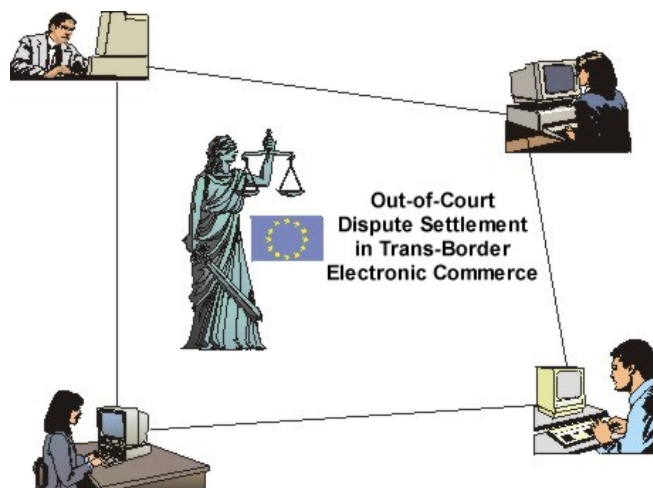


Out-of-court dispute settlement systems for e-commerce

Report of an exploratory study



- Title:** Out-of-court dispute settlement systems for e-commerce. Report of an exploratory study.
- Abstract:** This report presents study results, including a survey on EU and other international initiatives on out-of-court dispute settlement systems applied to e-commerce. A workshop was held in Brussels on 21st March 2000 with over 100 participants from industry, consumer and research organisations. The legal issues and technological challenges raised in the report derive from the survey, interviews and workshop discussions. The report focuses on technological issues related to the deployment of on-line cross-border systems.
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The authors would like to thank all the representatives from organisations who contributed to this project.

The report can also be downloaded from: <http://dsa-isis.jrc.it/ADR/>

We invite readers of this report to send comments or suggestions to:

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Executive Summary

Upon request of the European Commission DG Information Society, the Joint Research Centre has undertaken an exploratory study aimed at fostering a better understanding of the issues and challenges related to the **deployment of on-line out-of-court dispute settlement systems in an electronic commerce environment**. The study has been carried out in three linked phases. The initial phase was a preliminary study, based on interviews and surveys, for identifying the legal background and providing an initial categorisation of the technological challenges. The second phase was a workshop to identify and refine the issues and the challenges as well as identify follow up activities (See Annex 3). The final phase integrates the results from the first two phases.

All phases of the study have aimed at identifying the apposite legal and business aspects against which the technology requirements for an online dispute settlement system must be identified and evaluated. These aspects have been included in this, the final report, and include:

- the identification of the diverse out of court dispute settlement systems from a regulatory perspective appropriate for both consumers and businesses for cross border transactions that may be relevant for out of court dispute settlement systems. The report includes discussion of the issues surrounding: arbitration, mediation and conciliation, consumer complaint boards and ombudsmen as well as consideration of the minimum guarantees which out of court dispute settlement bodies should offer to their users.
- the distinguishing characteristics of out of court dispute settlement systems from various perspectives. This includes on-line/off-line systems, identification of the nature of disputes, as well as the organisation of current schemes that would support the identification of technological requirements. Specific instances of the various systems that are either currently in use or are being proposed are described in Annex 1 and Annex 2;
- a functional view of emerging business models used in the deployment of out of court dispute settlement systems including complaint resolution, third-party negotiation, third-party decision-making and possible integration in codes of conduct and trust seal schemes.
- the trends that shape the environment and define the need in which such systems are being deployed. This includes discussion on the increasing number of cross border consumer disputes, in particular related to the growth of e-commerce as well as the nature of the products that are being traded.

A number of legal and technological challenges need to be addressed if there is to be a swift and successful deployment of on line mechanisms, particularly in a cross-border environment. In addition to the above aspects and background, the report identifies two distinct types of technological criteria for online dispute settlement systems termed: accessibility and trustworthiness. The accessibility criteria include: visibility, party control, traceability, availability and timeliness, use-ability, affordability, interoperability, scaleability, language and integrated services. The trustworthiness requirements include authentication, security, confidentiality, privacy and anonymity.

1 Introduction

1.1 Context

Electronic commerce and the Internet offer unprecedented opportunities for improving growth, employment prospects and the quality of life. But, as with off-line trading, on-line trading provides opportunities for fraudulent, misleading and unfair commercial conduct.

The problems involved in seeking redress from such incidents cannot be underestimated. The costs and the delays involved in litigation, particularly for consumers and SMEs, can be prohibitive and soon eclipse the value of the disputed product or service. The problems are compounded when the dispute is cross-border. The costs are higher, the delays are longer, and the relevance and effectiveness of the courts for resolving such disputes, especially when the value of the disputed product is low, is not obvious.

Uncertainty over the legal framework may inhibit both consumers from purchasing products or services over the Internet, and companies from entering into the electronic market place.

A potentially appropriate and popular solution to these concerns may be found through the use of cross border **out-of-court** dispute settlement procedures. Consumers, SME's and businesses could benefit from such systems by avoiding the cost of time-consuming lawsuits in a legally fragmented and uncertain environment.

The importance of the problem is exemplified by the activities of organisations at both a national and an international level. Recent EU policy initiatives, for example, in the areas of e-commerce¹, jurisdiction², and consumer protection^{3,4}, discuss or encourage the deployment of on-line dispute settlement and consumer redress mechanisms. In addition there are a number of private international fora such as the Global Business Dialogue⁵ and the Global Consumer Dialogue that recently have set up working groups on the issue. The European Commission has also published⁶ minimum quality requirements applicable to out of court dispute settlement bodies for consumer disputes.

The development of Internet and the ubiquity of Web-based technologies could also be harnessed to support out of court dispute settlement systems. This could provide the citizen and Small and Medium Enterprises' with effective and easy access to on-line alternative dispute resolution mechanisms.

There are, however, a number of legal and technological challenges that need to be addressed if there is to be a swift and successful deployment of on line mechanisms, particularly in a cross-border environment. On-line systems are still in their infancy and new concepts need to be further developed and assessed in large-scale environments.

¹ European Parliament and Council directive on "Certain legal aspects of information society services in particular electronic commerce in the Internal Market"

² Proposal for a Council Regulation on jurisdiction and the recognition of judgements in civil and commercial matters. COM(1999) 348 final.

³ Commission Communication: Out of court settlement of consumer disputes. COM (1998) 198 final.

⁴ Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce. OECD, December 1999.

⁵ <http://www.gbde.org/>

⁶ Commission Recommendation on the "Principles applicable to the bodies responsible for out-of-court settlement of consumer disputes" (98/257/EC).

1.2 Study objectives

Upon request of the DG INFSO (Information Society), the Joint Research Centre has undertaken an exploratory study aimed at fostering a better understanding of the issues and challenges related to the **deployment of on-line out-of-court dispute settlement systems in an electronic commerce environment**. On-line settlement systems may provide significant support to the provision of a cost effective, fair, easy to use and fast redress mechanism to consumers in cross-border transactions. In support of this the study has focused on two related facets:

- Dispute settlement systems for cross border transactions that are appropriate for both consumers and business, in particular SMEs.
- The use of innovative information processing technologies and infrastructures to facilitate on-line access and to support the operation of on-line dispute settlement schemes.

It is anticipated that a better characterisation of the challenges would stimulate and characterise apposite follow up activities within appropriate fora. These activities may take the form of knowledge exchange on international initiatives, consensus building on fundamental requirements, pilot projects (proof of concept, refinement of requirements), R&D projects, and comparative evaluations. Projects of a technological nature could be supported in the frame of the European Commission's Research programmes such as Information Society Technologies and TEN Telecom programmes.

1.3 Study approach

The study is being carried out in three linked phases with the following deliverables.

- The first phase involved constructing a **draft study report**. This was published on 17th March 2000. The report includes the initial results derived from surveys and interviews. Particular emphasis is placed on: the background and legal context for out-of-court dispute settlement systems; an inventory of existing on-line initiatives and their characteristics and an initial categorisation of the business and technological challenges in the context of the classification of legal issues.
- In the second phase, a **workshop** was held on 21st March 2000 to identify and refine the issues and the challenges. The workshop report summarising the workshop discussions is included in Annex 3.
- During the third phase this, the **final report** has been constructed following the workshop. It includes an elaboration of the legal and technical issues based on workshop presentations and discussions. The final report will be composed of two parts: 1) This report that, starting from the draft study report, elaborates on technological issues and 2) A special separate report on legal issues to be published by the end of 2000.

2 Regulatory framework

2.1 Terminology and framework

'Out-of-court settlement' or 'alternative dispute resolution' (out-of-court dispute settlement) relates to all types of dispute settlement which are not litigated before a court. Depending on the binding character of the final decision⁷, there

⁷ A beginners guide to out-of-court dispute settlement: <http://www.adr.org/rules/guides/guide.html>

are different types of out-of-court dispute settlement available. They include arbitration, mediation or conciliation and Ombudsman proceedings or consumer complaint boards.

2.1.1 Arbitration

In arbitration, the parties choose one or more neutral persons (arbitrators) to whom they present their dispute for a final and legally binding decision (the award).

The most important legal instrument regulating international arbitration is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958⁸ that regulates, amongst others, the enforceability of foreign arbitral awards. The development of law and specialised rules for international arbitration have been extensively developed, in particular by the UNCITRAL and bodies responsible for International arbitration. Arbitration is predominantly used to resolve disputes in the B-to-B sector. In international commerce, many firms incorporate arbitration clauses in their contracts to avoid litigation in foreign courts.

Some critical issues related to arbitration in a cross-border e-commerce environment include:

- the arbitration agreement online and the click-wrap arbitration clause (are arbitration agreements valid which were concluded online, for example through the clicking of a button indicating 'consent'?)
- the seat of the arbitration in cyberspace (where is the 'seat' of the arbitration if the arbitrators 'meet' and make their decisions from different places online?)
- multi-party-arbitration in cyberspace
- the law applicable to the dispute and cross-border e-commerce
 - non-applicability of the Brussels and Rome Conventions
 - a possible choice of the law by the parties (the parties are generally free to choose the law applicable to the dispute)
 - in the case of no choice of law by the parties: selection by arbitrator. In this case can the arbitrator select a transnational law concerning electronic commerce and should the bodies responsible for arbitration regulate the issue in their rules?
- the law applicable to the proceedings in cyberspace (electronic filing of documents, electronic evidence, audio- and videoconferencing)
- the making of the electronic award online (does an electronic award comply with requirements of international arbitration law?)
- the recourse against the electronic award
- the recognition and enforcement of the electronic award

Reasons which disfavour arbitration include costly procedures in institutional arbitration and procedural requirements. Reasons which favour arbitration relate to availability of small claims arbitration procedures offered by bodies of institutional arbitration with speedy proceedings.

2.1.2 Mediation/Conciliation

By mediation, the parties to a dispute try to reach a voluntary settlement with the help of a third party. Mediation/conciliation is increasingly offered by bodies

⁸ (<http://www.uncitral.org/en-index.htm>)

responsible for institutional arbitration, but also by other bodies such as trade associations.

