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**DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY  
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COMMITTEE ON CONSUMER POLICY**

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**Working Party on Information Security and Privacy**

**BUILDING TRUST IN THE ONLINE ENVIRONMENT: BUSINESS TO CONSUMER DISPUTE  
RESOLUTION**

**JOINT CONFERENCE OF THE OECD, HCOPI, ICC**

**REPORT OF THE CONFERENCE**

**The Hague, 11-12 December 2000**

*This unclassified document reports on the two-day conference on online alternative dispute resolution jointly organised by the OECD, the ICC, and the HCOPI in The Hague on 11-12 December 2000. The document is based largely on the draft Report of the Conference by the OECD Secretariat, and includes input received from the ICC Secretariat and from participants.*

*The Orientation Document which assisted Conference participants in discussing the issues to be explored, is annexed.*

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**BUILDING TRUST IN THE ONLINE ENVIRONMENT:  
BUSINESS TO CONSUMER DISPUTE RESOLUTION**

**JOINT CONFERENCE OF THE OECD, HCOPIL, ICC  
The Crowne Plaza Promenade Hotel  
The Hague  
11-12 December 2000**

**REPORT OF THE CONFERENCE**

*Note by the Secretariat*

1. Global networks and electronic commerce significantly increase the possibility for individuals and companies to interact and transact easily 24 hours a day, 7 days a week, over great distances, regardless of geographic borders, local cultures and legal frameworks. Such benefits, however, raise challenges as to how potential disputes arising from both sides can be resolved in an equally easy way, effectively, and with guarantees of equity and fairness.
2. On 11-12 December 2000, the Organisation for Economic Co-operation and Development (OECD)<sup>1</sup> organised a conference on business-to-consumer (B to C) online dispute resolution with the Hague Conference on Private International Law (HCPIIL) and the International Chamber of Commerce (ICC). The event was hosted by the Government of the Netherlands in The Hague. Close to 250 people attended the conference, representing government, business and civil society organisations, academia and the media.
3. Building on discussions and information shared to date in various fora, the objective of the Conference was to:
  - Provide an opportunity for presenting, discussing and disseminating information on the diverse range of existing online alternative dispute resolution (ADR<sup>2</sup>) mechanisms.
  - Explore whether and how online ADR can help resolve B to C disputes arising from privacy and consumer protection issues, and thus improve trust for global electronic commerce.
  - Discuss the role of stakeholders in fostering the development of appropriate and effective online ADR mechanisms.
4. The primary focus of the conference was on B to C disputes involving small values and/or low levels of harm, as well as on informal, flexible systems that allow for the necessary balancing between the type of dispute and the formality of the process for resolution (*e.g.* assisted negotiation and mediation).
5. This document by the OECD Secretariat reports on the two-day conference. It recalls the focus and summarises the discussion for each session. The Orientation Document [DSTI/ICCP/REG/CP(2000)1] which assisted Conference participants in discussing the issues to be explored is annexed.
6. It is hoped that the key themes of the two-day conference will help guide OECD Member countries to decide on their follow up work through national and international efforts in the area of online ADR. Based on the concluding remarks of the conference chairs, the main points follow:

## MAIN POINTS

### **Need for strong co-operation between stakeholders, and flexibility in ADR mechanisms**

7. The Internet is global and borderless. Efforts to devise online ADR mechanisms must take into consideration the voices of all stakeholders – be they governments, businesses, or consumer groups. In the same respect, any mechanisms for online ADR must have flexibility as a key principle to allow for differences between nations and cultures and to respond to the variety of disputes that can arise. ADR can provide fair and effective redress for users in the online environment. More generally, effective online ADR can help to foster the sense of trust between Internet businesses and users and consumers, necessary for the continued growth of e-commerce.

### **Common elements have emerged for ADR principles**

8. Not one size fits all in terms of ADR and differing situations (in value or in complexity, for example) may require differing approaches. At the same time, some common principles have emerged among government, industry, and consumer groups for approaches to fair and effective ADR including: accessibility, low cost for consumers, transparency (*i.e.* providing information that is essential for consumers to make an informed choice about the ADR mechanism), reaching decisions quickly, addressing culture and language differences in the ADR process, and impartial and qualified intermediaries to conduct ADR.

### **Differences have come into focus**

9. Three areas requiring further debate among stakeholders are particularly clear. First, stakeholders disagree as to whether there are situations where it should be mandatory for consumers to engage in an ADR process before going to litigation. Second, stakeholders disagree as to whether online ADR resolutions should, or even could, be binding on parties. Third, stakeholders need to further explore what are the most effective means to ensure compliance with, and enforcement of, ADR processes and outcomes.

### **Growing number of users and consumers complaints in relation to e-commerce**

10. The number of privacy and consumer related complaints with regard to the Internet is increasing each year. The most common consumer complaints with regard to e-commerce include the failure of merchants to deliver goods on time, if at all, non-disclosure of charges/costs and insufficient information on product attributes, and inadequate complaint handling. Privacy complaints mainly focus on data collection without consent, use of data different from original purpose of collection, selling data to third parties, unsolicited commercial e-mail, identity theft, providing credit history without consent, and children's privacy online. Complaints by consumers in one country about merchants in another are just beginning.

### **Consensus that disputes should be settled at the earliest stage**

11. Global business-to-consumer disputes should be resolved as quickly as possible for the benefit of all parties involved. The first step toward resolving disputes online is to avoid them. To this end, businesses should provide effective and efficient customer service and internal complaints handling systems. “Chargebacks” and other consumer refund mechanisms are also positive, even if limited in scope. In general, online customers have high expectations for response times from online companies. Good handling of customer complaints dramatically increases customer loyalty.

### **Just as complaints including a fraudulent element may not be conducive to ADR, not all online ADR programs may be suited to resolve all privacy and consumer related disputes**

12. There is a range in online ADR programs from the fully automatic at one end to a formal arbitration setting at the other. It is recognised that each point along that spectrum has both advantages and disadvantages for consumers and businesses alike. While not every mechanism is appropriate for every dispute, the development of a wide variety of mechanisms can help address the breadth of disputes; such variety is enhanced by healthy competition among mechanisms. Practical guidance and sufficient information should be made available so that parties can make appropriate choices about dispute resolution mechanisms.

### **Socio-economic and cultural barriers persist**

13. ADR providers and related service providers should work to make ADR truly accessible to all. Many socio-economic and cultural barriers exist as challenges to implementing fair and effective systems of online ADR on an international scale. In particular, linguistic barriers are a frequent problem, as are differences in how cultures approach disputes and disagreements. It is important that ADR services be sensitised and responsive to these issues.

### **Technology can advance online ADR, but also presents a paradox**

14. Advances in such fields as computer languages, enhanced videoconferencing, translation, speech recognition and broadband access technology may facilitate some online ADR mechanisms, and bring the parties to a nearly equivalent face-to-face relation. However, where some users may find synchronous (e.g. face-to-face) resolution mechanisms more desirable, asynchronous communication may provide a party the advantage of longer deliberation on a response.

### **Debate continues over the possible roles for judges during the ADR process as well as of last resort**

15. The conference reviewed four situations related to judicial involvement in the context of ADR: *i)* As enforcement authority since courts have the exclusive exercise of coercive powers; *ii)* As a judge of last resort; *iii)* As a *juge d'appui*, in cases of binding arbitration; and *iv)* In the enforcement of a settlement agreement. There appears to be little support for involving a judge (*juge d'appui*) in the course of a non-arbitration type online ADR process because it could jeopardise the principle of having an informal process and making it economical for both parties.

**Now may be the right time for stakeholders to join forces**

16. All stakeholders independently have issued principles, recommendations and guidance on ADR. While areas of divergence still exist, there are many areas of common ground. There is agreement that stakeholders should work together to continue to find more common ground to ensure fair and effective online ADR mechanisms to resolve B to C privacy and consumer-related disputes.

17. Presentations made at the Conference and other related documents are available at: <http://www.oecd.org/dsti/sti/it/secur/>.

## REPORT ON THE CONFERENCE

### DAY 1: OVERVIEW OF ADR IN RELATION TO THE ONLINE ENVIRONMENT

18. The conference was opened by **Peter Ford**, Chair of the Working Party on Information Security and Privacy of the OECD and **Jytte Oelgaard**, Chair of the Committee on Consumer Policy of the OECD.

#### Welcome and Keynote

19. **A.H. Korthals**, Minister of Justice, The Netherlands, discussed electronic commerce generally and then recalled the fundamental tension between nationally oriented governments and their related legal systems and the borderless nature of the Internet. Mr. Korthals proposed four questions for the attendees to consider: *i)* At which level and in which form should regulation take place? *ii)* Should the same norms and values apply online and offline?; *iii)* Is it possible to clearly determine what aspects of private international law are involved?; and *iv)* How can laws be enforced in the context of a borderless world? He pointed out the advantages of ADR as a way for speedy, efficient resolution of disputes that helps overcome the issue of jurisdiction, and suggested that a digital form of mediation, a means through which both parties voluntarily commit themselves to the outcome, may be the best option.

20. **Herwig Schlögl**, Deputy Secretary-General of the OECD stressed that this broad, international conference was the first of its kind to discuss online ADR issues, and in keeping with OECD practice, to bring all stakeholders to the table. Mr. Schlögl recalled that in terms of micro-economics, the “electronic” economy has, since 1995, fundamentally changed how business is done, and will continue to change how the markets function in the future. He offered some compelling figures to illustrate the growth of online trade.

21. Mr. Schlögl discussed the OECD’s work on electronic commerce policy and referred to the 1998 Ottawa Ministerial conference and the OECD’s current programme of work in the areas of privacy and consumer protection. He highlighted that building trust is an important policy issue related to the new economy and global information society. In particular, he stressed that a key element to building trust is ensuring users and consumers effective redress for disputes arising from interactions and transactions in the online environment. However, for online ADR to reach its potential, particularly for settling cross-border B to C disputes, the complex legal issues and equally complex technological ones must be addressed; to this end, he encouraged participants to utilise the range of expertise to find practical solutions in this area.

22. **Maria Livanos Cattai**, Secretary General of the International Chamber of Commerce offered the perspective of the global business community and the ICC, which, for 80 years, has been a pioneer in the field of commercial dispute resolution. She said that all stakeholders have a distinct role to play in establishing effective ADR around the world, and that building partnerships among stakeholders ready to commit time and effort is the most crucial step toward this end.

23. Mrs. Cattai outlined the distinct roles of the various stakeholders. She stated that governments can contribute political strength and a common forum, but must not limit the benefits of ADR. Accreditation or approval must neither be mandatory nor exclusive of international self-regulatory principles and rules, and must embrace transparency and openness where offered. Governments should actively promote ADR as an alternative to court-based methods. Governments must not allow obstacles to innovation to appear, especially in terms of on-line confidentiality and security. Finally, they must give equal consideration to the efforts for all stakeholders.

24. Mrs. Cattai suggested that the world business community should provide resources to promote ADR but must remain flexible to the needs of consumers and responsibilities of governments in their approaches. This includes ensuring that consumer complaints are handled thoroughly by the business itself before they are referred to an ADR mechanism. It also means that companies should be prepared to co-operate with consumers from any place on the map, any culture, and in any language.

25. Civic organisations, including consumer representatives, must be attentive to the needs of their constituents, and must communicate to them that ADR is here for their benefit, that it is cost efficient, and that it is fair. They must recognise that government is there to ensure that both parties ultimately gain from using ADR. Today's ADR providers are pioneers and must therefore remain flexible when recognising consumer choices, and must manage procedures and decisions in such a way that consistently ensures impartiality, accessibility, convenience and transparency. It is also their responsibility to bridge cultural and linguistic gaps. The burden of efficiency ultimately falls on ADR providers, as it is to them that businesses and consumers entrust the resolution of their disputes.

26. Finally she stated that businesses, governments, ADR providers and civic organisations alike must not succumb to fears about addressing sensitivities of ADR, as this is counterproductive.

27. **Hans van Loon**, Secretary General of the Hague Conference on Private International Law stressed the importance of co-operation among interested parties on a topic such as online ADR, which is trans-national and affects both the industrialised world and developing countries.

28. Mr. van Loon drew a distinction between the technological and economic environment, which is truly global, and the legal environment, which is a patchwork of national, sometimes regional issues. He stressed that against such a background, the challenge is to build bridges to cope with diversity. He stated that it was necessary to provide an ordered system for access to national courts and to facilitate court conclusions, and he described the work of the Hague Conference to these ends. He said that it was also equally important to promote ADR and to provide citizens with precise rules stating exactly what occurs if agreement is not reached. Mr. van Loon commented that there is a future for trans-national ADR, interfaced with rules on appropriate law and uniform policies, but that the major challenge is to find a formula creating room for ADR on the one hand and adjudication on the other.

## Session 1: Taking Stock – Overview of Recent Discussions about Online ADR

**Focus:** In an effort to provide a forum, at a global level, for exploration of ADR and to foster co-operation among the stakeholders, this session aimed at taking stock of the work undertaken on online ADR by other fora. The session was expected to outline similarities and differences in the various approaches to date in order to identify challenges to be met and gaps to be bridged in terms of essential elements for fair and effective online ADR.

29. **Risaburo Nezu**, Director, Directorate for Science, Technology and Industry, OECD, opened the session by stressing that it was important to get a general understanding about common ground and principles for ADR mechanisms as well as an awareness of the remaining issues to be further discussed.

30. **Carina Törnblom**, Head of Unit, Directorate General for Health and Consumer Protection, European Commission (EC), gave an update of activities taking place in the European Union to advance effective dispute resolution for B to C transactions. She explained that the EC, in co-operation with business and consumers, has first focused on preventing consumer problems, and encouraging the use of best market practices. The EC has also discussed practical alternatives to going to court, codes of conduct for trustmarks programs and credit card chargeback mechanisms.

31. Ms. Törnblom highlighted the concern that the rapid proliferation of codes of conduct make it easy for a business to assert that it adheres to a code of conduct, but might leave in question the quality of the code and the issue of compliance. To this end, she stated that European Member States need to establish certain common criteria and a basis for approval of codes of conduct; she gave the example of the 1998 Recommendation on Out-of-Court Dispute Settlement Bodies, produced by the EC. She said that the Recommendation had been quite successful and Member States had already notified the Commission of which bodies meet the criteria prescribed by the Recommendation.

32. Ms. Törnblom also discussed the European Extra Judicial Network (EEJ Net), a European-wide system of clearinghouses for consumer complaints, which should be established by summer 2001. As to other work on ADR, she explained that the EU is considering adding rules to the regulations governing the functioning of mediators and facilitators. Finally, Ms. Törnblom stressed the importance of allowing consumers to have access to their own legal system while at the same time working to prevent the need to go to court by providing voluntary access to ADR.

33. **James Dorskind**, Acting General Counsel of the US Department of Commerce shared some observations from a workshop on ADR for online consumer transactions held in June 2000 by the Department of Commerce and the US Federal Trade Commission. He stressed that what works in a B to B environment may not necessarily work for B to C. For ADR to be useful in the B to C context, it must be practical for consumers to use as well as effective in protecting their information. He also referred to other means of resolving disputes such as credit card chargebacks. Mr. Dorskind explained that different kinds of businesses may approach ADR in different ways; for example, smaller companies may have a greater need to use a third party provider than larger companies. In addition, the best approach for resolving a dispute is likely to vary depending on the value of the transaction, or the complexity of the dispute. He described some general principles for ADR that emerged as a result of the discussions at the US workshop, adding that it is too early to define these in detail. They include: impartiality, accessibility, low or no cost to the consumer (relative to the amount in dispute), transparency (*i.e.* consumers should have information about the mechanism before they are asked to make a decision about entering ADR), timeliness, and speed. He mentioned that there is little consensus among stakeholders about whether or not ADR should be binding.

34. Mr. Dorskind expressed that in order to promote consumer confidence, global and seamless ADR mechanisms must be achieved. To this end, the Department of Commerce is working with the EU to

encourage development of ADR mechanisms by the private sector and in response to market developments. He stressed that all stakeholders should participate in these discussions to ensure fair and effective mechanisms. In addition, Mr. Dorskind explained that the problems of applicable law must be addressed at the international level, as ADR must work well across different national and legal cultures.

35. **Yuko Yasunaga**, Deputy Director, Commerce Policy Division, Japan Ministry of International Trade and Industry, followed with an overview of the experience of APEC in relation to consumer protection and ADR. He described the establishment of the E-Commerce Steering Group (ECSG) of APEC and the 1998 APEC Blueprint for Action, which charged business to take a leading role in developing e-commerce, and governments to provide a favourable environment for the growth of e-commerce. He discussed the Consumer Protection Workshop, held by the ECSG in Bangkok in July 2000. The workshop demonstrated the need for greater co-operation and collaboration among stakeholders in the region as a way to overcome the uneven situation that exists among APEC economies regarding laws, rules, practices, information availability, and education in relation to e-commerce. Workshop participants agreed to share information about consumer protection laws and regulations, and to look for ways to increase law enforcement co-operation.

36. Mr. Yasunaga illustrated several “Best Practice Models” for building consumer confidence online, being undertaken by APEC economies, including Australia’s codes of conduct initiatives, Japan’s Online Shopping Trustmark program, and Singapore’s CaseTrust, a government-led dispute consultation program. He offered an example of joint co-operation in Asia, describing talks between Japan and Korea regarding accreditation and mutual recognition of trustmarks, and the July 2000 APEC/ECSG workshop on consumer protection in Bangkok. Mr. Yasunaga stressed that online ADR is still at the beginning stages in APEC, and that private sector initiatives must be the primary driving force behind the use of such mechanisms; he added, however, that governments also have a role to play. He said that governments should encourage the use of clearinghouses, for example, and other appropriate solutions to foster use of and adequate information about ADR.

