



Online Dispute Resolution (Odr) As a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes

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Le règlement des différends en ligne (“ODR” pour Online Dispute Resolution) est une voie intéressante pour fournir aux consommateurs en ligne des recours efficaces dans les litiges transfrontaliers. Bien que l’effectivité de l’ODR soit parfois problématique, des solutions ad-hoc peuvent être mises en place suivant si la procédure ODR est de nature adjective ou non-adjudicative, ainsi qu’en fonction du caractère contraignant ou non-contraignant de son issue. Cela permet aux parties de demander l’exécution devant un tribunal ou une autorité publique, ou de compter sur des mécanismes d’exécution privés. L’analyse de chacune de ces situations montre que l’exécution des résultats contraignants obtenus par ODR devraient être soutenue par la réglementation publique. Cependant, des instruments aussi importants que les règlements européens Rome I, Bruxelles I et Bruxelles I (refonte) interdisent les ententes à fins d’ODR préalables à la naissance du différend, situation qui pourrait changer rapidement grâce à la directive européenne ADR. Les efforts dans ce sens améliorent grandement la confiance dans les transactions transfrontalières, et ils devraient être encouragés..

Online Dispute Resolution (ODR) is an interesting means of giving online consumers efficient remedies in cross-border disputes. While the effectiveness of ODR is sometimes problematic, ad hoc solutions can be implemented depending on whether the ODR procedure is adjudicative or non-adjudicative, and whether the outcomes are binding or non-binding. This allows parties to seek enforcement before a court or a public authority, or to rely instead on private enforcement mechanisms. The analysis of each of these situations shows that the enforcement of binding outcomes obtained through ODR should be sustained by public regulation. However, important instruments such as the Rome I, Brussels I and Brussels I recast European Regulations prohibit pre-dispute ODR agreements, but this scenario might rapidly change thanks to the European ADR Directive. Efforts of this kind pave the way for greater trust in engaging in cross-border transactions and should be encouraged.

INTRODUCTION

In Cyberspace, frontiers as we know them in the real world are no longer relevant. As a result, a buyer located thousands of kilometers away from a trader can purchase a product or a service with a few clicks. Henceforth, e-commerce is a giant boundless market place. However, even if e-commerce is very active in domestic marketplaces, cross-border e-commerce has not grown significantly, and remains very low to date.¹ Indeed, the lack of regulation specific to cross-border transactions performed in Cyberspace, and the unsuitability of traditional court-based processes with consumer resources, have the effect of depriving consumers from efficient means of redress when a dispute arises with a trader.² Consequently, potential buyers do not have the trust necessary for entering into a cross border transaction. Therefore, the idea of resorting to out-of-court means of redress on the Internet, Online Dispute Resolution (ODR), has emerged as a logical solution to resolve the large number of small value disputes that arise every day.³

ODR refers to the use of Alternative Dispute Resolution (ADR) mechanisms on the Internet.⁴ ADR proceedings (negotiation, mediation and arbitration) have already proven their success as the main forms of dispute resolution over the last three decades.⁵ To date, several ODR systems have been implemented with success. For instance, since the beginning of the 1990's, the Internet Corporation for Assigned Names and Numbers (ICANN)⁶ has developed online proceedings for the resolution of disputes arising from the allocation of domain names: the Uniform Domain Name Dispute Resolution Policy (UDRP).⁷ In the area of e-commerce, the well-known eBay/ Paypal procedure successfully resolved 60 million disputes between buyers and sellers by 2010,⁸ largely without any human intervention.⁹ Nevertheless, ODR as a mean of redress for consumers is largely unemployed today.¹⁰ ODR mechanisms still face major legal issues, and many authors

1 OECD, *Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy*, Background Report, DSTI/CP(2009)20/FINAL (Washington: OECD, 2009) at paras 11-12.

2 When a dispute arises, particularly in the context of cross border online transactions, most of the consumers do not exercise their legal remedies because of the costs, distance or lack of information. See Naomi Creutzfeldt, "The Origins and Evolution of Consumer Dispute Resolution Systems in Europe" in Christopher Hodges & Adeline Stadler, eds, *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Cheltham: Edward Elgar, 2013) 223 at 235 [Hodges & Stadler, "Consumer Dispute Resolution in Europe"]; Pablo Cortès, *Online Dispute Resolution for Consumers in the European Union* (New York: Routledge, 2010) at 10 [Cortès, "ODR for Consumers"].

3 On the rise of ODR for the resolution of cross border consumer disputes in EU and at the international level, see Ethan Katsh, "ODR: A Look at History – A Few Thoughts About the Present and Some Speculation About the Future" in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey, eds, *Online dispute resolution: Theory and Practice* (The Hague: Eleven International Publishing, 2012), ch 1, online: <www.mediate.com/articles/ODRTheoryandPractice.cfm>; see also Creutzfeldt, *supra* note 2 at 240–242.

4 Susan Blake, Julie Brown & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution*, 2nd ed (Oxford: Oxford University Press, 2012), at para 5.07.

5 Mohamed S Abdel Wahab et al, *supra* note 3 at 14.

6 Internet Corporation for Assigned Names and Numbers (ICANN), online: <<https://www.icann.org/>>.

7 ICANN, *Uniform Domain Name Dispute Resolution Policy* (1999), online: <<https://www.icann.org/resources/pages/policy-2012-02-25-en>>.

8 Katsh, *supra* note 3 at 27.

9 Nancy H Rogers et al, *Designing Systems and Processes for Managing Disputes* (New York: Aspen Publishers, 2013) at 24.

10 At the domestic level, only 1.5% of consumer complaints finally go to an ADR body, this rate drastically decreases when it comes to cross border disputes, see Jonathan Hill, *Cross-Border Consumer Contracts*, (Oxford: Oxford

contest the usefulness and relevance of ODR for resolving disputes in general.¹¹

Despite the existence of technical and legal obstacles in the implementation of ODR, this system represents a more promising solution than private litigation for the resolution of cross border disputes arising from consumer contracts.¹² Indeed, an ODR system that is free, simple, efficient, transparent, and fair might offer hope for justice in such disputes.¹³ This is why, over the last few years, a real interest for ODR has emerged within major international institutions.

First, the United Nations Commission on International Trade Law (UNCITRAL) established Working Group III in 2010, which has been mandated to provide a practical avenue for the quick, simple and inexpensive resolution of low-value cross-border disputes.¹⁴ To this extent, Working Group III has created a set of procedural rules,¹⁵ as well as guidelines for ODR providers.¹⁶

Then, the European Union issued a new legal framework for the online resolution of cross-border consumer disputes within the internal market.¹⁷ A Directive (ADR Directive),¹⁸ and a Regulation (ODR Regulation),¹⁹ will set a cross-border ODR system that covers all disputes arising from an online contract of sales or services,²⁰ with the exception of disputes relating to health services and higher education.²¹ An ODR Platform will be implemented and monitored by

University Press, 2008) at paras 11.71–11.72 [J Hill, “Cross-Border Consumer Contracts”].

11 See e.g.: Julio César Betancourt & Elina Zlatanska, “Online Dispute Resolution (ODR): What is it, and is it the Way Forward?” (2013) 79:3 Intl J Arb, Mediation & Disp Mgmt 256; Horst Eidenmueller & Martin Engel, “Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe” (2014) 29:2 Ohio St J Disp Resol 291 [Eidenmueller & Engel, “Against False Settlement”]; Gerhard Wagner, “Private law enforcement through ADR: Wonder drug or snake oil?” (2014) 51:1 CML Rev 165.

12 J Hill, “Cross-Border Consumer Contracts”, *supra* note 10 at para 11.106.

13 Ronald A Brand, “Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project” (2012) 10:1 Loy U Chicago LR 11 at 13.

14 UNCITRAL Working Group III, 2010, online: <www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html>.

15 UNCITRAL, Working Group III, *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules*, Note by the Secretariat, UNCITRALOR, 29th Sess, UN Doc A/CN.9/WG.III/WP.127 (2014), online: <www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html> [UNCITRAL ODR Draft Procedural Rules].

16 UNCITRAL, Working Group III, *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules*, Note by the Secretariat, UNCITRALOR, 29th Sess, UN Doc A/CN.9/WG.III/WP.128 (2014), online: <www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html>.

