BUILDING A GLOBAL REDRESS SYSTEM FOR LOW-VALUE CROSS-BORDER DISPUTES: AN APPRAISAL OF THE UNCITRAL RULES ON ONLINE DISPUTE RESOLUTION

PABLO CORTÉS AND FERNANDO ESTEBAN DE LA ROSA*

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Abstract: This article examines UNCITRAL's draft Rules for Online Dispute Resolution (ODR) and it argues that in low-value, e-commerce cross-border transactions, the most effective consumer protection policy cannot be based on national laws and domestic courts, but on effective and monitored ODR processes which decisions are swiftly enforced outside the courts. The draft Rules propose a tiered procedure that culminates in arbitration. Yet, this procedure neither ensures out-of-court enforcement, nor does it guarantee compliance with consumer mandatory law. Accordingly, this article argues that the draft Rules may be irreconcilable with the European approach to consumer protection.

* Dr Pablo Cortes is a Lecturer in Law at University of Leicester and a 2012 Gould Research Fellow at Stanford University. Dr Fernando Esteban de la Rosa is an Associate Professor in the School of Law at University of Granada. The authors are grateful for the participation in numerous discussions that led to the drafting of the UNCITRAL Rules on ODR and the EU initiatives. In particular the authors would like to thank Ms Ozana Olariu, Professors Paula Giliker, Louis del Duca, Vikki Rogers, Janet Martinez, DG SANCO and UNCITRAL Working Group III. The usual disclaimers apply.

I. INTRODUCTION

Disputes inevitably arise between parties to transactions, and all the more so in transactions involving cross-border e-commerce. International disputes arising out of e-commerce are often of low value and more complex than their offline counterparts. They may also involve additional issues, such as the applicable law and forum, the language of the dispute and the need for translation, the distance between the parties and different cultural expectations.[1] In cross-border cases, especially if of low value, judicial processes of dispute settlement are too slow and too expensive.[2] Indeed, the cost of determining the applicable law might be disproportionate to the value of these disputes.[3] The traditional approach in private international law, which is to grant consumers with the application of the law of the country in which the consumer is resident and that jurisdiction[4], is insufficient to provide the consumer redress in a globalized e-commerce. The unsuitability of judicial enforcement as the default channel through which to deal with these low-value disputes has therefore become apparent.[5]

Against this backdrop, the United Nations Commission for International Trade Law (UNCITRAL) agreed that 'a Working Group should be established to undertake work in the

[1] T. Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2007) 10 Yale J L & Tech 159. Cf. R. Bordone, 'Electronic Online Dispute Resolution: A System Approach –Potential, Problems, and a Proposal' (1998) 3 Harvard Neg L Rev 175.

[2] See generally Organisation of American States, Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes (2010). Cf. D. Fernández Arroyo, 'Current Approaches Towards Harmonisation of Consumer Private International Law in the Americas' (2009) 58(2) ICLQ 420.

[3] Ibid at 421; M. Dennis 'Diseño de una Agencia Práctica para la Protección de los Consumidores en las Américas' in D. Fernández Arroyo and J. Moreno Rodríguez (eds) Trabajos de la CIDIP VII (Asunción, 2007) 219; and E. O'Brian 'The Hague Convention on Jurisdiction and Judgments: The Way Forward' (2003) 66(4) MLR 491.

[4] See Art. 16 of the Regulation 44/2001 of 22 December on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, (Brussels I) O.J. (L. 12) and Article 6 of the Regulation 593/2008 of the Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), O. J. (L. 177).

[5] Report of UNCITRAL Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010) A/CN.9/716, para. 16. Cf. C. Hodges, I. Benohr, N. Creutzfeldt-Banda, *Consumer ADR in Europe* (Civil Justice Systems) (Beck/Hart 2012).

field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.'[6] The goal of this mandate, acknowledging that traditional judicial avenues are inadequate for settling these types of disputes, is to improve access to redress by incentivizing the use of ODR. More specifically, UNCITRAL Working Group III (ODR) has been given the task of developing a new legal framework that would support the use of ODR. The Working Group has already developed a draft model set of procedural rules (hereinafter the Rules) to deal with high-volume low-value cross-border disputes. The Rules propose a tiered procedure that commences with negotiation and escalates to the appointment of a neutral third party that acts as conciliator/facilitator when both parties so agree; unresolved disputes will be adjudicated through binding arbitration. This ODR procedure will be activated when both parties agree to it in their contractual agreement.

The negotiation of the Rules was initiated in 2010, and national delegations have met thus far in four additional sessions; the most recent at the time of writing being that held in Vienna from 5th to the 9th November 2012.[7] This paper aims to contribute to the UNCITRAL discussions at this critical time, when its preliminary draft procedural Rules are to be agreed upon, allowing for the discussions to be extended to additional regulatory instruments with the aim of completing a legal framework for ODR. Accordingly, the Working Group requested the Secretariat, subject to the availability of resources, to prepare the following documents in addition to the procedural Rules: a) Guidelines for ODR providers; b) ODR provider Supplementary Rules; c) Guidelines and minimum requirements

[6] See UNCITRAL Report on the work of its twenty-third session (New York, 21 June-9 July 2010).
[7] UNCITRAL Working Group III (Online Dispute Resolution) twenty-sixth session (Vienna, 5-9 November 2012). A/CN.9/WG.III/WP.117. The work which has taken place in the various different sessions may be found at <http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html>. (Hereinafter all websites were accessed 05/11/2012).

for neutrals; d) Substantive legal principles for resolving disputes; and e) Cross-border enforcement mechanisms.[8]

In a similar vein, renewed efforts are taking place in the European Union to develop ODR initiatives. On 29 November 2011 the European Commission published two legislative proposals in the field of consumer ADR. The first is a Directive on consumer ADR that requires Member States to ensure the provision and availability of ADR entities. These entities will have to comply with minimum procedural standards when resolving contractual disputes between traders and consumers arising from the sale of goods and provision of services.[9] It also requires traders to inform consumers when they are committed to participating in ADR schemes that comply with the quality standards established in the Directive (impartiality, effectiveness, fairness, transparency, liberty and legality).[10] The second proposal is a Regulation on consumer ODR which establishes a pan-European ODR Platform which aims at becoming a single entry point for solving online cross-border consumer complaints arising from e-commerce.[11] In essence, the Platform, which is expected to be fully operational by 2015, will be a webpage that will act as a hub dealing with consumer complaints. Although all the traders will not be required to participate in an approved ADR process (saved as to those in specific sectors required by national or EU law), those who have been adhered (either voluntarily or required by law) to an ADR scheme will

[8] Art. 2 of the draft procedural Rules of the twenty-third session (New York, 23-27 May 2011) A/CN.9/WG.III/WP.109.
[9] Proposal for a Directive on alternative dispute resolution for consumer disputes (Directive on consumer ADR) COM(2011) 793 final.
[10] Ibid Art. 6-9. It should be noted that the European Parliament and the European Council have both proposed the inclusion of the principle of legality. See Draft Report of the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (COM(2012)0793 – C7 0454/2011– 2011/0373(COD)) Rapporteur: Louis Grech (18 April 2012), and the Council of the European Union, General Approach to the proposal for a Directive on consumer ADR 2011/0373 (COD) (24 May 2012).
[11] Proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR) COM(2011) 794 final.

have to inform consumers of this. Consumers will be able to submit complaints free of charge and in their mother tongue. Two ODR facilitators will be appointed by the competent authorities of each Member State (most likely drawn from the European Consumer Centres) in order to provide the parties with technical and language support where necessary. Both legislative proposals are due to become law at the time of sending this article to press (i.e. during the first quarter of 2013). The draft Directive envisages implementation in all Member States within 24 months of its approval, and the draft Regulation within 30 months.[12] Since the UNCITRAL Rules and the EU ODR Platform will take a number of years to become fully implemented, discussion is essential in order to evaluate the direction that these two initiatives should take in order to ensure that they complement each other.

The analysis of the UNCITRAL Rules will require balancing minimum due process requirements with the economic constrains of resolving low-value disputes. Ensuring due process for these disputes creates tension between efficiency and fairness, particularly in binding processes such as arbitration. It can be argued that, on the one hand, due process requirements should be reduced because increasing legal formalities has a knock-on effect on the cost and time of arbitration; on the other hand, due process standards should be even more stringent in asymmetric relationships as they can counteract the advantages enjoyed by the stronger party. Many commentators have highlighted this crucial concern.[13] For instance, Hörnle correctly argues that commercial arbitration is not suitable for resolving Internet disputes because there is often an important imbalance of power between the parties, with the

[12] The documents can be found at: <http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm>. The European Council has requested that the six month implementation period be extended.

[13] See for example C. Rule, *Online Dispute Resolution for Businesses. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey Bass, 2002). Cf. P. Cortés book review of J. Hörnle, *Cross-Border Internet Dispute Resolution,* (CUP 2009) (2010) 73(1) MLR 171; F. Esteban de la Rosa, 'Principios De Protección Del Consumidor Para Una Iniciativa Europea En El Ámbito De La Resolución Electrónica De Diferencias (ODR) De Consumo Transfronterizas (2011) 25 *Revista General de Derecho Europeo* 1.

stronger party easily able to take advantage of the principle of autonomy that characterises these processes.[14] Hence, it is necessary to consider whether an ODR process takes imbalances of power into account, or whether an independent monitoring mechanism exits. It is also important to consider whether higher standards of due process result in a more costly process. It seems obvious that the level of due process requirements in consumer online arbitration cannot be as high as that in high-value traditional commercial arbitration. In this regard Schultz observes that

> 'the very *raison d'être* of online arbitration is the parties' pursuit of a radically faster and cheaper form of disputes resolution[…] For such disputes, arbitration is no longer the truth-seeking process that it is for commercial, investment or interstate disputes,[…] but a process to avoid crass disrespect of the contract or basic legal obligations in a consumer transaction.'[15]

Thus, ODR in the e-commerce context is aimed at settling niche disputes, which, given their small-value and the location of the parties, cannot be resolved in any other way. Accordingly, this paper advances a new approach by arguing that, in low-value, cross-border transactions, the most effective consumer protection will not necessarily be based on the national laws and courts of the consumer, but on ODR processes that rely on minimum due process guarantees, incorporate adequate ODR systems with built-in incentives for participating and settling disputes, employ the power of technology, and whose outcomes are guaranteed by swift extrajudicial enforcement. Indeed, the legal debate and public policy thinking on consumer redress are experiencing a major shift; the spotlight is now moving away from a conflict of laws' discourse towards a renewed call for effective ODR schemes.

