

# **Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Market Place**

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Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, NW  
Washington, D. C. 20580

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## Introductory Comments

As Managing Director of Web Dispute Resolutions I would like to thank the Secretary of Commerce and the Federal Trade Commission for this opportunity to comment on the need to develop partnerships between industry and consumer advocates to expand on the redress mechanisms for online consumers.

Since 1998, there has been growing interest in developing, or employing, alternative dispute resolution (ADR) to protect consumers in the global electronic market place. This interest has come from the Organization for Economic Cooperation and Development, the President, and numerous private sector groups. These groups include the Global Business Dialogue on Electronic Commerce, Internet Law and Politics Forum, Trans-Atlantic Business Dialogue, and Trans-Atlantic Consumer Dialogue.

It has become increasingly apparent that there is a need for an open discussion of how alternative dispute resolution programs may contribute to fostering consumer confidence in e-commerce without creating an unnecessary burden on business. Furthermore, it has become increasingly clear that traditional methods of resolving commercial and consumer disputes, i. e. litigation, move too slowly to satisfy the pace and direction of e-commerce.

The electronic market place provides consumers and businesses with a 24-hour market place, with unprecedented choices. E-commerce provides businesses low cost access to an enormous customer base that is global. At the same time, this global market place offers new challenges. Because of the international scope consumers must have confidence that the goods and services offered in the online market place are fairly represented and that merchants, who may be a continent away, deliver on their commitments. Consumers must feel that they have fair and prompt redress for problems arising in the online market place.

Due to its global nature, the online market place poses unique difficulties for consumers and businesses. Online global challenges include language and cultural differences, as well as the inconvenience and expense that a consumer may incur when the merchant and

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consumer are thousands of miles apart. A consumer may face jurisdictional disputes, difficulties in determining applicable law and enforcement of judgements.

However, it is vital to encourage the growth of global e-commerce, and not to burden businesses that are frequently small or medium sized. It should also be remembered that in business to business transactions these same enterprises face the same hurdles. Business faces the dilemma and costs associated with determining which jurisdictions and laws apply to them. Obviously, complying with the laws of numerous jurisdictions and the vulnerability to litigation in multiple court systems will have a significant impact on the cost of doing business on line.

It then follows that to address the concerns of both the business community and consumers regarding online transactional dispute resolution, we must look to alternative methods. International forums have expressed interest in developing methods of alternative dispute resolution.

The Consumer Policy Committee of the OECD drafted a Guideline on Consumer Protection in the Context of Electronic Commerce. The Guidelines target the prevention of fraud, deceptive practices in e-commerce; providing the industry guidance on fair business practices, while emphasizing the need for governments, consumers and businesses to cooperate on a global scale.

The Guidelines contain a section on Dispute Resolution and Redress providing that "consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden." To accomplish this lofty objective the document suggests that consumer representatives and business establish mechanisms to address consumer complaints and assist consumers in resolving disputes.

There have been several private organizations representing the business community and consumers that have advocated the development of ADR. These groups have individually

arrived at what may be termed a consensus that ADR methodologies should be employed to assist on-line consumers in resolving disputes and complaints.

The Federal Trade Commission and the Secretary of Commerce have also emphasized the need to develop effective alternative dispute resolution mechanisms. This brings us to both agencies requests for comments regarding the resolution of on-line consumer disputes and complaints.

As I indicated earlier, Web Dispute Resolutions provides an Alternative Dispute Resolution Program to assist both consumers and the electronic commerce business community resolve disputes and complaints using ADR methodologies.

# Existing Alternative Dispute Resolution Programs

- 1) There are several different alternative dispute resolution methodologies, which may be suited to online transactions. These methodologies include:

Arbitration is a process of dispute resolution in which a neutral third party, acting as the arbitrator, renders a decision after a hearing at which both parties have an opportunity to be heard. When arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding judgement. Within the United States, the majority of states adopted the Uniform Arbitration Act. Agreements to arbitrate have been declared valid and fully enforceable by statute, 9 U.S.C.A. 2.

Compulsory arbitration is that which occurs when the consent of one the parties is enforced by statutory provisions, for example state statutes requiring compulsory arbitration of labor disputes involving public employees. This methodology is not suited to on line transactions.