17 For a complete description of the new legal framework of ODR in European Union, see among others Pablo Cortès, “A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward” (2015) 35:1 LS 114, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2324945> [Cortès, “New Regulatory Framework”]; Julia Hörnle, “Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?” in Hodges & Stadler, “Consumer Dispute Resolution in Europe”, *supra* note 2, 293 at 302-308.

18 EC, *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*, [2013] OJ, L165/63 [ADR Directive].

19 EC, *Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*, [2013] OJ, L 165/1 [ODR Regulation].

20 ADR Directive, *supra* note 18 arts 2.1 and 5.

21 ADR Directive, *supra* note 18 arts 2.2(h)(i).

the European Commission in order to provide a single entry point for each consumer in Europe initiating a complaint. This platform²² will rely on a network of harmonized ADR entities that each Member State must establish before July 2015.²³ Both initiatives try to implement a global framework for ODR, which represents a real challenge upon considering the disparities between the legal systems in each country, especially in regard to consumer law.

In this paper, I will focus on one of the most important issues of ODR: the recognition and enforcement of outcomes.²⁴ The lack of enforceable outcomes constitutes a major hurdle for the development of ODR,²⁵ and considerably decreases the level of trust of the potential parties to an ODR scheme.²⁶ Indeed, if the enforcement of the outcome cannot be guaranteed to the consumer, he²⁷ will actually have to rely on the good will of the trader to comply or not with the outcome, which is largely illusory. The problem is that the recognition and enforcement of ODR outcomes faces many obstacles, and the complexity of these issues increases when it comes to cross-border contracts.

First of all, a distinction is to be made between the non-adjudicative and adjudicative ADR mechanisms,²⁸ and between the binding or non-binding nature of the outcomes, as the enforcement proceedings follow different patterns according to these distinctions. Indeed, if the trader is unwilling to comply with the ODR outcome, the consumer has two options depending on the binding nature of the outcome.²⁹ If the outcome is binding between the parties, the winning party can go before the judge for enforcement. In the case of a non-binding outcome, there is nothing the party can do to have the decision enforced outside of private enforcement mechanisms or traditional court proceedings, where he will have to initiate a new claim.

In non-adjudicative proceedings, parties will most of the time enter into an agreement with the help of a neutral third party (e.g. a mediator), or via automatic conciliation or assisted conciliation.³⁰ In an online mediation, parties usually choose whether to be bound by the settlement or not. In the situation where the parties choose to give a contractual effect to the agreement, one of the parties will have to seek a court decision if the other party refuses to comply with the agreement.³¹ With regards to online non-binding arbitration, the issues are similar: the final outcome could be a recommendation issued by the neutral third party where the parties decide

22 The ODR platform is supposed to be effective by January 2016.

23 *ADR Directive*, *supra* note 18 art 25.

24 This paper does not cover general legal issues of ODR that deals with jurisdiction, applicable law, proceedings standards, agreement validity or confidentiality. For a complete overview of ODR issues, see among others Julia Hörnle, *Cross-border internet dispute resolution* (Cambridge, UK: Cambridge University Press, 2009) [Hörnle, *Cross-border internet dispute resolution*]. See also Cortès, “ODR for Consumers”, *supra* note 2.

25 Cortès, “ODR for Consumers”, *supra* note 2 at 83.

26 *Ibid* at 183.

27 Hereinafter whenever the term “his” is used, it includes “her”.

28 Henry J Brown, *ADR principles and practice*, 3d ed (London: Sweet & Maxwell, 2011) at 649.

29 Thomas Schultz, “Online Dispute Resolution: an Overview and Selected Issues” (Paper delivered at the United Nations Economic Commission for Europe Forum on Online Dispute Resolution, Geneva 6-7 June 2002) at 10-11 [Schultz, “ODR Overview”] [unpublished], online: <www.holmeskirby.com/index_bestanden/Schultz_2002_ODR.pdf>.

30 UNCITRAL ODR Draft Procedural Rules, *supra* note 15 arts. 5-7.

31 Cortès, “ODR for Consumers”, *supra* note 2 at 163.

whether or not they want to follow the proposed solution.³²

Conversely, the outcome may be a final binding award if the parties initially agreed to be bound by the arbitration proceedings. In this case, the existence of international conventions such as the New York Convention (NYC) provides an effective background for the enforcement of these awards.³³ However, a binding online arbitration for the resolution of consumer disputes might not represent a proper solution, since it is traditionally dedicated to disputes arising between two business parties, and most national laws prohibit the recourse to arbitration with consumers. The prohibition of binding arbitration with consumers, and the legal constraints associated to this kind of dispute resolution, had the effect of increasing the recourse to non-binding forms of dispute resolution on the Internet.³⁴ Hence, non-binding outcomes can only rely on private enforcement mechanisms to be enforced, which can prevent consumers from seeking redress if these systems are not built on efficient incentives.

From this introduction of the issues related to the enforcement of outcomes issued in the context of ODR, it comes out that the parties seeking for the enforcement of outcomes have two choices: to seek enforcement of the ODR binding outcomes before a court or a public authority (**Section I**), or to rely on private enforcement mechanisms (**Section II**). In this paper, I will assess these different enforcement mechanisms and their suitability for ODR proceedings, in order to explore the potential solutions to the enforcement issues of ODR outcomes.

SECTION I: JUDICIAL AND PUBLIC ENFORCEMENT OF ODR OUTCOMES

Traditionally, resorting to ADR proceedings is designed to avoid courts and their related constraints. However, when a party refuses to comply with the outcome, the other party has to seek public authority for enforcement. For the consumer, it constitutes a major pitfall, as it requires costs, knowledge and time,³⁵ which often leads to the withdrawal of the claim³⁶ and denies the consumer access to justice.³⁷ Nevertheless, the existence of international conventions such as the NYC may provide an efficient mechanism for the enforcement of online awards regardless of the legal and practical obstacles that might arise.

But before entering into the details of the judicial enforcement of ODR outcomes *per se*, a fundamental issue linked to the enforcement of outcomes in ODR must be addressed: the enforcement of pre-dispute ADR agreements, and the binding effect of ODR outcomes with consumers.³⁸ Indeed, access to judicial redress requires the outcome to be binding between the

32 UNCITRAL ODR Draft Procedural Rules, *supra* note 15 art. 7.

33 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739 (entered into force 7 June 1959) [*New York Convention*].

34 Thomas Schultz, "Online Arbitration: Binding or Non-Binding?" (2002) ADR Online Monthly at 5-7, online: <www.ombuds.org/center/adr2002-11-schultz.html> [Schultz, "Online Arbitration"].

35 Cortès, "ODR for Consumers", *supra* note 2 at 82.

36 In the EU, for instance, it appears that only 2 percent of European consumers who encounter a problem bring their claim before a court, see EC, *Special Eurobarometer 342 Consumer Empowerment* (Belgium: EC, 2011) at 184, online: <ec.europa.eu/public_opinion/archives/ebs/ebs_342_en.pdf>.

37 J Hill, "Cross-Border Consumer Contracts", *supra* note 10 at paras 11.106 and 11.109.

38 For a complete insight of the issues related to the enforcement and the validity of consumer arbitration agreements, see Alexander J Bělohávek, *B2C arbitration: consumer protection in arbitration* (New York: Juris, 2012); F Paul

parties and the pre-dispute agreement to be valid. In the context of ODR with consumers, the enforcement of pre-dispute agreements and binding outcomes meets serious legal obstacles that might undermine the implementation of an efficient ODR mechanism.

Enforcement of pre-dispute ADR agreements, non-binding and binding proceedings in consumer ADR

A pre-dispute ADR agreement is an agreement made by parties in a contract before any issues or disputes arise. This agreement provides that any disputes that the parties have will be resolved out of court through ADR proceedings, such as mediation or binding arbitration. The prohibition of pre-dispute arbitration agreements and binding outcomes in ADR proceedings with consumers constitute an obstacle in setting a global ODR framework for consumer contracts because it prevents parties from entering into ODR. However, alternatives such as unilaterally binding proceedings could be implemented in order to circumvent the current legal barriers to ADR proceedings with consumers.