[14] J. Hörnle, *Cross-Border Internet Dispute Resolution* (CUP, 2009).
[15] T. Schultz, 'Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle' (2011) 19(2) *International Journal of Law and Information Technology* 156-7.

This paper explores the progress of UNCITRAL and makes suggestions on how the Rules can promote cost-effective consumer redress while guaranteeing an acceptable level of due process.[16] The paper, however, also suggests that there are reasons to doubt the suitability of the approach adopted by UNCITRAL. It is submitted that a 'one size fits all' procedure that culminates in arbitration does not take account of the diversity of e-commerce disputes; nor does the legally binding nature of an award necessarily ensure that it will be enforced in a context where final outcomes should be primarily enforced outside the of the courts. Furthermore, in the EU, consumer laws require arbitration to apply consumer protection policies, especially those related to due process and mandatory national laws. Yet, for the majority of e-commerce disputes, compliance with these requirements would not be proportionate to their complexity and cost. Consequently, it is argued that, even if hypothetically arbitration could comply with the requirements contained in national consumer laws, the cost of compliance would not be proportionate to the cost of international low-value consumer disputes.

II. AN ANALYSIS OF UNCITRAL'S DRAFT PROCEDURAL RULES FOR ODR

A. Scope of Application of the Rules

The Rules have been drafted for the resolution of cross-border low-value, high-volume transactions conducted in whole or in part by the use of electronic means of communication, including mobile phones.[17] These Rules are thus intended to apply to disputes that arise from

[16] This article mainly considers the results of the twenty-fifth session of UNCITRAL Work Group III (21-25 May 2012, New York) Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules. Hereinafter Draft Rules. A/CN.9/WG.III/WP.112. Available at <http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html>.

[17] Draft Preamble. Although UNCITRAL has a mandate to develop procedural rules to assist in the resolution of cross-border electronic transactions, not domestic ones, there is no reason why national legislators cannot use

e-commerce, and in particular from online transactions for the sale of goods and provision of services, including both B2C and B2B transactions.

1. A New Paradigm in E-Commerce: From Business to Consumer (B2C) Relationships to the Precondition of Payment at the Time of the Transaction

The Rules do not distinguish between businesses and consumers; they simply refer to parties. This new taxonomy underscores how online vendors are often not aware whether they are trading with consumers or businesses. Buyers (both consumers and business) in e-commerce share a number of characteristics: they cannot normally negotiate the terms of the contract; they pay the vendors in advance, before receiving the goods or services; they often have less experience in entering into that particular transaction; etc. Hence, the Rules underpin a dispute resolution system which seeks to ensure that the buyer, who is most likely to be the claimant, is afforded adequate protection.

From a practical point of view, this new taxonomy circumvents the challenge of defining a consumer in an international instrument. Indeed, if the concept of 'consumer' is to be used, there either needs to be the subject of a uniform definition, and this has already proved to be a challenge at a regional level,[18] or it will be necessary to devise an ad hoc conflict of law rule to deal with the resulting legal diversity. However, an obvious consequence of not including the terms 'consumer' and 'business' in the Rules is that both parties –not only the typical buyer-consumer– will be able to bring a claim. The Rules therefore create the option of having 'consumer-defendants', which in turn raises further

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these Rules, particularly if they are finally adopted as a Model Law, since in practice it may be difficult for sellers to know whether they are entering into a contract with foreign or local buyers.

[18] The need to determine the meaning of 'consumer' in the context of EU law has resulted in many ECJ judgments. See F. Esteban de la Rosa, *La Protección de los Consumidores en el Mercado Interior Europeo*, (Comares, 2003) pp. 44-70; H. Micklitz and N. Reich 'Crónica de una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights' (2009) 46(2) CML Rev 471.

concerns and challenges for the design of Rules which need to take account of the imbalance of power between the parties, especially since consumer-defendants may be less likely to defend a case than are business-defendants.

At this point it is worth noting that the EU has opted in its forthcoming legislation to distinguish between consumers and traders, requiring EU Member States to ensure that ADR is available in disputes where the consumer is the claimant.[19] The fact that in some European countries ADR systems are free of charge[20] and that they are focussed on promotion of consumer protection seem to provide good reasons for using such systems and continuing to treat B2B and B2C disputes differently.

It is however submitted that the UNCITRAL Rules would be more justified in abandoning the classic B2C taxonomy if they distinguished between types of transactions, instead of between types of players. Only capturing transactions where payment has been made in advance would have some beneficial consequences: first, it would make it easier for parties to agree upon substantive principles applicable to limited types of disputes; secondly, decisions could be enforced expeditiously through the payment channels, once the cooperation of these channels has been obtained. Arguably, restricting their scope to such transactions would make it irrelevant whether the parties were a consumer or trader, while still applying to millions of cases of cross-border e-commerce. Restricting the scope of the Rules in which way would permit the smooth development of substantive principles and the

[19] This restriction is pending the approval by the European Commission, the Parliament and Council during the first quarter of 2013. See also P. Cortés, 'Improving the EU's Proposals for Extra-judicial Consumer Redress' *Computers and Law* (10 May 2012) Available at <http://www.scl.org/site.aspx?i=ed26381>. Cf. See European Parliament Internal Market and Consumer Protection (IMCO) Committee Draft Report by Rapporteur R. Thun (April 2012). The Draft Report proposes that traders should be able to bring complaints against consumers but only when the consumers have voluntarily opted into the process. Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE487.752> p. 42.

[20] See for instance Art. 41 Spanish Royal Decree 231/200 that regulates the consumer arbitration system.

effective enforcement of outcomes. Yet, this approach is not the one currently found in the Rules, which also apply to transactions where the goods have been sent or delivered by the seller without payment being made in advance.

2. A Narrow Scope for Frequent Disputes: Simple Fact-Based Claims Arising from the Sale of Goods and the Provision of Services

UNCITRAL is considering the possibility of narrowing the scope of the Rules to so-called 'simple fact-based claims'[21] arising from the sale of goods and the provision of services. There are a number of reasons for this: first, having a limited scope of application might make the ODR schemes more workable, as having a wide scope of application adds complexity and restricts the impact of the technology as an effective dispute settlement tool; secondly, restricting their scope to 'simple fact patterns'[22] and low-value cross-border claims is in line with the aim of developing a cost-efficient ODR system; thirdly, and from a more cynical point of view, it would facilitate achieving the consensus needed among UNCITRAL delegates for the Rules to be adopted .

Although there is already consensus on some restrictions to the scope of application (e.g. tort issues, family law disputes, taxation and intellectual property, just to name a few)[23] the definition of 'low-value claims' has not yet been agreed upon. Thus far UNCITRAL has only indicated that it will embrace disputes related to subject matters which are capable of

[21] UNCITRAL noted that '[i]n a global cross-border environment for low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies. Otherwise there is a substantial risk of flooding the system with complex cases, making it inefficient and expensive.' See UNCITRAL WG III in its twenty-third session (23-27 May 2011, New York) A/CN.9/WG.III/WP.107 para. 34.
[22] D. Girsberger and D. Schramm, 'Cyber-Arbitration' (2002) 3 *European Business Organization Law Review* 626.
[23] This limitation on its scope has also been inserted in Article 1(2) of Electronic Consumer Dispute Resolution (ECODIR) Rules and in Article 2 of Online Dispute Resolution Proposal –United States Submission at the Organisation of American States 2010. Cf. L. Del Duca, C. Rule, and V. Rogers, 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value - High Volume Claims – OAS Developments' (2010) 42(3) UCC LJ 221.

being settled by arbitration. However there is an underlying assumption that the grounds for a claim should be clear and limited to specific headings, such as those employed by eBay and major credit card providers –*i.e.* 'goods not delivered'; 'goods delivered but not as described in the transaction'; or 'unpaid delivered goods'.

Reducing the number and grounds for claims will simplify the standardised treatment of disputes, thus streamlining the ODR process and increasing the availability of redress through automated means or with minimal neutral third party intervention. However, there are several practical and legal concerns: first, significantly restricting the scope of the Rules could stand in the way of ODR providers dealing with wider types of disputes and from employing technology (the 'fourth party') most effectively; secondly, limiting the grounds for claims may raise public policy issues if the final decision is binding, as it may infringe fundamental principles such as legality (i.e. where an arbitral award does not recognise a mandatory consumer right) and the equality of arms in adversarial proceedings (i.e. where the parties have the presentation of their case significantly restricted by the procedure). These risks do not arise is the ODR system only aims to help parties negotiate or if the outcome is not legally binding.

B. A New Tiered ODR Procedure: From Consensual Settlements to Adjudication

The Rules under negotiation propose a two or three - stage process, starting with a consensual stage in which parties first participate in an automated negotiation process; if the dispute remains unresolved, parties are invited to participate in an optional facilitated negotiation; and if that fails, the dispute escalates to binding arbitration. Although the current draft Rules presupposes a tiered procedure, some of the delegations in UNCITRAL have proposed that the final version should allow parties to agree to participate in only the first or second stages, that is, only in the non binding processes. The basic features of each stage of the ODR

process will now be looked at in order to make some constructive suggestions for improving the Rules.

1. The Negotiation Stage and Negotiated Settlements

a) The Use of Standard Forms and Automated Negotiation

Under the Rules, the ODR process commences when the claimant submits the online claim explaining the reasons for the complaint and outlining the proposed settlement. It is expected that this stage of the ODR process will become highly automated. In online negotiation the parties use the framework provided by the software, which is often referred to as assisted or facilitated negotiation, as the software helps the parties to reach a settlement. One key element of computer-facilitated negotiation is the use of standard forms provided by the normally web-based ODR platform which parties will use to negotiate with each other.[24] The ODR platform can facilitate communication by, for example, contacting the other party, identifying and clarifying important information, etc.

For such negotiations to be effective it is important to constantly update the standard forms, taking into account previous cases, meaning that past experience informs and helps develop new generations of standard forms.[25] Although users should be able to access the form in their own language and fill in multiple-choice options, a standardised system will inevitably result in some restrictions in the communication between the parties. Such restrictions might even give rise to due process concerns, particularly if the arbitrator can take

[24] Draft Rules Art. 2 states that ''ODR platform' means one or more than one online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.'

[25] This approach was taken first by SquareTrade and later by eBay and PayPal in order to promote settlement between the disputants. See S. Abernethy, 'Building Large-Scale Online Dispute Resolution and Trustmark Systems' in Online Dispute Resolution: Technology as the 'Fourth Party' (E. Katsh & D. Choi eds. 2003). Cf. O. Rabinovich-Einy 'Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation' (2006) 11 Harvard Neg L Rev 253.

into account the online record of the unsuccessful negotiation when later issuing an arbitral award.

