promoted and regulated mediation in the last decade. The “Mediation First” Pledge (The Pledge) initiative was launched in 2009 to encourage the use of mediation in commercial disputes. Companies or organizations signing the Pledge agree first to explore the use of mediation to resolve their disputes before pursuing other dispute resolution processes or litigation. The Pledge can be signed online by filling out a form with the name, phone number, and address of the person representing the company.⁶³⁸ In 2010, the Hong Kong Mediation Code was promulgated to provide common standards for mediators. In June 2012, the government passed a Mediation Ordinance (Cap. 620 of the Laws of Hong Kong) that came into operation on 1 January 2013 to provide a proper statutory framework for the conduct of mediation in Hong Kong. The main objects of the Ordinance are to promote, encourage, and facilitate the use of mediation as an alternative dispute resolution and to protect the confidential nature of mediation communications.⁶³⁹ The Ordinance applies to any mediation conducted under an agreement to mediate if the mediation is wholly or partly conducted in Hong Kong or the agreement provides that this Ordinance or the law of Hong Kong is to apply to the mediation.⁶⁴⁰

Another important step toward regulating and standardizing mediation in Hong Kong was the creation of a Mediation Task Force to establish a single accreditation industry-led accreditation body, which would become the premier accreditation body for mediators in Hong Kong. This single accreditation body, the Hong Kong Mediation Accreditation Association Limited (HKMAAL), was incorporated on 28 August 2012 with the Hong Kong Bar Association, the

⁶³⁶ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China of 1990, Order No. 26, Chapter I, Art. 1 and Art. 8.

⁶³⁷ Yang Lin, “E-commerce and Online Dispute Resolution in Hong Kong,” *Amicus Curiae* 4, no. 3 (2023): 542-551, doi:10.14296/ac.v4i3.5615.

⁶³⁸ “Mediate First Pledge,” The Government of Hong Kong, March 30, 2020, <https://eform.one.gov.hk/form/doj004/en/>.

⁶³⁹ Mediation Ordinance (Cap. 620), section 3.

⁶⁴⁰ *Ibid.*, section 5 (1) (a) and (b).

Law Society of Hong Kong, the Hong Kong International Arbitration Centre, and the Hong Kong Mediation Centre as the founder members.⁶⁴¹ In December 2017, the Apology Conduct (Cap. 631) came into effect to apologize in certain proceedings and legal matters, prevent disputes' escalation, and facilitate their amicable resolution (section 2). Arbitration is regulated by the Arbitration Ordinance (Cap. 609) (The Arbitration Ordinance) that came into effect in June 2011. The Arbitration Ordinance reforms the arbitration law by unifying the legislative regimes for domestic and international arbitrations based on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL). The main objective of the Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.⁶⁴² Under the Arbitration Ordinance, the Hong Kong International Arbitration Center (HKIAC) has been designated the appointing body. The new Ordinance has made Hong Kong an attractive location for resolving international disputes. As reported by the Department of Justice, in 2011, 65% (representing 178 cases) of all HKIAC's arbitration cases were international.⁶⁴³

Progress has also been made in adopting technologies in alternative dispute resolution. The opportunities generated by China's Belt and Road Initiative and the Greater Bay Area (GBA) Development Plan have contributed to accelerating the development of ODR in Hong Kong.⁶⁴⁴ Furthermore, in response to the COVID-19 crisis, the government of Hong Kong has adopted a series of measures to support individuals and businesses affected by the pandemic.⁶⁴⁵ These measures are particularly relevant to the legal and dispute resolution sector: the LawTech Fund⁶⁴⁶ and the COVID-19 Online Dispute Resolution (ODR) Scheme.⁶⁴⁷ The LawTech Fund aims to assist small and medium-sized law firms and barristers' chambers in acquiring and upgrading information technology systems (such as video-conferencing facilities) and attending LawTech training courses. Anticipating increased disputes arising from or relating to COVID-19, the ODR Scheme aims to provide fast and cost-effective means to resolve

⁶⁴¹ "Mediation," The Government of the Hong Kong Special Administrative Region. Department of Justice, accessed August 7, 2020,

<https://www.doj.gov.hk/eng/public/mediation.html>.

⁶⁴² The Arbitration Ordinance (Cap. 609), art. 3 (1).

⁶⁴³ "Arbitration," The Government of the Hong Kong Special Administrative Region. Department of Justice, accessed August 7, 2020, <https://www.doj.gov.hk/eng/public/arbitration.html>.

⁶⁴⁴ Lin, "E-commerce."

⁶⁴⁶ "Stand in solidarity against COVID-19," The Government of the Hong Kong Special Administrative Region. Department of Justice, https://www.doj.gov.hk/eng/public/blog/20200411_blog1.html.

⁶⁴⁷ The Online Dispute Resolution Scheme was launched on June 29, 2020. See the Government of Hong Kong Special Administrative Region's press release, <https://www.info.gov.hk/gia/general/202006/29/P2020062900651.htm>.

disputes, especially for micro, small, and medium-sized companies involved in low-value disputes. The scheme will engage an electronic Business-Related Arbitration and Mediation (eBRAM) web-based multi-tiered platform with video-conferencing technology support.⁶⁴⁸ The parties will first attempt to resolve their dispute through negotiation or mediation, followed by arbitration in case a settlement is not reached. The scheme plans to cover COVID-19-related disputes with a claim amount of not more than HK\$500,000 per case. It is funded by the Department of Justice of the Hong Kong Special Administrative Region (HKSAR) to cover arbitrators' and mediators' fees. The scheme aligns with the development under the Asia-Pacific Economic Cooperation's Collaborative Framework on ODR (APEC Framework). There is no official data regarding the number of disputes handled to date. The minutes of the Legislative Council of HKSAR meeting of 25 April 2022 reported that 23 cases were handled under the COVID-19 ODR scheme, of which two cases were settled in negotiation, 11 were closed for the respondent lack of consent in participating in the ODR process, and ten were still pending at the time of the meeting.⁶⁴⁹

4.5.3 Japan

Since the Act on Promotion of Use of Alternative Dispute Resolution in 2004, the government and the national courts have promoted and encouraged ADR. The act aimed to establish a certification system and set special rules on nullifying the statute of limitations. It also makes ADR procedures easier and allows the parties to choose the most suitable method.⁶⁵⁰ This certification system provides that the Ministry of Justice issues a certificate to those persons or entities that have applied for the certification if the ADR services they offer meet the certification standards and the applicant has the necessary knowledge, skills, and financial base for carrying out the services.⁶⁵¹ Art. 25 of the Act consents to a party to a dispute requesting a certified dispute resolution to invoke the prescription suspension under the statute of limitations. It allows the party to resolve the dispute through a certified ADR service before filing a lawsuit if it cannot be resolved successfully. Per Art. 26, if both parties request to try certified ADR, the court can suspend the legal proceedings for not more than four months.

⁶⁴⁸ The platform was developed by eBRAM, an independent and not-for-profit organization established in 2018 with the support of the Asian Academy of International Law,² the Hong Kong Bar Association, the Law Society of Hong Kong and Logistics and Supply Chain MultiTech R&D.

⁶⁴⁹ Lin, "E-commerce."

⁶⁵⁰ The Act on Promotion of Use of Alternative Dispute Resolution Act No. 151 of 2004, Chapter I, art. 1.

⁶⁵¹ As of August 2020, 167 organizations are included in the list of certified ADR providers. To see the list visit <http://www.moj.go.jp/KANBOU/ADR/jigyousya/ninsyou-index.html>.

Arbitration procedures are regulated by Arbitration No. 138 of 2003, implemented on March 1, 2004. This law replaced the old Arbitration Law of 1890 and is modeled on the United Nations Commission on International Trade Law (Uncitral) Model Law on International Commercial Arbitration. The national court administers civil mediation under the Civil Mediation Law No. 222 of 1951.

In recent years, the government has been working to establish Japan as a neutral venue for the resolution of cross-border disputes through arbitration, mediation, and other forms of ADR. An important initiative in this sense was the establishment in 2017 of the Japan International Dispute Resolution Center (JIDRC) for the promotion of international mediation and arbitration in Japan.⁶⁵²

Although Japan is one of the largest e-commerce markets in the world, it has not yet developed ODR. In the last twenty years, public organizations and industrial groups have undertaken a few initiatives to implement ODR to address e-commerce disputes but, unfortunately, without success.⁶⁵³ The most common alternative redress process for online consumers remains the National Consumer Affairs Center of Japan (NCAC),⁶⁵⁴ an incorporated administrative agency established in 2003 under the Basic Consumer Act of 2004.⁶⁵⁵ NCAC serves as a central consumer affairs institution in accordance with the Consumer Fundamental Act and NCAC Act. The agency manages consumer issues, collects consumer-related information in collaboration with the government and local consumer affairs centers, advises consumer counselors, and undertakes ADR procedures.⁶⁵⁶ In 2009, the NCAC established the ADR committee with independent authority to mediate and arbitration to resolve “important

⁶⁵² The Japan International Dispute Resolution Center, “The Japan International Dispute Resolution Center,” The Japan International Dispute Resolution Center, accessed June 21, 2023, <https://idrc.jp/en/>.

⁶⁵³ See Hiroki Habuka and Colin Rule, “The Promise and Potential of Online Dispute Resolution in Japan,” *International Journal of Online Dispute Resolution* 4, No. 2 (2017): 82-83.

⁶⁵⁴ Habuka and Rule, “The Promise,” 80; Henrique D. Zanin and Pedro H. Bernardes, “Technology and access to justice during the pandemic: online dispute resolution development in Brazil and Japan,” *Revista Tecnologia e Sociedade* 18, no. 50 (2022): 1-18, doi:10.3895/rts.v18n50.13443.

⁶⁵⁵ The Consumer Basic Act sets the framework for Japan's consumer policies. Art. 1 of the Act states, “The purpose of this Act is to promote comprehensive initiatives relating to the protection and promotion of consumers' interests and to thereby ensure stabilization and improvement in the people's lives as consumers, by prescribing respect for consumers' rights, support for their self-reliance, and other fundamental principles, as well as by clarifying the responsibilities of the State, local governments, and businesses, and prescribing the particulars upon which these initiatives are based, in consideration of the discrepancy in the quality and quantity of information and in bargaining power between businesses and consumers.”

⁶⁵⁶ “What is NCAC? - National Consumer Affairs Center of Japan -,” accessed July 25, 2020, https://www.kokusen.go.jp/e-hello/about_ncac/data/ncac_hello.html.

consumer disputes.”⁶⁵⁷ The Consumer ADR Committee handles the process, which includes 15 members who have special knowledge and legal expertise in consumer disputes.⁶⁵⁸ NCAC’s division deals with cross-border transactions called the Cross-border Consumer Centre Japan (CCJ). The CCJ was established in November 2011 by the Consumer Affairs Agency (CAA). It provides counseling services to consumers concerning cross-border transactions and assists in resolving B2C between Japanese consumers and businesses outside Japan or between consumers outside Japan and Japanese businesses. The CCJ maintains mutual relationships with several consumer support organizations in North America, South America, and Asia.⁶⁵⁹ In the fiscal year 2020, the CCJ received 4,625 inquiries about cross-border consumer disputes, which were down compared to FY 2019. 99.8% of the inquiries concerned issues related to online shopping, of which “credit card payment” accounted for 60% of all and “bank transfer” for 10%.⁶⁶⁰ The breakdown of inquiries by type of trouble showed that inquiries related to “trouble over cancellation” accounted for over half of the total. The second most common type was “trouble over fraud or counterfeit products” (19.2%). The breakdown of inquiries by product/service category showed that inquiries about software accounted for 5.3% of the total, decreasing to about one-third of 15.8%. The most common home country of businesses related to the inquiries was the US (23.2%) in FY2019, followed by China (12.6%), the UK (9.2%), and Hong Kong (6.0%).

4.5.4 India

In India, ADR is essential in helping courts lighten the burden of lawsuits.⁶⁶¹ The most common forms of ADR are arbitration, conciliation, mediation, negotiation, and Lok Adalat, or ‘People’s Court.’ Lok Adalat is a forum where disputes or cases pending in a court of law or at the pre-litigation stage are settled or compromised amicably.⁶⁶²

⁶⁵⁷ Per Art. 1-2 (2) of Act No. 123 of December 4, 2002, an important consumer dispute means “a consumer dispute whose resolution is regarded nationally important for the stabilization and improvement of the people’s lives in light of the situation of damage that occurs or is likely to occur to consumers or the nature of the case as specified by Cabinet Office Order.”

⁶⁵⁸ For the Consumer ADR Committee structure see http://www.kokusen.go.jp/e-hello/about_ncac/pdf/ncac_adr.pdf.

⁶⁵⁹ For a complete list of partner organizations see http://www.kokusen.go.jp/hello/pdf/mi-gyoumu_01_en.pdf, p. 7.

⁶⁶⁰ “FY2020 Summary of Inquiries About Cross-border Consumer Disputes Received by Cross-border Consumer Center Japan (CCJ) - National Consumer Affairs Center of JAPAN -,” accessed December 2, 2021, https://www.kokusen.go.jp/e-hello/news/data/n-20210805_2.html.

⁶⁶¹ As of March 2021, there are around 38.07 million cases pending before the District Judiciary and 4.83 million cases before the High Courts, according to the e-Courts website. See https://ecourts.gov.in/ecourts_home/.

⁶⁶² “Lok Adalat,” last modified February 26, 2019, <https://nalsa.gov.in/lok-adalat>.

Few critical provisions relate to and deal with ADR. Section 89 of the Civil Procedure Code, 1908, amended in 1999, confers the courts' powers to refer the parties to alternative dispute resolution methods to settle their disputes.⁶⁶³ Courts should resort to Section 89 whenever it appears that elements of a settlement may be acceptable to the parties.⁶⁶⁴

The Arbitration and Conciliation Act of 1996, amended in 2019 and 2020, governs India's procedure, appointment, and enforcement issues for arbitration and conciliation. It regulates domestic and international commercial arbitration and the enforcement of foreign arbitral awards per the UNCITRAL Model Law on Arbitration standards and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It also defines the law relating to conciliation.⁶⁶⁵

Lok Adalats have been given statutory status under the Legal Services Authorities Act 1987. Section 19 (5) of the Act lays down the jurisdiction of the Lok Adalat, which has the power to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case that is pending before any court or any dispute which has not been brought before any court and is likely to be filed before the court.

While no legislation governs mediation, the Consumer Protection Act recognizes it as an ADR method. Lok Sabha passed the Act⁶⁶⁶ on 30 July 2019 and later passed in Rajya Sabha⁶⁶⁷ on 6 August 2019. It repealed and replaced the Consumer Protection Act of 1986, which the Indian parliament enacted to protect the interests of consumers and establish authorities for fast and effective administration and resolution of consumer disputes. Chapter V of the Act recognizes the need for mediation in consumer disputes. It establishes consumer mediation cells attached to each state's District and State Commissions.⁶⁶⁸ The act also mandates the mediation cells to maintain a list of empaneled mediators. In contrast, the empanelment of mediators shall be prepared by the National Commission, the State Commission, or the District Commission.⁶⁶⁹

⁶⁶³ The ADR referenced by Section 89(1) are arbitration, conciliation, judicial settlement including settlement through Lok Adalat, or mediation.

⁶⁶⁴ Code of Civil Procedure, 1908 (CPC), Section 89(1).

⁶⁶⁵ The Arbitration and Conciliation Act, 1996. Act No. 26 of 1996.

⁶⁶⁶ The Lok Sabha, or House of the People, is the lower house of India's bicameral Parliament.

⁶⁶⁷ The Rajya Sabha or Council of States is the upper house of the bicameral Parliament of India.

⁶⁶⁸ The Consumer Protection Act, 2019, Chapter V, art. 74 (1).

⁶⁶⁹ Ibid., art. 74 (3) and art. 75 (1).

Art. 75 (3) specifies that the panel of mediators shall be valid for five years, and empaneled mediators shall be eligible for re-empanelment for another term, subject to the terms and conditions specified by the regulations. Art. 76 provides the mediator's duty to disclose specific facts concerning conflict of interests, independence, and impartiality. The mediation procedure is outlined in the Art. 79. The art. specifies that the mediation shall be held at the consumer mediation center and requires the nominated mediator to regard the rights and obligations of the parties, the usages of the trade, and other relevant issues. The mediator shall also follow the principles of natural justice during the entire mediation process. The Act does not establish the duration of the mediation. Still, it merely requires the mediator to conduct the mediation within such time and in such a manner as specified by the regulations.⁶⁷⁰ In the absence of a fixed time limit for mediation, some have seen a deficiency that could delay the entire procedure's duration and affect the Act's potential positive impact.⁶⁷¹ Many perceive Mediation as an efficient and fast method, and the "absence of a specified timeline could frustrate the mediation process and may result in unreasonable delays."⁶⁷² The mediation settlement is regulated by art. 80 that requires that the terms of the agreement reached by the parties must be reduced in writing and signed by the parties or their authorized representatives. The mediator shall then prepare a settlement report and submit it with the signed agreement to the concerned Commission. Art. 81 (1) requires that the District Commission, the State Commission, or the National Commission pass an order recording such settlement within seven days of receiving the settlement report. Suppose a consumer dispute is settled only in part. In that case, the District Commission, the State Commission, or the National Commission shall record the partial settlement while hearing the other issues involved in the dispute.⁶⁷³

Apart from section 37 of the Consumer Protection Act, mediation in India can be initiated through a dispute resolution clause in a contract or referred to by a court under section 89 of the CPC. Also, it can be foreseen as a compulsory mechanism under Section 12A of the Commercial Courts Act that provides the parties with an alternative to resolve their disputes by negotiating in the presence of a mediator. In this case, the plaintiff must initiate mediation before filing a claim.⁶⁷⁴ Aside from being recognized as a form of ADR, mediation is not yet

⁶⁷⁰ Ibid., art. 79 (3).

⁶⁷¹ Saptarshi Das, "Consumer Redress through Online Dispute Resolution," 124.

⁶⁷² Ibid.

⁶⁷³ Art. 81 (2).

⁶⁷⁴ "Pre-Institution Mediation in Commercial Matters," National Legal Services Authority!, last modified April 3, 2019, <https://nalsa.gov.in/services/mediation/pre-institution-mediation-in-commercial-matters>.

regulated in India. For this purpose, in January 2020, the Supreme Court established the Mediation and Conciliation Planning Committee (MCPC) to draft legislation to institutionalize mediation and give legal sanctity to disputes settled through it.⁶⁷⁵ The Bill that was recently sent to the Parliamentary Standing Committee on Law and Justice looks at regulating mediation as a professional activity and provides for the composition of a Mediation Council as a central regulating body.⁶⁷⁶ The Bill also includes a mechanism for recognizing and enforcing settlement agreements, provisions for pre-litigation mediation, and enforcement of international mediation settlements.⁶⁷⁷

The provisions regulating ADR also form a legal basis for Online Dispute Resolution, and “the current legislative framework can be used to implement ODR in practice.”⁶⁷⁸ Key legislations are the Arbitration and Conciliation Act of 1996, the Amendment Acts of 2019 and 2020, the Code of Civil Procedure 1908, and the Legal Services Authorities Act of 1987.

The current laws’ provisions allow for virtual documents and hearings sharing. The Information Technology Act, 2000 (IT Act) accords legal recognition to electronic signatures and electronic records and validity to online contracts.⁶⁷⁹ The Banking Ombudsman Scheme, 2006, of the Reserve Bank of India allows complaints to be made electronically.⁶⁸⁰ Furthermore, the Indian Supreme Court has repeatedly expressed itself in favor of using technology in dispute resolution and has encouraged the use of ODR systems.⁶⁸¹ It has established the validity of video conferencing for taking evidence and depositions and upheld

⁶⁷⁵ “Supreme Court Forms Committee to Draft Mediation Law, Will Send to Government,” The Economic Times, last modified January 19, 2020, <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/art.show/73394043.cms?from=mdr>.

⁶⁷⁶ AM Jigeesh, “Sending Mediation Bill to the Standing Committee is a Good Development: Sriram Panchu,” @businessline, last modified December 27, 2021, <https://www.thehindubusinessline.com/news/national/sending-mediation-bill-to-the-standing-committee-is-a-good-development-sriram-panchu/art.38046271.ece>.

⁶⁷⁷ The NITI Aayog Expert Committee on ODR, “Designing the Future of Dispute Resolution. The ODR Policy for India,” | NITI Aayog, last modified October 2021, <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>.

⁶⁷⁸ Deepika Kinhal, Tarika Jain, and Vaidehi Misra, *ODR: The Future of Dispute Resolution in India*, (VIDHI Center for Legal Policy, 2020): 26.

⁶⁷⁹ The Information Technology Act, 2000 (IT Act), Chapter III, art. 4, 5, 10A, and Chapter IV, art. 11-15.

⁶⁸⁰ The Banking Ombudsman Scheme, 2006, art. 3(6), 9(c).

⁶⁸¹ Pablo Cortés, Aura Esther Vilalta, and Chittu Nagarajan, “ODR for E-Commerce: Legal Standards and Developments in Asia and Europe,” 2021; Rahul J. Nikam and Nongthombam B. Singh, “An Analytical Study on Legal validity of Online Dispute Resolution (ODR) System in India and Indonesia,” *Indonesia Law Review* 12, no. 2 (August 2022): 41-59, doi:10.15175/1984-2503-202214308.

that consultation can be achieved with electronic media and remote conferencing.⁶⁸² The Supreme Court has also held the validity of online arbitration when it complies with certain provisions of the Arbitration and Conciliation Act, the Evidence Code, and the IT Act.⁶⁸³

It would be necessary to amend the IT Act 2000 and update the Consumer Protection Act 2019 to provide a solid legal basis for the functioning of the ODR mechanisms.⁶⁸⁴ Also, an ODR framework will require a data protection law to deal with security and confidentiality issues and concerns. In December 2019, the Ministry of Electronics and Information Technology (MEIT) introduced the Personal Data Protection Bill in Lok Sabha, which the Joint Parliamentary Committee (JPC) reviewed. The Bill seeks to protect the privacy of individuals relating to their personal and establish a Data Protection Authority.⁶⁸⁵ On December 16, 2021, the JPC submitted its report on the Bill to Parliament, which contains recommendations on changes that should be made to the Personal Data Protection Bill 2019, along with general recommendations related to privacy and data protection. The report includes a recommendation to extend the scope of the Bill to non-personal data and rename the Bill to the ‘Data Protection Act.’⁶⁸⁶

Some private and public initiatives have taken steps to encourage the use of ODR in consumer disputes, in the banking sector, and disputes between landlords and tenants concerning bill payments.⁶⁸⁷ For instance, in 2016, the Online Consumer Mediation Centre (OCMC) was established at the National Law School of India University (NLSIU) with the Ministry of Consumer Affairs sponsorship to promote online mediation use in consumer disputes. The OCMC has developed an online platform with the motto ‘Anytime Anywhere Dispute Resolution’ to facilitate and expedite the resolution of business-to-consumer disputes (B2C).⁶⁸⁸ Again, in 2016, the Department of Consumer Affairs (DCA) launched a portal named Integrated Consumer Grievance Redressal Mechanism (INGRAM) to offer a platform for

⁶⁸² See *State of Maharashtra v Praful Desai* (2003) 4 SCC 60 and *Grid Corporation of Orissa Ltd. v AES Corporation* (2002) 7 SCC 736.

⁶⁸³ See *Shakti Bhog v Kola Shipping* (2009) 2 SCC 134.

⁶⁸⁴ Cortés, Vilalta, and Nagarajan, “ODR for e-Commerce.”

⁶⁸⁵ The Personal Data Protection Bill No. 373 of 2019, Preamble.

⁶⁸⁶ Osho Chhel and Singh Vijayant, “Summary Of The JPC Report On Data Protection - Privacy - India,” Welcome to Mondaq, last modified December 21, 2021, <https://www.mondaq.com/india/data-protection/1143628/summary-of-the-jpc-report-on-data-protection>.

⁶⁸⁷ Kinhal, Jain, and Misra, “ODR.”

⁶⁸⁸ “Online Consumer Mediation Centre Inaugurated at NLSIU, Bengaluru,” SCC Blog, last modified March 2, 2021, <https://www.sconline.com/blog/post/2017/02/21/online-consumer-mediation-centre-inaugurated-at-nlsi-bengaluru/>.

consumers to get their complaints and grievances addressed directly by the companies that are partnered with the National Consumer Helpline (NCH).⁶⁸⁹ In 2019, the Department for Promotion of Industry and Internal Trade (DPIIT) released the Draft National e-Commerce Policy “to prepare and enable stakeholders to fully benefit from the opportunities arising from the digitalization of the domestic digital economy.”⁶⁹⁰ The policy suggests developing a system for the electronic redressal of grievances for e-commerce disputes, including electronically making available compensation to the aggrieved consumer, which will boost consumer confidence.⁶⁹¹

In October 2021, the national government issued the ‘Desing the Future of Dispute Resolution’ report that contains a comprehensive policy plan on ODR.’ The report wants to serve as a starting point for implementing ODR and introduce a framework for ODR in India. For this purpose, the report recommends “a two-pronged approach that uses legislative and non-legislative tools.”⁶⁹² First, the report suggests amending the existing ADR legislation, like the Arbitration and Conciliation Act of 1996, to incorporate ODR and provide a regulatory structure for e-ADR. Also, it will require introducing mandatory pre-litigation mediation for pre-determined classes of cases in the form of an opt-out mediation model similar to the one implemented in Italy.⁶⁹³ Such amendments should align with UNCITRAL Model Law and Arbitration Rules and incorporate provisions of the UNCITRAL Technical Rules on ODR. As suggested by the report, ODR could be introduced as umbrella legislation that addresses all ODR-related issues.⁶⁹⁴ Second, the report recommends introducing a set of design and ethical principles that could act as standards for ODR providers and neutrals. It could also govern the technology and design of ODR platforms using a progressive regulation model similar to the one adopted by the European Commission, which transitioned from non-binding principles to directives over a decade.⁶⁹⁵

⁶⁸⁹ Department of Consumer Affairs, “INGRAM,” INGRAM | Integrated Grievance Redressal Mechanism, last modified 2021, <https://consumerhelpline.gov.in/about-portal.php>.

⁶⁹⁰ Draft National e-Commerce Policy (2019), Foreword (6).

⁶⁹¹ *Ibid.*, IV, F 4.16.

⁶⁹² The NITI Aayog Expert Committee on ODR, “Designing The Future,” 81.

⁶⁹³ Italian mediation law requires in limited civil and commercial case the plaintiff to first file a mediation request with a provider and attend the initial mediation session before bringing an action to court. At the initial session, the mediator explains the mediation process and its benefits to the parties and the parties can decide if they want to proceed with the full mediation procedure. Attending the initial session allows the parties to fulfill the mediation requirement so that if one of the parties decides not to proceed with mediation is able to “opt-out” and file the case in a court. See Legislative Decree No. 28 of 4 March 2010.

⁶⁹⁴ The NITI Aayog Expert Committee on ODR, “Designing The Future,” 83.

⁶⁹⁵ *Ibid.*, 81-82.

4.5.5 Singapore

Since the 1990s, Singapore has actively promoted ADR through several initiatives and schemes driven by Singapore's courts and legislature to institutionalize mediation and encourage disputing parties to consider ADR before resorting to legal proceedings. The first initiative came in 1992 when the judiciary incorporated Pre-Trial Conferences (PTCs) into civil cases before the Supreme and Subordinate Courts (State Courts). During the PTC, a registrar encouraged parties to discuss a settlement. In 1994, the Primary Dispute Resolution Centre (PDRC) was established to provide mediation and neutral evaluation for civil matters brought before the courts. In 1996, the PTCs were formalized in Order 34 A of the Rules of the Court, which gave the court the power to order the parties to attend a pre-trial conference at any time after the commencement of any proceedings.⁶⁹⁶ Other schemes pro-ADR were introduced into courts in 2002 with the Pre-action Protocol for Non-injury Motor Accident (NIMA) claims through a brief form or neutral evaluation conducted by the judge; and in 2010 with the introduction of an ADR form at the Summons of Direction stage of civil disputes that needs to be completed and filed by the plaintiff before the hearing. A presumption of ADR was included in 2012 in the State Courts Practice Directions for all civil disputes.⁶⁹⁷ In Part VI, 35 (2), the State Courts encourage all parties to explore alternative dispute resolution processes at the earliest possible stage as a "first stop." These processes include Court Dispute Resolution (CDR) sessions like mediation, neutral evaluation, and conciliation and are provided by the State Courts Centre for Dispute Resolution (SCCDR).⁶⁹⁸ Other ADR procedures include the following:

- Mediation at the Singapore Mediation Centre or Singapore International Mediation Centre;
- Mediation under the Law Society Mediation Scheme and/or Arbitration under the Law Society Arbitration Scheme; and
- Mediation and/or Arbitration by private service providers.⁶⁹⁹

⁶⁹⁶ Supreme Court of Judicature Act (Chapter 322, Section 80) Rules of Court R 5 G.N. No. S 71/1996, (O. 34A, r. 2).

⁶⁹⁷ State Courts Practice Directions, Part VI, 35 (9).

⁶⁹⁸ *Ibid.*, 35 (4).

⁶⁹⁹ *Ibid.*, 35 (3).

If a party has a personal injury or a "non-injury motor accident claim" (NIMA), the case will be automatically referred for ADR. The ADR process used will be a brief form of Neutral Evaluation.⁷⁰⁰ In any other civil suit in the State Courts, a party may request the other side's consent to use ADR at any time in the proceedings. The request must be filed through the online eLitigation system. Parties can choose to use mediation, conciliation, or neutral evaluation. A judge may also refer the parties to ADR at any proceeding stage. The referral may be made at the Summons for Directions, Pre-Trial Conference, or Case Management Conference. The following table summarizes the ADR process for all claims.⁷⁰¹

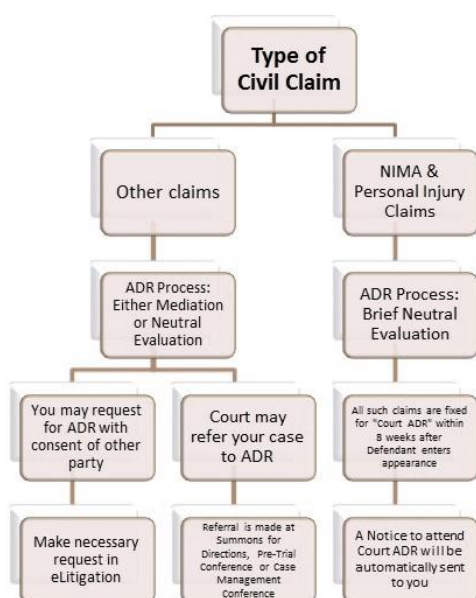


Figure 4.3 ADR Process Outline

Particularly interesting is the provision within the State Courts Practice Directions that allows parties to request mediation online at the State Courts Centre for Dispute Resolution. Parties may appear via Skype if overseas and unable to travel to Singapore to attend the mediation or if they are a foreign-incorporated company with no local presence and/or representative.⁷⁰² This provision is part of the modernization process of justice and the adoption of technology within the Singaporean Courts, which began as early as 1996 with the adoption of technological

⁷⁰⁰ Ibid., 35 (10).

⁷⁰¹ The table was retrieved from the website of the State Courts of Singapore from https://www.statecourts.gov.sg/cws/Mediation_ADR/Pages/Overview-of-Alternative-Dispute-Resolution.aspx.

⁷⁰² State Courts Practice Directions, Part VI, 22 (a).

tools for recording testimonies and has continued with the e-filing of documents and the e-litigation system. Adopting some laws, such as the Electronic Transactions Act 2010 and the Personal Data Protection Act 2012, has encouraged further push toward using technology in courts.⁷⁰³ More recently, with the amendments to the Supreme Court of Judicature Act approved by the parliament in 2018, the courts have been allowed to conduct hearings through a live video link, a live television link, or any other electronic means of communication.⁷⁰⁴

In July 2017, the State Courts of Singapore launched an electronic case filing and management system called Community Justice and Tribunals System (CJTS), allowing dispute parties to file claims and access Court e-services online. The CJTS consists of the Small Claims Tribunals (SCT), the Community Disputes Resolution Tribunals (CDRT), and the Employment Claims Tribunals (ECT). The SCT provides a fast and low-cost process to handle small claims arising from disputes in contracts for the sale of goods and provisions of services and disputes related to property damage and residential lease matters. A similar online process is provided for the parties submitting a claim at the CDRT (neighbor disputes) or ECT (salary-related and wrongful dismissal disputes). Through the CJTS e-service system,⁷⁰⁵ the parties can file their claims, submit documents, make a payment, select their court date, and view documents the other side presents. Through the system, the parties have the opportunity to negotiate a settlement on an ODR platform before going to court. If, through e-negotiation, an agreement is reached, the parties can apply online for an e-court order. If they cannot reach an agreement, the claim will proceed to the consultation and the hearing stage. Either party can also initiate an e-mediation process by logging on to the CJTS website and clicking e-Mediation under the e-service section. The mediation is conducted within a chatroom setting, and parties can try to resolve their dispute online with the help of a court mediator. The Community Justice and Tribunals System (CJTS) represents an essential step toward digitizing justice and adopting the ODR in the Singapore court system. The CJTS also signifies an improvement in access to justice, especially in low-value consumer disputes where parties can benefit from an easy, fast, and inexpensive process to resolve their disputes online without going to court.

⁷⁰³ Pablo Cortés, Aura Esther Vilalta and Chittu Nagarajan, “ODR for E-Commerce: Legal Standards and Developments in Asia and Europe,” in *Online Dispute Resolution: Theory and Practice*, edited by Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey, (The Hague: Eleven International Publishing, 2020), 14.

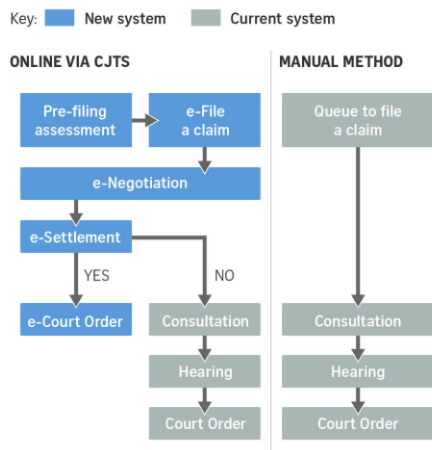
⁷⁰⁴ Supreme Court of Judicature Act, Part II, Section 8A (1).

⁷⁰⁵ The Community Justice and Tribunals System (CJTS) platform can be access at <https://www.statecourts.gov.sg/CJTS/#!/index1>.

The chart below compares the online Small Claims Tribunals process with the traditional in-person process.

Small Claims Tribunals process flow

On July 10, the first phase of the State Courts' Community Justice and Tribunals System (CJTS) - an electronic case filing and management system - was launched



Source: STATE COURTS OF SINGAPORE
STRAITS TIMES GRAPHICS

Figure 4.4 State Court's Community Justice and Tribunal System (CJTS)

4.5.6 South Korea

In South Korea, traditionally, the preferred method of dispute resolution has been litigation. However, there has been a push toward ADR in domestic and cross-border dispute resolution in recent years. The two most used types of ADR are arbitration in commercial disputes and mediation in civil and family disputes. Arbitration is regulated by the Arbitration Act of South Korea, which was amended in 1999 to substantially adopt the UNCITRAL Model Law on International Commercial Arbitration of 1985. The act was enacted to ensure the proper, impartial, and rapid settlement of disputes in private laws by arbitration.⁷⁰⁶ It applies to all disputes regardless of their nature.⁷⁰⁷ In 1996, following the act, the Korean Commercial Arbitration Board (KCAB) was established to prevent and settle domestic and foreign commercial disputes through arbitration, conciliation, or mediation. The KCAB is the only

⁷⁰⁶ Art. 1 of the Arbitration Act of Korea (Amended by Act No.6083 as of Dec. 31, 1999).

⁷⁰⁷ Ibid., art. 2.

officially recognized arbitration and mediation body in the Republic of Korea and maintains a panel of Korean and foreign arbitrators.⁷⁰⁸ South Korea has enacted a Court-Annexed Civil Mediation system through the Judicial Conciliation of Civil Disputes Act of 1990. Mediation is encouraged by the courts in resolving family and civil disputes. It can be conducted either by a single judge (mediation judge), a standing mediation council, or a court mediation commission.⁷⁰⁹ Parties can file an application for mediation in writing or orally.⁷¹⁰ The trial judge can also refer the case to mediation and has the discretion to appoint the mediator. Despite the court's efforts to encourage mediation, voluntary referral to civil mediation in South Korea does not exceed 10% of total litigation cases.⁷¹¹ It has led to several criticisms of court-referred mediation. In this regard, we must consider that the South Korean judiciary does not recognize private mediation programs since a mediation training program has not yet been established.⁷¹²

There are separate committees for mediating disputes in different fields in Korea, ranging from finance, medicine, electronic transactions, environment, copyright, and personal data. The Mediation Committee of Disputes on Electronic Documents and Electronic Transactions is particularly interesting for online dispute resolution, also known as the 'E-Commerce Committee (hereafter referred to as the "Committee"). It was established in 2002 following the enactment of the Framework Act on Electronic Transactions to mediate disputes on electronic documents and electronic transactions.⁷¹³ The act was enacted to ensure electronic documents and electronic transactions' security and reliability and to guarantee consumer protection.⁷¹⁴ The committee is composed of a minimum of 15 to a maximum of 50 members, including a chairperson appointed by the Minister of Commerce, Industry, and Energy.⁷¹⁵ The committee helps resolve disputes occurring during the creation, distribution, and storing of an e-document and a dispute relating to the delivery, contract, provision of incorrect information on goods, the return of goods, or refunds that occur in e-transactions. Anyone who intends to

⁷⁰⁸ Kcab, accessed July 5, 2020, <https://www.kcab.or.kr/servlet/main/1000>.

⁷⁰⁹ Art. 7 and 8 of the Judicial Conciliation of Civil Disputes Act 523 of 1990.

⁷¹⁰ *Ibid.*, art. 2 and art. 5.

⁷¹¹ Hyjien Jeon and Yejee Lisa Kim, "Korean Mediation and Its Applications in Environmental Cases," *Asian Pacific Mediation Journal* 1, no. 1 (March 2019): 4.

⁷¹² Yonghwan Choung, "Achieving Justice Through ADR: An Analysis of the Korean Mediation System" (PhD diss., Indiana University Maurer School of Law, 2017), 13.

⁷¹³ Framework Act on Electronic Transaction, Chapter VI, art. 32 (1). The act can be accessed here http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=27334&type=part&key=28.

⁷¹⁴ *Ibid.*, Chapter I, art. 1, and Chapter III, art. 12 and art. 13.

⁷¹⁵ *Ibid.*, art. 32 (2).

obtain a remedy for any loss or seek mediation of a dispute related to an electronic document or electronic transaction may submit an online application to the Committee.⁷¹⁶ The committee chairperson appoints the members of the Mediation Board (not more than three members), and the board will conduct the mediation. The committee has forty-five (45) days from the petition date to mediate the dispute.⁷¹⁷ After hearing the parties and their legal counsels and reviewing the necessary documentation, the Mediation Board may prepare a mediation proposal and invite the parties to accept it. The mediation is completed when the parties accept the Mediation Board's proposal or submit a mediation agreement to the Board.⁷¹⁸ A protocol of mediation signed and sealed by the Committee Chairperson is then sent to each party. The protocol has the same effect as a consent judgment under the Civil Procedure Act.⁷¹⁹

The mediation can occur at the committee's office or be conducted using an online chat or video conferencing system connected to the Cyber Mediation Center (Electronic Commerce Mediation Committee).⁷²⁰ The Framework Act regulates the mediation proceedings on Electronic Documents and Commerce. Online mediation can be particularly beneficial for B2C disputes where the value of the dispute is modest, and consumers require fast and efficient dispute resolution processes. In 2020, the number of cases filed with the Dispute Mediation Committee for consumer damage relief regarding e-commerce amounted to 268 cases.⁷²¹

4.5.7 Association of Southeast Asian Nations (ASEAN)

The Association of Southeast Asian Nations (ASEAN) was established on August 8, 1967, in Bangkok with the ASEAN Declaration (Bangkok Declaration) and signed by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Subsequently, Brunei, Vietnam, Laos, Myanmar, and Cambodia joined the association with ten members. In 2007, the ASEAN member states signed and adopted the ASEAN Charter, which governs the principles and purposes of the organization by providing its legal status and institutional framework. The

⁷¹⁶ Ibid., art. 33 (1).

⁷¹⁷ Ibid., art. 34 (4).

⁷¹⁸ Ibid., art. 35 (1).

⁷¹⁹ Ibid., art 35.

⁷²⁰ For information regarding the mediation process see <https://www.ecmc.or.kr/ecmceng/subIndex/233.do>.

⁷²¹ "South Korea: Mediated Consumer Damage Relief Cases by Transaction Type 2020," Statista, last modified April 7, 2021, <https://www.statista.com/statistics/1227745/south-korea-consumer-damage-relief-cases-in-mediation-by-transaction-type/>.

Charter entered into force on 15 December 2008.⁷²² With the entry into force of its Charter, ASEAN has become the first real intergovernmental organization in the Asian region. The organization aims to sustain economic growth, share social progress and cultural development, and promote peace and stability in the South East region.⁷²³

In recent years, ASEAN has taken several initiatives to facilitate and foster the development and strengthening of e-commerce within the ASEAN single market. The lack of a unified legal regime supporting regional e-commerce prompted ASEAN to develop a legal framework for e-commerce by harmonizing the Member States' national laws into a regional legal system.⁷²⁴ The purpose of this harmonization also lies in ASEAN's hope to foster further the integration of ICTs in the region as tools to increase the development of online commerce.

To enhance and strengthen the cooperation and coordination among member states, ASEAN launched in November 2017 the ASEAN Work Programme on E-commerce. This program is in line with the ASEAN Economic Community (AEC) Blueprint 2025, which calls on ASEAN to develop an ASEAN Agreement on E-Commerce to facilitate cross-border e-commerce transactions and promote confidence in the use of e-commerce in the region. The Agreement on E-Commerce was signed in Singapore in November 2018. In this framework of cooperation and development, one of the ASEAN Agreement on E-Commerce objectives has been to guarantee a higher level of consumer protection. ASEAN considered consumer protection an essential driver for developing a "modern, efficient, effective and fair marketplace"⁷²⁵ and increasing consumer confidence in cross-border transactions. The ASEAN AEC Blueprint 2025 recognizes that consumers must rely on harmonized consumer rights and protection laws⁷²⁶ and effective dispute resolution mechanisms, including ODR.⁷²⁷ To provide a practical framework for consumer protection in the region, the ASEAN adopted a Strategic Action Plan for Consumer Protection (ASAPCP), which sets out ASEAN's strategy for consumer policy through four strategic goals. Under its strategic goal 1, the ASEAN provides guidelines for

⁷²² "Charter of the Association of Southeast Asian Nations," ASEAN | ONE VISION ONE IDENTITY ONE COMMUNITY, accessed March 6, 2021, <https://asean.org/asean/asean-charter/charter-of-the-association-of-southeast-asian-nations/>.

⁷²³ The ASEAN Charter, art. 1(1)(2).

⁷²⁴ Phet Sengpunya, "Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspective," *Pécs Journal of International and European Law* 1 (2020): 58-74.

⁷²⁵ ASEAN Economic Community Blueprint 2025, para. 28.

⁷²⁶ *Ibid.*, para. 53(i).