The enforcement of pre-dispute ADR agreements and consumer protection

Consumer Protection is often part of the public policy of a country,³⁹ and some special provisions may apply accordingly. One of the most common provisions applied all over the world is the prohibition of pre-dispute arbitration clauses in consumer contracts.⁴⁰ The prohibition of pre-dispute ADR agreements is designed to protect consumers from having unfair dispute resolution mechanisms imposed on them, which could deny the consumer access to justice.⁴¹ In the context of cross-border resolution of small claims, as will be discussed below, the consumer is *de facto* deprived of effective access to justice because resorting to the judicial systems of Member States, for instance, is too difficult, too expensive or too slow for the consumer.⁴² Consequently, it also prevents consumers from entering into agreements on dispute resolution mechanisms of their choice.⁴³ Thus, the success of ODR might rely on the evolution of the current consumer protection legal framework through a shift from the principle of prohibition of pre-dispute ADR agreements and the exclusion of the binding effect of ADR entities' decisions, to a fair, consumer-centered, binding procedure.⁴⁴

Bland, *Consumer arbitration agreements: enforceability and other topics*, 7th ed, The consumer credit and sales legal practice series (Boston: National Consumer Law Center, 2015).

39 In the European Union, consumer protection has always been a major pillar, see EC, *Charter of Fundamental Rights of the European Union*, [2010] OJ, C 83/389 at art 38.

40 In France, for instance, the *Code de la Consommation* (Consumer Code) in its article L 132-1 sets the validity of the terms of a consumer agreement. Pursuant to this article, a list of unfair terms is set by decree (*Décret du 18 mars 2009 portant application de l'article L. 132-1 du code de la consommation*, JO, 20 March 2009, 5030) providing a black list of contract terms which are unfair and automatically ineffective and a grey list of clauses that are presumed to be unfair, imposing a burden on a business to prove otherwise. According to article R-132-2-10° of the Consumer Code, the arbitration or ADR clause is on the grey list and is therefore presumed to be unfair.

41 On this topic, see Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice" (2005) 51:4 McGill LJ 693.

42 J Hill, "Cross-Border Consumer Contracts", *supra* note 10 at para 5.02.

43 Brand, *supra* note 13 at 26.

44 Cortès, "ODR for Consumers", *supra* note 2 at 183, 206.

In the European Union, the Brussels I⁴⁵ and Rome I⁴⁶ Regulations implemented a general prohibition on pre-dispute ADR clauses for consumer agreements. Indeed, Article 17 of the Brussels I Regulation (now Article 23 of the Brussels I Recast) prohibits pre-dispute choice of court agreements if such an agreement has not been entered into after the dispute has arisen. Article 6(2) of Rome I Regulation prohibits a choice of law clause in a consumer contract that has the result of depriving the consumer of the protection afforded to him by the law of his country. In fact, both Regulations do not explicitly prohibit pre-dispute ADR agreements.⁴⁷ In this respect, the Court of Justice of the European Union held in *Alassini* that if online redress processes were imposed inappropriately on consumers, it would impede their right of access to justice.⁴⁸ However, the European judge gave some precisions on the scope of this principle and stated that a law establishing pre-action mandatory online conciliation does not breach the right of access to justice to the extent that it does not deny the parties access to the courts after an unsuccessful conciliation.⁴⁹

The new legal framework provided by the ADR Directive and the ODR Regulation follows the same principles by excluding the binding effect of pre-dispute ADR agreements.⁵⁰ Article 10 of the ADR Directive, entitled “Liberty”, provides that the agreements reached prior to the dispute in which the consumer and the trader decide to submit a complaint to an ADR entity will not be binding if the agreement has the effect of depriving the consumer of his right to bring an action before the courts. Then, article 11, “Legality”, provides that in ADR procedures that aim at resolving the dispute by imposing the solution on a consumer, the solution imposed must not result in the consumer being deprived of the protection afforded to him by the mandatory rules of the law of the Member State where he is resident.⁵¹

The UNCITRAL Working Group adopted a similar position by creating two tracks in the procedural rules in order to accommodate jurisdictions in which pre-dispute ADR agreements are considered binding on parties (Track I), as well as jurisdictions where pre-dispute ADR agreements are not considered binding on parties and did not end in a binding arbitration phase (Track II).⁵² Therefore, UNCITRAL Rules will apply to the agreement of the parties only to the extent that the

45 EC, *Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] OJ, L 12/1 [*Brussels I Regulation*]; this prohibition was reaffirmed by the Brussels I recast that entered into force on 10 January 2015, EC, *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] OJ, L 351/1 [*Brussels I recast*].

46 EC, *Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, [2008] OJ, L 177/6 [*Rome I*].

47 Brand, *supra* note 13 at 16.

48 ECJ, *Rosalba Alassini and Others v Telecom Italia*, [2010], C-317/08–C-320/08, ECR I02213.

49 *Ibid* at para 67.

50 See *ADR Directive*, *supra* note 18 recital 41: “[a]n agreement between a consumer and a trader to submit complaints to an ADR entity should not be binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute”.

51 *ADR Directive*, *supra* note 18 art 11.

52 UNCITRAL, Working Group III, *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-sixth session*, UNCITRALOR, 46th Sess, UN A/CN.9/762 (2013) at paras 13-24, online: <www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html>.

Rules are enforceable, and draft article 1(3) provides that if any of the UNICTRAL Rules “is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail.”⁵³

Therefore, the new ODR framework prevents the use of pre-dispute ADR agreements with consumers. However, after a dispute has arisen, a consumer and a trader can agree to enter into ADR proceedings.⁵⁴ But the fact is that this technique has a “chilling effect” on consumers.⁵⁵ Indeed, after the dispute has arisen, the lack of trust between the parties usually prevents them from entering into ADR proceedings. This has the effect of hindering the use of ODR, and to this extent, some authors have proposed to create mandatory ODR clauses in order to enhance the use of ODR.⁵⁶ Nevertheless, the implementation of such clauses requires a legal reform, which is not expected, to date, in the European Union.

Exclusion of binding outcomes on consumers

Judicial enforcement of ODR outcomes is possible only to the extent that the outcomes bind the parties. Most of the time, however, national laws prohibit binding outcomes when one of the parties is a consumer. This leaves no choice to the consumer but to rely on private enforcement mechanisms, which might deny the consumer access to an effective mean of redress. In the UNCITRAL and EU legal frameworks, ODR mechanisms rely more on non-binding outcomes. Indeed, the UNCITRAL Working Group III created the “track II” rules for proceedings that did not end in a binding arbitration phase.⁵⁷ The UNCITRAL Draft Procedural Rules provides in article 7(4) that a recommendation is not binding on the parties unless they agree otherwise.⁵⁸ In the same way, the ADR Directive retains the non-binding effect of the outcomes upon consumers when the latter did not previously agree to be bound.⁵⁹

These kinds of proceedings do not create any incentive to comply with ODR outcomes. Indeed, if the party is not satisfied with the outcome, there is very little chance that it will comply with the outcome on a voluntary basis. Therefore, if the outcomes are not binding upon the parties, the consumer has no means of redress available, and he will have to initiate a new claim before a court.

Unilaterally binding proceedings

A binding ODR mechanism may have some advantages for the consumer, particularly

⁵³ UNCITRAL ODR Draft Procedural Rules, *supra* note 15 at para 29.

⁵⁴ In France, for instance, the French Court of Cassation stated that a consumer who entered into an arbitration agreement after the dispute has arisen (an insurance dispute in this case) is bound by the terms of this agreement. The Court further held that such an agreement cannot be considered as unfair terms, see Cass. Civ 1re, 25 February 2010, *Association Générale de Prévoyance Militaire Vie (AGPM) v M. X.*, (2010) Bull civ I 49, No 09-12.126, online: <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021884584&fastReqId=1814943435&fastPos=1>>.

⁵⁵ Chris Hodges & Naomi Creutzfeldt, “Implementing the EU Consumer ADR Directive” (2013) Foundation for Law, Justice and Society Policy Brief at 7, online: <www.fljs.org/files/publications/Hodges-Creutzfeldt_0.pdf>.

⁵⁶ Cortès, “ODR for Consumers”, *supra* note 2 at 198, 206.

⁵⁷ UNCITRAL ODR Draft Procedural Rules, *supra* note 15 at para 3.

⁵⁸ *Ibid* at para 82.