The ODR platform should be designed in such a way that, it automatically generates an agreement formalizing any settlement that has been reached. The agreement should inform claimants that they have voluntarily agreed to the settlement and that they can no longer pursue the enforcement of other legal rights related to the issues addressed in the ODR proceeding. The obligation to inform the parties of this has been proposed in the ADR Directive.[26] Although the UNCITRAL system addressed both B2C and B2B cases, it is submitted that they too should reflect this requirement since sharing this information would enhance the fairness of the agreement in all such cases.

b) Limited Timeframe

The Rules establish ten days for parties to reach a negotiated agreement but they may agree to extend this deadline by another ten days.[27] Given the low value of the dispute and the need for an expeditious ODR process[28] setting a short deadline may be justified. Clearly, time limits can act as incentives to settle the dispute, particularly when claims are resolved by negotiation on the basis of the available factual evidence rather than by exploring other legal dimensions.[29] Time limits bolster the principle of effectiveness in out-of-court proceedings.[30] Nevertheless, UNCITRAL should take into consideration that the time limit of the

[26] These requirements are similar to those established for the consumer/trader disputes by Art. 9 of the proposal for a Directive on consumer ADR.
[27] Draft Rules Art 5(3) and 5(4).
[28] Research carried out by the online payment system PayPal found that parties often prefer an expeditious ODR process than a lengthier and more accurate process. A. Lodder and J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (CUP, 2010) p. 21.
[29] See, e.g., R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LJ 950 and R. Cooter et al., 'Bargaining in the Shadow of the Law: A testable Model of Strategic Behavior' (1982) 11 LS 225.
[30] We thank the reviewers for raising this point.

negotiation phase should be sufficient to allow the respondent to accept the solution or to be able to propose an alternative, which the claimant will then also need time to consider: parties should have the time necessary to ascertain their legal entitlements. Indeed, it would undermine the principle of fairness if consumers have insufficient time to negotiate or to accept a proposed settlement under time pressure.[31]

If the respondent admits the claim, the Rules provide for the conclusion of the negotiation and the ODR proceedings. If the respondent does not reply to the notice,[32] the Rules presume that the opportunity to negotiate has been declined and the case automatically moves to the stage of facilitated settlement and arbitration.[33]

2. The Appointment of Neutral Third Parties and the Optional Facilitated Settlement Stage

According to the Rules, when parties cannot reach a negotiated agreement stage, the ODR provider will select a neutral third party (i.e. the neutral).[34] Once the neutral has assessed all the information submitted, the Rules provide that the neutral will invite the parties to a conciliation session, i.e. the facilitated settlement stage.[35] At this point the neutral, or the ODR platform automatically, may propose a settlement to the parties. If the parties agree to a

[31] Cf. Art. 9(2)(c) of the draft ADR Directive which deals with the principle of fairness and requires that parties in ADR processes "before expressing their consent to a suggested solution or amicable agreement, are allowed a reasonable period of time to reflect." See also the European Commission Recommendation of 4 April 2001 on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes, Principle D Fairness: 'The fairness of the procedure should be guaranteed. In particular: (d) prior to the parties agreeing to a suggested solution for resolving the dispute, they should be allowed a reasonable period of time to consider this solution.'

[32] The current time limit is 10 calendar days but this is expected to be revised once the draft Rules are more developed. See Draft Rules Art. 5.2.

[33] The Guidelines for ODR providers should explain the mechanism by which the provider can ascertain whether a respondent has received the notice. In practice this may not be a difficult task since the respondent should provide an electronic address for the purpose of all communications when accepting the Rules on the ODR platform.

[34] At the 22nd session of the Working Group, there was general agreement that, in the absence of agreement by the parties, there should be a sole neutral (n 5) para. 62.

[35] Draft Rules Art. 7.

settlement, the dispute will be resolved. However, there are a number of issues related to the choice of language and new procedural paradigms that need to be considered further.

a) The Language Selection in Cross-Border Low-Value Disputes

The Rules state that the language of the proceedings can be the same as the language of the transaction, as it is assumed that this will be the mutual language of the parties.[36] However, the language used by the seller and buyer when making the transaction might be different, depending on their respective locations.[37] The Rules allow parties to agree to an alternative language but if the parties are unable to do so the neutral is required to choose the language of the process. This approach might clash with consumer protection laws, particularly in the EU, which allow consumers to employ their own languages when filing a complaint.[38]

Sellers often offer consumers in other countries the possibility of using their own language to complete a transaction. Consumers may, however, also make online purchases in a foreign language. Whilst it may not be a major challenge to make an online transaction in a foreign language, it could represent an insurmountable obstacle when seeking redress. Hence, in cross-border disputes parties may need to rely on text translation software provided by multilingual ODR platforms. As automatic translation software may not produce optimum results,[39] limiting the Rules' scope of application could facilitate the use of standardised forms which would enable the parties to read and write in their own languages.

[36] See A/CN.9/WG.III/WP.112/Add.1, paras. 20-25.
[37] Ibid.
[38] See Draft Rules Art. 5 of the proposal for an ODR Regulation.
[39] It should be noted that instant translation is already offered by several sites free of cost E.g. <http://translate.google.com/#>.

b) Low-Value ODR Procedural Paradigms

The need for an expeditious resolution to low-value disputes may require some changes in t traditional neutral third party procedural paradigms. The goal is to balance such change with the maintenance of minimum due process standards. This section briefly examines four procedural changes resulting from ODR processes.

First, the simple nature of a claim may mean that it is not necessary for the neutral to be a qualified lawyer. The Rules consider it sufficient that neutrals have obtained some relevant skills in legal dispute resolution.[40] Nevertheless, the training of neutrals should not be a matter of self-regulation as they are involved in determining legal entitlements; hence they should be able to make decisions that respect the law, especially when issuing arbitral awards, since such awards ought to be compatible with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Convention) The monitoring of neutrals by independent accreditation agencies will be considered below.

Secondly, the Rules depart from the criterion adopted in the Model Law on International Commercial Conciliation[41] in that they allow the same neutral to be involved in the facilitated settlement stage and in arbitration.[42] In order to ensure that arbitration is impartial, the normal practice in commercial, and sometimes in consumer, arbitration is for the arbitrator be

[40] See (n 5) para. 63. See also Art. 6 Proposal for a Directive on consumer ADR.
[41] Draft Rules Art. 12 of UNCITRAL Model Law on International Commercial Conciliation (2002) states that 'unless otherwise agreed by the parties the conciliator should not be [the arbitrator].' This article follows the reasoning that the two processes are different, so they must be triggered by different needs and create different results. Despite the article clearly stating that the parties' intent should prevail, such intent must be clearly expressed by the parties. It must be noted that a number of UNCITRAL Working Group delegations have expressed a preference for having a different neutral for the conciliation and the arbitration given that they have different roles and training.
[42] The Model Law allows this only if the parties' agree (Art. 12). The Model Law is accessible at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html>.

different from the mediator or conciliator.[43] Yet, employing two neutrals would increase costs and time, as two different professionals would have to examine the same dispute. Since this is an online process for the resolution of low-value disputes, it can be argued that, in the interests of speed and simplicity, the Rules could depart from the traditional approach found in off-line processes. A more flexible position however, could be to allow parties to request a different neutral for arbitration, but since this would increase the cost of the procedure, the request should be subject to the requirement of a payment of an additional fee by the applicant.

Thirdly, the Rules require neutrals to be independent and impartial[44] and to disclose any circumstance that may raise doubts about their own impartiality.[45] Once appointed, the parties will be given two days within which to disqualify the neutral. With each party being able to reject up to a maximum of three neutrals without providing grounds for doing so.[46] The UNCITRAL Arbitration Rules recommend that when appointing an independent neutral, the arbitration provider should take into account the advisability of appointing a national of a State other than that of the parties.[47] It is not clear whether this would be feasible in the first stages of the ODR process since e-commerce is unequally distributed; for instance, there is likely be a higher number of US participants and possibly a higher number of US neutrals. In any case, this requirement does not necessarily have same significance in the e-commerce context as it does in traditional commerce due to the low-value of the transactions. Another, and perhaps more important, concern would be if the same neutral were frequently allocated

[43] See for instance the Spanish consumer arbitration system, art. 22.1 Royal Decree 231/2008. There is also traditionally a preference for separate ethics codes for mediators and arbitrators. See C. Menkel-Meadow 'Are there Systematic Ethic Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts' (Winter 2009) 14 Harvard Neg L Rev 202.
[44] Draft Rules Art. 8.1.
[45] Draft Rules Art. 6.
[46] Draft Rules Art. 6.3.
[47] UNCITRAL Arbitration Rules Art 6.7 (as revised in December of 2010).

to disputes concerning the same businesses. Procedural disclosures, transparency, and diligent accreditation mechanisms should be put in place to minimise potential forum shopping and conflict of interests.

Fourthly, the level of access by the neutral to the information exchanged between the parties during the negotiations has not yet been decided. One possibility is for neutrals to have full access to the records of negotiation stage,[48] while another would be to allow one of the parties to limit access in order to respect the confidentiality of the negotiations. This latter approach reflects traditional judicial and arbitral systems, which grant complete confidentiality to the negotiations.[49] Maintaining the confidentiality of the negotiations is intended to ensure that parties are not discouraged from disclosing evidence or settlement proposals by a concern that they might be used against them during a subsequent adjudicative process. It also ensures that the adjudicator's are not coloured by parties' prior discussions and admissions of liability. Given that ODR seeks to ensure an expeditious and efficient resolution of low-value disputes, the confidentiality of the negotiations could also be limited; but if the Rules adopt such an approach, then parties should be notified of the level of confidentiality which attaches to the negotiations whilst they are taking place.

