

## Online Dispute Resolution: Consumer Redress in a Global Market Place

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### A. Introduction<sup>1</sup>

Online dispute resolution (“ODR”) can be conceived as a means to achieve some of the most powerful legal ideals of the Western legal tradition.<sup>2</sup> Among these are:

(1) *Legal Certainty*: In making individual plans, decisions, and choices everyone is entitled to know what the law is in advance. Therefore, laws shall be public, written in everyday language, and shall not be changed too often. The application of laws shall be a simple operation (legal syllogism) so that citizens do not need attorneys, and judges are just *la bouche de la loi* (Montesquieu).

(2) *Access to Justice*: Everyone involved in a dispute shall be entitled to an easily accessible redress mechanism that provides for a timely resolution and effective remedies at reasonable cost. This principle received the status of a human right<sup>3</sup> when states acquired a monopoly in the legitimate use of force. For in the social contract people transferred their natural right to (violent) self-help only in return for the state’s guarantee to provide for mandatory dispute resolution mechanisms.

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<sup>2</sup> See, for the use of this term BERMAN, LAW AND REVOLUTION THE FORMATION OF THE WESTERN LEGAL TRADITION, (1983).

<sup>3</sup> Article 6 para. 1 of the European Convention for the Protection of Human Rights reads: “In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly ...”

Of course, these ideals were never fully accomplished by any given legal system. However, as ideals do shine most brightly through their negation, frustration, or failure, it is specifically the fact of their non-realization that makes them such powerful drivers of human conduct. It so happened that the advent of modern information and communications technologies (ICT) instantly fuelled dreams of new ways to enhance the achievement of the above quoted legal ideals. As early as in the 1960ies, scholars embarked on a new discipline called *legal informatics*, where the guiding research idea was to replace judges by computers as the new “mouth of law” or, less ambitiously, to produce computerized expert systems in order to provide laymen with easy-to-use legal services at low cost.<sup>4</sup> While these efforts were not rewarded with much success, except for a number of new law faculty chairs dedicated to the topic, the Internet as a global communications network in the mid 1990s quickly became regarded as offering a multitude of opportunities for making legal services ubiquitous by bringing them online.<sup>5</sup>

The more substantive idea of law being calculable (i.e. legal certainty) and the procedural principle of effective dispute resolution (i.e. access to justice) were merged, when scholars suggested that ODR involves more than simply integrating e-mail communications, a password protected webpage, or chat rooms and video-streaming to traditional dispute resolution mechanisms. The first book published on the topic in 2000 indeed suggested that technology comes in as a *fourth party* in ODR, thereby integrating the earlier ideas of computer expert systems making law calculable for laymen with the idea of easy Internet access to justice.<sup>6</sup>

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<sup>4</sup> See HAFT, NUTZANWENDUNGEN KYBERNETISCHER SYSTEME IM RECHT, (1968); KILIAN, JURISTISCHE ENTSCHEIDUNG UND ELEKTRONISCHE DATENVERARBEITUNG - METHODENORIENTIERTE VORSTUDIE, (1974); FIEDLER, RECHTSINFORMATIK UND JURISTISCHE TRADITION, in: FS WELZEL 1974, 167.; COMPUTERGESTÜTZTE JURISTISCHE EXPERTENSYSTEME, (Erdmann/Fiedler/Haft/Traunmüller eds., 1986)

<sup>5</sup> Post, *Anarchy, State and the Internet: An Essay on Law Making in Cyberspace*, JOURNAL OF ONLINE LAW (J. ONLINE L.) art. 3 (1995).; Karamon, *ADR on the Internet*, 11 OHIO STATE JOURNAL ON DISPUTE RESOLUTION (OHIO ST. J. ON DISP. RESOL.) 537 (1996).; Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFFALO LAW REVIEW 975 (1997).; Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 1305.; Almaguer/Baggott, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711 (1998).; Bordone, *Electronic Online Dispute Resolution: A Systems Approach - Potential, Problems, and a Proposal*, 3 HARVARD NEGOTIATION LAW REVIEW 175 (1998).; Perritt, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675 (2000).

<sup>6</sup> KATSH/RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 93 (2001). ; Lodder/Thiessen, *THE ROLE OF ARTIFICIAL INTELLIGENCE IN ONLINE DISPUTE RESOLUTION*, in: ONLINE DISPUTE RESOLUTION (ODR), PAPERS AND PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR (Katsh/Choi eds., 2003) available at [http://www.odr.info/unece2003/pdf/lodder\\_thiessen.pdf](http://www.odr.info/unece2003/pdf/lodder_thiessen.pdf).