⁷²⁷ *Ibid.*, para. 29(i).

common approaches to ADRs and establishing national small claim courts/ADRs.⁷²⁸ In strategic goal 3, the ASEAN offers to create a Regional Online Dispute Resolution (ODR) Network that includes a national ODR system, an ODR network, and an ASEAN mechanism for cross-border complaints and investigations.⁷²⁹ According to the ASAPCP, each member state should create an ODR system to serve as a platform for resolving e-commerce disputes by offering online mediation services. To facilitate the development of the ODR system, ASEAN has provided for creating a regional ODR network by 2025, intending to cooperate and share information and best practices on ODR among member states.⁷³⁰ This network can also include annual meetings and events where members can share their experiences and discuss ODR issues. The third essential element for developing and implementing the ODR scheme is represented by mechanisms for cross-border complaints and investigations, such as online consumer portals through which complaints can be filed and processed. One of these mechanisms is represented by the ASEAN Consumer Protection website launched in 2012. The website wants to provide a channel for ASEAN consumers to complain or claim any loss related to the online or offline purchase of goods or services.⁷³¹ It plays a vital role in cross-border consumer complaints. It offers information on recalled products that are traded within the ASEAN region⁷³² and on consumer protection legislation of the ASEAN member states.

In recent years, ASEAN, like the European Union, has paid particular attention to e-commerce and consumer protection, recognizing its fundamental role in developing trade and cooperation between its member states. An important initiative to improve the functioning of the internal market and increase consumer confidence in cross-border transactions has been the plan to create a regional system of ODR. The realization and implementation of the ODR initiative rely on developing a national ODR system, an ASEAN ODR network, and an ASEAN system for cross-border complaints and investigations. ASEAN's goal is to complete the Regional ODR system by 2025. However, unlike the EU, ASEAN lacks a legal framework supporting an effective ODR system. ASEAN legal regime depends on the harmonization of the laws of each member state into a regional legal order.⁷³³ It represents an obstacle in the development

⁷²⁸ See the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) (2016-2025), <https://asean.org/storage/2012/05/ASAPCP-UPLOADING-11Nov16-Final.pdf>.

⁷²⁹ Ibid.

⁷³⁰ Sengpunya, "Online."

⁷³¹ ASEAN Consumer, accessed March 9, 2021, <https://aseanconsumer.org/>.

⁷³² "Product Alerts/Recalls," ASEAN Consumer, accessed March 9, 2021, <https://aseanconsumer.org/product-alert>.

⁷³³ Sengpunya, "Online."

of regional initiatives. Furthermore, it would be desirable for ASEAN to develop an ODR platform that allows a single entry point for consumers and traders as in the European model but which offers, unlike the EU platform, an effective online dispute resolution mechanism for B2C cross-border disputes. However, this would require a supranational legal structure to enforce any settlement reached through the ODR platform.

4.5.8 General Considerations and Conclusions

In recent decades, the Asian market has grown exponentially, leading economies such as China and India to become among the world's most robust and competitive economies. Asia's increasing consumption and integration into global trade flows have attracted capital and investment, favoring increased international trade transactions. The development of the Internet and digital technology have favored the emergence of e-commerce and the number of transactions carried out daily by millions of users. The number of users in the e-commerce market in Asia is projected to increase between 2023 and 2027 by over half a billion.⁷³⁴

This rapid development of commercial transactions has also meant an increase in the number of disputes, often causing an overload of the court system and a slow dispute adjudication. Also, the growth of e-commerce has raised the issue of providing consumers with adequate and effective dispute resolution to resolve B2C disputes arising from online transactions. Alternative out-of-court dispute resolution processes have become fundamental to help reduce the burden on the courts and provide access to justice to online consumers.

Several countries like China, India, Singapore, Hong Kong, Japan, and South Korea have seen remarkable developments in ADR and ODR in recent decades, demonstrating their commitment to providing efficient, accessible, and cost-effective dispute resolution mechanisms.

In China, the government has promoted fast and cost-effective out-of-court dispute resolution to attract international investments and reduce court caseloads. The rapid development of technology and AI has led to the creation of an online mediation platform that allows millions

⁷³⁴ Statista, "Asia: Number of E-commerce Users 2017-2025," Statista, last modified August 23, 2021, <https://www.statista.com/forecasts/1259097/e-commerce-users-asia>.

of individuals to resolve commercial and civil disputes through an online portal with successful results. This technology has also been adopted within the courts to facilitate access to justice and the resolution of disputes. Three internet courts have been established in three major Chinese cities (Hangzhou, Beijing, and Guangzhou), enabling an entire litigation process to take place online. Chinese e-commerce businesses have successfully integrated ODR into their platforms, facilitating B2C disputes and helping generate consumer trust. For instance, Taobao has developed a dispute resolution system where parties can choose to resolve their dispute by asking a Taobao representative to adjudicate or using a jury-type system of public jurors randomly selected from millions of users with high reputations. However, disputing parties are incentivized to negotiate to avoid reducing their reputation if their dispute requires Taobao's intervention.

In Hong Kong, where traditionally the primary means of dispute resolution has been litigation, the government has launched a series of initiatives (e.g., The Pledge, the Mediation Task) and ordinances to promote and encourage the use of mediation and ADR, especially in civil and commercial disputes. In recent years, the government has also adopted a series of measures facilitating the use of technology in alternative dispute resolution to support individuals and small and medium-sized businesses affected by the COVID-19 pandemic in resolving low-value disputes. The COVID-19 Online Dispute Resolution (ODR) Scheme was established to cover COVID-related disputes, providing a multi-tiered system that includes negotiation, mediation, and arbitration.

In Japan, the government has been working to establish the country as a neutral venue for resolving transnational disputes through arbitration, mediation, and other forms of ADR. The 2004 Act on the Promotion of the Use of ADR has established an accreditation system for individuals and entities that offer ADR services, enabling disputing parties to resolve disputes through certified ADR. Despite being one of the largest e-commerce markets in the world, Japan has not yet developed ODR systems for e-commerce disputes. Establishing the Japan International Dispute Resolution Center (JIDRC) has contributed to activating online mediation and arbitration in Japan.

In India, ADR methods are widespread and widely recognized. Traditionally, disputes are settled amicably through the Lok Adalat, or 'People's Court. The Arbitration and Conciliation Act of 1996 has provided a legal framework for arbitration and conciliation, regulating

domestic and international commercial arbitration and the enforcement of foreign arbitral awards. Aside from being recognized as a form of ADR, mediation is not yet regulated in India. In 2020, the Supreme Court established the Mediation and Conciliation Planning Committee (MCPC) to draft legislation to institutionalize mediation and include a mechanism for recognizing and enforcing settlement agreements and provisions for pre-litigation mediation. India has also made progress in the promotion and development of ODR. The Indian Supreme Court has expressed itself in favor of using technology in dispute resolution and has encouraged the use of ODR systems. It has established the validity of electronic media and remote conferencing in court proceedings. Still, a legal framework is needed to regulate ODR. It will require amending existing ADR legislation to include ODR and providing a regulatory structure for e-ADR. In 2021, The national government issued a report that contains a comprehensive policy plan for ODR, including a recommendation to introduce a set of design and ethical principles that could act as standards for ODR providers and neutrals.

Singapore has a long and established tradition in ADR. Throughout the years, the country has become an important venue for international ADR in Asia. Since the early 1990s, ADR schemes like mediation and early neutral evaluation have been introduced in state courts to facilitate the resolution of civil claims. The modernization process of justice and technology adoption within the Singaporean Courts have allowed disputing parties to e-file documents, appear through video conference, and request online mediation. In 2017, the State Courts of Singapore launched the Community Justice and Tribunals System (CJTS), allowing dispute parties in minor claims disputes to file claims and access Court e-services online, negotiate through a chat online, or activate an e-mediation process.

South Korea has enacted legislation to promote ADR and ODR in the last few decades, creating a legal framework for accessible, efficient, and cost-effective out-of-court dispute resolution. The two most used ADR methods are arbitration, regulated by the Arbitration Act, and mediation, regulated by the Mediation Act. South Korea has established an annexed-court mediation system to encourage mediation in civil and family disputes. Disputing parties can request mediation or be referred to it by a judge. The Korean judiciary does not recognize private mediation programs, as South Korea lacks national standards and guidelines for mediation training, constituting a limit for ADR and mediation promotion. Voluntary referral to civil mediation in South Korea does not exceed 10% of the total litigation cases. South Korea's propensity for technological advancement and development and enacting the

Framework Act on Electronic Transactions are leading the way in promoting and using ODR, particularly in e-commerce consumer disputes.

The analysis of the state of ADR and ODR in Asia demonstrates that:

- The development and integration of ADR into the judicial system have led to greater access to justice by facilitating the resolution of disputes and easing the court's caseload. However, litigation remains the dominant mode of dispute resolution in many Asian countries due to the general public and business community's lack of awareness and robust legal frameworks for ADR and ODR.
- The absence or lack of standardized processes, rules, and qualifications of mediators and arbitrators may impact ADR's credibility and trustworthiness.
- The COVID-19 pandemic has pushed toward greater use of ICT in the courts, facilitating access to justice and paving the way for ODR in civil and commercial disputes.
- The advancement of ODR in resolving e-commerce disputes is still limited to private initiatives related to platforms such as Alibaba and Taobao. The ASEAN initiative to create a regional ODR system for resolving cross-border disputes is important. The initiative would improve the functioning of the internal market and increase consumer confidence in cross-border transactions. However, ASEAN lacks a legal framework supporting an effective ODR system. Its legal regime depends on the harmonization of the laws of each member state into a regional legal order.
- The increasing expansion of ITC and AI has made evident the need to reform laws to keep pace with the changes and advances in technology to ensure greater access to justice, expedite dispute resolution, and guarantee personal data protection and safety.

4.6 INTERNATIONAL INITIATIVES

Several critical international initiatives have been promoting and using out-of-court ADR and ODR mechanisms in cross-border disputes in recent years. These initiatives also aim to foster the development of a global market and increase consumer confidence in cross-border

transactions, especially online commerce. Some of these initiatives are described and analyzed in this section.

4.6.1 United Nations (UN) Guidelines for Consumer Protection

United Nations Guidelines on Consumer Protection (UNGCP) were adopted by consensus on April 16, 1985, by the United Nations General Assembly in Resolution n. 39/248. The Guidelines result from a long campaign carried out by different consumer associations in many countries to obtain adequate consumer protection at the international level. The Guidelines outline consumers' fundamental rights, ensure the development of independent consumer associations and international cooperation in consumer protection, and encourage a high level of ethical conduct in producing and distributing goods and services to consumers.⁷³⁵ They also encourage interested member states to develop, strengthen, or maintain effective consumer protection laws⁷³⁶ and set up redress mechanisms to ensure the settlement of consumer disputes fairly, quickly, and inexpensively. As stated by art. 37 of the Guidelines, "Member States should encourage the development of fair, effective, transparent and impartial mechanisms to address consumer complaints through administrative, judicial and alternative dispute resolution, including for cross-border cases." Art. 38 invites all Member States to "encourage all businesses to resolve consumer disputes in an expeditious, fair, transparent, inexpensive, accessible, and informal manner" by establishing voluntary mechanisms and informal grievance measures.

With the advent of the internet and e-commerce, new provisions were introduced by the revised Guidelines in 1999 and 2015. Although the Guidelines are essential to developing consumer law, they are only soft law provisions with no legally binding force. As they lack legal force and cannot be enforceable, the critical question becomes understanding how these guidelines differ from other consumer protection measures and their role in promoting and transforming consumer protection.⁷³⁷

⁷³⁵ See art. 1 of the United Nations Conference on Trade and Development, *United Nations Consumer Protection Guidelines*, United Nations, New York and Geneva: 2016, https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf (accessed June 6, 2020).

⁷³⁶ See art. 4, United Nations Conference on Trade and Development, *United Nations Consumer Protection Guidelines*.

⁷³⁷ Iris Benöhr, "The United Nations Guidelines for Consumer Protection: Legal Implications and New Frontiers," *Journal of Consumer Policy* 43, (2020): 105–124.

4.6.2 UNCITRAL Working Group III on ODR

The UNCITRAL Working Group III on ODR was established in 2010 to create standards and mechanisms to offset the lack of adequate redress for international disputes arising from cross-border e-commerce transactions.⁷³⁸ The United Nations (U.N.) recognized that small claims from global e-commerce needed a legal framework that would favor effective resolution and ultimately contribute to international commerce and economic growth.⁷³⁹ Moreover, it was generally accepted that traditional judicial venues like national courts could not overcome the issues of conflict laws and jurisdiction, making it hard for consumers to access justice remedies and resolve disputes that originate from online transactions. Therefore, the U.N. gave a mandate to Working Group III to suggest specific rules and standards that could be applied by ODR providers worldwide to both Business-to-Business (B2B) and Business-to-Consumer (B2C) transactions.⁷⁴⁰ However, the challenge for the Working Group lay in conceiving rules that would overcome the differences and restrictions imposed by national laws regarding pre-dispute agreements to use ODR. A disagreement arose inside the Working Group between jurisdictions like the U.S. that allow pre-dispute agreements to arbitrate with consumers and consider the resulting arbitral awards valid and enforceable. Those jurisdictions like the European Union member states deem pre-dispute agreements to arbitrate as non-binding upon consumers.

Moreover, some delegations pushed for ODR processes compatible with the 1958 New York Convention. Even though the secretariat had warned delegates to consider “whether the application of the enforcement mechanisms provided by the New York Convention should be regarded as an optimal solution for small value claims in the context of ODR.”⁷⁴¹ For five years, the Working Group drafted procedural rules for ODR and tried to propose compromising solutions. Firstly, a two-track system separated binding arbitration from other non-binding

⁷³⁸ Clara Flebus, “Report: UNCITRAL Working Group III on Online Dispute Resolution—A change of focus in the outcome document,” *NYSBA International Law Practicum* 29, no. 1 (2016): 60.

⁷³⁹ Esther Villalta, A., “ODR and E-Commerce,” in (Eds.), *Online Dispute Resolution Theory and Practice*, eds. Mohamed S. Abdel Wahab, Ethan Katsch and Daniel Rainey (The Hague, NL: Eleven International Publishing, 2012).

⁷⁴⁰ Official records of the United Nations Commission on International Trade Law Working Group III (Online Dispute Resolution), Twenty-second session, A/CN.9/WG.III/WP.105, para. 2.

⁷⁴¹ Official records of the United Nations Commission on International Trade Law Working Group III (Online Dispute Resolution), Twenty-second session, A/CN.9/WG.III/WP.105, para. 75.

ODR processes.⁷⁴² Then, a three-stage process would comprise negotiation, negotiation settlement facilitated by a neutral third party, and a final determination presented by the ODR administrator to the parties. In February 2015, the US and the European Union suggested that work be abandoned since no consensus could be reached regarding the content of said rules. In July 2015, the UNCITRAL Commission redefined the Working Group’s mandate to develop a non-binding document. The document “reflects elements of an ODR process, on which elements the Working Group had previously reached a consensus, excluding the question of the nature of the final stage of the ODR process (arbitration or non-arbitration).”⁷⁴³ The UNCITRAL Commission gave the Working Group a year to produce the document to be completed by the end of its thirty-third session.⁷⁴⁴ At its thirty-third session, the Working Group agreed to submit the “Technical Notes on Online Dispute Resolution” draft outcome document to the UNCITRAL Commission for its consideration and eventual adoption.⁷⁴⁵ The UNCITRAL Commission finalized and adopted the Technical Notes on Online Dispute Resolution at its forty-ninth session in 2016.⁷⁴⁶ In adopting the technical notes, the General Assembly recommended to all states the promotion and the “use of the Technical Notes in designing and implementing online dispute resolution systems for cross-border commercial transactions.”⁷⁴⁷

4.6.3 UNCITRAL Technical Notes on ODR

The UNCITRAL Technical Notes on ODR were adopted to “foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.”⁷⁴⁸ They are expected to contribute significantly to developing systems that resolve disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.⁷⁴⁹ The notes are not intended to be used “as rules for any ODR

⁷⁴² One track of which would end in a binding arbitration phase (“Track I”), and one track of which would not (“Track II”). See Official records of the United Nations Commission on International Trade Law Working Group III (Online Dispute Resolution), Thirty-first session, A/CN.9/WG.III/WP.133, para. 4.

⁷⁴³ Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 352.

⁷⁴⁴ UNCITRAL Working Group III, Thirty-third session took place in New York from February 29 to March 6, 2016.

⁷⁴⁵ Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session, A/CN.9/868.

⁷⁴⁶ Report of the United Nations Commission on International Trade Law, Forty-nine session, A/71/17, paras. 203-218.

⁷⁴⁷ Official records of the General Assembly, Seventy-first session, A/RES/71/138.

⁷⁴⁸ UNCITRAL Working Group III, Thirty-third session, A/CN.9/WG.III/WP.140, para. 1.

⁷⁴⁹ Official records of the General Assembly, Seventy-first session, A/RES/71/138.

proceeding and do not impose any legal requirement that is binding upon the parties or the people/entities involved in administering or facilitating an ODR proceeding.”⁷⁵⁰ Instead, they are proposed to be of assistance regardless of the structure and framework of an ODR system, which may offer a variety of dispute resolution mechanisms such as conciliation, negotiation, mediation, facilitated settlement, and arbitration. Moreover, the Notes describe practices and procedures of ODR mechanisms that should be based on principles of fairness, due process, accountability, and transparency and be simple, fast, and efficient. The Notes describe ODR as a process that may include three stages: negotiation, facilitated settlement, and a third final stage. In the first stage of proceedings — a technology-enabled negotiation — the parties negotiate directly through the ODR platform.⁷⁵¹ If that negotiation process fails, the process may move to a second, “facilitated settlement” stage. The ODR provider assigns a third neutral who helps the parties reach an agreement.⁷⁵² If the facilitated settlement stage also fails for any reason or where one or both parties request to move directly to the next stage,⁷⁵³ a third and final stage may be commenced. The ODR administrator will inform the parties or set out possible process options to choose for the parties.⁷⁵⁴ Regarding the proceedings, notes also indicate that the ODR process requires a platform for generating, sending, receiving, storing, exchanging, or otherwise processing communications.⁷⁵⁵ Ultimately, the notes provide specific direction on the commencement of the proceedings, the first two stages, appointment, power, and functions of the neutral, language to be used, and governance of the proceedings.

4.6.4 UNCITRAL Working Group IV: Electronic Commerce

Working Group IV has maintained its current focus area of electronic commerce since 1997. Since its 48th session in 2015, WG IV has focused on legal issues relating to identity management (“IdM”) and trust services.

It is worth noting that during the work of its Fifty-Six Session, the UNCITRAL Group IV (Electronic Commerce) Working Group agreed to “add a subsection on online dispute resolution (ODR) in the light of the relevance and importance of ODR to the resolution of

⁷⁵⁰ UNCITRAL Working Group III, Thirty-third session, A/CN.9/WG.III/WP.140, para. 5

⁷⁵¹ *Ibid.*, para. 19.

⁷⁵² *Ibid.*, para. 20.

⁷⁵³ *Ibid.*, para. 41.

⁷⁵⁴ *Ibid.*, para. 21.

⁷⁵⁵ *Ibid.*, para. 26.

disputes arising from cloud computing transactions and taking into account UNCITRAL's work in that area."⁷⁵⁶

4.6.5 United Nations Convention on International Settlement Agreements Resulting from Mediation: The "Singapore Convention on Mediation."

The United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the "Singapore Convention on Mediation" (the "Convention"), was adopted in December 2018. It came into force on 12 September 2020. Opened for signature on August 7, 2020 (the day of the signing ceremony held in Singapore), 46 countries, including the world's two largest economies – the United States and China – as well as three of the four largest economies in Asia – China, India, and South Korea – signed the Convention on the opening day. It represents one of the highest first-day signatories for any UN trade convention. Another 24 countries attended the signing ceremony in Singapore to show their support for the Convention. In total, 70 countries were present and represented at the Convention on August 7, 2020.

The Convention recognizes the value of mediation for international trade and economic development. Through a multilateral treaty on the enforceability of settlements reached in mediation, the Convention aims to promote the use of mediation as an alternative method for resolving trade disputes. It should overcome the disadvantage and skepticism with which mediation is perceived by the international business community and favor mediation, perhaps to the advantage of arbitration. One significant limitation and a cause for concern for international businesses has been the enforceability of mediation settlement agreements. In this regard, the Singapore Convention provides a cross-border mechanism for enforcing international mediated settlement agreements (IMSAs), filling the gap in the existing mediation landscape as the 1958 NY Convention does with Arbitration.

The Singapore Convention guides the conditions that must be met for a state to enforce a settlement agreement.⁷⁵⁷ Art. 3(1) requires that each Party to the Convention enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid

⁷⁵⁶ UNCITRAL Working Group IV, Fifty-six Session, A/CN.9/936, para. 33.

⁷⁵⁷ Eunice Chua, "The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution," *Asian Journal of International Law* 9, no. 2 (2019): 195-205, doi:10.1017/s2044251318000309.

down by the Convention. Art. 3(2) requires that a state allow a party to invoke the settlement agreement (under its rules of procedure and the conditions set by the Convention) to prove that the matter has already been resolved.

The Convention makes it possible to enforce international settlement agreements resulting from mediation and concluded by parties to resolve international⁷⁵⁸ commercial disputes.⁷⁵⁹ Parties seeking to enforce cross-border commercial IMSAs would apply directly to a Competent Authority (usually a Court) in the State where the agreement needs to be enforced without the need to convert them into a judgment or arbitral award. The convention application excludes settlement agreements concluded by a consumer for personal, family, or household purposes or relating to family, inheritance, or employment law.⁷⁶⁰ The Convention also does not apply to settlement agreements enforceable as a court judgment or arbitral award.⁷⁶¹ It avoids overlap with the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Convention creates a harmonized legal framework for the right to invoke and enforce internationally mediated settlement agreements. States that ratify the Singapore Convention are then obliged to enforce settlement agreements resulting from mediation in accordance with their domestic rules of procedure. To rely on a settlement agreement, a disputing party is required to provide the competent authority (i.e., national court) with the settlement agreement signed by the parties and evidence that the settlement agreement results from mediation (i.e., the mediator's signature on the settlement agreement).⁷⁶² Art. 2(2) requires that the agreement must be reached "in writing" but leaves a very broad interpretation of what must be considered as "in writing." The same art. considers the settlement agreement "in writing" "if its content is recorded in any form." The form can also be an electronic communication if the information in the agreement is accessible for subsequent reference. This suggests that the Convention extends to agreements reached through ODR procedures.

⁷⁵⁸ According to art. 1 of the Convention the 'International' requirement is satisfied provided that: a) At least two parties to the settlement agreement have their places of business in different States; or (b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected.

⁷⁵⁹ United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 1.

⁷⁶⁰ *Ibid.*, 1(2).

⁷⁶¹ *Ibid.*, 1(3).

⁷⁶² *Ibid.*, 4(1)(a)(b).

Art. 5 lists the reasons for refusing to grant relief. Art. 5(1) allows the competent authority of the party to the Convention where relief is sought to refuse to grant relief based on a party's inability, a settlement agreement that is void, inoperative, or incapable of being performed, is not binding, indefinite, or has subsequently been amended.⁷⁶³ Other reasons for refusing a grant measure concern cases where the obligations of a party have already been fulfilled, the terms of the settlement agreement are not clear or understandable, or granting relief would be contrary to the terms of the settlement agreement.⁷⁶⁴ A further reason relates to the mediator's misconduct.⁷⁶⁵ Finally, The competent authority of the party to the Convention where relief is sought can refuse to grant relief if it is contrary to the public policy or the matter in dispute cannot be resolved by mediation under the law.⁷⁶⁶

To guarantee its integrity, only two reservations to the application of the Convention are authorized under Art. 8. A Contracting State can declare that: a) It will not apply the Convention to settlement agreements to which it is a party; b) it will apply this Convention only if the parties to the settlement agreement have agreed to the application of the Convention. No other reservations are permitted.

As of September 2022, 55 states have signed the Convention, but only ten states have ratified it.⁷⁶⁷ The European Union and the United Kingdom have yet to sign the Convention. No EU member states have signed the Convention either. This diminishes the Convention's global reach by limiting its application mainly to Asia and the Pacific areas with solid economic traction, such as China, India, and the United States.

Although the EU participated actively in the treaty negotiations, it initially preferred an instrument of soft law, like a non-binding legislation model. Then, it agreed on a 'dual-track' approach consisting of a Convention on International Settlement Agreements resulting from Mediation and an amendment to the Model Law on International Commercial Conciliation.⁷⁶⁸

⁷⁶³ Ibid., 5(1)(a)(b).

⁷⁶⁴ Ibid., 5(1)(c)(d).

⁷⁶⁵ Ibid., 5(e)(f).

⁷⁶⁶ Ibid., 5(2)(a)(b).

⁷⁶⁷ The ten states that have ratified the convention are: Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore, and Turkey.

⁷⁶⁸ See Dr. Norel Rosner's (Legal and Policy Officer, Directorate-General for Justice and Consumers, European Commission) speech at the Roundtable on the Position of the European Union on the Singapore Convention on

The primary reason for the EU's non-participation in the Convention is whether the EU can legally sign it. The EU is not a sovereign state but a supranational organization. It may not possess the necessary legal competence to enter and enforce an international treaty like the Singapore Convention. It remains uncertain whether the EU would join and apply the convention to all its member states or, instead, its Member States would act independently.⁷⁶⁹ After internal analysis, the EU Commission believes it has competence. However, the European Court of Justice will have to decide if the competence is exclusive.⁷⁷⁰ Becoming a party to the Convention might be a complex matter for the EU as it involves 27 member states with different legal and procedural systems. Finding alignment on signing the Singapore Convention can be challenging and require extensive negotiations and time.

Second, the EU was skeptical about considering private mediated settlement agreements as executive orders. Many EU Member States' legal systems regard settlement agreements as contracts and enforce them as such. Also, in some EU Members States' legal systems, settlement agreements can be executed under certain conditions established by each member state. Because of this situation, the EU thought an instrument like the Singapore Convention was unnecessary.⁷⁷¹

Third, in recent decades, the EU has focused on developing its ADR frameworks (e.g., the 2008 Directive on Mediation) to promote confidence in its internal single market. It might first prioritize expanding internal ADR mechanisms before signing an external convention like the Singapore Convention on Mediation.

Fourth, the Convention allows the parties to unilaterally enforce a private settlement agreement reached in international commercial mediation, eliminating the requirement to record the

Mediation organized on 18 June 2021 by the European Law Institute (ELI) and the Forum for International Conciliation and Arbitration (FICA), available at <http://www.ecdr.si/index.php?id=142>.

⁷⁶⁹ Itai Apter and Ron B. David, "Chronicles of the Singapore Convention – an insider view," in *The Singapore Convention on Mediation: A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation* (Gloucestershire: Edward Elgar Publishing, 2022); Joséphine H. Chahine et al., "The Acceleration of the Development of International Business Mediation after the Singapore Convention," *European Business Law Review*, no. 4 (2020), doi:10.2139/ssrn.3647073.

⁷⁷⁰ *Ibid.*, 726.

⁷⁷¹ *Ibid.*

agreement, upon the request of both parties, in a notarial deed or court judgment.⁷⁷² EU's hesitancy in joining the Convention could be ascribed to the fear that one party could abuse the process to the detriment of the other when applying to the competent authority to execute the mediated settlement agreement.⁷⁷³ EU law does not regulate such a variation.

In the EU, there is no common legal framework for the enforceability of mediated settlement agreements (MSAs). In most Member States, the MSA is not directly enforceable. The agreement reached by the parties in mediation is considered a contract that must be enforced through a court action or arbitration.

Extensive discussion has occurred about whether the EU should adopt a particular instrument for enforcing MSAs. The 2008 Mediation Directive recognizes the importance of enforcing settlement agreements resulting from mediation.⁷⁷⁴ However, the Directive does not provide a specific enforcement mechanism for MSAs. Still, it requires Member States to ensure that the content of the MSA "may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made."⁷⁷⁵ The enforcement can only be rejected on specifically limited grounds. If the agreement's content is "contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability."

Consequently, to be enforced in another Member State, the MSA must be enforceable in the Member State where the parties reached the agreement. A more complex situation regards the recognition and enforcement of MSAs outside the Member State where they were reached. A judgment, decision, or authentic document (i.e., notary deed) embodying an MSA could be enforceable in other Member States according to other EU Regulations on recognition and enforcement in cases where the settlement falls within their scope (i.e., Brussels Ia; Brussels IIa). In 2016, the European Parliament commissioned a study to examine the issues arising in cross-border mediation, specifically concerning the enforcement of MSAs. The study proposed two solutions regarding the EU's enforceability and circulation of MSAs. The first solution would be to create an EU Mediation Settlement Certificate to be granted by certain public

⁷⁷² Henneke Brink, "The Singapore Convention on Mediation - Where's Europe?," Mediate.com, last modified March 26, 2021, <https://mediate.com/the-singapore-convention-on-mediation-wheres-europe/>.

⁷⁷³ Apter and David, "Chronicles."

⁷⁷⁴ See Directive 2008/52, Preamble para. 19.

⁷⁷⁵ Directive 2008/52, art. 6(2).

authorities in the country of origin.⁷⁷⁶ However, creating this certificate would not be easy as it would have to overcome several issues, including significant changes to the existing situation, controversy and opposition in some Member States, and breach of confidentiality. The second option would be reforming the 2008 Mediation Directive and making MSAs enforceable per se, even when not formally embodied in a judgment or authentic act.⁷⁷⁷ Considering the lack of a common legal framework on the enforceability of MSAs, should the EU sign the Singapore Convention? It would be desirable for the EU to seize the opportunity and sign the convention to continue promoting mediation to resolve cross-border commercial disputes. However, in the case of an EU accession to the Singapore Convention, it would be necessary for all signatory states to move in harmony to avoid the inconsistencies between the laws of the various states.

Ensuring access to justice through effective, accountable, and inclusive resolution of disputes is a critical component of the UN sustainable development goal 16. The Singapore Convention goes in this direction by recognizing the value of mediation in enhancing access to justice. The Convention's entry into force marks a significant milestone for international commercial dispute resolution and the recognition of mediation by the global business and legal community.

4.6.6 Asia-Pacific Economic Cooperation (APEC) Collaborative Framework for ODR

Asia-Pacific Economic Cooperation (APEC) is a multilateral forum of 21 countries for free trade and investment cooperation throughout the Asian-Pacific region.⁷⁷⁸ The APEC project can be traced back to the early postwar years to create an economic forum that included East Asia, Oceania, and the states of the American continent overlooking the Pacific. However, the logic and opposition of a bipolar world made creating a free trade zone in Southeast Asia impractical.⁷⁷⁹ 1989 marked a change in the international political climate and led to the beginning of the end of the Cold War. In this context, the APEC was finally created the same

⁷⁷⁶ Esplugues and Iglesias, "Mediation," 1-26.

⁷⁷⁷ Ibid.

⁷⁷⁸ APEC's 21 member economies are Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Philippines; The Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America

⁷⁷⁹ "Asia-Pacific Economic Cooperation (Apec) Cooperazione Economica Asia-Pacifico," Treccani, *Il Portale Del Sapere*, accessed March 3, 2021, https://www.treccani.it/enciclopedia/asia-pacific-economic-cooperation-cooperazione-economica-asia-pacifico_%28Atlante-Geopolitico%29/.

year in Canberra, Australia, to leverage the growing interdependence of the Asia-Pacific.⁷⁸⁰ APEC operates as a cooperative, multilateral economic and trade forum and promotes open dialogue between its members. There are no treaty obligations, and commitments are undertaken voluntarily. APEC facilitates the movement of goods, services, people, and investments within the borders of member states by providing faster customs procedures, reducing costs for importers and exporters, and aligning regulations and standards across the region.⁷⁸¹ In this context of regional cooperation, integration, and economic development, the Economic Committee (EC) of the APEC has studied and promoted the use of online dispute resolution (ODR) mechanisms and information and communication technology (ICT) to improve justice and promote confidence in cross-border trade. In August 2019, the EC endorsed an online dispute resolution collaborative framework for business-to-business (B2B) cross-border disputes. This ODR framework aims to help global businesses, particularly Micro, Small and Medium Enterprises (MSMEs), resolve B2B cross-border disputes, especially low-value disputes, through technology-assisted dispute negotiation, mediation, and arbitration. According to an APEC Business Advisory Council (ABAC) survey, many small businesses abandon cross-border trading because of a lack of efficient dispute resolution.⁷⁸²

Along with the ODR framework, the EC APEC has created a set of procedural rules (Model Procedural Rules) to resolve B2B cross-border low-value disputes and ensure businesses “receive the same due process regardless of location.”⁷⁸³ The system envisaged by the procedural rules includes three phases: negotiation, mediation, and arbitration. Most disputes can be resolved in the first phase through direct negotiation between the parties and facilitated by an ODR platform.⁷⁸⁴ If the parties fail to reach an agreement within ten (10) calendar days of submission of the commencement of the negotiation stage, the case may be resolved through mediation. Upon commencement of the mediation stage, the ODR provider appoints a third neutral who works with the parties to reach a settlement agreement.⁷⁸⁵ Suppose the parties cannot resolve the dispute in mediation within ten (10) calendar days of being notified of the

⁷⁸⁰ “About APEC,” APEC, accessed March 3, 2021, <https://www.apec.org/about-us/about-apec>.

⁷⁸¹ *Ibid.*

⁷⁸² APEC Economic Committee, *Study on Best Practices in Using ODR*, (Singapore: e Asia-Pacific Economic Cooperation Secretariat, 2023), https://www.apec.org/docs/default-source/publications/2023/1/study-on-best-practices-in-using-odr/223_ec_study-on-best-practices-in-using-odr.pdf?sfvrsn=1bb06f15_2.

⁷⁸³ Michael J. Dennis, “APEC Online Dispute Resolution Framework,” *International Journal of Online Dispute Resolution* 6, no. 2 (2019): 142, doi: 10.5553/IJODR/235250022019006002003.

⁷⁸⁴ Model Procedural Rules for the APEC Collaborative Framework for ODR of Cross-Border B2B Disputes, art. 6.

⁷⁸⁵ *Ibid.*, art. 7.

appointment of the neutral. In that case, the case may escalate to the final arbitration stage. In this case, the neutral evaluates the dispute based on the information and evidence presented by the parties and renders an award. The award made in writing and signed by the neutral is communicated to the parties by the ODR provider and recorded on the ODR platform.⁷⁸⁶ The arbitration award is considered final and binding on the parties, which should carry it out without delay.⁷⁸⁷

The APEC ODR Collaborative Framework has excluded B2C disputes for practical reasons like the small value of the dispute in B2C cases, most e-commerce disputes involving B2B, and applicable laws for consumer protection varying widely within APEC.⁷⁸⁸ However, because of the rapid retail e-commerce growth in many APEC countries, the ODR Framework could be extended to cross-border B2C e-commerce transactions. APEC economies will want to protect consumer transactions through adequate and efficient dispute resolution mechanisms to attract more consumers globally.⁷⁸⁹

In implementing the ODR Collaborative Framework, APEC will partner with platform hosts and ODR providers like arbitration and mediation centers that operate under the ODR Framework and agree to use the Model Procedural Rules. The Guangzhou Arbitration Commission recently launched the first ODR platform for MSMEs in the APEC member economies in China. The first ODR platform within the APEC fully complies with the ODR Framework and the Model Procedural Rule.⁷⁹⁰

The APEC ODR Framework has helped raise awareness of the advantages of ODR. It will help reduce barriers to entry into international trade, build confidence between trade partners, and provide small businesses with effective dispute remedies.⁷⁹¹ It will benefit MSMEs in the APEC and worldwide by bringing effective dispute-resolution remedies. However, the benefit could be more significant if the APEC ODR Framework could also be extended to B2C e-

⁷⁸⁶ *Ibid.*, art. 8(2)(3)(4).

⁷⁸⁷ *Ibid.*, art. 8(9).

⁷⁸⁸ See Report of 2018 Workshop for Developing an APEC ODR Collaborative Framework for ODR at <https://aimp2.apec.org/sites/PDB/Supporting%20Docs/Forms/Supporting%20Docs.aspx?RootFolder=%2fsites%2fPDB%2fSupporting%20Docs%2f3682%2fCompletion%20Report&FolderCTID=&View=%7bCA72D0E0%2d295E%2d45DF%2dB491%2dF7BF6581A22F%7d>.

⁷⁸⁹ APEC Economic Committee, “Study on Best Practices.”

⁷⁹⁰ “First ODR Platform for APEC Member Economies Launched in Guangzhou,” Ministry of Justice of the People’s Republic of China, last modified February 4, 2021, https://en.moj.gov.cn/2021-02/04/c_587662.htm.

⁷⁹¹ Dennis, “APEC.”

commerce disputes since most online transactions are B2C. Although these disputes are of minor value, effective remedies would ensure that millions of consumers could operate safely online, increasing their confidence in the APEC e-commerce market. As highlighted by the APEC Economic Committee in its recent study,⁷⁹² B2C e-commerce ODR systems like ODR platforms developed and implemented in several APEC countries (e.g., Canada, Chile, and Mexico) but also in Brazil and Europe could represent a model to follow for all APEC economies to protect consumers' electronic transactions.

4.7 SUMMARY

In the experience of international legal systems, ADR was born out of a need both to lighten the courts of a load of cases and respond to dissatisfaction with traditional judicial methods for resolving disputes. ADR represents the hopeful attempt to bring ordinary judicial resolution systems back to normal functioning and offer guarantees of greater protection to dissatisfied litigants.

The need to find mechanisms that resolve disputes more effectively, flexibly, and faster than ordinary justice has led to the spread of ADR systems such as arbitration and mediation. Governments worldwide have introduced legislation and rules to regulate but simultaneously promote these alternative forms of dispute resolution. Governments have recognized the inherent value of ADRs in resolving disputes and enabling better access to justice.

The encounter between ADR, the internet, and ITC has led to the development of ODR. ODR can be considered a natural evolution of ADR through communication and the telematic network.

Results from ODR platforms like *Concilianet* and *Consumidor* show that ODR can significantly enhance A2J by providing efficient dispute resolution mechanisms that rely on the newest technology to facilitate access and justice delivery. ODR can give consumers dispute resolution tools that combine cost-effectiveness, flexibility, and decentralized conciliation processes. In e-commerce, ODRs are suitable for resolving disputes as they are the product of the information society. In this sense, ODRs are the products the online market

⁷⁹² APEC Economic Committee, "Study on Best Practices."

needs and operate in the same environment where transactions and related disputes occur. The network is the environment in which the dispute develops and resolves. Online transactions occur between subjects of different nationalities operating in different countries. In an online dispute, the transnational nature of the transaction involves the problem of the applicable legislation and, consequently, the jurisdiction responsible for deciding the dispute. ODR responds to this practical need. However, the very nature of ODR makes it difficult to subject it to a system of rules related to a particular spatial sphere of operation.⁷⁹³ The different geographical locations of the individuals operating in B2C online transactions, the difficulty of finding national or international standard laws that regularize the relationship between consumers and traders, and the consequent disputes present problems of private international law that are difficult to solve. The experience of the UNCITRAL Working Group on ODR has shown that attempts to adopt uniform dispute resolution procedures for online settings have proved problematic. Six years of negotiation were spent trying to resolve a fundamental disagreement between the United States and the European Union on whether the outcomes of ODR processes should be legally binding.

There is no solution at the present moment in the context of e-commerce consumer disputes. Identifying and proposing a solution to the need for a uniform regulatory system on ODR exceeds the limits of this research. However, a final consideration should be made. Suppose a so-called new *Lex Mercatoria* for e-commerce should be imagined. In that case, it should be considered how to build it to meet the needs of consumer disputes, particularly low-value, high-volume cross-border disputes, and ensure the protection of consumer rights, which entails guaranteeing access to tribunals. Indeed, the inadequacy of ordinary judicial procedures to deal with international disputes of modest value appears peaceful. It is due, in particular, to the low value of consumer contracts compared to the high costs of international procedures, slow national judicial systems compared to the speed of online transactions, and the difficulties of carrying out a judgment in a foreign state even if favorable to the consumer.

Government and international organizations are pivotal in improving access to justice through government intervention and international collaboration, ensuring the “justice system’s response to any dispute is proportionate and in the best interest of litigants.”⁷⁹⁴ Governments

⁷⁹³ Enrico Minervini, *Le online dispute resolution (ODR)* (Napoli, IT: Edizioni Scientifiche Italiane, 2016), 30.

⁷⁹⁴ Richard Susskind, *Online Courts and the Future of Justice* (New York: Oxford University Press, USA, 2021), 67.

and organizations can provide better access to justice when providing consumers with alternative forms of dispute resolution.

CHAPTER FIVE

THE EUROPEAN UNION (EU) REGULATORY FRAMEWORK FOR ALTERNATIVE DISPUTE RESOLUTION AND ONLINE DISPUTE RESOLUTION

5.1 INTRODUCTION

Legislative measures favor ADR and ODR mechanisms in the European Union. With its half-billion potential consumers, the EU has been progressively harmonizing domestic legal frameworks to guarantee EU citizens the same high level of protection throughout the European market.⁷⁹⁵ Several consumer protection laws have originated from national and European Union norms. They demonstrate the determination of the EU to protect its consumers from disputes arising from cross-border transactions.

Access to justice has proved difficult and expensive for many consumers in the EU, especially in low-value cross-border disputes. The complexity of national and international laws and the legal, cultural, and language differences between the EU member states have made access to justice more difficult. Additionally, the high costs of traditional judicial remedies have discouraged consumers from exercising their rights in traditional civil courts, especially when dealing with low-value e-commerce disputes.

In the last two decades, the EU has promoted legislative initiatives to improve access to the civil justice system through recommendations, directives, and regulations. One of the objectives of the EU in the justice field has been to modernize the civil justice system and make

⁷⁹⁵ See Directive 2013/11/EU, art. 1.

it more accessible through technology. Extrajudicial dispute resolution processes have been promoted to provide consumers with less costly and more efficient ways to solve their disputes with traders. Since the early 2000s, the EU has been at the forefront of delivering and developing out-of-court dispute resolution mechanisms for consumers.⁷⁹⁶ However, consumer ADR has remained for many years largely unregulated.⁷⁹⁷ In 2013, the EU enacted Directive 2013/11/EU to provide a new regulatory framework for consumer ADR to remedy this situation. In this regard, the EU has also encouraged the development and implementation of ODR to meet the needs of consumers, strengthen their trust in e-commerce, and overcome issues of applicable laws and the identification of competent jurisdiction in cross-border e-commerce disputes. Regulation (EU) No. 524/2013 on online dispute resolution has led to the implementation of an online platform that offers consumers a single entry point for resolving consumer disputes arising from e-commerce transactions.

This section describes and evaluates the European regulatory system for ADR and ODR. Also, it critically examines the outcomes of implementing the ODR platform by looking at EU reports on its functioning.

5.2 EC GREEN PAPER OF 16 NOVEMBER 1993 ON CONSUMER ACCESS TO JUSTICE IN THE INTERNAL MARKET

The European legislator's first initiatives on ADR can be traced back to the 1990s when the European community encouraged the development and promotion of out-of-court mechanisms to resolve B2C disputes and ensure a high level of consumer protection within the European economic area. These initiatives also established principles to which the various national laws have gradually conformed.

The first important document issued by the European Commission (EC) was the EC Green Paper of 16 November 1993 on consumers' access to justice and the settlement of consumer disputes in the single market. The Paper's main objective was to guarantee access to justice to

⁷⁹⁶ Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2, n. 5 (2014), 269.