3. The Arbitration Stage

The second stage of the tiered process (or the third stage, in cases where the parties agree to the facilitation stage) will be arbitration, with the arbitral award being final and binding.[50] This means that the claimant will not be able to make a claim before the national court in relation to a situation which has already been dealt with at the Arbitration stage of the ODR

[48] This Rule is in the rules for ODR providers funded by the European Commission: ECODIR. See <http://www.ecodir.org/>.
[49] Anonymous authors, 'Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes' (1990) 103 Harvard L Rev 1086.
[50] Draft Rules Art. 9.2.

process. The draft Rules state that the neutral will resolve the claim within seven days of the parties having submitted all the required documents. However, if there were a delay, this would not provide a basis for challenging the award.[51] The consumer would, however, potentially be able to bring a claim against a business in a court of law for issues which related to torts or warrantees if these issues fall outside the scope of the ODR system. The Rules also provide for a period of five days during which parties may request the correction of an 'error in computation, any clerical or typographical error, or any error or omission of a similar nature'.[52] The arbitrator may make corrections within two days of receiving the request. This safeguard reflects the reality that because awards will be issued expeditiously, errors are more likely to occur. Although challenges to arbitral awards of cross-border low-value claims would be extremely rare, the appellant could only challenge the enforceability of the award on the grounds set out in in Article V of the New York Convention.

The shortcomings of consumer arbitration have been discussed extensively in the literature.[53] Two of the most prominent disadvantages are the lack of precedents and the lack of transparency as a result of awards being confidential, which can mean that market abuses go undetected. Publication of data on arbitral awards, accreditation agencies, and consumer protection bodies could facilitate the monitoring of potential abuses.

There are additional compelling arguments against arbitration being the most suitable process for low-value e-commerce claims. First, the enforceable nature of an arbitration award does not bring additional value to the final decision, since it is extrajudicial means of enforcement which are more important as regards decisions concerning low-value cross-

[51] Draft Rules Art. 9.1.
[52] Draft Rules Art. 9.4.
[53] See e.g. A. Schmitz, 'Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms' (2010) 15 Harvard Neg L Rev 194 and ''Drive-Thru' Arbitration in the Digital Age: Empowering Consumers through Regulated ODR' (2010) 62 Baylor L Rev 178-244.

border disputes. Secondly, if – as has been suggested above – the ODR Rules may result in an award which does not take full account of relevant legal provisions, and particularly mandatory consumer laws, the final outcome should not be considered as *res judicata,* and parties ought to be able to have recourse before domestic courts –either through class actions[54] or through the small claims court when available.[55]

A further practical challenge for adjudicating online individual disputes concerns the assessment of the evidence. Although each party will have the burden of proving the facts which they rely on to support their claims and defences, the *onus probandi* will weigh more heavily on the consumer-claimant who may not have the resources necessary to challenge the technical evidence provided by the business-defendant. For example, a buyer submits a claim because he has purchased online a new laptop that is not working well. The vendor refuses to replace the laptop based on an engineer's report that states that there has been water damage, which is not covered by the warranty. The buyer is convinced that the laptop has not been near water but proving this would require an expensive report from another computer engineer which a buyer is unlikely to get. What would be the likely outcome of this case? A neutral under these circumstances should decide in favour of the defendant where the

[54] Class actions are one of the key differences between US and EU civil justice cultures. While in the US a class action is a real threat to large traders, this is not so in the EU where collective actions are not common. It should be noted that the US Supreme Court has recently given the green light in *AT&T Mobility v Concepcion* 131 S. Ct. 1740 (2011) to US businesses that wish to minimize the threat of class actions by using cost-effective and fair consumer arbitration programs. Conversely, the same motivation does not exist in the EU, where there is no opt-in system for collective actions, where they do not normally allow contingency fee agreements, and they are not heard by civil juries which can award punitive damages. Although the EU is developing a legislative instrument on collective redress, it is unlikely to become as widespread as in the US for the reasons given. See generally C. Hodges, J. Peysner and A. Nurse 'Litigation Funding. Status and Issues' (2012, Oxford: Centre for Socio-Legal Studies). Available at: <http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf> and European Parliament Resolution of 2 February2012, 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)). The restrictive application of collective redress in the EU is balanced with the ADR and ODR proposals, and its amendments, which restrict the use of pre-dispute consumer arbitration and processes that cannot guarantee compliance with consumer rights. See MEP Grech Draft Report (n 10) p. 21, para. 21(b) and European Council General Approach to the Proposals (n 10) p. 13 para. 21(a).

[55] The e-Justice portal is presently preparing an online filing system for the European Small Claims Procedure, which is expected to start running in 2013. See <https://e-justice.europa.eu/home.do?plang=en&action=home>. Cf. P. Cortés 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' (2008) 27 CJQ 83-97.

claimant had not been able to refute the vendor's evidence. The outcome might, however, be different if the arbitrator detects a pattern of activity which might suggest the possibility of fraud. A well-functioning ODR system needs to provide clear directions for dealing with such difficult situations.[56]

4. A Key Element for an Effective ODR System: Incentives for ODR Users

The success of the UNCITRAL ODR model will depend to a large extent on whether the Rules create suitable incentives for the parties (a) to decide to participate in the ODR; (b) to accept an early settlement at the negotiation stage; and (c) to voluntarily comply with the agreement or decision. This section discusses each of these three types of incentives. Even though they do not all need to be included in the Rules, drafters of ODR procedures should at least bear them in mind.

a) Incentives to Encourage Participation

Participating in an ODR process raises an economic dilemma for businesses as it will burden them with additional costs.[57] At the same time, consumers and buyers may be attracted to an ODR process if the services are given free of charge, or at least at a low-cost fee. Sellers may be willing to finance ODR if they think it will enhance their reputation in the market place.[58] As it may allow them to charge more for their products, attract more buyers, and consolidate their competitive position in the online market. To assist buyers identify reliable sellers and redress schemes an online trustmark or label might be used, though the effectiveness of these

[56] See, for example, the Spanish consumer arbitration system, where the possibility of equity-based solutions allows the arbitrators to change the *onus probandi* of the parties.
[57] J. 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. 122/2012, section 7).
[58] P. Balboni, *Trustmarks in E-Commerce* (CUP, 2009).

online logos will be highly dependent on the reputation of the scheme and on its becoming known by a critical mass of participants.[59]

Effective redress mechanisms will instil consumer trust in sellers and in the market place. Market analysis carried out by eBay has shown that well designed ODR platforms encourage a sense of justice and fairness in the market place, which in turn increases the loyalty and trust of those who benefit from the redress system. eBay and PayPal have found that eBay users who have had disputes resolved efficiently have subsequently increased their commercial activity on eBay. Indeed, the market activity of eBay users who have had disputes resolved is greater than that of those users who have not been in dispute during the same time period, suggesting that users' confidence in the fairness of the market place is enhanced by their experience.[60]

The reputation of small and medium size sellers in e-commerce is increasingly linked to review sites and feedback. It is, then, important to have technology which is capable of automatically filtering frivolous and vexatious reviews and which allow sellers to challenge or resolve disputes flowing from negative reviews.

Sellers may also be attracted to ODR processes that restrict the number of chargebacks where a credit-card provider at the consumer's request demands a trader to refund the payment of a disputed transaction. When a consumer initiates a chargeback process, the seller is normally required to pay a fee.[61] In addition, the trader's credit score will

[59] A trustmark is an electronic label displayed in the traders' website by which they pledge to comply with a code of conduct, the relevant law, and that disputes will be addressed by an independent neutral third party. Balboni, Ibid, p. 35-37.
[60] C. Rule, CEO at MODRIA (and former ODR Director for eBay and PayPal), Presentation on eBay ODR Experience at the 10th International ODR Forum, Chennai, India. 9 February 2011.
[61] D. E. Sorkin, 'Payment Methods for Consumer-to-Consumer Online Transactions' (2001) 35 (1) Akron L. Rev. 1, 9-10.

be affected; so the interest rates paid per transaction depend on the number of chargebacks issued against them.

National courts can also play a role in providing economic incentives for parties to participate in a more cost-efficient dispute resolution process. For instance, they could employ cost sanctions[62] if a party had unreasonably refused to participate in an ODR process. Although, as mentioned above, national courts are not appropriate venues for resolving low-value e-commerce disputes at the moment, national small claims courts may become more accessible with the improvement of e-justice technology and recourse to collective redress may become an option in certain jurisdictions.[63]

b) Incentives for Early Settlements

Cost efficient resolution of low-value disputes should adopt be pyramid shaped, where most disputes are resolved at the based of the pyramid once parties have exchanged all the necessary information, with only a small proportion of disputes escalating to the next stage, where a neutral third party acts as facilitator.[64] An even smaller number of disputes should reach the adjudicative stage where a decision is imposed on the parties. The higher the stage the dispute reaches, the more expensive the procedure should become. The earlier the settlement,,the cheaper should be the cost of the proceedings. That is why an economically efficient ODR system should incentivize early dispute settlement through automatic negotiation, avoiding, as much as possible, the intervention of a human third neutral party.[65]

[62] This incentive would go hand in hand with the Article 5.1 of the Mediation Directive that allows national courts to recommend the use of mediation. Established UK case law states that cost penalties for unreasonably refusing to participate in ADR complies with Article 6 ECHR and Article 47 of the CFREU. See *Halsey v Milton* EWCA Civ 576 (2005), and Part 36 of the Civil Procedure Rules 1998 (England and Wales).
[63] See European Parliament Resolution (n 54).
[64] Hörnle (n 57) 4a.
[65] Ibid.

Early settlement of disputes would be further promoted by informing the parties of what would be the likely outcome if the case were to proceed to adjudication. A list of examples of how similar cases had been resolved, as well giving decision greater publicity might act as a 'reality check' for the parties and encourage settlement. Claimants should receive information about their rights and obligations when filing a claim in a clear and targeted manner. Clear policies on other issues, such as who has the burden of proof if a complaint escalates to an adjudicative process, are also helpful in persuading parties to settle. Indeed, the more predictable the outcome, the less likely it is that the parties will go to adjudication, particularly if the adjudication process requires filing fees and extends the time involved in the dispute.[66]

Fees can be used as in a 'carrot and stick' fashion to encourage early settlement of disputes. Also, cost penalties may be used to encourage parties to settle their disputes, instead of employing more costly adjudicative models. It may also be worthwhile considering whether to require parties to carry to additional cost of the adjudicative process if they do not achieve a more favourable outcome than they would have had if they had settled the case by negotiation.[67]

c) Incentives to Comply with Outcomes

The aim of an ODR process is to avoid offline judicial intervention. Accordingly, if the UNCITRAL initiative is to be successful compliance with settlements and awards should also

[66] Rule (n 13).

[67] For instance, CEDR Solve through the Association for British Travel Agents (ABTA) offers an arbitration scheme that incorporates economic incentives. Its rules state that if the consumer complainant is awarded less than what was previously offered by the trader, the consumer will be ordered to pay an amount which is equal to the registration fee. See <http://www.abta.com/consumer-services/travel_problems/arbitration>. Cf. P. Cortés, 'A Comparative Review of Offers to Settle – Would an Emerging Settlement Culture Pave the Way for their Adoption in Continental Europe?' (2013) CJQ forthcoming.

take place outside of the courts –and. incentives could play a vital role in promoting voluntary compliance.