While many dreams on the potential role of ODR in realising our legal ideals were disseminated, a lot of concerns were raised as well. It was pointed out, for instance, that with respect to the so-called “digital-divide” mostly the educated middle-classes in OECD-countries were likely to profit from ODR services.<sup>7</sup> And in the context of the struggle of U.S.-based consumer activists against the practice of pre-dispute mandatory arbitration clauses in adhesion contracts it was envisioned, that businesses by means of “click-wrap-agreements” might enforce a private dispute resolution network on consumers in order to waive goodbye to consumers substantive and procedural statutory rights.<sup>8</sup> Thus, it remains to be decided, if the future practice of ODR will be a dream-come-true or a nightmare.<sup>9</sup>

As suggested by my subtitle, in the following I intend to deal with ODR in a very specific context, i.e. as a means of providing effective redress and thereby enhancing mutual trust and confidence in cross-border business to consumer electronic commerce (b2c-e-commerce). I shall start with a definition of ODR (1), proceed with two examples of successfully implemented ODR-systems (2), in order to present the idea of a seamless ODR-network for global consumers, which is about to be realised by cooperation of different national and regional initiatives under the umbrella of the Global Trustmark Alliance (3).

## B. Defining Online Dispute Resolution (ODR)

Private law, first of all, is concerned with the civilized (i.e. peaceful) resolution of disputes between private parties, and, secondly, with the prevention of such conflicts through the provision of legal certainty. National legal systems fulfil the former function by offering plaintiffs to litigate disputes before state courts which exercise mandatory jurisdiction over defendants, and the latter by making the litigation process public, thus allowing for the proliferation of precedent, as well as by the enactment of codifications of rules of law.

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<sup>7</sup> See, Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 *FORDHAM INT'L L.J.* 985, 990-995 (2001).

<sup>8</sup> See, Gibbons, *Creating a Market for Justice. A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 *NW. J. INT'L L. & BUS.* 1 (2003); Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 *LAW & CONTEMPORARY PROBLEMS* 237 (2004).

<sup>9</sup> Bates, *Consumer's Dream Or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes*, 27 *FORDHAM INT'L L.J.* 823 (2004); more generally Goodman, *The Pros and Cons of online dispute resolution: an assessment of cyber-mediation websites*, *Duke Law & Technology Review* 0004 (2003) available at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html>.

Regarding the dispute resolution function of private law, there are a variety of functional equivalents to litigation available, which are collectively referred to as alternative dispute resolution (ADR). In modern societies different means of dispute resolution form a planetary system of justice, as Takeshi Kojima has put it so aptly: the litigation process is at the centre of the galaxy, circled by formal arbitration, followed by the more informal conciliation and mediation processes, and, finally, informal party negotiation at the outer periphery. In this picture the forces of gravity determine the level of interdependence and mutual influence between the elements of the system, with cultural bias leading to a focus on the centre in the Western legal tradition, and a preference for the periphery in East Asia respectively.<sup>10</sup>

It is worth mentioning that in this galaxy the decrease in formality involved is directly related to an increase in the presence of consent. While in the practice of negotiation and mediation party consent is the result of the procedure (substantive consent), in conciliation and arbitration it is at least a pre-condition of the process (procedural consent). In contrast, litigation is based on mandatory jurisdiction and party consent is completely absent except for its most fictitious form, i.e. the social contract (societal consent).<sup>11</sup>

Having thus defined the dispute resolution galaxy, adding the term *online* may specify the meaning in two directions:<sup>12</sup> On the one hand, ODR relates to the resolution of disputes that result from online conduct, i.e. from communications and transactions which come about through the use of the Internet Domain name disputes are a prominent example as are disputes related to e-commerce. On the other hand, ODR relates to the use of online communication technology in the resolution process, even if the dispute itself has an offline origin. The provision of alternative dispute resolution (ADR) services on the Internet has become quite popular during the last decade. A 2004 survey accounted for 115 ODR providers

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<sup>10</sup> Kojima, *A Planetary System of Justice*, in: CIVIL PROCEDURE AND ADR IN JAPAN, 10 (2004) ; Kojima, *Dispute Resolution Systems and Legal Culture* in: CIVIL PROCEDURE AND ADR IN JAPAN, 292 (2004).

<sup>11</sup> For the importance of party autonomy and consent in the litigation process see Wagner, *PROZESSVERTRÄGE. PRIVATAUTONOMIE IM VERFAHRENSRECHT*, (1998).