37. **Constanze Picking**, Senior Manager Trade and E-Business at Daimler Chrysler AG, discussed the views of the Global Business Dialogue on E-Commerce (GBDe). She outlined GBDe’s work on ADR during 2000, including efforts by each regional working group (Europe/Africa, the Americas and Asia/Oceania) to conduct an inventory of online ADR mechanisms within the region, as well as numerous workshops and meetings with stakeholders.

38. Ms. Picking described the GBDe paper on online ADR programs prepared for their annual conference in September 2000. The paper makes recommendations to Internet merchants, ADR service providers and governments on best approaches for developing online ADR. The GBDe recommends that Internet merchants encourage the use of in-house customer satisfaction programs and inform consumers about the possibility and conditions of using ADR. For service providers, the GBDe specifies that ADR mechanisms should be impartial, accessible and convenient, speedy, low cost to the consumer, transparent, allow for an adversarial procedure, and ADR officers should be adequately qualified. Furthermore, ADR mechanisms should allow parties to be represented and should specify applicable rules for the procedure. ADR providers should also promote consumer awareness of online ADR. Finally, GBDe recommends that governments finalise international rules on competent forum and applicable law; encourage the use of customer satisfaction programs; not discriminate between different ADR systems; not establish mandatory criteria or accreditation systems for ADR, and allow the possibility for binding arbitration in B to C disputes in certain cases.

39. Ms. Picking described several open issues that are still under discussion by GBDe members, such as certification of ADR systems and accreditation of certification bodies. Among GBDe's next steps in this area will be to create a consumer confidence Web site, establish ADR clearinghouses, and hold discussions with consumer representatives.

40. **Louise Sylvan**, President of Consumers International said that there were many areas of commonality and agreement between Consumers International principles for online ADR and those provided by GBDe, the EU and the TACD. She presented a summary of the Consumers International study of online ADR providers, released on 11 December 2000. The study rated 30 online ADR programs against eight criteria, including independence/impartiality, transparency, availability, affordability, effectiveness, fairness (due process), legality/liberty, and third party oversight. The results of the study concluded that none of the 30 programs met all the criteria, although most were easy to find, timely, easy to use and described the procedure adequately. Ms. Sylvan cited a number of shortcomings with the mechanisms: many were limited in their ability to resolve disputes in multiple languages, most were disproportionately costly, and few reported the results of ADR transparently. She stated that the study shows that there are problems with enforcement of ADR decisions and that ADR is suffering from a proliferation of programs that will confuse consumers. In addition, consumer interests do not have the same level of representation in the programs' governance structures as business interests.

41. Ms. Sylvan offered a number of recommendations for online ADR programs, based on the study. Mechanisms need to cater to non-English speakers and should report decisions more transparently. In addition, costs of ADR to consumers can not be higher than most B to C disputes, and inappropriate mandatory ADR and binding arbitration clauses need to be eliminated. She concluded that global standards are needed for online ADR as well as ongoing independent oversight.

42. **Mr. Nezu** summarised the discussion by saying that while it is clear that not one size fits all *vis-à-vis* ADR programs, the discussion helped identify some common elements for ADR mechanisms and approaches to developing such mechanisms, including the need for:

- Strong co-operation amongst all stakeholders.
- Transparency (*i.e.* providing information that is essential for consumers to make an informed choice about the ADR mechanism).
- High quality accessibility to permit consumers to use the ADR systems at low cost while striking a balance between the cost of ADR and the benefit to the consumer.
- Addressing culture and language differences in the ADR process.
- Reaching decisions quickly.
- Impartial and qualified intermediary to conduct ADR.

43. Mr. Nezu added that none of the existing online ADR mechanisms (most of them very recently set up) meet all of the above elements and therefore the systems still need further improvement. Regarding future work in this area, he stressed that several thought that a clearinghouse to facilitate the sharing of information would be beneficial. He also identified two outstanding issues that deserve further discussion: *i)* Whether recourse to ADR should be voluntary or could be mandatory, and whether the outcome of the ADR process ought to be non binding in nature or could be binding; and *ii)* The need to clarify what is ADR and to differentiate between the ADR process and the court process.

## Session 2: Illustrating Possible B to C Complaints in the Online Environment

**Focus:** This session was intended to provide information and statistics on the types and volumes of complaints received from users and consumers in relation to their interactions and transactions online in order to educate all stakeholders on where to focus their efforts in exploring redress mechanisms and discussing online ADR mechanisms.

44. **Michelle Childs**, Head of Policy Research for Consumers Association, United Kingdom gave an overview of the Web Trader seal program, a European partnership of consumer organisations in seven countries. Currently, 1 500 member companies hold the seal. The scheme is one of adherence to a code of practice that requires traders, for example, to give the consumer clear and inclusive prices, provide refunds within a maximum of 30 days, maintain a secure site, and have in place a complaint handling procedure. There are strict pre-entry conditions for merchants, and there is ongoing monitoring of compliance with the code.

45. The Which?Web Trader program also collects consumer complaints. As of November 2000, the two largest areas of complaints were failure to deliver goods on time (226 of more than 740 total complaints) and inadequate complaints handling (107 of more than 740 total complaints). In the event of a consumer dispute, the code requires the consumer to contact the trader first. If the trader does not adequately respond in five days, Which?Web Trader intervenes. Outcomes suggested by Which?Web Trader are binding on the trader. Which?Web Trader does not presently provide cross-border dispute resolution services, and is seeking EU funding in order to expand this service.

46. **Stephen Lau**, Privacy Commissioner for Personal Data, Hong Kong, China, outlined the main threats to data privacy on the Internet against Hong Kong's Personal Data Ordinance. The privacy Ordinance establishes six principles for data protection, covering purpose and manner of personal data collection, accuracy and duration of information retention, use of personal data, security of personal data, information on data held and purpose of use, and access to personal data by data subjects. The main complaints which were received by his office include data collection without consent, identify theft, interception of data during transmission, and use of data different from original purpose of collection.

47. Mr. Lau then summarised the results of a sample survey of 531 Hong Kong Web sites conducted between July and October 1998 in order to measure compliance with the Ordinance and standards of good and reasonable personal information handling. The study concluded that in 1998 only 6.2% of sites with online personal data collection forms displayed a privacy policy statement. That figure increased, he said, to 25% in 1999. Formal investigations are being conducted against 16 sites with personal data collection forms that are lacking a personal information collection statement. The Privacy Commissioner's office has since published guidelines on protection of privacy and privacy policy statements for individual net users and data users as a way to promote awareness of good online privacy practices, and thus diminish the risk of breaches of privacy.

48. **Maneesha Mithal**, Attorney with the Consumer Protection Bureau of the US Federal Trade Commission (FTC) provided an overview of the Consumer Sentinel Database, a joint project of the FTC and Industry Canada. Consumer complaints are fed into the database from both public and private sources and government users can review specific complaints, and general complaint trends. Internet-related complaints have increased dramatically over the past three years, more than doubling each year from 872 in 1997 to 7 955 in 1998 and to 18 622 in 1999. At the same time, the proportion of Internet-related complaints in the database also consistently has grown, from just 3% in 1997 to 11% in 1998 and to 22% in 1999. In the last year, 10% of the complaints involved US consumers and foreign companies while 2% involved foreign consumers and US companies. The FTC has seen a rise in the past three years in the numbers of Internet-related complaints regarding breach of warranty and the mail order rule. Ms. Mithal

also described some of the more common privacy-related complaints made by consumers such as unsolicited commercial email, identity theft, harassing phone calls, providing credit history without consent, selling data to third parties, and children's privacy. Finally, she mentioned that complaints including a fraudulent element may not be conducive to ADR.

49. **Marcie Girouard**, Assistant Deputy Commissioner of Industry Canada, illustrated the volume and types of e-commerce complaints filed by consumers with the Canadian government, mentioning that consumer trends in Canada lag behind the United States by two years. In the first three-quarters of 2000, complaints about activities on the Internet accounted for 2.2% of overall complaints filed with Industry Canada. Of these Internet complaints, 17.4% were based on e-commerce-related transactions. The most common areas of e-commerce complaints were non-delivery of goods, time for delivery, non-disclosure of charges/costs, product attributes, and retail versus online pricing. An increasing number of complaints were against Web sites established outside Canada.

50. Ms. Girouard also described Industry Canada's recent review of 292 Web sites, comparing them against selected criteria set forth in the *1999 OECD Guidelines on Consumer Protection in the Context of Electronic Commerce*. Among the results were that 77% of merchants disclosed full purchase cost and 52% described the return/exchange policies; 26% of merchants provided consumer complaint procedures and only 16% described dispute resolution mechanisms. As a result of Industry Canada's complaint database and the Web site review, she concluded that consumer issues are multi-jurisdictional, that consumers using the Internet report a range of complaints, and the ADR mechanisms are not yet widely available.

### **Session 3: Dispute Resolution at the Earliest Stage – Internal Complaints Handling and Customer Refunds**

**Focus:** This session was intended to examine the scope of application and effectiveness of internal customer complaint handling systems and customer refunds (as a result of chargeback systems) to resolve complaints and disputes that arise in the B to C online environment.

51. **Hugh Stevenson**, Associate Director, Bureau of Consumer Protection at the US Federal Trade Commission, served as moderator for Session 3.

52. **Charles Underhill**, Acting Chief Operating Office at the Council of Better Business Bureaus, provided an overview of the customer complaint handling activities of the BBB and some general observations about internal complaints handling. BBB's AutoLine program, which handles consumer automobile disputes, received nearly 33 000 complaints during 1999. A significant number of these complaints were settled by the merchant before the consumer filed a formal case. BBB handled most of the remaining cases through a process of mediation. Also in 1999, local BBB offices throughout the United States and Canada received more than 3 million requests for complaint assistance from consumers. The BBB resolved 66% of these.

53. Mr. Underhill described a recent survey conducted by e-Satisfy of customer service by e-commerce site. The study showed that online customers have higher expectations than offline customers for response time from companies. Poor handling of online contacts create at least 30% lower customer loyalty among the two-thirds of online contacts that are not satisfied. He said that BBBOOnline is helping to promote better business practices by online merchants through its new Code of Online Business Practices, approved in May 2000. In addition, BBB has entered into an alliance with Visa USA to educate the US online merchant community about the Code and security and data protection issues, and has just

entered into a partnership with PriceWaterhouseCoopers to develop a Web-based B to C problem resolution system.

54. **Alastair Tempest**, Director General of the Federation of European Direct Marketing (FEDMA), discussed the need to boost trust in the online marketplace between businesses and consumers. He noted that FEDMA's "ring of confidence" program aims to help achieve this through a code of conduct, a related consumer complaint resolution mechanism, and links to online ADR systems. In addition, he said, FEDMA believes that various mediation systems should be available and that multilingualism should be stressed. But, Mr. Tempest added, the consumer should never be given the impression that she or he is forced to use either a consumer complaints resolution mechanism or ADR; the consumer should not be denied the alternative of legal action.

55. **Helen Bridges** of American Express Services, Europe discussed the use of credit card chargeback mechanism as a means of nurturing consumer confidence.

### *Discussion*

56. The following arose from the discussion with the panellists and the audience:

- Payment mechanism rules do not apply in the same way to all payment card mechanisms; for example, where there are rules, debit cards and credit cards have different rules (**Jean Ann Fox**, Director of Consumer Protection at the Consumer Federation of America).
- In countries such as France where it is impossible for a card scheme to have chargebacks because of the irrevocability of payments principal, it is however possible to find a way to ensure that consumers have the same rights as in the United States for example. For example, Visa requires as a first step that the cardholder try to resolve the problem directly with the merchant; if the problem is not so resolved, the consumer can then appeal to the card issuer for assistance (**Peter Møller Jensen**, Manager of EU Relations at Visa International).
- There are no figures available on chargebacks. However, one of the benefits for consumers is that card issuers have extensive negotiating power and can leverage this power to impose best practice requirements on merchants (**Eric Mickwitz**, Finnish Consumer Ombudsman).
- It is not helpful to think of chargebacks as ADR. They are a form of complaints handling system, even if they go further than normal complaints handling. They do not constitute ADR mechanisms and certainly do not meet the criteria set forth for ADR, such as independence, transparency, etc. (**Ms. Fox** and **Mr. Mickwitz**).
- It is worth noting the need to be careful when encouraging consumers to use credit cards online because a merchant's ability to accept a credit card does not reflect in any way on the merchant's credibility.

#### Session 4: Online Alternative Dispute Resolution Mechanisms

**Focus:** This session was intended to explore through presentations of online ADR mechanisms already existing or under development, the variety of approaches for solving disputes arising online. In an effort to focus on distinctive procedural and other elements that exist in these various mechanisms, the session was divided into three parts. The first discussion was devoted to fully automated mechanisms where outcomes are generated without human intervention. The second and third discussions were expected to examine mechanisms that vary from flexible to formal with regard to procedure and intervention of a neutral. Finally, the fourth discussion, by exploring systems under development, was designed to focus on objectives and methodology necessary for setting up an online ADR mechanism.

57. **Bernard Clements**, Head of the ICT Unit at the EC Joint Research Centre's Institute for Prospective Technological Studies (IPTS) in Seville, served as moderator for Session 4. He recalled that the previous sessions had shown that not all types of disputes may be conducive to ADR, citing fraud, non-co-operation of the vendor and privacy matters as examples. He asked the audience to consider, therefore, whether there are particular types of disputes which may be better resolved through given categories of ADR, and whether in fact ADR mechanisms can be tailored to B to C privacy and consumer protection disputes, given the low-value, low level of harm, high-volume nature of transactions in this segment. He added that this session was expected to bring out problems and difficulties in implementing different types of ADR mechanisms and thus help stakeholders identify essential elements for fair and effective B to C online ADR in subsequent sessions of the conference.

#### *Session 4-I: Fully automated online resolution mechanisms*

**Focus:** Most fully automated ADR systems are designed to settle cash-based disputes, such as insurance claims, and require the parties, before entering a negotiation, to be bound by the generated outcome, if the dispute settles. This session was intended to explore whether automated systems could help settle non-financial B to C disputes arising in the area of privacy and consumer protection.

58. **Richard Belczynski**, Vice President of the International and Commercial Division at ClickNSettle.com, described one of their forms of ADR, the online blind-bidding process used to resolve insurance and other cash-based disputes. Mr. Belczynski explained that the system is designed for parties who have previously met and have not resolved their dispute. Each party registers on the Web site and is allowed to enter a desired settlement amount. If the parties' bids are within 30% of each other's, the case settles; if not, the parties are notified and can enter another round of bids. Neither party is able to view the bids of the other, but can see if the other party has entered a bid and when. Before entering the process, the parties agree to be legally bound by the outcome. If a settlement does not occur within 60 days, the parties can resubmit to the process or seek a traditional settlement approach, such as offline arbitration.

#### *Discussion*

59. **Ethan Katsh**, Director of the Center for Information Technologies and Dispute Resolution at the University of Massachusetts, noted that in these early stages of online ADR development, there is a great difference in technological capabilities of systems. Some are much simpler than others, and cost less money, as is the case for such "arbitration-type" automated systems. However, where fraud is suspected or a human intervention is needed, fully automated systems can not offer an adequate solution.

60. **John Borking**, Deputy Privacy Commissioner for the Netherlands, questioned whether the technology would allow the system to serve as an intelligent agent whereby it would learn case law and apply it accordingly when reaching decisions.

61. A discussion ensued about the capacity of such fully automated systems to settle typical consumer disputes.

- The scope of the ClickNSettle model appears to be limited to damage-type claims, and use of such ADR schemes seems to require the assistance of an attorney (**John Borking**). **Mr. Belczynski** confirmed that the system might be limiting when more human issues are at stake. He also indicated that 70% of consumers using the system have attorneys and 30% use the system themselves.
- The ClickNSettle model has a very limited applicability for typical consumer purchase disputes; it appears to cover purely monetary settlements in cases where the consumer is willing to compromise (**Pippa Lawson**, Counsel for the Public Interest Advocacy Centre).

62. The topic of disclosure of case outcomes was also discussed.

- ClickNSettle has a reporting mechanism that allows clients to view their own cases. This mechanism creates an imbalance of information from a consumer's perspective: insurance companies that repeatedly use the system can view all of the cases they have been involved in, whereas a consumer will only be able to view the results of his/her individual case. A suggestion to create information symmetry may be to post publicly accessible information on cases (**Mr. Underhill**).

63. Finally, **Dana Haviland**, Partner at Wilson Sonsini Goodrich & Rosati, asked about ClickNSettle's experience in the international context and suggested that in order to ensure enforcement across borders, extra mechanisms like escrow accounts might be needed. **Mr. Belczynski** replied that the program has existed for 13 months and most cases have been domestic. In the case of international cases, the company has not yet had a challenge to a decision, but is discussing the use of escrow accounts in the future.