Final offer arbitration involves the arbitrator choosing the final offer of either one party or the other, and is not permitted to compromise.

Interest and grievance arbitration. Interest arbitration involves the settlement of the terms of a contract between the parties as contrasted with the grievance arbitration, which concerns the violation or interpretation of an existing contract. *School Committee of Boston et al. v Boston Teachers Union etc.*, 363 N.E.2d 485.

Fact Finding involves the appointment of a person or persons by business, government, labor or the courts to investigate, hear testimony or otherwise determine and report facts concerning a particular event, situation or dispute.

Mediation is private, informal dispute resolution in which a neutral third person, acting as the mediator, helps disputing parties reach an agreement. The mediator has no power to impose a decision on the parties.

Negotiation is the process of submitting and considering offers until an acceptable offer is made and accepted. It is the deliberation, discussion, or conference upon the terms of a

proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale or other business transaction.

Of these methodologies, the first step in resolving a dispute is to engage in negotiation. If an agreement can not be achieved then the preferred route would be to proceed to a mediation or arbitration. The problem may arise in using arbitration in cross border transactions of enforceability. However, in a cross border transaction mediation, which has no enforcement power, would be less than desirous.

- 2) In consumer transactions today the process is varied and dependent upon the Terms and Conditions set forth by the business on its web site. Transactional dissatisfaction generally results from a variety of reasons, including poor service, damaged or incorrect product shipments, goods being damaged during shipment, goods or services deemed to be misrepresented, overcharges, or other consumer complaints. For example, the difficulty that many e-retailers had in meeting the demand for service and product in the United States during the 1999 Christmas shipping season.

In such situations, ADR allows the disputing parties to resolve the dispute out of court. More importantly, for the business, ADR may be private and permit face saving. For the consumer, and frankly for the business, employing ADR is more cost efficient and less burdensome than litigation.

In solving these types of disputes mediators and arbitrators are generally selected from a list generated by a member driven professional association such as International Association of Professional Negotiators (IAPN), the American Arbitration Association (AAA), SPIDER, or the American Bar Association (ABA). The consumer however, may find that he/she is required, or believes that he/she is required, to choose from the organization that is listed in the Terms and Conditions posted by a business.

Consumers and businesses are subject to the "mercy" of the professional association and/or vendor. This is because the consumer and many small businesses are not educated in the value and services available through ADR providers and independent organizations. In addition, vendors frequently designate the American Arbitration Association, SPIDER and or the American Bar as the result of a contractual obligation, as the independent authority. This creates a virtual monopoly for these organizations, and possibly restricts the rights of a consumer to an impartial decision.

Web Dispute Resolutions feels that this is an area that needs to be resolved as an educational issue within the United States, as well as internationally. The mandated use

of a particular organization will have cross border implications in part due to language and national customs, as well as jurisdictional and regulatory issues.

- 3) There are several ADR programs currently in existence for online consumer transactions. However, many of these are pilot programs, and are the result of academic efforts. Programs offered by SPIDER and Web Dispute Resolutions supplement these programs such as Online Mediation, and Online Ombudsman.

There have been some attempts to perform actual on line mediations, however they are in the infant stage and suffer from technological issues such as transmission line capability, modem speed, as well as human frailties such as slow typing ability. Therefore, most online consumer complaints and disputes that do use ADR methodologies are still performed on-site and involve some expense and burden for both parties.

E-commerce is international, however it is subject to existing frameworks of applicable law and jurisdiction. Electronic commerce poses challenges to the framework for some of the following reasons.

- Transaction may be in more than one language.
- The speed at which electronic commerce is conducted is faster than traditional commerce.
- There are varying levels of privacy and security in many jurisdictions.
- There are restrictions on goods, services and information that can be provided in some political situations.
- Transactions may take place under various geo-political jurisdictions.
- There are currency exchange issues, as well as potential international trade issues.

Existing programs provide access to fair and timely resolution for an educated consumer. However, accessibility remains an issue due to a lack of public awareness of the availability of such programs and the process involved. Affordability varies among programs and countries, yet the cost of ADR is far less than litigation.