<sup>12</sup> For these two potential meanings of ODR see Hörnle, *Disputes Solved in Cyberspace and the Rule of Law*, 2001 (2) JOURNAL OF INFORMATION LAW AND TECHNOLOGY (JILT) available at [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001\\_2/hornle/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/hornle/); Teitz, *supra* note 7, at 990.; Schultz, 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust', 6 NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY (2004) 71.; PONTE/CAVENAGH, *CYBERJUSTICE: ONLINE DISPUTE RESOLUTION*, (2004); KAUFMANN-KOHLER/SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* (2004).

worldwide.<sup>13</sup> While ADR with the use of online technology has itself become a part of e-commerce (e-ADR), there are also governmental projects promoting the use of online technology in litigation.<sup>14</sup> For the time being, however, the most successful ODR providers do operate at the intersection of the described implications of the term, i.e. where *online disputes are resolved online*.

### C. Successful ODR-Systems

One of two successful examples to be discussed in this section is the WIPO Arbitration and Mediation Centre. This is the dominant dispute resolution service provider registered with the Internet Corporation for Assigned Names and Numbers (ICANN) under its Uniform Domain Name Dispute Resolution Policy (UDRP)<sup>15</sup> and which since 1999 has resolved almost 9000 domain name disputes online.<sup>16</sup> The second example is SquareTrade, an online negotiation and mediation service provider which since 2000 has handled over 2 million disputes across 120 countries in 5 languages, predominantly between buyers and sellers at the online auction and market place eBay.<sup>17</sup>

So how did this success come about? When offering ODR as a service at the market for dispute resolution, it is sensible to direct that offer to a sector where demand is very high and competitors perform quite badly. In both domain name disputes and eBay seller-buyer disputes the performance of litigation in state courts is very poor. Domain name disputes involve very difficult questions of multi-jurisdictional trademark law and often it is impossible to serve documents on cybersquatters, i.e. people registering trademarks, celebrity names, etc. as domain names in order to

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<sup>13</sup> Conley Tyler, *115 and Counting: The State of ODR 2004*, in: PROCEEDINGS OF THE THIRD ANNUAL FORUM ON ONLINE DISPUTE RESOLUTION, (Melissa Conley Tyler, Ethan Katsh, and Daewon Choi eds., 2004) available at <http://www.odr.info/unforum2004/ConleyTyler.htm>.

<sup>14</sup> See Tamberlin, *Online Dispute Resolution and the Courts*, in: PROCEEDINGS OF THE THIRD ANNUAL FORUM ON ONLINE DISPUTE RESOLUTION, (Melissa Conley Tyler, Ethan Katsh, and Daewon Choi eds., 2004) available at <http://www.odr.info/unforum2004/tamberlin.htm>: on a pilot project in Australia; On the pilot project at the German "Bundesgerichtshof" see the presentation available at [http://www.bundesgerichtshof.de/docs/bgh\\_erv\\_presentation\\_2002-07-26.pdf](http://www.bundesgerichtshof.de/docs/bgh_erv_presentation_2002-07-26.pdf); within this project a XML-based software for standardized exchange of data was developed, which is called "XJustiz".

<sup>15</sup> Available at <http://www.icann.org/udrp/udrp.htm>.

<sup>16</sup> As of July 24, 2006, see: <http://arbitrator.wipo.int/domains/statistics/cumulative/results.html>.

<sup>17</sup> As of July 24, 2006, see: [www.squaretrade.com](http://www.squaretrade.com) (About us).

market them or otherwise use them in an illegitimate way. The UDRP in turn is enforced on domain name holders by virtue of ICANN's monopoly power over the registration process in generic top-level domains (.com, .org, etc.). The UDRP is part of the adhesion contract domain name holders submit to when registering a domain name. A complaint by a trademark holder is deemed to be served to the holder of the domain in dispute, if it is sent to his registered e-mail address. If the holder of the domain name fails to respond to a complaint, a default judgement will be released. In addition, time limits are very tight and the cost of the procedure is quite low. All together, the ODR-service offered by WIPO to trademark holders under the UDRP is very competitive when compared to the alternatives.<sup>18</sup>

In the latter case, i.e. for eBay seller-buyer disputes, litigation proves unattractive even where no cross-border situation is involved, because the average amount at dispute is very low and court litigation, thus, may not pay-off. The ODR-service of SquareTrade in turn is very attractive, since it is integrated into the eBay platform on the basis of a cooperation agreement. The business model of eBay, the world's premier marketplace for online auctions and sales between consumers and small and middle-sized enterprises (SMEs), is based on commissions per sale. In order to attract a maximum of sellers and buyers to the marketplace, eBay is engaged in making customers comfortable in buying and selling at eBay through a variety of trust building measures like the mutual rating system which allows for online reputation, identity verification, secure online payment services like Paypal or Escrow, insurance, and last but not least the ODR-service of SquareTrade.<sup>19</sup>