An important incentive for businesses compliance with final outcomes would be for this to affect their reputation on rating websites. The withdrawal of a popular trustmark may also be a persuasive incentive. Another method would be to notify consumer agencies or the relevant public authorities in the country of the business that outcomes are being not complied with.[68] Another technique currently used by consumer organisations is to "name and shame" recalcitrant businesses which have high numbers of complaints and which either refuse to participate in redress schemes or which fail to comply with agreements or decisions. A number of ADR and ODR schemes already use these black-lists as an incentive to encourage compliance and as a warning to consumers: for example Trusted Shops lists websites which have had their accreditation withdrawn for non-compliance;[69] the Internet Ombudsman in Austria publishes a Watchlist of traders who have generated multiple consumer complaints;[70] and the Swedish National Board for Consumer Disputes also makes public its decisions for 'naming and shaming' traders who have not complied with final outcomes.[71] In terms of size, the largest is the Better Business Bureau (BBB), which rates traders in Canada and the USA.[72]

Online browsers and search engines, which are important intermediaries in e-commerce, could also play an important role in rewarding compliant sellers while penalising those sellers with a high number of unresolved complaints. Currently, when Google Shopping

[68] See for example the proposal made by the USA at the OAS meeting in 2010. See generally Del Duca et al (n 23) 221.
[69] <http://isisa.ccreditation.imrg.org/User/Pages/WithdrawnWebsites.aspx?pageID=16&pageTemplate=1>.
[70] <http://www.ombudsmann.at/schlichtung.php/cat/5/aid/17/title/Watchlist>.
[71] European Parliament Study Cross-border Alternative Dispute Resolution in the EU (2011) p. 40
[72] <http://www.bbb.org/>.

displays online sellers in its browser, the list includes third party reviews.[73] Google's algorithms aggregate the reviews (as well as extracts from such reviews) which they find on the Net when searching for the sellers' domain name. Similarly, Google and other online browsers could also rank down those sellers who have a high number of unresolved complaints or who are included in a black-list.

III. ACHIEVING CONVERGENCE BETWEEN THE UNCITRAL ODR INITIATIVE AND THE EUROPEAN APPROACH TO CONSUMER PROTECTION

A. The Need for a Common Approach to Consumer Redress

The UNCITRAL and the EU ODR initiatives need to be compatible, as both initiatives aim to stimulate cross-border e-commerce. As e commerce does not know of physical boundaries, it is imperative to seek convergence at both global and regional levels. These two initiatives must strike a suitable balance between achieving efficient and expeditious redress and ensuring that there is compliance with an acceptable level of due process. However, certain differences in approach should not pose serious obstacles to the development of ODR at a global and European level; the UNCITRAL Rules not making the distinction between consumers and traders which is found in the European proposals being an example.

Both the European initiatives and the UNCITRAL Rules aim to promote ODR by intervening in the self-regulatory ODR market and giving preference to ODR providers that comply with rules of due process. While both initiatives envisage assuring compliance with due process through an accreditation system, the European system takes consumer ODR a

[73] <http://www.google.com/ads/shopping/> and <http://www.google.com/wallet/>.

step further by requiring Member States to ensure the provision of ADR/ODR entities in compliance with the procedural guarantees established in the forthcoming Directive. While UNCITRAL proposes a multi-step process that moves from automated negotiation to binding arbitration, the European consumer ODR initiative is open to different ADR/ODR models that range from adjudicative to consensual extrajudicial processes. The EU approach reflects the various traditions and models of consumer redress currently found in the EU (e.g. ombudsmen, complaints boards, etc)[74] and leaves the establishment of specific procedures to the individual ADR/ODR schemes themselves. This raises the question of whether the approach followed by UNCITRAL is the most suitable one, as one procedural model cannot cover all the diversity and complexity of e-commerce disputes.[75]

In his publications on legal processes, Lon Fuller foresaw that the type of factors involved in a dispute should determine the most suitable procedure for its resolution.[76] Thus, the adequate level of due process should vary according to the value and complexity of the dispute. However, the difficulty of developing a set of standards for a variety of legal processes is well attested.[77] While procedural standards need to be broad enough to encompass various processes, they also need to be sufficiently narrow to guarantee an acceptable level of due process. In the European context it has been argued that it would be preferable for legislation to distinguish clearly between binding (or adjudicative) and non-

[74] Reports on the main features of the ADR systems in Europe, country by country, are available in C. Hodges et al. (n 5).
[75] V. Rogers, Institute of International Commercial Law (Pace Law School) Note on the Resolution Process Designated by the Draft ODR Rules Vienna, 14-18 November 2011.
[76] L. Fuller 'The Forms and Limits of Adjudication' (1978) 92 Harvard L Rev 353; L. Fuller 'Mediation –Its Forms and Functions' (1971) 44 Cal L Rev 305; K. Winston, 'Introduction to the Revised Edition' in *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Hart, 2001).
[77] Menkel-Meadow (n 43) p. 195, 201.

binding (or consensual) processes.[78] By contrast, the draft Rules provide very specific procedural norms without considering the particulars of every sector.

When establishing due process rules there must be a clear distinction between binding processes (such as arbitration) and non-binding processes (such as mediation), as the due process requirements are different for each.[79] Thus, for example, in adjudicative processes the adversarial principle, the independence of the neutral and a high degree of transparency (including the publication of outcomes) are important. Also, arbitral procedures need to be considered separately as they have a *res judicata* effect and mandatory consumer laws limit the principle of autonomy.[80] Whilst for non-binding processes the principle of legality is irrelevant, this principle turns into public policy when the final outcome is binding on the parties.[81] The principle of fairness is also perceived differently in consensual procedures, such as mediation, where parties can at any time withdraw from the process.[82]

The approaches taken by UNCITRAL and the EU on a number of issues, such as the accreditation of ODR providers, cannot be fully compared as they are still subject to negotiation and it will be a number of years before for these initiatives to be finalised and

[78] Hörnle (n 57).
[79] The two main different types of procedures were considered by the European Commission when adopting Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, (OJ L 115, 17.4.1998), and in Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109/56, 19.4.2001. See Hörnle (n 57).
[80] Ibid.
[81] The Directive is also set to include the principle of legality, providing that in adjudicative processes consumers cannot be offered a lower level of protection than the mandatory law. Cf. Esteban de la Rosa, 'Régimen Europeo de la Resolución Electrónica de Litigios (ODR) en la Contratación Internacional de Consumo' in F. Esteban de la Rosa and G. Orozco Pardo, *Mediación y Arbitraje de Consumo, una Perspectiva Española, Europea y Comparada* (Tirant lo Blanch, 2010) pp. 165-222, especially 195-197. See MEP Grech Draft Report (n 10) p. 21, par. 21(b), and European Council General Approach to the Proposals (n 10) p. 13 par. 21(a). A uniform approach in the EU would also facilitate the negotiation of international treaties, such as the on-going negotiations in the frame of the UNCITRAL and the Hague Convention on Conflict of Laws.
[82] Ibid.

fully implemented.[83] It is, however, already clear that, once implemented, the models will need to interact with each other, as EU consumers may be offered an ODR process that follows the UNCITRAL Rules. Hence, the UNCITRAL process will not only be used to resolve international disputes when the seller is based outside the EU, but it could also be used to settle disputes arising from the Internal Market. It can also be expected that the most likely ODR providers will be those approved by their national competent authorities and listed in the EU ODR Platform.[84] Furthermore the UNCITRAL model should complement future legislative instruments in the B2B as well as in the B2C context, such as the forthcoming European legislative initiative in the field of commercial ADR, expected in 2013.[85]

The need for convergence and compatibility of these two initiatives makes it necessary to examine some key elements in the UNCITRAL Rules in the light of the European approach, including questions concerning with the validity of consumer pre-dispute arbitration agreements, the monitoring of the ODR providers, the enforcement of the settlements and the substantive rules applicable in the ODR process. These issues are examined below.

B. The Validity of Pre-Dispute Arbitration Agreements

One of the major bones of contention between the EU and the US is their approach to arbitration for resolving consumer disputes. While in the US arbitration is commonly employed for these types of disputes (albeit with some minor restrictions based mostly on

[83] For instance the EU ODR Platform is schedule to be fully operational in 2015.
[84] Article 15 of the Proposal for a Directive on Consumer ADR.
[85] DG JUSTICE Workshop on Alternative Dispute Resolution held in Brussels on 28 February 2012.

state law)[86] other national laws, including many EU Member States, Latin-American jurisdictions and Japan, invalidate these clauses in consumer contracts.[87] In the EU the consumer cannot become committed to an out-of-court procedure prior to the dispute has arisen, since such a commitment would deprive the consumer of the right to settle the dispute before the courts (known as the 'principle of liberty).[88] These different approaches are reflected in the New York Convention. According to article II (1) of the New York Convention pre-dispute arbitration agreements are valid and signatory States must recognise their legal validity; however, there are a number of exceptions contained in article V, which specifically contemplates the refusal of recognition and enforcement of arbitral awards where such recognition or enforcement would be contrary to the public policy of the country where the enforcement is sought. The restriction in article V is therefore applicable as long as consumer protection legislation is considered to be part of a country's public policy.[89] These

[86] See the US Supreme Court cases which have rejected challenges to pre-dispute arbitration clauses in consumer contracts, e.g. *Buckeye Check Cashing, Inc. v. Cardegna* 546 US 440 (2006). Pre-dispute arbitration has nonetheless certain restrictions. In a recent decision the Second Circuit Court held that the credit card industry had breached anti-trust laws by conspiring to limit consumers' dispute resolution choices through pre-dispute mandatory arbitration clauses. See *Ross v. Bank of America* F.3d. 2008 WL 1836640 (Cir.2d. N.Y.). See, e.g. Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. para. 1226(a)(2) (2002). It must be noted that there is increasing pressure in the US Congress to pass a Federal Law restricting the use of pre-dispute arbitration clauses in consumer and employment contracts. See more generally the Bill on the Arbitration Fairness Act of 2011 (S. 987). Cf. S. Smith and J. Martinez, 'An Analytic Framework for Dispute System Design' (2009) 14 Harvard Neg L Rev 1417 (on the challenges for a designing a dispute resolution process where there is an imbalance of power between the parties).