International mediation and/or conciliation is hardly regulated, taking into account that it does not follow a strict legal procedure. Some international instruments concerning mediation/conciliation are:

- UNCITRAL Conciliation Rules
- See also the US proposed Uniform Mediation Act

Typical mediation procedures include:

- mini trial (an information exchange between the parties before a team of senior managers of both parties in an objective role)
- semi-binding mediation - the parties agree from the beginning that they will, at least in part, accept the proposed settlement as binding, or that a party, if it does not accept the settlement but proceeds to arbitration/litigation, has to bear the costs of the proceedings if it does not achieve an improvement of the mediator's proposed settlement
- fact finding – if the solution of the dispute depends on issues concerning technology, for example relating to the authenticity of data, it may be appropriate to appoint a neutral expert who may inspect evidence such as documents, computers, or other equipment
- conflict management – the contract between the Information Society service provider and the recipient may envisage for early mediation in the case of disputes, for negotiation in good faith, cooling-off periods, contract reviews (however, conflict management seems to be reasonable in the case of valuable long term contracts)
- high-low arbitration (a scheme by means of which the mediator aims at a settlement by arriving at a compromise between the sum claimed by the plaintiff and the sum which the defendant is willing to pay)
- final-offer arbitration (a scheme according to which the parties declare their 'final offers' for a settlement to the mediator who then aims at the proposal of a settlement by balancing the interests of the parties)

Reasons which disfavour mediation:

- the lack of a legal framework, particularly in transborder disputes
- non-bindingness (a party may terminate the mediation at any moment, and it is free to accept the proposed settlement or not)
- non-enforceability (if the parties accept the proposed settlement, their consent is considered to constitute a contract. If a party subsequently refuses to execute the settlement, the other party may have to institute court proceedings asserting a breach of contract)
- whereas mediation techniques are practised in many common law countries since more than 20 years, often due to rising costs of traditional litigation and arbitration, in many civil law countries litigation before the courts is less expensive so that there was a lesser need for the development of mediation techniques.

Reasons which favour mediation:

- relatively simple procedural rules
 - speedy procedure
 - relatively low costs
-

2.1.3 Consumer Complaint Boards/Ombudsmen

Consumer organisations, trade and industry associations, public administrations or other 'neutral' organisations may offer schemes through which out-of-court dispute settlements of consumer complaints can be dealt with. The most common are often referred to as ombudsman or consumer complaint boards. Important legal issues include:

- Regulation by national law: Consumer complaint systems and Ombudsmen may be instituted on the basis of national legislation or on the initiative of industry as a measure of self regulation. In the case where a complaint system is regulated by a legislator on the national level, for example in the Scandinavian countries, Greece, Italy or Spain it appears that Information Society service providers of those countries should be able to rely on an online complaint system which will be offered by the competent national consumer complaint boards.
- National consumer complaint systems and international contracts: In the case of international contracts between Information Society services and recipients the national consumer complaint system in the Member State where the Information Society service is established should be able to deal with complaints. However, national consumer complaint systems are directed to assist consumers within the national territory. Thus in an international contractual relation it may be unclear whether the national consumer complaint system at the place where the Information Society service is established or at the place where the recipient is resident should deal with the complaint. The situation is even more uncertain if the dispute between the parties does not relate to a contract, but is based, for example, on pre-contractual obligations or tort.
- 'Mixed' regulation or no regulation by national law: If a consumer complaint system is only partially regulated by public laws or not regulated at all, the establishment of a consumer complaint system may be based on the initiative of the Information Society service providers. Such a system may be appropriately drafted to respond to the needs of the particular economic sector concerning Information Society services and their clients.
- Privately organised consumer complaint systems: The Information Society service provider may use the services of a body responsible for out-of-court dispute settlement on a long term contractual basis. Such a relation may be based on a licence agreement with a body responsible for out-of-court dispute settlement which offers its services together with the offer to use its trustmark. In such a case the Information Society service will inform recipients on its website that complaints can be made to the body. The Information Society service may declare that it will be bound by the body's decision.

The Information Society service provider and the recipient may, in an individual agreement, select a body responsible for out-of-court dispute settlement in their contract. If the Information Society service uses general terms for contracts, the validity of a corresponding clause may be controversial, particularly if the recipient is a consumer. Accordingly, such clauses should be carefully drafted.

The Information Society service provider and the recipient may also decide ad hoc on a body responsible for out-of-court dispute settlement.

- Regulation of transborder consumer complaints: Transborder consumer complaints are hardly regulated, taking into account of the fact that in the non-e-commerce sector the consumer usually bought locally or regionally..

Generally speaking, the question does not seem to be clarified whether the complaint boards in the state where the Information Society service is established or in the state where the recipient is resident should deal with the complaint and up to which extent a board should observe the laws of a foreign state if such laws would be applicable according to the principles of the international private law. A regulation at the EU level should also take into account a balancing of the interests of the parties to the contract with due regard to the expectations which they fairly might have had. In those countries where consumer complaints are regulated by law, the laws might specifically be extended to regulate transborder complaints.

Complaint systems generally use mediation or conciliation techniques. These methods permit the rendering of a relatively quick proposal at modest costs.

Reasons which disfavour the resort to consumer complaint mechanisms:

- the lack of a legal framework in transborder issues
- the generally non-binding nature of the decision (in part binding on the business)
- the non-regard of the consumer protection laws in a country other than this where the body responsible for consumer complaints is established

Reasons which favour the resort to consumer complaint mechanisms:

- a simple and speedy procedure
- low costs for the complaining party.

2.2 Minimum guarantees

In 1998 the European Commission adopted a Communication on “the out-of-court settlement of consumer disputes”⁹ to encourage and facilitate settlement of consumer disputes at an early stage. In the communication, the Commission refers to “Principles applicable to the bodies responsible for out-of-court settlement of consumer disputes” as minimum guarantees, applicable to on-line as well as off-line systems, which such bodies should offer to their users. The application of these principles is limited to dispute settlement procedures whereby an active third party intervenes to impose a decision or propose a formal solution to settle the dispute. The minimum guarantees are expressed under the following seven principles: independence, transparency, respect of adversarial principle, effectiveness, legality, liberty, representation.

The EU Commission addressed the issue in ¹⁰ and clarified the principles:

- *Independence*: The independence of the decision-making body or person should be ensured in order to guarantee the impartiality of its actions.
- *Transparency*: Appropriate measures should be taken to ensure the transparency of the procedure. This includes the provision of information, on the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute, any preliminary requirements that the consumer may have to meet, as well as other procedural rules, the possible cost of the procedure for the parties, the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes

⁹ COM (1998) 189 Final

¹⁰Comment of 21/04/99 to the US Perspectives on Consumer Protection in the Global Electronic Marketplace, Federal Trade Commission Notice requesting academic papers and public comments, concerning the settlement of disputes and redress, under letter "F" the issue of consumer disputes.

of conduct, etc.), the decision-making arrangements within the body and the legal force of the decision taken.

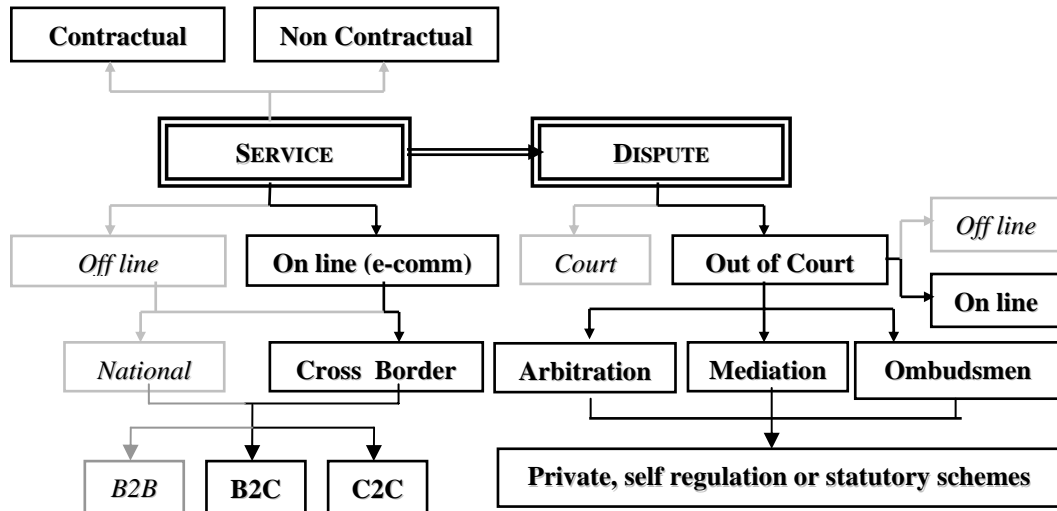
- *Adversarial Principle*: The procedure to be followed allows all the parties concerned to present their viewpoint before the responsible body and to hear the arguments and facts put forward by the other party, and any experts' statements.
- *Principle of Effectiveness*: The effectiveness of the procedure is ensured through measures guaranteeing that the consumer has access to the procedure without being obliged to use a legal representative, that the procedure is free of charges or of moderate costs, that only short periods elapse between the referral of a matter and the decision, that the responsible body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.
- *Principle of Legality*: The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.
- *Principle of Liberty*: 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. The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.
- *Principle of Representation*: The procedure should not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

Also the OECD has published in 1999 the "Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce ". The guidelines encourage "businesses, consumer representatives and governments [to] work together to continue to provide consumers with the option of alternative dispute resolution mechanisms that provide effective resolution of the dispute in a fair and timely manner and without undue cost or burden to the consumer."

3 Survey of out-of-court dispute settlement systems

3.1 Distinguishing characteristics

A survey of out-of-court dispute settlement systems has been performed. To support subsequent analysis, a classification of distinguishing characteristics is provided below:



The bolder lettering and lines scope what are considered to be the scope for this study. Inventories of existing on-line out-of-court dispute settlement systems and of planned cross-border systems can be found in Annexes 1 & 2.

3.1.1 Nature of disputes related to contractual or non-contractual services

The term service is to be understood in two ways: a) a service provision based on a contract (e.g. selling of goods) or b) a service not directly linked to a contractual agreement with the party who receives the service (e.g. commercial communication, advertising aimed at consumers).

The majority of out-of-court dispute settlement systems handle disputes related to services based on contracts. The nature of these disputes include:

- Disputes related to goods/services: goods not received, late delivery, goods or quantity delivered deviate from description, defective goods.
- Disputes related to payment: credit card fraud/unauthorised reuse by a third person, processing errors (e.g. wrong currency), non refund in case of contract withdrawal.
- Intellectual property rights infringements. For instance, e-Resolution and WIPO provide arbitration services for domain name disputes.

Disputes originating from so-called non-contractual services are of growing relevance. In particular in an on-line Internet environment it gets much easier to manipulate intangibles and content and due to the convergence of media, the distinction between advertising, web publishing, direct marketing gets blurred. Incidents and disputes of this nature include:

- Invasion of privacy.

- Illegal, harmful, offensive content or misleading content.

For instance, IRIS mediation focuses on disputes of a non-commercial nature related to Internet use. The advertising sector has a long tradition in self-regulatory measures and the European Advertising Standards Alliance (EASA) is in the process of setting up a cross-border complaints procedure and the Federation of Direct Marketing Associations (FEDMA) is also investigating schemes.

3.1.2 Disputes related to on-line or off-line B2B, B2C or C2C services

Transactions in e-commerce services are fully, or at least partially, performed on-line. For instance, the ordering and payment transactions can be done on-line whilst delivery of physical goods is performed via logistics systems. It should be noted that efficient out-of-court dispute settlement could provide valuable mechanisms for resolving disputes in the traditional off-line commercial environment as well as in on-line e-commerce.