#### ***4-II: Flexible resolution mechanisms***

##### *Online Resolution, Inc.*

64. **Colin Rule**, CEO of Online Resolution, Inc., offered an overview of the onlineresolution.com dispute resolution system, with particular emphasis on their online collaborative environment tool, Resolution Room. Online Resolution accesses a network of 500 mediators and arbitrators and settles a range of consumer, workplace, business, and family disputes. An online advisor tool helps consumers choose which type of ADR is best suited for their type of dispute. The Resolution Room is a secure Web-based environment that combines chat rooms, caucus rooms, a voting tool, and a calendar function that the neutral can configure to best suit the needs of the parties. No dispute information is sent via email, as this is inherently insecure, according to Mr. Rule. For disputes under USD 500, onlinedisputes.com charges consumers USD 20; for disputes over USD 500, each party is charged per hour of a neutral's time. The company has a tiered fee structure for use of the Resolution Room; for low value transactions, the room is used for only a short time and the fees are relatively low.

*SquareTrade*

65. **Cara Cherry Lisco**, Director, SquareTrade Online Dispute Resolution Network, followed with an overview of Square Trade's model, and focused particularly on how technology can be an effective tool for helping to resolve high volume, low value transactions. Square Trade allows parties to conduct direct negotiations with one another as a first step to resolving disputes. If the parties are not successful through this approach, the dispute is elevated to mediation. The direct negotiation tool is free to consumers. Ms. Lisco explained that when Square Trade started its direct negotiation system, only 30% of cases settled, but with improved technology, the settlement rate has reached 80%. An important part of their technology is the online complaint form that is not static but is rather a "wizard" tool that presents different options depending on the answers to the previous question. This helps parties better define their problems and demands. Ms. Lisco described another helpful resource for users, which is the provision of data on how similar disputes reached solution. At the time of the conference, they had resolved more than 30 000 cases of which 12-15% were cross-border.

66. Ms. Lisco discussed some of the privacy and confidentiality issues that arise in the context of online ADR. Square Trade maintains a database of complaints against seal holders; it remains questionable who should have access to this information and what information may be subject to disclosure. Additionally, Square Trade continues to consider whether it should make information about case outcomes public or not.

*Discussion*

67. Questions ensued from the panellists regarding the ability of average consumers to use the Resolution Room tools and regarding the training of neutrals. **Mr. Rule** replied that the Resolution Room system has been tested by consumers in a number of different countries and appears to be very intuitive and easy to understand. They utilise pop-up windows and animation and have conducted demonstrations in many countries. Neutrals are experts in their areas. Each of them receives 60 hours of training to ensure they can move effectively their mediation/arbitration skills online.

68. Questions were also raised about the types of disputes handled and length of time to resolve them. Mr. Rule explained that their program was developed to resolve disputes that arose online but their market has grown to include offline cases. He also explained that 90% of disputes are resolved in less than two hours of total neutral time.

69. **Odile Nicolas-Etienne**, of the *Union Fédérale des Consommateurs*, stressed that consumers need to be given the resources to determine if ADR is the best approach for them. This includes information about the ADR schemes. She expressed disappointment that ADR providers did not provide information about the settlement outcomes.

70. **Pippa Lawson** drew attention to the high cost structure of most online ADR providers as found in the Consumers International report. She lauded Mr. Rule for mentioning that they are exploring a new pricing structure. Ms. Lawson also raised the issue that mediation is more appropriate where both sides must compromise. She urged caution that there are some situations where consumers must not be forced to compromise; online dispute resolution may mean more effective redress but that does not mean that avoiding court at all cost is the solution either.

71. **Mr. Borking** advised against disclosures, saying it would discourage businesses from entering into mediation. **Ms. Lawson** observed that between the models of onlinedisputes.com and Square Trade, Square Trade seemed to be more appropriate for the typical consumer dispute since most disputes, if not settled by internal complaints handling mechanisms, can be settled at the first stage through direct negotiation.

72. The issue of the appropriateness of online ADR to settle privacy disputes was discussed. Some felt that for simple privacy disputes, some of the kinds of systems illustrated in this session might apply. **Mr. Borking** pointed out that his government (the Netherlands) had received funding from the EC to build an intelligent software agent capable of handling more complex dispute cases, such as those pertaining to consumer privacy.

73. Finally, **Mr. Borking** raised the issue of the advisory tool that helps consumers decide which type of ADR to pursue, and if onlinedisputes.com provides a disclaimer. **Mr. Rule** responded that they do provide a disclaimer, telling consumers the advisory tool is not legal advice and suggesting that they may wish to seek legal counsel during the resolution process.

74. A question was raised from the audience regarding oversight of the quality of the neutral's activities, and disparities between writing abilities of parties. **Mr. Rule** highlighted the benefits of online ADR, saying that all the information exchanged between a neutral and the parties is captured, so can easily be reviewed for quality control. In addition, asynchronous communication can be helpful to those with writing difficulties because it allows parties to take time to prepare responses rather than being forced to provide an immediate verbal response. **Ms. Lisco** responded that their system builds in technological triggers that, for example, notify Square Trade if a mediator has not responded to a client within 24 hours, or if a case has not been settled within one week, etc. Other quality control measures include reviewing satisfaction and settlement rates of neutrals.

#### ***Session 4-III: Formal resolution mechanisms***

75. **Fabien Gélinas**, Vice President and General Counsel of eResolution, described his organisation's activities as a dispute resolution service provider under the ICANN Uniform Dispute Resolution Policy for domain names. eResolution also recently began licensing its technology for B to B disputes and providing dispute resolution for any type of commercial transaction. In the B to C field, eResolution will provide its technology to the ECODIR project, which is presented in Session 4-IV. Since launching on 1 January 2000, eResolution has handled more than 300 cases involving parties from 45 different countries. A new, Web-based case and document management system allowing the parties and the neutral to work on a case from anywhere was recently put into place. It includes fax uploading capability, chat room, and soon, videoconferencing. In addition, eResolution is currently developing a system in which the same neutral may play both the role of mediator, and, if necessary, decision-maker. He said he believes that "soft" enforcement mechanisms are more promising than methods based on a legalistic approach.

76. **Erik Wilbers** gave an overview of the World Intellectual Property Organisation (WIPO) resolution system for domain name disputes and the development of their online ADR program. WIPO is developing an online database that will allow parties to access files and other information securely. The system lets parties submit files of all types, provides notifications of submissions, allows parties to pay fees online and will in the future include videoconference capabilities. He outlined the ICANN rules for domain name dispute settlement, and said that in the last year, 1 682 cases were filed with WIPO from parties in 74 countries. More than 1 100 cases have been resolved, and the average case is settled in less than two

months. Of the case resolutions, 880 came through panel decisions and 251 came through party settlements.

### *Discussion*

77. **Ms. Haviland** noted that regarding ADR for domain name disputes, it is crucial that arbitrators are trained and highly qualified since they are acting as “judges” in a *de facto* international commercial court. While ICANN rules require domain name case outcomes to be made public, she is not convinced that this should be the case with B to C disputes since in the case of domain names, the goal is to develop precedent where the same may not be the purpose in the B to C sphere. Others suggested that perhaps provisions for disclosures could be specified in the pre-dispute conditions.

78. A discussion ensued about potential problems of bias in the ICANN process; consumer representatives asserted that WIPO arbitrators rule in favour of the domain name trademark holders more often than the registrants, accounting for the relatively larger number of disputes filed with WIPO. ADR providers argued that the issue is one of perception.

79. **Ethan Katsh** said that arbitration in the B to C environment is difficult because whilst some parties would prefer to arbitrate it would always be difficult to persuade others to participate. He recommended that recourse to arbitration be non-binding or governed by an arbitration agreement in place between the parties. Mr. Katsh reminded the conference that domain name dispute resolution is still in its early days. He said that there were three main providers of domain name dispute resolution, one of which used mainly IP practitioners and one of which used academics and a final one used retired United States judges. He said that it could be interesting to look at the effect the different classes of neutrals have on the different outcomes.

### *4-IV: ADR mechanisms under development*

80. **Duncan McDonald** of the *American Institute for Contemporary German Studies (AICGS)* outlined a proposal by the AICGS to create a joint venture network between German and United States companies to settle online B to C disputes between parties in these countries. The aim of the joint venture is to bypass legal systems and minimise the role of lawyers. The system is being designed to be free to consumers, non-adversarial, voluntary and non-binding. In order to give consumers the freedom to work with a neutral where they live or bought the product, universities would provide neutral services. Important issues to address include educating neutrals on how to handle this kind of work, deal with the consumers who are unfamiliar with the rules in the other country and design a very simple system to accommodate the majority of consumers who do not want to read or write.

81. **Vincent Tilman**, Researcher at the *Centre de Recherches Informatique et Droit*, described the ECODIR (Electronic CONsumer DISpute Resolution) project, currently under development and funded by the EC. The objective of the project is to implement an online ADR process for pan-European, cross-border B to C disputes. Due to launch in June 2001, the project takes into account studies of the social, legal and technological aspects of ADR. Stakeholders involved in the project include European and North American universities, mediation centres, private sector partners, and an advisory board including representatives of business and consumer organisations and national out-of-court-bodies. To date, organisers have identified several areas of difficulty in meeting the criteria for online ADR, including:

- Independence: how to finance ADR for small value disputes?
- Transparency: how to strike a balance between the quantity of the information and the simplicity of such information to be provided to consumers?
- Adversarial principle and how to protect confidentiality in the mediation process?
- Effectiveness and legality.

82. **Christopher Kuner**, of Counsel, Morrison & Foerster, LLC gave a presentation on the International Chamber of Commerce's strategies in the area of B to C ADR. Mr. Kuner recalled that ICC houses the world's largest B to B arbitration forum and is interested in B to C because it is the world business organisation, because it has wide experience in arbitration and because it can offer the leadership that the business community needs. He mentioned that an expert group had been formed taking into account geographical and professional diversity and had issued a strategy paper on policy matters and concrete steps to be taken. The policy principles highlighted in the paper are aimed at businesses, governments and ADR providers, in an effort to promote principles such as availability (need for access to ADR when doing business), credibility (notice of terms and conditions relating to ADR), competition (variety of ADR offered) and openness.

83. The concrete steps outlined in the strategy paper include the setting up of a dispute resolution clearinghouse, which would:

- Provide information to business and consumers on ADR world wide.
- Assist parties in search of ADR.
- Provide standard online forms for submission of cases to ADR.
- Provide a translation service of these forms.
- Develop basic standards for ADR provision.

Finally, Mr. Kuner mentioned that ideas for the future included assistance to business in internal consumer services and setting up their own ADR. To this end, he stressed that the ICC intends to work closely with the GBDe and consumer groups.

### ***Discussion***

84. Two areas of difficulty identified for setting up online ADR mechanisms were discussed by the panellists: the issue of mandatory recourse to ADR, and the independence of ADR schemes.

- At this early stage of development of online ADR, the binding nature of arbitration makes it less attractive to consumers (**Charles Underhill**).
- Non-binding ADR creates an incentive for providers to develop good ADR that meet the minimum standards and thus could engender consumer confidence. Consumers should not be bound, but business should be (**Pippa Lawson**).

- ADR is just a tool to achieve consumer confidence which, in any case, will mostly be achieved by compliance by business with all aspects of the transaction. Independence of ADR schemes should be secured by using collective funds from e-commerce companies (**Odile Nicholas-Etienne**).

## **DAY 2: REACHING EFFECTIVE ONLINE ADR AT A GLOBAL LEVEL**

85. **Ms. Jytte Oelgaard** opened the second day of the Conference, saying that it was important to discuss how ADR could become an effective tool in establishing peoples' trust in the online B2C marketplace. She outlined the day's focus on legal and technical issues surrounding online ADR. Based on the previous day's discussions, she offered her views on the necessary requirements of online ADR, including impartiality, easy access, low cost, transparency, and reliability. Ms. Oelgaard said it was also important to examine who is competent to have oversight over these ADR.

### **Session 5: Challenges to Online Dispute Resolution**

#### ***5-I: Socio-economic issues related to online ADR***

**Focus:** This session was intended to discuss some of the socio-economic challenges, including how cultural, linguistic and economic differences might challenge the effectiveness of ADR systems; or similarly, how differences in information and expertise might affect the use and implementation of ADR, while considering that online means of communication (digitalised texts, sounds, stationary or moving images) affect methods of work, cultural patterns and life-styles.

86. **Anna Fielder**, Director of the Office for Developed and Transition Economies at Consumers International, served as moderator for session 5-I. She raised three points discussed during Day 1 that related to the session's focus. First was the idea of synchronicity of communications in online ADR, and the potential benefits of giving parties time to think before responding. Second was the possibility that online ADR helps eliminate bias and preconceived notions of, for instance, race, gender, or age. And finally, she stressed that online ADR may accentuate literary imbalances: those who can write well have an advantage in the online context.

87. **Nora Femenia**, Professor and Vice President of OnlineDisputes.org, presented the results of her extensive research on social aspects of ADR, and how cultural differences affect the use and implementation of ADR systems. She said that some studies have shown that where a mediator is an Anglo-Saxon, invariably any party that is non-Anglo-Saxon will lose. She said that each culture has different ideas about what conflict means, and that, in examining culturally-influenced behaviour in mediation, it is possible to draw a basic distinction between: *i*) individualists (focus on personal gain) and *ii*) collectivists (focus on good of the community). It is important to look at how people act and whether they are orientated towards individualism or collectivism as these two types approach a dispute in different ways, the individualist concentrating on receiving redress, and the collectivist concentrating on the outcome that is best for the community and the relationship with the other party.

88. She also highlighted that it is very important for customers to perceive that they have experienced justice through a dispute resolution process. She referred to the message delivered the day before by other speakers that customers who complain, and whose complaint is dealt with correctly, actually return and are more loyal and spend more money than before. She also said that in general people want sympathy and understanding and want to feel like a valued customer.

89. Ms. Femenia also stressed that customers' expectations of a dispute resolution process include an expert complaint handling, an apology from the other party, and a quick and simple mechanism. Customers will accept a decision generated by a computer (*i.e.* automated) because computers are seen as neutral parties.

90. She discussed that some cultures are not conducive to complaining and business must therefore give support that recognises this difference to those customers. She explained that some elements of customers' desires are however cross-cultural, for example, the offering of an apology; acknowledgement of the customer as a real person; business not denying or excusing its fault; identifying the problem quickly; acting in a respectfully attentive way; and providing opportunities for emotional "venting." Ms. Femenia added that businesses should offer some token of reparation in recognition of the time spent by the consumer in complaining, and that any dispute resolution mechanism should be free of charge and designed from a customer's point of view. Finally, she emphasised that customers should not be overwhelmed with information, rather they should be provided information that is necessary at the appropriate moment.

### ***Discussion***

- The ability of a consumer to complain in his/her own language is an integral component for an accessible system. From the experience of the European Advertising Standards Alliance (EASA), which has 28 members in 25 countries and deals with 50 000 complaints per year (national and cross-border) in a variety of languages, ensuring linguistic barriers are properly addressed is a key necessary first step towards effective ADR. (**Carmen Fernandez Neira**). And language does not just mean literal translation, it must reflect the intended cultural meaning. Online translation sites should therefore have cultural adaptation as well as language translation (**Ms. Femenia**).
- The issue of community values versus individual values in dispute resolution must be taken into consideration. There are several examples of difficulties in mediation between Asian and American or European parties. The culture of the mediator can also be an issue. It is doubtful that automated dispute resolution systems could take account of these complex human elements (**Toh See Kiat**, Partner, Tan Peng Chin and Partners).
- There are many different meanings and interpretations of what is ADR. Even within the European Union, the lack of information on ADR available to consumers and linguistic barriers are a serious source of concern (**Giles Buckenham**, Administrator, Directorate General for Health and Consumer Protection at the European Commission).
- It is important to develop a system that recognises cross-cultural differences. People want to feel they have a fair hearing. Stakeholders should not expect perfect ADR mechanisms at this stage: it is important to be flexible and consider what needs to be done in order to get global or regional ADR programs up and running (**Scott Cooper**, Manager of Technology Policy at Hewlett-Packard).

91. **Christopher Drahozal**, Professor at the University of Kansas School of Law made a presentation on the economics of online ADR. Starting from a basic definition of economics that parties make choices in the face of scarcity he raised a number of issues to consider when looking at the development of online ADR. He stressed that some disputes are too expensive to resolve, even through online ADR. On the other hand, because the online medium can reduce the cost of ADR, it may enable the settlement of disputes that in the offline world would be too expensive to resolve. However, he stressed that without online dispute resolution available at a global level, many disputes will remain unresolved or outcomes un-enforced.

92. He discussed the issue of fairness related to who bears the cost of ADR: not all consumers have disputes, yet the costs of ADR will be passed on in the price of the product, and all consumers will end up paying for the dispute resolution mechanism.

93. Mr. Drahozal also raised the point that not all disputes are the same, and because of this, different disputes may require different approaches. For example, low value consumer purchase disputes and disputes involving personal injury are completely different. He commented that, from an economic perspective, there may be certain circumstances where removing access to court by including a pre-dispute, binding arbitration clause might be efficient. However, he also acknowledged that requiring consumers to submit to binding ADR will likely not be conducive to building trust.

### *Discussion*

- The first barrier to achieving consumer confidence in e-commerce is mistrust in the medium itself. ADR is not a complete solution to consumer confidence in e-commerce and consumers need further confidence that nothing will go wrong in the first place (**Mr. Buckenham**).
- Many consumers are reluctant to use the Internet; however, e-commerce can save consumers a lot of time and money, and they may receive better service in the online environment (**Dr. Toh**).

94. **Ms. Fielder** closed the session by saying that consensus is emerging that ADR must be free or low cost to consumers and accessible. In making dispute resolution fair and more accessible, cultural and language problems must be addressed.