The SquareTrade ODR-process has two layers.<sup>20</sup> A complaint may be filed at the SquareTrade homepage, where the complainant is guided through an automated multiple choice questionnaire, which is based on the experience of SquareTrade with typical eBay buyer-seller disputes like "item not paid", "item not delivered",

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<sup>18</sup> See, Calliess, *GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE*, IUS PRIVATUM 103, (2006), ch. 6, 262-278, also available at [http://www.jura.uni-frankfurt.de/ifawz1/teubner/dokumente/Calliess\\_Globale\\_Zivilregimes.pdf](http://www.jura.uni-frankfurt.de/ifawz1/teubner/dokumente/Calliess_Globale_Zivilregimes.pdf); see as well Helfer, *Whither the UDRP: Autonomous, Americanized or Cosmopolitan?*, 12 *CARDOZO JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* (CARDOZO J. INT'L & COMP. L.) 493 (2004); Brannigan, *The UDRP: How Do You Spell Success?*, 5 *DIGITAL TECHNOLOGY LAW JOURNAL* (2004); Dinwoodie, *Detaching Trademark Law From The Nation-State*, 41 *Houston Law Review* 885 (2004).

<sup>19</sup> See overview at <http://pages.ebay.com/services/>; Baron, *Private Ordering on the Internet: The EBAY Community of Traders*, 4 *BUSINESS AND POLITICS* (2002), available at <http://www.bepress.com/bap/vol4/iss3/art1>; Schultz, *eBay: un système juridique en formation ?*, 22 *REVUE DU DROIT DES TECHNOLOGIES ET DE L'INFORMATION*, 27-51 (2005).

<sup>20</sup> For the following see, Abernethy, *Building Large-Scale Online Dispute Resolution & Trustmark Systems*, in: *ONLINE DISPUTE RESOLUTION (ODR), PAPERS AND PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR* (Katsh/Choi eds., .2003) available at <http://www.odr.info/unece2003/pdf/Abernethy.pdf>.

“item defective” or “item substantially not as described”. The defendant then is asked by e-mail to participate by responding again by means of an automated multiple choice questionnaire. In the negotiation phase the process is fully automated, parties are guided by multiple choice suggestions of how their dispute might be solved, which suggestions are customized on the basis of the parties answers to the questionnaires. This negotiation service is subsidized by eBay on the basis of the cooperation agreement and, thus, can be offered free of charge to the parties, which in turn are guided to the process through hyperlinks from the eBay homepage. Most disputes are resolved in the negotiation phase. Only if parties cannot agree, each of them may ask for a mediator, which will charge a mere \$ 20. The mediator can easily access the dispute’s history by clicking through the electronic case file and is thus put, at a very early stage, in an ideal situation for helping parties to find a solution. Only upon the request by both parties, he will make a non-binding recommendation. In total, 80 per cent of the cases are resolved either through negotiation or mediation. In addition, SquareTrade offers a trustmark for sellers who on the basis of a code of conduct pre-commit to solve problems through the SquareTrade procedure, promise to act in good faith in order to reach a compromise, and to obey by any agreement found. SquareTrade says that in 98 per cent of resolved cases parties actually do obey. This may not only be due to the wide use of the trustmark, which might be withdrawn in a case of non-obedience, but as well because of the integration of the service in the eBay reputation system. When one party does not respond to a claim, obstructs the process, or fails to follow an agreed solution, the other party may give negative feedback on these grounds.

When comparing the WIPO-UDRP and the SquareTrade examples, what is striking is that both ODR-service providers do not only make a very attractive offer for easy accessible, quick, effective, and low-cost dispute resolution, but have succeeded as well in integrating their offer to the primary markets for domain name registration and e-commerce, where online disputes evolve. This integration is brought about in both cases by cooperation agreements with the primary market makers (ICANN, eBay), and by creating *socio-legal bonds* for potential dispute parties to commit to the process.<sup>21</sup> The ICANN UDRP administrative procedure is mandatory to domain name holders, although results are not binding: Panel decisions are enforced by domain name registrars only, if the respondent has not filed an appeal to a

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<sup>21</sup> The term “legal bond” is being used in a very broad sense, including not only contractual design but also all kinds of “private ordering”, see in more detail Mifsud Bonnici/de Vey Mestdagh, *On the use of legal measures to entice participation in Online Dispute Resolution systems for the settlement of online-related disputes*, in: SECOND INTERNATIONAL ODR WORKSHOP, 31-42 (Zelevnikow/Lodder eds., 2005), available at <http://odrworkshop.info/papers2005/odrworkshop2005Bol.pdf>.

competent court of jurisdiction within a time period of 10 days.<sup>22</sup> The SquareTrade mediation process is mandatory to eBay-sellers, which committed to the SquareTrade trustmark scheme in order to give potential customers an incentive to enter into a transaction with unknown SMEs in the first place. In addition, the commitment of parties to the process is streamlined by the potential repercussions with the eBay feedback system.