⁷⁹⁷ Cortés, *The Law of Consumer Redress*, 100.

European consumers and provide them with instruments to deal with cross-border disputes.⁷⁹⁸ In the Green Paper, the Commission indicated the judicial and extrajudicial procedures (ADR) applicable to consumer disputes for each Member State. It designated the protection of collective interests through the intervention of consumer associations or administrative functions. Also, the European Commission addressed the obstacles to offering consumers effective remedies. These obstacles included identifying the applicable legislation, determining the competent jurisdiction, communicating and translating documents, and executing judgment. In this respect, the Commission wished for harmonization and mutual recognition of national provisions and a cross-border dispute management mechanism composed of judges and independent experts. It also hoped to develop mediation and other ADR mechanisms that could help reduce the disparity between the cost of cross-border judicial settlements and the value of the dispute.

The Green Paper constituted the first attempt to establish minimum standard rules on dispute resolution procedures and create the entities that provide and manage them.⁷⁹⁹ The Paper intended to make judicial, extrajudicial, and administrative systems reliable and accessible to consumers and resolve cross-border disputes.

5.3 RECOMMENDATION 98/257/EC

Recommendation 98/257/EC on the principles applicable to out-of-court consumer dispute resolution adopted by the Commission on 30 March 1998 represents another *soft-law*⁸⁰⁰ initiative in favor of developing extrajudicial dispute resolution. The Recommendation signifies a starting point for creating a new approach to alternative dispute resolution (ADR) and is one of the EU Commission's two recommendations to promote ADR.

The Recommendation emphasized the need to boost consumer confidence in the internal market. It affirmed the right of consumers "to settle disputes in an efficient and appropriate manner through out-of-court or other comparable procedures."⁸⁰¹ It also stressed the

⁷⁹⁸ See EC Green Book of 16 November 1993 on access of consumer access to justice and the settlement of consumer disputes in the single market, European Commission COM (93) 576 Final.

⁷⁹⁹ Giuseppe Cassano and Massimiliano Nisati, *La riforma dell'Arbitrato* (Milano, Italy: Giuffrè Editore, 2006), 201.

⁸⁰⁰ Soft-law instruments are often used by the European Commission to promote reflection and build consensus on specific issues prior to the adoption of and EU legislation.

⁸⁰¹ Recommendation 98/257/EC, recital 1.

requirement for out-of-court procedures "to meet minimum criteria guaranteeing the impartiality of the body, the efficiency of the procedure and the publicizing and transparency of proceedings."⁸⁰²

Building on the experience of the 1993 Green Book and the good results obtained by the Member States with ADR, the Commission recognized the importance of implementing out-of-court procedures for settling consumer disputes. It also acknowledged the role of out-of-court mechanisms in enhancing "confidence between existing out-of-court bodies in the different Member States and strengthen consumer confidence in the existing national procedures."⁸⁰³

The Recommendation considers out-of-court procedures that "lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution."⁸⁰⁴ However, the Recommendation did not concern procedures like negotiation, which consist of "an attempt to bring the parties together to convince them to find a solution by common consent."⁸⁰⁵

The Recommendation also laid down essential principles that ADR bodies that will be competent in the out-of-court settlement of consumer disputes must follow. These principles include independence, transparency, legal adversary, effectiveness, legality, liberty, and representation. Regarding the principle of legality, the Recommendation affirmed that the decision taken by the ADR body may not deprive the consumer "of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established." Likewise, in cross-border disputes, the decision made by the ADR entity cannot deprive the consumer of the protection guaranteed by the mandatory provisions of the Member State in which the consumer resides, typically in the cases provided for under Art. 5 of the Rome Convention.⁸⁰⁶

With this Recommendation, the European Commission wanted to take another step toward improving access to justice and setting up convenient, flexible, and fast mechanisms that could

⁸⁰² Recommendation 98/257/EC, recital 3.

⁸⁰³ Recommendation 98/257/EC, recital 5.

⁸⁰⁴ Recommendation 98/257/EC, recital 9.

⁸⁰⁵ Recommendation 2001/310/EC, recital 3.

⁸⁰⁶ Directive 98/257/EC, V.

complement or substitute judicial procedures for resolving low-value disputes. The Recommendation also wanted to promote consistent and reliable standards so that users could have confidence in ADRs.

5.4 DIRECTIVE 2000/31/EC: THE "E-COMMERCE DIRECTIVE."

The advent of the internet and the progressive development of e-commerce prompted the EU to adopt, on 8 June 2000, Directive 2000/31/EC, also known as the "Directive on Electronic Commerce." The Directive aimed to remove obstacles to cross-border online services within the EU and provide legal certainty to businesses and citizens.

From a regulatory perspective, the Directive establishes a legal framework of standard rules relating to various issues concerning electronic commerce in the European Union. It also encourages the development of electronic commerce and information society services and ensures the free movement of such services within the EU community.⁸⁰⁷ Moreover, it establishes the principle that operators of such services are subject to regulation only in the member state where they have their registered office and not in the country where the server, e-mail addresses, or mailboxes are located. Information society services must be understood as those "normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service."⁸⁰⁸

The Directive is part of a series of initiatives to consider the importance of conflict prevention in consumer protection in the context of e-commerce. It provides specific transparency and information requirements for traders and online service providers who are required to include on their website information related to their activities (name, address, business registration number, etc.). It also makes information easily, directly, and permanently available to the recipient of the service and competent authorities.⁸⁰⁹ Additionally, service providers must clearly and comprehensively provide information regarding the steps to follow in online contracting, payments, and claims submission before the service recipient places the order.⁸¹⁰

⁸⁰⁷ See Directive 2000/31/EC, art. 1.

⁸⁰⁸ Directive 2000/31/EC, recital 17.

⁸⁰⁹ Directive 2000/31/EC., art. 5.

⁸¹⁰ Directive 2000/31/EC, art.s 6 and 11.

In addition, consumers must be able to store and reproduce contract terms and general conditions.⁸¹¹ The Directive establishes that online agreements must have a legal status equivalent to paper contracts in all member states regarding contracts concluded electronically.⁸¹²

Directive 2000/31 is also the first EU legislation that deals with online dispute resolution. It requires that member states ensure that in a dispute, the online service provider and the service recipient must be able to access out-of-court schemes, including those provided through adequate electronic means. The Directive also invites member states to encourage out-of-court dispute resolution bodies, especially concerning consumers, to operate with sufficient procedural guarantees for the parties involved.⁸¹³

5.5 RECOMMENDATION 2001/310/EC

In 2001, to facilitate the use of ADR systems to settle cross-border consumer disputes and increase consumer confidence in the European e-market, the Commission promoted the creation of the European Extra-Judicial Network (EEJ-Net)⁸¹⁴ and the Financial Dispute Resolution Network (FIN-Net).⁸¹⁵ The two extrajudicial networks aimed to help consumers resolve cross-border disputes with traders providing defective goods and services and in financial services through appropriate out-of-court ADR bodies. A single national arbitration chamber dealt with these disputes in each Member State. This arbitration chamber helped dissatisfied consumers with information and support using ADR systems. In 2005, the European Consumer Centres Network (ECC-Net) replaced the EEJ-Net, taking over the organization's duties.

Along with creating the EEJ-Net and the FIN-Net, the Commission issued a new Recommendation (2001/310/EC) to ensure consumers with adequate access to justice and encourage and facilitate settling consumer disputes at an earlier stage.⁸¹⁶ The Recommendation recognized that one way to increase consumer confidence in new commercial practices like e-

⁸¹¹ Directive 2000/31/EC, art. 10 (3).

⁸¹² Directive 2000/31/EC, art. 9 (1).

⁸¹³ Directive 2000/31/EC, art. 17 (1)(2).

⁸¹⁴ The EEJ-Net was launched as a pilot project in October 2001 by the Belgian Presidency.

⁸¹⁵ FIN-NET was set up by the European Commission in 2001 to promote cooperation among national ombudsmen in financial services and provide consumers with easy access to ADR for in cross-border disputes about provision of financial services.

⁸¹⁶ Recommendation 2001/310/EC, recital 1.

commerce was to promote access to ADR systems.⁸¹⁷ Recommendation 2001/310/EC set principles applicable to out-of-court bodies that facilitate the resolution of a consumer dispute by bringing the parties together and assisting them in solving by common consent.⁸¹⁸ The Recommendation was, thus, dedicated to forms of dispute resolution of a negotiating nature not included in the previous Recommendation 98/257/EC. However, the principles set in Recommendation 2001/310/EC did not affect the principles laid down by Recommendation 98/257/EC related to those procedures in which the third party proposed or imposed a solution to the dispute.⁸¹⁹ The Recommendation did not apply to customer complaint mechanisms operated by a business, even if concluded directly by a third party.⁸²⁰

Like Recommendation 98/257/E.C., Recommendation 2001/31/E.C. went toward promoting consumer confidence and guaranteeing a high level of consumer protection "by ensuring easy access to practical, effective, and inexpensive means of redress, including access by electronic means."⁸²¹ Moreover, the Recommendation adopted four principles that must refer to the procedure rather than the bodies responsible for consumer dispute resolution procedures. Specifically, the principle of impartiality specified in Part II (A) should apply to the ADR body responsible for the procedure. In contrast, the other principles refer to the characteristics of the procedure that should be transparent, effective, and fair.

In its preamble, the Recommendation recognized how new technology could contribute "to the development of electronic dispute settlement systems" by providing mechanisms to settle disputes across different jurisdictions without the need for the parties' physical presence.⁸²²

Adopting non-binding legislative acts like Recommendation 98/257/EC and Recommendation 2001/310/EC contributed to promoting ADR procedures in many member states. The Recommendations also helped harmonize ADR by setting fundamental qualitative criteria for ADR bodies and procedures. However, as reported by the EU Commission, they were not enough to enhance consumer trust in the single market. In 2011, to fully develop the single market's potential to grow the European economy, the Commission recognized the need for

⁸¹⁷ Recommendation 2001/310/EC, recital 2.

⁸¹⁸ Recommendation 2001/310/EC, recital 9 and art. 1.

⁸¹⁹ Recommendation 2001/310/EC, recital 9.

⁸²⁰ Recommendation 2001/310/EC, Part I (2).

⁸²¹ Recommendation 2001/310/EC, recital 2.

⁸²² Recommendation 2001/310/EC, recital 6.

legislative interventions to guarantee European consumers' ability to submit a dispute with competent ADR entities.⁸²³

5.6 DIRECTIVE 2008/52/EC: "THE MEDIATION DIRECTIVE."

In 2008, the European Union promoted and regulated ADRs by adopting Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. Following a consultation carried out with the 2002 Green Paper on ADR in civil and commercial disputes, the Mediation Directive was designed to facilitate access to ADR mechanisms and promote the amicable settlement of disputes⁸²⁴ while encouraging the use of mediation.⁸²⁵ It constitutes the first binding act of the EU in ADR. Member States were obliged to transpose the Directive into their legal systems by 21 May 2011 and adopt the regulatory framework with a certain freedom. The Mediation Directive does not prevent the Member States from making mediation compulsory or subject to incentives or sanctions before and after the beginning of judicial proceedings, provided that such legislation does not prevent parties in disputes from exercising their right to access the judicial system.⁸²⁶

The Directive sets minimum regulatory standards for mediation legislation. It applies to cross-border civil and commercial matters when at least one of the parties is domiciled in an EU Member State, except for Denmark.⁸²⁷ Conversely, it does not apply to civil and commercial matters where parties do not dispose of their rights and obligations under national law, like family and employment law.⁸²⁸ The Directive does not apply to pre-contractual negotiations or processes of an adjudicatory nature like conciliation, consumer complaint schemes, arbitration, and expert determination or to methods where the third party issues a formal recommendation, whether or not it be legally binding.⁸²⁹ Additionally, the Directive's objective does not extend to disputes concerning revenue, customs, administrative matters, the liability of the State, or omissions in the exercise of State authority.⁸³⁰ The European legislator has considered these

⁸²³ See EU Commission COM(2011) 791 on Alternative dispute resolution for consumer disputes in the Single Market.

⁸²⁴ Directive 2008/52/EC, recital 2.

⁸²⁵ It is also important to note the stimulus given by the European Council at the meeting in Tampere on 15 and 16 October 1999 which invited member states to establish and adopt ADRs in civil and commercial disputes.

⁸²⁶ Directive 2008/52/EC, recital 14.

⁸²⁷ Directive 2008/52/EC, art. 1(2)(3), and recital 10.

⁸²⁸ Directive 2008/52/EC, art. 2 and recital 10.

⁸²⁹ Directive 2008/52/EC, recital 10 and 11.

⁸³⁰ Directive 2008/52/EC, art. 1(2).

areas subjects of specific regulations on mediation, delegating the Member States to adopt them.

The Mediation Directive reaffirms the importance of access to justice as an integral part of the European Union's policy to establish an area of freedom, security, and justice. Access to justice should be guaranteed through judicial and extrajudicial dispute resolution methods.⁸³¹ The Directive affirms the importance of out-of-court procedures for resolving civil and commercial disputes to simplify and improve access to justice.⁸³² In this context, mediation is practically considered a form of access to justice. Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in such matters through processes tailored to the parties' needs.⁸³³ The very nature of mediation allows for agreements reached to be more likely complied with by the parties. Also, they "are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements."⁸³⁴

With the Mediation Directive, the EU has intervened to regulate the ADR instruments more decisively. Its objective is to facilitate access to ADR and promote the amicable settlement of disputes by encouraging mediation and ensuring a balanced relationship between mediation and judicial proceedings.⁸³⁵ The Directive gives a rather general definition of mediation and mediator with the intent to achieve a greater application. Mediation is defined as a "structured process" in which the parties voluntarily attempt to resolve a dispute with the assistance of a mediator.⁸³⁶ The parties may initiate the process or be suggested or ordered by a court or prescribed by a member state's law. It includes mediation conducted by a judge not responsible for any judicial proceedings concerning the dispute. It excludes attempts made by a court or a judge to settle a dispute during judicial proceedings.⁸³⁷ Through this provision, the Directive aims to separate the mediator's person from the judge. Art. 3(b) defines the mediator as a third party "who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State

⁸³¹ Directive 2008/52/EC, recital 5.

⁸³² Directive 2008/52/EC, recital 3.

⁸³³ Directive 2008/52/EC, recital 6.

⁸³⁴ *Ibid.*

⁸³⁵ Directive 2008/52/EC, art. 1.

⁸³⁶ Directive 2008/52/EC, art. 3 (a).

⁸³⁷ *Ibid.*

concerned and of the way in which the third person has been appointed or requested to conduct the mediation."

The Directive's main provisions concern the quality and promotion of mediation, the enforcement of mediation agreements, the non-compulsory nature of mediation, the confidentiality of the process, and the expiry of limitation periods during the mediation. Regarding the quality of mediation, the Directive, in Art. 4, encourages mediators and organizations to develop voluntary codes of conduct to guarantee better control over mediation services and ensure that the participating parties conduct the mediation in an impartial, effective, and competent manner. Member states are also encouraged to develop mediation training to ensure the mediators' competence and knowledge.

Concerning the promotion of mediation, Art. 5 invites the courts to refer cases to mediation to settle disputes when deemed appropriate. The same art. encourages the parties to educate themselves about mediation and attend information sessions when such sessions are held and easily accessible.⁸³⁸ Mediation can be initiated by the parties, referred to or ordered by a judge, or the national law of a Member State.⁸³⁹ Art. 5 (2) gives the option to the Member States to make mediation mandatory or subject to incentives or sanctions, provided that the legislation does not prevent the parties from exercising their right to access the judicial system.

The Directive requires the Member States to offer mechanisms for enforcing mediation agreements by a court or other competent authority. The content of mediation agreements shall be enforceable unless it is "contrary to the law of the Member State where the request is made, or the law of that Member State does not provide for its enforceability."⁸⁴⁰ This provision allows parties from different states with different legal systems to enforce a mediated agreement in their respective countries through a judgment or court order. However, the Directive does not create a uniform system for the enforcement of mediation settlement agreements (MSAs). Still, it leaves the choice of the form an MSA may take and the competent authority to the Member States. In this regard, many Member States have adopted mechanisms

⁸³⁸ Directive 2008/52/EC, art. 5 (1).

⁸³⁹ Directive 2008/52/EC, art. 5 (1)(2).

⁸⁴⁰ Directive 2008/52/EC, Art. 6 (1).

to transform MSAs into directly enforceable titles. As a general rule, in most Member States, MSAs are subject to homologation by a public authority.⁸⁴¹

In Recital 13, the Directive highlights the voluntary nature of mediation “in the sense that the parties are themselves in charge of the process and may organize it as they wish and terminate it at any time.”⁸⁴²

Recital 23 states that confidentiality is crucial to the mediation process. Therefore, the Directive should provide minimum compatibility of civil procedural rules protecting mediation’s confidentiality in subsequent civil and commercial judicial proceedings or arbitration. Further, Art. 7 provides that the mediator cannot be forced to share information about what occurred during mediation in subsequent proceedings between the parties. However, the Directive provides for two exceptions. First, sharing information is necessary due to public policy considerations, mainly to protect children’s best interests or prevent harm to a person’s physical or psychological integrity.⁸⁴³ Second, disclosing the agreement’s content is needed to implement or enforce the mediation agreement.⁸⁴⁴ It is worth noting that the Directive does not prevent the parties from sharing and using such information in a court proceeding or arbitration, representing a significant flaw in the Directive. Confidentiality is crucial to the success of the process. Parties choose to resolve their disputes through mediation because they rely on the process’s confidentiality, which is not granted in litigation. Confidentiality allows the parties to open up and speak freely, trusting the information they share will not be used against them in future proceedings. Knowing that someone can attempt to discover information that was shared in mediation to use it in perspective proceedings may prevent the parties from speaking openly and honestly during the mediation. Finally, the Directive provides minimum regulations regarding confidentiality without precluding the Member States from enacting stricter measures to protect the confidentiality of the mediation process.⁸⁴⁵

Art. 8 covers the issue of the effect of mediation on limitation and prescription periods. The

⁸⁴¹ European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the ‘Mediation Directive’) (2016/2066(INI)), Section 10. MSAs can be enacted in an enforceable notarial deed (i.e., in Austria, Belgium), validated by a mediation body (i.e., Estonia), transferred into an arbitral consent award (i.e., Austria, Germany), or e filed in a court for summary proceedings (i.e., in Italy, Latvia, Hungary, Lithuania).

⁸⁴² Directive 2008/52/EC, Recital 13.

⁸⁴³ Directive 2008/52/EC, art. 7 (1)(a).

⁸⁴⁴ Directive 2008/52/EC, art. 7 (1)(b).

⁸⁴⁵ Directive 2008/52/EC, art. 7 (2).

art. states that the Member States shall ensure that parties who choose mediation are not later prevented from initiating judicial proceedings or arbitration concerning the dispute by the expiry of limitation or prescription periods during the mediation process.⁸⁴⁶ This provision protects the principle of fair access to justice if the mediation does not successfully resolve the dispute.

It is worth noting that the Directive points out the utility and value of technology in dispute resolution by encouraging in recital 9 of the preamble the use of modern communication technologies in mediation.⁸⁴⁷ In this way, the Directive ensures that online mediation can occur, although it does not openly recognize it as a method of resolving disputes. The Directive leaves it up to the Member States whether to adopt online mediation as a valid dispute resolution process.

5.7 REBOOTING THE MEDIATION DIRECTIVE

The unsuccessful results achieved by the Directive in promoting mediation in cross-border commercial and civil disputes led to a debate on the effectiveness of mediation policies. A series of studies evaluated the Directive's impact and significance.⁸⁴⁸ A European Parliament assessment released in 2011 raised concerns about the implementation and effects of the Mediation Directive. The evaluation noted that the Member States were still experiencing low mediation rates despite increasing mediation, bringing significant time and cost savings for the parties.⁸⁴⁹ In 2014, the Directorate-General for Internal Policies of the Union released a study commissioned by the European Parliament on the need for "rebooting" the Mediation Directive. Five years after the Directive was issued, the Rebooting study collected the opinion of 816 experts from all over the EU to understand why mediation, despite its proven and multiple advantages, has not taken root as a dispute resolution process in cross-border disputes. The study noted how the Member States' legislation to implement the directive had favored the development of an "ADR movement" within the EU. However, it emphasized the limited

⁸⁴⁶ Directive 2008/52/EC, art. 8 (1).

⁸⁴⁷ Preamble, recital 9 of Directive 2008/52/EC recites that "This Directive should not in any way prevent the use of modern communication technologies in the mediation process."

⁸⁴⁸ See the 'Study for an evaluation and implementation of Directive 2008/52/ EC' of 2014, the European Implementation Assessment on the Mediation Directive by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service (EPRS), and the study by its Directorate-General for Internal Policies entitled 'Quantifying the cost of not using mediation.'

⁸⁴⁹ See the study 'Quantifying the cost of not using mediation.' According to the study, the EU break-even point for time was 19% mediation success rate, and the break-even point for costs was 24%. Also, the study found the average cost to litigate in the European Union was €10,449 while the average cost to mediate was €2,497.

impact of the Directive in the promotion and use of mediation. The data reported by the experts highlighted that only in four EU countries the number of mediations carried out per year was higher than 10,000, with Italy reporting over 200,000 mediations annually. A significant number of Member States reported less than 500 mediations per year.⁸⁵⁰ Mediation in civil and commercial matters accounted for less than 1% of cases in the EU.

The study's results led the European Parliament to reflect on what has been called the 'European Mediation Paradox': statistics show that mediation helps to save time and costs; still, the Member States experience a low number of mediations per year. The Rebooting study also provided a comparative analysis of the 28 Member States' legal framework for mediation. It showed that pro-mediation regulatory features such as solid confidentiality protection, judicial referrals to mediate, and a robust accreditation process for mediators did not help increase the use of mediation. Instead, the study data revealed that a mitigated form of mandatory mediation, either compulsory attendance at information sessions (opt-in) or mandatory mediation with the ability to withdraw from the proceeding (opt-out), could be the only way to increase the number of mediations. Art. 5(2) of the Mediation Directive allows the Member States to introduce compulsory mediation; however, a tradition of voluntary mediation has primarily prevailed at the legislative level. Thus, laws introducing elements of mandatory mediation would be necessary to revitalize mediation in the EU. Italy's successful example demonstrates this. With over 200,000 mediations per year, Italy saw this increase (from maybe a few thousand annually) when mediation became a pre-condition to trial in certain cases.⁸⁵¹ In contrast, when mediation ceased to be mandatory (from October 2012 to September 2013), the number of mediations⁸⁵² decreased to maybe 2000 per year and rose again when compulsory mediation was re-introduced.⁸⁵³

⁸⁵⁰ It is worth noting that almost each Member State did not have an official count of mediations. As a result, the estimates provided by experts were averaged for each EU country.

⁸⁵¹ Policy Department C: Citizens' Rights and Constitutional Affairs, *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, (Brussels: European Parliament, 2014), [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf).

⁸⁵² It included mandatory and voluntary mediations.

⁸⁵³ Mandatory civil and commercial mediation was introduced in Italy by Legislative Decree n. 28/2010. The Decree identified 11 types of matters subject to compulsory mediation. Following a ruling of the Constitutional Court in December 2012, mandatory mediation was ruled unconstitutional as beyond the powers delegated to the Government in issuing the instrument. In 2013, Legislative Decree no. 69/2013 reintroduced mandatory mediation in specific matters listed in Art. 5(1). The Decree requires disputing parties to attend an informative meeting with a professional mediator following which the parties can decide whether to participate in the mediation or opt out the proceeding for justified reasons.

The study concluded that there were two possible courses of action at the legislative level to “reboot” the Mediation Directive. First, it invited EU legislators to consider a mandatory mediation system in certain matters mitigated by the opt-out provision. Second, it proposed that each Member State commit to and reach a ‘Balanced Relationship Target Number’ between civil litigation and mediation, a precise target number representing a minimum percentage of mediation to occur every year. The study was generally well-received. Still, its findings and conclusions were subject to criticism. Critics argued that mediation is a voluntary process, and no one should be forced to mediate. Thus, mandatory mediation provisions would go against the nature of mediation. However, “the concept of mandatory elements of mediation refers only to educating litigants about the benefits and opportunities of mediation,”⁸⁵⁴ either through an ‘opt-in’ or ‘opt-out’ mechanism.

Despite the numerous initiatives at the EU level to foster civil mediation practice for settling cross-border disputes, multiple obstacles still hinder the effective uptake of mediation, making it a “Sleeping Beauty” waiting for a “Prince Charming” to wake her up.⁸⁵⁵ One of the main challenges in this field is the inadequate functioning of the quality control mechanisms for mediators and selection procedures due to heterogeneous national regulatory frameworks. Another critical factor is the lack of statistical data on mediation, including the number of mediated cases, the average duration, and the success rates of mediation procedures. The absence of a reliable database represents another challenge in promoting mediation and increasing citizens’ confidence in its effectiveness.⁸⁵⁶

Other problems are the lack of a mediation culture and the low awareness of mediation in most Member States, as highlighted by the European Parliament in its resolution of 12 September 2017 on implementing the Mediation Directive.⁸⁵⁷ However, as highlighted by De Palo, several international legal systems have demonstrated the will to promote mediation by introducing a series of requirements in their legal and judicial systems.⁸⁵⁸ Still, little progress has been made.

⁸⁵⁴ Giuseppe De Palo and Romina Canessa, “Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union,” (revisar estilo en la citación y bibliografía en general) *Cardozo Journal of Conflict Resolution* 16 (2015): 714.

⁸⁵⁵ *Ibid.*, 713.

⁸⁵⁶ See the European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the ‘Mediation Directive’) (2016/2066(INI)), Point 6.

⁸⁵⁷ *Ibid.*, Point 2.

⁸⁵⁸ Giuseppe De Palo, “Mediating Mediation Itself: The Easy Opt-out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation,” *Cardozo Journal of Conflict Resolution* 22, no. 3 (2021): 543-568.

The Italian experience has shown that introducing mandatory elements, more specifically compulsory mediation with the ability for parties to opt-out, can increase the number of mediations. With this in mind, other Member States have questioned the need to adopt a model of compulsory mediation. Greece, for example, has adopted the Italian opt-out model by introducing a mandatory initial mediation session⁸⁵⁹ for a broad category of civil and commercial cases, including family disputes and certain contractual disputes.⁸⁶⁰ At the same time, Spain is discussing the opportunity to include a mandatory attempt at mediation.⁸⁶¹ On July 6, 2012, Spain enacted Law 5/2012 on mediation in civil and commercial matters that transposes Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 into Spanish law. The Law only requires the courts to inform the parties in the preliminary hearing of the possibility of resolving their dispute through mediation.⁸⁶² However, the final decision to initiate a mediation process applies only to the parties.⁸⁶³ In Catalonia, Law 9/2020 of July 31st, modifying Book II of the Civil Code of Catalonia and Law 15/2009 on Mediation in private law, has introduced a compulsory mediation briefing session when the judge invites the parties to mediation. Since 2018, Belgium has opted for a mediation system that has become mandatory in the courts. A judge can now impose mediation on the parties in civil cases if he deems it appropriate.⁸⁶⁴ In France, Law No 2019-222 of 23 March 2019 on programming for 2018-2022 and justice system reform has made mandatory to use mediation for small claims (under 5000 Euros) or claims concerning neighborhood disputes.

5.8 DIRECTIVE 2013/11/EU: THE "CONSUMER ADR DIRECTIVE."

In 2013, the European Commission took an extra step forward in acknowledging the role of ADR in providing consumers with complementary remedies. Building on the previous

⁸⁵⁹ Law 4640/2019, Art. 6. The information session has to take place within twenty (20) days from the day after the mediation has been notified of the petition for initiation of mediation. After the first session, the parties can decide to opt out and refer the case to the courts or to opt in and proceed with the following mediation sessions.

⁸⁶⁰ Greece was among the first member states to implement the Mediation Directive through the Mediation Act. In regulating the new institution, the Greek Mediation Act established a uniform system for both domestic and cross-border mediation.

⁸⁶¹ See Proyecto de Ley de Eficiencia Procesal. The 2020 Project seeks to introduce the concept of 'appropriate means of dispute resolution resolution' (Medios adecuados de solución (MASC)) and make any ADR method mandatory to validly file a civil or commercial claim.

⁸⁶² See amendment to art. 414 of the Spanish Civil Procedure Act included in Law 5/2012.

⁸⁶³ See amendment to art. 415 of the Spanish Civil Procedure Act included in Law 5/2012.

⁸⁶⁴ See Art. 225 under Title 9 of the "Law of 18 June 2018 on various provisions in the field of civil law and provisions to promote alternative forms of dispute resolution, amending Art. 1734 of the Judicial Code.

Commission Recommendations 98/257/EC and 2001/310/EC, the European Union adopted Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

In its preamble, the Consumer ADR Directive recognizes that "ADR is not yet sufficiently and consistently developed across the Union." It also regrets that despite the above recommendations, "ADR has not been correctly established and is not running satisfactorily in all geographical areas or business sectors in the Union."⁸⁶⁵ For the EU, this situation represents an obstacle to the internal market and one of the reasons for the lack of consumer confidence in cross-border shopping.

The Directive highlights the importance of developing functioning ADR to enhance consumers' trust in the internal market, including e-commerce, and ultimately increase cross-border and online trade opportunities.⁸⁶⁶ The Directive aims to make up for some shortcomings of the ADR mechanisms established at the national level. It acknowledges that the ADR coverage, quality, and awareness disparities in the Member States constitute a barrier to the internal market.⁸⁶⁷ Consequently, to overcome these difficulties, the Directive intends to contribute to the functioning of the EU single market and achieve a high level of consumer protection.⁸⁶⁸ As stated in Art. 5, "Alternative dispute resolution (ADR) offers a simple, fast, and low-cost out-of-court solution to disputes between consumers and traders."⁸⁶⁹

The Directive applies to business-to-consumer (B2C) domestic and cross-border EU disputes concerning contractual obligations arising from sales or services contracts, both online and offline, in all economic sectors between a trader established in the EU and a consumer resident of the Union.⁸⁷⁰ Also, it applies to binding and consensual non-binding ADRs.⁸⁷¹ Still, it excludes from its application proceedings before dispute resolution entities where the third

⁸⁶⁵ Directive 2013/11/EU, Preamble recital 5.

⁸⁶⁶ Directive 2013/11/EU, Preamble recital 15.

⁸⁶⁷ See Preamble, recital 5 and 6 of Directive 2013/11/EU.

⁸⁶⁸ Art. 1 of the Consumer ADR Directive entitled 'Subject Matter' recites, "The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures."

⁸⁷⁰ Directive 2013/11/EU, Art. 2 (1).

⁸⁷¹ The fact that the Directive does not distinguish between consensual non-binding ADR processes (i.e., Conciliation and mediation) and binding procedures (i.e., Arbitration) has led to criticism already in the proposal stage of the directive. In fact, the Directive combines and applies the same rules to two totally different procedures. See Julia Hörnle, "Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?" *SSRN Electronic Journal*, 2012.

party is employed or paid exclusively by the trader, direct negotiations between consumers and traders, consumer complaint-handling systems operated by the trader, and judicial settlements.

The Directive guarantees consumers can turn to quality ADR entities when they have a contractual dispute with traders. To this end, it obliges Member States to ensure the provision of nationally certified ADR entities for consumer disputes concerning contractual obligations stemming from sales contracts or service contracts. ADR entities must be operational in all EU member states and comply with binding due process requirements in Chapter II of the Directive. The requirements include impartiality, expertise, transparency, accessibility, fairness, effectiveness, and legality of their procedures. Each Member State shall designate competent national authorities that create and keep national lists of ADR entities and monitor that such entities comply with the quality requirements mentioned above and with national provisions implementing the Directive.⁸⁷² The Directive ensures a minimum harmonization process but gives the Member States some flexibility to create their certification and monitoring processes. To ensure a higher level of consumer protection, Member States can establish or maintain quality rules beyond those the Directive sets.⁸⁷³

Chapter III of the Directive ensures that consumers are informed about the ADR entity or entities and have access to ADR procedures in case of cross-border disputes. Art. 13 requires that traders established on Member States territories inform consumers about the ADR entities that are competent to resolve consumer disputes by including the contact information on their websites or their contract (if they are affiliated with an ADR entity) ADR entities. Also, traders with unsettled consumer complaints are required to provide consumers with information about the ADR entities mentioned above. Additionally, they should inform consumers about a durable medium to use the ADR processes to settle disputes. National competent authorities can issue penalties to those ADR entities that do not comply with the information requirements. The penalties should be adequate, dissuasive, and proportionate.⁸⁷⁴ Art. 14 provides that the Member States shall ensure that consumers can obtain assistance to access the competent ADR entity operating in another Member State in case of cross-border sales or service contract disputes.

⁸⁷² Directive 2013/11/EU, Arts. 18 (1)(2) and 20 (1).

⁸⁷³ *Ibid.*, Art. 2 (3).

⁸⁷⁴ *Ibid.*, Art. 21.

With Directive 2013/11 / EU, the EU has taken steps to regulate ADR mechanisms to make consumer rights applications in the Member States more effective and improve consumer redress options. This regulatory system has led to the institutionalization of ADR entities through an accreditation process monitored by national entities identified by the Member States.⁸⁷⁵ The quality requirements imposed by the Directive have enhanced ADR entities' structure, organization, and procedures by improving their services' quality, effectiveness, and speed. Furthermore, information obligations have allowed greater transparency⁸⁷⁶ and awareness about ADRs and the bodies responsible for offering them. Establishing high-quality ADR mechanisms has incentivized traders to review and enhance their internal complaint-handling systems.⁸⁷⁷ Although the Directive has led to better accessibility and quality and a minimum standardization of ADR within the EU, the various Member States have adopted the regulatory framework differently. This diversity is due to the presence or absence of pre-existing ADR regulatory and cultural traditions in the different states.

5.9 CRITICISMS OF THE ADR DIRECTIVE

Numerous criticisms and concerns exist regarding the ADR scheme proposed by the Directive to guarantee a high level of consumer protection through high-quality consumer ADR schemes in the EU. These criticisms and concerns are considered here to understand their potential impact on consumer protection and trust in ADR.

- *Impartiality and independence of ADR providers*

On the one hand, the Directive calls upon the member states to “ensure that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial” (art. 6). On the other, it allows the natural persons in charge of the ADR procedure to be employed by the trader, a professional organization, or a business association of which the trader is a member when meeting specific requisites.⁸⁷⁸ Although the directive provides requirements and

⁸⁷⁵ Cortés, *The New Landscape*.

⁸⁷⁶ Greater transparency is promoted by the Directive in Recital 16 (a) that recites, “Confidentiality and privacy should be respected at all times during the ADR procedure. However, it should be permitted for final decisions of an exemplary nature to be published subject to any legal obligation of confidentiality.”

⁸⁷⁷ See the European Commission Report COM(2019) 425 on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/201.

⁸⁷⁸ Directive 2013/11/EU, Art. 2 (2) (a), Arts. 6 (3) and 7 (d).

measures around independence and impartiality,⁸⁷⁹ the fact that the person in charge of the procedure is remunerated by one of the litigants raises concerns regarding his objectivity. It could discourage many consumers from using ADRs since they would not have the necessary confidence in a mechanism that could benefit one side.

- *Liberty and voluntary participation in the procedure*

The directive provides voluntary participation in the ADR procedure by both the consumer and the trader.⁸⁸⁰ However, national rules may provide for the mandatory participation of the trader in ADR procedures.⁸⁸¹ The voluntary nature of the procedure casts doubts on the actual participation of the trader who, free to join the process, will prefer not to participate.⁸⁸² The trader is not interested in accepting the cost of the procedure (often at his expense)⁸⁸³ and participating in an ADR procedure, knowing that he can simply wait to be sued by the consumer, which generally does not happen in low-value disputes. This is confirmed by the Commission's 2020 report on the functioning of the ODR platform. The data reveal that in most complaints (83%), the trader did not respond to the consumer's ADR request, and 11% refused to participate in the procedure. Only 2% of complaints resulted in an agreement.⁸⁸⁴ The Directive did not provide for this situation of misconduct by the trader, thus undermining the effectiveness of ADR procedures and discouraging the consumer from using them.

- *Fairness and legality of the ADR procedure and the competence of the persons in charge*

On the principle of fairness, the Directive requires each member state to ensure that the parties are aware and informed of their rights, notified of the ADR procedure outcome, and receive communication of the grounds on which the outcome is based.⁸⁸⁵ Regarding legality, art. 11

⁸⁷⁹ Ibid., Art. 6 (3)(4).

⁸⁸⁰ Ibid., Art. 10.

⁸⁸¹ Ibid., Art. 9 (2)(a).

⁸⁸² Silvana Dalla Bontà, "Una Giustizia "Co-Esistenziale" Online Nello Spazio Giuridico Europeo?," in *Comunicare, Negoziare e Mediare In Rete* (Università degli Studi di Trento2020). The trader's tendency not to participate in the procedure is also confirmed by the data presented by the Commission's 2019 report on the functioning of the ODR platform. These data are reported and analyzed in section 4.2.9.

⁸⁸³ Art. 8 (c) of Directive 2013/11/EU, affirms that the procedure is free of charge or available at a nominal fee for consumers.

⁸⁸⁴ European Commission, *Functioning of the European ODR Platform*, (2020), https://ec.europa.eu/info/sites/default/files/odr_report_2020_clean_final.pdf.

⁸⁸⁵ Directive 2013/11/EC, art. 9.

requires that in adjudicative ADR procedures, the imposed judgment must not deprive the consumer of the protection provided by the provisions that cannot be conventionally derogated under the law of the Member State where the consumer habitually resides. The fairness and legality principles are linked to the provisions of art. 6 (a), which requires the person in charge of the ADR procedure to possess “the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of law.” The fact that the Directive requires a ‘general knowledge of the law’ in its requirements suggests that the person in charge of the procedure could be a non-jurist or, in any case, someone who may not have specific knowledge of consumer law. This raises the question of whether the person in charge of the procedure, who may not be familiar with the complexity of national and European regulations, can correctly identify the law applicable to the cross-border dispute or whether the ADR procedure can at least guarantee the application of the mandatory rules of the law of the consumer’s country of habitual residence, per art. 6 of the Rome I Regulation.

Furthermore, the Directive does not oblige the parties to retain a lawyer or a legal advisor⁸⁸⁶ who could participate in the procedure without legal assistance or representation. Therefore, it could be argued that although the Directive’s objective is to ensure a high level of consumer protection, it fails to ensure the implementation of the right to protect the consumer. Even in the case of facilitative ADR procedures such as mediation in which the third party would act as a facilitator of the dispute, we could assume that consumer law would not necessarily be taken into account or even enforced.

EU Commission Report on the ADR Directive

In September 2019, the Commission published a report on implementing the Consumer ADR Directive in all member states.⁸⁸⁷ The report was based on the following information:⁸⁸⁸

- Member States’ legislation implementing the ADR Directive;

⁸⁸⁶ Directive 2013/11/EU, art. 9 (b).

⁸⁸⁷ Pursuant to art. 26, starting from July 2019 and then every four years, the Commission is required to submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Directive. This report should include considerations regarding the development and the use of ADR entities and the impact of the Directive on consumers and traders.

⁸⁸⁸ “Alternative dispute resolution: reports and research,” European Commission, accessed September 16, 2020, https://ec.europa.eu/info/alternative-dispute-resolution-reports_en.

- Reports by Member States' national competent authorities for consumer ADR on the development and functioning of ADR entities;
- Meeting with competent national authorities that took place on 20 November 2018;
- Results of an ADR Assembly (networking event) with representatives from the ADR community, regulators, academics, and members of ADR entities that took place on June 11-12, 2018;
- 2017 and 2018 reports on the functioning of the European ODR platform ('ODR Reports');
- Activity reports by Member States' ODR contact points;
- Meetings with the ODR contact points network.

The Commission's report highlighted some critical issues and challenges that limit the full effectiveness and use of the ADR framework created by the Directive. The first criticism identified in the report concerns ADR awareness and perceptions. In most EU Member States, overall ADR awareness has increased among consumers and traders. However, ADR awareness is still low in small and medium-sized enterprises (SMEs) and much higher in large retailers. Furthermore, consumers and traders often perceive ADR entities as organisms representing the other side's interests and, therefore, non-impartial.

The second critical point highlighted by the report is the difficulty for consumers and traders to navigate the national ADR landscapes, particularly in the Member States with many certified ADR entities. It makes it difficult for consumers and traders to understand which ADR entity to turn to when there is more than one entity per retail sector. While more competition between ADRs can lead to more competitive prices, too much competition can confuse consumers, mainly when ADR entities use different complaint procedures. It can also lead traders to choose cheaper ADR entities that are more likely to decide in their favor.⁸⁸⁹ Furthermore, increasing ADR entities can make it more difficult for national bodies to monitor quality and compliance with the minimum procedural standards established by the Directive. It is necessary to consider that ADR entities are not required to be established in the Member State where they operate. This situation can allow ADR entities that do not obtain accreditation from one national authority to seek certification from an authority in another Member State that requires lower procedural standards. Solutions to these problems may include requiring ADR entities to be

⁸⁸⁹ Cortés, *The New Landscape*.

established in the Member State where they operate, restricting the number of ADR-certified entities or having organisms specialized in specific sectors, and considering a single EU competent authority that monitors the different ADR entities.⁸⁹⁰

The third issue reported by the Commission is the traders' low participation and willingness to participate in ADR. According to the 2019 edition of the Consumer Conditions Scoreboard,⁸⁹¹ just under a third of retailers (30.4%) are willing to use ADR. To this must be added the reluctance of consumers to file a complaint due mainly to three reasons: i) the procedure would take too long; ii) the low value of the complaint; iii) the belief that the complaint would not produce a satisfactory result. In 2019, only 5% of consumers encountering a problem with a trader turned to an ADR body. Consumers' trust in redress mechanisms remains low, with an average of 37.9%. Lower traders' participation may be addressed by making their participation in ADR mandatory in specific sectors or developing incentives for traders, such as trust marks.⁸⁹²

Despite the challenges, the regulatory framework established by the ADR Directive represents an important step toward promoting ADR to improve consumers' access to justice by fostering substantial harmonization of ADR mechanisms at a national level and improving consumer confidence in the single market. Considering the increasing importance of cross-border e-commerce as a pillar of the EU economy and consumer confidence, the European legislator recognizes in the Preamble of the ADR Directive the need to create "a properly functioning ADR infrastructure for consumer disputes online dispute resolution (ODR) framework for consumer disputes arising from online transactions are necessary to achieve the Single Market Act's aim of boosting citizens' confidence in the internal market."

5.10 REGULATION (EU) No 524/2013: THE "ODR REGULATION."

The search for more suitable tools to guarantee consumers adequate protection and, at the same time, stimulate growth and enhance trust in the single market has prompted the European Union

⁸⁹⁰ Richard Kirkham, "Regulating ADR: Lessons from the UK," in *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press, 2016).

⁸⁹¹ "Consumer Conditions Scoreboard - 2019 Edition," European Commission - European Commission, last modified 7, 2020, https://ec.europa.eu/info/files/consumer-conditions-scoreboard-2019-edition_en.

⁸⁹² Pablo Cortes, "The New Regulatory Framework for Consumer Alternative Dispute Resolution," *SSRN Electronic Journal*, 2016, xx, doi:10.2139/ssrn.2793564.

to consider technology as a complementary element to ADR processes. Such consideration led to the adoption of the ODR Regulation.