[87] For the EU law see generally Recommendation 98/257/CE of the Commission on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes 1998 O.J. (L. 115), VI principle of liberty. See also Annex [q] Unfair Terms in Consumer Contracts Directive 1993/13/EC. See also Annex 3 of the Arbitration Act No 138 of 2003 prohibiting consumer pre-dispute arbitration.

[88] See 1998 Recommendation, Annex I [q] of the Unfair Terms Directive 93/13/EC and Article 84 (d) of the Proposed Regulation on Common European Sales Law. This aspect has been clearly indicated by the European Court of Justice in *Asturcom Telecomunicaciones and Mostaza Claro*. The clause must be considered as unfair. See C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*. [2006] ECR I-10421. The forthcoming Consumer ADR Directive is set also to include the principle of liberty whereby clear consent from consumers will be required when they accept to participate in a binding adjudicative process. For the situation in Mexico and other latinoamerican jurisdictions see A. Arley 'Análisis Tridimensional de la Resolución Electrónica de Disputas para el Comercio Electrónico en México (Online Dispute Resolution)' (2012) 1(1) *Revue Droit International, Commerce, Innovations & Développement* 101 et seq.

[89] A/CN.9/WG.III/XXIII/CPR.1/Add.1 par. 21.

different approaches in the US and EU have put, in the words of Adams and Brownsword, two different doctrines at play: 'consumer-welfarism' and 'market-individualism'.[90]

The arguments on the validity/invalidity of pre-dispute consumer arbitration clauses are still split. On the one hand, the main argument in favour of having a binding arbitration provided for from the outset is that it ensures finality by encouraging parties to participate in a process that issues a decision that is final and binding. On the other hand, there is a vast literature dealing with the counter-arguments,[91] which generally revolve around the idea that consumers, as the weaker parties, should be able to rely on their mandatory laws and national courts when they have been unable to secure redress through extrajudicial means of dispute resolution. In order to protect this right, the principle of liberty does not permit consumers to limit themselves to arbitration before the dispute arises.

There are points of convergence, since there are EU countries where pre-dispute consumer arbitration clauses are not considered unfair. In some cases, the reason for allowing pre-dispute clauses is the high value of the dispute. The UK permits pre-dispute arbitration provisions when claims are above the limit of the small claims track in the civil courts, which is currently 5,000 GBP.[92] In France too, pre-dispute consumer arbitration agreements are also valid in some situations concerning high value and international disputes.[93] However, since

[90] J. Adams and R. Brownsword, *Understanding Contract Law* (London, Thomson, 2007) pp. 188 and seq.

[91] See generally A. Schmitz (n 53); J. W. Hamilton, 'Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?' (2006) 51 McGill LJ 693; J. M. Matthews, 'Consumer Arbitration: Is it Working Now and Will it Work in the Future?' (2005) 79 *The Florida Bar Journal* 1; J. Sternlight, and E. Jensen, 'Using Economic Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?' (2004) 67 *Law and Contemporary Problems* 75; J. Sternlight, 'Is Alternative Dispute Resolution Consistent With the Rule of Law' (2006) 56 DePaul L Rev 569; J. Sternlight, 'In Defense of Mandatory Arbitration (If Imposed on the Company)' (2007) 8 Nevada LJ 82; K. Stewart and J. Matthews 'Online Arbitration of Cross-Border, Business to Consumer Disputes' (2002) 56 University of Miami L Rev 1119; T. Stipanowich 'The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution' (2007) 8 Nevada LJ 427.

[92] See the Arbitration Act 1996 and delegated legislation in the UK.

[93] Article 2061 of the French Civil Code only allows arbitration clauses in contracts concerning professional activities, i.e. not in consumers' contracts; but this article does not apply to international arbitration. A case on

these exceptions concern high value disputes, and situations in which there may be a presumption that the parties have an adequate degree of legal skills, they may not be relevant comparators given the types of disputes which the UNCITRAL Rules aim to tackle.

It is more relevant to examine those situations in which national laws allow consumer arbitration pre-dispute clauses provided that consumers are given sufficient protections and guarantees, such as information concerning the clause. For example, jurisdictions such as Germany and Austria required there to be clear and adequate notice of arbitration in consumer transactions. In order to be valid, a pre-dispute arbitration agreement must be contained in a separate document in order to ensure that the consumer has made an informed choice.[94] In the e-commerce context, the separate document is normally a click-wrap agreement which the consumer enters into by ticking an 'OK-box'. This measure aims to protect consumers against hidden clauses that subject their claims to arbitration. Clear information regarding an arbitration clause seems to be one main means of protecting the consumer, as reflected in the 'principle of liberty' which states that "the decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this".[95]

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the legality of an international arbitration clause was discussed by the French courts in the Jaguar case [*Sté V 2000 and Sté XJ 220 Ltd c M Meglio and M Renault* Rev. Arb. 1997 p. 537 and *Cass Civ Ire* (21 May 1997)] where the first instance court held the clause to be illegal, but the Court of Appeal reversed that decision and the Supreme Court confirmed that the dispute, in the circumstances, (it was a transaction of high value and the consumer was not in a weaker position) was subject to arbitration.

[94] These clauses would require vendors to take reasonable steps to ensure buyers are sufficiently well informed of the dispute resolution process at the time of entering into transactions. Compliance with the rules provides an additional safeguard since they are designed to ensure a minimum of procedural guarantees when resolving disputes. Furthermore, the accreditation bodies would ensure that ODR providers comply with the rules contained in the model law. See N. Horn, 'Arbitraje de Consumo en el Derecho Alemán y Europeo', in F. Esteban de la Rosa and G. Orozco Pardo, *Mediación y Arbitraje de Consumo, una Perspectiva Española, Europea y Comparada* (Tirant lo Blanch, 2010) pp. 221-233.

[95] Recommendation 98/257/EC.

Another example is the Spanish Consumer Arbitration Act, which provides that consumer arbitration agreements are equally valid irrespective of whether they have been concluded pre or post dispute.[96] However, it is important to highlight that this is the case only where the dispute is to be submitted to the public consumer arbitration system, which follows the consumer protection principles contained in the 1998 Recommendation.[97]

These exceptions show that pre-dispute arbitration agreements may be valid under EU Law if there are sufficient guarantees of information or if the procedures reflect due process principles. The European legislation and UNCITRAL Rules need to define the information and due process guarantees which need to be offered to consumer in order to render a pre dispute consumer arbitration clause valid.

However, unlike the neutrality in terms of the validity of pre-dispute arbitration clauses found in the European Commission proposed Directive, the present amendments of the Directive envisage a full ban on pre-dispute arbitration clauses.[98] It is submitted that there should be no impediment to considering such an arbitration agreements valid, provided a minimum standard of consumer protection standard is respected in the ODR process,.

In the *Océano* case,[99] the Court of Justice of the European Union (CJEU) stated that pre-dispute arbitration clauses would be considered unfair if they required the consumer to travel an unreasonable distance to litigate, as this requirement would restrict the consumer's rights to defence. Kaufmann-Kohler and Schultz note that this hurdle would be removed if

[96] See Art. 24 Royal Decree 231/2008 and Art. 90.1 Royal Decree Law 1/2007.
[97] Art. 41 Royal Decree 231/2008. These commentaries take into consideration the situation of the consumer as claimant. Spanish law does not allow the agreement to be used against the consumer, with the exception of the counterclaim.
[98] See MEP Grech Draft Report (n 10) p. 21, par. 21(b), and European Council General Approach to the Proposals (n 10) p. 13 par. 21(a). A uniform approach in the EU would also facilitate the negotiation of international treaties, such as the on-going negotiations in the frame of the UNCITRAL and the Hague Convention on Conflict of Laws.
[99] Joined Cases C-240/98 to C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero*.

the consumer could use ODR.[100] Nonetheless, as noted by the CJEU in *Alassini*, it is arguable that, at least in some instances, the requirement for a consumer with limited knowledge of and access to the ICT tools necessary to participate in an ODR process could represent a barrier to the consumer's right of access to justice.[101] It is therefore clear that although court proceedings will be very unusual in cross-border disputes, and only feasible in collective or class actions, an accessible and user-friendly ODR system needs to be in place if online arbitration is to have validity. Moreover, the online nature of the arbitration should be emphasised by the specific arbitration agreement. These requirements should be reflected in the UNCITRAL Rules.

C. Quality control over ODR Providers

One of the four pillars of the UNCITRAL initiative (together with the procedural rules, the principles for resolving disputes, and the enforcement protocol) is to issue guidelines setting minimum requirements for ODR providers and neutrals. Although the drafting of these guidelines has not commenced yet, it appears that in order to operate effectively they will need to be linked to an accreditation system. This section briefly discusses (1) the role of accreditation, (2) the need for self-enforcement, and (3) types of accreditation structures, before (4) recommending a trustmark as a quality-label for the recognition of accredited ODR providers.

1. The Role of Accreditation

The role of the accreditation system is to ensure that ODR processes comply with the guarantees established by the Rules. Accreditation can boost the development of ODR by

[100] G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International, 2004) p. 204.
[101] Joined Cases *Rosalba Alassini and Others v Telecom Italia* C-317/08.

increasing awareness, overcoming the shortcomings of self-regulation, providing uniform standards and ensuring quality ODR systems. Trust is an essential ingredient for the development of ODR and this can be enhanced by accrediting ODR providers and neutrals, providing them with legitimacy and facilitating the enforcement of outcomes. Accreditation should only be given to ODR providers who comply with a high level of transparency and due process, including the publication of model cases and aggregated information of decisions (which can be more important than the decisions themselves when, for reasons of cost, they are not reasoned).[102]

Accreditation agencies must act as independent evaluators. Regular follow-up and monitoring should take place to ensure that ODR providers are acting in accordance with the procedural standards established in the Rules; those procedural standards should relate to the independence of ODR providers, the impartiality of neutrals, the transparency of the process and the effectiveness of their decisions. Compliance with these principles should not only be reliant on the self-assessment of the ODR providers themselves[103] or on the consideration of reports submitted by them to accreditation agencies: accreditation entities should themselves have the duty to actively check compliance with quality standards. Furthermore, consideration needs to be given to establishing a complaints system, should ODR providers and neutrals not follow the Rules. Such complaints could be submitted directly to the accreditation agencies.

[102] P. Cortés, 'Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers' (2011) 19(1) *International Journal of Law and Information Technology* 1-28.
[103] Rabinovich (n 25) 253.