### *Session 5-II: Legal issues related to online ADR*

**Focus:** This session was expected to highlight those procedural and substantive elements considered as essential to ensure a fair and effective ADR process, while recognising that these elements may vary depending on the type of ADR and/or dispute.

95. **Mozelle Thompson**, Commissioner at the US Federal Trade Commission, served as moderator for Session 5-II. He raised, on behalf of Philippe Fouchard, Professor, University of Paris II, four important legal issues to be addressed: *i*) Preserving voluntary recourse to courts; *ii*) Insuring transparency for the status of intermediaries; *iii*) Fostering flexible procedures; *iv*) Ensuring confidentiality unless agreed otherwise by the parties.

96. **Christopher Kuner** presented a summary of a study he conducted for the GBDe on legal obstacles to online ADR. He acknowledged that there is no common understanding of the different ADR processes, and that basic terms such as “arbitration” are understood differently, due to cultural differences

among people. In looking at the out-of-court dispute resolution systems run by third parties, Mr. Kuner explained that ADR must be based on some sort of agreement between the parties, adding that it is in no-one's interest to force a party into arbitration against his/her will. He then discussed whether the accreditation of ADR schemes should be considered. He raised other legal concerns related to online ADR, such as the difficulty of determining the place of arbitration online, or the fact that national laws on encryption could add further complications. He discussed online security and commented that flaws in the Internet could run afoul of constitutional guarantees for fair procedures in countries such as Germany.

97. Mr. Kuner discussed embodying the result of ADR settlement agreements. He added that enforcing judgements based on these agreements is too costly. He then discussed binding awards. He stated that he did not think that the New York Convention was useful in the e-commerce context.

### *Discussion*

98. **James Murray**, Director of the *Bureau Européen des Unions de Consommateurs (BEUC)*, discussed the question of binding or non-binding procedures. He argued in favour of a non-binding arbitration procedure, adding that ADR should be an alternative to court but should not require a strict choice between court and ADR. He emphasised that there was great difficulty in enforcing legal rules. In this regard, he recommended standards for ADR schemes and suggested that trusted third parties could assess whether or not a business meets those standards. He also said that sensible involvement of public authorities should be encouraged.

99. **Ron Plessner**, Partner at Piper Marbury Rudnick & Wolfe, discussed the possibility of an exhaustion of remedies concept. He advocated a system that requires consumers to go to ADR first; if after undertaking ADR, the consumer is still not satisfied with the outcome, he/she may then go to court. This approach does not extinguish the rights of consumers. He argued that businesses would be investing a significant amount of money in developing and maintaining ADR systems; therefore, it was only fair that consumers should be required to undertake ADR first. He added that in relation to standards, the difficult issue is whether to accept the law of a particular jurisdiction. He suggested that it may be easier to create codes for different types of procedures, and examine the question of how codes should be enforceable.

100. **Petra Spring-Reiman**, Directorate General for Internal Market at the European Commission, commented that, in relation to the question of binding and non-binding ADR, continental lawyers probably agree that the threat of establishing a quasi-judicial system would be problematic. In this respect, she explained that if the system of ADR were binding then its decisions would act as a form of precedent and lawyers would be examining those decisions for consistency and potentially the establishment of new legal principals. She said that if the right to go to court were precluded and the ADR system were binding then there should still be clear appeal possibilities. She also provided that moving online requires systems to be flexible, not burdened by the types of safeguards required in judicial procedures.

101. **Michael Geist**, Professor at the University of Ottawa Law School said that a list of elements can be established to make ADR work, but that tradeoffs need to be made on issues such as precedence and cost. He said that there is a need to have precedence and that once a number of decisions will have been made, seeking legal counsel will be important. This is now the case with domain name disputes. As for the issue of who should pay for the ADR, he added that very little money is being invested in ADR systems at the moment as the market is not yet receptive.

102. **Matthias Blume** of the Austrian Ministry of Justice commented that there was a thin line between who pays for the ADR and who achieved the standards. He said that it was important to build trust for consumers, and that, in this regard, standards should not be mandatory and the voluntary character of ADR schemes should be upheld. In relation to trustmark systems for ADR, he argued that enforcement measures are needed, and he explained that such measures have been set up in Austria.

103. **Jean Ann Fox** said that when consumers are going online to purchase goods, they often do not read the ADR agreement, and therefore, they do not voluntarily agree to be bound by ADR. She commented that she was strongly opposed to Mr. Plessers' proposal to require consumers to go through the ADR system before they seek court remedies. She said that an ADR system ought to be established in such a way that it is more attractive to consumers than court.

104. **Mr. Plessers** responded that there is a need to justify the expense of the ADR system. He said that his proposal for an exhaustion requirement was a middle ground solution because he was not preventing recourse to court but only requiring ADR to be tried first.

105. **Mr. Blume** said that in his three years' involvement in the area of consumer issues, he had never seen a consumer proceed to court at the first stage. However, he argued that consumers should have the possibility to go to court at any moment during a dispute.

106. **Hubert van Breemen** said that in the Dutch system, binding outcomes are possible, but this was a decision reached by both industry and consumer representatives.

107. Another question came from the floor regarding the role of preserving class action lawsuits in the discussion of ADR. Mr. Plessers described such suits and explained that in some class action cases in the United States, security brokers have opted for mandatory arbitration.

108. **Mozelle Thompson** closed the session by stressing the need to foster co-operation between business and consumer representatives on these legal issues.

### *Session 5-III: Last resort principle and juge d'appui*

<p><b>Focus:</b> This session aimed at focusing on the intersection of online ADR with the jurisdictional framework, during the ADR processes as well as when the alternative mechanisms fail.</p>
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109. **Catherine Kessedjian**, Professor at University of Paris II, served as moderator for Session 5-III.

110. She presented the framework for the session, which included first addressing the question of whether, in the course of ADR, to facilitate a successful and smooth ADR process there is a role for the *juge d'appui*, a notion which exists in international trade arbitration; and second, the notion of last resort which preserves recourse to the courts. Ms. Kessedjian recalled that the focus of the session was on methodology and the competency of the judge and did not address issues of the applicable law.

111. She invited the panellists to discuss what part a *juge d'appui* might play in ADR.

112. **Roger Cochetti**, Senior Vice President and Chief Policy Officer at VeriSign, responded that the *juge d'appui* is a useful concept but is based on the presumption that cases involve low volume/high value disputes, a presumption which underlies the practice in the context of international commercial arbitration. In B to C e-commerce, he argued, this presumption is defeated given that it deals, to a large extent, with

low value/high volume disputes. He added that it would be difficult to involve the judicial process in ADR without jeopardising the principle that the process should be economical for both parties.

113. **David Goddard**, a barrister representing the New Zealand Law Commission, outlined four basic situations in which the judge may still be useful in the context of ADR: *i)* Pure enforcement of consumer rights issues as courts still have the exclusive exercise of coercive powers; *ii)* As a judge of last resort, by having clear rules as to what happens if there is no agreement about ADR; *iii)* As a *juge d'appui*, in cases of binding arbitration (in case of non-binding arbitration if parties cannot agree on a new replacement ADR, there is not much hope that an agreement could be reached on the merits); and *iv)* In the enforcement of a settlement agreement.

114. **Naja Felter** of Consumer International, asserted that consumers should always be able to go to court and should never be required to forfeit that right. She agreed that the *juge d'appui* concept is difficult to build into the B to C context given the usual low value nature of the disputes, and added that if there is good oversight of the ADR, there should be no need to resort to a *juge d'appui*.

115. **Asuncion Capparros**, Manager of European Affairs at ABN Amro Bank, said that the *juge d'appui* is not *a priori* an attractive new layer in B to C. Furthermore, she raised the issue of the background of a judge in this context and what the qualifications might be. Would a judge come from the court system or a government law enforcement agency? What specialised experience could be required of judges?

116. **Giacinto Bisogni**, National Expert in the Legal Services of the European Commission said that, given the voluntary nature of ADR, he did not see a role for a *juge d'appui* in the course of an ADR process. He added that recourse to a judge in the course of an ADR process may introduce far too much rigidity. He suggested that responsibility to ensure a successful and smooth ADR process be given to the ADR provider or to an oversight organisation.

117. An audience participant pointed out that questions of applicable law and procedure could be solved by the judge since the neutral has no power in this regard. He also suggested that the judge could serve to protect consumer rights in provisional and protective measures as well as in enforcement issues. In addition, he posed the question of whether it would not be appropriate, instead of having a limited role for a *juge d'appui* in ADR, to make jurisdictions more mediation-oriented.

118. **Ms. Kessedjian** then invited the panellists to consider the following questions in relation to a last resort: *i)* What role must a judge play; *ii)* Who should that judge be, what are the required competencies; *iii)* Could it be compulsory for a consumer to make a choice or should there be rules by default; *iv)* What means should be used.

119. **Mr. Goddard** presented an overview of the ongoing work by the Hague Conference on Private International Law on a convention on jurisdiction and recognition of foreign judgements. The convention's original proposal to have a special consumer jurisdiction (*i.e.* the place of habitual residence of the consumer) gave rise to a lot of controversy. In view of the difficulty of the issue, some proposed to exclude consumers from the scope of the Convention; others proposed that countries be allowed to let their consumers agree to some other forum than the ones provided in the Convention. Another possibility would be to retain the classical jurisdiction (defendant's habitual residence, place of establishment or branch, place where the tort occurred, or voluntary appearance of the defendant).

120. **Ms. Caparros** recalled that whereas under current European legislation consumers have the right to sue in the courts of their country of residence, they may still need to seek enforcement of the judgement in a foreign country.

121. **Mr. Cochetti** indicated that the access of consumers to local courts is not practical and that the results are likely to be unenforceable given the low value of the disputes.

122. Finally, **Giacinto Bisogni** recalled that the Commission is considering a general consultation on the creation of an extra-judicial European space where ADR outcomes would be recognised.

123. An audience participant pointed out that it is important in designing rules to be careful not to discourage smaller countries and industries from participating in e-commerce.

#### **5-IV: Technological issues related to online ADR**

**Focus:** This session aimed at highlighting technologies already in use or under development with a view to how they can be used to facilitate online B to C dispute resolution. For example technologies used for secure electronic signature and authentication<sup>3</sup>, or encryption of content messages may help ensure confidentiality and integrity of the process and the information exchanged. Furthermore, interactive technologies like video-conferencing may bring the parties together, moving them from behind their computer screens to a virtual setting making the experience a face-to-face interaction. Similarly, automatic translation and voice recognition may help bridge some cultural differences.

124. **Wibo Koole**, Head of Consumer Policy Department at Consumentenbond NL, served as moderator for Session 5-IV. He stressed the importance of examining how technologies can support ADR and speed its development.

125. **Chris Lynn**, Legal Associate with Microsoft Europe, Middle East and Africa, gave a presentation on technological developments that will be useful for online ADR. He focused on advances in computer languages, enhanced videoconferencing, and translation and speech recognition software. Mr. Lynn stressed that technology is ethically neutral and that users need to think about policy issues before they deploy systems.

126. He described XML (extensible mark-up language), a language that allows Web-based applications to talk to each other and make “intelligent” decisions from this information. XML connects all the technological components of the supply chain. In the ADR context, he suggested that it could help achieve transparency by overcoming certain person-to-person barriers such as allowing for digital signature “handshakes”. He discussed how ultra-fast broadband access technology, such as Mbone, will allow for secure high-quality videoconferencing at a low cost. Finally, Mr. Lynn discussed advances in translation and speech recognition software. Although the current versions of these are far from perfect, “smart” software is being designed that promises to change the user experience.

127. **Joseph Alhadeff**, Vice President of Global Public Policy at Oracle, followed with a discussion of some of the policy issues to consider in developing online ADR, including how do ADR providers use technology, and how does technology affect an arbitrator’s evaluation of facts. Among some main questions for parties to consider in doing business online are: *i*) Can you authenticate the other party (are they really who they say they are?); *ii*) As a merchant, what are my tax obligations for providing goods or services cross-border?; *iii*) With whom has the consumers information been shared; (are there privacy concerns?).

128. Mr. Alhadeff also discussed technology-related issues specific to customer service online, such as navigability of a Web site and language capabilities; security and confidentiality of data online; and ability of a merchant to know product availability. For ADR providers, he stressed that systems should be backed up regularly to maintain data integrity. Finally, he identified a number of consumer trust issues involving

technology and policy. Among those cited on the technology side were concerns about identity theft, the security of payment card information, and lack of customer-side controls. The list of policy topics included privacy, authentication, and fraud and consumer protection.

### *Discussion*

- Common market technology can be used for online ADR. XML and other new technologies, such as video conferencing, will be used in the future. As XML can be used to formalise a group of applications, it could be an Extended dispute resolution language. First, there may be a need for simple middle ground technology, not a Cadillac, but “a public transport” technology (**Peter Lubkert**, Head of Division, Information Technology and Networks, OECD).
- Language problems can still occur with videoconferencing, whereas asynchronous communications may give each party time to fully understand the communications they are reading and sending (**Pippa Lawson**).
- There is a need for generic standards and criteria for ADR, and the challenge is how to translate these standards into technological requirements. It appears that a very high level of automation is needed to handle the first stages of online dispute resolution such as direct negotiation (**Marc Wilikens**, European Commission’s Joint Research Centre).
- Technology has to be guided by principles as on the one hand, technological tools can help consumers maintain their anonymity online, and on the other hand, technology also poses threats to data protection and individual liberties. ADR may not be appropriate for privacy disputes where users need injunctive relief. Because most privacy violations are not single cases, but perpetrated against large numbers of users, the right to class action must be preserved (**Sarah Andrews**, Policy Analyst, EPIC/Privacy International).

129. Speaking from the floor, **Susan Grant**, Director of the National Fraud Information Center at the National Consumers League, raised the issue of interoperability of computer hardware and software between the ADR provider and the consumer. She suggested using an approach similar to the one adopted in the recently-passed United States e-signature law that requires consumers to give consent to receive electronic documents in such a way that it demonstrates they have the capability to receive this information on their systems.

130. During a brief discussion about “intelligent” software agents, **Mr. Alhadeff** raised the concern that, although useful, such agents could create legal concerns if they make decisions on the part of the parties.

### **Session 6: The Roles of Stakeholders**

**Focus:** Based on previous discussions, this final session was expected to highlight common stakeholder views on a number of socio-economic, legal and technological elements that should be part of any fair and effective online ADR for B to C disputes, and to focus on how best to foster their implementation through exploration of two main policy areas.

131. **Arie van Bellen**, Managing Director of Electronic Commerce Platform Nederland, served as moderator for Session 6.

**6-I: Promoting fair and effective online ADR and ensuring compliance (e.g. trustmark programmes)**

**Focus:** This session was expected to further discuss the roles of stakeholders in relation to promoting fair and effective B to C online ADR. This included discussing how the stakeholders should co-operate to identify essential elements for online ADR (e.g. Who should sit at the table? Should there be separate recommendations by different stakeholders, as is the case to date? Where should guidance for ADR be identified – e.g. in regulation or codes of conduct). It was also to include how the stakeholders can work together to ensure compliance with these elements.

132. **Naoshi Shima**, Vice President for Internet Business Development at NEC Corporation, offered an overview of dispute resolution in Japan. He stated that while most Japanese consumers trust the good faith of merchants, they are very strict about product/service defects. As a result, standards of quality tend to be high. While recourse to courts is available to consumers, most prefer to negotiate directly with the merchant or to use ADR mechanisms such as consultation and mediation if direct negotiation fails.

133. Japan's consumer protection law obliges local governments to establish consultation centres for B to C disputes. In addition, NGO's and industry groups operate consultation centres. Almost all disputes brought before the centres are settled. The centres operate offline and lack the requisite knowledge and skills to move to the online environment. Mr. Shima discussed several issues being discussed in Japan related to dispute resolution, including deregulation of the "attorney law," which permitted only attorneys to deal with consumer dispute cases.

134. **Barbara Wellbery**, Partner at Morrison & Foerster, LLC, presented her perspective of the roles of stakeholders in identifying criteria for online ADR mechanisms. She stated that thus far stakeholders agree that ADR must be effective, no or low cost to consumers, easily available, and independent/impartial. However, she questioned how long this consensus would last once stakeholders begin to discuss the specific details of these elements. She highlighted a similar situation that arose in discussions of privacy principles for the recently adopted safe harbour accord between the United States and the European Union. She further identified a number of elements of ADR on which participants did not yet agree, including: who should bear the cost of ADR; possible trade-offs between procedural guarantees and efficiency; whether ADR can be mandatory for consumers; and whether ADR outcomes can be binding on consumers.

135. She discussed two options for who should set rules for ADR: governments or the private sector. She argued that because governments have national interests and perspectives, it is unlikely that they will adopt globally-compatible guidelines. Rather, she recommended that the private sector take the lead in establishing criteria for online ADR, ensuring that all stakeholders are at the table. She also suggested that if stakeholders define the scope of this exercise to that of making rules for cross-border, online ADR for B to C transactions and simple privacy disputes, the task will become more manageable.

