

**Appendix 1 to the Report of the Working Group
Alternate Dispute Resolution in the Consumer Context**

August 2004

INTRODUCTION

[1] This Appendix provides a brief overview of a number of initiatives that are underway regarding online ADR mechanisms and the legal issues raised by these initiatives.

OVERVIEW

[2] Conventional ADR is generally recognized as providing a fair way of resolving many types of disputes. It is seen as less expensive, quicker, more flexible and less formal than traditional litigation processes. ADR includes a variety of processes, including mediation, arbitration, conciliation and negotiation. These processes have been used to solve consumer disputes for some time and many standard consumer contracts, both on and off line, contain dispute resolution/arbitration clauses.

[3] The worldwide growth of e-commerce has been significant and is expected to reach 9% of total world commerce in 2004¹. The number of Internet based legal difficulties has grown along with e-commerce, as confirmed by the US Federal Trade Commission report that Internet related complaints have increased substantially each for the last 6 years.

[4] The rise of Internet based transactions has also led to a creation of a new method of resolving disputes that arise from them; known generally as Online Dispute Resolution (ODR)². ODR has been defined as online technology applied to alternate dispute resolution³. ODR experts note, however, that ODR is not just an online version of ADR; "...it is dispute resolution that takes advantage of the Internet, a resource that extends what we can do, where we can do it, and when we can do it."⁴ They also note that "existing commercial and consumer laws are inadequate to address the needs of e-commerce. ADR focuses on moving dispute resolution away from litigation and court-based decision making. ODR, by designating cyberspace as a location for dispute resolution, extends this process by adapting traditional offline ADR processes, such as negotiation, mediation and arbitration. ODR has developed and utilized specific

¹ Legal Works ADR Forum September, 2003, Number 36, page 2.

² The Impact of the Online Dispute Resolution Process by Jonathon Bick, GigaLaw.com September, 2003

³ Journal of Information Law & Technology, Online Dispute Resolution in Business to Consumer E-commerce Transactions, by Julia Hornle, August 16, 2002.

⁴ Supra, footnote 1 at page 1, quoting from Janet Rifkin, "Online Dispute Resolution: Theory and Practice of the Fourth Party" (2001), 19(1) Conflict Resolution Quarterly, 117 at page 119.

UNIFORM LAW CONFERENCE OF CANADA

technologies for automated negotiations and online support of the various other ADR processes.”⁵

[5] Generally speaking, disputes that are appropriate for ADR are also appropriately dealt with by ODR. The European Commission and European governments have strongly advocated the use of ODR systems for consumer disputes and consumer ODR schemes are on the rise. The American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution issued its final report in August, 2002 (ABA Task Force Final Report) in which it noted that the provision of ODR through the Internet and other forms of information technology is a new form of e-commerce in and of itself.

[6] The main ODR mechanisms currently in use are:

- Online arbitration – This is the most formal of the mechanisms, with due process as a fundamental requirement;
- Online evaluation – This involves a neutral third party making a decision based on written submissions and documents that are provided. It is nonbinding.
- Mock trial – This involves a jury of peers (volunteers) making a non-binding determination of the issues via a web-based platform;
- Online mediation – This is the most frequently used process. It is non-binding. Because of the involvement of a person as mediator, it is often too expensive for small consumer claims;
- Automated Settlement System - This process is most suited to claims where the amount of compensation is at issue and provides for successive blind bids being settled automatically for a median amount. It is software driven and therefore cost-effective;
- Complaints Assistance – This provides the parties with tools for effective communication of complaints, demands for redress and often includes general assistance for the purpose of self-help;
- Credit Card Charge Back – Although this is not strictly speaking ODR, these mechanisms do fulfill the same function and are most effective in resolving consumer disputes. The credit card issuer generally acts as an adjudicator.⁶

[7] ODR services are generally provided in three forms⁷, namely:

- Generally Accessible Services – These are independent in that any claimant can use them to seek redress; neither party is required to be a member of the scheme. Their open and independent structure is an advantage, however, the main disadvantages include funding (user rather than membership funding results in it being too costly for small consumer claims) and enforceability (membership schemes are more effective in pressuring compliance by member merchants).

⁵ Supra, footnote 1 at page 2.

⁶ Supra, footnote 3.

⁷ Supra, footnote 3.