2. The Need for Self-Enforcement of Final Outcomes

UNCITRAL contemplates the drafting of an enforcement protocol. Although yet to be drafted, it is expected to confirm that settlements and arbitral awards will be legally enforceable. At the same time, it is also likely to focus on private enforcement mechanisms, since inefficient and costly court enforcement would make the whole ODR process futile. In order to guarantee prompt enforcement it would be beneficial if accredited ODR providers could rely on private channels of enforcement in collaboration with payment providers. Payment providers might assist in the implementation of settlements, particularly when parties have contractually agreed to participate in an accredited ODR process. It would be preferable to collaborate with existing payment providers (e.g. Visa, Mastercard or PayPal) than creating new intermediaries, e.g. escrows, as these could hinder the payment flow for sellers.

By outsourcing disputes to accredited ODR providers, payment providers would maintain their position of neutrality as both the medium for payment and the enforcement of settlements. It must be noted that such an enforcement system would only be effective if the payment intermediaries have access to the accounts of the parties, which is more likely to be the case when payment takes place in advance of the transaction.

In addition, as noted above, the Rules should bear in mind that there are a number of incentives that may be used to encourage the voluntary compliance with a settlement: these include the publication of negative reviews; black-lists; trustmark logos that may be

withdrawn once the vendor fails to comply with a final outcome; and, communication of the outcome to the relevant public authority in the respondent's state.[104]

Under the Rules, settlements and adjudicated decisions issued by accredited ODR providers should in most cases be final, possibly subject to a very limited number of exceptions, for instance when consumers might take a class action in their national courts or when their mandatory laws had not been respected in the ODR process.

Yet, the monitoring of all relevant standards cannot be carried out effectively by the national courts (as for nearly all cases this is not an option) or the accreditation agencies (who do not have adequate resources to monitor every case), and so has to be achieved by also having independent neutrals and transparent ODR processes which require that data is published on decisions taken.

3. ***Models of Accreditation Agencies***

Careful consideration should be given to the question of who should carry out accreditation. This could be carried out at the national, regional or global level, but efficiently tackling e-commerce disputes requires that accreditation agencies be properly coordinated. Accreditation agencies do not necessarily have to be public entities provided that, if private, they are independent.

Different models for accrediting ADR/ODR are emerging. In the EU there is a list published by the Network of the European Consumer Centres (ECC-Net) and the European Commission which contains the name of those ODR providers that have been approved by

[104] See, for example, the proposal made by the USA at the OAS meeting in 2010. See generally Del Duca et al (n 23) p. 221.

the Member States through the ECC national centres.[105] The listed providers pledge to comply with the EC Recommendations for adjudicative and consensual processes, but this is currently a rather limited system as these recommendations are a form of unsupervised soft law. The new legislative proposals (*i.e.* the ADR Directive)[106] convert the EC Recommendations into hard law, making compliance with them compulsory for all accredited ADR and ODR providers. Yet, if there is not adequate supervision by competent national authorities then this accreditation system runs the risk of misleading ODR users into trusting neutrals and ODR providers who, though claiming otherwise, may not in fact, be compliant.[107] To be effective an accreditation system requires ODR providers to be adequately and constantly monitored. An accreditating or certificating entity must have a body that monitors compliance with the minimum requirements and issues the necessary certifications to those providers which meet them[108] In the EU this be carried out by the national 'competent authorities', appointed by each Member State.[109] Outside the EU these entities may be either public or private. For example, in the US, the American Bar Association has created a task force to provide guidelines for the development of ethical ODR systems.[110] The Association for Conflict Management has prepared a proposal for guidelines on ODR,[111] and the International Mediation Institute, based in The Hague, has also developed

[105] See database at <http://ec.europa.eu/consumers/redress/out_of_court/adrdb_en.htm>.
[106] See the Commission Recommendations on Consumer ADR 98/257/CE and 2001/310/CE.
[107] P. Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010) ch. 5.
[108] M. Conley Tyler, and J. Bornstein, 'Accreditation of On-line Dispute Resolution Practitioners' (2006) 23(3) *Conflict Resolution Quarterly* 383.
[109] See article 15 of the proposal for a Directive on Consumer ADR.
[110] See <http://www.americanbar.org/groups/dispute_resolution/policy_standards.html>.
[111] The National Alternative Dispute Resolution Advisory Council (NADRAC) in the Australian Department of Justice commissioned a study on the accreditation of ODR in 2002. See Conley Tyler, '115 and Counting: The State of ODR 2004', in Conley Tyler M, Katsh E and Choi D (eds) Proceedings of the Third Annual Forum on Online Dispute Resolution. International Conflict Resolution Centre in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP).

standards for international mediation competency and provides certification for mediators.[112] Similar private certification programs also exist for arbitrators.[113]

Currently, there is no single entity at the international level that has this task. One option would be for UNCITRAL to sponsor a not-for-profit organisation which would coordinate national and regional accreditation entities.. The principle of equivalence should underpin such an accreditation system. In the meantime, accreditation entities could initially function on the basis of bilateral or multilateral agreements. In due course, it can be expected that this type of collaboration will organically develop into interoperable standards.

UNCITRAL must consider whether accreditation should be awarded to ODR providers which then, in turn, accredit their own neutrals. This option would be cost-efficient and it is how approved-providers of domain names operate.[114] UNCITRAL is expected to develop a list of minimum requirements regarding the training and skills of neutrals. Although legal training may not be necessary, some legal knowledge and dispute resolution skills ought to be required. Forum shopping between ODR providers and between neutrals will also be an important issue to consider, as will be the decision on who selects the neutrals. In this regard, lessons should be learned from the ODR process established for the resolution of domain name disputes which, even though it had been proposed as a model for resolving consumer disputes,[115] faced criticisms for inherited bias.[116]

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[112] See Qualifying Assessment Program at <http://www.imimediation.org/>.
[113] See The Chartered Institute of Arbitrators at < http://www.arbitrators.ogr>.
[114] Cf. P. Cortés 'The UDRP Reviewed: The Need for a 'Uniform' Policy' (2008) 14(6) *Computer and Telecommunications Law Review* 133-139 and 'An Analysis of the UDRP Experience: Is It Time for Reform?' (2008) 24(4) *Computers Law and Security Report* 349-359.
[115] S. Donahey 'The UDRP Model Applied to Online Consumer Transactions' (2003) 20(5) J. Int'l Arb. 475.
[116] A. Froomkin, 'ICANN Uniform Dispute Resolution Policy, Causes and (Practical) Cures' (2002) 67 Brooklyn L Rev 690; M. Geist, 'Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP' (2002) 27 Brooklyn J. Int'l L. 903; M. Mueller, 'Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy' (2000) Syracuse University Convergence Centre <http://dcc.syr.edu/PDF/roughjustice.pdf>.

Although the EU is about to finalise common criteria for ADR and ODR providers, a counterpart is needed at the global level. UNCITRAL will soon start preparing accreditation standards. It has been proposed that these standards be included as an annex to the Procedural Rules,[117] but it would be better if they formed a separate document so that they could be applied to ODR providers that do not use the Procedural Rules.[118] This way it would be possible for ODR providers using other procedures to be accredited in accordance with UNCITRAL standards.

4. *Trustmark*

ODR providers need to be able to inform others of their accreditation and a plausible way of doing so is through the use of quality-labels, logos or trustmarks.[119] Trustmarks have traditionally been displayed on websites to show that a trader complies with codes of conduct and independent dispute resolution systems; the same model could be used by accredited ODR providers. Trustmarks aim to enhance the reputation of their holders, instill greater confidence in potential users, and thus make businesses more attractive to consumers. However, as noted above, this process will only be effective if consumers recognise and respect the trustmark. This could be achieved by establishing a public trustmark backed by a UN body or the European Commission. Although governments have been reluctant to sponsor institutional trustmarks since their use might give rise to liability, this may soon

[117] Preamble, para 2.
[118] The authors would like to thank Prof. Vikki Rogers for raising this point.
[119] See generally P. Cortés 'Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes' (2008) 17(3) ICTL 221-237. See also Civic Consulting Presentation of the Study on a Pan-European Trustmark for e-Commerce, IMCO Committee, 28 July 2012. Available at <http://www.europarl.europa.eu/document/activities/cont/201206/20120628ATT47908/20120628ATT47908EN.pdf>.

change within the EU as there are renewed discussions about developing a pan European quality label.[120]

D. Two Approaches for Identifying the Applicable Law

It is possible to identify two approaches to the selection of the substantive norms to be used for the resolution of low-value disputes: (i) national laws; and (ii) a uniform international regulation. This section considers the suitability and limitations of these two approaches.

1. *National Laws*

It has been traditionally argued that the consumers' national law should be followed when resolving consumer disputes, in order to protect them from the traders' choice of laws and forum shopping.[121] The drawback of this approach, as noted recently in the proposed Regulation for a Common European Sales Law, is that this increases costs.[122] Another disadvantage of this approach is that outcomes may vary depending on the jurisdiction of the consumer, so the outcome of a dispute may be less predictable (and more costly) for the international trader. In addition, the determination of national law generates complexity and costs, and it can be argued that this is not the best approach when resolving international e-commerce disputes.

[120] See MEP Grech Draft Report (n 10) p. 65.
[121] This has been approach taken by the EU. See Regulation 44/2001 of 22 December on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, (Brussels I) O.J. (L. 12) and Regulation 593/2008 of the Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), O. J. (L. 177). Cf. Fernández Arroyo (n 2) p. 420.
[122] The proposed Regulation on a Common European Sales Law recognises that many SMEs in the EU are simply not willing to offer their products cross-border as they have to apply the mandatory rules of all 27 EU Member States, whose laws sometimes conflict with each other. Consequently, EU consumers cannot purchase such goods in other Member States and this drives up prices and decreases product availability.

Conversely, although private international law is more useful as a means of determining the applicable law in the case of collective and high-value disputes,[123] it cannot be entirely disregarded in the context of low-value claims. Knowing what the applicable law is allows parties to adjust their behaviour, promotes trust and, as a result, helps avoids disputes. However, under EU law both courts and arbitral bodies, when resolving cross-border consumer disputes, must comply with the mandatory consumer law of the consumer's country of residence if the trader had directed his activity to the consumer's jurisdiction.[124] But, as noted above, the cost of determining the consumer´s national law applicable to the dispute would be disproportionate to the actual value of the cross-border dispute. This is a major handicap when seeking a decision on the basis of national applicable law in cross-border low value disputes.