⁵⁹ *ADR Directive*, *supra* note 18 recital 43 and art 11.

for the enforcement of its outcomes. One of the most interesting solutions to be considered is unilaterally binding arbitration where the binding force of the outcome depends on the acceptance of one of the parties,⁶⁰ here the consumer. This legal mechanism represents a real opportunity for the consumer to benefit from the enforceability of a binding outcome without contravening consumer protection rules.⁶¹ To this extent, the ADR Directive leaves to the Member States the option to implement a unilaterally binding mechanism. Indeed, the ADR Directive in its recitals 43 and 49, together with article 9, allows each Member State to create unilaterally binding mechanisms. According to those provisions, once the consumer has accepted the solution notified by the ADR entity, the outcome becomes binding on the trader.⁶² Since the procedure is not binding on the consumer, that party can withdraw from the procedure at any stage if he is dissatisfied with the performance or the operation of the procedure.⁶³ This ADR mechanism has already been implemented in some Member States. In Germany, for instance, insurance companies agreed to be bound by the German Insurance Ombudsman⁶⁴ for claims of up to 10 000 €. ⁶⁵ However, the non-binding effect of the outcome on the consumer may be undermined to the extent that the consumer will rarely challenge the decision of the neutral party and go before a court. Consequently, a mechanism that was initially designed to be unilaterally binding on the trader could be *de facto* binding on the consumer.⁶⁶

Furthermore, unilaterally binding mechanisms might be challenged by the traditional principles of arbitration. Indeed, arbitration is based on the grounds of mutuality and consideration; therefore, when an arbitration clause is not mutually binding, none of the parties are bound.⁶⁷ However, those principles are applicable only in the frame of commercial arbitration in business-to-business disputes. When it comes to business-to-consumer (B2C) disputes, the imbalance of powers between the parties compensates for the lack of mutuality.⁶⁸ That is why, at the European level, the ADR Directive allows the implementation of unilaterally binding outcomes and legitimates the imbalance between the stronger party, the trader, and the weaker party, the consumer. However, differences between the national laws might create uncertainty, as the enforcement of unilaterally binding outcomes could be challenged in some jurisdictions. Besides, the enforcement of unilaterally binding outcomes under the NYC could raise additional

60 Thomas Schultz & Gabrielle Kaufmann-Kohler, *Online Dispute Resolution : Challenges For Contemporary Justice* (The Hague: Kluwer Law International, 2004) at 159 [Schultz & Kaufmann-Kohler, *Contemporary Justice*].

61 Schultz, "Online Arbitration" *supra* note 34 at 3, 6.

62 *ADR Directive*, *supra* note 18 art 9(3).

63 *ADR Directive*, *supra* note 18 art 9(2).

64 The German Insurance Ombudsman is operated and funded by an association whose members are German insurance companies, see Ombudsmann für Versicherungen, Wir über uns, Stellung der Mitglieder des Vereins, online: <www.versicherungsombudsmann.de>.

65 Eidenmueller & Engel, "Against False Settlement" *supra* note 11 at 13–14.

66 *Ibid* at 14.

67 Schultz, "Online Arbitration", *supra* note 34 at 6; see for the differences of interpretation between common law and civil law countries on unilateral dispute resolution clauses on jurisdictions, Maxi Scherer and Sophia Lange "The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses?", (18 July 2013), Kluwer Arbitration Blog (blog), online: <kluwerarbitrationblog.com/blog/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/>.

68 Schultz & Kaufmann-Kohler, *Contemporary Justice*, *supra* note 60 at 159.

issues, since it is only applicable to arbitral awards, and a unilateral outcome might not fall under this qualification. Nevertheless, a unilaterally binding mechanism represents a real enforcement guarantee for the consumer. It seems obvious that the trader will be more disposed to comply with a binding outcome, even if there are few probabilities that the consumer attempts to enforce the outcome before a court in the case of non-compliance.

Thus, the prohibition of pre-dispute ADR agreements with consumers hampers the recourse to ODR proceedings and deprives the consumer from obtaining a binding outcome enforceable before a court. However, if the consumer gets a binding outcome such as an arbitration award, he can rely on simplified enforcement proceedings.

THE NEW YORK CONVENTION AND THE ENFORCEMENT OF ONLINE AWARDS

Within the context of international arbitration, the NYC represents a great tool to the extent that the enforcement of foreign arbitration awards and outcomes is now easier than the enforcement of foreign court decisions with the *exequatur* proceedings.⁶⁹ When it comes to ODR, the NYC seems to be applicable, and might present many advantages for the consumer seeking the enforcement of online awards. However, the mechanisms of recognition of the foreign award, and the mandatory recourse to a court, deprive the consumer from an efficient enforcement tool that appears to be out of reach for the usual consumer.

The New York Convention in the context of ODR

The issue here is to determine if an award rendered online falls within the scope of the NYC.⁷⁰ Indeed, the 1958 NYC has set formal requirements for the validity of arbitration awards, and the party seeking the enforcement of the outcome must provide an award that is in writing, signed by the arbitrators, and that is either the authenticated original or a duly certified copy thereof.⁷¹ In the context of ODR, where the proceedings are dematerialized, the conditions set by the NYC might not be fulfilled.

It is obvious that the NYC did not anticipate ODR and the possibility that both arbitration agreements and arbitral awards could take other than a physical form.⁷² However, the mere fact that both parties and arbitrator use electronic means of communications should not in itself constitute invalidity.⁷³ Indeed, the latest positions of the UNCITRAL on the recognition of electronic arbitration agreements,⁷⁴ and the global trend in national legislations to give full recognition to

⁶⁹ Blake, *supra* note 4 at para 32.29.

⁷⁰ The question of the validity of online arbitration awards arose since the convention clearly sets the respect of the formalism as a key condition, see Herbert Kronke, *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York Convention* (Alphen aan den Rijn: Kluwer Law International, 2010) at 17—18.

⁷¹ *New York Convention*, *supra* note 33 at art IV (1).

⁷² UNCTAD, *Dispute settlement: International Commercial Arbitration, Electronic Arbitration*, Module 5.9 of Course on Dispute Settlement in International Trade, Investment and Intellectual Property (New York: UN, 2003) at 2.2.1, online: <unctad.org/en/docs/edmmisc232add20_en.pdf>.

⁷³ Brown, *supra* note 28 at para. 25–032.

⁷⁴ UNCITRAL, *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New*

electronic documents and electronic signatures, provide a suitable framework for the growth of ODR.⁷⁵

However, the recognition of electronic documents largely depends on national laws, and the validity of the award is set by the procedural rules of the state where enforcement is sought pursuant to article 3 of the NYC.⁷⁶ Accordingly, even if the validity of an online award may be asserted in a global context, the potential differences between national laws create uncertainty for the party seeking enforcement of the online award, which might constitute a serious difficulty in designing an efficient cross border enforcement system.⁷⁷

The formalism required by the NYC is justified by the protection against fraudulent awards. To this extent, formalism and authenticity in the context of ODR are also very important. Indeed, the recourse to information and communications technology, with its associated risks, should increase the need of security in ODR proceedings.⁷⁸ In the European Union, the European Court of Justice regularly remarks the importance of using a durable medium and its strict interpretation when it is required by consumer protection rules.⁷⁹

Thus, the compatibility of the NYC with ODR outcomes is not completely certain, but the evolution of the standards provided by the old convention suggest that the courts will review online awards the same way they review traditional “offline” arbitration awards.⁸⁰ Then, this recognition will allow the consumer to seek enforcement of the online awards in court.

A limited tool for the enforcement of awards by consumers

Even if the electronic award rendered by the online arbitrator is considered valid according to the provisions of the NYC and the rules of the state where enforcement is sought, the consumer will face additional obstacles.

One of the most important obstacles is provided by the NYC through the “commerce-limitation” doctrine, according to which a signatory state may exclude non-commercial matters from the scope of the NYC.⁸¹ Since consumer disputes are considered non-commercial matters in

York, 10 June 1958, UNGAOR, 61st Sess, Supp No 17, UN Doc A/61/17, Annex II, online: <www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>.

75 Richard Hill, “On-line Arbitration: Issues and Solutions” (1999) 15:2 *Arb Intl* 199 at 203.

76 *New York Convention*, *supra* note 33 at art III citing that “[e]ach contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of the procedure of the territory where award is relied upon.”

77 Haitham A Haloush, “The Authenticity of Online Alternative Dispute Resolution Proceedings” (2008) 25:3 *J Intl Arb* 355 at 364.

78 In addition to the formalism issues regarding arbitral awards, there are also other fundamental issues concerning the notifications and communications between the parties. Indeed, for instance, current email protocols are not able to produce proofs of receipt that can obstruct the proceedings if the trader contests the validity of a document. See on the formalism issues in general in ODR: *ibid* at 357-358. See also on the electronic proof and the hosting of electronic documents Christiane Féral-Schuhl, *Cyberdroit le droit à l'épreuve de l'internet*, 6th ed (Paris: Dalloz, 2010) at ch 91-93.