Regulation 524/2013 on ODR for consumer disputes was promulgated by the European Parliament and the European Council on 21 May 2013. It represents the institutionalization of consumer ODR in the European Union (EU). The Regulation was adopted to help ensure a high level of consumer protection based on Art. 169⁸⁹³ of the Treaty of the Functioning of the European Union (TFEU) and through the measures adopted under Art. 114 TFEU. As stated by Art. 1, the Regulation's purpose is "to contribute, through the achievement of a high level of consumer protection, to the proper functioning of the internal market, and in particular of its digital dimension by providing a European ODR platform ('ODR platform') that facilitates the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online."

The ODR Regulation aims to establish an online platform that acts as a single access point of entry for consumers and traders seeking to resolve out-of-court disputes over domestic and cross-border online purchases.⁸⁹⁴ It applies to the out-of-court resolution of disputes concerning only contractual obligations from online sales or service contracts. The ODR Regulation allows consumers to submit disputes against traders through an electronic complaint form.⁸⁹⁵ It also applies to disputes initiated by a trader against a consumer when "the legislation of the Member State where the consumer is habitually resident allows for such disputes to be resolved through the intervention of an ADR entity."⁸⁹⁶

Consumers can file a complaint by accessing the ODR platform website and filling out a form with the trader's details, the description of the complaint, and the consumer's information. Once the complaint is submitted and processed, the platform informs the trader. It provides the parties with the names of the quality-certified ADR entity or entities competent to handle their case. The platform then transmits the dispute to the ADR entity selected by the parties. From the submission date of the complaint, parties have 30 days to agree on an ADR entity.

⁸⁹³ Art. 169 of the TFEU recites, "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests."

⁸⁹⁴ See Preamble, recital 18 of Regulation (EU) No 524/2013.

⁸⁹⁵ Regulation No 524/2013, Art. 8 (1).

⁸⁹⁶ Regulation No 524/2013, Art. 2 (2).

Otherwise, the case is closed on the ODR platform.⁸⁹⁷ The complaint is also not processed if the ADR entity does not inform the parties whether it accepts or refuses to deal with the dispute simultaneously.⁸⁹⁸ However, the automatic closure of the complaint does not prevent the complainant from pursuing the claim outside of the platform (i.e., by submitting the complaint directly to an ADR entity). The ADR entity that has agreed to deal with the dispute has 90 calendar days from the date of receiving the complete complaint file to conclude the procedure.⁸⁹⁹

Art. 14 requires all businesses operating online and established in the EU to include an electronic link to the ODR platform on their websites to guarantee the consumer's right to be informed. Traders are also required to provide an email address as the first point of contact for consumers. Where applicable, this information should also be provided in the general terms and conditions of online sales and service contracts.⁹⁰⁰ This link is essential to direct consumers with a dispute to the ODR platform and raise ADR awareness.⁹⁰¹ However, it may lead the consumer to believe that the trader must participate in the ADR procedure when requested. The link's presence on the website does not imply that the trader must participate in the procedure. To the consumer's request initiated through the ODR platform, the trader may not respond or decline without suffering any sanction. Consequently, the trader, unmotivated to participate in the procedure, could simply contact the consumer directly and outside the ODR platform and negotiate with him to resolve the dispute. The process would then move from online to offline, undermining one of the central objectives of the Regulation.

To provide information and assistance, each Member State should designate an ODR contact point that hosts at least two ODR advisors.⁹⁰² The ODR contact points assist with submitting complaints and provide the parties and ADR entities with general information on consumer rights, the platform's functioning, and ADR procedures. It also informs the complainant party about other means of redress.⁹⁰³ The national ODR contact points cooperate in a network

⁸⁹⁷ Ibid., art. 9 (8).

⁸⁹⁸ Ibid.

⁸⁹⁹ Ibid., art. 10 (a).

⁹⁰⁰ Ibid., art. 14 (2).

⁹⁰¹ See the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes (COM (2019) 425 Final).

⁹⁰² In most cases, the ODR advisors are members of the national European Consumer Centers.

⁹⁰³ Regulation (EU) No 524/2013, art. 7.

managed by the Commission. Every EU country has a national contact point, including the UK, Norway, Iceland, and Liechtenstein.⁹⁰⁴

EU ODR Platform

The ODR platform of the European Union was launched in January 2016 and opened to the public on 15 February 2016. It was created to incentivize consumers and traders to use high-quality alternative dispute resolution and enhance their trust in cross-border e-commerce transactions within the EU Single Digital Market (SDM). The platform website is available in 25 languages from 31 countries, including Norway, Iceland, and Liechtenstein, and is managed by the European Commission. Through the platform, consumers and traders can resolve their disputes through direct negotiation or with the help of a registered ADR entity. The platform does not facilitate consumer-to-consumer (C2C) or business-to-business (B2B) disputes. Traders can submit a complaint against a consumer if the legislation of the Member State where the consumer is a resident enables it.⁹⁰⁵

460 ADR entities from all Member States, including Liechtenstein and Norway, are registered on the platform.⁹⁰⁶ All the registered dispute resolution entities offer out-of-court settlement procedures and are pre-approved for quality standards relating to fairness, efficiency, and accessibility. Consumers can use the platform to contact traders directly and have 90 days to resolve the dispute. Also, the platform allows consumers to submit their disputes for a resolution to a certified ADR entity. Consumers and traders have 30 days to agree on an ADR entity.

The ODR complaint form provides three steps that the consumer must follow to complete the claim submission. First, the consumer must insert the trader's details, including the trader's name, email, website, and possibly address. This information may be complex for the consumer to find. For this reason, the platform provides a search engine through which the consumer can retrieve more information about the trader by simply providing the name and website of the trader. Second, the consumer must describe the complaint by providing the purchase's details,

⁹⁰⁴ For a complete list of ODR contact points see <https://ec.europa.eu/consumers/odr/main/?event=main.complaints.odrList>.

⁹⁰⁵ Regulation (EU) No 524/2013, art. 2(2).

⁹⁰⁶ "Dispute resolution bodies," European Commission," accessed September 23, 2020, <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>.

including the type of good and service,⁹⁰⁷ the date of the purchase, the price, and the kind of complaint. A drop-box helps the consumer pick the type of complaint from the following options: defective/caused damage, not conforming with the order, delivery, invoicing/billing, warranty/guarantee, and others. In two free-text boxes, the consumer is invited to describe the complaint in detail and the type of remedy he is seeking. The consumer has the option to attach any documents to the complaint. To complete this section, the consumer has to answer three yes or no questions:

- Have you already contacted the trader about your complaint?
- Have you already tried to reach an out-of-court settlement, or have you taken the other party to court over your complaint?
- Does the trader want to use a specific dispute resolution body?

Third, the consumer must insert his data, which must include his name, email address, phone number, postal code, city, and country. Also, if there is one, the consumer must add the representative's information. Finally, the consumer can choose the language he wants to receive the messages from the ODR form. Once he has completed the ODR complaint form with all the required information, the consumer has two options: a) send the case to the trader to find a solution directly, or b) use a dispute resolution body.⁹⁰⁸ The consumer can also save a draft of the complaint and complete it later. The system notifies the trader of the complaint submission via email, which links to the ODR platform and the complaint information. At this point, the trader can: a) contact the consumer and negotiate a solution. In this case, the parties have 90 days to find a solution. Otherwise, the consumer can still submit the complaint on the ODR platform and try to have the problem resolved with the help of a dispute resolution body or b) agree to have the case handled by a neutral third party. Then, the parties will have 90 days to decide on an ADR body to use; otherwise, once the 30 days have passed, the case is closed

⁹⁰⁷ A drop-box can help the consumer select a type of good and service from the following options: consumer goods, education, energy and water, financial services, general consumer services, health, leisure services, postal services and electronic communications, transport service, and other. A second drop-box helps the consumer narrow down the category of the dispute. For example, if the consumer chooses "Education" from the first drop-box, the second drop-box makes available the following options: schools, language, driving instructions and other private courses, and other.

⁹⁰⁸ "Online Dispute Resolution." European Commission. Accessed September 17, 2020. <https://ec.europa.eu/consumers/odr/main/?consumer-question3=N&complaintType=1&event=main.complaints.new>

on the ODR platform. As previously mentioned, the trader can wait for 30 days without responding and have the case closed.⁹⁰⁹

According to data provided by the European Union, 57% of EU consumers shop online, 33% buy from another EU country, and 21% have problems with online purchases. In the first two years of its implementation, more than 4 million people visited the platform, and more than 50,000 complaints were filed, with an average of 2,000 complaints per month⁹¹⁰. Most complaints regard clothing and footwear purchases, airline tickets, and ICT goods. The following chart shows the top 10 most complained about sectors and the percentage of national and cross-border complaints. Also, it shows that most complaints were domestic, with 55.14% compared to 44.86% of cross-border complaints.

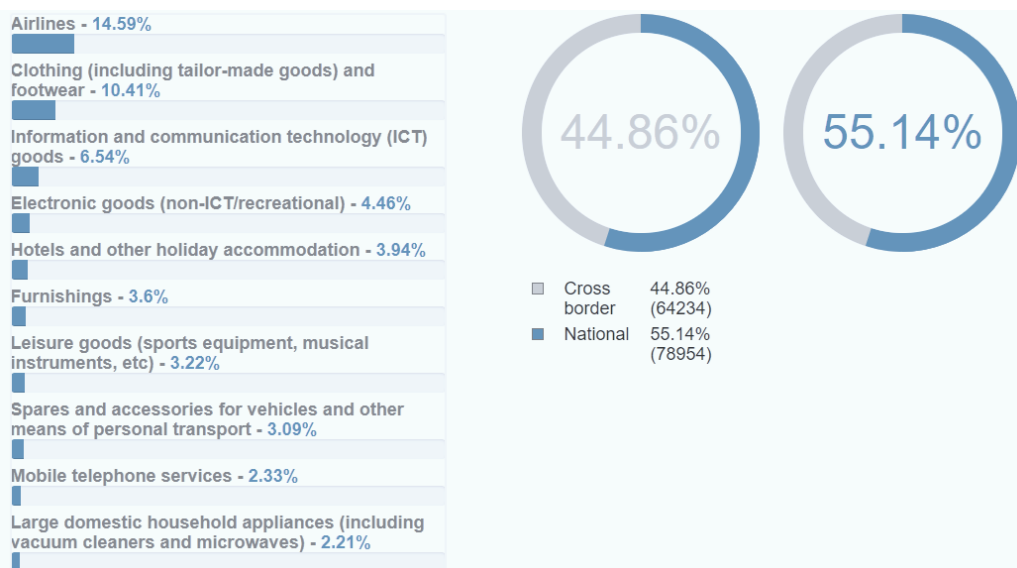


Figure 5.1 Consumer Complaints Submitted through the ODR Platform by Sector

According to the data collected by the Commission, Germany has the most complaints, followed by the UK, France, and Italy.

⁹⁰⁹ Cortes, *The law of Consumer*, 121.

⁹¹⁰ "Online Dispute Resolution," European Commission, accessed September 17, 2020, https://ec.europa.eu/consumers/odr/resources/public2/documents/trader_info_stats/ODR_Trader_Info_stat_EN.pdf.

Table 5.1 EU ODR Platform Procedural Design

Consumers	Registration is not required
Suppliers	Registration required
Type of ODR	Enabled Negotiation – Facilitated settlement
Response Deadline	30 days
Fees	If an ADR entity is used
Type of transactions	Online
Intermediary	ADR entity
Nature of Decision	Non-binding/Binding – It depends on the ADR entity used.

*Table adapted from M. J. Schmidt-Kessen et al. 2020.

EU Reports on the Functioning of the ODR Platform

Since the establishment of the platform, the EU has taken steps to provide detailed reports on the functioning and use of the ODR platform.⁹¹¹ Art. 21 of the Regulation requires the Commission to report yearly to the European Parliament and the Council on the platform’s functioning. The Commission has to provide a detailed report on the application of the Regulation every three years that may include, when necessary, proposals to reform the Regulation. So far, the Commission has published two reports, one in December 2017 and one in December 2018.⁹¹² The first report analyzed complaints generated within the ODR platform’s workflow. It did not consider complaints that were submitted directly to the ADR entities. Instead, the 2018 report analyzes data related to all complaints submitted on the platform between 15 February 2017 and 14 February 2018. In the twelve months covered by the 2018 report, 5 million people visited the platform, confirming a steady growth in visits since the platform’s launch. In its second year of operation (2017-2018), the platform has seen

⁹¹¹ Regarding the obligation to report on the functioning of the ODR platform, art. 21 (2) of the Regulation recites, “By 9 July 2018 and every three years thereafter the Commission shall submit to the European Parliament and the Council a report on the application of this Regulation, including in particular on the user-friendliness of the complaint form and the possible need for adaptation of the information listed in the Annex to this Regulation. That report shall be accompanied, if necessary, by proposals for adaptations to this Regulation.”

⁹¹² The reports are accessible at <https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show>.

an average of 2,700 cases submitted per month, representing a 50% increase over the previous year. The retail sectors with the highest complaints were airlines 13%, clothing and footwear 11%, and ICT goods 8%. Germany and the UK are where consumers submitted the most complaints on the platform, followed by France, Spain, and Italy.⁹¹³ Most of the complaints involved issues with the delivery of the goods (25%), followed by non-conformity with the order (15%) and problems with defective goods (12%). 40% of the cases were related to cross-border issues. Despite the increase in complaints, the data analysis reveals how many complaints (83%) were automatically closed after the 30-day deadline for the consumer and trader to agree on a competent ADR body. Instead, only 2% of cases reached an ADR body after an agreement between the consumer and the trader. According to a new survey run by the Commission among consumers, 37% of consumers were successfully contacted directly by the trader to try and settle the dispute.

Additionally, in 13% of the cases, traders refused to engage in the process on the platform and preferred dealing directly with the consumer. In 4% of the cases, one or both parties withdrew from the procedure, suggesting that the parties reached an agreement. However, this is only speculation since the Commission reported no certain data.

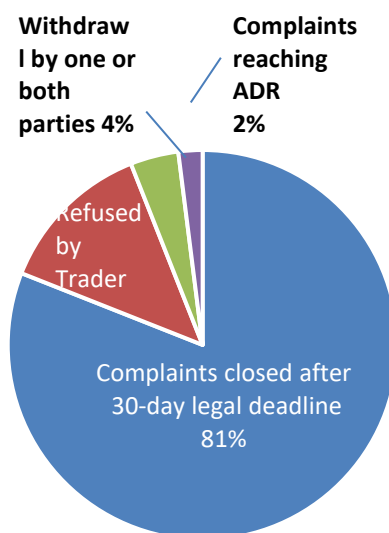


Figure 5.2 Complaint Outcomes

⁹¹³ Germany and the UK are the largest e-commerce markets in the European Union and the top 5 in the world. According to the Global E-Commerce Ranking 2019, the UK shoppers spend annually nearly \$1650 USD per shopper, with an overall market revenue of \$86.45 Billion; Germany accounts for 63.9 million online shoppers who were among some of the first to embrace eCommerce.

*Adapted from the 2018 EU Commission ODR Report

As highlighted by the European Commission in the report on the application of Directive 2013/11/E.U. and Regulation (EU.) No 524/2013, the high number of visitors and complaints submitted to the platform demonstrates consumers' specific interest and satisfaction. However, the low number of disputes transmitted to the competent ADR entities proves two limits of the platform: a) The thirty-day legal deadline within which the parties must agree on an ADR entity to avoid the dismissal of the case represents, in practice, an obstacle to reaching an ADR entity; b) Offering only a procedure that directs disputes to ADR entities through a platform does not respond, or perhaps only partially, to the needs of consumers and users of the platform. To address these limitations, the Commission, after a careful analysis of the data collected on the flow of complaints submitted through the platform, has added more information on the platform's website. Also, it has introduced a feedback system to collect the opinions and reviews of the platform's users. To improve traders' awareness and engagement on the ODR platform, the Commission conducted an ADR/ODR communication campaign resulting in a 54% increase in the number of traders registered on the platform in 2018 and another 24% in the first five months of 2019. However, the trader's engagement in the ODR platform remains low.

Criticisms of the ODR Platform

The ODR platform represents a valid means to facilitate the resolution of B2C e-commerce disputes in the EU internal market. Nevertheless, the platform has been at the center of criticism regarding its limitations and shortcomings. These criticisms and shortcomings are considered here:

- Limited Participation of Businesses:

According to a 2018 EU Commission report, many consumers have resorted to the platform to resolve B2C disputes. In contrast, the participation of online traders in dispute resolution procedures has been very modest. When faced with consumer demands to resolve disputes through ADR procedures, most traders either did not respond or declined to adhere to the procedure. Only 2% of cases did the parties agree to resolve the dispute through ADR, and the request was forwarded to an ADR entity via the platform. 81% of complaints were

automatically closed after the 30-day deadline for the consumer and trader to agree on a competent ADR body.⁹¹⁴ As the Commission pointed out, it is clear that the requirement that the parties agree on an ADR entity before the platform transmits the dispute to that ADR entity acts as an impediment rather than as a facilitation of the ADR procedure.

- Voluntary Participation:

Although the Regulation obliges online traders to indicate the link to the ODR platform on their website,⁹¹⁵ leading consumers to believe that the trader must adhere to the ADR procedure if the consumer requests it, businesses are not obligated to participate.⁹¹⁶ They can opt out or not respond without incurring a penalty. This voluntary participation undermines the platform's effectiveness and limits the number of complaints that can be resolved through the platform.

- Procedure Complexity:

The platform's procedure is relatively complex and can create confusion and frustration among the consumer. The trader and consumer must agree on an ADR entity handling the dispute. The trader must send a preliminary list of the ADR entities competent to the consumer. If the consumer does not agree with any of the entities proposed by the trader, they have to request the platform to provide a new list. The parties have 30 days to agree on the competent ADR entity.⁹¹⁷

- Consumer Rights:

To address the lack of business participation, in 2019, the Commission decided to modify the platform by adding the possibility of a direct dialogue between consumer and trader. The platform allows consumers to settle their disputes directly with traders without the intervention of an ADR entity. If the trader agrees, the consumer can exchange messages through the

⁹¹⁴ 13% of complaints were not automatically closed by the system but traders actively indicated they did not want to engage in the process on the platform. See the 2018 EU Commission Report on the Functioning of the European ODR Platform, https://commission.europa.eu/system/files/2018-12/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf.

⁹¹⁵ Regulation 524/2013/EU, Art. 14.

⁹¹⁶ See Directive 2013/11/EU, Art. 1.

⁹¹⁷ Regulation 524/2013/EU, Art. 9.

platform dashboard and send attachments, such as photos of the product purchased online.⁹¹⁸ The platform thus enables direct negotiation between consumer and trader, adding an essential tool for the consumers in resolving their disputes. However, whether the consumer rights recognized by European legislation are protected in these private negotiations between consumers and traders is questionable. Consumers often enter these negotiations without actual knowledge of their rights. The site of the ODR platform also provides information on consumer rights through information pamphlets.⁹¹⁹ Furthermore, the consumer can contact one of the national ODR contact points and receive support from an ODR advisor. However, one wonders if this information package is sufficient to guarantee and promote a high level of consumer protection required by the European treaties and simultaneously encourage consumer confidence in the internal digital market, as emphasized in the ODR Regulation.⁹²⁰

- Trust in ADR Entities:

Another critical point concerns the trust placed in the ADR entities responsible for resolving the dispute if the consumer and trader agree to entrust the resolution of the dispute to a neutral third party. As reported by the Commission and previously highlighted, there are misconceptions among consumers and traders about ADR entities.⁹²¹ Sometimes, consumers confuse ADR entities with traders' customer service or perceive them as biased parties that favor traders, especially if they are linked to traders' associations. At the same time, traders perceive these ADR entities as centers that represent the interests of consumers and, therefore, are biased.⁹²² The diversity of ADR landscapes, models, and procedures within the Member States complicates the situation. It makes it challenging for consumers and traders to understand which ADR entity to choose. Furthermore, the problem arises of ensuring that qualified bodies carry out ADR procedures with qualitative standards and, again, the parties, especially consumers, are informed about their rights. This considerably undermines consumer confidence in ADR proceedings and certainly does not encourage traders to participate in alternative forms of dispute resolution.

⁹¹⁸ "Online Dispute Resolution | European Commission," European Commission | Choose Your Language | Choisir Une Langue | Wählen Sie Eine Sprache, accessed March 1, 2022, <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register>.

⁹¹⁹ European Commission, "EU Consumer Rights," European Commission | Choose Your Language | Choisir Une Langue | Wählen Sie Eine Sprache, accessed March 2, 2022, https://ec.europa.eu/consumers/odr/resources/public2/documents/leaflet_for_traders/traderleaflet_web_en.pdf

⁹²⁰ Dalla Bontà, "Una giustizia."

⁹²¹ 2019 EU Commission Report on the ADR Directive.

⁹²² Cortés, *The New Landscape*.

- Ineffective ODR Redress Mechanism:

The platform does not constitute an actual ODR mechanism. It represents only a communication and information exchange tool that allows consumers to negotiate a solution with traders directly through a chat portal or through an ADR body. Furthermore, the procedure does not necessarily take place online. The ODR Regulation does not require the ADR procedure to be carried out online. It could also take place offline.⁹²³ Also, it lacks authority and enforcement mechanisms to force online traders to participate in the ADR procedure and comply with the outcome of an ADR settlement.⁹²⁴ This weakens the platform's ability to provide adequate redress, as businesses that refuse to participate or comply with resolutions can go unpunished.

5.11 REGULATION (EU) 2022/2065: THE DIGITAL SERVICES ACT

In response to the increasing dominance of digital giants (e.g., Amazon, Google, Facebook, etc.), in 2022, the EU adopted two pieces of legislation ('The Digital Service Pack') to balance their platforms' power and dominant position, regulating their practices and providing a more competitive, transparent, and safer digital space. The Digital Service Pack consists of Regulation (EU) 2022/1925 ('The Digital Markets Act') and Regulation (EU) 2022/2065 ('The Digital Services Act'). The two bills set standards for how the tech industry should operate and provide services in the EU, in line with the EU's fundamental rights and values.⁹²⁵

The Digital Markets Act (DMA) was signed into law by the European Parliament and the Council of the EU in September 2022. The DMA was enacted to ensure a contestable and fair digital market by imposing a list of obligations on large platforms to prevent them from imposing unfair conditions on businesses and consumers. It applies to core platform services⁹²⁶ provided or offered by gatekeepers to businesses and end users established or located in the EU. Art. 3 of Regulation (EU) 2022/1925 establishes the objective criteria for qualifying large

⁹²³ Art. 10(d) of the ODR Regulation 524/2013 does not require the ADR entity to conduct the procedure through the ODR platform.

⁹²⁴ Schmidt-Kessen, Nogueira, and Marta, "Success of Failure?"

⁹²⁵ "Digital Services: Landmark Rules Adopted for a Safer, Open Online Environment | News | European Parliament," last modified May 7, 2022, <https://www.europarl.europa.eu/news/en/press-room/20220701IPR34364/digital-services-landmark-rules-adopted-for-a-safer-open-online-environment>.

⁹²⁶ See art. 2(2) for a definition of 'core platform service.'

online platforms as "gatekeepers." According to the art., a core service platform is designated as an essential gateway when it significantly impacts the internal market and enjoys or foresees to enjoy in the future an entrenched and durable position. Thus, gatekeepers are entities that greatly influence the EU internal market and function as a 'gateway' for businesses to reach end users and consumers. The Regulation lays out a series of "do's" and "don'ts" gatekeepers must comply with in their daily operations. Art. 5 provides obligations for gatekeepers towards end users and third parties. They include obligations concerning using, processing, and combining end users' personal data without their consent,⁹²⁷ preventing business users from offering their products or services at a lower price on other online platforms or their website,⁹²⁸ precluding business users from informing, promoting offers to, and concluding contracts with end users already acquired through the gatekeeper or other channels,⁹²⁹ and preventing or restricting business or end users from contacting any relevant authorities to raise issues of non-compliance with the law.⁹³⁰ Art. 6 introduces a series of obligations pertinent to consumer protection. It prohibits the use of business users' data that is not publicly available to compete against them;⁹³¹ it forces gatekeepers to allow end users to easily un-install any software applications on the operating system of the gatekeeper;⁹³² it prohibits gatekeepers from treating their products and services more favorably in ranking than similar products and services of third parties;⁹³³ it ensures that gatekeepers do not restrict the ability of end users to switch between, and subscribe to, different software applications and services;⁹³⁴ it obliges gatekeepers to allow interoperability with hardware and software features;⁹³⁵ it ensures, free of charge, easy data portability for end users.⁹³⁶ Additional obligations are set in art.s 7, 14 and 15. It has been argued that these developments may improve consumer rights by giving consumers a real choice when selecting and using digital services. However, DMA focuses primarily on platforms and business users, while consumers are treated as passive end users rather than key players in the digital market.⁹³⁷

⁹²⁷ Regulation (EU) 2022/1925, art. 5(2).

⁹²⁸ *Ibid.*, art. 5(3).

⁹²⁹ *Ibid.*, art. 5(4).

⁹³⁰ *Ibid.*, art. 5(6).

⁹³¹ *Ibid.*, art. 6(2).

⁹³² *Ibid.*, art. 6(3).

⁹³³ *Ibid.*, art. 6(5).

⁹³⁴ *Ibid.*, art. 6(6).

⁹³⁵ *Ibid.*, art. 6(7).

⁹³⁶ *Ibid.*, art. 6(9).

⁹³⁷ Anna Moskal, "Digital Markets Act (DMA): A Consumer Protection Perspective," *European Papers*, last modified January 31, 2023, <https://www.europeanpapers.eu/en/europeanforum/digital-markets-act-consumer-protection-perspective>.

Regulation (EU) 2022/1925 establishes an enforcement framework to ensure effective implementation and compliance with the DMA's provisions. Gatekeepers must implement measures to ensure and demonstrate compliance with the obligations in Art.s 5, 6, and 7.⁹³⁸

They must provide the Commission with a report describing the measures implemented in a detailed and transparent manner within six months after their designation under art. 3.⁹³⁹

Independent external experts and auditors, along with officials of national competent authorities, will assist the European Commission in monitoring the obligations and enforcing the regulation.⁹⁴⁰ The DMA provides penalties for non-compliance, including fines of up to 10% of a company's worldwide annual turnover, where the Commission finds that the gatekeeper fails intentionally or negligently to comply with the provisions outlined in art. 30(1).

The DMA aims to bring significant benefits to both businesses and consumers, including a fair business environment for business users who depend on gatekeepers, new opportunities to compete for innovators and technology start-ups, more and better services to choose from, and fairer prices for consumers, including more options to switch providers. Although DMA aims to reduce the power of the tech giants, increase competition, and promote innovation, it is not exempt from criticisms and concerns regarding its application and enforcement. The regulation focuses on a specific group of digital platforms categorized as "gatekeepers" subject to several obligations and limitations. This categorization could be difficult and complex to achieve in a constantly evolving digital market and a fast and changing technological environment. Furthermore, the strict regulations provided by the Regulation for gatekeepers could discourage new start-ups from entering the market instead of promoting innovation and competition. Another concern could arise from the challenges concerning the effective enforcement of the DMA. The digital market operates in a borderless space, and it could be challenging to enforce the provisions of the DMA and easier for smart tech companies to evade regulations.

The Digital Services Act (DSA), which amended Directive 2000/31/EC, came into force on 16 November 2022. It was enacted to contribute to the better functioning of the EU internal market for intermediary services by setting out harmonized rules for a safe, predictable, and trusted

⁹³⁸ Regulation (EU) 2022/1925, art. 8(1).

⁹³⁹ Ibid., art. 11(1).

⁹⁴⁰ Regulation (EU) 2022/1925, art. 26(1)(2).

online environment that facilitates innovation and protects consumer rights.⁹⁴¹ The DSA regulates the obligations of digital services, acting as intermediaries in connecting consumers with goods, services, and content according to their size and impact on the online environment.⁹⁴² The DSA offers to strengthen the responsibility of digital platforms for published content, ensuring that content is legal, not harmful to users' rights and that it respects intellectual property rights. It gives users more control over what they see online and better information about recommended content.⁹⁴³ It protects them from illegal and harmful content (e.g., political disinformation) while safeguarding rights and freedoms, such as freedom of expression and information. The DSA accelerates procedures for removing illegal content and improves public control over online platforms.⁹⁴⁴ It requires online intermediaries to equip platforms with easy-to-access and user-friendly mechanisms to enable users to notify them electronically of the presence of illegal content on their services.⁹⁴⁵ It gives 'trusted flaggers'⁹⁴⁶ a priority channel to report illegal content, to which platforms must react with priority.⁹⁴⁷ When platforms decide to remove, restrict access to, or demote specific content, they must provide users with a 'statement of reasons' for their decisions.⁹⁴⁸ Such a statement should include clear and user-friendly information on the possibilities for redress available to users regarding the decisions.

Of particular significance is the requirement for providers of online platforms to adopt effective, easy-to-access, and user-friendly internal handling-complaint systems enabling users to lodge complaints electronically and free of charge against providers' decisions to remove or restrict access to illegal content or content that violates the platform's terms of service.⁹⁴⁹ The DSA requires providers to handle complaints promptly, non-discriminately, diligently, and non-arbitrary.⁹⁵⁰ Providers must reverse their decisions without unnecessary delay if

⁹⁴¹ Regulation (EU) 2022/2065, art. 1(1).

⁹⁴² The DSA divides intermediary service platforms into four categories: Intermediary services, hosting services, online platforms, and very large platforms.

⁹⁴³ Regulation (EU) 2022/2065, art. 14.

⁹⁴⁴ *Ibid.*, arts. 9, 10, and 11. The DSA requires Member States to designate by February 2024 authorities or Digital Services Coordinators to supervise compliance of the services established on their territory with the new rules and to participate in the EU cooperation mechanism.

⁹⁴⁵ *Ibid.*, art. 16.

⁹⁴⁶ According to Art. 22 (2), The status of 'trusted flagger' is awarded by the Digital Services Coordinator of the Member State in which the applicant is established to any applicant that has demonstrated particular expertise and competence to detect, identify and notify illegal content; it is independent of any provider of online platforms and performs its activities to submit notices diligently, accurately and objectively.

⁹⁴⁷ *Ibid.*, art. 22 (1).

⁹⁴⁸ *Ibid.*, art. 17.

⁹⁴⁹ *Ibid.*, art. 21 (1).

⁹⁵⁰ *Ibid.*, art. 16 (6).

complaints contain sufficient grounds to believe that decisions are unfounded or the content in question is not illegal or is not against the platform's terms and conditions.⁹⁵¹ For complaints not resolved through the internal complaint-handling system, providers must inform complainants of the possibility of using out-of-court dispute resolution and other redress remedies.⁹⁵² In this regard, the DSA mandates the use of out-of-court dispute settlements to resolve disputes regarding decisions made under art. 20. It establishes the right of platform users and persons or entities who have submitted reports concerning harmful or illegal content to choose any certified out-of-court settlement body to resolve such disputes.⁹⁵³ However, online platform providers can refuse to engage with an out-of-court dispute settlement body if the dispute has already been resolved.⁹⁵⁴ Also, users can opt, at any time, to resolve these disputes before a court. The Digital Services Coordinator of the Member State, where the out-of-court dispute settlement body is established, certifies the body for a maximum renewable period of five years if it meets specific requirements. These requirements include the impartiality, independence, and expertise of the resolution body, easy-to-access electronic means to initiate a dispute settlement, and clear and fair procedural rules that are easily and publicly accessible.⁹⁵⁵ Certified out-of-court dispute settlement bodies must make their decisions available to the parties within a reasonable time and no later than 90 calendar days after receiving the complaint. However, they do not have the power to impose a binding dispute settlement on the parties.⁹⁵⁶ Charges are envisaged if the body decides against the online platform provider, who will have to bear the fees charged by the dispute resolution body and reimburse the user or whoever has submitted the claim for the expenses incurred during the procedure.⁹⁵⁷

The DSA provides a standard set of rules on intermediaries' obligations and accountability across the EU single market, favoring new opportunities to deliver digital services while ensuring high levels of protection to all users. For this research, it is important to note that the DSA has highlighted the significance of providing greater protection to online platform users through appropriate remedies that safeguard their rights. These remedies contain mandatory procedural mechanisms online platforms must implement in their content moderation

⁹⁵¹ *Ibid.*, art. 22 (4).

⁹⁵² *Ibid.*, art. 20 (5).

⁹⁵³ *Ibid.*, art. 21 (1).

⁹⁵⁴ *Ibid.*, art. 22 (2).

⁹⁵⁵ *Ibid.*, art. 21 (4).

⁹⁵⁶ *Ibid.*, art. 21 (2).

⁹⁵⁷ *Ibid.*, art. 21 (5).

processes, including complaint-handling systems and out-of-court dispute settlement. Such procedural instruments are essential in improving users' access to effective redress mechanisms.

5.12 SUMMARY

One of the main objectives of the EU after its enlargement in 2004 was to stimulate the single internal market by trying to create regulatory instruments that would foster competition and increase consumer confidence. High costs and length of court settlements undermine consumer confidence and prevent consumers from taking advantage of the Single Market. The EU has recognized that well-functioning consumer ADR and ODR can help tackle this issue by providing consumers with new instruments to resolve domestic or cross-border disputes concerning purchases made online or offline. One means to remove obstacles to justice and ensure adequate remedies has been to promote the use of ADR and recognize the role of technology in providing out-of-court remedies. The 2013/11/EU Directive was enacted to increase ADR availability and ensure that consumers have access to "high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union."⁹⁵⁸ Regulation 524/2013 sought to facilitate the resolution of e-commerce disputes arising from online sales or service contracts between consumers and traders by providing a European ODR platform that was easily accessible and usable. Well-functioning ADR and ODR across the EU could boost consumer confidence and open new business opportunities driving economic growth.

However, six years after the launch of the ODR platform, the ADR/ODR framework is underused and has yet to reach its full potential. The ODR platform lacks a negotiation stage for disputants, such as assisted negotiated tools. This lack of automated negotiation tools and the absence of EU forces in making participation in the ODR process mandatory for business has reduced the effectiveness of the EU ODR platform.⁹⁵⁹

⁹⁵⁸ EU Directive 2013/11/UE, art. 2(3).

⁹⁵⁹ Julia Hörnle, "Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?," *Queen Mary School of Law Legal Studies Research Paper*, no. 122 (September 2012): xx, doi:10.2139/ssrn.2154214.

Moreover, it must be concluded that the same causal link between strengthening the ADR/ODR tool and trust in cross-border trade appears rather tenuous and not yet proven.

The spread of ADR/ODR in Europe has inevitably followed a different path from what happened in the United States. The reasons for this difference are easily found in its peculiar conformation, containing a diversified panorama of cultural, social, and, above all, legal contexts, a different way of understanding how to protect the consumer.

The discussion, therefore, should be conducted on two parallel tracks: the first relating to the initiatives of the European institutions, then culminating in the 2008/52 / EC directive, and the second focused on the implementation of EU regulations by individual member states.

CHAPTER SIX

E-COMMERCE AND TRUST: ASSURANCE MECHANISMS AND A STRUCTURAL ASSURANCE (SA) MODEL PROPOSAL

6.1 INTRODUCTION

This chapter analyzes the importance of trust in e-commerce and, more specifically, consumer trust when shopping online. It starts with conceptualizing the notion of “trust” and identifying the elements that must be present for trust to occur. It investigates how “traditional trust” differs from “online trust” to determine the key factors and main drivers of consumers’ online purchasing uncertainty.

The chapter reflects on the importance of assurance mechanisms in gaining consumer trust. It describes several assurance mechanisms that combined provide structural assurance, influencing consumer intentions and purchase behavior. These mechanisms will be arranged into three trust-based pillars: Preventive Dispute Mechanisms, Security and Data Protection, and Complaint Handling Services and ODR.

Next, the chapter investigates the use of ODR mechanisms to assess, communicate, and establish trust in the e-commerce environment while resolving B2C e-commerce disputes and the role of ODR. As noted by Rule and Friedberg, implementing “online dispute resolution on a site or service in a manner that promotes trust needs to consider ODR as just one tool in a broader toolbox of trust-building tools and techniques.”⁹⁶⁰ It will be claimed that ODR systems are fundamental to building consumer trust in e-commerce transactions. They promote competition among online businesses by providing consumers with the necessary remedies in case their rights are violated and guaranteeing fair, efficient, and affordable access to justice. ODR is an essential part of a strategy.

⁹⁶⁰ Colin Rule and Larry Friedberg, “The appropriate role of dispute resolution in building trust online,” *Artificial Intelligence and Law* 13, no. 2 (2005): 193, doi:10.1007/s10506-006-9011-3.

The second part of the chapter proposes a Structural Assurance (SA) model that, starting from the SA model identified by Zucker and Sha, includes ODR as an institutional trust mechanism in its dual function of resolving B2C disputes and increasing consumer confidence in the e-commerce market.

Trust

Trust is fundamental to all human relationships, from people to work colleagues, citizens and governments, and consumers and businesses.

In literature, many are interpretations of the concept of “trust.” In his art. on the nature of trust, Guido Möllering defines trust “as a state of favorable expectation regarding other people’s actions and intentions.”⁹⁶¹ David Shoorman, Mark Davis, and Roger Mayer define “trust as the willingness to be vulnerable to another party when that party cannot be controlled or monitored.”⁹⁶² Many of these interpretations focus on specific elements that have to be present for trust to occur: a) two actors, the trustor, and the trustee; b) vulnerability (risky or uncertain situations); c) a context (trust depends on the context of the situation).⁹⁶³

According to Cynthia Johnson-George and Walter Swap, the willingness to take risks is one of the characteristics common to all situations in which trust is involved.⁹⁶⁴ The desire to take risks presumes a certain degree of vulnerability. A party should be willing “to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party.”⁹⁶⁵ In a certain sense, we entrust ourselves to others based on our propensity to trust

⁹⁶¹Guido Möllering, “The Nature of Trust: From Georg Simmel to a Theory of Expectation, Interpretation and Suspension,” *Sociology* 35, no. 2 (2001): 404. doi:10.1017/s0038038501000190.

⁹⁶²Roger C. Mayer and Mark B. Gavin, “Trust in Management and Performance: Who Minds the Shop While the Employees Watch the Boss?,” *Academy of Management Journal* 48, no. 5 (2005): 874, doi:10.5465/amj.2005.18803928.

⁹⁶³ Antonina Bauman and Reinhard Bachmann, “Online Consumer Trust: Trends in Research,” *Journal of technology management & innovation* 12, no. 2 (2017), doi:10.4067/s0718-27242017000200008.

⁹⁶⁴ Cynthia Johnson-George, and Walter Swap, “Measurement of Specific Interpersonal Trust: Construction and Validation of a Scale to Assess Trust in a Specific Other,” *Journal of Personality and Social Psychology*, 43, no. 6 (1982): 1306-1317.

⁹⁶⁵ Roger C. Mayer, James H. Davis, and F. David Schoorman, “An Integrative Model of Organizational Trust,” *The Academy of Management Review*, 20, no. 3 (1995): 709-734.

people in general and the perception that the trustee we are dealing with is trustworthy⁹⁶⁶ and will not take advantage of us. Trust, in this case, is defined as “behavioral intentions.” Other researchers consider trust as a set of beliefs that others “will behave in a socially acceptable manner by showing appropriate integrity, benevolence, and ability.”⁹⁶⁷

In many social and business interactions, trust results from a combination of intentions and beliefs, and in many business activities, trust is crucial because it reduces social uncertainty. Social uncertainty can be defined as “the degree to which a person’s uncertainty about (i.e., inability to predict precisely) their future states and actions depend on their uncertainty about the states and actions of others.”⁹⁶⁸ It has been shown that familiarity is vital in reducing social uncertainty. A certain familiarity with a trustworthy vendor increases people’s trust in business interactions and transactions. Therefore, familiarity and reducing social uncertainty are critical elements in building business confidence.

Strategies for Establishing Trust in E-Commerce

According to recent statistics, the global e-commerce market has grown exponentially, reaching 4.9 trillion US dollars in sales.⁹⁶⁹ E-commerce is attracting more and more consumers who find online shopping easy and convenient. However, many online retail sellers struggle to attract consumers due to the difficulty of building trust between sellers and buyers. According to the Digital Economic Report of the United Nations Conference on Trade and Development (UNCTAD), B2C only accounted for 13% of global e-commerce between 2016 and 2017.

⁹⁶⁶ Roger C. Mayer and James H. Davis, “The Effect of the Performance Appraisal System on Trust for Management: A Field Quasi-Experiment,” *Journal of Applied Psychology*, 84, no. 1 (1999): 124.

⁹⁶⁷ David Gefen and Tsipi Heart, “On the need to include national culture as a central issue in e-commerce trust beliefs,” 2.

⁹⁶⁸ Oriell FeldmanHall, and Amitai Shenhav, “Resolving Uncertainty in a Social World,” *Nature Human Behaviour*, 3, no. 5 (2019): 426–435.

⁹⁶⁹ “Global Ecommerce 2020,” EMarketer, accessed November 17, 2020, <https://www.emarketer.com/content/global-ecommerce-2020>; “Global Retail E-commerce Market Size 2014-2023,” Statista, last modified February 2, 2022, <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/#:~:text=In%202021%2C%20retail%20e%2Dcommerce,7.4%20trillion%20dollars%20by%202025.>

Several studies show that it is essential to consider safety, trust, privacy, and quality of goods to influence consumer online purchase behavior. Among these, trust appears to be the most critical factor.⁹⁷⁰

In the offline world, trust is built upon physical relationships between two sides who can locate each other. Even when exchanges occur remotely, the parties in the offline world perceive the physical presence of additional market players, as they know where they are located. It helps them conceive the counterpart as an existing physical party. Understanding a business's physical existence and location gives consumers a sense of security, incentivizing them to conclude a transaction. In electronic commerce, a buyer must trust a seller with whom he has no physical interaction and, therefore, cannot count on those physical and social clues that derive from an exchange between two people.⁹⁷¹

The potential perceived risk in e-commerce is greater, and trust is more critical than in traditional commerce transactions due to higher uncertainty. Antonina Bauman and Reinhard Bachmann pose a crucial question regarding online trust. They ask, "How does one know which online retailer (e-retailer) to trust and which e-retailer not to trust?"⁹⁷² When a consumer buys online, the expectation is that the site through which the purchase is made is reliable and efficient and that the seller behaves honestly and professionally. The risk of purchasing online is more significant as consumers share critical personal information and sensitive credit card data before receiving the goods or services.

Furthermore, the nature of the online transaction can facilitate opportunistic situations. Suppose the supplier accepts the payment but does not deliver the product or delivers the wrong product. Or suppose the supplier does not return a faulty product or does not send a refund on a product the consumer never received.⁹⁷³ Online trust assurance helps consumers mitigate concerns about privacy violations or security issues.⁹⁷⁴

⁹⁷⁰ See the 2017 CIGI-Ipsos Global Survey on Internet Security and Trust. "CIGI-Ipsos Global Survey on Internet Security and Trust," Centre for International Governance Innovation, last modified 2017, <https://www.cigionline.org/cigi-ipsos-global-survey-internet-security-and-trust/>.

⁹⁷¹ Jun Chen and Sally Dibb, "Consumer trust in the online retail context: Exploring the antecedents and consequences," *Psychology & Marketing* 27, no. 4 (2010): 2-45, doi:10.1002/mar.20334.

⁹⁷² Bauman and Bachmann, "Online Consumer Trust," 68.

⁹⁷³ Bauman and Bachmann, "Online Consumer Trust."

