

22 The Emergence of Online Dispute Resolution

1) Electronic Commerce

In the introduction to the 1999 article on electronic commerce referred to in the last Chapter, this writer stated that:

"For the past few years the emergence and development of the Internet has made changes to the life of millions of people worldwide. The rate of development is extraordinary. Even today, no one can predict with certainty where the Internet will take us. One of the areas where the Internet has had a particular impact is commerce. Cross-border trading can take place on the Internet virtually without regard to national boundaries. The problems which this raises for politicians, lawyers and legislators are immense...."

"Broadly speaking, there are two types of business being transacted on the Internet: that between business and consumer and that between business and business.... Many consumers in the United Kingdom are now becoming used to shopping on the Internet: not just supermarket shopping, but shopping in increasingly sophisticated areas.... If the increasing consumer business on the Internet in Britain follows the trend in America, the rate of growth will be staggering. The estimated business-to-consumer trading in America, presently put at \$8 billion, is reckoned to increase to \$108 billion over the next five years. But this is small beer compared with business-to-business trading. The American forecasts for inter-company trading put the present figure at \$43 billion, increasing to \$1.3 trillion in 2003...."

"Business on the Internet – electronic commerce – will not simply present opportunities and challenges to businessmen: cybertrade presents challenges and opportunities to lawyers, legislators, governments and international bodies concerned with international trade."¹⁰

The article then went on to consider problems likely to be created in relation to trading on the Internet:

- formation of a contract;
- digital signatures, encryption and authentication;
- electronic payment;
- intellectual property rights;
- governing law and jurisdiction;
- dispute resolution.

It is the last of these topics – dispute resolution – that will now be considered: specifically, online dispute resolution (ODR).

2) Online Dispute Resolution

ODR may be defined as a dispute resolution process that operates entirely by electronic means, without the need for the parties in dispute to meet physically. The actual dispute resolution procedures used may include some of the types of alternative dispute resolution (ADR) systems considered in Part IV of the Manual.¹¹¹

ODR has been developing not only in the commercial field, but also internationally through organisations such as the United Nations.

i) Commercial Developments: eBay and Square Trade

The Internet auction organisation, eBay, has instituted a system for resolving disputes online that operates in conjunction with SquareTrade. eBay says that online dispute resolution is a *“new, unbiased method that can help you resolve disputes that may arise involving eBay transactions. SquareTrade, eBay’s preferred dispute resolution provider, offers two services: a free web-based forum which allows users to attempt to resolve their differences on their own or, if necessary, the use of a professional mediator.”*

According to eBay, the benefits of the system are that *“All eBay buyers and sellers can use this online dispute resolution service. It’s free to file a complaint. SquareTrade will contact and encourage the other party to respond to your case. You can then try and settle your dispute through SquareTrade’s free Web-based process and patent-pending technology. A significant number of complaints are directly resolved in this way. Because we believe this service helps make eBay a better place to trade, you can request the assistance of a professional mediator for \$15 (eBay will subsidize the rest of the cost).”*

To file a complaint, an online form is to be completed in which details of the complaints are to be entered: *“SquareTrade will send a notification email to the other party who can then respond to you. Your complaint and the other party’s response will appear in a secure area on the SquareTrade Web site. Only you, the other party and the mediator (if you choose to involve one) will be granted access. Disputes are often successfully settled with this independent resolution method.... If you’d like, you can also use a SquareTrade mediator for \$15 to guide you through the Web-based process. The mediator works to understand both points of view and to help develop a fair, agreeable settlement. If a resolution can’t be reached, the mediator will recommend a solution based on principles of fairness and good conduct.”*

SquareTrade’s ODR service is said to have *“a proven track record of resolving disputes, having handled over 1 million disputes in areas ranging from online auctions to traditional home purchases. SquareTrade uses a worldwide network of over 250 professional mediators, and is advised by experts in the fields of consumer protection, cyberlaw, and dispute resolution.... SquareTrade was founded in 1999 to provide a way for people to transact online with peace of mind. Since then, SquareTrade has rapidly grown to become the world’s leading online dispute resolution service. The SquareTrade Seal Program has become the most recognizable symbol of trust, attracting several thousand new members*