79 See e.g. *Content Services Ltd v Bundesarbeitskammer*, C-49/11, [2012] ECR I-02213.

80 Cortès, “ODR for Consumers”, *supra* note 2 at 112.

81 *New York Convention*, *supra* note 33 at art I(3) provides that: When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may ... also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under

many countries, the NYC cannot benefit all consumers as an efficient enforcement tool.

Then, the major hurdle for the use of the NYC in the context of consumer disputes concerns the traditional access to justice issues encountered by the consumer seeking redress. Indeed, the costs and the knowledge of this procedure might discourage the common consumer to the extent that any party seeking to enforce an award under the provisions of the NYC will have to go to court. For example, in France, the party must file an application to enforce the award in the Court of First Instance of the place where the award was made.⁸² For awards not issued in France that fall under the scope of the NYC, the applications can only be filed before the Paris Court of First Instance,⁸³ which is certainly not convenient for consumers located outside of Paris. Moreover, pursuant to French procedural rules, it is compulsory to be represented by a lawyer before the Court of First Instance⁸⁴. This kind of proceedings evidently imply additional costs that are disproportionate compared to the claim, which prevents the consumer from pursuing his claim and, as a matter of fact, will hinder his access to justice.⁸⁵

Therefore, the enforcement of online arbitration awards under the NYC is clearly not adapted to cross border consumer disputes.⁸⁶ The question of the recognition of electronic awards, the differences among the different national laws, and the necessity to go before a court to enforce foreign awards make it very unlikely that the deceived consumer initiates the proceedings and seeks application of the NYC. Considering the inadequacy of the NYC in the ODR, and in the cyberspace in general, the idea of creating an international convention for the enforcement and recognition of foreign online arbitration awards has been proposed by some authors.⁸⁷ However, the creation of an international convention is not on the agenda of any institution, nor has the UNCITRAL proposed to create such an instrument. Furthermore, the different projects of the Working Group III seem to rely more on private enforcement mechanisms than on judicial enforcement.⁸⁸

The NYC is applicable to arbitration awards rendered in the frame of adjudicatory proceedings; the next section will deal with the judicial enforcement of non-adjudicatory outcomes.

Judicial enforcement of non-adjudicatory outcomes

Non-adjudicatory outcomes resulting from mediation or conciliation proceedings are not enforceable *per se*, and will additionally require a mutually binding agreement between the

the national law of the State making such declaration.

82 Art 1487 NC proc civ.

83 Art 1516 NC proc civ.

84 Art 751 NC proc civ.

85 Christopher Hodges, "Settlement and its Pitfalls in England and Wales" in Hodges & Stadler, "Consumer Dispute Resolution in Europe", *supra* note 2 at 111.

86 Hörnle, *Cross-border internet dispute resolution*, *supra* note 24 at 259-260.

87 *Ibid* at 263; J Hill, "Cross-border Consumer Contracts", *supra* note 10 at para 11.75.

88 UNCITRAL, Working Group III (Online dispute resolution), *Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms*, Note by the Secretariat, UNCITRALOR, 28th Sess, UN Doc A/CN.9/WG.III/WP.124 (2013), online: <www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html> [*Private Enforcement Mechanisms*].

parties. Generally, parties resorting to non-adjudicative ADR, such as negotiation and mediation, are closely associated to the dispute resolution proceedings; thus, there are fewer difficulties in regard to enforcement. Therefore, in most cases, parties will voluntarily honour the terms of the settlement.⁸⁹ However, in many cases, one of the parties might not comply with the solution proposed by the mediator or negotiated between the parties. Accordingly, the party seeking enforcement will have to sue the unwilling party on the basis of a breach of contract. Most of the time, the claimant will easily establish the breach of contract before the civil judge when the unwilling party does not comply with the outcome.⁹⁰ Thus, the obligations arising from the contract could be easily enforced, in particular when it is an obligation to pay. Nevertheless, the fact is that in the context of consumer disputes involving small claims, resorting to the regular courts raises several practical obstacles for the consumer. Indeed, the costs and time associated with regular civil proceedings hinder the will of the consumer to pursue the claim.⁹¹

The European Union has implemented simplified proceedings in order to improve access to justice. The European Small Claims Procedure,⁹² and more recently the Mediation Directive,⁹³ are both intended to improve consumer's access to Justice. According to the Mediation Directive, all Member States must ensure that a mediated agreement, including those resulting from online mediation,⁹⁴ are confirmed by public authorities and enforced in other Member States.⁹⁵ The Directive left the choice of the enforcement proceedings applicable to the agreement to the States, which creates uncertainty in regard of different laws of the Member States. In the context of online mediation, the Directive may represent an interesting tool for the consumer in that it may increase the enforceability of the mediated agreements,⁹⁶ in particular when it comes to cross border disputes. Indeed, article 6(2) of the Mediation Directive provides that a mediated agreement can be made enforceable by a decision of a court or by another competent authority. Therefore, it may be possible to delegate the power to make a mediated agreement directly enforceable to some non-judiciary authorities. For example, in Spain,⁹⁷ the Spanish Mediation Bill provides that a mediated agreement reached with the assistance of an accredited mediator is directly enforceable in court.⁹⁸ In the case of cross border mediation, such an agreement would be easily enforceable if each Member State acknowledged the authority of an accredited ADR provider since the mediated agreement could benefit from the simplified proceedings of recognition and enforcement of decisions under *Brussels I* Regulation (and now under Brussels I Recast).⁹⁹ One could regret that the ADR Directive did not propose to set rules for the recognition of agreements reached with

89 Blake, *supra* note 4 at para 32.01.

90 *Ibid* at para 32.12.

91 Schultz & Kaufmann-Kohler, *Contemporary Justice*, *supra* note 60 at 161.

92 EC, Regulation (EC) 861/2007 of European Parliament and of the Council of 11 July 2007 Establishing a European Small Claims Procedure, [2007] OJ, L 199/1.

93 EC, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects Of Mediation in Civil and Commercial Matters, [2008] OJ, L 136/3 [Mediation Directive].

94 Cortès, "ODR for Consumers", *supra* note 2 at 159.

95 *Mediation Directive*, *supra* note 93 art 6.

96 Cortès, "ODR for Consumers", *supra* note 2 at 163—164.

97 *Ibid* at 164.

98 *Ibid*.

99 *Ibid*.

online mediation, and also did not call for the creation of accredited mediators that could give the agreements direct enforceability.

However, even the use of simplified proceedings require the consumer to go before the judge, which still constitutes a serious practical obstacle in a similar way as the recognition of international arbitral awards. Indeed, we cannot ignore the fact that the value of a right is directly related to its enforcement mechanism and the costs associated with this enforcement.¹⁰⁰

Finally, it appears that traditional mechanisms of enforcement are out of reach for consumers and seem inappropriate for ODR outcomes. Considering the lack of redress for consumers, the use of private enforcement mechanisms emerged and is now supposed to constitute the most relevant answer to enforcement issues in the frame of ODR.¹⁰¹

SECTION II: PRIVATE ENFORCEMENT MECHANISMS AND ODR OUTCOMES

The notion of private enforcement mechanisms is wide, and there is no clear definition that covers the variety of mechanisms. However, the UNCITRAL Working Group proposed the following definition: “alternative to a court-enforced arbitration award or settlement agreement, and which can either (i) create incentives to perform or (ii) provide for the automatic execution of the outcome of proceedings.”¹⁰² As a matter of fact, most of the successful ODR providers, such as eBay, PayPal, and ICANN, rely on private enforcement mechanisms. The ICANN, for instance, provides a very efficient self-enforcement mechanism of the decisions issued on the basis of its UDRP procedure. According to that procedure, domain name registrars have 10 days to comply with the decision, after which their domain name is suspended.¹⁰³ Therefore, most of the UDRP decisions are final and enforceable.¹⁰⁴ Furthermore, the control of the resource (the domain name) by the ODR provider implies that the compliance rate decisions based on UDRP proceedings is extremely high.¹⁰⁵ As we will see below, the control of the resource by the ODR provider plays a great role in the compliance with ODR outcomes.

Resorting to private enforcement mechanisms is not exclusive to non-binding mechanisms. Indeed, the outcomes resulting from an ODR procedure can be rendered under the form of an arbitral award or a contractual agreement between the parties. In both cases, the outcomes are in theory easily enforceable before any national court, but as discussed in Section I, the enforcement of binding outcomes suffers from various practical obstacles. Therefore, private enforcement mechanisms may be used as an effective incentive to comply with binding outcomes, and they represent an interesting alternative to courts proceedings.