⁹⁷⁴ Yeolib Kim and Robert A. Peterson, "A Meta-analysis of Online Trust Relationships in E-commerce," *Journal of Interactive Marketing* 38 (2017): 45, doi:10.1016/j.intmar.2017.01.001.

According to a Global Online Shopping Survey conducted by MarkMonitor in 2018, 65% of consumers were concerned with hackers stealing details; 59% were concerned with identity theft; 56% were concerned with scammers stealing money, and 33% were concerned with identity theft buying something by mistake.⁹⁷⁵ Data and statistics regarding online fraud confirm consumer concerns. As the Federal Trade Commission (FTC) reported, from 2017 to 2018, credit card fraud increased by 24%, and online shopping and payment account fraud increased by 18%.⁹⁷⁶ Furthermore, the European Consumer Centres Network (ECC-Net) reported that 12% of internet users across the EU had experienced online fraud, and 8% have fallen victim to identity theft.⁹⁷⁷

While online trust may not be that different from face-to-face trust, one could argue that the online relationship of trust between the consumer and seller extends to a third party (i.e., the website or platform created by another human).⁹⁷⁸ The intermediary provides the infrastructure that allows buyers and sellers to make transactions. A buyer needs to trust not just the seller but also the intermediary.

In 2018, a study conducted by the Kookmin University of Seoul investigated the effects of trust and distrust on a buyer's purchase intentions. The study found that the buyer's trust in the intermediary also positively affects the buyer's trust in the seller, influencing the buyer's purchase intentions. Conversely, the buyer's distrust of the intermediary has a negative impact on the buyer's perception of risk, thus affecting the purchase intention.⁹⁷⁹

Recent surveys of internet users show that a lack of trust is why people choose not to shop online.⁹⁸⁰ Other studies have empirically demonstrated a direct correlation between trust and

⁹⁷⁵ MarkMonitor - Domain Management Solutions, accessed November 16, 2020, https://www.markmonitor.com/download/report/MarkMonitor_Online_Shopping_Barometer-q4-2018.pdf?cid=pr.

⁹⁷⁶ Federal Trade Commission | Protecting America's Consumers, accessed November 18, 2020, <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book->

⁹⁷⁷ "Fraud in Cross-Border E-Commerce," European Commission, accessed November 18, 2020, https://ec.europa.eu/info/sites/info/files/online_fraud_2017.pdf.

⁹⁷⁸ *Ibid.*, 69.

⁹⁷⁹ Suk-Joo Lee et al., "Trust and Distrust in E-Commerce," *Sustainability* 10, no. 4 (2018): 1-19, doi:10.3390/su10041015.

⁹⁸⁰ See the 2018 and 2019 CIGI-Ipsos Global Survey on Internet Security and Trust, <https://www.cigionline.org/internet-survey-2018>

purchase intention.⁹⁸¹ In 2018, twelve percent of global internet users reported making fewer online purchases. Frederick Reichheld and Phil Schefter pointed out that what determines online purchases is not the price but the trust. To gain consumer loyalty, one must first earn⁹⁸² and “enhance customer’s trust. A supplier should promote the customer’s trust in the supplier.”⁹⁸³

The development of trust in e-commerce is pivotal. However, tricky given the complexity and uncertainty of the online environment compared to the traditional face-to-face one. Building consumer trust and promoting confidence in the Internet market can challenge many online businesses. Many studies have investigated specific determinants or factors influencing online consumer trust in B2C e-commerce.⁹⁸⁴

Others have investigated the role of structural assurances such as third-party affiliation, trust marks, guarantee policies, and encryption mechanisms in reducing system-related uncertainty and building trust.⁹⁸⁵

Hence, trust in e-commerce must be based on different assumptions, including product and service information, reputation systems, consumer reviews, privacy policies, security technology, and dispute resolution remedies. Consumers are becoming experts in online shopping by researching the best deals and security, online reviews, shipping, and delivery policies. Almost two-thirds (63%) of respondents say they check the trustworthiness of

⁹⁸¹ Jayani Athapaththu and Dushyantha Kulathunga, “Factors Affecting Online Purchase Intention: A Study Of Sri Lankan Online Customers,” *International Journal of Scientific & Technology Research* 7, no. 9 (2018), 120-128.

⁹⁸² Frederick F. Reichheld and Phil Schefter, “E-Loyalty: Your Secret Weapon on the Web,” *Harvard Business Review* 78, no. 4 (2000), 105-113.

⁹⁸³ Papassapa Rauyruen and Kenneth E. Miller, “Relationship quality as a predictor of B2B customer loyalty,” *Journal of Business Research* 60, no. 1 (2007): 21, doi:10.1016/j.jbusres.2005.11.006.

⁹⁸⁴ Ismaila Bojang et al., “Determinants of trust in B2C e-commerce and their relationship with consumer online trust,” *AIP Conference Proceedings* 1910, 020001, 2017, doi:10.1063/1.5013938; Jayani Athapaththu and Dushyantha Kulathunga, “Factors Affecting Online Purchase Intention: A Study Of Sri Lankan Online Customers,” *International Journal of Scientific & Technology Research* 7, no. 9 (2018), 120-128; Yi J. Lim et al., “Factors Influencing Online Shopping Behavior: The Mediating Role of Purchase Intention,” *Procedia Economics and Finance* 35 (2016): 401-410, doi:10.1016/s2212-5671(16)00050-2; Chung-Hoon Park and Young-Gul Kim, “Identifying key factors affecting consumer purchase behavior in an online shopping context,” *International Journal of Retail & Distribution Management* 31, no. 1 (2003): 16-29, doi:10.1108/09590550310457818; D. Harrison McKnight and Norman L. Chervany, “What Trust Means in E-Commerce Customer Relationships: An Interdisciplinary Conceptual Typology,” *International Journal of Electronic Commerce* 6, no. 2 (2001): 35-59, doi:10.1080/10864415.2001.11044235.

⁹⁸⁵ Lisa Van der Werff, Colette Real, and Theodore G. Lynn, “Individual Trust and the Internet,” *The Routledge Companion to Trust*, 2018, 391-407, doi:10.4324/9781315745572-27.

websites by looking at online reviews, 43% say they check for SSL certificates, 43% look at the returns policy, and 39% analyze the grammar and spelling on the website.⁹⁸⁶

E-commerce represents an uncertain and risky environment for the consumer. It is essential to develop strategies to increase consumer confidence and systems that can help consumers assess their level of trust in e-commerce transactions and vendors when shopping online.⁹⁸⁷

Lack of consumer confidence in e-commerce vendors is a fundamental factor that induces consumers to avoid online purchases. Surveys have shown that lack of trust is a top reason that keeps consumers from purchasing goods and services online. According to the United Nations Conference on Trade and Development (UNCTAD) 2017 Global Survey, among those who never shop online, 49% of them identified a lack of trust as the main reason they do not shop online.⁹⁸⁸ The latter UNCTAD 2019 survey confirmed such a trend.

Consumers' perception of trust can influence their purchase intentions from an online vendor. Mary Anne Patton and Audun Jøsang identify three critical factors that affect consumer confidence in e-commerce: security risks, privacy concerns, and the lack of reliability of e-commerce processes in general.⁹⁸⁹ Along the same lines are Miyazaki and Fernandez. They identify product and service, security, and privacy concerns as the three focal problems hindering online consumers' purchasing decisions.⁹⁹⁰

Online vendors and traders have created and utilized several assurance mechanisms such as third-party certification, web assurance seals, money-back guarantees, and reputation systems to alleviate consumers' concerns and build confidence in online shopping. However, a large majority of them have not used these mechanisms in a structured way, thus failing to exploit the potential of these tools when applied together. Applying structural assurance (SA) in electronic commerce can bring significant advantages by positively influencing consumer confidence and purchasing intentions. This research helps highlight these benefits.

⁹⁸⁶ "MarkMonitor."

⁹⁸⁷ Mary A. Patton and Audun Jøsang, "Technologies for Trust in Electronic Commerce," *Electronic Commerce Research* 4, no. 1/2 (2004): 9-21.

⁹⁸⁸ Centre for International Governance Innovation, "Global Survey."

⁹⁸⁹ *Ibid.*, 2.

⁹⁹⁰ Anthony D. Miyazaki and Ana Fernandez, "Consumer Perceptions of Privacy and Security Risks for Online Shopping," *Journal of Consumer Affairs* 35, no. 1 (2001): 27-44, doi:10.1111/j.1745-6606.2001.tb00101.x.

6.2 ASSURANCE MECHANISMS, STRUCTURAL ASSURANCE, AND CONSUMER TRUST

Structural assurances (SAs) are structures created in an online environment to make the online experience less risky.⁹⁹¹ SA represents an institutional trust mechanism where “a buyer perceives robust structures that ensure a successful e-commerce transaction will occur under safe and secure circumstances.”⁹⁹² Wei Sha states, “SA can provide a sense of protection for consumers against possible losses, such as loss of privacy, identity, and money, from a web vendor’s possible opportunistic behaviors.”⁹⁹³ It is hypothesized that the effects of SA can positively influence consumer confidence and purchasing intentions, particularly when encountering unfamiliar web vendors.⁹⁹⁴ However, empirical studies on the impact of SA on consumer confidence have reported different results. However, other studies show that different trust mechanisms may form various aspects of SA and positively influence consumer trust.⁹⁹⁵ Zucker and Sha identified several assurance mechanisms that combined provide structural assurance, including vendor guarantees, seals of approval, and credit card guarantees.

However, along with these instruments, other mechanisms provide assurance, improve consumer trust, and influence purchase behavior. Security and data protection can be critical assurance mechanisms to gain consumer trust. When shopping online, consumers must trust technology is safe and secure to share sensitive information and personal data. Also, complaint-handling services and ODR have emerged to assure customers that measures are in place if something goes wrong with their purchase or transaction.

⁹⁹¹ Patrick McCole et al., “The role of structural assurance on previous satisfaction, trust and continuance intention,” *Information Technology & People* 32, no. 4 (2019): 8, doi:10.1108/itp-08-2017-0274.

⁹⁹² Lee, “Trust and Distrust,” 8.

⁹⁹³ Wei Sha, “Types of structural assurance and their relationships with trusting intentions in business-to-consumer e-commerce,” *Electronic Markets* 19, no. 1 (2008): 43-44, doi:10.1007/s12525-008-0001-z.

⁹⁹⁴ Manel Khadraoui and Jamel-Eddine Gharbi, “Initial trust toward an unknown website,” *2013 World Congress on Computer and Information Technology (WCCIT)*, 2013, 90-97, doi:10.1109/wccit.2013.6618704; Mary A. Eastlick and Sherry Lotz, “Cognitive and institutional predictors of initial trust toward an online retailer,” *International Journal of Retail & Distribution Management* 39, no. 4 (2011): 234-255, doi:10.1108/09590551111117527; Tao Zhou, “An empirical examination of initial trust in mobile banking,” *Internet Research* 21, no. 5 (2011): 527-540, doi:10.1108/10662241111176353;

⁹⁹⁵ K.M. Kimery and M. McCord, “Third-party assurances: the road to trust in online retailing,” *Proceedings of the 35th Annual Hawaii International Conference on System Sciences*, 2002, doi:10.1109/hicss.2002.994158.

The following sections propose and develop a theoretical explanation through a literature review of how these mechanisms influence consumers' trust and purchase intentions by providing assurance.

These mechanisms will be arranged into three large groups or trust-based pillars:

- Preventive Dispute Mechanisms (service guarantees, reputation systems, seals of approval)
- Security and Data Protection
- Complaint Handling Services and ODR

Particular attention will be given to Preventive Dispute Mechanisms as e-commerce vendors mostly use them to prevent the emergence of disputes and to resolve issues close to the delivery of products or services. Offering such mechanisms is essential to gaining consumer trust and loyalty.

This study contributes to the SA and consumer trust research by proposing ODR as an assurance mechanism. It also presents a third trust-based pillar comprising two independent support mechanisms (internal complaint handling services and external ODR). This pillar should be considered when creating SA models that positively affect consumer confidence and trusting intentions.

6.3 PREVENTIVE DISPUTE MECHANISMS

Dispute prevention mechanisms allow consumers and businesses to prevent the emergence of a dispute and the consequent need to resolve it. Over time, many online companies have adopted preventive procedures to increase consumer confidence. Dispute prevention mechanisms⁹⁹⁶ can be used to prevent disputes and improve consumer confidence in online vendors. This study identifies three assurance mechanisms (service guarantees, reputation systems, and seals of approval) that combined provide structural assurance and constitute the first trust-based pillar, Preventive Dispute Mechanisms (PDMs).

⁹⁹⁶ Authors like Cortés prefer to talk about dispute avoidance mechanisms as a means to impede the occurrence of disputes between consumers and traders, and resolve disputes at an early stage. See Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (London: Routledge, 2010).

In this section, it is crucial to describe each assurance mechanism and its role in helping businesses and consumers alleviate the need for external resolution procedures, consequently saving them time and money.⁹⁹⁷ Also, to explain how these mechanisms can influence consumers' trusting intentions and purchase behavior.

6.3.1 GUARANTEE SERVICES

Online Escrows and Payment Service Providers (PSPs)

As noted in section 6.1, trust in e-commerce is much more complex and has different characteristics from traditional commerce. Many consumers consider transactions and online purchases very risky precisely because of the lack of direct relationship with the seller, who often does not reside in the same state or even on the same continent. For many consumers, the risk must translate into the hope that the seller will act in good faith and keep his promise by sending the product or delivering the service and matching the one advertised.

Services that can help reassure the consumer but also the seller and which have the function of preventing possible disputes are escrow services. Escrow services act as a trusted third party that collects holds and only pays out funds when buyers and sellers are satisfied with the transaction. An online buyer can create an account with an escrow service for a small fee and make payments to a seller. The escrow company will hold and then transfer the money to the seller only when the buyer receives and approves the purchased item.⁹⁹⁸ The buyer has a previously agreed time to inspect the item and report any problem with the product/service. Escrow services protect both the buyer and the seller from fraud risks and limit the uncertainty of online sales.

It may be argued that online marketplaces should integrate escrow solutions into their businesses and provide consumers and trades with a more trustworthy and secure online experience. Escrow.com is one of the leading providers of online escrow services for both buyers and sellers. A critical feature of Escrow.com is that it offers a tracking system and gives

⁹⁹⁷ Cortés, *Online*, 59.

⁹⁹⁸ *Ibid*, 60.

live status updates that show where the buyer or the seller is in the transaction process and notify them if any action is to be taken.⁹⁹⁹ Also, the consumer can calculate the fee he will have to pay for the transactions by simply entering the value and type of item and the preferred payment method. For example, for a transaction involving tickets worth \$ 100, the fee for the buyer will be \$ 10. For an item worth \$ 1,000, the standard fee will be \$ 32.50, \$ 10,000 the typical cost, and \$ 175.50 for a transaction worth \$10,000.

Escrow services may be too costly for low-value consumer transactions, and online consumers might not be incentivized to use them.

Other preventing dispute systems include Payment Service Providers (PSPs) like Alipay (Alibaba Group), Amazon Pay, Apple Pay, Google Pay, and PayPal. PSPs connect merchants to acquiring banks and the broader financial system to facilitate customers' credit and debit card payments. PSPs handle the entire payment transaction from authorization to settlement and facilitate the transfer of funds from customers' accounts to merchants' accounts. Perhaps the best-known PSP globally, PayPal is used by millions worldwide. PayPal is a global online payment business that allows users to make payments and transfer money online. With 325 million active accounts worldwide, PayPal is often considered the online and mobile payment market leader.¹⁰⁰⁰ PayPal also offers a dispute resolution center where users can report transactions and unauthorized account activity, resolve an account limitation, and investigate a transaction. The dispute center facilitates communication between buyers and sellers. A buyer can file a dispute with the dispute center if he did not receive the item or the item was not as described. The buyer has 180 days from the transaction date to submit the dispute. By opening a claim, a buyer can communicate directly with the seller in the Resolution Center and request a refund, return the item, and/or ask the seller to re-ship the item. In this case, PayPal does not get involved nor decides the outcome. If the buyer cannot resolve the issue with the seller, the buyer can escalate the dispute to a claim within 20 days and ask PayPal to investigate the case and decide the outcome. After 20 days, the dispute will automatically be closed, and the buyer will not re-open it. If PayPal gets involved, it will decide within 14 days, but in some cases, it may take up to 30 days or longer.¹⁰⁰¹

⁹⁹⁹ "What Is Escrow? How Does Escrow Work?," Escrow.com, accessed May 25, 2020, <https://www.escrow.com/what-is-escrow>

¹⁰⁰⁰ "Number of PayPal's total active user accounts from 1st quarter 2010 to 1st quarter 2020," Statista.com, accessed May 25, 2020, <https://www.statista.com/statistics/218493/PayPals-total-active-registered-accounts-from-2010/>.

¹⁰⁰¹ "How can we help?," PayPal.com, accessed May 25, 2020, <https://www.PayPal.com/us/smarthelp/art./faq2337>.

Satisfaction Guarantees and Returns

As mentioned in the previous sections, e-commerce contains many risk elements for a consumer. For this reason, building and winning consumer trust is vital for a business. Offering satisfaction guarantees represent an effective way for a merchant to mitigate consumers' perceived risks. Satisfaction guarantees are potent tools to reassure and attract consumers, and at the same time, they represent valuable marketing tactics to gain competitive edges in the marketplace.¹⁰⁰² Many satisfaction guarantees include money-back guarantees (MBGs), best-price guarantees, low-price guarantees, free trials, lifetime guarantees, 'try before you buy' or first-purchase guarantees, and refund policies. Money-back is the most common guarantee and consists of a promise that any unsatisfied consumer with a purchase can return the product or service and receive a refund. Money-back guarantees are usually limited to 30, 60, or 90 days to prevent consumers from taking advantage. They serve a double function by reducing the social, financial, and psychological perception risks linked to purchasing and increasing the product's quality perceptions and the retailer's performance.¹⁰⁰³ Since they reduce perception risks, MBGs generate positive emotional responses in consumers who might be willing to pay a higher price for an item if a seller provides an MBG.¹⁰⁰⁴ MBGs can positively affect consumers' purchase intentions¹⁰⁰⁵ and decision-making processes.

European legislation offers a series of guarantees to consumers when they make purchases in other Member States. Consequently, the seller is obliged to repair, replace, offer a discount, or refund the cost of your purchase if the product is defective or is not or does not function as advertised.¹⁰⁰⁶ However, such guarantees are time-limited legal provisions without enforceable

¹⁰⁰² Thomas Suwelack and Manfred Krafft, "Effects of Money-Back and Low-Price Guarantees on Consumer Behavior," *Quantitative Marketing and Marketing Management*, 2012, 4, doi:10.1007/978-3-8349-3722-3_26.

¹⁰⁰³ Suwelack and Krafft, "Effects of," 5.

¹⁰⁰⁴ Thomas Suwelack, Jens Høgreve, and Wayne D. Hoyer, "Understanding Money-Back Guarantees: Cognitive, Affective, and Behavioral Outcomes," *Journal of Retailing* 87, no. 4 (2011): 464, doi:10.1016/j.jretai.2011.09.002.

¹⁰⁰⁵ Michael A. McCollough and Dwayne D. Gremler, "A conceptual model and empirical examination of the effect of service guarantees on post-purchase consumption evaluations," *Managing Service Quality: An International Journal* 14, no. 1 (2004): 58-74, doi:10.1108/09604520410513677; Stacy L. Wood, "Remote Purchase Environments: The Influence of Return Policy Leniency on Two-Stage Decision Processes," *Journal of Marketing Research* 38, no. 2 (2001): 157-169, doi:10.1509/jmkr.38.2.157.18847.

¹⁰⁰⁶ See Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on

measures that guarantee their efficacy. They guarantee consumers get purchased items repaired or replaced or receive their money back. If they do not within the stipulated time frame, they do not have alternatives but to resort to an ordinary court.

Credit Card Chargebacks

A chargeback is a consumer protection process that allows consumers to receive their funds back for fraudulent charges or unsatisfied purchases. A consumer who purchased a product or a service with a credit card can contact the credit card issuer to reverse the payment through this process rather than requesting a refund from the merchant. A consumer can request a chargeback in case of fraud or unauthorized charges on the account; an item was purchased but never delivered; an item was damaged or defective; the product or service was not as described; incorrect charges were made on the account. An investigation usually follows a credit card chargeback request. If the credit card issuer considers the request valid, the funds are removed from the merchant's account and returned to the consumer while the merchant is fined a fee.

Credit card chargebacks represent a consumer protection process designed to make consumers feel secure, promote transparency, and make merchants accountable. They also intend to balance the inequality of power between consumers and merchants by allowing consumers to notify their bank or credit card issuer of a transaction's cancellation quickly and at no cost.¹⁰⁰⁷ Previous studies suggest that third-party protection mechanisms can enhance consumer trust in sellers and e-commerce transactions.¹⁰⁰⁸

However, chargebacks present some limitations and risks for both consumers and merchants. Once a chargeback has been requested, it may take some time for the credit card holder to receive a refund. Usually, consumers have between 45 and 120 days from the purchase to file a chargeback from when the transaction was made, while merchants have approximately 45

certain aspects of the sale of consumer goods and associated guarantees, and Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

¹⁰⁰⁷ Cortès, *The Law of*, 35.

¹⁰⁰⁸ Ramnath K. Chellappa and Paul A. Pavlou, "Perceived information security, financial liability and consumer trust in electronic commerce transactions," *Logistics Information Management* 15, no. 5/6 (2002): 358-368, doi:10.1108/09576050210447046.

days to dispute it.¹⁰⁰⁹ If merchants differ a chargeback, they can re-present the charge, reversing the funds again. This situation can escalate to adjudication administered by the card issuer.¹⁰¹⁰

Also, consumers may fear that claiming a chargeback could hurt their credit score or harm their relationship with the credit card company. If a business has too many credit card chargebacks, their account can be shut down, or the credit card issuer could raise their transaction fee. Chargebacks often come with high costs (between \$20 and \$100)¹⁰¹¹ for the merchants, who also are hit with administrative fees associated with the process. They can also result from “friendly fraud” when a consumer tries to gain money back from a legitimate transaction by filing a fraud chargeback.

From a regulatory perspective, chargebacks are subject to national and regional laws, while no global chargeback system exists.¹⁰¹²

In the United States, credit card holders are guaranteed reversal rights by Regulation Z of the Truth in Lending Act (TILA) for credit cards and Regulation E of the Electronic Fund Transfer Act (EFTA) for debit cards. Under Regulation Z, credit card issuers have the legal obligation under 12 C.F.R. §1026.13(a) to investigate and resolve specific billing errors involving goods or services not accepted by the consumer or not delivered as agreed. The regulation clarifies that the issuer’s obligation is triggered when the consumer sends a written notice 60 days after providing the first periodic statement reflecting the alleged billing error.¹⁰¹³ The card issuer must send an acknowledgment to the consumer within 30 days of receiving the billing error notice. The issuer must resolve the dispute within two complete billing cycles (but no later than 90 days).¹⁰¹⁴ Until the billing error is resolved, the consumer has the right to withhold the disputed amount.¹⁰¹⁵ Suppose the credit card issuer determines that a billing error occurred as asserted. In that case, it must correct the billing error and credit the consumer’s account with the entire disputed amount and related finance or other charges.¹⁰¹⁶

¹⁰⁰⁹ See Visa’s, Mastercard’s, American Express’, and Discover’s chargeback rulebooks.

¹⁰¹⁰ Amy J. Schmitz and Colin Rul, “The New Handshake: Where We Are Now,” *International Journal of Online Dispute Resolution* 3, no. 2 (2016): 95.

¹⁰¹¹ “How Much is a Chargeback Fee?,” Verifi, last modified June 24, 2019, <https://www.verifi.com/in-the-news/much-chargeback-fee/>.

¹⁰¹² Cortés, *The Law of*.

¹⁰¹³ 12 C.F.R. §1026.13(b)(1-3)

¹⁰¹⁴ 12 C.F.R. §1026.13(c)(1-2)

¹⁰¹⁵ 12 C.F.R. §1026.13(d)(1)

¹⁰¹⁶ 12 C.F.R. §1026.13(e)(1)

The EFTA provides consumer protections for electronic fund transfers (EFTs),¹⁰¹⁷ including debit card transactions, and gives consumers the right to dispute billing errors related to debit card transactions. Under 12 C.F.R. §1500.11(a)(1), the regulation includes “errors” among others: unauthorized electronic fund transfers, incorrect electronic fund transfers to or from the consumer’s account, and omissions of an electronic fund transfer from a periodic statement. Unlike Regulation Z, Regulation E does not include merchant disputes regarding issues with goods and services as errors, limiting its application to a mistake in the amount a merchant charged the consumer’s card.

Directive 2007/64/EC on payment services in the internal market (PSD) and Directive 2008/48/EC on credit agreements for consumers (CCD) form the primary legal bases for requesting a chargeback in the EU. A consumer can request a chargeback when a trader has not respected a consumer’s rights, in case of a transaction authorized by the consumer, or in bankruptcy. According to art. 60 of the PSD, in case of non-authorized use of cards, the credit card institution must refund the amount to the credit cardholder. However, Art. 61 requires credit cardholders to bear the losses deriving from an unauthorized transaction up to 150 euros when the credit card is lost or stolen or when the cardholder has been negligent and failed to keep the personalized security features safe required by Art. 59(2). EU law only covers credit card chargeback while not covering purchases made with a debit card. However, purchases made with a debit card may be protected by national laws, as in Denmark and Portugal.

As in the US, EU law provides that if the consumer has purchased goods or services on the Internet and they have not been received, he should contact the trader directly and try to resolve the dispute.¹⁰¹⁸

6.3.2 E-COMMERCE REPUTATION AND FEEDBACK SYSTEMS

Reputation and feedback systems are designed to increase consumer confidence by providing information and previous user experiences.¹⁰¹⁹ They collect, distribute, and combine feedback

¹⁰¹⁷ 12 C.F.R. §1500.3(b)(1) defines an electronic fund transfer as “any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer’s account.”

¹⁰¹⁸ ECC-Net, *Chargeback in the EU/EEA: A solution to get your money back when a trader does not respect your consumer rights*, (n.d), <https://www.eccireland.ie/wp-content/uploads/Chargeback-Report-2020.pdf>.

¹⁰¹⁹ Cortés, *Online Dispute Resolution*, 61.

about consumers' past behavior. As suggested by Steven Tadelis, the role of reputation and feedback systems is "to provide future buyers with a window into a seller's past behavior with previous buyers in anonymous marketplaces."¹⁰²⁰ Reputation and feedback systems allow users (buyers/sellers) to rate each other to build trust among users of e-commerce platforms. They promote confidence and trustworthiness in online marketplaces so as to reduce frictions caused by asymmetric information and, in turn, increase the efficiency of these markets. They help users decide whom and what product or service to trust, especially in a marketplace such as the online one where the actors, sellers, and buyers do not know each other, and buyers cannot physically try what they purchase. They help sellers improve their reputation scores and consequently increase their sales.¹⁰²¹ A study by the University of Rennes shows that feedback systems can significantly enhance trust. In particular, the study highlighted how simultaneous rating systems provide better results in terms of trust than sequential rating systems.¹⁰²²

Many marketplaces such as Airbnb, Amazon, eBay, and Uber owe part of their success to the reputation and feedback systems they make available to their users, which play a fundamental role in facilitating consumer confidence.¹⁰²³ They encourage buyers to leave feedback based on their experience with purchasing a product or service so that other buyers can establish trust based on the experiences made by others.¹⁰²⁴ For example, buyers can leave positive, neutral, or negative feedback for the sellers anytime they buy something on eBay. They can also rate how the seller communicates with them and the shipping cost. Amazon buyers have 90 days from their order's date from a third party to leave comments, feedback, and ratings.¹⁰²⁵ Buyers can leave comments and feedback on how the seller packaged and shipped their order, the quality and professionalism of their work, and the quality of their customer service.¹⁰²⁶

¹⁰²⁰ Steven Tadelis, "Reputation and Feedback Systems in Online Platform Markets," *Annual Review of Economics* 8, no. 1 (2016): 327, doi:10.1146/annurev-economics-080315-015325.

¹⁰²¹ Tadelis, "Reputation."

¹⁰²² David Masclet and Thierry Pénard, "Do reputation feedback systems really improve trust among anonymous traders? An experimental study," *Applied Economics* 44, no. 35 (2012): 1-38, doi:10.1080/00036846.2011.591740.

¹⁰²³ Paul Resnick et al., "Reputation systems," *Communications of the ACM* 43, no. 12 (2000): 45-48, doi:10.1145/355112.355122; Chrysanthos Dellarocas, "The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms," *Management Science* 49, no. 10 (2003): 1407-1424, doi:10.1287/mnsc.49.10.1407.17308.

¹⁰²⁴ Johannes Sanger and Gunther Pernul, "Interactive Reputation Systems," *Business & Information Systems Engineering* 60, no. 4 (2017): 273-287, doi:10.1007/s12599-017-0493-1.

¹⁰²⁵ Ebay.com, "Leaving Feedback for Sellers," EBay.com, accessed April 27, 2022, <https://www.ebay.com/help/buying/leaving-feedback-sellers/leaving-feedback-sellers?id=4007>.

¹⁰²⁶ Amazon.com, "Comments, Feedback, and Ratings about Sellers," amazon.com, accessed April 25, 2022, https://www.amazon.com/gp/help/customer/display.html?ref_=hp_left_v4_sib&nodeId=G5T39MTBJSEVYQWW.

The platform aggregates buyers' feedback for sellers and displays them on the website, usually under the seller's history. Other e-commerce platforms use a star system to summarize the feedback sellers receive, and buyers can check the sellers' scores on the website. eBay employs a one-sided feedback system, allowing buyers to leave positive, neutral, or negative feedback while sellers can only leave positive or no feedback. Other marketplaces like Airbnb and Uber adopt a two-sided feedback system as both sides play a crucial role in the transaction, from the purchase to when the service is provided. In the case of eBay, once the buyer has purchased the product and paid, he can only wait for it to arrive.

Conversely, in the case of Uber, a rider can leave the vehicle dirty or have rude behavior with the driver. Similarly, Airbnb renters can leave the house or apartment damaged or cause noise and disturb neighbors during their stay. It is, therefore, essential for rideshare and lodging marketplaces to adopt a two-sided feedback system to maintain trust among their users.

By assessing users' behaviors, reputation and feedback systems can act as dispute avoidance mechanisms by promoting sellers' and buyers' good practices and integrity, stimulating quality, and providing consumers with more information about sellers' reliability.¹⁰²⁷ These mechanisms can be embedded into ODR processes to help consumers report issues, such as defective products, and encourage sellers to resolve problems quickly to avoid negative reviews. Consumers will likely leave positive reviews when issues are promptly addressed and resolved. ODR can also help resolve disagreements arising out of negative reviews. It can allow reviewed buyers to contact consumers, address the issues that led to a negative review, and offer solutions to fix the problem. ODR can also help businesses report false and inappropriate reviews so that the system can investigate and possibly remove those that are inaccurate or violate the website rules. However, the reputation system must provide fair and transparent options for disagreements to avoid users questioning the overall accuracy and reliability of all reviews in the system.¹⁰²⁸

Feedback and reputation systems can be subjected to bias and manipulation from both sellers and buyers. To compete in the market, sellers may inflate their ratings through fake positive

¹⁰²⁷ Aura E. Vilalta Nicuesa, "Reputational Feedback Systems and Consumer Rights," *International Journal of Online Dispute Resolution* 5, no. 1-2 (2018): 122-142, doi:10.5553/ijodr/235250022018005102012.

¹⁰²⁸ Colin Rule and Harpreet Singh, "ODR and Online Reputation Systems," in *Online Dispute Resolution Theory and Practice* (Eleven International Publishing, 2012), 175-196.

reviews or leave fake negative reviews for their competitors. A 2016 study assessed the impact of fake reviews on the online visibility of businesses in the hospitality industry. The study used data from over 2.3 million reviews of 4,709 hotels from 17 cities and found that limited numbers of reviews can significantly impact online visibility. Specifically, it found that even 50 fake reviews are sufficient for a business to impact its competitors in terms of visibility.¹⁰²⁹ They may also act fraudulently by buying a reputation they do not have or do not deserve.

Online Consumer Reviews

Online consumer reviews are electronic word-of-mouth (eWOM) information¹⁰³⁰ influencing purchasing behavior. They are considered reliable data sources consumers use to make informed decisions about online products or services. Consumer reviews are opinions on and experiences of a product, service, or business found on specific review websites or platforms (i.e., Yelp, Trip Advisor, Google My Business, and Angie List). They can also be included on many retailers' websites (i.e., Amazon) or booking agents (i.e., Booking). They are beneficial for assessing the quality of a product or service with which the consumer has not yet had a direct experience. According to a 2019 study conducted by Bright Local, an integrated System Engine Optimization (SEO) platform, 82% of consumers read reviews for local businesses, including 93% of people aged 35-54. The average consumer reads ten reviews before trusting a company.

Customer reviews are an influential factor in consumers' purchase decisions and can boost a business's reputation and stimulate competition between businesses on the quality of their products and services. They act as consumer-generated "sales assistants" that "facilitate consumer searches for products that best match their consumption needs."¹⁰³¹ A 2018 study from tech provider TurnTo showed that in the United States, many consumers (73%) would prefer the pricer product with a higher rating when comparing two similar products. Moreover, in 2019, a study from Trustpilot, a Danish consumer review website that hosts consumer reviews of businesses worldwide, found that consumers lose trust in a brand if they see it has

¹⁰²⁹ Theodoros Lappas, Gaurav Sabnis, and Georgios Valkanas, "The Impact of Fake Reviews on Online Visibility: A Vulnerability Assessment of the Hotel Industry," *Information Systems Research* 27, no. 4 (2016): 940-961, doi:10.1287/isre.2016.0674.

¹⁰³⁰ Yubo Chen and Jinhong Xie, "Online Consumer Review: Word-of-Mouth as a New Element of Marketing Communication Mix," *Management Science* 54, no. 3 (2008): 477-491, doi:10.1287/mnsc.1070.0810.

¹⁰³¹ Carolyn A. Lin and Xiaowen Xu, "Effectiveness of online consumer reviews," *Internet Research* 27, no. 2 (2017): 362, doi:10.1108/intr-01-2016-0017.

negative reviews and if the brand deletes negative comments or reviews from consumers. At the same time, 76% of consumers are less inclined to buy anything from a retailer that does not show any reviews or ratings on its website.¹⁰³² Reading reviews comes before looking at a business's social media, comparing prices, and searching for coupons. Reading reviews is becoming part of the consumer's routine when looking online for information about a product or service. Online reviews have empowered consumers to look for information instead of passively receiving information from traders or marketing experts. They allow consumers to reduce their search for a product or service to the one that best meets their needs, tastes, and necessities. Also, online reviews and comments help consumers feel more confident about their purchases and make companies accountable to their customers. However, suppose reviews have a great potential to influence consumer behavior and purchase intentions. In that case, it is equally valid that consumer reviews can shape the reputation of a business and affect and reduce competition.

In recent years, attention has been paid to the trustworthiness of online reviews following many scandals that have hit the online reviews industry and revealed that many companies offered gifts or discounts to consumers in exchange for positive reviews.¹⁰³³ Other practices concern businesses writing or commissioning fake positive reviews to boost their ratings or writing or commissioning fake negative reviews to undermine competitors.¹⁰³⁴ These practices can mislead consumers when shopping online and undermine consumer trust in online reviews. According to the Pew Research Center, American business owners and consumers express reservations and concerns about the validity and truthfulness of online reviews. 51% of Americans who read online reviews think they “generally give an accurate picture of the product's true quality,” while 48% believe it is often hard to tell if they are truthful and biased.¹⁰³⁵ A fake review does not represent an honest opinion about a product or service but attempts to influence consumer behavior through untrue and misleading information.

Consequently, businesses, the entire e-commerce sector, policymakers, and regulators should take fake online consumer reviews seriously. Otherwise, consumers risk losing confidence in

¹⁰³² “Consumer Trust Relies Heavily on Reviews and Brand Honesty,” EMarketer, accessed November 24, 2020, <https://www.emarketer.com/content/consumer-trust-relies-heavily-on-reviews-and-brand-honesty>.

¹⁰³³ Raffaele Filieri, “What makes an online consumer review trustworthy?,” *Annals of Tourism Research* 58 (2016): 47, doi:10.1016/j.annals.2015.12.019.

¹⁰³⁵ “Online Reviews and Ratings,” Pew Research Center: Internet, Science & Tech, last modified May 30, 2020, <https://www.pewresearch.org/internet/2016/12/19/online-reviews/>.

the online market, or the market will be transformed into a "lemons market."¹⁰³⁶ Consumer enforcement bodies and regulators have already adopted some guidelines domestically and internationally.

The EU, through Directive 2005/29/EC (the Unfair Commercial Practices Directive) concerning unfair business-to-consumer commercial practices in the internal market, prohibits fake online consumer reviews, which fall within the scope of Art. 6 of the Directive concerning misleading commercial practices. According to Art. 6, a commercial approach is considered misleading if it contains false information and is, therefore, untruthful or deceiving. It will likely mislead the average consumer, even if the information is factually correct. Also, a commercial practice shall be regarded as misleading if it causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise. Additionally, the Directive prohibits using “editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer” and “falsely representing oneself as a consumer.”¹⁰³⁷ EU Directive 2019/2161, known as the Omnibus Directive or “Enforcement and Modernization Directive,” improve consumer protection in case of unfair practices in online markets and establishes legal requirements for online reviews. According to the Directive, traders should inform consumers about procedures that ensure published reviews are from actual consumers who have used or purchased the products. They should also provide information about how consumer reviews are processed, whether positive and negative reviews are posted, or whether they have been sponsored or influenced by a contractual relationship with a trader.¹⁰³⁸

In December 2009, the US Federal Trade Commission formally instituted guidelines covering online testimonials and endorsements, specifying that advertisers should only use genuine consumers for the endorsements or testimonials they publish.¹⁰³⁹

¹⁰³⁶ Dustin Malbon, “Taking Fake Online Consumer Reviews Seriously,” *Journal of Consumer Policy* 36, no. 2 (2013): 141, doi:10.1007/s10603-012-9216-7.

¹⁰³⁷ Directive (EU) 2005/29/EC, Annex I.

¹⁰³⁸ Directive (EU) 2019/2161, Section 47.

¹⁰³⁹ Electronic Code of Federal Regulations, Part 255 - Guides Concerning use of Endorsements and Testimonials in Advertising.

Besides informing consumers about reliable sellers, consumer reviews could also play a role in helping consumers obtain redress¹⁰⁴⁰ and, at the same time, avoid misuse or fraudulent use of consumer reviews.

6.3.3 SEALS OF APPROVAL: TRUST MARKS

A significant way of promoting consumer trust and influencing consumer purchase intentions, particularly from unknown sellers, can be represented by trust marks. A Trust mark is a badge, image, or logo granted to an e-commerce website by an institution that establishes standards of conduct. The institution or trust mark provider supplies its badge or logo to members who comply with good practice standards concerning privacy, quality, customer care, and dispute resolution. Trust badges are usually visible during checkout, but websites display them more frequently on the homepage.

There are several types of trust marks, which can be grouped into the following:

- Reputation Trustmarks offer proof that trustmark carries compliance with quality standards.
- Privacy Trustmarks act as seals of approval regarding privacy practices.
- Secure Sockets Layer (SSL) is a standard security technology for establishing an encrypted link that protects transactions between websites and users.
- Security/Vulnerability Scanning provides security auditing and vulnerability services to guarantee that online shops are of malware, viruses, and suspicious spyware.¹⁰⁴¹

Each trust mark provider has its own requisites and policies that a business member must have and follow to receive the seal of approval. Trust marks can cover various areas ranging from compliance with consumer protection, the financial situation of a seller, a trader's compliance with regulations, the clarity of information provided by a seller's website, the security measures

¹⁰⁴⁰ Cortès, *The Law of*, 231.

¹⁰⁴¹ "Trustmark - Safe.Shop, the Global Ecommerce Trustmark for Online Shopping," Safe.Shop - The Global Ecommerce Trust Seal, accessed December 10, 2020, https://www.safe.shop/uk-en/knowledge/glossary_definitions/2/trustmark.

in place to protect and secure online transactions, and the existence of dispute resolution mechanisms to facilitate B2C disputes.¹⁰⁴²

Recent studies suggest that trust marks increase consumer online confidence and purchase intentions and decrease perceived risk.¹⁰⁴³ Consumers do not care what one trustmark signifies over another; instead, they want to see a trust seal that assures them that their information is protected and secure.¹⁰⁴⁴ Trust marks can help consumers recognize reliable sellers and make more informed decisions about the goods and services they buy. Baymard has observed that checkout pages that display trust badges are often perceived as ‘more secure’ by consumers, while pages without these badges feel less secure.¹⁰⁴⁵ Consequently, trust mark badges and policies can positively impact consumer confidence in cross-border e-commerce online transactions. They are significant for Small and Medium-sized Enterprises (SMEs) that often lack recognized brands. Consumers tend to have fewer security concerns when shopping from big brand websites (i.e., Amazon, Apple, and Walmart) than less well-known brands, especially if their sites do not display any visual security badge.

Trust marks have been around for some time. Still, only a few, especially branded trust badges (PayPal, Visa, Google Trusted Store, BBB, etc.), have achieved the necessary popularity and have been adopted by businesses on their websites. Some problems regarding the use of trust marks may come from the fact that some sellers resist displaying seals of approval on their websites for purely aesthetic and design reasons or because they might look like advertisements that can potentially alienate the consumer.¹⁰⁴⁶ Creating trust marks that are easily recognizable, simple to understand, and simultaneously can provide the assurance that the information consumers look for could overcome this potential challenge. The effectiveness of a trust mark depends on the consumer recognition of the logo, and attaining brand recognition and obtaining

¹⁰⁴² See the EU Interim Report 1: Barriers to eCommerce and Trustmarks Inventory. <file:///C:/Users/lucad/Downloads/Annex1-TrustmarksInterimReport1.pdf>.

¹⁰⁴³ Frauke Mattison Thompson, Sven Tuzovic, and Corina Braun, “Trustmarks: Strategies for exploiting their full potential in e-commerce,” *Business Horizons* 62, no. 2 (2019): 237-247, doi:10.1016/j.bushor.2018.09.004; Corina Braun and Sven Tuzovic, ““Can I Trust the Trustmark?” An Empirical Analysis of the Impact of Trustmarks on Online Retailer Websites in Germany: An Abstract,” *Marketing at the Confluence between Entertainment and Analytics*, 2017, 707-708, doi:10.1007/978-3-319-47331-4_137.

¹⁰⁴⁴ “Which Site Seals Create The Most Trust? [Original Research],” CXL, last modified April 30, 2020, <https://cxl.com/research-study/trust-seals/>.

¹⁰⁴⁵ “How Users Perceive Security During the Checkout Flow (Incl. New 'Trust Seal' Study 2020) - Art.s - Baymard Institute,” Researching the Best Ways to Improve the Online User Experience - Baymard Institute, last modified 5, 2016, <https://baymard.com/blog/perceived-security-of-payment-form>.

¹⁰⁴⁶ Cortés, *Online Dispute Resolution*, 62.

the funding to support a trust mark initiative represents a significant challenge for businesses, especially for SMEs. However, research should be conducted through surveys to test the types of designs that most attract and reassure the consumer. Another challenge to using established and reputable trust marks is the growing number of trust mark initiatives that create confusion and generate distrust instead of reassuring the consumer. Many examples of existing and emerging trust mark initiatives in different areas address various problems related to a specific technology or product. According to a 2012 study by the EU Commission, around 30,000 webshops in the EU carry a trust mark. The same research shows that between 6% and 7.5% of 400,000 to 500,000 EU-based webshops with online revenue of more than 50,000 euros have a trust mark.¹⁰⁴⁷ These data obviously refer to a study done years ago. However, we can speculate that, given the increase in e-commerce and the consequent need for traders to gain consumer trust, the number of online shops that carry a trust mark has grown, as has the number of trust mark initiatives and providers.