The importance of pre-dispute commitments to any ADR-system is highlighted by the following statement of the General Counsel of the American Arbitration Association: "About 95 percent of the arbitrations that come to the Association result from pre-dispute arbitration clauses. Our 75 years of experience indicates that at the time a dispute arises people can't agree on anything. ... So the choice ... is not pre-dispute or post-dispute, it is pre-dispute or litigation, because our experience shows that post-dispute arbitration is something that people won't agree to."<sup>23</sup> However, the examples of the ICANN UDRP and SquareTrade show that the creation of socio-legal bonds does not necessarily imply that parties have to commit to pre-dispute mandatory arbitration clauses, but that there are functional equivalents.

#### **D. A Seamless Network of Trust for Cross-border B2C-E-Commerce**

As early as in 1999 the OECD released its "Guidelines for Consumer Protection in the Context of Electronic Commerce," which among others call for businesses, consumer representatives and governments to work together to develop fair, effective and transparent self-regulatory procedures, including alternative dispute resolution mechanisms, to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions.<sup>24</sup> The guiding idea behind this call for self-regulation was that the advent of the Internet enables cross-border b2c-e-commerce while multi-jurisdictional litigation involving very complicated questions of conflict of contract laws and applicable consumer protection regimes is not suitable for the relatively small

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<sup>22</sup> For details see Calliess, *supra*, note 18, 262 ff.

<sup>23</sup> See Peterson, General Counsel of the American Arbitration Association, June 2000 Statement at the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary of the House of Representatives of the 106th Congress on the draft "Fairness and Voluntary Arbitration Act" H.R. 534 available at [http://commdocs.house.gov/committees/judiciary/hju65871.000/hju65871\\_0.htm](http://commdocs.house.gov/committees/judiciary/hju65871.000/hju65871_0.htm); see also, Abernethy, *supra* note 20 at 8.

<sup>24</sup> OECD, Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) available at <http://www.oecd.org/dataoecd/18/13/34023235.pdf>.

values at stake. In order to promote global commerce by enhancing consumer confidence, it was suggested that businesses and consumer associations work together in implementing trustmark schemes, which on the basis of a code of conduct would pre-screen the reliability of online-shops, and would help consumers in case of problems through the provision of ODR services.<sup>25</sup>

In the beginning, such self-regulatory systems were introduced mostly at the national level. With about 20.000 webshop subscriptions the “BBBOnLine Reliability Seal”, an initiative of the American and Canadian Better Business Bureaus, is the most successful program.<sup>26</sup> In Europe the private enterprise “Trusted Shops”, with more than 1500 participating online-shops, is the leading trustmark provider.<sup>27</sup> In order to fight consumer deception through a proliferation of trustmark-schemes, in England, a “trustmark of trustmark” called TrustUK was initiated by cooperation of government, business and consumer associations. TrustUK does not issue its mark directly to internet shops, but licenses other trustmark providers to use the mark, if the scheme is reliable and conforms with the minimum requirements of the TrustUK code of conduct.<sup>28</sup>

In Japan, the Next Generation Electronic Commerce Promotion Council (ECOM), a business initiative founded in 2000,<sup>29</sup> and the Japan Direct Marketing Association (JADMA)<sup>30</sup> have both released Guidelines on electronic commerce or electronic direct marketing, respectively.<sup>31</sup> On this basis in 2000 the JADMA, in cooperation with the Japan Chamber of Commerce and Industry (JCCI),<sup>32</sup> co-founded an Online Seal program called “Online Shopping Trust”<sup>33</sup> which, however, has not proven to be very successful. As of September 2004 the number of accredited sites was about

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<sup>25</sup> See the very early analysis of Pichler, *Trust and Reliance - Enforcement and Compliance: Enhancing Consumer Confidence in the Electronic Marketplace*, JSM Thesis, Stanford 2000 available at <http://www.law.stanford.edu/library/biblio/rufus.pdf>; DE BRUIN, CONSUMER TRUST IN ELECTRONIC COMMERCE: TIME FOR BEST PRACTICE, (2002); Calliess, *supra* note 18 at. 7.