In this section, the two main categories of private enforcement mechanisms, incentives to perform and automatic execution of the outcomes, will be analyzed. Some of the alternatives to

100 Eidenmueller & Engel, “Against False Settlement”, *supra* note 11 at 6.

101 Schultz, “Online Arbitration” *supra* note 34 at 11.

102 *Private Enforcement Mechanisms*, *supra* note 88 at para. 4; see also Schultz, “ODR Overview”, *supra* note 29 at 11.

103 ICANN, *supra* note 7 art 4(k).

104 Cortès, “ODR for Consumers”, *supra* note 2 at 82.

105 Schultz, “ODR Overview”, *supra* note 29 at 11.

the traditional mechanisms of private enforcement will also be considered.

Building incentives to comply with the outcomes: online reputation mechanisms

Customers' trust and satisfaction is a keystone for the success in e-commerce market, just like any other market. Maintaining reputation and market share is fundamental. Amazon, for instance, has built one of the best customer services available,¹⁰⁶ which undoubtedly contributed and still contributes to the success of the services provided by this famous trader. This kind of in-house "customer care" and complaints management department operated within many large traders has now taken an important part in the business management, and traders have created very effective methods to resolve customer issues.¹⁰⁷ Actually, the main motivations for the development of "in-house" ADR mechanisms provided by the trader are the prevention of disputes, with the associated costs of court proceedings, and the avoidance of any harmful situation for the reputation of the business.¹⁰⁸

One of the main reasons of the low amount of cross border e-commerce transactions remains the lack of trust between the purchaser and the trader.¹⁰⁹ In order to manage and improve online reputation, traders usually resort to two kinds of instruments: (i) feedbacks and ratings that rely on "user-generated-content", and (ii) trustmarks that are issued by a third-party.

User-generated content: feedbacks and ratings

In the world of trade, trust always had an important place, and so did the means to assess it. For example, in ancient Mesopotamia traders recorded on stone tablets lists of cross-border transactions with the information related to the foreign trader in order to be able to evaluate the trustworthiness of the trader.¹¹⁰ That fact illustrates how important the information on a trader and the trust associated with it is, in particular in the context of cross-border transactions.

The success of the online auction provider eBay essentially relies on its feedback system. This system is based on a simple idea: the trader and the customer should be able to leave a public evaluation on how the transaction was performed by each of the parties. To this extent the customer can give a positive, neutral or negative feedback. This is a simple concept but it has huge consequences on the business of a trader; indeed, feedback rating largely influences sale prices and yearly profits.¹¹¹

106 Kathy Grannis, "Amazon.com Tops in Customer Service, According to NRF Foundation/American Express Survey", *National Retail Foundation* (17 January 2012), online: <<https://nrf.com/media/press-releases/amazoncom-tops-customer-service-according-nrf-foundationamerican-express-survey>>.

107 Creutzfeldt, *supra* note 2 at 233—234 .

108 *Ibid* at 234.

109 EC, Commission, "Report on Cross-Border e-commerce in the EU" (2009) Commission Staff Working Document SEC (2009) 283 Final at 11, online: <ec.europa.eu/consumers/archive/strategy/docs/com_staff_wp2009_en.pdf>.

110 Colin Rule & Harpreet Singh, "ODR and Online Reputation Systems" in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey, eds, *Online dispute resolution: Theory and Practice* (The Hague: Eleven International Publishing, 2012) 163 at 164.

111 *Ibid* at 195.

In the context of ODR, the use of ratings could create an incentive for the trader to comply with an ODR provider's decision.¹¹² Indeed, if a trader refuses to execute a decision, or refuses to submit its complaints to an accredited ODR provider, the consumer is likely to leave a negative review. Furthermore, users are more likely to communicate about a negative experience than a positive one.¹¹³

However, the subjective nature of ratings, the low response rates, and the inaccurate ratings given by the consumer to express his dissatisfaction with the outcome together represent some limits to the trustworthiness of such a system.¹¹⁴ This is why a neutral and independent third party, such as a trustmark, may better assess the trustworthiness of a trader.

Trustmarks

In the context of ODR, one of the most potentially significant mechanisms in promoting consumer confidence involves the use of trustmarks. Trustmarks are quality labels that take the form of seals or logos granted by institutions that establish standards of conduct. These institutions can be either an ODR provider or an independent third party.¹¹⁵ As regards enforcement issues, trustmarks may be used to assure consumers that the online trader will adhere to quality standards, participate in an ODR procedure, and comply with the outcomes.¹¹⁶ Therefore, the submission to a trustmark could create a real incentive to comply with the ODR outcomes if the trader's non-compliance results in the removal of the trustmark.¹¹⁷ Like ratings and feedbacks systems, the appearance of trust created by the trustmark has a direct impact on the business of the trader. One of the main trustmark institutions, SquareTrade, claims that its accredited traders increase their sales by over 15 per cent after obtaining the trustmark.¹¹⁸

However, there are some doubts regarding the real strength of such an incentive. Indeed, a trader could just resort to another trustmark provider with lower standards in order to avoid a stringent provider,¹¹⁹ and it could result in a sort of "forum shopping" by the traders.¹²⁰ Actually, the trustmark system in e-commerce suffers from a lack of regulation that resulted in the proliferation of a multiplicity of trustmarks. Most of the trustmark providers set their own standards and rules to grant their accreditation, which is confusing for the consumer, who in the end may not pay attention to them.¹²¹ These dissimilarities are even more pronounced in the cross-border context,

112 Pablo Cortès, "Online Dispute Resolution for Consumers" in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey, eds, *Online dispute resolution: Theory and Practice* (The Hague: Eleven International Publishing, 2012) 139 at 149.

113 Rule & Singh, *supra* note 110 at 178.

114 *Private Enforcement Mechanisms*, *supra* note 88 at para 19.

115 *Ibid* at para 20.

116 Cortès, "ODR for Consumers", *supra* note 2 at 62.

117 *Private Enforcement Mechanisms*, *supra* note 88 at para 22.

118 Steve Abernethy, "Building large-scale online dispute resolution & trustmark system" (Proceedings of the UNECE Forum on ODR, 2003) at 2, online: <www.mediate.com/Integrating/docs/Abernethy.pdf>.

119 J Hill, "Cross-Border Consumer Contracts", *supra* note 10 at para 11.67.

120 *Private Enforcement Mechanisms*, *supra* note 88 at para 24.

121 Cortès, "ODR for Consumers", *supra* note 2 at 62-64.

especially because of the lack of international harmonization.¹²² Actually, the utility and the quintessence of a trustmark depends on awareness, which requires that the trustmark is known by a great part of the consumers, which is not the case considering the current configuration. For those reasons, the European Union proposed in its Digital Agenda the creation of a pan-European Trustmark.¹²³

Finally, the ADR Directive and the ODR Regulation did not establish this accepted trustmark.¹²⁴ Awareness is nevertheless taken into account with the obligation for traders to provide the hyperlink to the ODR platform and the ADR entities by which the trader is covered.¹²⁵ Each Member State must monitor traders' information obligations through a national competent authority¹²⁶ that must communicate to the Commission on a regular basis the information on the activity of ADR entities and traders.¹²⁷ This system is not centralized, and is far from constituting a European trustmark. However, the new legal framework could rely on the ODR platform to play the role of a trustmark. As was aforementioned, every online trader has the obligation to display the link of the ODR platform on his or her website, and the platform will inform consumers on whether the trader is affiliated with, or committed to, an ADR entity. Thus, the ODR platform will *de facto* be associated with every e-commerce website. In addition to that, the ODR platform is a user-friendly, multilingual platform, and constitutes a single-entry point for consumers and traders.¹²⁸ All these characteristics make the ODR platform a suitable instrument for the implementation of a pan-European trustmark.¹²⁹ Yet, it is regrettable that the ADR Directive did not provide for the mandatory publication of the decisions issued by the ODR provider, as it constitutes a powerful incentive for the enforcement of outcomes.¹³⁰

Thus, mechanisms that are based on information and awareness may represent an efficient enforcement mechanism to the extent where they have an impact on the trust of the consumer

122 J Hill, "Cross-Border Consumer Contracts", *supra* note 10 at para 11.81.

123 EC, Commission, *A Digital Agenda for Europe: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2010) 245 Final (2010), online: <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0245&from=EN>; Cortès, "ODR for Consumers", *supra* note 2 at 193-194; J Hill, "Cross-Border Consumer Contracts", *supra* note 10 at para 11.81.