Arbitration systems typically focus on B2B. It is well developed for disputes within national boundaries as well as for settling international business disputes. In B2C, the majority of the schemes belong to the mediation and ombudsman/complaints board category. In some EU countries, such as Portugal and Belgium, arbitration services are well developed for consumer disputes for instance related to travel services. Recent applications can also be found in the C2C sector. Online Ombuds Office, for instance, sponsored by the on-line auction e-Bay, offers mediation services to users of e-Bay (C2C).

3.1.3 On-line or off-line out-of-court dispute settlement

Traditionally dispute resolution systems are off-line, i.e. the parties need to contact (e.g. by writing, telephone or by physically presenting themselves) the competent body and the proceedings employ hearings and are usually paper-based. On the other hand, on-line systems exploit the Internet and Web technologies for providing parties with remote access to dispute settlement services, independent from their physical location.

The first experiments in on-line out-of-court dispute settlement were made during 1996-1997 in America (US and Canada). This experimental stage included initiatives such as V-magistrate, Online Ombudsoffice and Cybertribunal covering both business-to-business and business-to-consumer disputes.

Because of the legal traditions in the US and other (mainly) English speaking countries such as Canada and Australia, off-line out-of-court dispute settlement systems are part of the traditional economic fabric. Such systems are now rapidly being extended to cover e-commerce. We can now see a number of on-line systems focusing on on-line arbitration in more or less specialised niche markets (e.g. e-Resolution for domain name disputes, ClickNsettle for automated claim settlements).

More recently, and within Europe as well as America, on-line out-of-court dispute settlement systems that address consumer disputes are beginning to appear with increasing rapidity. One of the pioneers was IRIS mediation in France which looked into disputes of a non-commercial nature. Further interesting on-line developments in the consumer market are made by organisations (consumer and trade organisations) providing trust seals combined with mediation such as BBBOnline, Webtrader and Trustedshops.

Within existing on-line out-of-court dispute settlement systems there is a wide range of levels of computer support. This ranges from the submission of a complaint by e-mail to paper-less and fully automated processes without

human intervention. Although the trend is towards greater computer support in the proceedings in some cases, paper-less systems are still hampered by established rules that still require manually signed paper forms (e.g. ICANN).

3.1.4 Organisation of the schemes

- Private schemes: Privately organised by organisations that provide services on the basis of fees or free of charge. To this category belong the majority of on-line arbitration and mediation systems in Annex 1.
- Self-regulatory schemes: Privately organised and supported by industry groups, trade associations. Examples include bodies supported by the financial services industry. Self-regulatory schemes are usually based on codes of conduct that are drawn up by industry groups. The codes are interpreted and applied by the appropriate dispute resolution body when receiving complaints.
- Statutory schemes: The bodies responsible for out-of-court dispute settlement are established usually on the basis of national laws, for example concerning consumer protection. They can be publicly funded such as the Ombudsman schemes in Scandinavia or industry funded such as the Chambers of Commerce in Italy. The latter were granted new powers by means of a law of 1993 for the organisation of services for alternative dispute resolution concerning also B2C disputes.

Participation of industry to schemes can be:

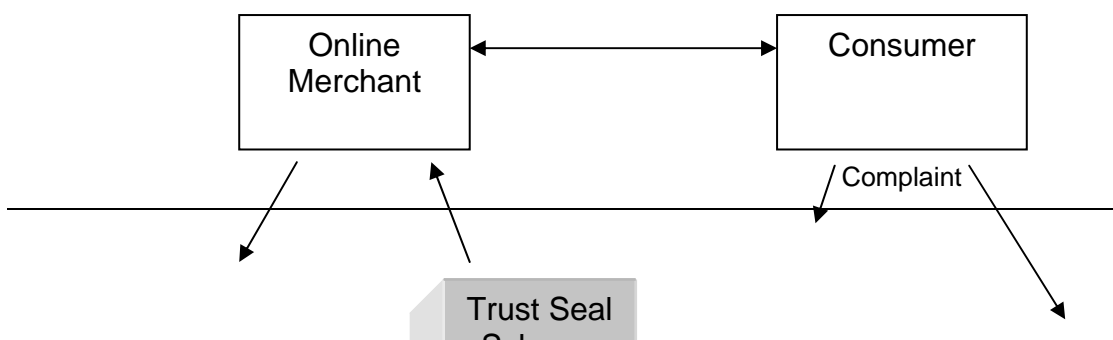
- Voluntary: Companies can choose whether or not to join the scheme.
- Compulsory: All companies usually part of a regulated industry in a country, are automatically part of the scheme. For example in Denmark all the financial services regulated from that country are automatically part of the consumer complaint scheme.

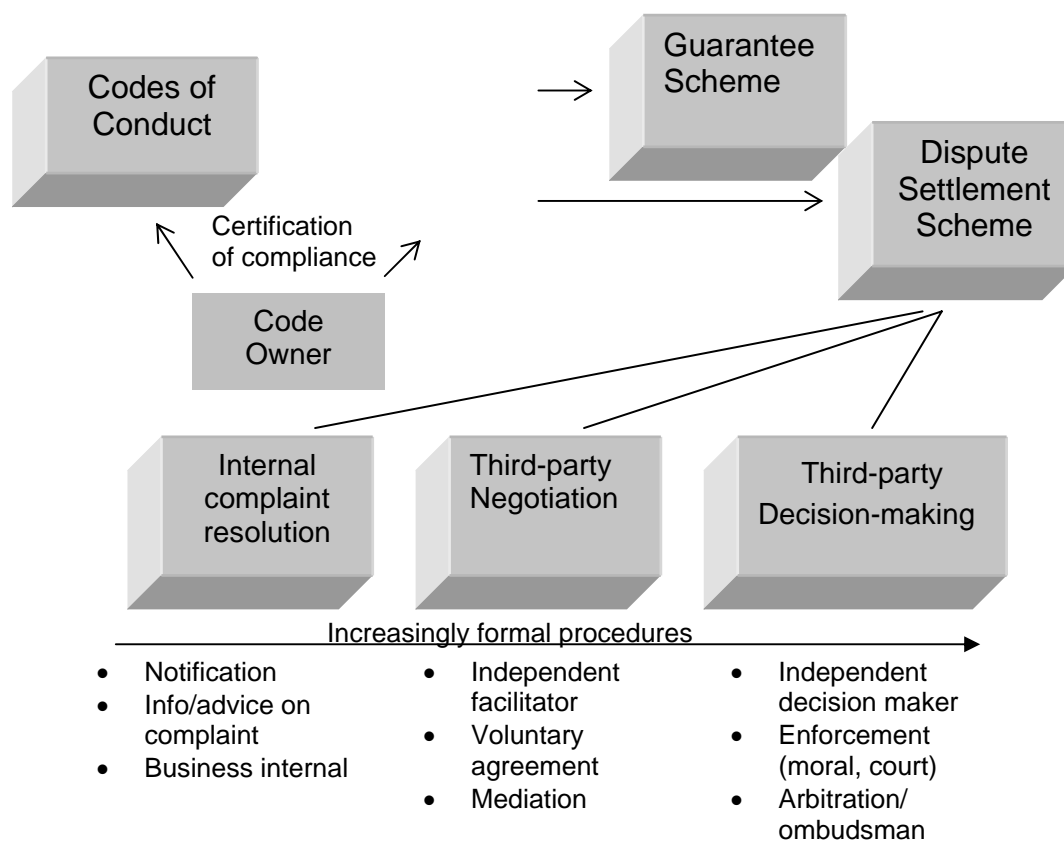
3.1.5 Legal nature of out-of-court dispute settlement system

A classification of types of systems from a legal perspective has been given in chapter 2. Important distinguishing issues between different mechanisms is the binding nature of proceedings, binding nature of the decision and enforcement of the decision made. Legal instruments to regulate these issues are well developed for international arbitration whilst other mechanisms such as mediation, conciliation, ombudsman/consumer complaints boards are hardly regulated at international level. Apart from legal instruments, alternative approaches to enforce decisions include sanctions such as moral pressure, public relations, withdrawal of trust seal, public reporting, referral.

3.2 Business models for confidence building

A number of types of business models are currently in use or are being explored in the provision of out-of-court dispute settlement services. In the B2C sector, these services are increasingly linked to other confidence building mechanisms, such as trust seals. In the following, we take a functional perspective on these mechanisms. A functional perspective has the advantage of being independent from the underlying infrastructure and types of bodies that provide the mechanisms.





- Codes of conduct: In typical self-regulatory schemes, codes of conduct are drawn up by industry or trade associations called the code owners. Consumer organisations can in some cases be involved. Compliance with the code can be based on self-certification or on certification by the code owner. The code could be interpreted and applied by the appropriate dispute resolution body when receiving complaints. It is argued that¹¹, when controls of codes of conduct are applied effectively, self-regulatory schemes could act as a preventive measure, i.e. as dispute avoidance. In an on-line trading environment, typical codes of conduct (e.g. BBBOnline, Trustedshops) would cover issues such as:
 - the proper identification of the on-line merchant/business;
 - transparency on applicable contractual terms and conditions;
 - privacy practice;
 - redress mechanisms in case of complaints.
 In a co-regulatory approach, codes of conduct may also be the subject of guiding principles or even approval by public authorities.
- Codes of conduct combined with trust seals: The use of trust seals, trust labels or trust marks and codes of conduct is closely related. Indeed, a trust seal can be defined as a sign indicating that an organisation agrees to comply with some codes of conduct. Trust seals are often provided by code owner bodies which provide this service on the basis of licence agreements

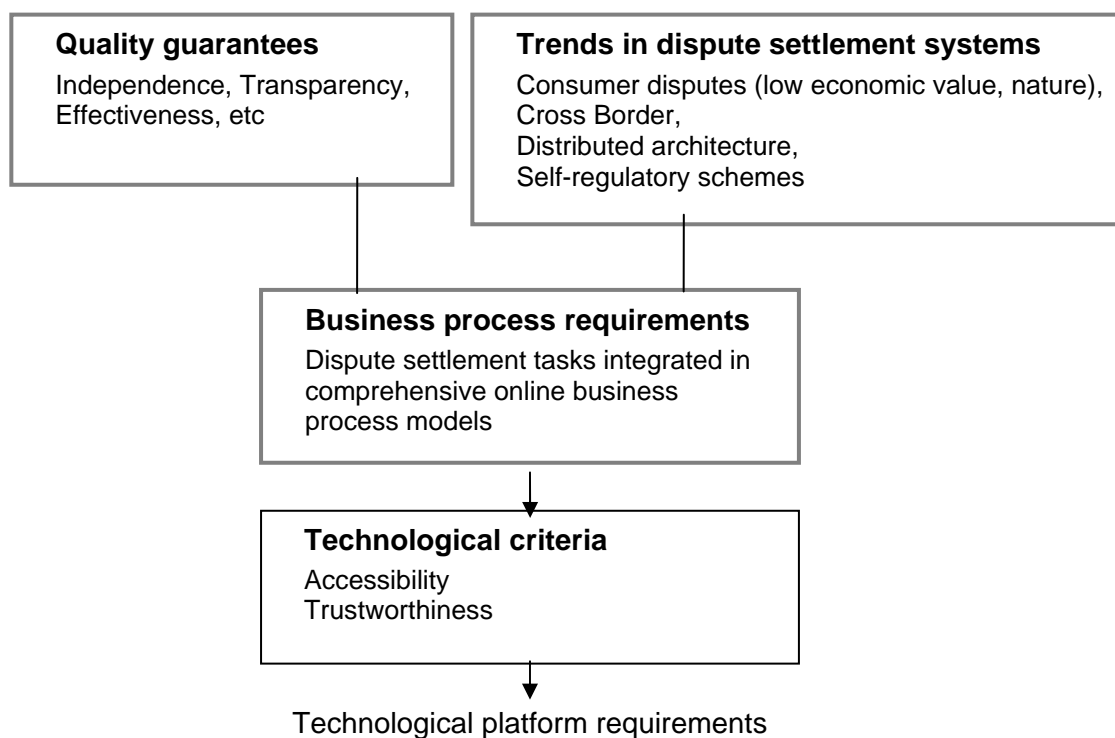
¹¹ La labellisation des sites Web: classification, strategies et recommandations. Didier Gobert, Anne Salaun, CRID, Université de Namur. DA/OR n 51, novembre 1999, pp 83-94.

with traders which in turn obtain the right to use the body's trust seal. As a measure to attract customers and enhance their confidence in the trader, the seal is usually displayed by the Web trader (e.g. on his web site). As an extension of this approach, the displayed codes of conduct may include adherence of the trader to a certain out-of-court dispute settlement scheme. In this case, codes and seals are functionally related to some out-of-court redress schemes. Such a scheme, that may include consumer complaints and mediation services, can be provided by the body, usually free of charge for the consumer. Examples of this approach include BBBOnline, Which?Webtrader and Trustedshops.