<sup>26</sup> See, <http://www.bbbonline.org/consumer>.

<sup>27</sup> As of July 24, 2006, see, <http://www.trustedshops.de/de/trustedshops/index.html>.

<sup>28</sup> See, [www.trustuk.org.uk](http://www.trustuk.org.uk); for a similar German version see: [www.internet-guetesiegel.de](http://www.internet-guetesiegel.de).

<sup>29</sup> See, <http://www.ecom.jp/en/index.html>.

<sup>30</sup> See, [http://www.jadma.org/e\\_page/index\\_e.shtml](http://www.jadma.org/e_page/index_e.shtml).

<sup>31</sup> The JADMA Guidelines available at [http://www.jadma.org/e\\_page/guide\\_1e.html](http://www.jadma.org/e_page/guide_1e.html).

<sup>32</sup> See, <http://www.jcci.or.jp/home-e.html>.

<sup>33</sup> See, <http://mark.cin.or.jp>.

640, making up only 1.3 % of the estimated 50.000 Japanese small and middle-sized online shops.<sup>34</sup>

In November 2001 the “ECOM Internet Shopping Dispute Consultation Office” (ECOM ADR) was founded as an ADR pilot project commissioned by the Ministry of Economy, Trade and Industry (METI) and operated by Next Generation Electronic Commerce Promotion Council of Japan (ECOM) to provide resolution services for disputes arising from Internet transactions.<sup>35</sup> With over USD 40 billion total revenue in 2003 Japan is the third biggest b2c-e-commerce market in the world after the USA and Europe. But, despite Japan's long-standing tradition in ADR, the ECOM ADR-project, which ceased its operations in March 2006, was the only Japanese ODR-system.<sup>36</sup> ECOM-ADR offered advice to consumers, and with the other party's consent, mediation or adjudication services for problems related to the internet in a b2c or c2c situation. Except for its informative webpage, the only online technology used was e-mail communication. As of July 2004 the total number of cases handled amounted to 1.894, where approximately 20 % involved a cross-border situation. In 80 % of the cases, advice was given to consumers, and in only 388 cases was ECOM ADR engaged in mediation (19 %) or adjudication (2 %). The problem was that only e-shops participating in the Japanese “Online Shopping Trust”-Seal run by JADMA and JCCI had committed themselves in advance to participate in the procedure. However, almost all of the complaints handled by ECOM ADR were against non-accredited e-shops, where 30 % of the complaints regarded non-delivery of goods or services paid for, including a lot of fraudulent cases which do not qualify for mediation anyway.<sup>37</sup>

The problem with the described trustmark-schemes and ODR-systems is that they predominantly work only on the domestic level. However, there are a variety of initiatives aimed at cross-border cooperation on the basis of common minimum standards laid down in codes of conduct. In 2003 JCCI, JADMA, and ECOM established the Asia Trustmark Alliance (ATA) with the Korea Institute for Electronic Commerce (KIEC), Commerce Trust Limited (CTL) in Singapore, and the Secure Online Shopping Association (SOSA) in Taiwan. Under the Alliance the four

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<sup>34</sup> See, Sawada, Building Trust in Japanese EC Market, 22 September 2004, Presentation Slides, available at <http://www.ecom.jp/adr/en/html/Outline%20of%20ECOM%20ADR%20Office.pdf>.

<sup>35</sup> See, <http://www.ecom.jp/adr/en/index.html> as well as the outline in Sawada (FN 34). As of March 2006, however, ECOM ADR ceased its operations.

<sup>36</sup> E.g. in the account of Conley Tyler, *supra* note 12, not a single one is headquartered in Japan, available at <http://www.odr.info/unforum2004/ConleyTyler.htm>; And on the webpage of ADRJapan only foreign ODR-projects are linked: <http://www.adr.gr.jp/adr.html>.

<sup>37</sup> See, Sawada, note 34.

countries will mutually recognize member countries' national trustmark programs and cooperate on cross-border consumer complaint handling.<sup>38</sup> At the same time Online Confidence (OC), an initiative of the Association of European Chambers of Commerce (Eurochambres), was founded in order to integrate self-regulatory approaches on the European level under the umbrella of the OC-trustmark seal. The ODR-website of OC has been online since 2003, but it is not yet operational.<sup>39</sup> The regional chambers in the EU Member States have obviously had problems in convincing businesses to join the program.