124 Cortès, "New Regulatory Framework", *supra* note 17 at 28.

125 *ADR Directive*, *supra* note 18 art 13.

126 *ADR Directive*, *supra* note 18 art 18; it is worth noting that the ADR Directive and ODR Regulation both contain provisions on the protection of personal data, which implies that the national data protection authorities will certainly be associated to the implementation of the new legal framework. In France, the French Data Protection Authority, the "CNIL", is very active and already grants renowned trustmarks and labels, therefore, it could be interesting to create some synergies and to allow such an institution to grant trustmark to the traders that comply with personal data regulation and ODR procedures; see also on the personal data issues in the new ADR framework for consumers: Hörnle, *supra* note 2, 293 at 308-313.

127 *ADR Directive*, *supra* note 18 arts 19-20.

128 *ADR Directive*, *supra* note 18 recital 12.

129 Cortès, "New Regulatory Framework", *supra* note 17 at 28.

130 Hans Micklitz & Giovanni Sartor, *Assessing the scope of European dispute resolution platform* (Brussels: European Parliament, 2012) at 17; Cortès, "New Regulatory Framework", *supra* note 17 at 32; Schultz, "Online Arbitration", *supra* note 34 at 2.

toward the trader.¹³¹ However, such mechanisms suffer from a lack of regulation and awareness, and the new ADR legal framework does not explicitly provide the adequate tools to create efficient trustmarks or feedbacks. In particular, the implementation of these mechanisms involves the participation of a third party,¹³² and, to date, it is not clear which institution or Internet actor could assume this role. Therefore, Member States and the Commission shall work closely in order to build the necessary incentives for the compliance of outcomes by the traders.

Enforcement of ODR outcomes through “self-execution” mechanisms

The second kind of private enforcement mechanism deals with “automatic”¹³³ enforcement or “self-execution” of the case outcome. There are various mechanisms used for the self-execution of decisions: escrow accounts, credit card’s chargeback, dedicated funds, or transaction insurance mechanisms. This section will not give a full description of every self-execution or automatic mechanism available, it seems useless considering the vast literature on this subject. However, it seems relevant to examine the most important systems used on the Internet in order to highlight their limits and their characteristics. Then, the potential relevance of those mechanisms in the context of the resolution of cross-border consumer disputes will be assessed.

Escrow accounts

The online payment provider PayPal has established one of the most successful systems.¹³⁴ This system relies on an escrow service, where the buyer submits the payment of the product to the escrow company, who then authorizes the trader to ship the product. Then, during the time of the shipment, the escrow company holds the money on a secured account until the product is delivered to the buyer, who must confirm that the product corresponds to the characteristics of the sale. If a dispute arises between the parties after the negotiation period, the escrow company will temporarily retain the money after receiving the complaint.¹³⁵ In this system, the escrow company acts as a secure third-party¹³⁶ and also as an ODR entity,¹³⁷ to the extent that it will receive and examine the claims of the parties and issue a neutral decision accordingly. The outcome consists in reimbursing or not the buyer, and does not constitute a binding decision. The money will actually be transferred to the buyer or the seller account, and the traditional means of redress are still

131 In addition to Feedbacks and trustmarks, other mechanisms that rely on reputation, such as « merchant blacklist » or « name and shaming » have been implemented. The largest trustmark provider in Europe, Trusted Shops already uses this system, as well as the Swedish National Board for Consumer Disputes that makes available to the public its decisions for ‘naming and shaming’ traders for non-compliance; see on this topic and also for the cooperation with search engines as an incentive to comply with the ODR outcomes: Cortès, “New Regulatory Framework”, *supra* note 17 at 32—35; Rule & Singh, *supra* note 109; Cortès, “ODR for Consumers”, *supra* note 2 at 83.

132 *Private Enforcement Mechanisms*, *supra* note 88 at para 29.

133 *Ibid* at paras 30—34.

134 Colin Rule, former director of Online Dispute Resolution at Paypal, stated that buyer’s claims against sellers decreased by 50 per cent, and seller losses on Paypal.com owing to chargebacks decreased by 20 per cent. See Colin Rule, “Quick Query: PayPal Exec on Payment Disputes”, *Practical Ecommerce* (7 April 2008), online: <www.practicalecommerce.com/articles/709-Quick-Query-PayPal-Exec-On-Payment-Disputes>; Cortès, “ODR for Consumers”, *supra* note 2 at 60.

135 PayPal users have 45 days after the failure of the negotiations to bring their claims before the escrow company.

136 Schultz, “ODR Overview”, *supra* note 29 at 12.

137 Cortès, “ODR Consumers”, *supra* note 2 at 60.

available for the unsatisfied party.

Chargeback mechanisms

The chargeback system used via the payment service providers, such as a credit card company, is slightly different. This mechanism allows a buyer, after he has authorized the transaction via a credit card, to request the reimbursement of the payment from the merchant under particular circumstances. The situations justifying the chargeback are different depending on national laws¹³⁸ - which is confusing for the consumer in a cross border purchase, since he will not be certain to benefit from the same protection than the one provided in his country - but most of the time a fraudulent use of the credit card, the non-delivery or the non-conformity of the goods, will trigger the chargeback mechanism.¹³⁹ During the chargeback procedure, the credit-card company acts as an arbitrator, like in the escrow company scheme, but usually the credit-card company does not engage in an adversarial hearing. Furthermore, the merchant is the only party to be bound by the process, and has to bear the burden of proof.¹⁴⁰ Therefore, the credit-card company usually conducts a mere *prima facie* analysis that will be in favour of the consumer most of the time.¹⁴¹

The chargeback system provides an efficient remedy for the deceived consumer that initiates his claim in good faith, which in the end avoids a dispute between the consumer and merchant.¹⁴² However, this system goes against the principles of a fair process to the detriment of the trader, who also has to bear the costs and consequences of the chargeback. Indeed, the trader is required to pay a fee when the buyer initiates the claim, and the credit score of that trader is negatively impacted accordingly, which has the effect of increasing the credit rates of the payment services.¹⁴³ In addition to that, the credit card chargeback system is only available for the buyer using a credit card, which excludes *de facto* the other forms of payment to benefit from the chargeback system.¹⁴⁴ Finally, the options available for the consumer seeking financial redress appear to be heterogeneous, and third parties involved in the execution of the outcomes do not meet the standards of traditional ADR entities.¹⁴⁵

138 Hörnle, *Cross-border internet dispute resolution*, *supra* note 24 at 38–39; *Private Enforcement Mechanisms*, *supra* note 88 at para 35.

139 Hörnle, *Cross-border internet dispute resolution*, *supra* note 24 at 39. For instance, in the UK, the Consumer Credit Act 1974 (UK), s 75(1) provides that the credit-card issuer is jointly liable with the seller for breaches of contract and misrepresentation, provided that the cash price for the goods or services is in the range of £100-£30,000. At the European level, the former EC, *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] OJ, L 40/144 art 8, only granted the right to charge back in case of fraud.

140 *Private Enforcement Mechanisms*, *supra* note 88 at para 36.

141 Cortès, “ODR for Consumers”, *supra* note 2 at 70.

142 Hörnle, *Cross-border internet dispute resolution*, *supra* note 24 at 42.

143 Cortès, “A new regulatory framework for extra-judicial consumer redress” *supra* note 17 at 27. However, in the majority of B2C transactions, traders avoid almost all economic risks by securing payment from the consumer in advance of performing their obligations. Thus, most of the time, this is the consumer who bears the risks of non-performance, rather than the trader. Therefore, most of the time, the risks of non-performance are borne by the consumer, rather than the supplier, and the chargeback system reverses the rules of the game. See J Hill, “Cross-border Consumer Contracts”, *supra* note 10 at 374.

144 Hörnle, *Cross-border internet dispute resolution*, *supra* note 24 at 42.

145 In particular the standards set in *ADR Directive*, *supra* note 18 arts 9 and 7; see also *Ibid* at 44.

Integrating “self-execution” or “automatic” mechanisms in ODR proceedings

Having an in-built enforcement mechanism, such as “self-execution” or “automatic” systems, for ODR entities may present several advantages. First, it will provide a “one-stop-shop”¹⁴⁶ for the parties, which will prevent the parties from seeking enforcement before another entity or authority, and may considerably increase the compliance and enforcement rates of the outcomes. For instance, the UDRP proceedings allow the ODR providers to propose a dispute resolution function as well as the automatic enforcement of the decision such as, among others, the suspension of the domain name.