As a result, the application of consumer national law is being relaxed for the purposes of cross-border low-value dispute resolution. This change of policy is found in three forthcoming European consumer law legislative instruments. First, the European Commission's proposal on the ADR Directive states in article 7 that ADR entities may resolve consumer disputes without necessarily taking into consideration the principle of legality;[125] however, a forthcoming amendment will allow consumers to seek (in theory) the court's protection when a decision has been imposed which does not respect the consumers' mandatory law.[126] Secondly, while offering a high standard of consumer protection, the proposed Regulation for a Common European Sales Law (CESL) would allow parties, for the

[123] See ICC Electronic Project (ECP)'s Ad Hoc Task Force 'Policy Statement –Jurisdiction and Applicable Law in Electronic Commerce' 6 June 2001; see also Regulation 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1.
[124] Art. 6 of Rome I Regulation (n 4).
[125] See Art. 7.1(g) of the proposed ADR Directive which states that ADR entities must provide information about the rules that they will employ in resolving disputes, which may be not only rules of law but might also include considerations of equity and codes of conduct.
[126] This new requirement is still being discussed by the European Commission on one hand, and the Parliament and the Council on the other. See MEP Grech Draft Report (n 10) p. 22.

first time, to agree upon an optional body of law to be applicable in lieu of national consumer law, which in some cases would have the effect of reducing the level of consumer protection.[127] Thirdly, the strict application of consumer law *acquis* in the recent Consumer Rights Directive is also relaxed when applied to low-value cases. According to this Directive, Member States are not required to implement and apply it to transactions below the value of 50 euros (or lower value, if the national law so states).[128] Paradoxically, the EU is still in favour of upholding the principle of legality in the context of out-of-court redress for consumers but, importantly, this is not because it believes that ADR processes should strictly follow national substantive laws, but because it sees ADR and ODR as complementing the courts, which should remain the ultimate guarantors of this principle.

2. International Uniform Rules

Unlike with national laws, it is clear that if supranational laws are the basis for decisions (as was once the case of *lex mercatoria* and now may be the case with the UNIDROIT principles or the Convention on Contracts for the International Sale of Goods –CISG) disputes will be resolved on the basis of the same principles regardless of where the parties are located. It can be argued that this approach brings more consistency to dispute resolution, and therefore more certainty and legitimacy to the process.[129]

The problem with the texts mentioned is that they do not apply to consumer contracts. For that reason, the recently proposed CESL Regulation that embraces both B2C and B2B transactions (when at least one party is a Small and Medium Enterprise or SME) would be

[127] Art 1 of the European Commission Proposal for a Common European Sales Law COM(2011) 635 final.
[128] Art. 3.3.4 of the Directive on Consumer Rights 2011/83/EU.
[129] Schultz (n 1).

more suitable.[130] The advantage of using international uniform rules is that it allows for the resolution of cross-border consumer disputes without having to determine the national applicable law.[131] This common uniform law would substitute the mandatory consumers' law while guaranteeing a sufficiently high level of consumer protection. However, the use of CESL outside the EU triggers complex questions of private international law regarding its scope of application, which makes its application all the more suitable for any kind of consumer international disputes.[132]

A different, and perhaps even more important, question is whether these low-value disputes should be resolved by neutrals according to a legalistic set of principles, such as the proposed CESL Regulation, or whether they should be dealt with following the more basic rules elaborated by UNCITRAL. The latter approach, which seems to be favoured by UNCITRAL, would require the development of a simple list of principles that would need to be agreed upon by all the jurisdictions.[133] A likely format to follow would be that employed for settling cybersquatting disputes between domain names and trademark owners. It appears

[130] Art 7. European Parliament, Committee on Legal Affairs, Draft Report on Policy Options for Progress towards a European Contract Law for Consumers and Businesses (2011/2013 (INI)) 25.1.2011. Rapporteur: Diana Wallis. See also Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses COM(2010)348 final. See F. Gómez Pomar y M. Gili Saldaña, 'El futuro Instrumento Opcional del Derecho Contractual Europeo: una Breve Introducción a las Cuestiones de Formación, Interpretación, Contenido y Efectos' (2012) 1 *Indret* pp.1-8.

[131] H. Schulte-Nölke, 'EC Law on the Formation of – From Common Frame of Reference to the 'Blue Button'' (2007) 3 *European Review of Contract Law* 332.

[132] See G. Rühl, 'The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regimen, Maastricht European Private Law Institute, Working Paper nº 2012/5, pp. 1-14; P. Mankowski, 'Der Vorschlag für eine Gemeinsames Europäisches Kaufrecht (CESL) und das Internationale Privatrecht', Recht der Internationalen Wirtschaft, Marzo 2012, 58, pp. 97-105; F. Esteban de la Rosa and O. Olariu, 'La Protección del Consumidor en la Propuesta De Normativa Común de Compraventa Europea: ¿Realidad o Quimera? in P. Jiménez Blanco (dir.) *Monográfico de Derecho Internacional Privado, Noticias de la Unión Europea*, Wolters Kluwer, 2012, In print.

[133] According to paragraph 2 of the Draft Preamble, 'the Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as Annexes and form part of the Rules]: d) Substantive legal principles for resolving disputes.'

probable that a starting point for drafting these basic substantive law principles might be the rules used by credit card providers for issuing chargebacks.[134]

UNCITRAL contemplates limiting the type of remedies available to claimants, which might be restricted to: discounts in the cost of the transaction, full refunds, replacement of the goods, and return of the goods.[135] An element that has yet to be considered by UNCITRAL and ODR providers is the grounds for defence for respondents; such provisions could constitute an effective way for providing legal certainty and uniformity in the resolution of these claims while at the same time promoting early settlement without the intervention of neutrals.[136] A good model to follow could again be the ODR services for domain names, which contain a list of examples of typical defences for respondents while emphasising which party has the burden of proof.[137]

Two things should finally be noted. First, in order to be compatible with the EU approach, the UNCITRAL Rules should not hinder the application of EU consumer law.[138] Therefore it is to be welcomed that in the last phase of the UNCITRAL negotiation it was been proposed that the Rules should not overrule the mandatory laws stemming from national consumer protection laws.[139] Secondly, it is important to emphasise that although a global ODR system should adjudicate disputes, ODR providers should not be able to issue binding arbitral awards in consumer disputes, unless those awards respect minimum due process principles and national consumer laws or equivalent instruments, such as the CESL. It is

[134] Cf. R. Brand 'Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules' Note submitted by the Center for International Legal Education to UNCITRAL Working Group III twenty-fifth session, New York, 21-25 May 2012.
[135] UNCITRAL (n 21) para. 33.
[136] On the requirements of the principle of legal certainty, see A.E. Pérez Luño, *La Seguridad Juridical* (Ariel, 1994).
[137] UDRP Policy para. 4(b)
[138] UNCITRAL (n 7) para. 5.
[139] UNCITRAL (n 7) para. 5.

however recognised that since resolving disputes on the basis of legal principles will be more costly, thus hindering consumers' access to redress without providing the benefit of court enforcement, it would be preferable if decisions from accredited ODR providers were non-legally binding, yet self-enforceable through the operation of a system of adequate incentives.

IV. CONCLUSION

The expansion of e-commerce is limited by the default channel for resolving problems, this being the courts, which are unable to deal with the high-volume of low-value disputes arising from the online market. Against this backdrop, UNCITRAL and the EU are developing rules to stimulate the use of ODR for resolving these disputes. In doing so they acknowledge that ODR can contribute towards increasing parties' trust in cross-border transactions. The benefits of ODR will be particularly felt amongst consumers and SMEs, which are in need to be able to have greater trust in transnational trade. It is hoped that greater user confidence in reliable sellers will transform e-commerce into a more competitive market.

UNCITRAL and the EU are following different models for promoting the use of ODR for cross-border low-value disputes. Both initiatives try to strike an adequate balance between due process requirements (*i.e.* fairness) and economic constraints for resolving low-value disputes (*i.e.* efficiency). UNCITRAL is developing a fixed and rigid procedure that can be contractually chosen by the parties, and is therefore more likely to be propelled by the idea of efficiency. Meanwhile the EU is in the process of implementing legislation that sets minimum standards for a myriad of ADR procedures that are employed for settling consumer disputes, in which the consideration of fairness seems to take priority.

It has been seen that the different approaches found in the EU and the UNCITRAL ODR models will not necessarily lead to their incompatibility. Their convergence will largely depend on employing a workable model that respects current EU consumer protection policies. Particular attention should be given to binding processes which will need to respect not only minimum due process requirements, but also mandatory national consumer laws.

Having a single procedure may not reflect the complexity and variety of e-commerce disputes. Moreover, arbitration may not be the most adequate method for resolving consumer low-value cross-border disputes as it may allow market abuses to go undetected. In order to prevent these abuses, transparency ought to be promoted through the publication of awards and monitoring carried out by the appropriate accreditation agencies. It is also argued that the binding nature of the award does not provide any advantages in terms of ensuring out-of-court enforcement. Although arbitration supposes the maximum of certainty for the parties, this certainty would be illusory in international consumer disputes, as having an award will not ensure its enforceability, which needs to take place quickly and inexpensively out-of-court. Moreover, when the use of mandatory consumer law is not guaranteed in arbitration, the outcome may be incompatible with national laws. Accordingly, these decisions should not be legally binding, thus allowing domestic judicial processes to remain the guarantor and interpreter of national consumer law, and more generally, the rule of law itself. While it is recognised that in practically all low-value claims this option may not be feasible,[140] there may be opportunities for collective actions or government intervention, which cannot be restricted by a *res judicata* effect. Even when arbitration could theoretically be adapted to comply with the special requirements of consumer laws, in the majority of e-commerce

[140] Schultz (n 15) pp. 6-7.

disputes the complexity and costs of these procedures would not justify having recourse to arbitration.

This article has focused on the draft procedural Rules developed by UNCITRAL and has provided an examination of a number of the legal and technical challenges in coordinating this global ODR initiative. It has addressed a number of key issues which need to be fully considered by the UNCITRAL and European legislators, such as the validity of pre-dispute arbitration clauses, the use of incentives, the possibilities for accreditation of ODR providers and the challenges based on mandatory consumer laws.

It has been argued that the success of both initiatives will depend on developing a monitoring system for ODR processes; processes that comply with minimum standards, incorporate built-in incentives for parties participation and for settling meritorious claims at an early stage, employ the power of the 'fourth party' (*i.e.* technology), and issues outcomes that are swiftly enforced outside the courts.

It is only a question of time before ODR changes the way we engage in e-commerce and widens the road of cross-border trade. The 21st century is already starting to see a shift in international consumer law, which is changing the priorities of policy makers. Their focus is no longer on guaranteeing the protection of consumers by means of their national courts and laws, but on promoting ODR techniques that provide real and tangible redress for consumers.