An additional issue related to the use of trust marks is the lack of minimum standards or the lack of harmonization of the criteria for consumer protections,¹⁰⁴⁸ especially at the international level. Trust mark schemes should not be left to self-regulation. Instead, national or regional authorities, consumer associations, and groups of businesses should support them.¹⁰⁴⁹ Trust mark programs that provide ODR services can improve consumer trust and reduce out-of-court disputes.

6.3.4 ANALYSIS OF SOME EXPERIENCES ON TRUST MARKS

This section describes some European and American trust mark scheme initiatives to offer a perspective on how these mechanisms can positively or negatively influence consumer purchasing trends and build confidence in B2C e-commerce. The analysis focuses on trust mark initiatives that refer to two geographical areas that differ in terms of internet regulation, e-commerce policies, and consumer protection. In the EU, these initiatives take as a reference the EU legislation on consumer protection that promotes the interests of consumers and ensures a high level of consumer protection.¹⁰⁵⁰ Hence, trust mark initiatives in the EU do not

¹⁰⁴⁷ Luca Alessandro Remotti et al., *EU online Trustmarks: Building Digital Confidence in Europe. Final Report*, (European Union: The Publications Office of the European Union, 2012).

¹⁰⁴⁸ Cortés, *Online Dispute Resolution*, 63.

¹⁰⁴⁹ Cortés, *Online Dispute Resolution*, 63.

¹⁰⁵⁰ See Art.s 4(2)(f), 12, 114(3) and 169 of TFEU, Art. 38 of the Charter of Fundamental Rights of the European Union, and Directive 2011/83/EU on consumer rights.

contemplate arbitration to resolve disputes unless the entity is legally authorized. In the US, e-commerce and consumer protection policy is generally pro-business, and the self-regulation approach applies. Unlike in the EU, pre-disputes arbitration clauses are often found in consumer contracts, with the US jurisprudence requiring strict enforcement of arbitration in consumer cases.

6.3.4.1 Trust Marks in the European Union

Many e-commerce trust marks exist in the EU, although the number of active trust marks differs significantly within European countries. Most trust marks charge member fees and have sanctions against non-compliant members, including suspending or revoking the right to use and displaying the trust mark logo and other financial penalties. Generally, trust marks in Europe are national schemes carried out by private and non-profit organizations and governed by EU laws and regulations. Every trust mark has its own criteria and code of conduct that accredited businesses must meet and follow. Many trust marks have internal ADRs, while others cooperate with external ones. In some cases, the trust mark acts as a mediator to find a solution; if it fails, the trust mark may forward the case to an external ADR.

Digital trust marks have been on the Digital Agenda of the European Commission for the past few years to enhance trust in electronic transactions in the European Union's internal online market. In 2014, the electronic IDentification, Authentication, and trust Services (eIDAS) was established in Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market to help verify the identity of individuals and businesses online or the authenticity of electronic documents. Introducing and building a single, comprehensive trustmark has been part of the European Commission's Next Generation Internet (NGI) 2025 initiative to deliver the Single Digital Market and prevent further proliferation of national and commercial initiatives. A comprehensive trust mark as a policy tool could help carry out the objectives of the EU Commission in improving consumer confidence and creating a safe and secure digital market space. As highlighted in the 2020 Next Generation Internet (NGI) report on digital Trustmark, a single, comprehensive trust mark

across various internet products, services, and issues is more likely to become widely recognized.¹⁰⁵¹

The following sections describe two important trust mark initiatives in the EU and report other examples of trust mark schemes offered nationally.

The E-Commerce Europe Trustmark

The E-commerce Europe Trustmark (EET) is an initiative of the E-Commerce Europe Association, a Pan-European online retail association that involves fifteen (15) European national associations and associated schemes.¹⁰⁵² The EET Trustmark was created to stimulate cross-border e-commerce by offering protection mechanisms to consumers when purchasing goods or services through an online shop in another EU country. The EET Trustmark works as a trusted seal that traders can display on their website when they comply with the ethical standards of the EET Code of Conduct. The EET Code of Conduct obliges retailers to use fair and transparent contract terms and be transparent about the offer and prices before the consumer enters the order process.¹⁰⁵³

In the case of an incident involving the purchase of their products and/or services, companies with Trustmark allow you to file claims through the Trustmark Service Centre free of charge if their Customer Care Service has not been able to resolve the issue.

Regarding a consumer complaint, the Trustmark Service Centre provides a solution out of court. It enables consumers to reach a resolution easily and quickly. The Trustmark Service Centre assists consumers in coming to an agreement with the business. If there is no solution to the complaint, a legal resolution of the issue is still open to the consumer. The consumer can immediately seek out legal assistance and is free to pursue his complaint through lawful means otherwise.

¹⁰⁵¹ Hesty Elliott, "Report: Digital Trustmarks," NGI, accessed December 11, 2020, <https://research.ngi.eu/wp-content/uploads/2020/01/NGI-Forward-Digital-Trustmarks.pdf>

¹⁰⁵² This includes national associations from Austria, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, and Switzerland.

¹⁰⁵³ "Code of Conduct," Trust Ecommerce Europe, accessed December 9, 2020, <https://www.ecommercetrustmark.eu/the-code-of-conduct/>.

Trusted Shops

Trusted Shops (TS) is a private European trust brand for online shoppers and retailers with over 30,000 participating member shops. It was founded in Germany in 1999 to make online shopping safe and help e-commerce shops increase consumer confidence in their products.¹⁰⁵⁴ TS offers its customers trust-building services through a trust mark, a money-back guarantee process, and a system of customer reviews. To obtain the trust mark, online shops must comply with trusted brand quality criteria, including service quality, data security, customer protection, transparency, and other legal requirements. Once the participating shops meet the standard criteria, they are awarded the trust seal for displaying on their website. The trust mark is also connected with a money-back guarantee program offered by Trusted Shops to online shoppers for every purchase they make with a certified online shop. The money-back guarantee covers orders of up to 2,500 Euro and protects online shoppers from financial loss in case of non-delivery or non-refund. After purchasing or ordering from a certified online shop, the shopper who activates the TS Guarantee is entitled to a refund. To receive a refund, the online shopper must submit a few documents via email to the TS service center, including a confirmation email, proof of payment (i.e., bank statement), and proof of return.¹⁰⁵⁵

A feedback system complements the trust mark system, including reviews left by previous customers on a product. After placing an order, a shopper receives an email containing a link to a review form that the shopper can complete by awarding stars for the purchase and writing a short comment. Trusted Shops invites the online shopper to contact the seller if a product is defective or damaged. However, in case of disputes arising from buying goods or services from certified e-shops, Trusted Shops does not provide an internal ODR but instead refers the consumers to the European ODR platform.

Other Examples of Trust Marks in Europe

As mentioned earlier, trust marks are widely established in Europe. Several EU member states and the UK have developed national quality seals. In Denmark, e-Mark offers a certification

¹⁰⁵⁴ “Chi Siamo,” Le Soluzioni Di Fiducia Per I Negozi Online | Trusted Shops, accessed January 2, 2021, <https://business.trustedshops.it/chi-siamo>.

¹⁰⁵⁵ “How Do I Submit the Documents Necessary to Support My Refund Application?,” Help - Trusted Shops, accessed January 4, 2021, <https://help.trustedshops.com/hc/en-us/art.s/115001510064-How-do-I-submit-the-documents-necessary-to-support-my-refund-application->.

scheme for Danish online vendors to guarantee consumers a safe trading environment and promote good e-commerce practices. E-Mark was established in 2000 and has more than 2500 affiliates.¹⁰⁵⁶ In 2011, The Malta Competition and Consumer Affairs Authority (MCCAA) introduced a voluntary trust mark scheme to promote and protect consumer interests by helping them purchase products and services from approved businesses that abide by the MCCAA code of conduct.¹⁰⁵⁷ In the Netherlands, Thuiswinkel Waarborg, or Shopping Secure Trustmark, was established in 2001 and has more than 2100 affiliates.¹⁰⁵⁸ The EC recognizes the Trustmark and has an official ADR body which is part of the Foundation for Consumer Complaints Boards in The Hague. To be allowed to carry out the trust mark, e-retailers must undergo a thorough certification to check whether they meet strict legal, security, and financial stability requirements.¹⁰⁵⁹ Consumers can search for approved retailers from the database provided on the Thuiswinkel Waarborg website.¹⁰⁶⁰ Certyfikat Rzetelności is a Polish trust mark scheme offered by Rzetelna Firma, a private organization.

The trust mark guarantees that accredited companies are not registered in the national debt register (BIG SA), thus certifying their financial reliability.¹⁰⁶¹ The trust mark is issued in a traditional and electronic form, updated on an ongoing basis, and available online. Over 40,000 companies from all sectors of the economy are accredited through the scheme, and consumers can review the complete list of businesses on the Rzetelna Firma website.¹⁰⁶² TrustMark is a quality scheme endorsed by the government for trades within the home improvement industry in the UK.¹⁰⁶³ Established in 2005, TrustMark operates within a license agreement issued by the Department for Business, Energy, and Industrial Strategy (BEIS). It licenses and audits over 35 scheme providers with over 15,000 registered businesses.¹⁰⁶⁴ In Spain, Confianza Online was created in 2003 by the Spanish Advertising Self-regulatory Organization (AUTOCONTROL) and the E-commerce and Relationship Management Association

¹⁰⁵⁶ E-maerket, “E-mark | The Danish Guarantee for Secure Online Shopping,” E-mærket, last modified 2022, <https://www.emaerket.dk/english>.

¹⁰⁵⁷ Malta Competition and Consumer Affairs Authority, “Trust Your Scheme,” MCCAA, last modified December 9, 2021, <https://mccaa.org.mt/Section/Content?contentId=1228>.

¹⁰⁵⁸ Thuiswinkel Waarborg, “The Hallmark for Web Shops,” Thuiswinkel.org, last modified 2022, <https://www.thuiswinkel.org/en/>.

¹⁰⁵⁹ Ibid.

¹⁰⁶⁰ Ibid.

¹⁰⁶¹ Rzetelna Firma, “Certyfikat Rzetelności,” Rzetelna Firma – Program Pod Patronatem Krajowego Rejestru Długów, last modified 2022, <https://rzelnafirma.pl/certyfikat-rzetelnosci>.

¹⁰⁶² Ibid.

¹⁰⁶³ TrustMark, “About Us,” TrustMark - Government Endorsed Scheme For Work Done Around Your Home, last modified 2022, <https://www.trustmark.org.uk/aboutus>.

¹⁰⁶⁴ Ibid.

(AECEM) to improve consumer trust in e-commerce.¹⁰⁶⁵ At a European level, Confianza offers the E-commerce Europe Trustmark. The scheme includes a code of conduct that aims to guide any digital business regarding personal data protection, e-contracts with consumers, digital advertising, and the protection of minors and adolescents; an ADR mechanism; and a Trustmark Seal.¹⁰⁶⁶ Consumers who experience problems purchasing a product or contracting a service from a company that displays the Confianza seal can file a claim free of charge directly from the website. Once the claim is processed, Confianza allows the parties to find a satisfactory solution through mediation.¹⁰⁶⁷ The entire procedure is carried out asynchronously via email. In the last 18 years, Online Confianza has processed nearly 70,000 claims in 70% of cases resolved with an amicable agreement between the parties.¹⁰⁶⁸

To conclude, it is worth noting that in 2013, the EU Commission conducted a study on online trust marks and reported 29 operating trust mark schemes within the EU.¹⁰⁶⁹ As of today, many of the trust marks included in the study are not active anymore. Many workshops carry online trust marks to gain consumer trust. Trust marks assure consumers that they can buy from a certain online store safely and securely. They are a form of branding significant for SMEs as they often lack widely reconsigned brands. The proliferation at the EU level has led to a lack of standards harmonization for consumer protection. It has raised issues concerning the reputation of trust marks and the need to create EU minimum standards. Cortés was one of the first to raise and address the case at the European level by proposing the creation of a Pan-European Trustmark that would be granted to ODR providers that would meet minimum standards. National and regional authorities would monitor their compliance through the ECC-Net.¹⁰⁷⁰

6.3.4.2 Trust Marks in the United States

In the US, critical and popular trustmark schemes are provided and carried out by non-profit

¹⁰⁶⁵ Confianza Online, “¿Quiénes Somos? · Confianza Online,” Confianza Online · Por Un Comercio Electrónico Transparente Y Responsable, last modified 2022, <https://www.confianzaonline.es/quienes-somos/>.

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Confianza Online, “¿Cómo Reclamar? · Confianza Online,” Confianza Online · Por Un Comercio Electrónico Transparente Y Responsable, last modified 2022, <https://www.confianzaonline.es/como-reclamar/>.

¹⁰⁶⁸ Ibid.

¹⁰⁶⁹ European Commission, *EU online Trustmarks: Building Digital Confidence in Europe*, (Luxembourg: Publications Office of the European Union, 2012), https://www.europarl.europa.eu/cmsdata/59814/att_20130416ATT64613-6395490763952948749.pdf.

¹⁰⁷⁰ Pablo Cortes, “Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers,” *International Journal of Law and Information Technology* 19, no. 1 (2010): 1-28, doi:10.1093/ijlit/eq011.

or private trustmark providers such as the Better Business Bureau (BBB), TRUSTe, WebTrust, McAfee Secure, and Norton Secure.

According to a 2020 study conducted by Baynard,¹⁰⁷¹ the seal that establishes the best sense of trust when paying online is the Secure Sockets Layer (SSL) seal from Norton, followed by three trust seals, Google Trusted Store, BBB, and TRUSTe. This study reveals two significant results. The first is that seals from well-known consumer-facing brands like Norton and Google perform very well. The result suggests that high brand recognition is essential to building trust, and to some extent, the more familiar consumers are with a brand, the more they tend to trust it. Second, the study shows that the most trusted seals are “trust seals” instead of SSL seals. It suggests that consumers go with what makes them feel most secure besides the technical security they might understand to a certain extent.¹⁰⁷² In the US, trust marks are controlled by the Federal Trade Commission (FTC).

Some trust seals provide redress mechanisms to allow consumers and traders to resolve disputes online without having recourse to litigation for redress.

Better Business Bureau (BBB)

The Better Business Bureau (BBB) represents an essential example of trust mark experience in e-commerce, one of the first and most influential organizations founded in the United States (US). Established in 1912, the BBB is a nonprofit organization with 122 incorporated local organizations in the US and Canada that operate under the Council of Better Business Bureaus (CBBB) umbrella.¹⁰⁷³ BBB provides service to businesses and consumers all over the US, Puerto Rico, Caribbean territories, Mexico, and Canada, except for French-speaking Quebec. Each local BBB organization is run and governed by a board of directors and must meet the requirements set and scrutinized by the International Association of Better Business Bureaus (IABBB).¹⁰⁷⁴ Generally, local BBB entities accredit businesses in the jurisdiction. Companies moving from one BBB jurisdiction to another must apply for BBB accreditation at the new

¹⁰⁷¹ “How Users.”

¹⁰⁷² “How Users.”

¹⁰⁷³ Better Business Bureau, “The Council of Better Business Bureaus Restructures,” BBBPrograms.org, accessed May 20, 2022, https://bbbprograms.org/media-center/newsroom/cbbb_restructures.

¹⁰⁷⁴ Better Business Bureau, “International Association of Better Business Bureaus,” BBB: Start with Trust | Better Business Bureau, accessed May 20, 2022, <https://www.bbb.org/local-bbb/international-association-of-better-business-bureaus>.

BBB location unless they have obtained system-wide accreditation.¹⁰⁷⁵ In 2016, more than 384,000 businesses were BBB accredited. The BBB system provided 220 million direct-service interactions to businesses, charities, and the public.¹⁰⁷⁶ To qualify for accreditation, a business must meet and abide by the BBB Business Partner Code of Conduct standards.¹⁰⁷⁷ These standards incorporate legal business practices, ethical advertising, information security and confidentiality, and business integrity.¹⁰⁷⁸ Businesses must pay a fee for BBB accreditation and the BBB's general support to the public. A business must maintain a "B" rating to keep the accreditation.

BBB is considered an important resource for consumers who seek background information on companies and charities. Moreover, it protects consumers against unfair, misleading, or fraudulent advertising and selling practices.

As stated on its website, BBB ratings represent the organization's opinion of how a business will likely interact with consumers.¹⁰⁷⁹ The BBB rating system is based on information the company obtains directly from businesses and public data sources and includes complaints from the public. BBB assigns ratings from A+ (highest) to F (lowest).¹⁰⁸⁰ Sometimes, a business may not be rated due to insufficient information or because the business's file has been reviewed or updated. Profiles generally explain the most significant factors that raise or lower a business's rating. Yet, as stated by the BBB Bureau, BBB ratings are not a guarantee of a business's reliability or performance. An A + does not mean that the business is trustworthy; it simply means the business respects and follows the rules required by the BBB for its members.¹⁰⁸¹ For this reason, BBB recommends that consumers consider other available

¹⁰⁷⁵ Troy Flemming, "'Pay for Play' Scandal at the Better Business Bureau Leads to Consumer Mistrust of the Business Rating Organization," *Loyola Consumer Law Review* 23, no. 3 (2011): 445-458, <http://lawcommons.luc.edu/lclr/vol23/iss3/7>.

¹⁰⁷⁶ "Better Business Bureau Annual Report," Better Business Bureau, accessed November 30, 2017, <https://www.bbb.org/globalassets/local-bbbs/council-113/media/annual-reports/2017-annual-reports/2016-cbbb-annual-report.pdf>.

¹⁰⁷⁷ Better Business Bureau, "BBB Partner Code of Conduct | Better Business Bureau," BBB: Start with Trust | Better Business Bureau, accessed May 20, 2022, <https://www.bbb.org/partner-code-of-conduct>.

¹⁰⁷⁸ *Ibid.*

¹⁰⁷⁹ *Better Business Bureau*. Overview of BBB Grade. Retrieved from <https://www.bbb.org/council/overview-of-bbb-grade> (accessed November 30, 2017).

¹⁰⁸⁰ The BBB introduced the letter-grade system at the beginning of 2009, replacing the BBB's well-known "unsatisfactory-satisfactory" grade system to make it easier for consumer to find reliable businesses.

¹⁰⁸¹ North Carolina Consumers Council, "The Better Business Bureau (BBB) Isn't a Government Agency and Can't Force Companies to Act," North Carolina Consumers Council, last modified February 22, 2022, <https://www.ncconsumer.org/news-art.s-eg/the-better-business-bureau-bbb-is-powerless-tohelp-resolve-consumer-complaints.html>.

information about the company besides its BBB rating.¹⁰⁸² Businesses do not need to be accredited to receive a BBB rating.¹⁰⁸³

On BBB.org, consumers can access the BBB online database and search for businesses, read their profiles, file a claim, or leave a review. According to the BBB 2016 annual report, more than 340,000 consumer reviews were published on its website. Consumers and businesses reported feedback as necessary when researching companies on the BBB's website. Feedback allows for positive experiences to be shared on the website.¹⁰⁸⁴ BBB enables any consumer to leave a positive, negative, or neutral review on a business and will enable businesses to challenge whether a consumer interacted with their business and respond to the reviewer online. Companies that prove the reviewer is not truthful can suspend the review while BBB investigates and requests evidence of the interaction. BBB.org does not accept anonymous or third-party reviews, and reviewers must verify their email addresses. BBB monitors and tracks IP addresses and investigates when many reviews come from the same IP address. Once a review is submitted, companies receive a notification and can respond before the review appears publicly. After the review submission is verified or the time allowed (10 days) to respond has expired, the review is posted and stays on a company's BBB Business Review for three years.¹⁰⁸⁵ If a business addresses a customer's problem posted on a customer review, the customer can choose to withdraw the review. Customers can also update the information in their original review.

However, consumers cannot leave a negative review and file a formal BBB complaint on the same issue. They can either post the review or have the BBB help them resolve it.

The BBB also provides dispute resolution services to help consumers and businesses resolve B2B and B2C disputes. Consumers and businesses can choose to attempt to resolve their disputes through mediation, arbitration, and even class actions. The BBB provides "shuttle diplomacy" mediation via telephone conference calls or videoconferencing. Mediations can also take place in person at the BBB local offices. Once the parties reach an agreement, the

¹⁰⁸² *Ibid.*

¹⁰⁸³ Better Business Bureau, "Overview of BBB Ratings | Better Business Bureau," BBB: Start with Trust | Better Business Bureau, accessed May 23, 2022, <https://www.bbb.org/overview-of-bbb-ratings>.

¹⁰⁸⁴ *Better Business Bureau Customer Review F.A.Q.s.* <https://www.bbb.org/north-east-florida/reviews/about-bbb-customer-reviews/customer-review-f.a.q.s/> (Accessed November 30, 2017).

¹⁰⁸⁵ *Ibid.*

BBB confirms the settlement in writing and follows up with the parties to ensure compliance.¹⁰⁸⁶ The BBB offers arbitration services to resolve B2C and B2B disputes. For example, under the Verizon Wireless Dispute Resolution Program, customers can request arbitration to resolve \$10,000 or less disputes with Verizon Wireless.¹⁰⁸⁷ The arbitration hearings are conducted through document review, teleconference, videoconference, or in-person hearings at the BBB locations. The BBB National Programs maintains a panel of 700 arbitrators who are lawyers or dispute resolution experts trained by the BBB in specific matters. Some considerations have emerged about the validity and effectiveness of the BBB in improving consumer confidence and also the help that BBB can offer in resolving disputes between consumers and businesses. Many consumers think the BBB is a government agency that can act against companies. This expectation cannot be met as the BBB can facilitate communication between the consumer and the business but does not have the authority to force businesses to take action. The BBB provides a communication medium for consumers. However, even if a business responds to a consumer's complaint, that does not mean the company will address or resolve the issue.

In recent years, the BBB has often come under criticism for allegedly adopting a 'pay for play' policy. A 2010 ABC News report alleged that the BBB would reward higher grades to businesses that paid for a BBB membership and punish those with poor grades and those that did not.¹⁰⁸⁸ The same report documented that business owners received high rates for non-existing companies after paying the BBB membership.¹⁰⁸⁹ In 2010, Connecticut's Attorney General sent a demand letter to the BBB to stop using the letter-grading system for potentially harming and misleading consumers.¹⁰⁹⁰ These criticisms could lead to the conclusion that BBB grading businesses for their BBB membership would constitute a conflict of interest. Furthermore, one could speculate that companies that do not pay for a membership are not carefully scrutinized and, therefore, the BBB grades would not be 100% reliable.

¹⁰⁸⁶ See the BBB Dispute Resolution Program. To access the BBB Dispute Resolution brochure see Better Business Bureau, "Dispute Resolution," accessed May 21, 2022, https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/auto-line/disputeresolutionbrochure_10-19-2020.pdf?sfvrsn=3090a6c8_3.

¹⁰⁸⁷ Better Business Bureau, "Dispute Resolution Program for Verizon Wireless Customers," BBBPrograms, accessed May 21, 2022, <https://bbbprograms.org/programs/all-programs/VerizonDisputeResolution>.

¹⁰⁸⁸ ABC News, "Terror Group Gets 'A' Rating From Better Business Bureau?," ABC News, last modified November 11, 2010, <https://abcnews.go.com/Blotter/business-bureau-best-ratings-money-buy/story?id=12123843>.

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ Flemming, "'Pay for Play'."

Consequently, some consumers may lose confidence in the BBB grading system and in assessing a business's trustworthiness.

Google Customer Reviews

Created in 2012, Google Trusted Stores (GTS) was a certification program that allowed online merchants to display Google's seal of approval on their website, signifying their status as "Trusted Store" and Google Shopping results. The program consisted of a customer-satisfaction rating program based on the collection of ratings left at the time of the purchase on the seller's website. Online retailers were required to create an account and go through a qualification period for a minimum of 30 days while Google was collecting data and assessing eligibility to participate in the program.

The program was designed to boost online retailers' credibility and give consumers more confidence when shopping online. In April 2017, Google shut down the GTS certification program and replaced it with Google Customer Reviews.¹⁰⁹¹

Google Customer Reviews (GCR) is a program that allows users to rate their purchase experiences with retailers who participate in the program. Customers can opt-in to receive a survey that Google will email them a few days after their order has been delivered so that customers can review the whole shopping experience.¹⁰⁹² The new system relies on feedback from shoppers and allows online stores to collect Google product reviews. According to the GCR policies, all customers can leave positive and negative reviews, while merchants are forbidden to solicit positive reviews selectively. Google policies also prohibit merchants from paying for reviews. Google encourages merchants to respond to negative reviews and consider bad reviews an opportunity to resolve customer issues. To avoid negative reviews, Google invites businesses to provide a customer service line or an email to resolve complaints before they become negative reviews. Google's goal is to encourage direct communication between customers and sellers to contribute to the seller ratings and encourage sellers to improve the product or service offered. Merchants also have the opportunity to flag abusive or fake reviews.

¹⁰⁹¹ "Google Customer Reviews: Receive and Share Customer Feedback While Earning Seller Ratings," Google, last modified April 3, 2017, <https://www.blog.google/products/ads/google-customer-reviews-receive-and>.

¹⁰⁹² "Google Customer Reviews Opt-in and Survey," Google Help, accessed December 22, 2020, https://support.google.com/merchants/answer/7124322?hl=en&ref_topic=7125793.

Unlike the previous program, the GCR badge can be displayed on any page of the retailer's website. The badge can be suspended if the online merchant violates the GRS policies¹⁰⁹³ until the required changes are made. To set up Google Customer Reviews on their websites, merchants must create an account with the Google Merchant Center and ensure their website has a separate order confirmation page. The badge can be integrated into the website once the merchant reviews and accepts the appropriate GCR agreement based on the merchant's region.¹⁰⁹⁴

One of the problems with the Google Customer Reviews program is the lack of a system for resolving disputes arising from negative 'defamatory' reviews. Defamatory reviews can harm a business's reputation and turn customers away. Merchants may claim that Google makes it easy for customers to complain but difficult for merchants to deal with misleading reviews. While Google leaves the dispute resolution between the person who leaves the allegedly defamatory review and the business itself, a mechanism that intervenes first to mediate and then determine whether a review should be removed could help settle the dispute and prevent companies from filing lawsuits.

Google's popular review system is not exempt from criticism. One may wonder if the system is reliable. Despite Google's zero-tolerance policy on fake reviews,¹⁰⁹⁵ businesses and consumers have objected to the reliability of Google reviews. An investigation by CBC, a Canadian broadcasting company, revealed the existence of a black market in which some companies pay for false positive reviews.¹⁰⁹⁶ As Google reviews help businesses boost their search engine optimization (SEO), some companies may be prone to purchase fake positive reviews to rank higher on a search engine results page (SERP) and receive more traffic. Still, according to the same investigation, web firms would extort businesses by posting negative reviews and offering services to remove them.¹⁰⁹⁷ The research compiled 1,279 firms across North America connected by 208 fake accounts that posted 3,574 fake reviews. According to

¹⁰⁹³ "Google Customer Reviews Terms of Service," Google Help, accessed December 22, 2020, <https://support.google.com/merchants/answer/7180092>.

¹⁰⁹⁴ "Google Customer Reviews Website Badge," Google Help, accessed December 22, 2020, https://support.google.com/merchants/answer/7124685?hl=en&ref_topic=7125793.

¹⁰⁹⁵ "Prohibited and Restricted Content," Google Help, accessed May 24, 2022, <https://support.google.com/local-guides/answer/7400114?hl=en#zippy=%2Cfake-engagement>.

¹⁰⁹⁶ Matthew Pierce et al., "Why You Can't Believe Everything You Read on Google Reviews | CBC News," CBC, last modified May 20, 2021, <https://www.cbc.ca/news/investigates/fake-reviews-on-google-1.6033859>.

¹⁰⁹⁷ Ibid.

the CBC, many companies that trade fake reviews advertise their services on social media.¹⁰⁹⁸ Fake reviews are untruthful and deceiving as they are not based on consumers' experiences. Also, they mislead consumers about their shopping preferences. Although Google prohibits users from "paying, incentivizing, or encouraging false reviews" or trading reviews for discounts, free goods, or services, it does not prevent businesses from unfair practices.¹⁰⁹⁹ It is worth noting that the US Federal Trade Commission (FTC), under section 5 of the FTC Act (15 U.S. Code § 45), prohibits "unfair or deceptive acts or practices in or affecting commerce."¹¹⁰⁰ The FTC makes it, therefore, illegal for anyone to buy Google reviews.

TRUSTe

Security and confidentiality of information shared are the consumer's primary concerns when purchasing a product or service online. The American company TRUSTe is considered an online privacy pioneer and still one of the most recognized trust seals. It was the first organization to form, in 2000, a framework that included US and European data privacy standards.¹¹⁰¹ In 1997, TRUSTe started as a non-profit organization to foster e-commerce privacy. Since 2017, it has been a subsidiary of TrustArc Inc., a privacy compliance technology company based in San Francisco, California. TrustArc operates through its EU, Canada, the UK, and the Philippines.

TRUSTe offers privacy certification and verification programs¹¹⁰² that enable its members who collect or process personal information to demonstrate that their policies meet the highest data governance standards and comply with significant privacy frameworks. These frameworks include the EU General Data Protection Regulation (GDPR)¹¹⁰³, Asian Pacific Economic Cooperation (APEC) Privacy Framework, California Consumer Privacy Act (CCPA),

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ "Prohibited and Restricted."

¹¹⁰⁰ Federal Trade Commission, "A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority," Federal Trade Commission, last modified February 10, 2022, <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

¹¹⁰¹ Scott Baradell, "The History of the TRUSTe Seal — and Why It Still Has Value Today," Trust Signals, Trust Badges and the New PR of Trust, last modified September 3, 2020, <https://www.trustsignals.com/blog/the-history-of-the-truste-seal-and-why-it-still-has-value>.

¹¹⁰² For a complete list of TRUSTe certification and verification programs go to <https://trustarc.com/consumer-info/privacy-certification-standards/>

¹¹⁰³ EU Regulation 2016/679 on data protection and privacy.

Organisation for Economic Co-operation and Development (OECD) Privacy Guidelines, and other global privacy laws and regulations.¹¹⁰⁴

The TRUSTe seal companies display on their websites certifies website privacy and data processing policy, making participating companies accountable to the practices they outline in their privacy notice.

TRUSTe privacy assurance also offers a free online dispute resolution program to help consumers resolve disputes concerning potential violations of posted privacy statements and specific privacy issues that pertain to TRUSTe clients. To file a privacy dispute regarding a TRUSTe verification or certification client, a complainant must first contact the company and attempt to resolve the dispute in good faith. Suppose the parties cannot reach an agreement. In that case, TRUSTe reviews the information submitted by the complainant, determines if the complaint is eligible for a resolution, and makes a final decision.¹¹⁰⁵ In its decision, TRUSTe can require its client to correct or modify personally identifiable information to change its privacy policy. The complainant and the TRUSTe client have 14 calendar days from receiving notice of the decision to file an appeal. If the TRUSTe client refuses to comply with the decision, TRUSTe may remove it from its program or refer it to a government agency or the courts.

Final Observations on Preventive Dispute Mechanisms and Trust

As described in previous sections, PDMs comprise service guarantees, reputation systems, and seals of approval mechanisms that combined provide assurance and influence consumer trust.

Previous research has investigated the role of service guarantees and seals of approval in positively influencing consumers' trusting and purchasing intentions.¹¹⁰⁶ In an early

¹¹⁰⁴ "TRUSTe Privacy Certification and Assurance Services – TrustArc The Leader in Privacy Management Software," TrustArc The Leader in Privacy Management Software, last modified December 15, 2020, <https://trustarc.com/truste-certifications-assurance/>.

¹¹⁰⁵ "TRUSTe Privacy Dispute Resolution FAQs – TrustArc The Leader in Privacy Management Software," TrustArc The Leader in Privacy Management Software, last modified November 25, 2020, <https://trustarc.com/dispute-resolution-faqs/>.

¹¹⁰⁶ Milena Head and Khaled Hassanein, "Trust in e-Commerce: Evaluating the Impact of Third-Party Seals," *Quarterly Journal of Electronic Commerce* 3, no. 3 (2002): 307-325; Pingjun Jiang, David B. Jones, and Sharon Javie, "How third-party certification programs relate to consumer trust in online transactions: An exploratory study," *Psychology and Marketing* 25, no. 9 (2008): 839-858, doi:10.1002/mar.20243; Xiaorui Hu et

exploratory study, Nöteberg et al. found supporting evidence of web seals' effect on purchasing likelihood. The study showed respondents were less likely to buy without a seal regarding the seal types. Although, the seal type did not seem to make a difference.¹¹⁰⁷ Other studies on consumer trust have shown that seals, guarantees, and ratings influence consumers perceived confidence in online vendors, increasing the consumers' intention to purchase.¹¹⁰⁸ A 2018 study on driving purchase intention in Airbnb users showed that rating volume significantly impacted consumer purchase intention.¹¹⁰⁹

Research has confirmed that a vendor's reputation is a consumer-deciding factor.¹¹¹⁰ Jones and Leonard define reputation as "the degree to which the buyer believes in the seller's honesty."¹¹¹¹ Trust is initially gained through reputation, which can come from different sources (word-of-mouth, friends, previous customer experience, media, etc.).¹¹¹² Often, vendors rely on reputation systems to gain consumer trust. Reputation-based systems formalize the process of gathering, aggregating, and distributing information about consumers' past behavior.¹¹¹³ Reputation information may be quantitative (reputation scores, star ratings) or qualitative (consumer feedback and reviews). Reputation systems help determine if a particular participant is trustworthy and can reinforce generalized trust and trustworthiness.¹¹¹⁴ Previous studies found that the quality and value of online feedback influence consumers' confidence in

al., "The effects of Web assurance seals on consumers' initial trust in an online vendor: A functional perspective," *Decision Support Systems* 48, no. 2 (2010): 407-418, doi:10.1016/j.dss.2009.10.004.

¹¹⁰⁷ Anna Nöteberg, Ellen Christiaanse, and Phillip Wallage, "The Role of Trust and Assurance Services in Electronic Channels: An Exploratory Study," in *ICIS Proceedings* (Amsterdam 1999), 472-478.

¹¹⁰⁸ Pejvak Oghazi et al., "Online purchase return policy leniency and purchase decision: Mediating role of consumer trust," *Journal of Retailing and Consumer Services* 41 (2018): 190-200, doi:10.1016/j.jretconser.2017.12.007; Vishag Badrinarayanan, Enrique P. Becerra, and Sreedhar Madhavaram, "Influence of congruity in store-attribute dimensions and self-image on purchase intentions in online stores of multichannel retailers," *Journal of Retailing and Consumer Services* 21, no. 6 (2014): 1013-1020, doi:10.1016/j.jretconser.2014.01.002.

¹¹⁰⁹ Chia-Chen Chen and Ya-Ching Chang, "What drives purchase intention on Airbnb? Perspectives of consumer reviews, information quality, and media richness," *Telematics and Informatics* 35, no. 5 (2018): 1512-1523, doi:10.1016/j.tele.2018.03.019.

¹¹¹⁰ Nöteberg, Christiaanse, and Wallage, "The Role of Trust."

¹¹¹¹ Kiku Jones and Lori N. Leonard, "Trust in consumer-to-consumer electronic commerce," *Information & Management* 45, no. 2 (2008): 90, doi:10.1016/j.im.2007.12.002.

¹¹¹² Colin Rule and Larry Friedberg, "The appropriate role of dispute resolution in building trust online," *Artificial Intelligence and Law* 13, no. 2 (2005): 193-205, doi:10.1007/s10506-006-9011-3.

¹¹¹³ National Research Council et al., (Washington: 2013).

¹¹¹⁴ Ko Kuwabara, "Do Reputation Systems Undermine Trust? Divergent Effects of Enforcement Type on Generalized Trust and Trustworthiness," *American Journal of Sociology* 120, no. 5 (2015): 1390-1428, doi:10.1086/681231.

sellers' credibility and benevolence.¹¹¹⁵ Reputation systems also incentivize good behaviors and positively affect the market's quality.¹¹¹⁶

Research suggests that reputation influences trusting intentions and increases confidence in a purchase decision through consumer feedback and reviews or scores posted on the seller's website or other websites.¹¹¹⁷ Feedback or scores can assist consumers in determining whether or not to transact with a vendor. Generally, direct personal experience significantly impacts trust more than referrals from others or reputation.¹¹¹⁸ However, if there is no direct experience, as in the case of online shopping, the consumer will have to rely on other referrals. Thus, "reputation can be considered a collective measure of trustworthiness based on the referrals or ratings"¹¹¹⁹ from community members. An October 2018 survey found that 19 percent of respondents trusted online consumer reviews if they believed they were authentic, and another 25 percent trusted online reviews when multiple customer reviews were present.¹¹²⁰ In 2020, statistics showed that almost 55.6 percent of Amazon shoppers in the United States trust product reviews on Amazon.¹¹²¹ A recent local consumer review survey by Brightlocal found that 49 percent of respondents trust consumer reviews as much as personal recommendations from friends and family.¹¹²² Consumer reviews are considered a specific type of 'electronic word-of-mouth' (eWOM) communication that helps consumers assess the quality and performance of products or services.¹¹²³ Substantial academic research has provided evidence

¹¹¹⁵ Sulin Ba and Paul A. Pavlou, "Evidence of the Effect of Trust Building Technology in Electronic Markets: Price Premiums and Buyer Behavior," *MIS Quarterly* 26, no. 3 (2002): 243-268, doi:10.2307/4132332; Paul A. Pavlou and Angelika Dimoka, "The Nature and Role of Feedback Text Comments in Online Marketplaces: Implications for Trust Building, Price Premiums, and Seller Differentiation," *Information Systems Research* 17, no. 4 (2006): 392-414, doi:10.1287/isre.1060.0106.

¹¹¹⁶ Audun Jøsang, Roslan Ismail, and Colin Boyd, "A survey of trust and reputation systems for online service provision," *Decision Support Systems* 43, no. 2 (2007): 618-644, doi:10.1016/j.dss.2005.05.019.

¹¹¹⁷ Weber Shandwick/KRC, "Buy It, Try It, Rate It," Weber Shandwick, last modified 2012, <https://www.webershandwick.com/uploads/news/files/ReviewsSurveyReportFINAL.pdf>.

¹¹¹⁸ Audun Jøsang, "Trust and Reputation Systems," in *Foundations of Security Analysis and Design V: FOSAD 2008/2009 Tutorial Lectures* (Basingstoke: Springer, 2007), 209-245.

¹¹¹⁹ *Ibid.*, 215.

¹¹²⁰ Statista, "Trust in Online Customer Reviews 2018," Statista, last modified December 7, 2018, <https://www.statista.com/statistics/315755/online-customer-review-trust/>.

¹¹²¹ Statista, "U.S. Amazon Product Review Trust 2020," Statista, last modified April 2, 2020, <https://www.statista.com/statistics/623659/amazon-customer-review-usage-usa/>.

¹¹²² Brightlocal, "Local Consumer Review Survey: How Customer Reviews Affect Behavior," BrightLocal.com, last modified January 26, 2022, <https://www.brightlocal.com/research/local-consumer-review-survey/>.

¹¹²³ Raffaele Filieri et al., "Consumer perceptions of information helpfulness and determinants of purchase intention in online consumer reviews of services," *Information & Management* 55, no. 8 (2018): 956-970, doi:10.1016/j.im.2018.04.010.

of the influence of online consumer reviews on consumers' behavior, online product choices, future sales, and purchase decision-making.¹¹²⁴

6.4 COMPLAINT HANDLING SERVICES AND ODR

As previously highlighted, trust plays a fundamental role in consumers' intentions and purchase behaviors when consumers operate online. Therefore, building consumer confidence is essential to fostering e-commerce worldwide.

Consumer complaints represent valuable feedback for online merchants to understand issues consumers experience when shopping online. Scholars have emphasized how complaints affect customers' brand perception and reduce consumer purchase intentions.¹¹²⁵ Therefore, businesses pay close attention to how they respond to and handle online customer complaints.¹¹²⁶ Prompt and adequate procedures addressing consumer complaints are critical to online business growth and competition, as they promote consumer satisfaction, loyalty, and trust in online shopping.

Previous studies have demonstrated the role of effective complaint-handling services in enhancing consumers' confidence and building long-term relationships in B2C e-

¹¹²⁴ Judith Chevalier and Dina Mayzlin, "The Effect of Word of Mouth on Sales: Online Book Reviews," *Journal of Marketing Research* 43 (2003): 345-354, doi:10.3386/w10148; Sylvain Senecal and Jacques Nantel, "The influence of online product recommendations on consumers' online choices," *Journal of Retailing* 80, no. 2 (2004): 159-169, doi:10.1016/j.jretai.2004.04.001; Yong Liu, "Word of Mouth for Movies: Its Dynamics and Impact on Box Office Revenue," *Journal of Marketing* 70, no. 3 (2006): 74-89, doi:10.1509/jmkg.70.3.74; Do-Hyung Park, Jumin Lee, and Ingoo Han, "The Effect of On-Line Consumer Reviews on Consumer Purchasing Intention: The Moderating Role of Involvement," *International Journal of Electronic Commerce* 11, no. 4 (2007): 125-148, doi:10.2753/jec1086-4415110405; Wenjing Duan, Bin Gu, and Andrew B. Whinston, "Do online reviews matter? — An empirical investigation of panel data," *Decision Support Systems* 45, no. 4 (2008): 1007-1016, doi: 10.1016/j.dss.2008.04.001; Jumin Lee, Do-Hyung Park, and Ingoo Han, "The effect of negative online consumer reviews on product attitude: An information processing view," *Electronic Commerce Research and Applications* 7, no. 3 (2008): 341-352, doi: 10.1016/j.elerap.2007.05.004; Raffaele Filieri, "What makes online reviews helpful? A diagnosticity-adoption framework to explain informational and normative influences in e-WOM," *Journal of Business Research* 68, no. 6 (2015): 1261-1270, doi: 10.1016/j.jbusres.2014.11.006; Sahar Karimi and Fang Wang, "Online review helpfulness: Impact of reviewer profile image," *Decision Support Systems* 96 (2017): 39-48, doi:10.1016/j.dss.2017.02.001.

¹¹²⁵ Tobias Schaefer and Julia Schamari, "Service Recovery via Social Media," *Journal of Service Research* 19, no. 2 (2015): 192-208, doi:10.1177/1094670515606064; Ana Javornik, Raffaele Filieri, and Ralph Gumann, "'Don't Forget that Others Are Watching, Too!' The Effect of Conversational Human Voice and Reply Length on Observers' Perceptions of Complaint Handling in Social Media," *Journal of Interactive Marketing* 50, no. 1 (2020): 110-119, doi:10.1016/j.intmar.2020.02.002.