The fact is that most of the private enforcement mechanisms that resort to an automatic enforcement scheme, such as the escrow account or chargeback system, have a common factor: they rely on the control of a resource that is valuable to the parties.¹⁴⁷ This resource can be the money of the parties, their reputation, or their domain name.¹⁴⁸ Consequently, the entity that controls the resource also controls the access to this resource, which allows this entity to issue orders, where the incentive to comply with the decision is the fear of being denied access to this resource.¹⁴⁹ Thus, the keystone of these kinds of private enforcement mechanisms is the control of the resource, because it generates a self-enforcing regime where the outcomes -binding or non-binding- do not need to be enforceable before the traditional court system anymore.

In the context of ODR, this resource could be any of the resources previously mentioned, but its integration to an online cross-border dispute resolution procedure, as it is provided in the ADR directive and the UNCITRAL project, seems challenging. For instance, the management of domain names is the exclusive jurisdiction of the ICANN. The means of payment are largely out of control of the future ADR entities, in particular when it comes to cross-border payments. To this extent, the European Commission should cooperate closely with the main payment service providers in the implementation of the future ODR platform in order to create synergies.¹⁵⁰ In the same way, an international trustmark could be built in cooperation with the different consumer agencies worldwide, at least at the European level.

Thus, the future of ODR enforcement relies on the acquisition of the control of a resource, or the creation of a resource, in addition to the development of the other incentives aforementioned. Some other alternatives to the private enforcement mechanisms might be considered as well. The idea of insurance mechanisms, for instance, has been brought up to provide a remedy for the successful claimant.¹⁵¹ This insurance mechanism is a form of money-back guarantee¹⁵² where the ODR provider, or a related entity, directly compensates the winning party. Then, the neutral

146 *Private Enforcement Mechanisms*, *supra* note 87 at para 10.

147 Schultz, “Online Arbitration”, *supra* note 34 at 8.

148 *Ibid* at 8; Henry H Perritt Jr, “Towards a Hybrid Regulatory Scheme for the Internet” (2001) U Chicago Legal F 215 at 237.

149 Schultz, “Online Arbitration”, *supra* note 34 at 10.

150 As it was exposed previously, chargeback proceedings, the way they are handled by credit card companies, suffer from a lack of fairness and uniformity. Therefore, it might be interesting that credit-card companies delegate the resolution of the disputes covered by the chargeback system to the future European ADR entities. See Hörnle, *Cross-border internet dispute resolution*, *supra* note 24 at 262.

151 *Ibid* at 43; Schultz, “Online Arbitration”, *supra* note 34 at 9.

152 Schultz & Kaufmann-Kohler, *Contemporary Justice*, *supra* note 60 at 230.

party recovers the debt from the losing party. The problem with this kind of system relates to the funding and the associated costs. Indeed, generally, the funding of ODR providers is still an issue, and considering the recent economic crisis of 2008, governments are not disposed to dedicate public money to the creation of such a fund. The funding could be borne by traders,¹⁵³ but it may increase the costs of the transactions, and, in the end, it is the consumer who will certainly bear the costs.

Moreover, some issues might arise in the integration of enforcement mechanisms involving financial flows with ODR provider dispute resolution functions.¹⁵⁴ Both EU and UNCITRAL legal frameworks did not clearly consider this option,¹⁵⁵ and extra regulation could be required. Besides, issues of independence and impartiality should also be considered in the creation of synergies and cooperation with third parties such as credit-card companies or online payment service providers.¹⁵⁶

CONCLUSION

The enforcement of ODR outcomes in cross-border consumer disputes still faces many obstacles. First, the prohibition of pre-dispute ADR agreements prevents consumers from benefitting from an efficient and binding procedure. Provisions in the Rome I and Brussels I Regulations (and now Brussels I recast) are designed to protect the consumer, though they do not provide a solution for consumer access to justice problems.¹⁵⁷ Indeed, the consumer seeking redress before a court will have to bear high costs, solve jurisdictional issues, and expect a slow procedure. Allowing consumers to resort to binding ODR procedures could create a real opportunity to increase the enforcement of outcomes. Indeed, binding outcomes could be enforced through simplified procedures, such as the NYC or the Mediation Directive in European Union. However, it appears that the enforcement of binding outcomes obtained through ODR is largely out of reach for the consumer. The practical obstacles associated with the enforcement of the outcomes before the courts severely discourage the consumer to pursue his claim and obtain what he believes is rightfully his.¹⁵⁸ Thus, the implementation of a binding ODR procedure for cross-border consumer disputes is rendered useless because of the lack of accessible judicial enforcement mechanisms. It is highly regrettable that both the UNCITRAL and EU did not address these issues in their respective initiatives. They designed an ODR system that relies only on non-binding proceedings, to the exception of the European framework that proposes the implementation of a unilaterally binding procedure. Each Member State will have the choice to impose on the trader a binding

153 For example, Cortès designed a system where a trustmark could require business members to contribute to a fund dedicated to the compensation of consumers when traders do not comply with the ODR outcomes. See Cortès, “ODR for Consumers”, *supra* note 2 at 82—83.

154 *Private Enforcement Mechanism*, *supra* note 88 at para 10.

155 *Ibid* at para 9.

156 At least, the ODR entity shall propose to the parties to assist them in the practical execution of the outcome. For example, the ODR provider could propose to the losing party to receive his payment, and transfer the money to the winning party. Also, the ODR provider could provide a link to an online payment service provider, or any secured payment platform in order to facilitate the performance of the outcome, if it is a payment order.

157 J Hill, “Cross-border Consumer Contracts”, *supra* note 10 at para 5.01.

158 *Ibid* at para 5.02.

procedure, but one could favourably recommend the implementation of such a procedure.

However, non-binding arbitration should not be seen as an ineffective mechanism for the consumer seeking redress. Indeed, most of the legal obstacles of binding arbitration are not applicable to non-binding arbitration; thus, non-binding arbitration may in fact be more binding than traditional arbitration.¹⁵⁹

The enforcement of non-binding outcomes relies on the creation of powerful incentives, such as trustmarks or chargeback systems. Once again, both UNCITRAL and the European Union ODR systems did not consider the creation of these incentives. Hence, the success of ODR will depend on the action of the competent authorities in designing efficient incentives, as well as on the cooperation with online intermediaries. More largely, the enforcement issue in consumer contracts also deals with the enforcement of consumer's rights. The new ODR system in the European Union is supposed to improve consumer's rights; thus, the creation of an efficient mechanism of enforcement is fundamental, since it will have a direct impact on consumer's rights.¹⁶⁰ Besides, the implementation of the new ODR system in the European Union will have to find its place in the global policy of European institutions without interfering with the current legal initiatives that will set a European framework for collective redress. Indeed, traders may use ADR proceedings to protect them from consumer collective redress, which, for instance, is regularly criticized in the U.S system.¹⁶¹

The future ODR system in the European Union will also have to address the funding issues related to the implementation of the ADR Directive. The creation of efficient incentives will certainly need public funding, which could raise some issues considering the current recession in the EU.¹⁶² The Directive allows the private funding of the future ADR entities,¹⁶³ but Member States will have to guarantee the independence and impartiality of the ODR provider.

159 Cf. Schultz, "Online Arbitration", *supra* note 34 at 11.

160 *A contrario*, the delegation of consumers disputes to out-of-court private entities, may create significant fragmentation in the harmonization of consumer protection laws since the European Union Court of Justice will certainly be consulted less frequently by the national courts on matters of interpretation. Eidenmueller & Engel, "Against False Settlement", *supra* note 11 at 31.

161 Pablo Cortès & Fernando Esteban de la Rosa, "Building a Global Redress System for Low-Value Cross-Border Disputes" (2013) 62:2 ICLQ 407 at 15.

162 The UK government estimated that the implementation of the ADR Directive may cost up to €106 million, see UK, Department for Business, Innovation & Skills, *Alternative dispute resolution for consumers: Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation* (Impact Assessment, March 2014), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288200/bis-14-594-implementing-alternative-dispute-resolution-directive-and-online-dispute-resolution-regulation-impact.pdf>.

163 *ADR Directive*, *supra* note 18 art 2(2)(a).