- **Guarantee schemes:** Mechanisms to safeguard consumers against risks of shopping and payment fraud. They include established mechanisms such as charge-back mechanisms of the credit card industry or newer mechanisms based on insurance schemes usually combined with the above self-regulatory schemes provided by new on-line systems that provide reimbursement insurance in case of non-delivery of goods and/or non reimbursement by the merchant (e.g. Which?webtrader and Trustedshops).
 - **Out-of-court dispute settlement schemes for redress of consumer complaints and disputes:** A three-levelled model is envisaged in which complementary consumer redress mechanisms (excluding court) can be provided with increasing level of formality in the procedures. The three levels correspond to respectively:
 - complaint resolution mechanisms including advice/notification schemes which can be organised internally by the business concerned or by complaints boards, call centres etc.;
 - negotiations facilitated by third parties to reach a voluntary agreement (e.g., mediation process provided by IRIS, based on consent of both parties and without binding decisions);
 - more formal proceedings for resolving disputes that involve third party decision makers (e.g. arbitration provided by e-resolution).
-

4 Technological requirements overview

Technological requirements for on-line out-of-court dispute settlement systems are driven by a number of important factors including quality guarantees, some important trends that shape the environment in which such systems are being deployed, business process requirements and technological criteria. The following scheme and chapter provide an overview of these drivers.



4.1 Quality guarantees

A basis for the identification of the appropriate quality guarantees, is provided by the EC's recommendation on seven principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [98/257/EC]. They are: independence, transparency, respect of adversarial principle, effectiveness, legality, liberty and representation. Although they are general requirements applicable to off-line as well as on-line systems, the scope of their full application is on more formal type of dispute settlement systems in which a third party takes a binding decision, as, for example, in arbitration. Also the OECD has published in 1999 the "Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce", including requirements of fairness, timeliness, absence of undue cost of burden for the consumer.

It will be important to translate these principles defined in the recommendations to technological requirements for dispute resolution systems.

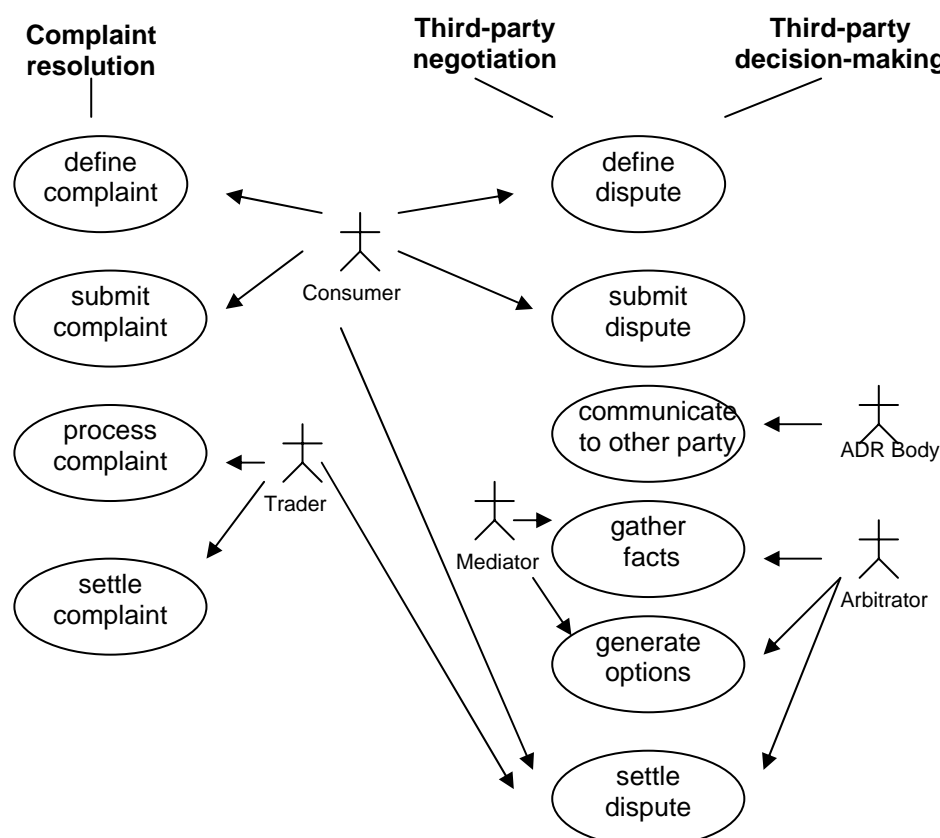
4.2 Trends

There is as yet not much empirical evidence on cross-border consumer disputes. One explanation for this is the relatively low number of cross-border contracts in the business-to-consumer business area compared to the business-to-business area. The volume of consumer transactions are however expected to grow because of e-commerce and will increasingly be of cross-border nature. This trend will give rise to the following plausible scenario in future out-of-court dispute resolution system developments:

- **Growth of cross-border consumer disputes** related to commercial transactions for which the individual economic value will be relatively small.
 - Due to the growth of Internet trade, advances in information processing technologies (e.g. data mining) and convergence of media, the **nature of disputes** will evolve. It is anticipated that there will be a growth in the number of disputes arising from problems concerning non-contractual services and handling of intangibles. Problems include issues such as privacy, advertising content, harmful content. Also, emergence of new intermediaries, such as shopping agents, will add to the complexity of transactions, thus affecting the complexity of dispute handling.
 - Starting from localised schemes that matured in national and/or sectorial environments, **cross-border initiatives** for handling consumer disputes are being planned by various organisations. Three main types of trends can be seen:
 - Currently, and this is particularly true in the EU, the source for on-line out-of-court dispute settlement initiatives can be predominantly found within private trade or consumer organisations. In some cases the private trade organisations were set up in ad-hoc manner, but most initiatives were originally set up to serve a local or National base. Usually, these systems handle disputes of a more generic nature. All, however, have the ambition to extend services on an international level.
 - Sectoral schemes, centred around industrial sectors such as financial services, also plan cross-border on-line out-of-court dispute settlement initiatives. Such initiatives have started from a consolidated approach at national level based on well-tested existing national (off-line) redress schemes. Due to their specificity, they can also cope with complex disputes requiring specialist mediation (e.g. loans). It seems likely that both off-line and on-line out-of-court dispute settlement systems will co-exist.
 - The traditional centres and organisations offering off-line out-of-court dispute settlement-services in Europe such as Chambers of Commerce and Arbitration tribunals are also fully aware of the potential that on-line systems may offer and are planning for initiatives.
 - There seems to be a general consensus that a **distributed architecture** instead of a centralised approach is the preferred option for such cross-border dispute settlement schemes. This is also exemplified by the EEJ-NET initiative (Annex 2). The distributed approach implies that individual bodies in each member state act together as a network to form a pan-European infrastructure.
 - An emerging business model is based on schemes based on **codes of conduct** combined or not with trust seals. In this scenario, third parties offering dispute settlement services, might be linked to these schemes via the trust seals displayed at the trader web site.
-

4.3 Business process requirements concepts

Business process requirements for out-of-court dispute settlement systems may differ depending on the type of procedure employed (complaint resolution, third-party negotiation, third-party decision making) and depending on specific rules laid down within legal or sector specific requirements. An elaborated functional requirements analysis would be outside the scope of this study. We limit ourselves here to an understanding of the basic business process concepts that could be used for subsequent more elaborated functional requirement analysis of the involved business processes. These concepts consist of the actors involved and the set of use-cases of the systems. In the following, use-case diagrams are drawn using the UML (Unified Modelling Formalism) notation. The diagrams are centred around a number of generic activities belonging to three main categories of dispute resolution. The diagrams make, as a principle, abstraction of the physical location of the parties and dispute settlement bodies. Also, the three categories are considered to be integrated into comprehensive confidence building models (cfr. Chapter 3.2).



Some of the use cases are further explained below:

- **Communicate to other party:** The body responsible for dispute settlement contact the other party involved in the dispute, transfers the dispute and requests for agreement on the procedure.
- **Gather facts:** Gather and organise the information including facts, evidence related to the underlying transaction that gives place to the dispute by means of hearings, evidence collections, expert opinions.
- **Generate options:** The contents of this use case changes considerably with the type of procedure. A number of decision options are generally generated. In case of facilitated negotiation, the mediator submits to both

parties the options and a consensus is aimed for. In the case of decision making, the arbitrator takes a decision.

- Settle dispute: Accepted by both parties (e.g. agreement) or imposed by arbitrator (e.g. arbitral award).

4.4 Technological criteria

A number of technological criteria for on-line dispute settlement systems have been identified. They can be grouped under two key categories: to enhance **accessibility** for the user to the system and **trustworthiness** in the system's operation. In the following table, we provide an initial scheme to indicate how these technological criteria could be influenced by the quality guarantees expressed in the EC recommendation.

quality guarantees \	visible	Interactivity/ control	traceable	available	useable	language	affordable	interoperable	scaleable	integration	authentication	secure	anonymity	confidentiality
<i>independence</i>											X			
<i>transparency</i>		X												
<i>adversarial</i>			X			X					X			
<i>effectiveness</i>	X			X	X	X	X	X	X	X		X		
<i>legality</i>												X	X	X
<i>representation</i>					X			X			X			
<i>liberty</i>		X												

4.4.1 Accessibility criteria

visible: It is expected that a wide range of competing schemes and on-line and off-line complementary schemes will be offered to the consumer. Available options should be visible to the user: to avoid potential confusion consumers should be guided, in a transparent way to the apposite schemes for their needs. This may entail starting perhaps from a trust seal to the appropriate redress schemes.

Interactivity / control: The parties should be given proper information and interactive control over the dispute resolution process. Interactivity implies establishment of dialogue between the distant parties themselves and with the (remote) dispute resolution system. Proper information provision facilities, possibly integrated in the on-line e-commerce transaction tools (e.g. on the Web site), should enable the parties to understand in an unambiguous way the purpose of the underlying dispute resolution mechanisms and their respective rules. A second type of information must focus on explaining the character (e.g. binding or non-binding) of the dispute resolution. A third type, allows for explicit and authenticated consent of both parties to the chosen options.

traceable: At least two aspects of traceability need attention:

- Complaint/dispute traceability: This aspect is closely linked to give the parties involved in the process a better control on the finality of the process.