136. **Malcolm Crompton**, Federal Privacy Commissioner of Australia, provided an overview of Australia's proposed co-regulatory approach for privacy protection. The Australian privacy law provides for either the establishment of sectorally-based codes of conduct and code complaint bodies for settling disputes, or the ability of the privacy commissioner to handle consumer complaints. The approach is to set minimum standards and benchmarks for privacy protection, and to allow the marketplace to develop solutions to privacy over and above the standards. The Privacy Commissioner will implement the standards and enforce compliance. Mr. Crompton stressed that 50% of the transactions by Australians are abroad where national laws do not apply. This illustrated the importance of privacy commissioners working together globally, and gave the example of the recent joint study conducted by his office and the Information and Privacy Commissioner of Ontario, Canada, on online trustmark programs. He argued that

privacy commissioners need to rethink their roles in the Internet age, focusing on co-operation and strategic partnerships.

137. **Martin Bond**, Assistant Director, UK Department of Trade and Industry, illustrated the United Kingdom's approach to identifying the roles of stakeholders in establishing rules for e-commerce. He said that there is a demand for official endorsements and governments can help forge global links. He described the United Kingdom's "light touch" approach to regulating the development of codes of practice and best practice programs. He strongly encouraged consumer organisations to participate in this process so that there is "buy in" from all stakeholders.

138. Mr. Bond outlined the TrustUK program through which the UK Government is encouraging codes of conduct. Rather than imposing a single code for the online environment, TrustUK approves codes of practice that embody their core standards on, for example, privacy, advertising, and provision of contract information. He stressed that ADR should be an integral part of these code systems.

139. He commented that as a result of this arrangement, the government is well placed to promote links between national codes. For instance, TrustUK is taking part in the EC's stakeholders group effort to develop guidelines for code providers in Europe. He also pointed to fora like the OECD where governments can participate on an international level.

### *Discussion*

- Governments have an important role to play in setting down a general policy framework. In particular, governments should set guidelines for fair and reliable ADR systems and to facilitate international co-operation in this area, for example, in the promotion of mutual recognition of online seal programs (**Yuko Yasunaga**).
- A proliferation of seal and ADR programs is arising nationally and there is a need to have general guidelines. Such guidelines should be concerned with all types of disputes. In developing these, it is important to include the ADR providers themselves who have practical experience in dealing with disputes (**Rebecca Richards**, Director of Policy and Compliance at TRUSTe).
- Governments ought to proceed with caution in looking to developing guidelines, because there is a tendency to be too territorial. The Internet is at a very early stage of development, given that more than 50% of current Web sites started just in 2000 and more than half of consumers who spent money on the Internet did so for the first time that year. However, if there is a need for a cautious approach, this does not mean inaction (**Roger Cochetti**).
- Although there is a need to be realistic about the early stage of Internet development and a need to experiment, some guidance is required at this point. Guidelines should come from a high level like the OECD consumer guidelines. Participants should consider what the role of stakeholders would be. In the case of consumer organisations, they can give input to businesses and rate business services, as they did for the online shopping checklist for consumers developed by the Trans-Atlantic Consumer Dialogue (**Susan Grant**).
- The adoption of guidelines should not be delayed because the marketplace is developing, because once online models are in place, businesses may argue that it is too costly to modify their processes to account for new standards (**Jean Ann Fox**).

140. **David Mair** described the difficulty of identifying who really speaks for e-commerce in the context of stakeholder discussions; for example, it is not always easy to find the voice of retailers and SMEs. David Mair also stated that it was important to distinguish between the following two key questions: *i)* The role of technology in ADR and *ii)* The role of ADR in e-commerce. He said that we should be extremely careful not to blur the distinction between these two questions and address them separately.

### *Session 6-II*

**Focus:** Cross-border ADR is common in the B to B context, but is new in the B to C context. Recognising that users' and consumers' knowledge and understanding of ADR is minimal, this session aimed at focusing on the roles of various stakeholders in educating consumers, as well as businesses, about such mechanisms to resolve disputes online. In particular, the discussion was to include effective approaches to educating business about offering ADR and to educating consumers about the nature of and procedures for fair and effective ADR.

141. **Francis Aldhouse**, Deputy Data Protection Commissioner in the United Kingdom gave a brief overview of the role of the Data Protection Commission and the Data Protection Act 1998. He explained that enforcement of the Data Protection Act is by criminal prosecution and added that there is a duty to investigate compliance at the request of any individual. However, the primary method of enforcement is by the provision of a notice period and therefore a type of regulatory power. However, Mr. Aldhouse argued that the best way forward was not for the Commission to take on a policing role but rather to promote cultural change by, among other ways, getting organisations to include privacy protection in their business plans, and to promote good practices, including ADR.

142. The Data Privacy Commission receives between 5 000 and 6 000 complaints a year. He said that last year, two thirds of cases handled by the Commission were based on simple factual disputes. Mr. Aldhouse also discussed efforts by the Commission to educate consumers about their privacy rights by running television advertisements and through poster advertising.

143. **Ms. Grant** referred the conference to the Consumers League Web site at [www.nclnet.org](http://www.nclnet.org). She said that there was a guide to shopping on-line safely available on the Web site and added that effective public education was crucial.

144. **Mr. Mair** commented that it was important to look at ADR in a wider context. He said that it is important to educate customers by promoting the message that if something goes wrong with a transaction, a good complaints handling system is available, then they may have recourse to ADR and then finally, if that is not adequate to redress their complaint, they can take the matter to court.

145. **Mr. Yasunaga** indicated that consumers who are not educated about seal programs or online issues are more likely to encounter problems. He said that it is important to promote disclosure about ADR and that consumer representatives should play a more active role in this area. He said that education was more effective for the younger generation than for adults.

146. **Mr. Cochetti** agreed that education was extremely important. He discussed a privacy leadership initiative that is launching a United States education campaign about protecting privacy on the Internet. He said that his company is developing an education program for SMEs about codes of conduct and other self-regulatory initiatives.

147. **Ms. Richards** said that it was important to remember that it necessary to educate stakeholders offline as well as online.

### Conference Conclusion

148. **Mr. Ford** recalled the key themes discussed on day 1:

- The keynote speeches highlighted the need for global partnerships among stakeholders as a key element in developing fair and effective online ADR mechanisms for business-to-consumer disputes. Speakers also acknowledged the complex legal and technological challenges that need to be addressed to reach this end.
- Session 1 provided a summary of efforts taking place to examine the development of online ADR nationally, regionally and internationally. It was clear that stakeholders from government, business and consumer organisations are equally committed to promoting ADR for B to C disputes. The discussion helped identify areas of common ground and differences to be bridged among the various stakeholders with regard to essential elements of online ADR. There was a degree of consensus in a number of areas. All recognised that attention should be paid to finding ways to avoid disputes that arise between businesses and consumers. It is clear at this stage that no one size fits all in ADR, meaning that no single approach is likely to apply best to all types of disputes. Next, given the borderless nature of the Internet, ADR mechanisms must be designed to bridge cultural differences. Finally, while it is crucial that ADR mechanisms are fair and effective, the speed of decision-making should be tailored to Internet time. The presentations in this session also highlighted areas that need further exploration, including issues of consumer choice (voluntary versus mandatory ADR), binding or non-binding outcomes, compliance and enforcement.
- Session 2 featured discussions and statistics on the most common types of online B to C disputes and compliance rates with privacy regulations. The most frequent consumer complaints are non-delivery, followed by late delivery, and lastly problems associated with costs. Some of the most frequent privacy complaints are related to unsolicited commercial e-mail, identity theft, harassing phone calls, providing credit history without consent, selling data to third parties, and children's privacy. An increasing number of consumer e-commerce complaints involve cross-border transactions. The importance of law enforcement co-operation was also highlighted through the illustration of a United States-Canadian joint database of fraud complaints.
- Session 3 focused on the issues of customer expectations for service and credit card chargeback mechanisms as a way to settle disputes. Recent surveys show that consumers expect faster responses from online merchants and are less likely to remain loyal if their problems are not addressed by internal mechanisms. It is important to educate merchants about the needs of consumers. A key point raised during this session was that chargebacks are not a form of ADR but are an important element in resolving consumer disputes.
- Session 4 included demonstrations and discussion of different types of online ADR mechanisms, including automated systems (where the outcome is generated by a computer); direct negotiation and mediation systems; formal arbitration systems; and cross-border systems under development. While it was not yet clear which ADR systems are best suited to resolve different types of disputes, there was agreement that current automated systems are mainly tailored to resolve monetary disputes. There was recognition that there are limits to

what ADR systems can accomplish and development is still in an early stage, but it was agreed that they offer great potential.

The session also highlighted the need for training of neutrals/intermediaries and awareness building. Participants addressed several consumer-related concerns with online systems, including asymmetry of information, language barriers, the funding of mechanisms and the relationship between funding and impartiality of the ADR system.

149. **Ms. Oelgaard** recalled the key themes discussed on day 2:

- Session 5-I explored cultural differences in dispute resolution and economic considerations in examining online ADR. It appeared clearly that not only language barriers in online ADR must be tackled, but also cultural distinctions that have an effect on dispute resolution, such as habits of complaining and what consumers expect from customer service and ADR.

On the economics of dispute resolution, the point was raised that some disputes may be too expensive to be resolved by online ADR, and that offering ADR at low cost to consumers raises issues of who should bear the cost. Since not all consumers have disputes, should they all bear the cost, or would competition be strong enough to bring the price down overall? Another challenge is that there may be a conflict between the need for economic efficiency and the need to build consumer trust. Further work must be done to strike the right balance.

- Session 5-II focused mainly on the difficult issues of voluntary *vs.* mandatory recourse to ADR, including the idea of a pre-court exhaustion requirement for consumers, and binding *vs.* non-binding outcomes. Although the session did not lead to concrete solutions, the message was clear that work is needed in this area, starting with definitions of terminology. ADR forces stakeholders to look at certain fundamental aspects of the legal system.
- In Session 5-III there was consensus on the fact that recourse to a *juge d'appui*, while good theoretically, may not be feasible at a practical level, except maybe in a limited number of cases. In fact, there was concern that this may add an additionally burdensome layer. Further work is needed on the last resort principle, in particular on how the competent forum would be determined.
- Session 5-IV highlighted that technology is fundamental for online ADR but requires a policy framework to ensure security and confidentiality, but also transparency and simplicity. Advances in new industry technology standards such as XML offer an opportunity to harmonise and increase interoperability of global ADR. Similarly, technological advances like translation software, intelligent agents, and videoconferencing may improve the efficiency of ADR and the potential to bring parties from around the globe to a face-to-face dialogue.

While there is much promise in the use of technology in online ADR, as in other areas of e-commerce, participants cautioned that privacy issues continue to arise and should continue to be considered as the technology is developed. Similarly, what can be considered to be the advantages of technology may also present some difficult choices. For example, where some users may find face-to-face resolution mechanisms more desirable, asynchronous communication may provide a party the advantage of longer deliberation on a response.

- Participants in Session 6 expressed a number of views about the appropriate roles for stakeholders in developing online ADR. Consumer organisations have a strong vision of what

they could do to provide input. Consultation with consumer groups should go beyond simply hearing their views, but should also incorporate them into initiatives. Some expressed the view that governments should be involved to the extent that they can inspire trust and provide for democratically legitimised discussion of various ADR elements. Others asserted that the private sector should lead as e-commerce is borderless and governments are constrained by geographic borders. The private sector calls on all stakeholders around the world to be involved in surpassing e-commerce roadblocks. In addition to the current involvement of business, consumer and government representatives, the importance of the involvement of other stakeholders was stressed. More representation from ADR providers and e-merchants would be beneficial to the discussion.

- Lastly, it was agreed that disseminating information about online ADR and educating individual users and businesses was an extremely important task.

150. The chairs thanked all participants for their active input in the conference, and invited them to widely disseminate what was learned from this conference.

**ANNEX**

**BUILDING TRUST IN THE ONLINE ENVIRONMENT:  
BUSINESS TO CONSUMER DISPUTE RESOLUTION**

**JOINT CONFERENCE OF THE OECD, HCOFIL, ICC  
The Crowne Plaza Promenade Hotel  
The Hague  
11-12 December 2000**

**ORIENTATION DOCUMENT**

151. The online environment is playing an important role in the global market. Both consumers and business will derive significant benefit from online interactions. With these benefits and the expected increase of business-to-consumer (B to C) national and international interactions, come new challenges. Of particular significance are the challenges of identifying the competent forum and applicable law, and of obtaining redress across borders. Given that traditional court-based dispute settlement mechanisms may not provide effective redress for electronic commerce interactions, there is a need to examine alternative dispute resolution (ADR) mechanisms both those in existence and under development as ways to fairly and effectively settle disputes.

152. Online ADR mechanisms hold the promise of providing speedy, low cost redress for a large number of the small claims and low-value transactions arising from B to C online interactions. In addition, new and developing technologies might provide innovative and potentially more effective dispute resolution, either alone or in combination with existing mechanisms.

153. This Conference on B to C Online Dispute Resolution is organised by the OECD<sup>4</sup> with the Hague Conference on Private International Law (HCOFIL) and the International Chamber of Commerce (ICC). The views of consumers are represented by Consumers International (CI).

**Objectives**

154. Building on discussions and information shared to date in various fora, the conference will:

- Provide an opportunity for presenting, discussing and disseminating information on the diverse range of existing online ADR mechanisms (day 1).
- Explore whether and how online ADR can improve trust for global electronic commerce by helping to resolve B to C disputes arising from privacy and consumer protection issues; this will include identifying what stakeholders view as important elements for fair and effective online ADR mechanisms, recognising that these elements, which are of various types (socio-economic, legal, technical), may vary depending on the type of mechanism and/or dispute.
- Discuss the role of stakeholders in fostering the development of appropriate and effective online ADR mechanisms (day 2).

### **Analysis and future work by co-organisers**

155. Based on the two-day discussion, the Conference is expected to help all stakeholders outline their further direction for work in this area. The OECD Secretariat will draft proposals for future work by the OECD in the field of online B to C alternative dispute resolution, which will be presented to the OECD Working Party on Information Security and Privacy, and the Committee on Consumer Policy at their meetings in early 2001.

### **Conference procedure**

156. The conference has been organised to facilitate discussion among session participants and with the audience. Under the guidance of moderators, most sessions will begin with brief presentations followed by reactions and comments from panellists, as well as question/answer and active participation of the audience. A wide range of stakeholders, including representatives of business, users and consumers, and government will participate in the Conference. Academics and ADR providers will also participate.

157. A report of the Conference will be published in early 2001.

### **Background materials**

158. This Orientation Document is intended to assist Conference participants in discussing the issues to be explored. It highlights the focus for each session, suggests questions to be considered, and provides brief summaries of presentations. Related documents are annexed as follows:

159. A list of online ADR mechanisms as identified by the OECD (based on independent research and materials provided by the ICC and CI) as of October 2000 (Annex 2).

160. A list of possible procedural, substantive and other elements that might exist in ADR mechanisms (Annex 3).

161. In addition to these annexes, the following documents are posted on the OECD ADR Conference Web page at <http://www.oecd.org/dsti/sti/it/consumer/index.htm>.

1. Various papers and recommendations related to B to C ADR systems produced thus far by the:
  - European Commission (EC) (Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes).
  - Trans Atlantic Consumer Dialogue (TACD) (Alternative Dispute Resolution in the Context of Electronic Commerce Recommendation, February 2000).
  - European Commission (EC) (Out-of-Court Dispute Settlement Systems for E-Commerce: The Report from the Workshop held in Brussels on 21 March 2000).
  - U.S. Government (USG) (Summary of June 2000 Public Workshop “Alternative Dispute Resolution for Consumer Transactions in a Borderless Online Marketplace,” November 2000).

- Asia Pacific Economic Co-operation (APEC) E-Commerce Steering Group (Consumer Protection in Electronic Commerce: Report and proposals for action following the APEC workshop on consumer protection held in Bangkok on 20 July 2000).
  - Global Business Dialogue for Electronic Commerce (GBDe) (Alternative Dispute Resolution Paper, September 2000).
  - Consumers International (CI) (Disputes in Cyberspace Report, December 2000).
2. Reports and documents related to ADR and trustmark seal programs:
- Report from September 1999 Geneva Roundtable on Electronic Commerce and Private International Law, April 2000.
  - Electronic Commerce and Consumer Protection Group’s Guidelines for Merchant-to-Consumer Transactions, released 6 June 2000.
  - Inventory of ADR mechanisms produced by the ICC in “Out-of-court settlement of disputes concerning e-commerce consumer transactions: An inventory of current approaches, September 2000”.
  - Report on “Web seals: a review of Online Privacy Programs” produced by the Data Protection Commissioners of Ontario, Canada, and Australia in September 2000.
  - BBBOnline Code of Online Business Practices, released 24 October 2000.
3. Articles and comments submitted voluntarily by the public in anticipation of the discussions at the Conference.

## Introduction to ADR

162. “ADR refers to a broad range of mechanisms and processes designed to assist parties in resolving differences. These alternative mechanisms are not intended to supplant court adjudication, but rather to supplement it.”<sup>5</sup> Generally, an ADR process involves a series of procedures, some of which may vary depending upon the form of resolution.<sup>6</sup> The most common forms of resolution are negotiation, facilitation or conciliation, mediation, and arbitration.

163. Though there is not full consensus - in the academic or business fields - on the precise definitions of ADR mechanisms and processes, most experts view ADR as a spectrum of approaches that fits within the broader spectrum of “dispute resolution” different ways of settling disputes, including corporate consumer complaint services, ADR, and litigation. ADR mechanisms differ on a sliding scale from the most flexible to the most formal in terms of the rules of procedure, the role of the neutral in facilitating or deciding an outcome, whether the outcome is non-binding or binding on all parties or on one of them, and, where the outcome is binding, whether this was prescribed in advance, either before or after the dispute arose.