¹¹¹ A useful work in this comparatively new area is Etan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, 2001.

each month.... SquareTrade was recognized with the '2002 Outstanding Practical Achievement Award' by the prestigious CPR Institute for Dispute Resolution. The World Economic Forum selected SquareTrade as one of the top 100 Technology Pioneers of 2001 and 2002. SquareTrade has acted as a key presenter to the Federal Trade Commission, the European Union and the United Nations Economic Commission for Europe on the issue of global online consumer protection. SquareTrade is a privately held company funded by top tier investors...."

ii) International developments: the United Nations

A Forum on Online Dispute Resolution was organised in June 2002 under the auspices of the United Nations Economic Commission for Europe (UNECE). UNECE explained:

"Numerous discussions have taken place on Online Dispute Resolution (ODR), and several international fora on the subject matter have been organized over the last few years. The objective of this Forum, the first of its kind in the UN, is to take stock of accumulated knowledge and expertise in this area, and to prepare an inventory of the work that has been undertaken or is currently underway in international organizations.

"The Forum is to analyze the current development process of ODR from both Alternative Dispute Resolution (ADR) and increasing interface with new Information and Communications Technology (ICT). By focusing on major existing ODR activities at the regional and global level, it aims at understanding the current state of technology and its likely future directions.

"Overall six expert panels on technical, economic and legal issues will be held during one and half day meeting, bringing together regional and international experts who will discuss the major issues and set the venue for further work in this field...

"The Forum will also seek to find the ways and means of expanding benefits of ODR to developing and transition economies in order to contribute to reducing digital divide. Finally, it will set out the future directions of ODR in technical, financial and legal terms.

"Confirmed speakers include the representatives from the European Commission, US Federal Trade Commission, the business communities, academic institutions and major international organizations, OECD, WIPO, UNCITRAL, CEFACT, ICC, UNCTAD, among others..."

In late 2002 one of those organisations, the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) produced a Draft Recommendation on ODR. The Introduction stated that:

"The increasing activity on the internet in both the Business-to-Business (B2B) and the Business-to-Consumer (B2C) sectors inevitably results in a growing number of conflicts in the electronic business environment.

"Characteristics of transactions on the internet are the absence of concrete obstacles making it easy for parties to create legally binding contracts involving participants in different jurisdictions. This is coupled with the dematerialisation of the medium of message exchange and, thus, contract conclusion. Parties negotiating on the internet are able to attempt to achieve consensus by a mouse-click. Click-wrap and click-through contracts are already widespread. This new way of communication and contracting has raised the need for special dispute resolution mechanisms.

Consequently, rapid, adequate and inexpensive instruments for conflict resolution, as an alternative to national litigation, need to be in place in order to create confidence and trust in electronic business. Because of the specificity of the electronic business environment, these alternative methods for dispute resolution are also increasingly being carried out also by electronic means. Many virtual forums for dispute resolution already offer services on the internet thus making Online Dispute Resolution (ODR) a reality. This, however, raises issues concerning the compatibility of ODR with the contemporary national and international legal frameworks and the appropriate regulation of ODR.”

The Draft Recommendation concluded:

“The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) agrees to recommend that:

- 1 Governments should promote and facilitate the development of Online Alternative Dispute Resolution in both the business-to-business and business-to-consumer sectors. In particular, Governments should refrain from adopting any rules hindering ODR in their future legislation, such as accreditation requirements for dispute resolution providers. The promotion and implementation of ODR can be done especially in combination with self-regulatory instruments for electronic business such as codes of conduct and trust-mark schemes.*
- 2 Governments should ensure that, in case of disagreement between a service provider and the recipient of the service in the information society, their legislation encourages and facilitates the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means so as to support the development of international trade.*
- 3 Governments, national, international and non-governmental organizations developing ODR should encourage the bodies responsible for out-of-court settlement (in particular of consumer disputes) to operate in a way which provides adequate procedural guarantees for the parties concerned.*
- 4 Governments should encourage bodies responsible for out-of-court dispute settlement to inform all relevant institutions of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.”¹¹²*

Possible future development in ODR is considered in Chapter 25.