The parties should be given on-line tools to trace the status, time history as well as position in the process, of a complaint/dispute.

- **Evidence traceability:** Fact finding, evidence collection and their traceability are a few examples of tasks that might become complex in out-of-court dispute settlement processes and are usually very context dependent. An E-commerce transaction in itself involves more parties than just the seller and buyer. For instance, a typical retail transaction would include processes of the financial institution and/or credit card company for payment, of the logistics company for delivery of goods, etc. New types of intermediaries in e-commerce, such as brokers or automated shopping agents increase the novelty or complexity of transactions. All these processes individually could be at the origin of a dispute. It is conceivable that the creation of advanced computer tools, such as artificial software agents, may support decision-makers in the fact finding in a multi-party environment.

available and timely: Expectations for timely response from the complaint or dispute handling body will rise in an Internet environment. As the number of transactions increases and the ease with which disputes may be resolved, the numbers of complaints will rise significantly. This may impose significant constraints on the availability of on-line processes and increase pressure for swifter resolutions.

useable: Use-ability might be substantially improved through making available to the consumer simple electronic complaint forms perhaps linked to automatic translation facilities. E-mail, chat conference rooms, videoconferencing are communications means that some on-line out-of-court dispute settlement services provide on a single service basis. Usually they are not integrated. Web-based multi-media tools would better exploit convergence of media into an integrated tool-set.

language: Cross border disputes will invariably involve businesses and consumers with little or no knowledge of each other's languages. Although cost-effective and timely dispute resolutions would undoubtedly be enhanced by fully automated computer translation between the concerned languages, some guarantee of semantic equivalence between the translations may be required before trust can be placed on such techniques. As first measure, automatic translation of complaint forms could be aimed for.

affordable: It is generally accepted that the costs for the parties engaging in out-of-court dispute settlement, in particular for low-value transactions should be low. This is particularly the case for consumers. To ensure that the systems are as cheap as is possible from the technical point of view for the consumer, affordable off-the-shelf commercial technologies should be used for user access such as standard web browsers;

interoperable: Different aspects of various existing and newly developed systems need to be reconciled. On-line systems will have to co-exist with off-line systems and be deployed on international scale in a distributed way. Also, so far, out-of-court dispute settlement schemes for consumers have been set up predominantly in a localised or national environment. In cross-border environments, existing schemes need to operate together and act as a network. Moreover, existing schemes need to inter-operate with clearing house systems of a generic nature and with sector specific and specialised schemes (e.g., financial services, advertising);

scaleable: Large-scale systems would have to be developed not just from the infrastructure point of view but also in terms of potentially large numbers of complaints/disputes to be handled.

integrated service: Platforms to allow for the integration of different alternative redress schemes, including complaint resolution, mediation, arbitration into comprehensive confidence raising frameworks based on codes of conduct combined with or without trust seals.

4.4.2 Trustworthiness criteria

authentication: During on-line dispute resolution it will be essential to ensure the identity of the parties concerned, to allow signature of formal documents by means of electronic signatures and public key infrastructures, in particular when paper-less processes are aimed for. Also, the third party involved in the decision making process should be properly identified to allow proper evaluation of its independence and integrity.

secure: trust seals must be designed to ensure no fraudulent reuse of the seal;

confidentiality: Confidentiality generally plays an important role in out-of-court dispute settlement processes. The parties may prefer to keep the content of the out-of-court dispute settlement proceedings confidential, or to have a report on the case published by reference to the result only. It may also have to be taken into account that the traditions of Member States concerning the reporting of cases differ. Whereas in some Member States the case reports indicate also the names of the parties, in other States the cases are reported anonymously. Again, in other States, like the US, the whole court file is a public document and accessible by everybody. However, in the case of out-of-court dispute settlement procedures, It may be useful to provide for confidence if the parties or the body responsible so wish. This implies greater control from the user side on how his data will be utilised.

anonymity: This issue has potentially conflicting implications in terms of striving for anonymity on one side and assurance of identity on the other: A large part of consumer transactions in the physical world are performed in anonymous manner. Mechanisms for allowing anonymity in e-commerce transactions are being developed (e.g. anonymous e-mail, pseudonyms). On the other hand, during on-line dispute resolution it will be essential to ensure the identity of the parties concerned.

5 Annex 1: Inventory of existing on-line out-of-court dispute settlement systems

5.1 Mediation/ Complaints boards

Online Ombuds Office(US) (<http://www.ombuds.org>). Online Ombuds Office deals with mediation and dispute resolution services since 1996. It is operated by the University of Massachusetts, Centre for Information Technology with support from US institutions. Services are sponsored by e-Bay (online auctioneer) and are free of charge.

CyberTribunal (Canada): The CyberTribunal was a Université de Montréal research project launched and developed by Prof. Karim Benyekhlef. It started in 1997 and it was already known, at that time that 1) the funding would eventually cease; 2) that the project should be continued in the private sector. The funding of the project - and by way of consequence the project itself - ended on December 31st, 1999. Prof. Benyekhlef wanted to take advantage of his expertise in the area of On-Line out-of-court dispute settlement and created e-Resolution.

IRIS Mediation (F) (<http://www.iris.sgdg.org/mediation>): IRIS (Imaginons un reseau Internet solidaire) was founded in October 1997. It is a private initiative that works with volunteers (at no cost for consumers). A complaint can be submitted electronically after which initial advice can be requested on mediation. It focuses on disputes between actors on Internet, originally about non-commercial transactions.

Beschwerdestelle of the Freiwillige Selbstkontrolle Multimedia Diensteanbieter (FSM) (D) (<http://www.fsm.de/bes/index.html>). Complaint board organised on a self-regulatory basis by German Internet Service Providers. It deals with complaints by Internet users related to Internet content. The system allows for informing the authorities in cases of presumed illegal content.

InternetNeutral (US) (<http://www.internetneutral.com>). InternetNeutral is a US company which provides online mediation services. It also provides infrastructure and tools for mediation sessions (e-mail, chat rooms, video conferencing).

Online Mediators (US) (<http://www.onlinemediators.com>). Online Mediators, also a US company, provides services in mediation, including disputes about small sums claims. It charges about 200\$ per case.

Transecure (<http://www.transecure.org>). Transecure is established, however not yet operational.

E-Mediation (NL) (<http://www.e-mediation.nl/>) . On-line services for mediation, claims settlement.

5.2 Trust Seals combined with alternative dispute resolution

The principle of this scheme is the following: Web traders can display a trust seal given by a third-party organisation when traders comply with certain minimum quality standards or codes of conduct. As a service to member traders, these organisations provide consumer complaints and mediation services, usually free of charge for the consumer.

BBBOnline (US/CND) (<http://www.bbbonline.org>): BBBOnline is a subsidiary of the Council of Better Business Bureaus. It is an Industry sponsored organisation that provides Reliability seals and Privacy seals to certified

member companies. It handles consumer complaints including privacy complaints and disputes of consumers with these companies. It has a distributed architecture by means of local BBB bureaus and a central bureau. A complaint filed by a consumer is sent to the central and subsequently dispatched to the local bureau where the company is established.

Which?Webtrader (UK) (<http://www.which.com/webtrader>): The consumer organisation Which? provides the Which? Seal to certified member companies. It also provides reimbursement of the first 50 pounds of loss in case of credit card fraud. A European network (Webtrader) addressing cross-border complaints is in the making.

Trusted Shops (D) (<http://www.trustedshops.org>): Trusted Shops was launched in 1999. It provides a seal denominated „Trusted Shops Guarantee“. Apart from complaints handling it also provides reimbursement guarantee to safeguard shoppers against risks of on-line shopping. The guarantee is provided by an insurance company.

5.3 Arbitration

Virtual Magistrate (US) (<http://vmag.org>): Virtual Magistrate is based on a project of 1996 by the Chicago-Kent College of Law and the Illinois Institute of Technology, funded by the US National Centre for Automated Information Research. It works in cooperation with the Cyberspace Law Institute and the American Arbitration Association (AAA). It handles disputes of individuals and companies and works with qualified AAA arbitrators. Usually users are referred to VMAG by means of contract clauses. The normal fee for an arbitrator is 250 \$ per dispute.

eResolution(CND, US) (<http://www.disputes.org>): e-Resolution provides on-line out-of-court dispute settlement system specialising in arbitration of Internet domain name disputes under ICANN. It was founded in the summer of 1999 by Prof. Benyekhlef together with 2 other people, namely Aubert Landry, a computer specialist and, Robert Cassius de Linval, a lawyer specialising in IT law. Disputes.org/eResolution.ca is now a US/Canada consortium. For e-Resolution, a whole new software was developed, privately funded, and based on the new rules and policy adopted by ICANN. These rules are in force since December 1st, 1999 and eResolution has been accredited by ICANN on January 1st, 2000 to handle Domain Name Disputes. At present, there are more than 25 cases under review by the e-Resolution team of arbitrators. The next step in e-Resolution's strategy is to develop on-line Mediation for commercial transactions involving also consumers. This will be launched shortly.

I-courthouse (US) (<http://www.i-courthouse.com>). iCourthouse is a US-Californian company providing services of online adjudication and dispute evaluation and resolution. It charges 200\$ per case. The process appears to be fully electronic.

Cybercourt (D) (<http://www.cybercourt.de>). Cybercourt is a private initiative from the Association of IT law (Gesellschaft fur Computerrech). It uses e-mail combined with chatbox technology for the procedures.

5.4 Automated settlement/negotiation of claims

This category of systems is included for completeness. In fact, systems under this category are limited to the provision of on-line computer assisted tools that allow two parties to reach an agreement on financial claims without any human intervention. Based on the sum claimed by one party and the offer made by the other party, the service aims at finding a reasonable settlement in between.

ClickNsettle.com (US) (<http://www.clickNsettle.com>): ClickNsettle is a commercial system owned by NAM, a US company which, in the traditional market, provides annually more than 10,000 private arbitration services.

CyberSettle (US) (<http://www.cybersettle.com>): Focuses on settling insurance claims

SettleOnline (US) (<http://www.settleonline.com>).

6 Annex 2: Inventory of planned cross-border out-of-court dispute settlement Initiatives

A number of out-of-court dispute settlement initiatives are being proposed or discussed that deal with cross-border commercial disputes, including consumer disputes. They all propose the networking of existing or new national bodies into pan-European infrastructures. These are of a generic nature (e.g. EEJ-NET, Chambers of Commerce, Webtrader) or sectoral (e.g. financial sector). Also, at this stage, networks are understood widely for supporting off-line as well as on-line out-of-court dispute settlement.

6.1 European Extra-Judicial Network (the EEJ-NET)

In 1998 the Commission adopted a "Communication on the out-of-court settlement of consumer disputes"¹² that included Recommendation 98/257/EC on the principles applicable to the out-of-court settlement of consumer disputes¹³. This established a number of minimum guarantees that out-of-court bodies should offer their users. Member States agreed to notify the Commission of out-of-court bodies that they deemed to be in full conformity with these principles and these have been put on the Commission's website.

Due to the increase in cross border consumption and the inevitable increase in cross border disputes, the Communication foresaw the need to create a cross-border network of out-of-court bodies to overcome the obstacles for a consumer to access relevant out-of-court bodies in other member states.

The aim of this network was to reduce cost, formality, time and obstacles (e.g. language) in resolving transborder consumer disputes by enabling consumers to gain easy access to justice through an out-of-court body in the place where the business is located.