164. At the extreme ends of the ADR spectrum rest assisted negotiation<sup>7</sup> (the most informal) and arbitration<sup>8</sup> (the most formal, or most “court-like”). For example, in assisted negotiation, decisions remain in the hands of the parties at all times and outcomes are agreed upon. While in arbitration, whether before or after the dispute arises, parties agree to be bound by the final decision of the third-party arbitrator. Between assisted negotiation and arbitration are a large variety of forms of mediation, from neutral evaluation to hybrid forms such as mediation-arbitration (med-arb).

165. ADR is used off-line to resolve many different types of disputes, from local disputes between neighbours to international commercial transactions. Not surprisingly, ADR mechanisms are being developed in the online environment to resolve a wide range of disputes (*e.g.* domain names, insurance, privacy, family, employment and commercial) between parties (B to B, B to C, C to C, G to B and G to C) involved in electronic interactions. These online mechanisms are not only used for disputes arising online; rather a dispute arising in the offline environment could be resolved using an online ADR mechanism.

166. Online ADR exists in a variety of contexts, including within a particular online marketplace (*e.g.* online auction sites), as part of a trustmark or seal programme, or on an independent basis. These differences may have an effect on consumer access to ADR and business compliance with the outcome.

167. In recent surveys and inventories, the OECD, ICC and CI have identified more than 40 online ADR mechanisms, most of them offering B to C dispute resolution<sup>9</sup>. These online ADR mechanisms vary in terms of procedural and technical aspects. It is however possible to distinguish those which are “fully automated”, in that outcomes are generated by a computer program and not with human intervention, from most others which vary from flexible to formal. While 26 of the online ADR providers offer informal, non-binding types of dispute settlement, such as assisted negotiation, mediation, or ombuds-type services, 14 offer more formal, binding arbitration procedures; 11 feature automated dispute resolution, and 14 offer multiple ADR methods.

**Focus**

168. This conference will explore the use of online ADR systems for disputes involving small values and/or low levels of harm that arise between businesses and consumers online with a primary focus on informal, flexible systems that will allow for the necessary balancing between the type of dispute and the formality of the process for resolution (see shaded area in figure below). For example, the cost or the complexity of the procedure should not be disproportionate with what is at stake.

Main ADR Forms and Processes				
Corporate Complaint Services	Assisted Negotiation	Mediation	Arbitration	Litigation
	<ul style="list-style-type: none"> <li>- Facilitation</li> <li>- Conciliation</li> </ul>	<p><i>On a Sliding Scale:</i></p> <ul style="list-style-type: none"> <li>- Automated, or not</li> <li>- More or less active guidance by the neutral</li> <li>- Voluntary or mandatory participation</li> <li>- No obligation on the parties to agree, before entering ADR, that the outcome will be binding</li> </ul>	<ul style="list-style-type: none"> <li>- Voluntary or mandatory submission</li> <li>- Automated or not</li> <li>- Final and binding</li> </ul>	
<p>➔➔➔➔➔➔➔➔➔➔</p> <p><b>Informal to Formal ADR</b></p>				

## DAY 1: OVERVIEW OF ADR IN RELATION TO THE ONLINE ENVIRONMENT

### Welcome and Keynote

Building trust is an important policy issue related to the new economy and global information society. In particular, a key element to building trust is ensuring users and consumers effective redress for disputes arising from interactions and transactions in the online environment.

The OECD mandate to explore redress for users and consumers is clearly stated in the OECD 1998 Ministerial Declarations on Protection of Privacy on Global Networks<sup>10</sup> and Consumer Protection in the Context of Electronic Commerce<sup>11</sup>, which serve as part of the blueprint for the OECD's work in electronic commerce. The mandate is further clarified by the 1999 Guidelines on Consumer Protection in the Context of Electronic Commerce, where OECD Member countries stress the importance of providing consumers with "meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden".<sup>12</sup> Similarly, the need for appropriate dispute resolution mechanisms in disputes over privacy has been highlighted in the OECD Report on Transborder Data Flow Contracts in the Wider Framework of Mechanisms for Privacy Protection on Global Networks.<sup>13</sup>

Consequently, the OECD programme of work for 2000-2001 places great emphasis on exploring how privacy and consumer protection disputes can effectively be resolved using online ADR.

### Welcome remarks

A.H Korthals, Minister of Justice, The Netherlands

### Keynotes

*Why is ADR a key element for building trust in the online environment?*

Herwig Schlögl, Deputy Secretary-General, Organisation for Economic Co-operation and Development

*The importance of global partnership in the development and support of ADR*

Maria Livanos Cattai, Secretary General, International Chamber of Commerce

*In or out of court? Challenges for the Hague Conference*

Hans van Loon, Secretary General, Hague Conference on Private International Law

## **Introductory Remarks by Day 1 Chair**

*Peter Ford, Chair, OECD Working Party on Information Security and Privacy*

### **Session 1: Taking stock - Overview of recent discussions about online ADR**

Several entities have either developed principles for B to C ADR systems or expressed views on essential elements of such ADR systems. In an effort to provide a forum, at a global level, for exploration of ADR and to foster co-operation among the stakeholders, this session takes stock of the work that has been undertaken on this issue by other fora. Representatives from the European Commission (EC), United States (US), Asian Pacific Economic Co-operation (APEC), Global Business Dialogue (GBDe), and Consumers International (CI) will present the findings from their fora's examination of online ADR.

While there are areas of common ground on principles for online ADR, further discussion needs to take place. This session is expected to outline similarities and differences in the various approaches to date in order to facilitate the Conference discussion on challenges to be met and gaps to be bridged in terms of essential elements for fair and effective online ADR.

**Moderator:** Risaburo Nezu, Director, Directorate for Science, Technology and Industry, OECD

#### **Presenters:**

Carina Tornblom, Head of Unit, Directorate General for Health and Consumer Protection, European Commission will present the approach of the European Commission based on the 1998 Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and the workshop, which was held in March 2000.<sup>14</sup>

James Dorskind, Acting General Counsel, U.S. Department of Commerce will provide insight into the recently released report from the joint Federal Trade Commission-Department of Commerce public workshop "Alternative Dispute Resolution for Consumer Transactions in a Borderless Online Marketplace," which was held in Washington, DC on 6-7 June 2000.<sup>15</sup>

Yuko Yasunaga, Deputy Director, Commerce Policy Division, Japan Ministry of International Trade and Industry (APEC) will present the results of the APEC Consumer Protection Workshop, which was held in July 2000 in Bangkok, Thailand.<sup>16</sup>

Constanze Picking, Senior Manager Trade and E-Business, DaimlerChrysler AG will present the GBDe Alternative Dispute Resolution Paper, issued in September 2000.<sup>17</sup>

Louise Sylvan, President, Consumers International will present a recent report from Consumers International on disputes in cyberspace. The presentation will also cover the principles adopted by the Trans-Atlantic Consumer Dialogue in February 2000.<sup>18</sup>

## **Session 2: Illustrating Business-to-Consumer complaints in the online environment**

This session will provide information and statistics on the types of complaints received from users and consumers in relation to their interactions and transactions online. The information will be presented by consumer and data protection authorities and consumer representatives in an effort to clarify the types and volume of disputes arising from B to C online interactions and transactions. The purpose of this session is to educate all stakeholders on where to focus their efforts in exploring redress mechanisms and discussing online ADR mechanisms.

### **Presenters:**

Michelle Childs, Head of Policy, Consumers Association, United Kingdom will present the statistics on the types of complaints received by Consumers Association in the United Kingdom as well as by the other consumer organisations, affiliated with the WebTrader scheme, from Belgium, Italy, France, The Netherlands, Portugal, and Spain.

Stephen Lau, Privacy Commissioner for Personal Data, Office of the Privacy Commissioner for Personal Data Hong Kong, China will discuss the nature of consumer complaints in Hong Kong relating to the handling of personal data on the Internet which might be in contravention with the data protection principles enshrined in the Hong Kong Personal Data (privacy) Ordinance.

Marcie Girouard, Assistant Deputy Commissioner, Industry Canada.

Maneesha Mithal, Attorney, Bureau of Consumer Protection, US Federal Trade Commission will present statistics on B to C complaints received by their respective agencies. The statistics will mainly be drawn from Consumer Sentinel, a fraud complaint database for use by law enforcement officials in the US, Canada, and Australia. In its less than five years of operation, the database now contains more than 44 000 Internet-related complaints, many of which have a cross-border component. For example, one in eight complaints received by the US and Canadian organisations involve foreign consumers or companies.

### **Session 3: Dispute Resolution at the Earliest Stage – internal customer complaints handling and customer refunds**

In the offline world, business internal complaints handling systems assist in effectively preventing and resolving disputes between business and consumers. It is anticipated that online business internal customer complaint handling systems will be as effective in the online environment. Similarly, chargeback regimes implemented by the payment card industry can provide significant benefits to certain consumers by providing customer refunds; some of these protections are required by law and some are provided voluntarily as a result of marketplace considerations. This session will explore how internal customer complaint handling and customer refunds (as a result of chargeback systems) could resolve complaints and disputes that arise in the B to C online environment. This session will also examine the scope of application and effectiveness of these mechanisms to resolve customer complaints in the online environment as compared to the offline environment.

**Moderator:** Hugh Stevenson, Associate Director, Bureau of Consumer Protection, US Federal Trade Commission

#### **Panellists:**

Jean Ann Fox, Director of Consumer Protection, Consumer Federation of America

Peter Møller Jensen, Manager, European Union Relations, Visa International

Eric Mickwitz, Finnish Consumer Ombudsman

Michel Van Huffel, Directorate General for Health and Consumer Protection, European Commission

#### **Presenters:**

Charles Underhill, Acting Chief Operating Officer, Better Business Bureau, will address how the BBB's codes of conduct and other initiatives assist in promoting effective internal complaints handling by businesses. He will present statistics on the rates of success with the conciliation phase of the BBB's third-party complaint handling system and data from similar programs. The presentation will also highlight a new initiative by the BBB to encourage internal complaints handling.

Alastair Tempest, Director General, Federation of European Direct Marketing (FEDMA) will explain FEDMA's role as a clearinghouse for European e-merchants with a particular focus on how FEDMA's Code of Conduct on e-Commerce & Interactive Marketing and other initiatives ("the Ring of Confidence") help in ensuring consumer redress, particularly across national borders.

Helen Bridges, Counsel, American Express Services, Europe, will present American Express's chargeback policy and consumer card member protections for online transactions.

#### ***Suggested questions:***

*Are statistics available on the number and types of resolutions reached as result of internal complaints handling and customer refunds through payment cards? What are the incentives to encourage business to handle complaints internally? How does online customer complaint handling differ from customer complaint handling by telephone, in writing, or in person? How widely available online are chargeback protections? Are there other innovative mechanisms arising in the online environment that will assist in resolving disputes early or assist in avoiding disputes, like feedback/rating systems, insurance, and escrow systems?*

#### Session 4: Online alternative dispute resolution mechanisms

Global networks and electronic commerce significantly increase the possibility for individuals and companies to interact and transact easily 24 hours a day, 7 days a week, over great distances, regardless of geographic borders, local cultures and legal frameworks. Such benefits, however, raise challenges as to how potential disputes arising from both sides can be resolved in an equally easy way, effectively, and with guarantees of equity and fairness. A pragmatic approach aimed at providing individuals and businesses with accessible and potentially more efficient means to settle disputes that cannot otherwise easily be resolved offers an interesting alternative.

This session will explore through presentations of online ADR mechanisms, already existing or under development, the variety of approaches for solving disputes arising online. In an effort to focus on distinctive procedural and other elements that exist in these various mechanisms and to facilitate the discussion on day 2, the discussion has been divided into three parts. The first discussion is devoted to fully automated mechanisms where outcomes are generated without human intervention. The second and third discussions will examine mechanisms that vary from flexible to formal with regard to procedure and intervention of a neutral. Finally, the fourth discussion, by exploring systems under development, will focus on objectives and methodology necessary for setting up an online ADR mechanism.

**Moderator:** Bernard Clements, Head of Unit, Joint Research Centre, European Commission

#### **Panellists:**

John Borking, Deputy Privacy Commissioner for the Netherlands

Dana Haviland, Partner, Wilson Sonsini Goodrich & Rosati

Ethan Katsh, Director, Center for Information Technologies and Dispute Resolution, University of Massachusetts

Pippa Lawson, Counsel, Public Interest Advocacy Centre

Odile Nicholas-Etienne, Union Federale des Consommateurs

Charles Underhill, Acting Chief Operating Officer, Better Business Bureau

#### **I. Fully automated online resolution mechanisms**

(*e.g.* outcome generated by computer)

Most fully automated ADR systems are designed to settle cash-based disputes, such as insurance claims, and require the parties, before entering a negotiation, to be bound by the generated outcome, if the dispute settles. A small number of automated programs, however, allow parties to choose at the outset whether or not to be bound by the outcome<sup>19</sup>. This session will explore whether automated systems could help settle non-financial B to C disputes arising in the area of privacy and consumer protection.

**Presenter:**

Richard Belczynski, Vice President, International and Commercial Division, ClickNSettle will present the fully automated system of the ClickNSettle business model, where the outcome is generated by computer. The presentation will also include the types of disputes that can be and have been resolved using ClickNSettle and the geographic distribution of the parties that have engaged in resolution by ClickNSettle. ([www.clicknsettle.com](http://www.clicknsettle.com)).

**II. Flexible resolution mechanisms**

(*e.g.* negotiation/mediation)

**Presenters:**

Colin Rule, Chief Executive Officer, Online Resolution, Inc. will present a summary of their various online resolution methods with particular emphasis on a new online resolution platform, *Resolution Room*. This new service is an interactive environment for mediation that combines several communications tools, including e-mail, blind bidding, and chat capabilities. The system is designed to resolve two-party and multi-party disputes. ([www.onlineresolution.com](http://www.onlineresolution.com))

Cara Cherry Lisco, Director, SquareTrade Online Dispute Resolution Network, will present an overview of a scalable online tool and dispute resolution service set up in February 2000. She will show how SquareTrade has been effectively inserted as the underlying neutral recourse mechanism in nearly 2 million transactions a week as the preferred provider of dispute resolution for eBay<sup>20</sup> users. She will also discuss lessons learned from its successful handling of more than 17 000 disputes from more than 80 countries in multiple languages including English, German, and Spanish. ([www.squaretrade.com](http://www.squaretrade.com))

**III. Formal resolution mechanisms**

(*e.g.* mediation/arbitration)

**Presenters:**

Erik Wilbers, Senior Counsellor, WIPO Mediation and Arbitration Center will present practical conclusions, based on the online dispute resolution experience of the WIPO Center, that may be of benefit in creating appropriate methods for the resolution of consumer disputes. Over the past few years, the WIPO Arbitration and Mediation Center has gained experience in the design and application of online dispute resolution procedures. Using on-line methods, the Center this year has administered over 1 600 domain name disputes. It has also undertaken work in the development of more generic applications that lend themselves to the arbitration of all types of disputes under the WIPO Rules. ([www.wipo.org](http://www.wipo.org))

Fabien Gélinas, Vice President and General Counsel, e-Resolution, will discuss the company's online arbitration model for domain name and other disputes. He will examine the arbitration process in the B to C area and draw some analogies and contrasts to online settlement of B to C disputes. The presentation will also address questions of the enforcement of an arbitration decision and the applicability of arbitration for B to C dispute resolution, based on eResolution's experiences. ([www.eresolution.com](http://www.eresolution.com))

#### **IV. ADR mechanisms under development**

##### **Presenters:**

Duncan McDonald, American Institute for Contemporary German Studies (AICGS) will present the AICGS proposal to create a network of US-EU universities to act as mediators to deal with consumer bewilderment about dispute management, ADR providers, and statutory rights. Emphasis will be on tackling the variety of legal and other issues that must be dealt with to set up and implement an effective cross-border scheme.

Vincent Tilman, Researcher, Centre de Recherches Informatique et Droit (CRID) will describe ECODIR, a cross-border online ADR project currently under development. The project, subsidised by the European Union, aims to provide consumers with an online mediation/arbitration support system to settle disputes arising from the use of the Internet. The project is led by the CRID, University of Namur, in co-operation with a consortium of European and North American Universities, mediation centres and private partners. The presentation will highlight the objectives, methodology, and the development schedule of ECODIR and will address particularly the challenges involved in deploying such a system for a cross-border, multi-lingual environment.

Christopher Kuner, Of Counsel, Morrison & Foerster, LLC will provide an overview of future International Chamber of Commerce (ICC) policy on B to C ADR in electronic commerce. The presentation will be based on a position paper, under formulation by the ICC, on ADR in B to C transactions. The position paper is intended both to identify some of the salient policy principles that the ICC believes should govern this area, and to provide an outline of the concrete actions the ICC could take to become involved in it.

##### ***Suggested questions:***

*What are the experiences of users and consumers when using ADR mechanisms? Are there particular types of disputes that are not conducive to resolution through online ADR? Are there categories of disputes that would better be resolved through the use of a particular type of online ADR? Other questions may be based on annexes 1 and 2 (list of online ADR mechanisms and list of possible procedural and substantive elements that exist in ADR mechanisms).*

## DAY 2: REACHING EFFECTIVE ONLINE ADR AT A GLOBAL LEVEL

Building on the presentations from day 1, the discussion will explore the various challenges to be addressed to facilitate B to C ADR at both national and global levels, as well as incentives and disincentives for businesses, consumers, and governments to participate in and/or encourage the use of ADR. Session 5 will focus on the challenges to online dispute resolution, including identifying important elements for fair and effective online ADR mechanisms. Session 6 will focus on the role of stakeholders in promoting fair and effective ADR, ensuring compliance and enforcement, and educating all stakeholders.