Moreover, in 2004, when the Global Trustmark Alliance Organizing Committee was formed, its purpose was to bring together the different self-regulatory initiatives from America (BBB-Online), Asia (ATA), and Europe (OC).<sup>40</sup> The GTA is a network facilitating cross-border cooperation between the participants on the basis of common legal and technical standards, ensuring the interoperability of ODR-systems, for example. GTA is about to market its own global trustmark on the basis of co-branding with the already existing regional schemes. With regard to global minimum standards for b2c-e-commerce the GTA is able to build not only on the above quoted OECD Guidelines, but also on the work since done under the auspices of the Global Business Dialogue on electronic commerce (GBDe).<sup>41</sup>

Especially in the area of dispute resolution, where procedural consumer protection law is at issue, three sets of guidelines were released by very reputed organisations, which contain principles of fairness for b2c-ODR-systems. These are the "Alternative Dispute Resolution Guidelines", an agreement reached between Consumers International and the GBDe in 2003,<sup>42</sup> as well as the "Best Practices for Online Dispute Resolution (ODR) in B2C and C2C transactions" of the International Chamber of Commerce,<sup>43</sup> and more generally the "Recommended Best Practices for Online Dispute Resolution Service Providers" released by the American Bar Association Task Force on E-Commerce and ADR in 2002.<sup>44</sup> In fact, these guidelines

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<sup>38</sup> See, <http://www.meti.go.jp/english/information/data/IT-policy/trust-mark.htm>.

<sup>39</sup> See, [www.onlineconfidence.org](http://www.onlineconfidence.org).

<sup>40</sup> For a list with links to members see, <http://www.globaltrustmarkalliance.org/members.asp>.

<sup>41</sup> See, <http://www.gbde.org/consumerconfidence.html>.

<sup>42</sup> Available at, <http://www.gbde.org/agreements/adagreement03.pdf>.

<sup>43</sup> [http://www.iccwbo.org/home/statements\\_rules/statements/2004/DISPUTES-rev.pdf](http://www.iccwbo.org/home/statements_rules/statements/2004/DISPUTES-rev.pdf).

<sup>44</sup> The ABA Best Practices are reprinted as an Annex to Calliess, *supra*, note 18, 445-455.

give evidence of a global consensus, which emerged beyond traditional international public law negotiations between states.<sup>45</sup>

The organizations involved in the GTA also intend to cooperate in the handling of cross-border disputes. A good example is the agreement on mutual cooperation in cross-border e-commerce complaints signed by Japan based ECOM ADR and the US Better Business Bureau in 2002, under which complaints from consumers in one country against an e-trader situated in the other country are exchanged and both organisations work together, if necessary assisting in language problems. As of October 2004, 45 complaints from Japanese consumers against US-based companies were forwarded from ECOM-ADR to BBB-Online, and 22 of these disputes had been settled. 12 disputes came to Japan in turn out of which only 2 could be settled, while the other cases involved fraud, where e.g. businesses turned out not to exist at all in Japan.<sup>46</sup> Although ECOM ADR ceased its operations in March 2006, the quite impressive resolution rate of BBB-Online may be taken as an outlook on how a seamless ODR-network for cross-border b2c-e-commerce might work in the future. Thus, similar cooperation agreements have been implemented between “BBBOnline” and trustmark providers from the United Kingdom, which jointly created a webpage for cross-border ADR,<sup>47</sup> and more recently with the Israel-based initiative Public Trust.<sup>48</sup>

### E. Global Justice: an Outlook

It is widely accepted that private law should facilitate trade by reducing transaction costs. This function of private law – rightly framed as a constitutional framework for trade – applies not only to domestic markets, but as well to global, border-less trade on the international level. Since the nationalization of private law, which came about with the rise of the nation state in 19<sup>th</sup> century, the guiding idea was that this function could be accomplished through the harmonization of national private laws by means of international treaties. However, the international organizations established for this task such as *The Hague Conference on International Private Law* (1893), *Unidroit* (1926), and *UNCITRAL* (1966) have not delivered the desired results. Market and legal developments continue to be out of synchrony. Even in light of further increases in international trade at the outset of the 21<sup>st</sup>

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<sup>45</sup> For details see, Calliess, *supra*, note 18, 347-362.

<sup>46</sup> See, Sawada, note 34.

<sup>47</sup> See, <http://www.crossborderadr.org/>.

<sup>48</sup> See, <http://www.bbb.org/alerts/article.asp?ID=658>.