This objective will be obtained by utilising all existing European out-of-court consumer dispute resolution bodies that have been notified to the Commission by Member States. A single contact point, a 'Clearing House', will be established by each Member State which the consumer can contact, in the event of a dispute with an enterprise, for information and support on making a claim to an out-of-court dispute resolution system in the place where the business is located. The EEJ-Net will thus be a communication and support mechanism. It will also allow new schemes and initiatives to be incorporated into the network thereby facilitating easy access and awareness.

In the short term the EEJ-Net provides a much-needed solution for consumers to overcome the difficulty of using out-of-court settlement bodies in other Member States. In the longer term the introduction of the Euro and the growth of electronic trading will lead to greater cross border consumption and potential conflicts. Therefore, it is necessary to have a flexible and evolving structure that will accommodate new schemes, make use of new technological methods supporting redress mechanisms and provide efficient and effective access to justice.

It is proposed that the Clearing houses will have the following functions:

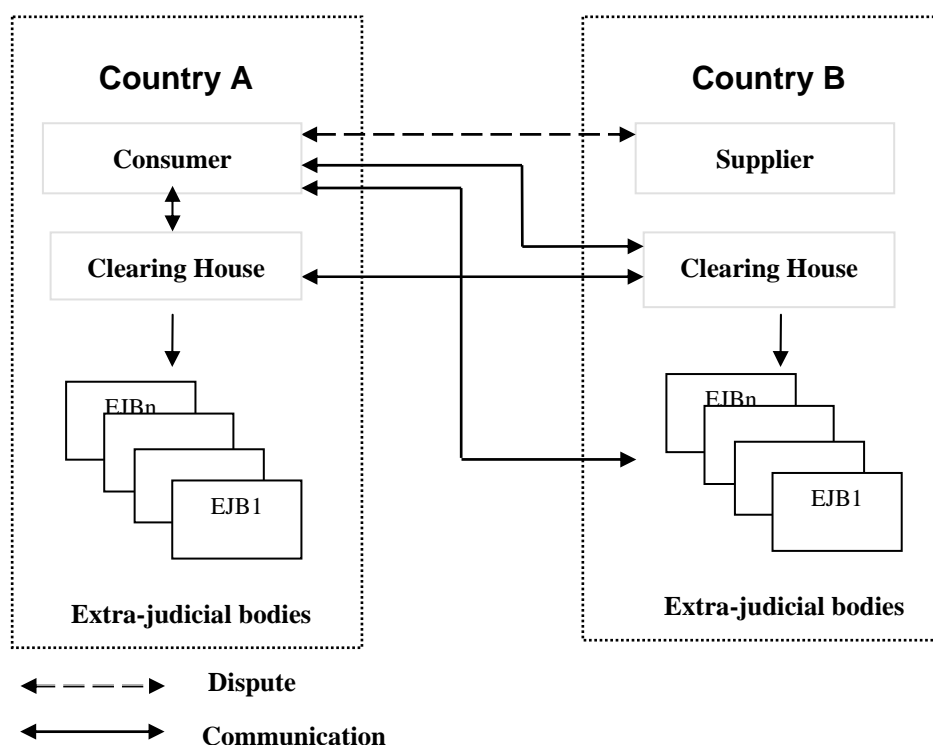
- determine, upon receipt of a complaint, whether an extra judicial body would deal with the complaint, whether a small claims procedure would be

¹² COM(1998) 198 Final

¹³ OJ L155/31, 17.04.98

more appropriate or if other types of consumer resolution schemes, such as conciliation, may be helpful;

- provide information on the appropriate out-of-court dispute resolution bodies in the jurisdiction of the consumer and pass appropriate complaints onto those bodies;
- provide information on national small claims procedures;
- provide assistance to the consumers in formatting and filing complaints for both national and cross-border disputes;
- provide support in cross-border disputes by identifying and then sending the complaint to the appropriate extra-judicial body in the other member state. This will be done via the clearing house from the concerned member state. Consumers may, if they should so wish, send their complaint directly to the clearing house in the other member state or to the extra-judicial bodies concerned. (See diagram below.)
- monitor and store information about the level and nature of complaints for future policy development.



Theoretically, the consumer has 4 options:

1. Contact his own Clearing House ('CH') in Country A, who will contact CH in country B (where the supplier is based) and forward the complaint to extra-judicial body.
2. Contacts CH B directly for same process (e.g. more likely where no language barriers, e.g. UK/Ireland, France/Belgium).
3. Contact directly the out-of-court body in Country B (e.g. this will become more likely with the development of on-line dispute resolution systems).
4. Contact an out-of-court body in Country A who contacts an out-of-court body in Country B (e.g. DG Markt are working with financial service

ombudsmen to create a network of co-operation to allow cross border complaints to be passed from one ombudsmen to another).

6.2 Chambers of Commerce

Together with representatives of Chambers of Commerce from a number of EU Member States, Eurochambres is planning to provide mediation and conciliation services in cross border electronic commerce in most of the EU Member States. The system, which will be available online, will also provide guidelines for conciliation/mediation.

In support of this Unioncamere, the association of the Italian Chambers of Commerce, carried out a study in 1999 on "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes"¹⁴. The study includes a survey of the role of the Chambers of Commerce in the various EU countries in the provision of out-of-court dispute settlement services and dispute resolution in consumer affairs in the various legislative systems.

Public and private systems

Each Chamber of Commerce in Europe operates under either **public or private legal systems**. Public systems are provided for and regulated by law. European chambers operating under public law are: Austria, France, Germany, Greece, Italy, Luxembourg, Netherlands and Spain. Private systems are organised under a system of private law. Membership is voluntary. European chambers operating under private law are: Belgium, Denmark, Finland, Ireland, Portugal, United Kingdom and Sweden. The different legal systems under which the chambers operate entail that very different services are offered by them.

Although France, Germany, Luxembourg and the Netherlands have no legal powers over arbitration and conciliation, these chambers do have significant experience of out-of-court dispute settlement. Particular mention should be made of the Chamber of Commerce in Paris through the recent creation of the Centre de Médiation et Arbitrage de Paris. In Germany 80 of its 83 Chambers of Commerce are members of the DIS (German Arbitration Institute) and organise arbitration under its regulations.

In Italy, the 1993 reform¹⁵ redefined the role of the Chambers of Commerce; new powers were introduced and others, previously granted only to some Chambers, were formally extended to the whole system. The laws apply to all Chambers for the organisation of services for alternative dispute resolution and concerns the resolution of both "business to business" and "business to consumer" disputes. It should be stressed that since the reform, the Chamber Councils, representing all branches of the economy, also include a consumer representative. Of the 102 Chambers around 67 already have their own arbitration systems, and the remainder are at an advanced stage in their planning. Among these, about 10 have already acquired significant experience, about 500 consumer dispute cases have been handled. The scheme for "drop-in" conciliation bureaux, which have been set up by all the Italian Chambers, is now well under way. In Spain, Greece, and Austria the Chambers of Commerce are also legally entitled to organise dispute resolution services.

The role of the Chambers of Commerce in Britain and Ireland has been primarily commercial. Until recently there has been a certain indifference to arbitration and conciliation services; they were considered institutional in nature

¹⁴ Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes. Editor: Valeria Federici, Coordination: Veronica Manfredi. Unioncamere, September 1999.

¹⁵ Law no. 580

and insufficiently “business-oriented”¹⁶. However, and particularly in Britain, a change of direction has been noted¹⁷. There is also an increasing collaboration between the London Chamber of Commerce and the London Court of International Arbitration.

In Scandinavia, the authority of the Finnish Chambers of Commerce in alternative dispute resolution is recognised in law. The Statutory Order under which Finnish Chambers operate led to the setting up of a standing body for national and international arbitration within the National Association with offices in Helsinki. The Stockholm Chamber of Commerce is also the headquarters of The International Arbitration Institute.

The Portuguese law on Chambers of Commerce has made it possible to set up a Centre for Commercial Arbitration which also has powers of conciliation.

In 1993 the Belgium structure of the state underwent radical constitutional reform to establish a federal system. The Chambers of Commerce wanted to play a clear institutional role. This aspiration is reflected in their keen attention to the subject of alternative dispute resolution as an opportunity to regulate the market. Although few are currently operating, a number of Chambers are organising services while others are already prepared to develop them.

Conclusion

The Chambers of Commerce plan to exploit the synergies stemming from their membership of a network spread throughout Europe, and set about harmonising the services on offer. Despite all the differences – both quantitative and qualitative – ADR as provided by the Chambers of Commerce has the potential to fill a market niche, that of small to medium disputes between companies (and consumers) where there are few effective methods of resolution, particularly in cross-border cases.

6.3 Financial sector

The financial services sector sees great potential in the on-line provision of financial services across borders. DG MARKT is working with national redress bodies to establish an effective cross-border complaints network. The purpose of this initiative is to deliver to the consumer as effective a system of cross-border redress as currently exists at national level. To do this, the cooperation builds on existing national schemes, utilising their experience and knowledge. This approach is coordinated with the EEJ-Net project presented earlier in this document as being one of the sectoral networks.

Business models

Business models used for the out-of-court dispute settlement schemes vary from country to country.

The out-of-court dispute settlement bodies may be:

- Statutory bodies, funded by public authorities. This is the case for most Scandinavian countries;
- Self-regulatory bodies, supported by the financial services industry; or
- Bodies set up jointly by industry and consumer organisations (note that these sometimes have public involvement).

¹⁶ However, it should not be forgotten that in the English-speaking world in general, extra-judicial dispute resolution has for a long time been practised by lawyers and private institutions of high repute.

¹⁷ According to a recent survey by the British Chambers of Commerce (BCC) at least 9 Chambers offer a legal aid service for mediation, and as many more have expressed an interest in doing so.

Membership may be:

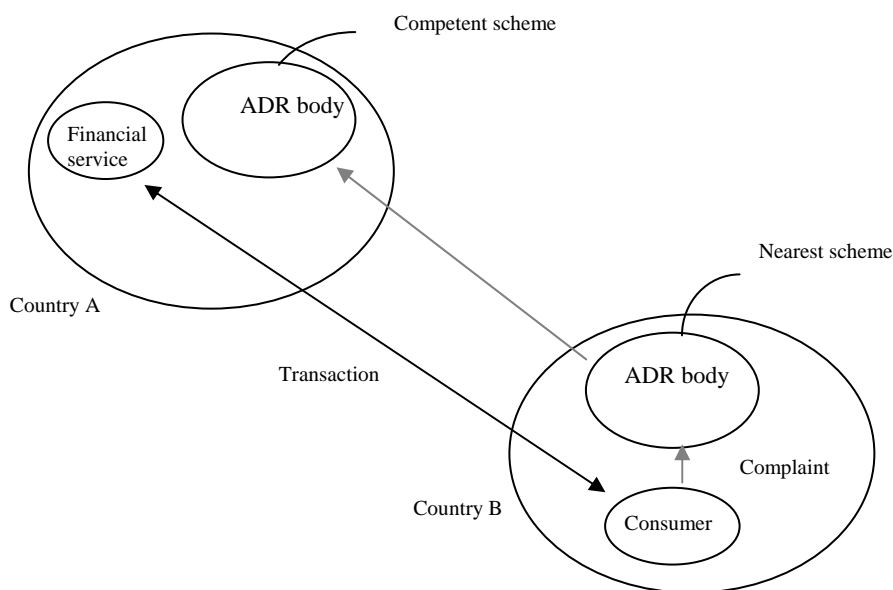
- Compulsory – for example in Denmark - in which case all the financial services regulated from that country are automatically part of the scheme;
- Voluntary, in which case financial institutions can choose whether or not to join the scheme (in practice, most of the industry usually opts to join).