### Introductory Remarks by Day 2 Chair

*Jytte Oelgaard, Chair, OECD Committee on Consumer Policy*

### Session 5: Challenges to online dispute resolution

Awareness of the potential legal and other barriers arising from resorting to courts in disputes resulting from cross-border online interactions is widely shared: which law applies, which authority has jurisdiction over the dispute, which forum is competent to hear the dispute, is the decision enforceable across borders? Another legitimate concern, though less legal in nature, is related to the cost of court proceedings, which may exceed the value of the goods or services in dispute, or the length of the procedure, which may be far slower than “cyber-time”.

This session will explore and discuss the variety of possible challenges to the effective use and implementation of online ADR, either socio-economic (including linguistic and cultural), legal (including last resort principle) and technological (including security). While discussing these challenges, participants may recognise the need for common ground among stakeholders on essential elements that should be in any fair and effective online ADR for B to C disputes, including: *i*) Transparency, *e.g.* information on the ADR procedure, its cost, and other important features should be made readily available to all parties before entering into an ADR process; *ii*) Accessibility; *iii*) Free or low cost to the consumer; and *iv*) quick decisions.

### I. Socio-economic issues related to online ADR

“Behind their screens there are people of all nationalities, all ethnic-cultural groups, social classes and professions, of all religions and political convictions, of all ages and life-styles, of both sexes who together, but also among themselves show a rich diversity of preferences and disfavours, expectations for the future and fears, likes and dislikes.”<sup>21</sup> This quotation illustrates how challenging the global online environment is in its sociological dimension, in particular when it comes to B to C interactions. Like the legal and technical issues, sociological and economic factors must be explored to better understand how they can affect the use and implementation of online ADR.

This session will discuss some of the socio-economic challenges, including how cultural, linguistic and economic differences might affect the effectiveness of ADR systems; or similarly, how differences in information and expertise might affect the use and implementation of ADR, while considering that online means of communication (digitalised texts, sounds, stationary or moving images) affect methods of work, cultural patterns and life-styles<sup>22</sup>.

**Moderator:** Anna Fielder, Director, Consumers International

**Panellists:**

Giles Buckenham, Administrator, Directorate General for Health and Consumer Protection, European Commission

Scott Cooper, Manager of Technology Policy, Hewlett-Packard

Carmen Fernandez Neira, Chairman, Internet Working Group, European Advertising Standards Alliance (EASA)

William Marsh, Director, CEDR

Toh See Kiat, Partner, Tan Peng Chin and Partners

**Presenters:**

Nora Femenia, Professor, and Vice President, OnlineDisputes.org, will discuss how online dispute resolution techniques and the global management of customers' complaints could be responsive to different social and cultural environments. She will focus on culturally different approaches to customer complaints, the impact of community pressure on conflict solving, and what would be the role of computer-assisted negotiation techniques in furthering public education on legitimate ways of solving online transaction problems.

Christopher Drahozal, Professor, University of Kansas School of Law will offer an economic perspective on various questions relating to the fairness of online ADR, including: why do parties use ADR in the first place? Should ADR mechanisms replace access to the courts? How do the incentives of stakeholders and of the neutral affect the use and implementation of ADR? and how differences in resources and information between businesses and consumers may raise concerns about whether online ADR mechanisms will be fair.

***Suggested questions:***

*How do linguistic and cultural differences affect the use and implementation of ADR? Should users and consumers be offered to interact in their own language during ADR? How do economic differences affect the use and implementation of ADR? Are there ways to level the imbalances in information and expertise among the parties? Should training of neutrals include education on socio-economic related issues?*

## II. Legal issues related to online ADR

Legal issues are related to making the ADR process fair and effective for both consumers and businesses. This session is expected to highlight those procedural and substantive elements considered as essential to ensure a fair and effective ADR process, while recognising that these elements may vary depending on the type of ADR and/or dispute.

During the discussion, participants may recognise the need for common ground on issues such as: *i)* Whether providers of ADR for online B to C disputes should be independent; *ii)* Whether ADR intermediaries should be neutral or impartial in their decision making, and have sufficient skills and training to fulfil the dispute resolution role in an appropriate manner; *iii)* Whether consumers should be permitted to choose between ADR and traditional legal mechanisms. *i.e.* should recourse to ADR be voluntary or could it be mandatory; *iv)* Whether parties should have representation or *v)* Whether the procedure should be adversarial.

Other issues to be discussed include whether current legal systems pose barriers for consumers to use ADR or prevent businesses from implementing outcomes, rendered under ADR, to which consumers have fully agreed. In addition to the more procedural questions, an important issue to be examined is what substantive principles might be applied to resolve an online cross-border dispute.<sup>23</sup>

The issue of whether the outcome of the ADR process should be binding or non-binding may also be discussed. While this is an important issue, participants will be reminded that the focus of the Conference is primarily on the more flexible and informal ADR systems.

**Moderator:** Mozelle Thompson, Commissioner, US Federal Trade Commission

### **Panellists:**

Matthias Blume, Austrian Ministry of Justice

Eric Ducoulombier, Administrator, Directorate General for Internal Market, European Commission

Marco Gasparinetti, Data Protection Commissioners' Office, Italy

Michael Geist, Professor, University of Ottawa Law School

James Murray, Director, Bureau Européen des Unions de Consommateurs

Ron Plessner, Partner, Piper Marbury Rudnick & Wolfe, and Co-ordinator, Electronic Commerce and Consumer Protection Group

**Presenters:**

Philippe Fouchard, Professor, University Paris II will discuss the fundamental legal elements that are necessary for online ADR to be fair and effective for users and consumers. He will focus on online ADR mechanisms where parties participate voluntarily and they agree upon the outcome at the conclusion of the process.

Christopher Kuner, Of Counsel, Morrison & Foerster, LLC will present an overview of the main conclusions of a study on legal obstacles to business-to-consumer ADR in electronic commerce in Europe. The study was commissioned last spring by the Global Business Dialogue in response to the uncertainty and confusion related to the legal framework for B to C ADR in Europe.

***Suggested questions:***

*How might national or international laws and related public policy issues affect the use or implementation of ADR? (e.g. non-waivable rights, differences in substantive law, or procedural rules related to ADR). How do the legal rules affect the availability of out-of-court dispute resolution?*

**III. Last Resort Principle and *Juge d'appui* (“support judge”)**

This session will focus on the intersection of online ADR with the jurisdictional framework.

It is expected that business internal complaint handling systems and online ADR mechanisms will succeed in resolving most disputes that arise from B to C online interactions. However, in cases where the alternative mechanisms fail, recourse to court might be necessary. Furthermore, as used in arbitration, recourse to a judge (*juge d'appui*)<sup>24</sup> in the course of the ADR may be helpful to solve a difficulty (e.g. the service provider disappears during the procedure, or there is a serious violation of the principles of independence and impartiality) and to facilitate a successful and smooth process. The discussion will include an exploration of the applicability of traditional notions of jurisdiction (competent forum), related enforcement issues, and a review of existing solutions and proposals for new ones. It will also explore the practicality and possibility of adapting the concept of the *juge d'appui* to less formal online ADR processes.

**Moderator:** Catherine Kessedjian, Professor, University of Paris II, and former Deputy Secretary General, Hague Conference on Private International Law

**Panellists:**

Katharina Boele-Woelki, Professor, University of Utrecht

Giacinto Bisogni, National Expert, Legal Service of the European Commission

Asunción Caparrós, Manager, European Affairs, ABN Amro Bank

Roger Cochetti, Senior Vice President and Chief Policy Officer, Network Solutions

David Goddard, Barrister, New Zealand Law Commission

Pippa Lawson, Counsel, Public Interest Advocacy Centre

#### **IV. Technological issues and trends affecting online ADR**

Current developments in technological applications and practices as well as the growing interoperability of systems have an impact on the development of online ADR mechanisms. The continuous technical innovation in the Internet environment is therefore worth discussing in relation to online ADR. This session will highlight technologies already in use or under development with a view to how they can be used to facilitate online B to C dispute resolution. For example technologies used for secure electronic signature and authentication<sup>25</sup>, or encryption of content messages may help ensure confidentiality and integrity of the process and the information exchanged. Furthermore, interactive technologies like video-conferencing may bring the parties together, moving them from behind their computer screens to a virtual setting making the experience a face-to-face interaction. Similarly, automatic translation and voice recognition may help bridge some cultural differences.

During the discussion, participants may also examine the need for common ground on issues related to the security of online ADR systems and to the confidentiality and integrity of the process and the information exchanged.

**Moderator:** Wibo Koole, Head of Consumer Policy, Consumentenbond

#### **Panellists:**

Sarah Andrews, Policy Analyst, EPIC/Privacy International

Peter Lübker, Information Technology and Networks, OECD

Marc Wilikens, Joint Research Centre, European Commission

#### **Presenters:**

Joseph Alhadeff, Vice President for Global Public Policy, Oracle, will present the policy-side of the technological issues and challenges related to ensuring effective online ADR for B to C dispute resolution.

Chris Lynn, Legal Associate, Microsoft Europe, Middle East and Africa will present the various advances in software technology that will make resolving basic consumer disputes in the B to C sector more effective.

#### ***Suggested questions:***

*How will technological innovation assist to remedy these challenges? How can technological interoperability be ensured? Can technological innovation bridge cultural and other sociological differences between the parties?*

## Session 6: The roles of stakeholders

Most stakeholders agree that online alternative dispute resolution (ADR) can be very helpful to both parties in electronic interactions or transactions, especially in cross-border disputes. They see incentives for fostering ADR, whether economic (*e.g.* reducing costs), legal (*e.g.* helping obviate the very perplexing issue of competent forum, because with online ADR, the forum will no longer be tied to a geographic location but rather it will be virtual,), or more sociological (*e.g.* improving confidence, and bridging cultural differences). Potential negative impacts have also been highlighted such as lack of consumer choice, disparity between the parties (*e.g.* lack of information, education, and resources) or possible lack of enforceability of decisions.

Based on previous discussions, this final session is expected to highlight common stakeholder views on a number of socio-economic, legal or technological elements that should be in any fair and effective online ADR for B to C disputes, and to focus on how best to foster their implementation through exploration of two main policy areas.

The session will therefore be divided in two discussions. The first will be devoted to the roles of stakeholders in relation to promoting essential elements for online ADR (regulation, self-regulation or integrated approach), and ensuring compliance (public and private sector trustmark programmes). The second discussion will focus on providing effective education about ADR.

This session is expected to highlight the need for complementary approaches among the stakeholders that effectively balance the interests of individuals and business, while exploiting particular stakeholder expertise where available.

**Moderator:** Arie J.M. van Bellen, Managing Director, Electronic Commerce Platform Nederland

### **Panellists:**

Roger Cochetti, Senior Vice President and Chief Policy Officer, Network Solutions

Susan Grant, Director of National Fraud Information Center, National Consumer League

David Mair, Administrator, Directorate General for Health and Consumer Protection, European Commission

Rebecca Richards, Director of Policy and Compliance, TRUSTe

Yuko Yasunaga, Deputy Director, Commerce Policy Divisions, MITI Japan

## **I. Promoting fair and effective online ADR and ensuring compliance (e.g. trustmark programmes)**

As discussed in session 1, a variety of stakeholders have developed principles for B to C ADR systems or expressed views on essential elements of such ADR systems. This session will further discuss the roles of stakeholders in relation to promoting fair and effective B to C online ADR. This will include discussing how the stakeholders should co-operate to identify essential elements for online ADR (e.g. who should sit at the table? should there be separate recommendations by different stakeholders, as is the case to date? where should guidance for ADR be identified – e.g. in regulation or codes of conduct). It will also include how the stakeholders can work together to ensure compliance with these elements.

Among other complementary measures to ADR, online trustmarks and seals programmes are worth exploring as they may have a positive impact on the issue of compliance, and encompass approaches that may be considered both by the private sector and governments. There is ongoing discussion among stakeholders on if and how trustmark/seal programmes could be designed to render fair and effective online ADR systems, how compliance with such programmes could be ensured, and how decisions rendered by ADR systems could be enforced under such programmes.

### **Presenters:**

Naoshi Shima, Vice President, Business Development, NEC will provide background on how the GBDe successfully co-ordinated its recent recommendations on B to C ADR. As the principal organiser for the GBDe's work in the Asia/Oceanian region, on behalf of NEC, Mr. Shima will begin with a closer look at the Asian experience with regards to resolving disputes that arise online among consumers and business.

Barbara Wellbery, Partner, Morrison & Foerster LLC, will explain the US self-regulatory approach as it relates to privacy and consumer protection, with emphasis on online ADR. She will also describe how self-regulation fits within the broader US framework for promoting consumer and business trust in e-commerce, which includes a complementary mix of industry mechanisms, government initiatives and law enforcement efforts.

Martin Bond, Assistant Director, Department of Trade and Industry, United Kingdom will present how government, traders, and consumer organisations in the UK came together to develop the TrustUK program. The presentation will include how the program was developed, how it works, and where ADR fits into the system.

Malcolm Crompton, Data Protection Commissioner, Australia, will focus on online seal programs. He will present the findings of a review of Online Privacy Programs conducted in September 2000 by his Office and the Office of the Information and Privacy Commissioner/Ontario. The project identified three key components for an effective online seal program, including sufficient privacy principles, sound dispute resolution method, and a robust compliance mechanism.

### ***Suggested questions:***

Is convergence of stakeholders in defining essential elements for promoting fair and effective online ADR desirable? Who should participate as stakeholders? What are the roles of stakeholders in developing trustmark programmes and codes of conduct, common complaint systems and ensuring enforcement? How can stakeholders co-operate best to develop such programmes and systems for cross-border transaction?

## II. Educating business, consumers and government about online ADR

Cross-border ADR is common in the B to B context, but is new in the B to C context. While it is expected that online ADR will be effective in resolving B to C disputes in the online environment, it is important to recognise that users' and consumers' knowledge and understanding of ADR is minimal. Recognising the need for education, this session will focus on the roles of various stakeholders in educating businesses and consumers about online ADR. In particular, the discussion will include effective approaches to educating business about offering ADR and to educating consumers about the nature of and procedures for fair and effective ADR.

### **Presenters:**

Duncan McDonald, American Institute of Contemporary German Studies, will explain how transparency through conspicuous online disclosures in plain language and multiple languages minimises consumer confusion and distrust, adverse media attention, and government scrutiny and enforcement.

Francis Aldhouse, Deputy Data Protection Commissioner, United Kingdom, will explain how the UK Data Protection Commissioner supports good customer care systems, ombudsman schemes, sectoral dispute resolution arrangements and other examples of ADR, and uses formal advertising and PR techniques to alert individuals to their legal rights and encourage them to pursue their own remedies and assert their own privacy.

### ***Suggested questions:***

*What are the roles of stakeholders in educating business, consumers and government about online ADR? What can stakeholders do to ensure overall participation in ADR? What are the incentives and disincentives for the different stakeholders to promote online ADR?*

### **Conference concludes**

The conference will conclude with brief highlights of the conference discussions.

## NOTES

1. The OECD mandate to explore redress for users and consumers is clearly stated in the OECD 1998 Ministerial Declarations on Protection of Privacy on Global Networks<sup>1</sup> and Consumer Protection in the Context of Electronic Commerce<sup>1</sup>, which serve as part of the blueprint for the OECD's work in electronic commerce. The mandate is further clarified by the *1999 Guidelines on Consumer Protection in the Context of Electronic Commerce*, where OECD Member countries stress the importance of providing consumers with "meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden". Similarly, the need for appropriate dispute resolution mechanisms in disputes over privacy has been highlighted in the *OECD Report on Transborder Data Flow Contracts in the Wider Framework of Mechanisms for Privacy Protection on Global Networks*.
2. ADR refers to mechanisms and processes intended to supplement court adjudication in assisting parties in resolving differences
3. An Electronic signature signifies any action that expresses the intention to sign (agree on, accept), such as a name attached at the end of an e-mail, a click on "I agree" button on screen or the use of a certification authority's e-signature. When an e-signature is certified by some method to assure the identity and/or authenticity of the signed document, it becomes electronic authentication. In other words, electronic authentication can be understood to encompass any method of verifying some piece of information in an electronic environment, whether it is the identity of the author of a text or sender of a message, the authority of a person to enter into a particular kind of transaction, the security attributes of a hardware or software device, or any one of countless other pieces of information that someone may want to be able to confirm in the electronic world.
4. Within the OECD, the conference is organised by the ICCP Working Party on Information Security and Privacy (WPISP) and the Committee for Consumer Policy (CCP), in co-operation with the OECD Business and Industry Advisory Committee (BIAC).
5. "ADR That Works" by Ernest G Tannis - the quote is taken from the ADR Primer of the American Bar Association (Appendix E).
6. In most situations, a party files a complaint with a third-party ADR provider who then notifies the other party or parties of the complaint. Then, an exchange or series of exchanges occur between the parties with the intervention of the third-party neutral as the parties attempt to settle the dispute. This neutral may be a human mediator/arbitrator or an automated system, as in the case of computer programs that settle insurance claim disputes. The parties may decide on the rules of procedure or the rules may be imposed by the ADR provider; the final outcome of the ADR process can be either an agreement reached by the parties themselves or a judgement imposed by the third-party; outcomes may be non-binding on both parties, binding only on one of the parties, or binding on both parties.
7. Assisted Negotiation (or conciliation) is an informal process whereby a neutral third-party guides the parties towards a compromise.
8. Arbitration is a process whereby the parties submit the facts of their dispute and their arguments (oral and/or written) to one or several independent decision-makers who decide the case on the basis of equity or law. Arbitration is legally binding and most often final.