- 4) Existing alternative dispute resolution programs offered by e-commerce business are not transparent to the average consumer. ADR clauses are frequently buried within the framework of lengthy Terms and Conditions, and set forth-rigid participatory requirements. The information provided under these Users Terms and Conditions is usually located at the end of a business website. The information is frequently written in complicated legal terms and not easily understood by the average consumer. This is further complicated if the consumer is engaging in a cross border transaction and not used to the native customs and language. Therefor, because of the placement of the ADR option, the phrasing of the Terms & Conditions, as well as the potential customs and language barriers, can we actually say that the average consumer understands his/her rights? If the consumer doe not have a working understanding of the terms and conditions, and/or has not actually read the document, does this negatively influence the consumers' due process rights?
  
- 5) There does not appear to be a set process or program for resolving business-consumer disputes. We know that there are different forms of alternative dispute resolution, each using its own methodology. Programs, practices and procedures vary from country to country and cross border transactions are subject to national frameworks and applicable laws and jurisdictions. However, it would seem that many firms have selected Binding Arbitration. Decisions may be appealed to legal authority, but in many cases on in the jurisdiction in which the business entity is domiciled. This may place an undue burden and cost on the consumer.
  
- 6) Under an appropriate ADR agreement, both parties agree to a procedure to be followed for resolution and the decision details the procedure(s) to be followed in achieving the resolution. Again, however the issue becomes one of cross-border jurisdiction, and the mutual respect of the disputing parties.
  
- 7) In the ADR, process costs are generally mutually assessed. ADR tends to be cost-effective when compared to the combined costs of litigation and ADR usually results in faster resolution partly because costs are mutually shared. In addition, a neutral third party is involved, taking away the anger and other associated issues that work to cloud and obstruct achievement of a settlement agreement.

The process is not attached to a dollar amount, as is litigation, rather it is focused on resolving the dispute which is not always a dollars and cents issue. The dispute may involve quality and quantity of goods or the nature of services provided. An appropriately structured program can resolve a large number of disputes. To do, the program may require the use of more than one ADR program provider.

- 8) On line, ADR may be better suited for cross border transactions since it does not require the parties to travel, or meet face to face. However, on-line ADR in cross border transactions needs to address technological issues and specifically such issues as post-resolution jurisdiction, and existing framework issues.

ADR is overall well suited for resolving online consumer transaction disputes. Traditional ADR may prove to cumbersome in a logistics sense to be effective.

In implementing ADR for these types of transactions, businesses, consumer representative and governments should employ technologies and use them to enhance consumer awareness and freedom of choice. Governments need to ensure that an international framework is established to protect consumers at the same level as in other forms of commerce.

# Development of Alternative Dispute Resolution Programs for Online Consumer Transactions

9) There are several models presently available using arbitration or mediation as the methodology. These programs generally follow the procedures for ADR set forth by the American Arbitration Association or the American Bar Association. Frequently, e-commerce firms, and traditional businesses, will specify an organization providing ADR, such as the International Association of Professional Negotiators or the American Arbitration Association.

10) There are obstacles and disincentives to implementing alternative dispute resolution programs for online consumer transactions. Many of these are educational in nature:

- Awareness of the ADR process
- Education of consumers, and businesses to the benefits of ADR, as opposed to litigation.
- Consumers do not know of the availability of independent ADR providers, or how to locate them.
- Lack of educated or trained specialists in dispute resolution that are knowledgeable in E-commerce procedures and policies.
- Because of the cross-border nature of E-commerce, there are language and cultural issues.
- Average consumers frequently do not take the time to read the Terms and Conditions, or do not understand the meaning of the documents.

There are jurisdictional and procedural issues resulting from the multi-national nature of E-commerce.

- International jurisdictional issues arising from international treaties.
- National issues regarding use of ADR, and legal frameworks.
- Existing Terms and Conditions frequently mask the availability of ADR.
- Consumers are often required to travel to arbitration sites, or must pay a representative to travel to the procedure.

There are a great many incentives for using ADR in this type of commercial transaction.

- Generally, these types of procedures are private, and not subjected to the glare of media publicity. This is a public relations bonus for both the business and the consumer.
- Alternative dispute resolution procedures allow the consumers' voice to be heard, due to the cost-effective nature of the process.
- The resolution of the dispute is a win-win situation for both parties.
- The outcome is frequently so satisfactory that a continued business relationship may result.
- The cost of an ADR procedure is less than litigation, and the costs are mutually shared.