The powers of the out-of-court dispute settlement schemes in financial services vary greatly from one scheme to another. In voluntary schemes, the decisions are often binding on the suppliers (most ombudsmen schemes in the banking sector) and some of the decisions may even bind both parties if they have agreed to it (arbitration in Portugal). Most often, the ruling only takes the form of a recommendation. Many schemes report, however, that recommendations tend to be as efficient as binding decisions.

Usually, the ADR bodies are ombudsman/complaints boards. In the UK, the Joint Ombudsman Scheme (Financial Ombudsman Services) is being established under the Financial Services Authority (FSA). It will cover credit institutions, insurance and investment firms. In Scandinavia a special financial services section is included in the statutory consumer complaint board. In others, specific ombudsmen are established specialising in financial services.

Cross-border Architecture

A decentralised architecture is advocated for handling cross-border disputes that builds on the framework of established national schemes. Each body has its own procedures and terms of reference. These may be based on voluntary banking codes of conduct, equity and/or civil law. It is important that in cross-border co-operation, there is mutual recognition between the schemes. The only common requirements are those set out in Commission Recommendation 98/257 on the „Principles applicable to the bodies responsible for out-of-court settlement of consumer disputes“ (98/257/EC) and subsequently referred to in the Commission communication on “the out-of-court settlement of consumer disputes” (COM (1998) 198 final).



Process

The out-of-court dispute settlement body in the consumer's country is known as the nearest scheme, that in the country of the provider, the competent scheme. In the case of products purchased at a distance, for example, via the web site of a foreign financial services firm without a physical presence (branch) in the country where the consumer resides, their respective roles would be:

- **Nearest scheme:** The out-of-court dispute settlement body in the country of the consumer gives the consumer information about the competent scheme and acts on the consumer's behalf to pass on details of the complaint to the out-of-court dispute settlement body in the country where the provider is based.
- **Competent scheme:** The out-of-court dispute settlement body in the country where the financial body is based accepts a duty of care to the consumer. If necessary, it translates the complaint. The competent scheme in most cases attempts to broker an agreement between the parties and, if this fails, it reaches a decision. In doing so, it takes account of its terms of reference, other rules applicable in the provider's country and, as far as is possible, the relevant mandatory consumer protection rules of the consumer's country.

Enforcement

The main lever for enforcement of the decision is the same as at the national level, i.e moral obligation of the company that subscribes to the scheme to uphold the complaint of the consumer. Were it not to accept the decision, it could find itself the subject of damaging publicity. For example, in Scandinavia, the recommendations of the complaint boards are often published. Ultimately, if the provider does not respect the decision, the consumer retains the possibility to take the case to court.

6.4 Webtrader

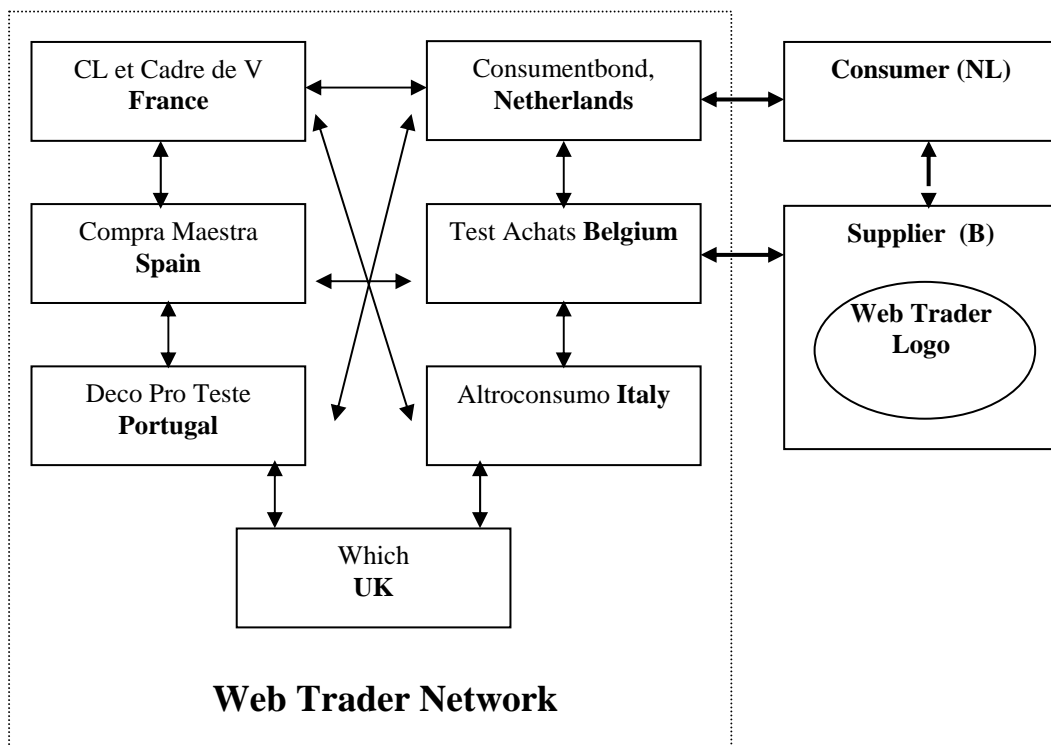
The Webtrader-project is a two-year project co-funded by the European Commission that started at the beginning of 2000. It aims at improving the access of SME's to electronic commerce. It is managed by a consortium of

independent consumer organisations of seven countries: Consumentenbond, **Netherlands**; Test-Achats, **Belgium**; Altroconsumo, **Italy**; Consommation Logement et Cadre de Vie, **France**; Compra Maestra, **Spain**; Deco/ProTeste, **Portugal** and Which, **UK**.

The Webtrader-project aims an on-line certification and arbitration programme for enterprises in the 7 EU countries. It is based on a code of conduct that suppliers of services or products can subscribe wherefore they will receive the Webtrader-logo. A mediation and arbitration programme has also to be installed to deal with disputes between enterprises wearing the webtrader logo and their customers. The mediation and arbitration programme will concern national and cross-border disputes.

If a consumer has a problem with an enterprise of one of the other 6 member states the organisation of the country where the enterprise is located will intermediate for the consumer of that other member state.

If, for example, there is a complaint of a consumer from the Netherlands about a service or product of a supplier in Belgium who legitimately displays the Webtrader-logo, the consumer organisation of the Netherlands will inform the the Belgian consumer organisation that will investigate and mediate with the Belgian supplier. For those cases that not lead to a positive result a, preferably virtual, arbitration procedure will be installed.



7 Annex 3: Workshop report

Introduction

On 21st March 2000, the European Commission (EC) held a Workshop to promote understanding on the legal, technical and business issues involved in deploying online systems for settling cross-border e-commerce disputes. The workshop was part of an exploratory study¹⁸ being undertaken by the Joint Research Centre (JRC) of the EC and organised in collaboration with the Directorate General Information Society (DG INFSO).

The aim of the workshop was to:

- share information on existing on-line systems and on proposed initiatives;
- refine the legal and the technological issues in cross-border out of court dispute settlement systems;
- discuss follow up activities.

Workshop background and overview

The workshop was attended by over 100 delegates from industry, trade associations, consumer organisations, the EC, the European Parliament, US Government, research institutes and international organisations. Participants came from Europe, the United States, and Canada. The workshop agenda is provided in Annex I.

The workshop took place within the context of a number of current and proposed European and international initiatives. Particular reference should be made to revisions currently underway for adjusting the legal framework addressing jurisdiction and the recognition and enforcement of judgements (Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters), the proposed e-commerce directive, policy initiatives by the EC and OECD concerning consumer protection in e-commerce, and the EC's eEurope initiative announced by President Prodi at the Helsinki Summit in December 1999, which was discussed at the extraordinary Lisbon European Council on 24th and 25th March 2000. A common feature of these initiatives is the importance placed on consumer confidence in stimulating the growth of electronic commerce. An integral aspect to developing this confidence is the effective deployment of out-of-court redress schemes in order to ensure that consumers can gain access to justice when things go wrong.

Commissioner Liikanen in opening the workshop, called on the private sector and consumer groups to "work together both in the European Union (EU) and globally to rapidly deploy online systems, which can settle consumer disputes on the Internet, swiftly and at low cost". Mr Liikanen emphasised that "globally compatible and proportionate solutions were needed to help build consumer confidence in cross-border electronic commerce". He pinpointed alternative dispute resolution (ADR) as "a promising area for co-operation with the EU's main trading partners, in particular the United States". Currently, around 20% of "e-consumers" in Europe are shopping on websites based in the United States.

¹⁸ <http://dsa-isis.jrc.it/ADR>

DG INFSO presented the IST R&D programme¹⁹ for collaborative research and the TEN-Telecom programme²⁰ for demonstrations of innovative services as possible routes for co-financing projects to deploy cross-border on-line dispute settlement systems.

The US Department of Commerce/Federal Trade Commission announced the workshop on the issue of 'Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace' to be held on 6th-7th June 2000.²¹ Kate Rodrigues said that it was important to open a public forum on the issue.

The European Commission outlined the purpose and scope of the Recommendation on the "Principles applicable to the bodies responsible for out-of-court settlement of consumer disputes" (98/257/EC). These establish a number of minimum guarantees, applicable to on-line as well as off-line systems, which ADR bodies should offer to their users. The minimum guarantees take the form of seven "principles" with which the out-of-court bodies should comply. Compliance with these principles is intended to guarantee both consumers and traders that their cases will be treated with rigour, fairness and independence. The application of these principles is limited to ADR mechanisms that have procedures whereby an active third party intervenes to impose or propose a formal solution to settle the dispute. An obvious example of this is where an arbitrator makes a formal award to one of the parties after hearing evidence from both parties.

The Joint Research Centre presented the results from the draft study report, both from the legal and technological perspectives, based on a survey and characterisation of existing systems and planned initiatives in the EU, US and Canada. The legal perspective on cross-border out-of-court dispute settlement was approached from the distinguishing factors between arbitration, mediation, ombudsman/consumer complaint board schemes and the existing legal frameworks. Main issues concerning cross-border dispute settlement systems included: set of rules applicable to cross-border disputes, the recognition of the settlement and its enforceability in a different country. The technological perspective was approached from the minimum quality guarantees, from an identification of future trends in cross-border dispute settlement including the changing nature of disputes, integration of existing national or sectoral schemes in a distributed architecture, integration with codes and trust seals, and how these trends challenge technical requirements for on-line dispute settlement systems. Technical issues include: accessibility, management of the process, safeguarding rights such as privacy and confidentiality. These issues together with possible options for follow up activities were presented to help organise the views and structure of workshop presentations and discussions. An elaborated characterisation of challenges will be provided in the final JRC study report to be made available after the workshop.

Subsequently, a number of existing initiatives and projects were presented and discussed at the Workshop, involving a range of countries, partners and approaches. These included "e-Resolution" (Canada), "BBB-Online" (USA and Canada), "IRIS mediation" (France), Eurochambres (Association of European Chambers of Commerce), FEDMA (Federation of European Direct Marketing Associations) and EASA (European Advertising Standards Alliance), Visa

¹⁹ (http://europa.eu.int/comm/information_society/ist/index_en.htm)

²⁰ (<http://www.ispo.cec.be/tentelecom>)

²¹ http://www.ita.doc.gov/ita_home/adfrfn.htm

International, Barclays Bank PLC, “WebTrader” (EU). Individual workshop presentations can be downloaded from the web site.²²

Diana Wallis, Member of the European Parliament and rapporteur for the draft Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, pointed out that whilst it was important to ensure that a balanced solution was found when revising the legal framework, the low value of most consumer transactions on the Internet would mean that cheaper, quicker and easy-to-use alternative solutions, in particular online dispute settlement systems, will be the preferred solution for consumers and businesses alike. Such solutions should not only be adapted to the needs of the EU environment but open to global electronic commerce.