¹¹²⁶ Wenkun Zhang and Yanan Wang, "Not just apologizing: The impact of complaint handling on sustained participation behavior in live-streaming shopping," *Journal of Consumer Behaviour* 22, no. 3 (2023): 688-700, doi:10.1002/cb.2154.

commerce.¹¹²⁷ Others have shown the positive effect and impact of complaint handling on consumer satisfaction and building consumer loyalty.¹¹²⁸ Online vendors must respond promptly to consumer complaints and adopt effective remedy systems to attain consumer trust and loyalty. When a problem arises with a transaction, consumers expect online sellers to respond by meeting their expectations. Research has shown that accessible, responsive, and forceful complaint-handling procedures impact consumer trust and consumers' online shopping decisions.¹¹²⁹

Prior work has suggested that the responsiveness of complaint-handling procedures is crucial in online shopping and directly influences consumer confidence when purchasing online.¹¹³⁰ Others have highlighted how addressing consumer issues and problems may influence consumers to repurchase from online vendors.¹¹³¹ Another study concluded that a business's competent response to customers' complaints informs repeat purchase intention.¹¹³² In contrast, findings have shown that low levels of complaint satisfaction increase consumer dissatisfaction and cause consumer repurchase intention to plunge.¹¹³³

A second instrument that can be used to enhance consumer confidence and resolve disputes is ODR. ODRs differ from complaint-handling services in that they represent external online

¹¹²⁷ Bernd Stauss and Wolfgang Seidel, *Complaint Management: The Heart of CRM* (Nashville: South-Western Pub, 2004); Zheng S. Tang, "An effective dispute resolution system for electronic consumer contracts," *Computer Law and Security Report* 23 (June 2010), <https://ssrn.com/abstract=2080552>.

¹¹²⁸ Stephen S. Tax, Stephen W. Brown, and Murali Chandrashekar, "Customer Evaluations of Service Complaint Experiences: Implications for Relationship Marketing," *Journal of Marketing* 62, no. 2 (1998), doi:10.2307/1252161; John W. Huppertz, "Firms' complaint handling policies and consumer complaint voicing," *Journal of Consumer Marketing* 24, no. 7 (2007): 428-437, doi:10.1108/07363760710834843; Bee Wah Yap, T. Ramayah, and Wan Nushazelin Wan Shahidan, "Satisfaction and trust on customer loyalty: a PLS approach," *Business Strategy Series* 13, no. 4 (2012): 154-167, doi:10.1108/17515631211246221; Rizwan R. Ahmed et al., "Customer Satisfaction & Loyalty and Organizational Complaint Handling: Economic Aspects of Business Operation of Airline Industry," *Engineering Economics* 31, no. 1 (2020): 114-125, doi:10.5755/j01.ee.31.1.8290; Doga Istanbuluoglu and Ezgi Sakman, "Successful complaint handling on social media predicts increased repurchase intention: The roles of trust in company and propensity to trust," *European Management Journal*, 2022, doi:10.1016/j.emj.2022.06.004.

¹¹²⁹ Chin Eang Ong and Caroline Chang, "How Complaint Handling Procedures Influence Consumer Decisions to Shop Online?" (Paper presented at 27th Bled eConference eEcosystems, Bled, Slovenia, June 2014).

¹¹³⁰ Chin E. Hong and Caroline Chan, "How Complaint Handling Procedures Influence Consumer Decisions to Shop Online?" (Paper presented at 27th Bled eConference eEcosystems, Bled, Slovenia, June 2014).

¹¹³¹ John W. Huppertz, "An effort model of first-stage complaining behaviour," *Journal of Consumer Satisfaction Dissatisfaction and Complaining Behaviour* 16 (2003): 132-144.

¹¹³² Brown W. Ateke and Horsfall Harcourt, "Perceived Satisfaction with Organizational Response to Complaints and Repeat Purchase Intention," *International Journal of Economics and Business Management* 3, no. 6 (2017): 11-24.

¹¹³³ Heiner Evanschitzky, Christian Brock, and Markus Blut, "Will You Tolerate This? The Impact of Affective Commitment on Complaint Intention and Postrecovery Behavior," *Journal of Service Research* 14, no. 4 (2011): 410-425, doi:10.1177/1094670511423956.

technology-based mechanisms operated by an independent administrator and designed to facilitate the resolution of disputes between consumers and traders through the intervention of a neutral third party. This guarantees their independence and the absence of conflict of interest. ODRs have specific characteristics, including transparency, impartiality, effectiveness, and accessibility.¹¹³⁴ In contrast, the EU ADR Directive defines complaint-handling services as internal mechanisms traders operate to manage disputes between merchants and buyers¹¹³⁵ through their customer service or dispute resolution teams. As internal mechanisms, they lack the fundamental principles distinguishing ODR, like transparency, independence, and neutrality.¹¹³⁶

ODR supporters have promoted the view of ODR as a trusted intermediary that can help supply much-needed confidence in online consumer transactions¹¹³⁷ by addressing and handling consumer complaints. Large Internet intermediaries like eBay and Amazon were among the first to realize that gaining consumer trust was critical to success. They understood that providing consumers with remedy systems could help improve consumer protection, resolve consumer issues, and gain consumer loyalty.

Many scholars have emphasized the significance of ODR in enhancing consumer trust. According to Ebner, “incorporating ODR into systems such as e-commerce is one measure expected to raise consumers’ level of trust in the system.”¹¹³⁸ Katsh and Wing believe that, although consumer shopping behavior may depend on several factors, “the presence and promise of ODR on an internet site can also build trust and reduce a potential buyer’s level of risk.”¹¹³⁹ For Schmitz, the increasing lack of customer service, the inability to reach live representatives, and the imposition of one-sided arbitration clauses on consumers have led to the need for “expanding access to remedies for consumers to build trust and preserve fairness in e-commerce.”¹¹⁴⁰ ODR can help fill that need. According to Schmitz, trustworthy ODR can

¹¹³⁴ Directive 2013/11/EU, Art. 1 and 1 (2).

¹¹³⁵ *Ibid.*, Preamble 17.

¹¹³⁶ UNCITRAL Technical Notes on ODR, Section II; Directive 2013/11/EU, Art. 1.

¹¹³⁷ Alex Chung and Ying Yu, “Consumer Trust in the Digital Economy: The Case for Online Dispute Resolution,” *UNCTAD Research Paper*, no. 72 (November 2021).

¹¹³⁸ Ebner and Zeleznikow, “Trust,” 155.

¹¹³⁹ Ethan Katsh and Leah Wing, “Ten years of online dispute resolution (ODR): Looking at the past and constructing the future,” *University of Toledo Law Review* 38 (2006): 25-26.

¹¹⁴⁰ Amy Schmitz, “Building trust in ecommerce through online dispute resolution,” in *Research Handbook on Electronic Commerce Law* (Gloucestershire: Edward Elgar Publishing, 2016), 326.

boost consumer trust in cross-border purchases.¹¹⁴¹ ODR systems that guarantee the consumer a rapid and effective resolution of any problem arising from online purchases can fuel consumer confidence in online shopping. Trusted ODR mechanisms protect cross-border deals and incentivize consumers to purchase from overseas vendors.¹¹⁴²

Not only can ODR tools ensure the prompt resolution of any disputes, but they can also prevent the escalation of disputes. Successful private ODR mechanisms show us that if consumers and traders trust a resolution process to be fair, transparent, easy to access, and use, no extra layer of redress is needed or required. If consumers are satisfied with the dispute resolution process offered by vendors, they will not escalate their cases.¹¹⁴³

European legislation has highlighted the crucial role of ODR in increasing consumer trust in the online market. Recitals 6 of Regulation 524/2013 affirms that reliable and efficient ODR systems can significantly strengthen consumer confidence when conducting online transactions.¹¹⁴⁴ UNCTAD's studies show that 87% of consumers deem online and offline cross-border dispute resolution mechanisms important, with 49% saying they are very important. Data prove that effective consumer dispute resolution systems are critical to fostering trust in B2C transactions.

The existence of prevention and complaint-handling tools along with ODR in online platforms as assurance mechanisms can improve consumer trust in online vendors and influence consumers' purchase intentions, strategically building and strengthening online confidence in B2C transactions. They can contribute to "increase the likelihood that a consumer will engage in an e-commerce transaction due to the trust in the infrastructure offered, regardless of whether or not they trust the online merchant."¹¹⁴⁵

¹¹⁴¹ Amy J. Schmitz, "There's an 'App' for That: Developing Online Dispute Resolution to Empower Economic Development," *University of Missouri School of Law Legal Study Research Paper*, no. 06 (January 2018): 1-4.

¹¹⁴² *Ibid.*

¹¹⁴³ *Ibid.*

¹¹⁴⁴ Regulation (EU) No 524/2013, Recital 6, "The internal market is a reality for consumers in their daily lives, when they travel, make purchases and make payments. Consumers are key players in the internal market and should therefore be at its heart. The digital dimension of the internal market is becoming vital for both consumers and traders. Consumers increasingly make purchases online and an increasing number of traders sell online. Consumers and traders should feel confident in carrying out transactions online so it is essential to dismantle existing barriers and to boost consumer confidence. The availability of reliable and efficient online dispute resolution (ODR) could greatly help achieve this goal."

¹¹⁴⁵ Patton and Jøsang, "Technologies for Trust," 2.

However, few studies have been conducted on trust indicators in this context. So far, what emerges clearly from previous studies, literature reviews, and the research results presented in Chapter Three is that a lack of adequate tools for resolving disputes leads to a certain degree of consumer dissatisfaction and lack of trust in online vendors. Such discontent leads to a bad reputation and loss of sales and affects consumer repurchase intentions.¹¹⁴⁶ Consumer satisfaction is essential to gaining consumer trust, which ensures loyalty and repeat purchase opportunities. Ensuring consumer repurchase is crucial to the success of online stores¹¹⁴⁷ and, overall, to the success of e-commerce.

Although ODR alone may not be sufficient to build consumer trust, it can be one mechanism among many that can attract consumers to shop online. This study claims that if combined with other assurance mechanisms, ODR can help improve consumer confidence and enhance access to justice. In this regard, this study proposes an STA model (elaborated in the following section) that incorporates ODR as an assurance mechanism that, in the presence of other instruments, can positively influence consumer intentions and purchase decisions.

ODR as an Assurance Mechanism

When problems arise online, the ability to access justice remedies can be crucial in helping increase consumer confidence in e-commerce. Although various marketplaces facilitate commercial transactions between third parties online, consumers still struggle to access justice and resolve disputes arising from B2C online transactions. The high costs, complexity, and length of offline procedures and the lack of trust in ADR remedies discourage some consumers from engaging in e-commerce transactions.

Many scholars and experts agree that ODR plays and can progressively play a vital role in improving access to justice. New, increasingly advanced forms of ODR technologies and

¹¹⁴⁶ Fleur J. Laros and Jan-Benedict E. Steenkamp, "Emotions in consumer behavior: a hierarchical approach," *Journal of Business Research* 58, no. 10 (2005): 1437-1445, doi:10.1016/j.jbusres.2003.09.013; Anna S. Mattila and Heejung Ro, "Discrete Negative Emotions and Customer Dissatisfaction Responses in a Casual Restaurant Setting," *Journal of Hospitality & Tourism Research* 32, no. 1 (2008): 89-107, doi:10.1177/1096348007309570; Yakup Durmaz, Bülent Demirağ, and Sinan Çavuşoğlu, "Influence of Regret and Regret Reversing Effort on Dissatisfaction and Repurchase Intention after Purchasing Fashion Products," *Journal of Fashion Business* 25, no. 6 (2020): 13-24, doi:10.20944/preprints202003.0280.v1

¹¹⁴⁷ Yunfan Lu, Yaobin Lu, and Bin Wang, "Effects of Dissatisfaction on Customer Repurchase Decisions in E-Commerce - An Emotion-Based Perspective," *Journal of Electronic Commerce Research* 13, no. 3 (2012): 224-237.

algorithms-based systems have expanded the redress available to consumers. Such systems, as shown by eBay's and Amazon's experiences, can handle large numbers of low-value e-commerce consumer disputes quickly and cost-effectively. Katsh and Rabinovich-Einy have argued that combining data collection, communication, and ODR software offers the opportunity to increase efficiency and fairness, which translates into increased access and justice.¹¹⁴⁸ Expanding consumer access to justice has been claimed to improve consumer confidence in e-commerce. ODR seems to adapt well to the needs of consumers who operate online precisely for its characteristics of accessibility through the internet and the low cost and speed of its procedure. It can make justice more accessible to consumers involved in e-commerce disputes, which, as a result, may help reinforce their trust in e-commerce transactions. ODR can also be a driving force for developing a global e-commerce economy.

As a means of access to justice and an instrument to enhance consumer confidence, ODR must first become a source of assurance. As noted by Ebner and Zeleznikow,¹¹⁴⁹ technology must be constructed so that the public will trust it as an efficient and effective way of managing disputes. Also, consumers must trust that ODR service providers will respect their confidentiality, be impartial, and provide each side with equal rules and procedures.¹¹⁵⁰ Abedi et al. developed standards for measuring consumer trust in ODR and identified three crucial trust indicators: knowledge, perception of fairness, and code of ethics.¹¹⁵¹ The first element contributing to measuring trust is knowledge and information about ODR systems. Users must be informed about the process to trust it.¹¹⁵² Another element identified in their research is the expectation of fairness. When using ODR mechanisms, individuals expect them to be fair. Fairness can be obtained through transparency about the process and neutrals, the confidentiality of personal data, accessibility of redress procedures, decision makers' integrity, honesty, and consistency of outcomes.¹¹⁵³ The third significant element for measuring trust in ODR systems is the presence of a code of ethics.¹¹⁵⁴ Such code should include an official certification to ensure neutrals and decision-makers impartiality and professional competence.

¹¹⁴⁸ Katsh and Rabinovich-Einy, *Digital Justice*.

¹¹⁴⁹ Ebner and Zeleznikow, "Trust."

¹¹⁵⁰ Rule and Friedberg, "The Appropriate Role."

¹¹⁵¹ Fahimeh Abedi, John Zeleznikow, and Emilia Bellucci, "Universal standards for the concept of trust in online dispute resolution systems in e-commerce disputes," *International Journal of Law and Information Technology* 27, no. 3 (2019): 209-237, doi:10.1093/ijlit/eaz005.

¹¹⁵² *Ibid.*

¹¹⁵³ *Ibid.*

¹¹⁵⁴ *Ibid.*

According to the results of this qualitative study, the standards should help enhance trust and confidence in ODR.

As affirmed by Schmitz, online vendors, and ODR providers should work with “policymakers to create regulations ensuring that ODR systems are designed, implemented, and monitored with attention to delivering justice,”¹¹⁵⁵ which promotes confidence in e-commerce.

Therefore, ODR designers and providers should create and develop efficient and trustworthy mechanisms. To promote and guarantee ODR quality, the International Council for Online Dispute Resolution (ICODR) and the National Center for Technology and Dispute Resolution (NCTDR) have recently developed and adopted ethical standards for designing and implementing ODR systems. The standards require that ODR platforms and processes must be¹¹⁵⁶ *accessible, accountable, competent, confidential, equal, fair and impartial, legal, secure, and transparent*.

These standards complement other significant ethical, legal, and technical principles for face-to-face dispute resolution. They provide an essential guide for developing fair, accessible, accountable, and secure ODR. This study has referenced the ICODR/NCTDR ethical standards to elaborate and identify the requirements an ODR assurance mechanism must have when integrated into the structural trust assurance model proposed in Chapter Seven. However, the criteria identified and reported below result from a review of the existing literature, the results obtained from previous research, and the investigation findings included in chapter three. This approach has made it possible to propose standards that reflect the literature and previous empirical investigations.

To act as an assurance mechanism that can help influence consumers’ intentions and purchase behavior and generate confidence in e-commerce, ODR must be:

- Accessible: Complaint procedures and options should be clearly explained to the consumer, and information should be available and clearly displayed online. Research shows that consumers expect complaint processes to be in place and accessible. Their

¹¹⁵⁵ Schmitz, “Building Trust,” 23.

¹¹⁵⁶ The International Council for Online Dispute Resolution, “ODR Standards,” ICODR, last modified May 3, 2022, <https://icodr.org/standards/#:~:text=Standards%20%7C%20ICODR&text=Created%20by%20the%20International%20Council,when%20employed%20for%20dispute%20handling>.

presence generates trust in the vendor.¹¹⁵⁷ In contrast, a lack of knowledge and understanding of procedures often leads to a lack of confidence.¹¹⁵⁸

- Easy-to-use: Complex procedures discourage consumers from shopping online.¹¹⁵⁹ Complaint handling systems must consider the needs of different social groups and the skills needed to complain online.
- Provide a fair process by respecting due process standards. It has been argued that ODR lacks fairness, especially when involving unequal parties like in B2C disputes.¹¹⁶⁰ Findings from the data analysis presented in Chapter Three have highlighted how consumers expect equal opportunities to share information, be heard, and present their cases.¹¹⁶¹ Consumers should receive just treatment and have equal access to remedies despite their economic status or the price of their purchases.¹¹⁶²
- Efficient and responsive. Research shows that consumers understand that mistakes can occur when shopping online. Errors do not prevent consumers from engaging in online transactions. However, they do expect vendors to respond quickly and fix their problems. Responsiveness and problem-solving are what gain their trust in the vendor.¹¹⁶³ Lack of responsive complaint handling also emerged as a consumer concern in the data analysis presented in Chapter Three.¹¹⁶⁴
- Transparent: Transparent and easy-to-follow redress policies generate trust in online vendors.¹¹⁶⁵ Data show that transparency can avoid the perception of biases and make consumers feel they are treated fairly and equally.¹¹⁶⁶
- Provide consumers with various resolution options: A three-tier system that includes negotiation, third-side facilitation/mediation, and a binding evaluation procedure. Restricting consumers to one form of redress reduces their access to justice.¹¹⁶⁷

¹¹⁵⁷ Chin E. Ong and David Teh, “Redress procedures expected by consumers during a business-to-consumer e-commerce dispute,” *Electronic Commerce Research and Applications* 17 (2016): 150-160, doi:10.1016/j.elerap.2016.04.006.

¹¹⁵⁸ John Zeleznikow and Emilia Bellucci, “Legal Fairness in ADR Processes Implications for Research and Teaching,” *Australasian Dispute Resolution Journal* 23, no. 4 (2012): 265-273.

¹¹⁵⁹ Ong and Teh, “Redress.”

¹¹⁶⁰ Teresa Ballesteros, “International Perspectives on Online Dispute Resolution in the E-Commerce Landscape,” *International Journal on Online Dispute Resolution* 8, no. 2 (2021): 85-101, doi:10.5553/ijodr/235250022021008002002.

¹¹⁶¹ See Chapter 3.9.4.

¹¹⁶² Schmitz, “Building Trust.”

¹¹⁶³ Ong and Chan, “How Complaint.”

¹¹⁶⁴ See Chapter 3.9.6.

¹¹⁶⁵ Ong and Teh, “Redress.”

¹¹⁶⁶ See Chapter 3.9.5.

¹¹⁶⁷ Katsh and Rabinovich-Einy, *Digital*.

- Train dispute resolution specialists. Results from the research investigation outlined in Chapter Three show that consumers expect to deal with knowledgeable and trained representatives when contacting a vendor's customer service or help center.¹¹⁶⁸
- Provide information security (preventing outsiders from accessing, manipulating, selling, or destroying parties' information). Information entered into the ODR program should be protected using encryption features such as the Transport Layer Security (TLS) protocol that allows client/server applications to communicate across a network to prevent data tampering, falsification, interception, and theft. Many consider security an antecedent of trust that can positively affect consumer trust.¹¹⁶⁹ For others, information security is essential in improving confidence in ODR technology.¹¹⁷⁰
- Provide data security: Prevent outsiders from hacking the ODR system and accessing private information stored in the system related to the parties and the dispute. Research and literature reviewed in Chapter 6.9.2 show how security is one of the main concerns preventing consumers from purchasing online.
- Ensure the confidentiality of the process. ODR mechanisms should guarantee the confidentiality of any communication and exchange of information between all the parties involved in the process. Studies have confirmed the importance of security measures to protect the confidentiality of information.¹¹⁷¹ Like any other dispute resolution process, confidentiality is essential to protect personal information and build trust.
- Provide reliable enforcement mechanisms to ensure consumers will receive the remedies deemed appropriate by the process.¹¹⁷² The enforcement of ODR outcomes is crucial, especially in cross-border e-commerce disputes. The traditional court enforcement mechanisms are too complex and costly for low-value B2C disputes and, therefore, do not represent an appropriate option. Authors have argued for self-enforcement mechanisms to ensure ODR efficiencies, like chargebacks or the ICANN

¹¹⁶⁸ See Chapter 3.9.6.

¹¹⁶⁹ Afshan Azam, Pro. F. Qiang, and Muhammad I. Abdullah, "Consumers' E-commerce acceptance model: Antecedents of trust and satisfaction constructs," *2012 IEEE Business, Engineering & Industrial Applications Colloquium (BEIAC)*, 2012, 371-376, doi:10.1109/beiac.2012.6226086. Mahliza, "CONSUMER."

¹¹⁷⁰ Fahimeh Abedi, John Zeleznikow, and Chris Brien, "Developing regulatory standards for the concept of security in online dispute resolution systems," *Computer Law & Security Review* 35, no. 5 (2019): 1-8, doi:10.1016/j.clsr.2019.05.003.

¹¹⁷¹ Sarita Mundra, Sadhana Zanzari, and Surabhi Mundra, "Security Issues in e-Commerce," *International Journal of Research in Commerce, IT and Management* 4, no. 12 (December 2014): 60-63; Anirban Sengupta, Chandan Mazumdar, and Mridul Barik, "e-Commerce security — A life cycle approach," *Sadhana* 30 (April 2005): 119-140.

¹¹⁷² Schmitz, "Building."

enforcement model. Different models have been proposed. The UNCITRAL Secretariat proposes an escrow-based model requiring a third-party account where money is stored until the dispute resolution. Similarly, Ortolani has suggested looking at the Bitcoin adjudication mechanism as an alternative model of self-enforcing mechanisms.¹¹⁷³ Others have advised that blockchain technology can be used for the decentralized execution of programmable contracts, known as smart contracts.¹¹⁷⁴ They have claimed that smart contracts could provide a solution to enforcing ODR outcomes. Different models should be compared to provide valuable solutions to enforcing ODR outcomes.

Establishing trusted ODR systems helps build consumer confidence in e-commerce by encouraging consumers to purchase online, knowing that efficient and secure redress mechanisms are in place when things go wrong.¹¹⁷⁵

6.5 SECURITY AND DATA PROTECTION

Online shopping requires greater consumer trust as physical distance and uncertainty of online transactions play a crucial role in determining consumers' intention to purchase. Online transaction uncertainties create different risks, including economic, product, seller performance, privacy, and security risks.¹¹⁷⁶ These risks have a significant impact on consumer trust in e-commerce. The higher the risk consumers perceive, the less likely they are to buy a product or service online.¹¹⁷⁷ Security and privacy can be defined as the degree to which consumers believe online vendors or websites are secure.¹¹⁷⁸ They are known as important factors that affect online purchase intention.

¹¹⁷³ Pietro Ortolani, "Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin," *Oxford Journal of Legal Studies* 36, no. 3 (2015): 595-626, doi:10.1093/ojls/gqv036.

¹¹⁷⁴ Koulu, "Blockchains."

¹¹⁷⁵ Schmitz, "There's an 'App'."

¹¹⁷⁶ Pavlou, "Consumer Acceptance.";

¹¹⁷⁷ Urvashi Tandon, Ravi Kiran, and Ash N. Sah, "The influence of website functionality, drivers and perceived risk on customer satisfaction in online shopping: an emerging economy case," *Information Systems and e-Business Management* 16, no. 1 (2017): 57-91, doi:10.1007/s10257-017-0341-3.

¹¹⁷⁸ Fatemeh Meskaran, Zuraini Ismail, and Bharani Shanmugam, "Online Purchase Intention: Effects of Trust and Security Perception," *Australian Journal of Basic and Applied Sciences* 7, no. 6 (2013): 307-315.

Previous studies have claimed that security and privacy perceptions positively influence trust in e-commerce transactions.¹¹⁷⁹ According to Camp, dimensions of trust include security, privacy, and reliability.¹¹⁸⁰ Privacy refers to the control over one's data, while security regards the attempted access to data by unauthorized users.¹¹⁸¹ Some studies have included security in the notion of privacy, whereas others have used security and privacy interchangeably.¹¹⁸²

Empirical research has proved that security and privacy concerns are among the main reasons that prevent consumers from shopping online.¹¹⁸³ In 2015, a survey conducted by the US Census Bureau revealed that American consumers were increasingly concerned about online security and privacy. Sixty-three percent of online households shared concerns with identity theft. Other issues included credit card or banking fraud, data collection or tracking by online services, loss of control over personal data, data collection or monitoring by the government, and threats to personal safety. Forty-five percent of online households reported that these concerns prevented them from conducting financial transactions and buying goods or services online.¹¹⁸⁴

Consumers feel uncomfortable releasing personal information online because they do not trust e-commerce.¹¹⁸⁵ They must trust the technology adopted by a vendor when placing an order

¹¹⁷⁹ Ramnath K. Chellappa and Paul A. Pavlou, "Perceived information security, financial liability and consumer trust in electronic commerce transactions," *Logistics Information Management* 15, no. 5/6 (2002): 358-368, doi:10.1108/09576050210447046.

¹¹⁸⁰ L. J. Camp, *Trust and Risk in Internet Commerce* (Cambridge: MIT Press (MA), 2000).

¹¹⁸¹ Gupta Palak and Akshat Dubey, "E-Commerce- Study of Privacy, Trust and Security from Consumer's Perspective," *International Journal of Computer Science and Mobile Computing* 5, no. 6 (June 2016): 224-232.

¹¹⁸² Chang Liu et al., "Beyond concern—a privacy-trust-behavioral intention model of electronic commerce," *Information & Management* 42, no. 2 (2005): 289-304, doi:10.1016/j.im.2004.01.003; Soumya Ray, Terence Ow, and Sung S. Kim, "Security Assurance: How Online Service Providers Can Influence Security Control Perceptions and Gain Trust," *Decision Sciences* 42, no. 2 (2011): 391-412, doi:10.1111/j.1540-5915.2011.00316.x.

¹¹⁸³ Dan J. Kim, Donald L. Ferrin, and H. R. Rao, "A trust-based consumer decision-making model in electronic commerce: The role of trust, perceived risk, and their antecedents," *Decision Support Systems* 44, no. 2 (2008): 544-564, doi:10.1016/j.dss.2007.07.001; Sindhu Singh and R. K. Srivastava, "Understanding the intention to use mobile banking by existing online banking customers: an empirical study," *Journal of Financial Services Marketing* 25, no. 3-4 (2020): 86-96, doi:10.1057/s41264-020-00074-w; Atefeh Mashatan, Mohamad S. Sangari, and Milad Dehghani, "How Perceptions of Information Privacy and Security Impact Consumer Trust in Crypto-Payment: An Empirical Study," *IEEE Access* 10 (2022): 69441-69454, doi:10.1109/access.2022.3186786.

¹¹⁸⁴ National Telecommunications and Information Administration (NAIT), "Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities | National Telecommunications and Information Administration," National Telecommunications and Information Administration, last modified May 13, 2016, <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

¹¹⁸⁵ Matthew K. Lee and Efraim Turban, "A Trust Model for Consumer Internet Shopping," *International Journal of Electronic Commerce* 6, no. 1 (2001): 75-91, doi:10.1080/10864415.2001.11044227; Myung-Ja Kim, Namho Chung, and Choong-Ki Lee, "The effect of perceived trust on electronic commerce: Shopping online for tourism products and services in South Korea," *Tourism Management* 32, no. 2 (2011): 256-265,

online.¹¹⁸⁶ They must believe the internet and the website are safe and secure to transmit sensitive information and personal data (i.e., credit card, social security, etc.). Consumers need to know that the site through which they will make a purchase has specific security systems that guarantee the safety of their data (i.e., encryption standards, firewalls, security software, operating systems, etc.). Several scholars have emphasized that website security should include data confidentiality, non-repudiation communication, verification security, IT effectiveness, and security of individual protection.¹¹⁸⁷

Previous studies have shown that security and privacy concerns strongly affect consumers' confidence in websites and influence their intentions.¹¹⁸⁸ Consumers expect their information to be protected when shopping online. The violation of their privacy expectations decreases their trust in a website.¹¹⁸⁹ Thus, safeguarding private consumers' information and ensuring security is significant to building trust in online shopping. The higher the security and privacy the vendor provides, the higher consumer trust will be in the vendor.¹¹⁹⁰ In this regard, consumers highly value measures that can protect against security and privacy threats.¹¹⁹¹ Suppose they perceive that the online vendor's website offers security mechanisms such as a security policy or a safe shopping guarantee. In that case, they will assume that the online vendor guarantees the security of an online purchase.¹¹⁹² A 2021 study on customer satisfaction

doi:10.1016/j.tourman.2010.01.011; Palak Gupta, "E-Commerce- Study of Privacy, Trust and Security from Consumer's Perspective," *International Journal of Computer Science and Mobile Computing* 5, no. 6 (June 2016): 224-232; Manuel J. Girsang et al., "Can Information Security, Privacy and Satisfaction Influence The E-Commerce Consumer Trust?," *2020 8th International Conference on Information and Communication Technology (ICoICT)*, 2020, doi:10.1109/icoict49345.2020.9166247.

¹¹⁸⁶ Axel Eggert, "Intangibility and Perceived Risk in Online Environments," *Journal of Marketing Management* 22, no. 5-6 (2006): 553-572, doi:10.1362/026725706777978668.

¹¹⁸⁷ Van D. TRAN, "The Relationship among Product Risk, Perceived Satisfaction and Purchase Intentions for Online Shopping," *The Journal of Asian Finance, Economics and Business* 7, no. 6 (2020): 221-231, doi:10.13106/jafeb.2020.vol7.no6.221.

¹¹⁸⁸ Yu-Hui Chen and Stuart Barnes, "Initial trust and online buyer behaviour," *Industrial Management & Data Systems* 107, no. 1 (2007): 21-36, doi:10.1108/02635570710719034; Narges Delafrooz, Laily H. Paim, and Ali Khatabi, "Understanding consumer's internet purchase intention in Malaysia," *African Journal of Business Management* 5, no. 3 (December 2010): 2836-284; Kim, Ferrin, and Rao, "A trust-based."; Kirsten Martin, "The penalty for privacy violations: How privacy violations impact trust online," *Journal of Business Research* 82 (2018): 103-116, doi:10.1016/j.jbusres.2017.08.034; Alisa Frik and Luigi Mittone, "Factors Influencing the Perception of Website Privacy Trustworthiness and Users' Purchasing Intentions: The Behavioral Economics Perspective," *Journal of theoretical and applied electronic commerce research* 14, no. 3 (2019): 89-125, doi:10.4067/s0718-18762019000300107.

¹¹⁸⁹ Martin, "The penalty."

¹¹⁹⁰ Febrina Mahliza, "Consumer Trust in Online Purchase Decisions," *EPRA International Journal of Multidisciplinary Research (IJMR)* 6, no. 2 (2020): 142-149, doi:10.36713/epra4022.

¹¹⁹¹ Hosein F. Badran, "IoT Security and Consumer Trust," in *Proceedings of the 20th Annual International Conference on Digital Government Research* (Dubai: Association for Computing Machinery, 2019), 133-140, <https://doi.org/10.1145/3325112.3325234>.

¹¹⁹² Bonsón Ponte, Carvajal-Trujillo, and Escobar-Rodríguez, "Influence of trust."

from Amazon online shopping during the COVID-19 pandemic has revealed that one of the most critical variables that lead to customer satisfaction is the availability of secured payment options.¹¹⁹³ Perceived security and privacy have been considered to determine consumer trust in online purchases¹¹⁹⁴ and significantly influence consumer confidence in e-payment systems.¹¹⁹⁵ A recent study has shown that security and privacy features substantially affect consumer perception of trustworthiness and behavior intention for online shopping.¹¹⁹⁶ Research suggests that security and data privacy significantly influence consumers' trusting intentions and purchase behaviors.

6.6 DESIGNING AND IMPLEMENTING STRUCTURAL ASSURANCE SYSTEMS TO IMPROVE ACCESS TO JUSTICE: A MODEL-BASED SA FOR B2C E-COMMERCE PLATFORMS

Previous sections have identified assurance mechanisms and described their influence on consumer trusting intentions and purchase behavior. This chapter proposes a structural assurance (SA) model that, starting from the SA model identified by Zucker and Sha, includes ODR as an assurance mechanism in its dual function of resolving B2C disputes and increasing consumer confidence in the e-commerce market. The model this thesis proposes comprises seals of approval (trust mark), vendor-specific guarantees, reputation systems, security and data privacy, complaint-handling services, and ODR, structured around three pillars that will be described. When deployed combined, these assurance mechanisms can have unique and different effects on consumer trusting intentions; it is essential to note that no consistent studies in the literature consider the joint effects of multiple trust and assurance mechanisms in online marketplaces.¹¹⁹⁷

¹¹⁹³ Himanshu Tiwari, Kartik Uttawar, and Yatin Malvi, "A Study on Customer's Satisfaction from Amazon Online Shopping during COVID-19 Pandemic," *SAMRIDDHI: A Journal of Physical Sciences, Engineering and Technology* 13, no. 2 (2021): 226-231.

¹¹⁹⁴ Enrique Bonsón Ponte, Elena Carvajal-Trujillo, and Tomás Escobar-Rodríguez, "Influence of trust and perceived value on the intention to purchase travel online: Integrating the effects of assurance on trust antecedents," *Tourism Management* 47 (2015): 286-302, doi: 10.1016/j.tourman.2014.10.009.

¹¹⁹⁵ Mashatan, Sangari, and Dehghani, "How perceptions."

¹¹⁹⁶ TRAN, "The Relationship."

¹¹⁹⁷ Youwei Wang, Zhe Qu, and Bernard Tan, "How do assurance mechanisms interact in online marketplaces? A signaling perspective," *IEEE Transactions on Engineering Management* 65, no. 2 (2018): 239-251, doi:10.1109/tem.2017.2786275.

Previous studies have examined the overall values of assurance mechanisms in increasing consumers' confidence. Furthermore, research revealed inconsistent findings on the influence of SA on trusting intentions. Depending on individual studies, this influence can be strong, weak, conditional, or not significant.¹¹⁹⁸

This study considers the joint effects of multiple assurance mechanisms in improving consumers' confidence in online marketplaces. It proposes a model that correlates structural assurance with consumer and purchase intentions. Such correlation may ultimately influence a consumer's level of confidence in B2C e-commerce. The model includes ODRs as structural assurance mechanisms that, along with others, can play a role in positively influencing consumer confidence in e-commerce. ODR is one part of an overall strategy with the ultimate goal of developing confidence.¹¹⁹⁹

Finally, it advises online traders to invest in and adopt an SA with multiple assurance mechanisms to attract consumers and enhance their confidence.

The construction of this model is based on Zucker's institution-based theory.¹²⁰⁰ Applications of the four SA mechanisms identified by Zucker and Sha are considered and applied to the B2C low-value disputes.

A Structural Assurance (SA) Model Proposal

Online marketplaces commonly use a combination of assurance mechanisms to mitigate transaction risks, assess vendors' quality and reputation, reduce consumers' privacy and security concerns, and consequently improve consumer trust. Assurance mechanisms are essential in driving buyers to trade with online merchants by helping them reduce the probability of entering into complex transactions and providing safe online environments through third-party safeguarding.¹²⁰¹ For instance, credit cards offer consumers assurance

¹¹⁹⁸ Sha, "Types."

¹¹⁹⁹ Rule and Friedberg, "The appropriate role."

¹²⁰⁰ Lynne G. Zucker, "Institutional Theories of Organization," *Annual Review of Sociology* 13, no. 1 (1987): 443-464, doi:10.1146/annurev.so.13.080187.002303; Lynne G. Zucker, "Production of trust: Institutional sources of economic structure, 1840-1920," *Research in Organizational Behavior* 8, (1986): 53-111.

¹²⁰¹ Jia J. Sim et al., "Do We Need Trust Transfer Mechanisms? An M-Commerce Adoption Perspective," *Journal of Theoretical and Applied Electronic Commerce Research* 16, no. 6 (2021): 2241-2262, doi:10.3390/jtaer16060124; Patrick McCole et al., "The role of structural assurance on previous satisfaction, -

mechanisms like credit chargebacks after consumers dispute a charge on their accounts. eBay provides its users with a money-back guarantee policy in case an item does not arrive, is faulty or damaged, or is not described as listed.

Structural assurances are institution-based mechanisms or institutional structures consisting of “different types of formal structures such as third party recognitions, warranties, guarantees and public key infrastructures in B2C e-commerce.”¹²⁰² Structural assurance consists of consumers’ beliefs that assurance structures are in place to protect their interests. Sometimes, the construct of structural assurance is referred to as an institutional trust. In e-commerce, institutional mechanisms can “reflect the social indicators that communicate the confidence in control mechanisms used to handle transactions.”¹²⁰³

Trust in a merchant comprises two interdependent elements: *trusting beliefs* and *trusting intentions*.¹²⁰⁴ Trusting beliefs include perceptions of the merchant’s competence, benevolence, and integrity. At the same time, trusting intentions are the extent to which consumers are willing to buy a service or product from a particular merchant.¹²⁰⁵ As found by McKnight et al., “Trust is a multidimensional construct, and trusting beliefs are related to trusting intentions.”¹²⁰⁶ Several studies have established that the higher consumers trust an online seller, the greater their intention to purchase.¹²⁰⁷ Oliviera et al. have shown that trust influences

trust and continuance intention,” *Information Technology & People* 32, no. 4 (2019): 781-801, doi:10.1108/itp-08-2017-0274.

¹²⁰² Wie Sha, “Examining Mediators of Structural Assurance Constructs in Business-to-Consumer E-commerce,” *Issues In Information Systems X*, no. 2 (2009): 364, doi:10.48009/2_iis_2009_364-371.

¹²⁰³ Robin Pennington, H. D. Wilcox, and Varun Grover, “The Role of System Trust in Business-to-Consumer Transactions,” *Journal of Management Information Systems* 20, no. 3 (2003): 200-201, doi:10.1080/07421222.2003.11045777.

¹²⁰⁴ D. Harrison McKnight, Vivek Choudhury, and Charles Kacmar, “The impact of initial consumer trust on intentions to transact with a web site: a trust building model,” *The Journal of Strategic Information Systems* 11, no. 3-4 (2002): 297-323, doi:10.1016/s0963-8687(02)00020-3.

¹²⁰⁵ Ibid.

¹²⁰⁶ Pennington, Wilcox, and Grover, “The Role of System,” 200.

¹²⁰⁷ Sirkka L. Jarvenpaa, Noam Tractinsky, and Lauri Saarinen, “Consumer Trust in an Internet Store: A Cross-Cultural Validation,” *Journal of Computer-Mediated Communication* 5, no. 2 (1999): 0-0, doi:10.1111/j.1083-6101.1999.tb00337.x; Paul A. Pavlou, “Consumer Acceptance of Electronic Commerce: Integrating Trust and Risk with the Technology Acceptance Model,” *International Journal of Electronic Commerce* 7, no. 3 (2003): 101-134, doi:10.1080/10864415.2003.11044275; David Gefen and Detmar W. Straub, “Consumer trust in B2C e-Commerce and the importance of social presence: experiments in e-Products and e-Services,” *Omega* 32, no. 6 (2004): 407-424, doi:10.1016/j.omega.2004.01.006; Kwek C. Ling, Lau T. Chai, and Tan H. Piew, “The Effects of Shopping Orientations, Online Trust and Prior Online Purchase Experience toward Customers’ Online Purchase Intention,” *International Business Research* 3, no. 3 (2010): 63-76, doi:10.5539/ibr.v3n3p63; Shih-Ming Pi, Hsiu-Li Liao, and Hui-Min Chen, “Factors That Affect Consumers’ Trust and Continuous Adoption of Online Financial Services,” *International Journal of Business and Management* 7, no. 9 (2012): 108-119, doi:10.5539/ijbm.v7n9p108.

consumer purchase intentions.¹²⁰⁸ If consumers believe an online merchant is trustworthy, credible, and competent, they will likely purchase a product or service online. Therefore, consumers' trusting beliefs positively influence their purchase intentions.¹²⁰⁹

As noted by Sha, most researchers suggest a direct relationship between structural assurance and consumer purchase intentions.¹²¹⁰

This research proposes a structural assurance (SA) model that directly correlates structural assurance with consumer trusting intentions and purchase intentions. The model identifies three institutional structures that increase consumers' beliefs, determine their purchase intentions, and help enhance confidence in B2C e-commerce.

According to Zucker's institutional trust theory, developed in the nineteenth century, "existing institutional structures and mechanisms embedded in the social environment can foster the growth of trust and cooperation between two concerned parties,"¹²¹¹ especially when they do not know each other. Institutional trust-producing structures were used in the US in the early periods of industrialization, about 1840 to 1920, to build trust to facilitate business transactions between parties who did not know each other and were physically distant.¹²¹² Zucker suggested that four types of institution-based trust structures were used to build trust for economic development during this period. The first type was a company's bureaucratic structures that were adopted to provide written rules and formal hierarchy to produce trust between employers and employees.¹²¹³ The second type consisted of the service offered by professional certification agencies to ensure reliability when informal reputation was difficult to assess. The third was the service a specific economic sector provided that "arose to bridge transactions

¹²⁰⁸ Tiago Oliveira et al., "Modelling and testing consumer trust dimensions in e-commerce," *Computers in Human Behavior* 71 (2017): 153-164, doi:10.1016/j.chb.2017.01.050.

¹²⁰⁹ Jarvenpaa, Tractinsky, and Saarinen, "Consumer Trust;" D. H. McKnight, Vivek Choudhury, and Charles Kacmar, "Developing and Validating Trust Measures for e-Commerce: An Integrative Typology," *Information Systems Research* 13, no. 3 (2002): 334-359, doi:10.1287/isre.13.3.334.81; Tibert Verhagen, Selmar Meents, and Yao-Hua Tan, "Perceived risk and trust associated with purchasing at electronic marketplaces," *European Journal of Information Systems* 15, no. 6 (2006): 542-555, doi:10.1057/palgrave.ejis.3000644.

¹²¹⁰ Sha, "Examining."

¹²¹¹ Sha, "Types," 45.

¹²¹² Lynne G. Zucker, "Production of trust: Institutional sources of economic structure, 1840-1920," *Research in Organizational Behavior* 8 (1986): 53-111.

¹²¹³ Ibid.

between firms and between individuals and firms.”¹²¹⁴ Lastly, the fourth type included regulations and legislation enacted to regulate transactions.

As discussed by Sha, the B2C e-commerce environment resembles the business environment of the period of the American industrial formation analyzed by Zucker. Like consumers in that period, today’s online consumers are not familiar with their vendors as they cannot talk to them in person and cannot physically inspect the products they buy online.

Following Zucker’s theory, Sha proposes four institutional structures that can influence consumers’ trusting intentions and may constitute four types of SA.