Century, the recent negotiations on a *Convention on the Recognition and Enforcement of Judgments* failed in The Hague.<sup>49</sup> In addition, the impact of consumer protection norms on national contract laws since the late 1960s has been such, that choice of law as an important means to safeguard legal certainty in international transactions has become more difficult<sup>50</sup> to the degree of having become altogether impossible.<sup>51</sup> In this light, it might not be an exaggeration to state that the legal framework for international transactions over the past decades did not improve, but instead was deteriorated.

Where the legal system is not perceived to accommodate the needs of the market, private actors will resort to higher levels of private ordering.<sup>52</sup> The New Law Merchant created and applied in International Commercial Arbitration is a good example for such privatization of private law.<sup>53</sup> However, as mentioned above, the use of pre-dispute mandatory arbitration clauses continues to be heavily criticized in the context of business to consumer transactions.<sup>54</sup> In light of this critique, Japan for instance, on the occasion of adopting the UNCITRAL Model Law on international commercial arbitration in 2003, awarded consumers a right to unilaterally cancel pre-dispute arbitration agreements contained in a business to consumer contract.<sup>55</sup> The tendency of national legal systems to fight any

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<sup>49</sup> See only Calliess, *Value-added Norms, Local Litigation and Global Enforcement: why the Brussels-Philosophy failed in The Hague*, 5 GERMAN LAW JOURNAL (2004) available at <http://www.germanlawjournal.com/article.php?id=527>.

<sup>50</sup> The early European model of limitation of choice of law for consumer contracts in Art. 5 of the 1980 Rome Convention was recently copied by the USA in the revised Art. 1-301 of the Uniform Commercial Code (2001), and Japan is considering introducing a comparable "country of consumer law applies"-rule in the context of the current reform of the Horei (Law No. 10 of 1898).

<sup>51</sup> On 15 December 2005 the European Commission presented a proposal for a Regulation on the law applicable to contractual obligations (Rome I), where the reformed Art. 5 abolishes choice of law in consumer contracts completely: COM (2005) 650 final.

<sup>52</sup> See, Hadfield, *Privatizing Commercial Law*, 24 REGULATION 40 (2001); Bernstein, *Private Commercial Law in the Cotton Industry*, 99 MICHIGAN LAW REVIEW 1724 (2001); Aviram, *A Network Effects Analysis of Private Ordering*, (Berkeley Olin Program in Law & Economics, Working Paper 2003/80) with further references.

<sup>53</sup> See, Berger (ed.), *THE PRACTICE OF TRANSNATIONAL LAW* (2001); Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUROPEAN LAW JOURNAL 400 (2002).

<sup>54</sup> *Supra* notes 7 & 8.

<sup>55</sup> Art. 3 para. 2 of the Supplementary Provisions of the Arbitration Act (Law No. 138 of 2003); see Nakamura, *Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration*, JCAA NEWSLETTER, April 2004, at 5 available at <http://jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news17.pdf>. However, since Japan had not made a reservation to apply the 1958 New York Convention to commercial disputes only, foreign arbitral awards will continue to be recognised and enforced on consumers in Japan.

privatization of contract law where consumers are involved, thus, can effectively hinder the emergence of legal certainty in cross-border consumer markets.

It is against this background that ODR systems are seen as a promising alternative not only to international litigation but as well to mandatory arbitration in the context of cross-border consumer transactions. The above quoted ODR guidelines of the ABA, the ICC, and the GBDe envision a global network providing the consumer with easy access to a fair and effective dispute resolution procedure at low cost. Each of these guidelines state that such ODR procedures shall not be mandatory for consumers, and that they shall be transparent. Transparency can be reached, for example, by publishing information on the independence and impartiality of the system, and – at least statistical data – on the results of the procedure. In addition, it is recommended that ODR systems should proceed on the basis of codes of conduct and equity, instead of engaging in an ultimately cumbersome conflict of (consumer protection) laws.

In order to implement ODR in cross-border, consumer business, the self-regulatory initiatives united under the umbrella of the Global Trustmark Alliance should keep in mind, however, that ODR systems only work effectively in practice if they succeeded in integrating their services very closely into the primary markets, where goods and services are traded and conflicts evolve, and where socio-legal bonds are created, which ensure that conflict parties actually do participate in the procedure as well as obey to the results. Time will tell whether or not the envisioned transnational legal regime can not only satisfy market actors but also fulfil the promises once given by the first consumer protection laws, i.e. to provide for fairness in business to consumer transactions. However, when compared to the disappointing results of more than hundred years of harmonization endeavours with respect to the private laws of the nation states, the idea of implementing a truly transnational regime for cross-border consumer contracts based on private codes and decisions in equity within a global ODR system does seem to be quite promising.