Workshop summary

This chapter provides a synthesis of the main points raised in the workshop discussions.

The phrase ‘E-Confidence’, was coined by Eurochambres at the workshop to signify the establishment of confidence in electronic commerce. FEDMA used the term “ring of confidence” to signify a similar concept. They both claimed that consumer confidence can be achieved by a number of complementary mechanisms. During the workshop, the presentations given in session 6 (on-line system initiatives) provided examples of the differing types of interconnected mechanisms that would support E-Confidence: codes of conduct, trust seals (e.g. BBBOnline, Webtrader), guarantee schemes (e.g. charge-back mechanism presented by VISA) and out of court dispute resolution schemes. From the different presentations made during the workshop a number of functional links between the E-Confidence mechanisms could be identified. Trust seals, for example, could be used to illustrate that the organisation displaying the seal complies with a certain code of conduct; and that codes of conduct imply the use of particular redress mechanisms in cases of dispute.

In the area of out-of-court dispute resolution schemes, FEDMA, BBBOnline and Diana Wallis, MEP suggested by that for practical reasons it is desirable to envisage a levelled “hierarchical” approach to resolving consumer complaints and disputes. In these levels a number of complementary consumer redress mechanisms are provided. These range from:

- complaint resolution mechanisms which can be organised internally by the business concerned or by complaints boards, call centres etc.;
- negotiations facilitated by third parties (e.g., mediation process provided by IRIS, based on consent of both parties and without binding decisions);
- to the more formal proceedings for resolving disputes that involve third party decision makers (e.g. arbitration provided by e-Resolution).

The lighter complaint resolution mechanisms potentially play an important role in handling complaints before resorting to the more formal dispute resolution proceedings. When provided in an easy to use and accessible way, FEDMA alleged that over 90% of the complaints could be resolved in this way.

In particular the more formal procedures involving third party decision-making such as arbitration, require an appropriate legal basis or rules to ensure fairness between consumer and merchant, equity and balanced safeguards for the parties (BBBOnline, Eurochambres, Barclays). Barclays pointed out that the

²² <http://dsa-isis.jrc.it/ADR/presentations.html>

legal basis for an alternative dispute resolution should not simulate a traditional judicial system; in this case it would stop being an alternative system; such a system when based on contractual agreement, should however allow the consumer to have recourse to the courts if needed (Barclays).

There are two important issues to give consumers and enterprises more confidence in cross-border dispute settlement that need to be kept distinct: the first relates to the problem of determining jurisdiction, that is to say the allocation of the power to the body in charge of the settlement. The second issues, also mentioned by Webtrader, concerns the issue of the determination of the rules and laws according to which the settlement will be achieved. These issues are to be kept distinct and it is important to work on both these issues (Mrs Kessedjian, The Hague Conference on private international law).

Another important issue from the legal perspective is related to the enforcement of the settlement (Barclays, BBBOnline). Enforcement in court would require the legal recognition of the alternative dispute settlement procedures (BBBOnline). Alternative approaches to enforce decisions by means of sanctions include moral pressure, withdrawal of trust seal, public reporting, referral (Barclays, BBBOnline, EASA).

Mrs Kessedjian stressed the need for globally acceptable rules by building upon and using, as much as possible, existing legal frameworks and codes. For instance, the use of international legal instruments already in place to regulate the recognition and enforcement of foreign arbitral awards (e.g. New York Convention). EASA gave the example of the ICC guidelines on advertising and marketing on the Internet for the drawing up of self-regulatory codes.

A number of important technological challenges were also discussed. It is crucial that technical means for on-line cross-border consumer redress schemes facilitate their accessibility and useability (BBBOnline, Eurochambres). E-Resolution claimed that the rapid deployment of on-line systems is crucial for resolving disputes in the new e-commerce environment. The advantages of online vis-à-vis off-line systems include: an easy and centralised management of cases, a fast way to submit disputes and to conduct the settlement procedures, and finally, very likely the only way to resolve disputes related to e-commerce transactions in an effective manner.

More specific technical requirements discussed include:

- Visibility (BBBOnline, EASA): This implies public visibility and guidance of the consumer in a transparent way to the apposite scheme. It is important to avoid confusion for the users related to the eventual proliferation of competing schemes.
 - Availability and timeliness (BBBOnline, Webtrader): A good response is required to meet expectations under Internet time frames.
 - Affordability was mentioned by the majority of speakers. Cost for the consumer should be zero or low related to the value of the transaction. Funding could be based on one or a combination of small flat fee, levy on service providers, state funding.
 - Language (Eurochambres, Webtrader): For instance, complaint submission systems could be linked to automatic translation facilities (FEDMA).
 - Interoperability (Eurochambres): Reconciling differences in the various existing systems.
 - Scalability (BBBOnline, Eurochambres, E-Resolution): The volume of disputes is expected to rise, in particular when easy accessible on-line
-

systems will be made available. Systems should also be adaptable to handle on-line as well as off-line disputes.

- Finality (BBBOnline): The process needs to be predictable and should eventually provide results.
- Privacy and authentication (IRIS), confidentiality (Barclays), identification of origin of problems implying proper establishment of the identity of parties (EASA), and integrity of the process (e-Resolution).

Cross-border out-of-court dispute settlement initiatives are currently being set up in the EU and elsewhere. Participants at the workshop identified a need for co-ordination. For example, Eurochambres identified the need for a contact point for information on Commission activities in this area and the need for collaborative research. BBBOnline stated that there is a need for alliances and relationships to foster global co-operation and suggested that Governments should adopt principles that complement private sector codes and establish flexible standards for ADR. The US FTC suggested a need for a public forum.

Conclusions

As co-organisers of the workshop with the JRC, Mr Eckert and Mr Fenoulhet (EC DG INFSO) drew the following conclusions:

- Knowledge and experience should continue to be shared in an efficient way at EU and international levels after the workshop. They hoped that this would contribute to a quicker resolution of the diverse problems facing the effective deployment of on-line out of court dispute settlement systems not only at a European level, but at a global level as well.
- They suggested that the Commission had a role to play in assisting in the co-ordination between the different initiatives. In response to a number of points raised by the participants (i.e. need for co-ordination, information exchange, possible work on developing basic criteria for online ADR systems), Mr Eckert and Mr Fenoulhet proposed that the Commission could establish a website with the working title of "E-CONFIDENCE FORUM". Initial ideas for the forum were:
 - To provide a one-stop shop or "portal" for information exchange on e-confidence initiatives, best practices, and Commission activities, in the area of "e-confidence" and particularly in out-of-court dispute settlement systems;
 - To promote co-ordination and co-operation between different players (consumers and the private sector) and initiatives at both EU and international levels).

Follow-up

This report and the JRC Study Report will be published on the study web site²³ and distributed to all workshop participants. All interested parties will be encouraged to comment. Every effort will be taken to ensure the reports secure an international reception.

Workshop agenda

08.30 - 09.00 Registration

Session 1 Workshop opening

²³ <http://dsa-isis.jrc.it/ADR>

09.00 - 09.05 Welcome: David Wilkinson (JRC), Detlef Eckert (DG INFSO)

09.05 - 09.20 Opening Address: the EU policy perspective: Erkki Liikanen, EC, Commissioner for Enterprise and Information Society.

09.20 - 09.25 IST and TEN Telecom programmes: Michel Roy (DG INFSO)

Session 2 Workshop objectives

09.25 - 09.35 Workshop objectives and agenda: Marc Wilikens (JRC)

Session 3 Generic principles

09.35 - 09.50 Recommendations on the principles applicable to out-of-court schemes: Mario Tenreiro (EC)

Session 4 Presentation of US Government initiative

09.50 - 10.00 DOC-FTC workshop announcement: Michael Donohue (FTC), Kate Rodriguez (DOC)

Session 5 Presentation of the initial draft study results

10.00 - 10.50 JRC draft study report presentation: Arnold Vahrenwald (JRC), Marc Wilikens (JRC)

10.50 - 11.10 Coffee

Session 6 On Line System Initiatives

11.10 - 11.30 e-Resolution: Karim Benyekhlef

11.30 - 11.50 BBB online: Russell T. Bodoff

11.50 - 12.10 IRIS mediation: Meryem Marzouki

12.10 - 12.30 Chambers of Commerce: Paul Skehan (EuroChambres)

12.30 - 13.00 Direct Marketing / Advertising: Alastair Tempest (FEDMA), Oliver Gray (EASA)

13.00 - 14.00 Lunch

14.00 - 14.20 Credit card industry: Peter MOLLER JENSEN (VISA International)

14.20 - 14.40 Financial Sector: Bill Eldridge (Barclays Bank Plc)

14.40 - 15.00 Web Trader: Chris Van Den Hole (test achats / test aankoop)

15.00 - 15.20 Discussion

Session 7 The European Parliament policy perspective

15.20 - 15.40 Report from the EP JURI Committee: Diana Wallis, MEP

15.40 - 16.00 coffee

Session 8 Discussion on the way forward

16.00 - 16.30 Consolidating the deployment challenges

16.30 - 17.00 Follow up activities to accelerate deployment of cross border projects in the European Union.

8 Annex 4: Contributors to this project

Numerous people contributed to this report by means of written comments, interviews and presentations done at the workshop held on 21 March 2000 in Brussels.

Andrea Servida, Michel Roy: DG INFSO

Tim Fenoulhet, Detlef Eckert: DG INFSO

Anne Troye: DG INFSO

Petra Spring-Reimann: DG MARKT

Giles Buckenham: DG SANCO

Maria Perogianni: DG ENTERPRISE

Mario Tenreiro: DG JAI

Diana Wallis: MEP

Vito Giannella, Tiziana Pompei, Sabrina Diella, Roberto Frisari:
UnionCamere/InfoCamere

Stefano Azzali: Milan Chamber of Commerce

Paul Skehan: Eurochambres

Karim Benyekhlef, Robert Cassius de Linval: e-Resolution

Axel Edling: Swedish Consumer Ombudsman

Ulf Franke, Anette Magnusson: Stockholm Chamber of Commerce

Hanns Glatz, Contanze Picking: GBDe / DaimlerChrysler

Oliver Gray: European Advertising Standards Alliance (EASA)

Peter Moller Jensen: Visa International

Ursula Pacht: BEUC

Alistair Tempest: Federation of Direct marketing (FEDMA)

Jean-Marc Noel: IMPACT / Trustedshops

Chris Van den Hole, Hans De Coninck: Belgische Verbruikersunie -Test-
Aankoop/Test-Achats

Bill Eldridge, Malcolm Levitt: Barclays Bank Plc

Catherine Kessedjian: The Hague Conference on Private International Law

Anne Salaun: Universite de Namur - CRID

Jarle Hulaas: CUI-University of Geneva

Sacha Polverini: European Mortgage Federation

Michael Donohue (US-FTC)

Kate Rodriguez (US-DOC)

Rusell T. Bodoff (BBB Online)

Meryem Marzouki (IRIS mediation)