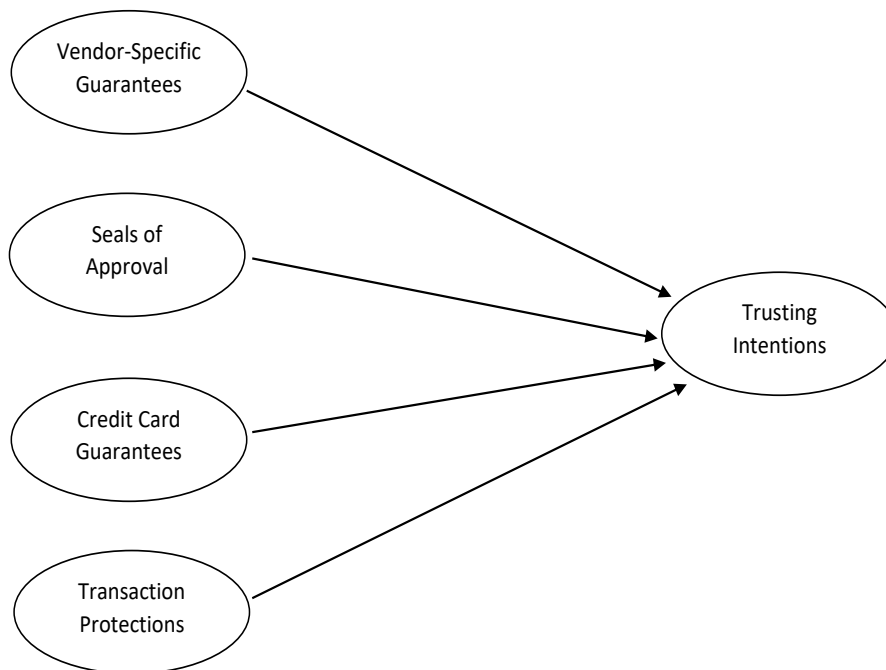


Figure 6.1 Sha’s Structural Assurance Model

As the first form of SA, Sha proposes the vendor’s specific guarantees (i.e., privacy policies, product warranty policies, and product return policies). These guarantees assure consumers that the vendor will take appropriate actions to protect consumers’ interests and well-being if something goes wrong.¹²¹⁵ The second type of SA consists of seals of approval. Seals of approval from accreditation agencies can influence consumers’ perceptions of vendors’

¹²¹⁴ Ibid., 55.

¹²¹⁵ Sha, “Types.”

trustworthiness and can help improve consumers' trusting intentions toward an online vendor. Sha's third form of SA includes credit card company guarantees such as money-back guarantees and identity thief protection. The degree to which a consumer believes a credit card company guarantee can protect their interests is classified as a perceived credit card guarantee. The fourth proposed form of SA is transaction protection, including protection from legal systems and technology infrastructures such as secure electronic transactions (SETs).¹²¹⁶ Sha defines perceived transaction protection "as the degree to which consumers believe that legal and technological protections are in place to make the Internet a safe environment."¹²¹⁷

The model presented in this study elaborates on Sha's model. In the present model, institutional trust-producing structures will consist of preventive dispute mechanisms (PDMs), security and data protection (SDP) mechanisms, complaint handling mechanisms (CHMs), and online dispute resolution (ODR) combined (Figure 6.2).

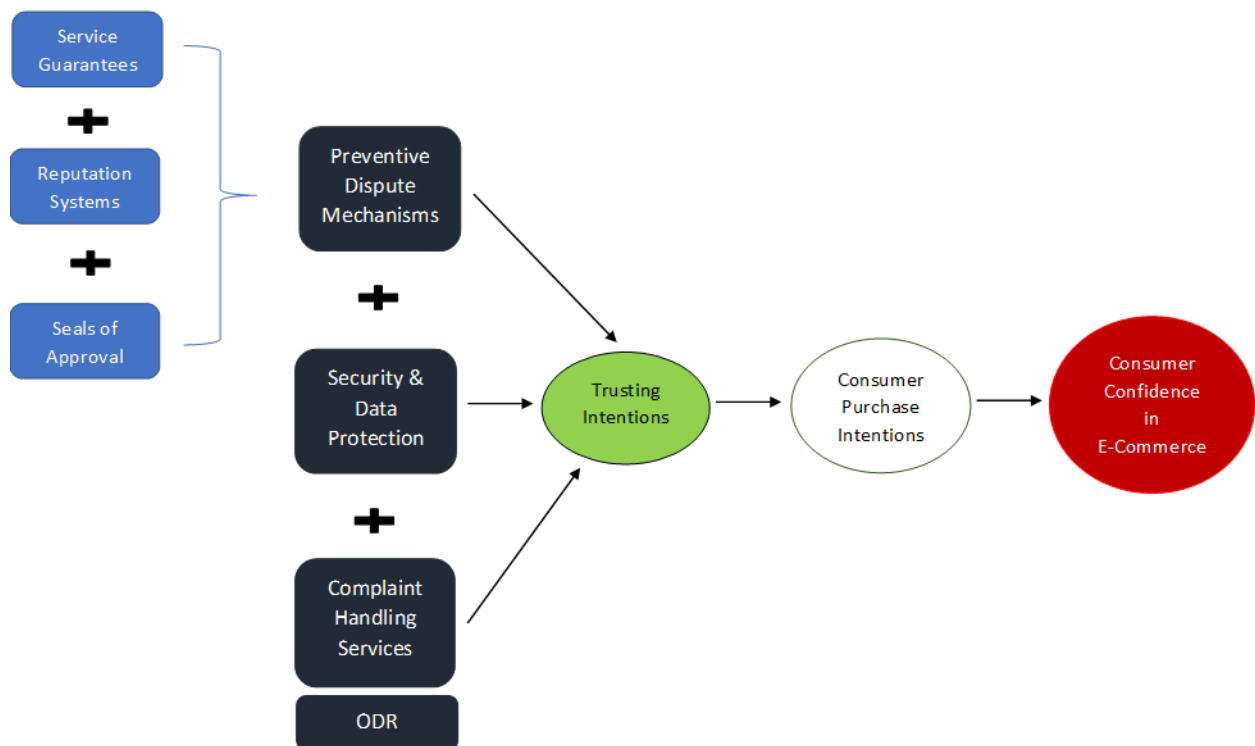


Figure 6.2 Structural Assurance (SA) Model Proposal

¹²¹⁶ Ibid.

¹²¹⁷ Ibid., 47.

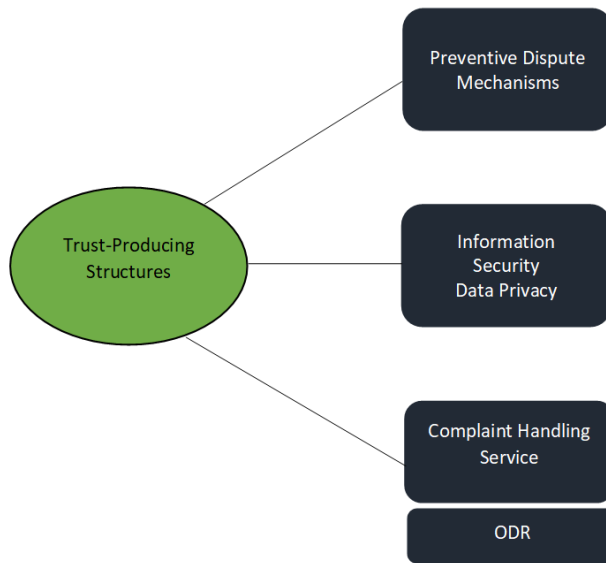


Figure 6.3 Institutional Trust-Producing Structures

Previous literature review of each assurance mechanism has developed a theoretical explanation of how each institutional structure considered in this model proposal influences consumers' trust and purchase intentions.

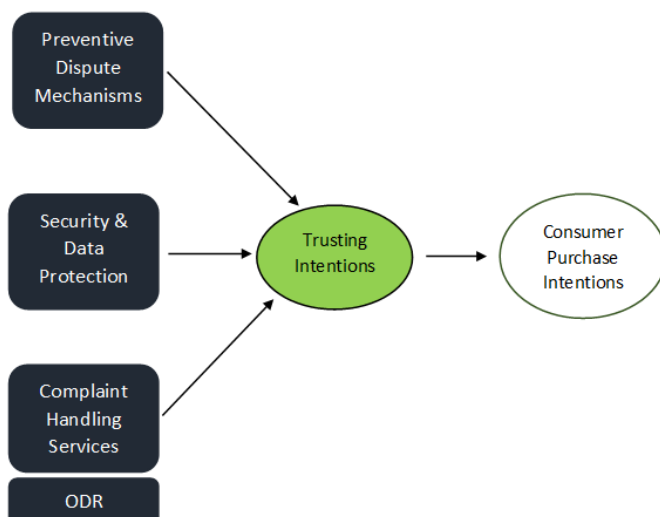


Figure 6.4 Institutional Trust-Producing Structures and Consumer Purchase Intentions

A Model-based Structural Assurance for BC2 E-commerce Platforms

When shopping online, one of the biggest challenges for consumers is finding reliable vendors to purchase products or services from. An e-commerce platform's structural assurance can determine how safely consumers can buy from online vendors.¹²¹⁸ E-commerce platforms have implemented different assurance mechanisms and structures like feedback and rating systems, technological safeguards, data privacy, and delivery policies to promote safe shopping and consumer trust. Based on Tauscher's theory and research, it can be assumed that online consumers have different purchasing behaviors on platforms with varying levels of SA.¹²¹⁹ Previous studies suggest consumers prefer e-commerce platforms with higher SA since they are perceived as less risky and trustworthy.¹²²⁰

This study proposes three trust-based pillars (PDMs, SDP, CHSs, and ODR) that e-commerce platforms can implement to increase SA and their effects on consumers' intentions and purchase behaviors. Each pillar includes several mechanisms and tools, as analyzed in sections 6.3, 6.4, and 6.5. Previous studies have shown that each pillar included in the model proposed in this study can influence consumers' trust in online vendors and their purchasing decisions. However, such influence may not be crucial. For example, the mere presence of preventive dispute systems, such as a seal of approval displayed on a website, does not induce a consumer to purchase a product from a particular online vendor.

This proposal makes it possible to distinguish three levels, depending on the number of pillars and tools incorporated in each pillar. The following diagram shows the three levels:

¹²¹⁸ Daniel A. Sanchez-Loor and Wei-Shiun Chang, "Experimental study of the effects of structural assurance, personal experiences, and product reviews on repurchase behavior in e-commerce platforms," *Electronic Commerce Research*, January 2022, doi:10.1007/s10660-021-09525-5.

¹²¹⁹ Sanchez-Loor and Chang, "Experimental study."

¹²²⁰ Paul A. Pavlou and David Gefen, "Building Effective Online Marketplaces with Institution-Based Trust," *Information Systems Research* 15, no. 1 (2004): 37-59, doi:10.1287/isre.1040.0015.

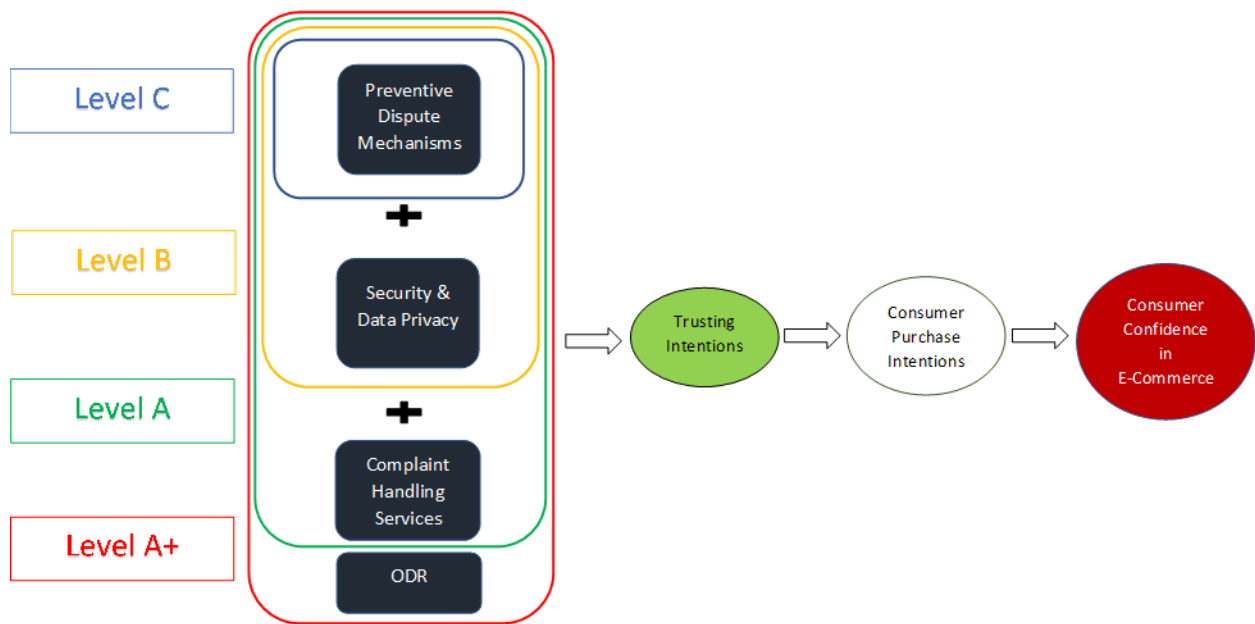


Figure 6.5 Trust-Based Pillars

- Level C: SA includes Preventive Dispute Mechanisms (PDMs).
- Level B: SA includes PDS and Security and Data Privacy (SDP).
- Level A: SA includes PDMs, SDP, and CHSs.
- Level A+: SA includes PDMs, SDP, CHSs, and ODR.

Research has shown that e-commerce platforms with higher SA levels can positively enhance consumer trust in online vendors.¹²²¹ This study advances the claim that SA e-commerce platforms that include only PDMs (Level C) exert less influence on consumer trust than SA platforms that offer SDP and PDMs (Level B). E-commerce platforms that include PDMs, SDP, and CHSs offer a high level of SA (Level A). Finally, those platforms, including PDMs, SDP, CHSs, and ODR, provide the highest level of SA and highly impact consumers' trust and purchase intentions (Level A+).

¹²²¹ Liu, "Beyond concern;" McCole, "The role."

For example, the Amazon platform offers an SA system that could fall into Level A of the above model (Figure 6.5). Its SA includes ratings and reviews, secure transactions, data privacy, customer handling services, and resolution processes.

When shopping on Amazon, consumers can rate a product (on a scale of 1 to 5) or leave a review. Reviews and the product price, description, and rating are available to consumers. The delivery time and date information on the same web page is visible before consumers purchase the product and finalize the transactions. Users can also read information and feedback about the specific vendor when Amazon acts as an intermediary. These mechanisms fall into the first pillar of Preventive Dispute Mechanisms (PDMs).

Consumers can rely on secure transactions without being concerned about sharing their personal information and data. Amazon uses a payment security system that encrypts consumer information during any transaction. Consumers can also review Amazon's privacy policy, which explains what information is collected, when and how their information is used or shared, and the procedural safeguards in place to collect, store, and disclose consumer data. Amazon's security systems and privacy policies fall into the second pillar of Security and Data Privacy (SDP).

When issues arise with a transaction or a product, Amazon provides procedures to help consumers resolve problems related to damaged or defective products, products not as described, or products that were not delivered. Consumers can dispute a transaction by contacting the vendor directly or submitting a claim through the A-to-z Guarantee program. Amazon can also act as a neutral third party to help facilitate resolution through negotiation or an adjudication mechanism. Amazon has established institution-based mechanisms "to mitigate transaction risks, build a trustworthy marketplace, and encourage online transactions."¹²²² The instruments and procedures Amazon provides to consumers fall into the third pillar, Level A of Complaint Handling Services (CHS).

AliExpress is another example of a high SA e-commerce platform that falls into Level A. It combines PDMs, SDP, and CHSs.

¹²²² Pavlou and Gefen, "Building Effective," 38.

Like Amazon, when searching for a given product on AliExpress, consumers can check the product reviews and ratings left by other buyers. AliExpress issues a certificate for qualified merchants whose information the platform has verified, and consumers can shop from qualified “Top Brands.” The platform provides consumers with detailed information about sellers and their rating feedback on any product page (First pillar: PDMs)

When placing an order, AliExpress ensures consumers the safety of their data and payment and provides a privacy policy consumers can review (although it is not clearly and visibly displayed) (Second pillar: SDP).

Consumer satisfaction is ensured through a money-back guarantee program if the item is not as described, delivered, or delivered on time. The AliExpress Buyer Protection guarantees consumer rights. In case of issues with an item, consumers can get a refund or start a dispute. In case of a dispute, AliExpress acts as a facilitator to help resolve the issue (Third pillar Level A: CHSs).

In contrast, Facebook Marketplace is a low-SA platform that does not provide assurance mechanisms to mitigate the risk of shopping from unknown vendors and enables consumers to buy safely. The platform does not offer return policies and guarantees nor provides handling complaint mechanisms.

Level A+ platforms can offer SA policies that, once well understood by consumers, can facilitate their trust in a given vendor and determine their purchase intentions.

This study supports the thesis (H1) that if offered jointly, PDMs, SDP, CHSs, and ODR mechanisms increase the likelihood of online purchases by positively influencing consumers’ trust in online vendors.

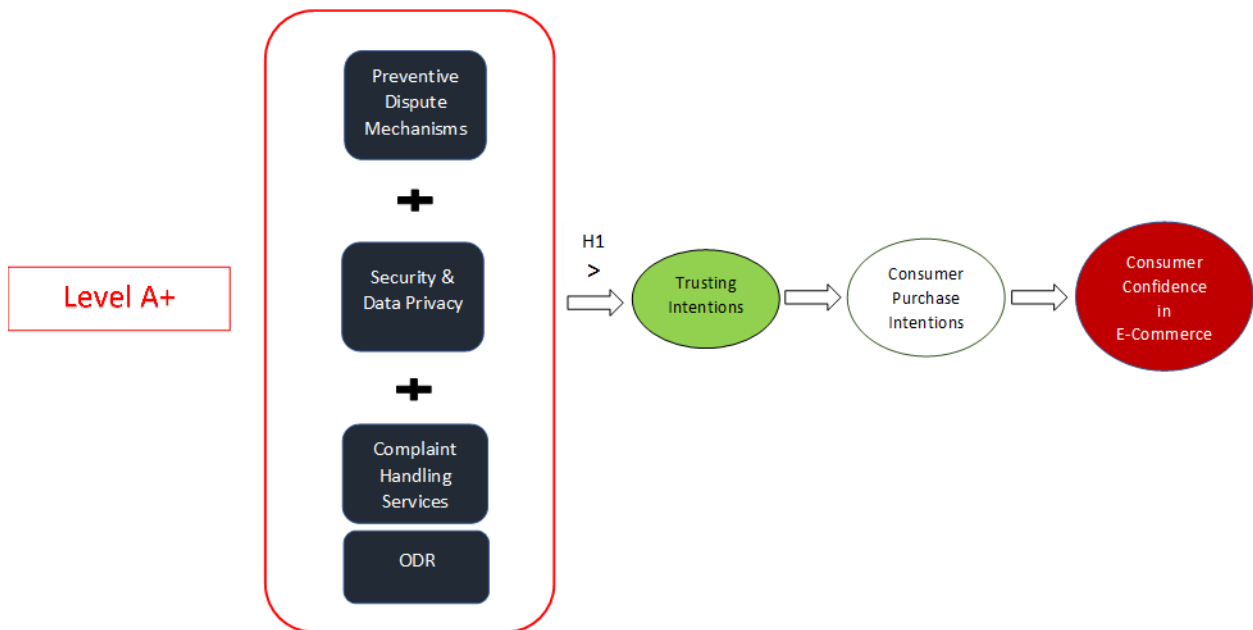


Figure 6.6 Trust-Based Pillars: Level A+

To build trust and encourage consumers' buying motivation, online vendors must adopt SA that includes various trust-based mechanisms that complement one another. These mechanisms can generate and enhance confidence throughout the whole consumers' online shopping experience: in the initial phase of consumers' approach to a website (i.e., ranking, trust marks), in the product or service selection phase (i.e., scores, consumer feedback), in the purchase phase (i.e., security and data privacy) and if something goes wrong with the transaction (i.e., credit card chargeback, ODR). This study has developed a model that responds to the needs and concerns of e-commerce consumers and can help online vendors address one of the main obstacles to online market success: trust.

6.7 CONSIDERATIONS AND LIMITATIONS

The previous sections have demonstrated how trust significantly determines consumers' intentions to buy from a given seller and the resulting purchasing behavior. Literature on consumer trust and previous research have concluded that the greater the consumer's confidence in an online vendor, the more the consumer's desire to buy online will increase. Therefore, before consumers purchase a product or service, vendors need to generate trust to

attract consumers' attention and persuade them to buy from their online store. Online vendors must engage in trust-building activities to win the competition and attract consumers. This study has reviewed different assurance mechanisms that, if implemented by online vendors, can help alleviate consumers' concerns and build confidence in online shopping. It has also proposed an SA model that includes ODR as an assurance mechanism.

The SA model presented is the first attempt to create a structural assurance model in B2C e-commerce that includes ODR. As an assurance mechanism, ODR plays a role in positively influencing consumers' intentions and purchasing behaviors. The model's theoretical structure contains all mechanisms identified in the literature review as correlated and determining consumers' trust. Each of these mechanisms is intended to increase consumers' trusting intentions and, ultimately, influence their purchase behaviors.

The model contributes to the literature on ODR and consumer trust and lays the foundations for future studies and research on SA models in e-commerce. Furthermore, this model could represent a valuable tool for independent agencies that provide quality seals to evaluate and certify an online vendor's level of SA. The quality seal agency would audit an online vendor to check the presence of assurance mechanisms and certify the levels of SA, as indicated in the SA model presented in this research (Figure 6.5). An SA quality seal would enhance an online vendor's image and convey that the vendor is concerned about the overall consumer experience when buying from its store. It would also ensure the customer that the vendor has several mechanisms in place in case of any purchase or transaction issues.

However, this study shows a significant limitation. It did not empirically test the model to demonstrate its rationality and strength. An empirical investigation could validate the model and verify the interactions between the various mechanisms and their effectiveness in determining consumer confidence in e-commerce. Future studies should, therefore, examine the validity of the proposed model.

6.8 SUMMARY

This chapter analyzed the importance of trust in e-commerce and investigated factors that can influence consumer confidence when shopping online. Lack of confidence is a critical factor in e-commerce; it induces consumers to avoid online purchases. Enhancing consumer trust is

crucial to gaining consumer loyalty. However, building trust and promoting confidence in the online marketplace can be challenging for many businesses.

This chapter investigated factors influencing online consumer confidence in B2C e-commerce. It looked at assurance mechanisms as strategies for establishing trust and discussed the impact of such instruments on consumer trust. It described several assurance mechanisms (e.g., guarantee services, satisfaction guarantees, credit card chargebacks, reputation systems, etc.) businesses use to gain consumer confidence, identifying them as preventive dispute mechanisms.

Finally, the chapter investigated the role of ODR as an assurance mechanism in establishing trust and enhancing confidence in B2C e-commerce. It argued that ODR systems are critical to building consumer trust and promoting business competition by providing consumers with effective remedies and guaranteeing fair, efficient, and affordable access to justice. However, it also claimed that to act as an assurance mechanism that can help influence consumers' intentions and purchase behavior and consequently generate confidence in e-commerce, ODR must meet specific standards. The chapter identified and described eleven critical criteria.

As highlighted in recent research by UNCTAD, Trust is a universal concept and a critical e-commerce element.¹²²³ Never before has trust been a determining factor in consumers' purchasing trends and promoting their loyalty to a business. The COVID-19 pandemic has brought more significant uncertainty and aggravated the financial situation of many consumers. Delays and non-delivery of goods during the pandemic and economic factors have led consumers to trust online shopping less and make trust a decisive issue in their purchasing decisions.

Although businesses remain highly trusted institutions, they need to manage trust carefully.¹²²⁴ The primary goal of online companies is to conquer the market. This objective is necessarily achieved through a commercial reputation that can win consumers' trust. To obtain this goal, companies must attain an adequate quality of their products and services to compete with other companies and protect consumers through mechanisms to prevent and resolve problems and

¹²²³ Chung and Yu, "Consumer Trust."

¹²²⁴ Tim Ryan, "How Business Can Build and Maintain Trust," Harvard Business Review, last modified February 7, 2022, <https://hbr.org/2022/02/how-business-can-build-and-maintain-trust>.

disputes arising from online transactions. Many online businesses have adopted protection systems such as chargebacks and reliability systems such as ratings or customer feedback to attract consumer trust. They have incorporated *trust marks* or *seals* on their websites to attest to their integrity and reliability.

Many commentators have argued that ODR can improve consumer trust and promote competition in the online global market. Online companies' adoption of ODR processes and systems represents a critical element of business policy to promote an ethical image, guarantee greater consumer protection, and facilitate access to justice remedies.¹²²⁵

Other researchers have investigated how adequate ODR may help build consumer trust and encourage loyalty. However, research has shown that ODR cannot positively influence consumer confidence in e-commerce. This study supports this claim by arguing that ODR may not be the solution for generating consumer confidence but can help significantly increase consumer trust, especially by solving issues or resolving disputes related to purchasing goods and services. This power of influence of ODR is more significant when accompanied by other assurance systems.

This study proposes a structural assurance scheme that combines preventive dispute systems, security and data privacy, complaint-handling services, and ODR. It claims that such an SA model could help positively affect trusting intentions and, consequently, consumers' behaviors when operating in the online market. Companies should be encouraged to adopt a similar structure and display it on their websites to be visible and easily accessible.

¹²²⁵ Minervini, "Le Online."

CHAPTER SEVEN

CONTRIBUTIONS, FUTURE CONSIDERATIONS, AND CONCLUSIONS

7.1 INTRODUCTION

This chapter summarizes the main points of this study and presents some tentative conclusions. It provides answers to the three research questions and outlines the related findings. Next, it summarizes the study's limitations, explains how it contributes to the body of work already performed in ODR, and presents proposals for future research.

7.2 ANSWERS TO THE RESEARCH QUESTIONS AND SUMMARY OF RESEARCH FINDINGS

This study focused on the role of information and communication technology and online dispute resolution in improving access to justice and consumer trust in B2C low-value disputes. The present study was designed to discuss the role of ODR in consumer A2J, obtain in-depth information about consumers' experiences with B2C ODR, analyze the international regulatory framework on ODR, and investigate the correlation between ODR and consumer trust in e-commerce.

Concerning the central area of investigation, this study sought to answer the following research questions (RQ):

- **RQ1:** What are some of the issues consumers face when using ODR? And what are their expectations towards ODRs?
- **RQ2:** Is it possible to reach uniform international procedures for ODR?
- **RQ3:** Can ODR play a role in improving justice and enhancing consumer trust in e-commerce? If so, how?

This section presents the summary of findings for the three research questions.

7.2.1 Conclusion for Research Question One

RQ1: What are some of the issues consumers face when using ODR? And what are their expectations towards ODRs?

ODR experts and academics have argued for the need to design and implement ODR systems that can respond effectively, quickly, and safely to the needs of consumers in resolving B2C disputes arising from transactions in the online market. Likewise, the UNCITRAL Technical Note on ODR reiterated that ODR should be simple, fast, and efficient to be used in a “real-world setting.” It should not impose delays, burdens, and costs that are disproportionate to the value of the dispute.¹²²⁶ To this end, it is essential to understand and identify consumers’ issues, concerns, needs, and expectations when navigating through online dispute resolution mechanisms. However, insufficient data are available to understand what consumers expect from ODR, the problems and issues they encounter when resolving B2C e-commerce disputes, and what works and needs improvements. Quantitative and, above all, qualitative research is necessary to address these issues.

This study argues that understanding consumers’ problems, concerns, and needs is critical to designing and implementing ODR that consumers can trust. It would lead to developing ODR systems that respond to online market needs, improve consumer trust in e-commerce, and offer instruments of justice for consumer protection.

Two hundred and twenty-nine (229) eBay consumer reviews were taken from the Better Business Bureau (BBB) website to answer research question one. The study involved cross-sectional research based on a content analysis of secondary data generated from eBay consumer reviews. It did not require ethical approval as the data were generated from a publicly available source. Also, data extraction did not identify any individual users and maintained the anonymity of the responses.

The collected reviews centered on various issues, including *problems with transactions, items not delivered, items refunded but not returned to the seller, defective items, shopping or selling frauds and scams, protection policies, and customer service*. Data analysis was organized around three central thematic units:

¹²²⁶ Section II, 9.

- Fairness and due process
- Consumer protection
- Customer service efficiency

The results of the investigation show a few crucial elements to consider when designing, developing, and offering ODR for B2C e-commerce disputes:

1. **Impartiality and fairness:** Consumers often perceive dispute resolution processes as unfair and biased. Disputing parties must receive fair and equal treatment by an impartial third neutral and have equal opportunities to be heard and present their cases in line with due process. Perceived fairness of remedies offered influenced consumer perception of justice.
2. **Transparency, accountability, and trust:** Lack of transparency in redress policies affects consumer trust. Consumers expect more accountability to prevent unfair practices and fraudulent behaviors. Transparent policies and accountability avoid the perception of unfair treatment.
3. **Efficiency (Customer Service):** Consumers expect customer service representatives to be professional, competent, and able to help resolve their problems quickly and fairly. They also expect to be treated with courtesy and respect. Customer service representatives must be trained to provide consistent information in line with publicly provided policies, communicate respectfully, and treat disputing parties fairly. Customer services are critical in determining consumer satisfaction and building trust in dispute resolution systems.

7.2.2 Conclusions for Research Question Two

RQ2: Can adopting ODR regulations and other remedies help enhance access to justice in B2C e-commerce disputes worldwide? Is it possible to reach uniform international procedures for ODR?

Several alternative dispute resolution initiatives have been developed in the international legal arena to address the delays, inefficiencies, and uncertainties of traditional ordinary judiciary systems and facilitate access to justice. Governments and international institutions have recognized the importance of ADRs in offering broader access to justice by resolving disputes quickly and cost-efficiently. Consequently, several countries have promoted legislative initiatives to introduce the use of out-of-court resolution mechanisms in different sectors. The advance in technology and the growth of electronic commerce have made it necessary to think about and develop new forms of dispute resolution. The intersection between ADR, the internet, and ITC has led to the development of ODR. ODR can be considered a direct outgrowth of ADR; therefore, it operates in the legal landscape already created for ADR.

Understanding how the international legal framework in which B2C e-commerce low-value cross-border disputes occur was crucial to answering research question two. To this end, a legal and normative approach was employed to examine the status of international laws and regulations in ADR and ODR and, more specifically, the redress remedies available to consumers. A comparative method was employed to compare soft laws and approaches to out-of-court dispute resolution and consumer protection. The investigation has highlighted a fragmentation among international regulations on ADR and ODR, often due to different legal cultures, different perspectives on how to protect consumers, the state of legal initiatives aimed at promoting alternative means of dispute resolution, and the level of technology available.

Driven by the need arising from the global health crisis or overloaded justice systems, several countries and international organizations have adopted procedural rules and mechanisms to promote and encourage the use of out-of-court means and technology for resolving disputes. This has favored citizens' access to justice. One of the more significant findings from this study is that when offered, ODR facilitates and improves access to justice, specifically in low-value B2C e-commerce disputes. The development of public centralized ODR platforms and their success have shown that ODR can help resolve B2C e-commerce disputes by reducing the time for resolving disputes and providing consumers with additional protection and alternatives to accessing justice.

7.2.3 Conclusion for Research Question Three

RQ3: Can ODR play a role in improving consumer trust in e-commerce? If so, how?

In today's world, where technology plays an increasingly important role in politics, finance, and economics, building trust online is essential for the development and growth of e-commerce. Numerous studies have shown that the lack of trust is one of the top reasons consumers do not shop online.¹²²⁷ Trust is crucial in helping consumers overcome perceptions of uncertainty and risk when operating online.¹²²⁸

Many studies have investigated the role of trust in influencing consumer intentions and purchasing behaviors. Previous literature and research have focused on identifying tools and mechanisms that can help boost online consumer confidence. Quantitative and qualitative research has evaluated the propensity and effectiveness of these mechanisms in determining consumer trust in e-commerce. This research question focused on ODR's role in improving justice and enhancing consumer trust. Based on the literature review, the following can be concluded:

- Many commentators and academics have argued that having adequate B2C online dispute resolution systems can help build and increase consumer trust and loyalty while promoting competition in the online marketplace.
- Although there is general agreement among experts on the role that ODR can play in improving trust in e-commerce, there is not enough quantitative and qualitative data to measure the effectiveness of ODR systems in increasing consumer confidence.
- Recent research has shown that effective ODR systems can increase consumer trust but are not a determining factor in influencing consumer intentions and purchasing decisions.
- ODR systems can generate trust more significantly when accompanied by other assurance mechanisms.
- ODR mechanisms must be designed to generate confidence in their ability to quickly resolve disputes arising from e-commerce to become a significant source of consumer trust.

¹²²⁷ "CIGI-Ipsos."

¹²²⁸ Jones and Leonard, "Trust."

This study has proposed an assurance institution-based system model that includes ODRs as assurance mechanisms to help respond to RQ3. The model is built on Zucker's institutional trust theory and elaborates on the model created by Sha. It comprises four assurance mechanisms: preventive dispute systems, security and data privacy, complaint handling services, and ODR. Related literature and studies have shown the role of each of these mechanisms in influencing consumer trust in e-commerce. However, they haven't proven to be individually decisive in affecting consumers' intentions and purchasing behaviors. This study has proposed combining these mechanisms in a single structural assurance model that can effectively attract and induce consumers to shop online and provide benefits to building confidence in e-commerce.

This proposal helps lay the foundations for future studies and research on SA models in e-commerce, including ODR systems. It invites researchers to test the proposed model.

7.3 RESEARCH LIMITATIONS

This study, like many others, presented some limitations.

Although already examined in detail in previous chapters, these limitations are collected and summarized in this section. It is worth noting that they do not diminish this study's findings, the validity of its conclusions, and its contribution to the existing literature on the subject.

The first limitation concerns the data collected in the study's first phase, which helped answer research question one. The 229 reviews from eBay users do not represent the needs, concerns, and expectations toward ODR of all global e-commerce users. It is undoubtedly limited to eBay users in the United States. Although this research has led to significant findings, face-to-face interviews with online consumers would have allowed for a more in-depth qualitative analysis of online consumer issues and expectations when using ODR. However, the small number of consumers who responded to the invitation to participate in interviews did not allow the collection of sufficient data to compare with the data resulting from the reviews of eBay users. Extending data collection to a more significant number of online consumers should be the focus of future studies. It would allow a better understanding of consumers' needs, concerns, and expectations regarding ODR systems in B2C disputes.

Another limitation of this study is the analysis conducted in chapters four and five on the international legal framework of ODR. It has focused on the most significant initiatives to regulate ODRs and provide consumers with tools to improve access to justice. This analysis has the merit of offering a general international framework on the state of the art of ODR; however, it does not represent an exhaustive global framework since it has not included all the initiatives to regulate ODR ongoing worldwide.

The SA model presented in Chapter Six represents a further limitation of this study. Although it has the merit of contributing to the discussion on the role of ODR in enhancing consumer confidence in e-commerce, the researcher was unable to propose and test this model on current ODR e-commerce websites and platforms. Such action would have allowed the researcher to test the model to understand its practicality and effectiveness and collect critical empirical data on the role of insurance mechanisms and ODR in influencing consumers' intentions and purchasing behaviors. It should be another focus of future studies. Still, the model proposal presented in this research has emerged from observing how, in reality, e-commerce intermediaries (e.g., eBay and Amazon) have spontaneously and progressively created and implemented types of assurance mechanisms that they have combined to generate consumer trust and confidence in their platforms.

7.4 RESEARCH CONTRIBUTIONS

Despite its limitations, the study certainly adds to the state of the art of access to justice through information and communication technology in B2C cross-border low-value disputes. It is one of the first attempts to thoroughly examine consumers' issues and expectations in ODR for B2C e-commerce disputes. Additionally, it extends the investigation on ODR and trust and makes several contributions to the current literature.

First, the research on eBay's dispute resolution has contributed to identifying several consumers' issues, concerns, and expectations when using online dispute remedies to resolve B2C e-commerce disputes. It has emphasized the importance of providing consumers with effective, fair, and transparent dispute resolution tools, the absence of which leads to consumers' dissatisfaction with vendors. The data analysis results have highlighted how consumer satisfaction is necessarily linked to access to dispute resolution mechanisms that the consumer perceives as transparent, fair, and efficient.

The results of this study have shown that e-commerce vendors and ODR providers must consider the following elements in designing, implementing, and offering ODR for B2C e-commerce disputes: Impartiality and fairness, transparency and trust, and efficiency. Understanding the importance of these elements is crucial in developing ODR systems that respond to consumers' needs.

Second, the analysis of the international state of the art on ODR conducted in chapters four and five has highlighted the international regulatory fragmentation on ADR and ODR. It has confirmed the ineffectiveness of traditional judicial mechanisms in resolving low-value cross-border B2C e-commerce disputes. This study has shown that attempts to harmonize international dispute resolution procedures for the online setting have proved problematic. The lack of uniform criteria on how consumers need to be protected does not facilitate the promotion and use of ODR and ultimately affects consumer trust in ODR. Intergovernmental initiatives and organizations such as the Singapore Convention and ASEAN can encourage and promote the adoption of ADR and ODR systems and cooperation between states in seeking and implementing common regulations and standards.

Third, this study has offered concrete examples demonstrating that adopting ODR regulations can lead to developing platforms that can facilitate access to justice, especially concerning low-value B2C e-commerce disputes. Successful results from public ODR platforms like *Consumidor* in Brazil, *Concilianet* in Mexico, *Parle* in Canada, and *Sic Facilita* in Colombia show that ODR can significantly enhance A2J by providing adequate dispute resolution mechanisms that rely on the newest technology. ODR can provide consumers with tools that combine cost-effectiveness, flexibility, and decentralized conciliation processes. In e-commerce, ODRs are suitable for resolving disputes as they are the product of the online market and operate in the same environment where transactions and related disputes occur. They facilitate access to justice, encourage dispute settlements, and improve users' satisfaction. The online platform Parle shows a settlement rate of 70% and users' satisfaction closer to 90%, while the platform Concilianet reports that 90% of online complaints result in an agreement.

Four, this study has added to the growing body of international literature by investigating the role of ODR in enhancing consumer confidence in e-commerce. It has confirmed the role of assurance mechanisms in influencing consumer intentions and purchase behaviors. Additionally, it has proposed ODR as a structural trust and assurance (STA) mechanism that,

along with others, can positively impact consumer trust in e-commerce. It has, therefore, filled an essential gap in the literature on the ODR field.

Previous studies have argued and affirmed the role of the ODR in increasing consumer confidence in the online market.¹²²⁹ Katsh highlighted the dual role of ODR: settling disputes and building trust. He affirmed that ODR is one of the many online vendors' mechanisms to attract consumers.¹²³⁰ Rule and Friedberg have investigated the relationship between ODR and trust. They have considered ODR as one tool in a broader trust-building toolbox. They have claimed that ODR, along with other tools like marketing, education, trust seals, and transparency, can contribute to the development of trust.¹²³¹ In a 2005 research investigation, Edwards and Theunissen concluded that ODR instills consumer trust and reduces consumer fear in online transactions. However, their research found that when consumers are generally satisfied with online transactions, ODR does not appear to be the "silver bullet."¹²³²

This study emphasized that ODR alone could not successfully induce consumer confidence in e-commerce. Yet, the contribution of ODR could be significant when accompanied by other assurance mechanisms.

The model presented in this study aims to reaffirm the role of ODR in consumer trust-building. It has been the first attempt to create a structural trust and assurance model in B2C e-commerce that includes ODR as an assurance mechanism. The theoretical structure of the model contains all instruments identified in the literature review as being correlated and determining consumers' intentions and purchasing decisions. Furthermore, this model was developed taking into account the point of view of consumer confidence in the individual mechanisms by proposing an interdependent relationship between them. An empirical investigation would be required to validate this model and verify the interactions between the various mechanisms and their effectiveness in determining consumer confidence in e-commerce.

¹²²⁹ Ebner and Zeleznikow, "Fairness;" Abedi, Zeleznikow, and Bellucci, "Universal Standards."

¹²³⁰ Katsh, "Online Dispute Resolution,"

¹²³¹ Rule and Friedberg, "The Appropriate Role."

¹²³² Lilian Edwards and Caroline Wilson, "Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions1," *International Review of Law, Computers & Technology* 21, no. 3 (2007): 315-333, doi:10.1080/13600860701701603.

Finally, the insights gained from this study may assist e-commerce businesses in designing and developing websites and platforms that can attract consumers and improve their trust in online vendors.

7.5 FUTURE INVESTIGATION AND PROPOSALS

This thesis has contributed to extending the investigation of the role of ODR in enhancing consumer access to justice and confidence in e-commerce.

The following are recommendations for future research based on the findings discussed in section 7.1. The results of this study suggest that:

- Considerably, more work will need to be done to determine and identify consumers' issues and expectations when using ODR in B2C e-commerce low-value disputes.
- Research must establish a direct correlation between ODR efficiency and consumer satisfaction. It would help understand whether efficient ODR can increase consumer satisfaction with online vendors.
- Further research should examine the links between ODR and consumer confidence in e-commerce more closely. More quantitative and qualitative data could shed light on the role of ODR in improving consumer trust.
- Future studies should assess the joint effects of multiple trust and assurance mechanisms, including ODR, on consumer confidence in online marketplaces. Further research needs to be conducted to test the SA model presented in this study. It would help validate and assess its accuracy and performance, confirming that the model achieves its intended purpose.
- Building upon this study's findings and the proposed SA model, future research should generate the necessary standards for creating and evaluating SA models for B2C e-commerce platforms. Reliable external quality assurance and accreditation agencies should assess, evaluate, and monitor the quality, effectiveness, and commitment to such standards of SA models adopted by platforms.

7.6 CONCLUSION

In the last decades, the profound transformation brought about by information and communication technology (ICT) has led to significant changes in every sector of society. However, it has also opened opportunities for more considerable equality in access to information, education, health, and justice. The widespread use of the World Wide Web and the rise of e-commerce have led to an ever-increasing number of global consumers shopping online worldwide, overcoming the space-time barriers of national and international borders. This study aimed to investigate the role of ICTs in improving consumers' access to justice through developing online dispute resolution mechanisms that address consumers' needs and improve their confidence in e-commerce.

This research has added to international literature and contributed to improving the state of the art on access to justice through information and communication technology by investigating consumers' needs and expectations (access to justice in B2C disputes), trust, and ODR's role in improving consumer confidence in e-commerce. Moreover, this research identified the relationship between ODR and trust. It invites scholars and ODR experts to reflect on the need to place consumers' needs and expectations at the center of the debate concerning the design of effective ODR systems. Finally, this research proposes an SA model composed of trust-based assurance mechanisms critical to improving consumer trust in online transactions and enhancing confidence in e-commerce.

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Luca Dal Pubel is a scholar-practitioner in conflict resolution, conflict management, mediation, and online dispute resolution (ODR). He teaches alternative dispute resolution (ADR), mediation, and negotiation courses for the International Security and Conflict Resolution (ISCOR) program and the Political Science department at San Diego State University and Negotiation and Conflict Resolution at Point Loma Nazarene University (PLNU). He is an adjunct faculty in the LL.M. in ADR program at the Catholic University of Portugal and a visiting lecturer at the Institute of National Defense of Portugal (NDIP). He cooperates with European and American Higher Education Institutions, NGOs, and Public Institutions in educational and research activities. He is an editorial board member of the Italian Law Journal *Giustizia Consensuale (Consensual Justice)*. He is a co-founder of the Bluebird Project, an innovative Italian start-up for ODR, and a partner of Resolutia, an Italian ADR provider. He received his Master of Arts (MA) Degree in Negotiation, Conflict Resolution, and Peacebuilding (NCRP) at the California State University of Dominguez Hills (CSUDH) and his LL.B. and MA in Law at the University of Bologna, Italy. He is a Ph.D. Candidate at Open University of Catalunya (UOC). His research and teaching interests include conflict theory, conflict resolution, international conflict management, ODR, ADR, and Leadership.