Additional disincentives related to the procedure may be the requirements for the parties to travel, which may place an undue cost or burden on a consumer. One must also acknowledge that unless the procedure involves binding arbitration, there is no guarantee of achieving a resolution.

11) RESERVED

12) We see very little use for the use of escrow accounts or agents in this type of transaction, except in very special circumstances.

The speed at which E-commerce moves generally precludes holding funds for several days until checks or other instruments clear the banking process, goods are shipped, received, inspected, and released.

In addition, the majority of consumer transactions are not conducted in large monetary denominations or for goods or services that would require this type of service. The majority of these transactions are performed on credit, and credit card issuers frequently have options to protect some rights of the consumer.

Obstacles to using an escrow agent and account would include:

- Liability exposure for an escrow agent.
- Licensing requirements for an agent and account.
- Currency valuations and exchange rates.
- Arranging transfer authority.
- Transfer and tax costs and liability.
- Cross-border issues such as customs and trade barriers.
- Convenience for the parties.

# Elements of Fair and Effective Dispute Resolution Programs for Online Consumer Transactions

13) In order to implement the principal of encouraging businesses, consumers and governments to work together to provide the alternative dispute resolution option, a variety of measures need to be undertaken.

- Consumer education on an international scale using a multi-media approach (audio, video, print) and Internet public service announcements.
- Terms and Conditions or Agreements placed on E-commerce sites need to be simplified, and the placement of the ADR option in these documents needs to be improved.
- Participation of E-commerce businesses in independent online evaluation as well as their participation in self-policing membership driven groups.
- The ADR option must be made transparent to the average consumer. The language must be simplified.
- The procedural costs must factor in the logistical expense and burden for both parties to the action.
- To implement this principal an ADR procedure should employ innovative information technologies.
- Businesses should be encouraged to collaborate with ADR providers as part of their internal mechanisms to resolve consumer disputes and complaints.
- Consumer representatives should also be encouraged to collaborate with ADR providers.
- ADR should be mandated and progressive ADR techniques should be exhausted before litigation.

14) There are issues for ADR in online consumer transactions. These include:

- Confidentiality in an online ADR procedure. E-mail is not considered privileged communication, and can be misdirected.
- Cross-border jurisdictional issues relating to enforcement of ADR agreements and judgements.
- The issue of transactional information and exposure to theft.
- In an off-line consumer transaction, goods and services are usually transferred at the point of sale, or at least inspected prior to purchase. In the online environment, the consumer frequently pays and ownership is transferred based on a representation. This increases the potential for fraud and misrepresentation, particularly in cross-border transactions.
- Technology is also an issue since the same level of communication infrastructure does not serve some areas, and because technology changes so rapidly, not every consumer is equal.

## Role of Governments

- 15) Governments should work with business and consumer representatives to promote transparent policies and procedures particularly in cross border transactions. This collaboration should include the development and promotion of transparent cross-border consumer protection programs.

Governments should collaborate with consumer representatives and businesses to review consumer protection laws in order to make them applicable to E-commerce, within their own borders.

In addition, all parties should work together to develop and promote innovative uses for technology. These technologies should promote international accessibility to consumer education information and promote the consumers' ability to file complaints related to E-commerce transactions.

In addition, governments should work cooperatively on international issues in combating cross-border fraudulent commercial conduct. There should be international cooperation in developing agreements for recognizing and enforcing ADR judgements resulting from business to consumer complaints and disputes.

- 16) RESERVED

- 17) As part of governments role the Department of Commerce and the Federal Trade Commission should develop and hold public workshops that address the issues previously discussed, as well as:

- Present the availability of Alternative Dispute Resolution and Redress. This should include participation of private and public organizations, as well as membership driven associations that provide ADR advocacy and third party neutral services.
- Conduct consumer and business education, as an on-going service, concentrating on the types of ADR and their methodologies.
- Review existing national and international frameworks for enforcing ADR judgements.
- Promote the use and availability of technology, while developing criteria resulting in mutually acceptable guidelines for resolving business to consumer disputes.
- Continue to develop private and public partnerships to further ADR education and implementation.
- Publicize the providers and resources participating and/or contributing to the public workshops.