JURISDICTION AND CONSUMER PROTECTION IN ELECTRONIC COMMERCE

- Trustmark Schemes – These schemes have been established by consumer and trade associations, governments and the private sector to build trust in the redress mechanism. Generally speaking, a supplier subscribes to the services of an ODR provider and agrees to be bound by the process offered. Often the subscriber must adopt a Code of Conduct. In return, the supplier is licensed to use a logo or trustmark on its website, signifying that the supplier will take part in the dispute resolution scheme and adhere to the Code of Conduct. The supplier pays a fee; so that there is little or no cost to the consumer for the ODR services. Suppliers are under pressure to comply with the process and the Code. There are a number of such schemes and the approach to resolution is often incremental so that it can be cost-effective. To date, however, funding of the schemes has been problematic.
- Marketplace Schemes – Generally, these marketplaces are websites that aggregate various suppliers of goods or services. They often provide dispute prevention mechanisms, such as seller ratings (help consumers select trustworthy suppliers), escrow or insurance services to protect against non-delivery or non-payment and common standards such as Code of Conduct, etiquette and business practices. Presumably this makes dispute resolution easier and more effective as merchants risk being excluded from the marketplace for noncompliance.

LEGAL ISSUES

[8] The legal issues that arise in consumer ODR generally cluster around appropriate compliance with the requirements of due process. These requirements have been addressed to some extent in:

- EC Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (98/257/EC), applying only to binding arbitration procedures;
- EC Commission Recommendation on the Principles for Out of Court Bodies Involved in the Consensual Resolution of Consumer Disputes (2001/310/EC), applying only to consensual, non-binding forms of consumer dispute resolution; and
- AAA Due Process Protocol for Mediation and Arbitration of Consumer Disputes (April 17, 1998) setting minimum standards of due process in consumer disputes.

[9] The main issues of due process are simply noted here as independence and impartiality, publicity and transparency, language barriers, right to be heard, right to respond and fair hearing. There is much discussion around whether it is realistic to demand the observance of high standards of due process in all cases. Access to justice requires that the cost of resolution should be proportionate to the amount at issue; and it is also noted that many consumer disputes are factually straightforward. Therefore it is

UNIFORM LAW CONFERENCE OF CANADA

argued that the approach to consumer ODR must be scaled, depending on the value and complexity of the particular dispute.

[10] In this context, the questions "should standards be developed for consumer ODR schemes", and if so, "how" have arisen and are being reviewed. Experts note the importance of broad international consensus on minimum due process requirements achieved in the related area of consumer protection in the OECD Consumer Guidelines.⁸ Suggested best practices for ODR have been developed by various groups including the American Bar Association, Consumers International, National Alternative Dispute Resolution Advisory Council (Australia) and the Working Group on Electronic Commerce and Consumers (Canada)⁹.

[11] While these various groups support ODR initiatives, regulation appears to be a long way off. The ABA Task Force Final Report encourages emphasis by business on all stages of dispute prevention, complaints handling and effective methods of redress through ADR and ODR and by merchants, government and nonprofit entities on consumer education and prevention of disputes. They note, however, that the lack of ODR does not appear to be a material impediment to the growth of consumer e-commerce and that more importantly; ODR is subsidiary to other higher priority consumer protection activities including consumer education and use of measures to help prevent or decrease the incidence of fraud in Internet transactions.

[12] The University of Melbourne's "Research into Online Alternative Dispute Resolution" Exploration Report prepared for the Department of Justice, Victoria, issued March 21, 2003 states at page 51 that its preliminary findings "suggest consideration of an early modest, adoption of online ADR supported by a campaign of community and practitioner education to raise awareness of this new technology." Its follow up Feasibility Report issued June 20, 2003 recommends "investment in a suite of online ADR tools to add to the existing dispute resolution functions of agencies across government". Both Australian reports recognize that government must ultimately play a role in online ADR for consumer disputes. At page 22 of the Feasibility Report, the options for government regarding consumer disputes are noted as including:

- providing education and referring consumers to existing online ADR providers;
- playing an oversight role by regulating standards for online ADR services; and
- taking a role as provider of online ADR in addition to or as an alternative to other government dispute resolutions services.

The report concludes that "in Australia, neither of the first two roles are realistic at this point. Private online ADR services are in their infancy and there is real doubt whether

⁸ Supra, footnote 3.

⁹ Supra, footnote 1, at page 5.

JURISDICTION AND CONSUMER PROTECTION IN ELECTRONIC COMMERCE

private industry will invest in this area without any leadership from government. It is appropriate for government to take the lead as a provider on online ADR services.”

[13] Perhaps the most telling commentary respecting regulating ODR is “However it should equally be pointed out that it is premature to talk about regulating something which has not fully emerged. The existing consumer ODR schemes are at an experimental stage and it is probably too early to define a regulatory framework at present.”¹⁰

¹⁰ Supra, footnote 3.