9. See annex 1.
10. [http://appli1.oecd.org/olis/1998doc.nsf/linkto/dsti-iccp-reg\(98\)10-final](http://appli1.oecd.org/olis/1998doc.nsf/linkto/dsti-iccp-reg(98)10-final)
11. [http://www.olis.oecd.org/olis/1998doc.nsf/LinkTo/DSTI-CP\(98\)12-FINAL](http://www.olis.oecd.org/olis/1998doc.nsf/LinkTo/DSTI-CP(98)12-FINAL)
12. The *Guidelines for Consumer Protection in the Context of Electronic Commerce*, approved on 9 December 1999 by the OECD's Council, available at: <http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm>
13. DSTI/ICCP/REG/(99)15 FINAL, declassified on 15 September 2000, available at: [http://www.oecd.org/dsti/sti/it/secur/prod/e\\_99-15-final.htm](http://www.oecd.org/dsti/sti/it/secur/prod/e_99-15-final.htm)
14. Relevant documents available at: <http://dsa-isis.jrc.it/ADR/>; [http://europa.eu.int/comm/consumers/policy/developments/acce\\_just/acce\\_just02\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html); and <http://www.oecd.org/dsti/sti/it/consumer/index.htm>
15. Available at <http://www.ftc.gov> and <http://www.oecd.org/dsti/sti/it/consumer/index.htm>
16. Information available at: <http://www.ecommerce.gov/apec> and at <http://www.oecd.org/dsti/sti/it/consumer/index.htm>
17. see <http://www.gbde.org/library/adr.doc> or <http://www.oecd.org/dsti/sti/it/consumer/index.htm>
18. see <http://www.tacd.org/ecommercef.html#adr> and <http://www.oecd.org/dsti/sti/it/consumer/index.htm>
19. 123Settle.com, for example, allows parties at the outset either to sign an agreement to be bound by the automatically-generated outcome or to view their settlement figure first (if the case reaches settlement) and then determine whether or not to sign a binding agreement to fulfill the settlement. At least one other system under development, OnlineDisputes.org, does not require parties to be bound by the outcome; furthermore, it allows parties to settle more than cash-based disputes, such as consumer exchange of products.
20. EBay refers customers with disputes to SquareTrade via its website.
21. Albert Benshop, *Peculiarities of Cyberspace "Building Blocks for an Internet Sociology"* (<http://www.pscw.uva.nl/sociosite/WEBSOC/introE.html>).
22. Albert Benshop, *ibid.*
23. For example the OECD Privacy Guidelines, the OECD Consumer Protection Guidelines, or any other international set of rules or guidelines.
24. The parties or the court of arbitration can refer to a *juge d'appui* where there are difficulties in the organisation, the implementation and the enforcement of the arbitration procedure. This particular judge does not have a competitive role, but is complementary to and co-operates in the arbitration procedure. The *juge d'appui* may be asked to intervene in the constitution of the court of arbitration (either ab initio or during the course of the arbitration procedure, if the tribunal is truncated and the remaining parties or arbitrators cannot reach agreement to rectify the situation). The *juge d'appui* may also be called upon, in particular, in cases of urgency, (although all national laws do not allow this role), in cases of difficulty in obtaining proof (more rarely), and to compel the enforcement of measures ordered by the court of arbitration. His exact role depends on the law applicable to the arbitration, which may be different to that applicable to the root of the dispute, and to that applicable to the arbitration procedure itself.

25. An Electronic signature signifies any action that expresses the intention to sign (agree on, accept), such as a name attached at the end of an e-mail, a click on "I agree" button on screen or the use of a certification authority's e-signature. When an e-signature is certified by some method to assure the identity and/or authenticity of the signed document, it becomes electronic authentication. In other words, electronic authentication can be understood to encompass any method of verifying some piece of information in an electronic environment, whether it is the identity of the author of a text or sender of a message, the authority of a person to enter into a particular kind of transaction, the security attributes of a hardware or software device, or any one of countless other pieces of information that someone may want to be able to confirm in the electronic world.

## ANNEX 1

Online ADR Provider	URL	Type(s) of Disputes Settled	B2B, B2C or C2C Disputes	ADR Method Used	Languages	Geographic Origin	Funding Source
<i>123Settle</i>	<a href="http://www.123settle.com/">http://www.123settle.com/</a>	all	B2B, B2C, C2C	automated negotiation; mediation; arbitration	English (Spanish to come)	USA	user fees
<i>AllSettle</i>	<a href="http://www.allsettle.com/">http://www.allsettle.com/</a>	insurance only	B2C	automated negotiation	English	USA	fees to insurance company
<i>BBBOnline</i>	<a href="http://www.bbbonline.org">http://www.bbbonline.org</a>	all consumer	B2C	conciliation, mediation, arbitration	English	USA/Canada	business membership fees
<i>clickNsettle</i>	<a href="http://www.clicknsettle.com">http://www.clicknsettle.com</a>	all financial	B2C	automated negotiation	English & Spanish	USA	user fees
<i>Cyberarbitration</i>	<a href="http://www.cyberarbitration.com">http://www.cyberarbitration.com</a>	domain name; all other	B2C, B2B, C2C	arbitration	English	India	
<i>Cybercourt</i>	<a href="http://www.cybercourt.org">http://www.cybercourt.org</a>	all online disputes	B2B, B2C, C2C	mediation	English and German	Germany	TBD
<i>Cybersettle</i>	<a href="http://www.cybersettle.com">http://www.cybersettle.com</a>	all financial	B2C	automated negotiation	English & French	USA	user fees
<i>E-Mediation</i>	<a href="http://www.e-mediation.nl">http://www.e-mediation.nl</a>	all	B2B, B2C, C2C	mediation	Dutch, English	Netherlands	To Be Determined
<i>Consensus Mediation (e-Mediator)</i>	<a href="http://www.consensus.uk.com/e-mediator.html">http://www.consensus.uk.com/e-mediator.html</a>	all online	B2B, B2C, C2C	mediation	English	UK	user Fees
<i>eResolution</i>	<a href="http://www.eresolution.com/">http://www.eresolution.com/</a>	domain name; all other	B2B, B2C, C2C	facilitated negotiation, mediation, arbitration	English & French	Canada	user fees
<i>European Advertising Standards Alliance</i>	<a href="http://www.easa-alliance.org">http://www.easa-alliance.org</a>	disputes related to advertising claims	B2B, B2C, C2C	various approaches	English & French	EU	member dues
<i>Fsm</i>	<a href="http://www.fsm.de/index.html">http://www.fsm.de/index.html</a>	complaints against members of Association	B2C	arbitration	English, German & French	Germany	member dues
<i>iCourthouse</i>	<a href="http://www.i-courthouse.com">http://www.i-courthouse.com</a>	all	B2C, B2B, C2C	non-binding arbitration	English (French and Spanish to come)	USA	user fees
<i>Ilevel</i>	<a href="http://www.ilevel.com">http://www.ilevel.com</a>	all	B2C, B2B, C2C	non-binding arbitration	English (French and Spanish to come)	USA	membership fees for membership
<i>InternetNeutral</i>	<a href="http://www.internetneutral.com">http://www.internetneutral.com</a>	all commercial online	B2B, B2C	mediatio	English	USA	user fees
<i>Internet Ombudsman (Austria)</i>		all commercial online		mediation, arbitration	German and English	Austria	Government/NGO/private sector
<i>Internet Ombudsmannen (Sweden)</i>	<a href="http://www.internetombudsmannen.se/io/">http://www.internetombudsmannen.se/io/</a>	all commercial online			Swedish	Sweden	Government

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Online ADR Provider	URL	Type(s) of Disputes Settled	B2B, B2C or C2C Disputes	ADR Method Used	Languages	Geographic Origin	Funding Source
<i>IRIS Mediation</i>	<a href="http://www.iris.sgdg.org/mediation">http://www.iris.sgdg.org/mediation</a>	all commercial online	B2B, B2C, C2C	mediation	French	France	
<i>MARS (SuperSettle; Fair&amp;Square; other)</i>	<a href="http://www.resolvemydispute.com">http://www.resolvemydispute.com</a>	all (Fair&Square -online only)	B2C, B2B, C2C	automated negotiation; mediation; arbitration	English (Spanish, French, Chinese to come)	USA	user fees
<i>Mediate-Net</i>	<a href="http://www.mediate-net.org/">http://www.mediate-net.org/</a>	family disputes		mediation	English	USA	free during trial
<i>NEWCourtCity.com (Virtual Mediator &amp; On-Line Mediation)</i>	<a href="http://www.newcourtcity.com">http://www.newcourtcity.com</a>	all financial	B2B, B2C, C2C	automated negotiation, mediation, legal consultation	English, Spanish	USA	user fees
<i>NovaForum</i>	<a href="http://www.novaforum.com/">http://www.novaforum.com/</a>	all	B2B, B2C, C2C	facilitated negotiation; mediation, arbitration	English, French, German, Portuguese, Polish, Russian, Ukrainian, Cantonese, Mandarin	Canada	business subscriber fees
<i>Online Mediators</i>	<a href="http://www.onlinemediators.com">http://www.onlinemediators.com</a>	all	B2B, B2C, C2C	mediation	English	USA	user fees
<i>Online Ombuds Office</i>	<a href="http://www.ombuds.org">http://www.ombuds.org</a>	all consumer	B2C	mediation, ombuds services	English	USA	public/private grants
<i>OnlineDisputes</i>	<a href="http://www.onlinedisputes.org">http://www.onlinedisputes.org</a>	all commercial	B2C, B2B, C2C	automated mediation	English, Spanish	USA	business subscriber fees
<i>Resolution Forum</i>	<a href="http://www.resolutionforum.org">http://www.resolutionforum.org</a>	all	B2C, B2B, C2C	facilitated negotiation; mediation	English, Spanish	USA	user fees
<i>SettlementNow</i>	<a href="http://settlementnow.com">http://settlementnow.com</a>	insurance only	B2C	automated negotiation	English	USA	user fees
<i>SettleOnline</i>	<a href="http://www.settleonline.com">http://www.settleonline.com</a>	all financial	B2C, B2B, C2C	automated negotiation	English, Spanish	USA	user fees
<i>SettleSmart</i>	<a href="http://www.settlesmart.com/">http://www.settlesmart.com/</a>	all financial	B2C, B2B, C2C	automated negotiation	English,	USA	user Fees
<i>SettleTheCase</i>	<a href="http://www.settlethecase.com">http://www.settlethecase.com</a>	all	B2B, B2C, C2C	mediation, arbitration, summary jury	English	USA	user fees
<i>SquareTrade</i>	<a href="http://www.squaretrade.com">http://www.squaretrade.com</a>	all online	B2C	facilitated negotiation, mediation	English	USA	business subscribers; user fees
<i>The Virtual Magistrate</i>	<a href="http://vmag.org">http://vmag.org</a>	all consumer online	B2C	non-binding arbitration	English	USA	funded by law school
<i>TRUSTe</i>	<a href="http://www.truste.org">http://www.truste.org</a>	online privacy disputes	B2C	conciliation/negotiation	English	USA	business subscriber fees
<i>USSettle</i>	<a href="http://www.ussettle.com">http://www.ussettle.com</a>	all financial	B2C, B2B, C2C	automated negotiation	English	USA	user fees
<i>WebAssured</i>	<a href="http://www.Webassured.com">http://www.Webassured.com</a>	all consumer online	B2C	mediation	English	USA	business membership fees
<i>Web Dispute Resolutions</i>	<a href="http://www.Webdisputeresolutions.com">http://www.Webdisputeresolutions.com</a>	all online	B2C, B2B,	mediation, arbitration	English	USA	user fees
<i>WEBdispute.com</i>	<a href="http://www.Webdispute.com">http://www.Webdispute.com</a>	all online commercial	B2B, B2C	arbitration	English	USA	user fees
<i>Webmediate</i>	<a href="http://www.Webmediate.com/">http://www.Webmediate.com/</a>	all	B2C, B2B, C2C	mediation, arbitration	English	USA	business subscriber and user fees

<b>Online ADR Provider</b>	<b>URL</b>	<b>Type(s) of Disputes Settled</b>	<b>B2B, B2C or C2C Disputes</b>	<b>ADR Method Used</b>	<b>Languages</b>	<b>Geographic Origin</b>	<b>Funding Source</b>
<i>Which WebTrader</i>	<a href="http://www.which.net/Webtrader/">http://www.which.net/Webtrader/</a>	all consumer online	B2C	ombuds service	Language of host country	UK, NL, BG, IT, FR, SP, PO	member and subscriber fees; other?
<i>WIPO</i>	<a href="http://arbiter.wipo.int/domains/index.html">http://arbiter.wipo.int/domains/index.html</a>	domain name	B2B, B2C	arbitration	English, French, Spanish	Switzerland	user fees

### ANNEX 3

The following list of questions is based on a factual survey of existing ADR mechanisms and is meant to spur conversation and discussion among conference participants in thinking about the variety of procedural and substantive elements that might exist in ADR mechanisms.

#### 1. GENERAL

##### 1.1. To what parties is ADR offered?

B2B
B2C
C2C
G2C (Government to Consumer)

##### 1.2. What type(s) of dispute is ADR offered for?

Auctions
B2C Contractual Disputes
Copyright
Domain Name Disputes
Family Disputes
Insurance
Intellectual Property Disputes
Other financial
Personal Injury
Other

**1.3. What type(s) of ADR are offered?**

Automated negotiation
Assisted negotiation (facilitation, conciliation)
Mediation
Med-arb or other combination of traditional ADRs
Arbitration
Non-governmental ombuds-type
Non-governmental tribunals
Other

**1.4. What is the background of entity offering ADR?**

Business organisation/industry group
Consumer organisation
International governmental organisation
National governmental organisation
Law Firm
Local governmental organisation
University
Association of former judges or lawyers (or other similar professional group)
Other
Were other types of organisations consulted when the ADR programme was being developed and implemented?
If so, which organisations (e.g. government, consumer group)?
What was the role of this organisation (e.g. funding, approval, referral, recommended practice)?
Has the ADR provider sought partnerships with any other organisation providing ADR?
Does the ADR provider represent that it complies with Guidelines governing the procedures of ADR issued by an organisation?
If so, which organisation?

**1.5. Has the ADR programme been certified and/or been granted a trustmark/seal?**

If yes, by whom?

What does the certification and/or trustmark seal granting process entail?

**1.6. Cost of ADR to the Parties:**

Is there a fee for the ADR service?

What kind?

Free

Flat fee

Fee contingent on value of dispute

Fee split among parties

Other (e.g. fee calculated on value of claim)

**1.7. What is the average length of a dispute?**

**1.8. Statistics:**

What is the number of disputes dealt with?

If applicable, how does the number of cases dealt with compare to the overall number of transactions?

What is the number/percentage of disputes successfully resolved?

Where applicable, what is the number/percentage of outcomes appealed to a court or other body?

Was the number/percentage of outcomes in which there were compliance problems reported?

**1.9. When was the ADR programme established?**

**1.10. Socio-economics:**

What is the geographical location(s) of entity offering ADR?

In which countries has the service been provided?

In what language has the service been provided?

Are there restrictions on the places or language in which the ADR service can be provided?

Which language are the proceedings held in?

Who chooses the languages to be used in the ADR proceedings and on what basis?

Are cultural differences taken into account?

**1.11. Has there been any survey of customer satisfaction with the programme service?**

If so, what are the results?

**2. SUBSTANTIVE RULES STANDARDS OR GUIDELINES (INCLUDING VOLUNTARY SELF-REGULATORY CODES)**

**2.1. On which basis is the ADR established**

General fairness

International rules, standards or guidelines

National rules, standards or guidelines

Other

**3. RULES OF PROCEDURE**

**3.1. Voluntary vs. mandatory ADR and Binding vs. non binding ADR outcomes:**

Do both parties voluntarily agree to ADR?

Is participation in the ADR programme required before a party can take a dispute to court?

Is there a pre-dispute binding ADR clause in the agreement that binds both parties to the outcome of the ADR?

Is there a pre-dispute binding ADR clause in the agreement that binds one party to the outcome of the ADR?

Are the parties permitted to enter into ADR that is binding on both parties after a dispute arises?

Are the parties permitted to enter into ADR that is binding on one party after a dispute arises?

**3.2. Content of the Rules of Procedure:**

Does the ADR only require fairness and good faith?

Does the ADR provide for parties agreeing to establish their own rules?

Does the ADR apply any established rules of procedure (e.g. UNCITRAL, ICC, ICANN/WIPO (UDRP) procedure)?

Does the ADR apply its own specific or supplemental rules of procedure in addition to any established rules?

#### 4. PROCEEDINGS

##### 4.1. Are the proceedings conducted:

Totally online?

Both on and offline?

Totally offline?

- By Mail?

- Face-to-face?

##### 4.2. Means of communication:

E-mail

Online forms

Tele/video conferencing

Telephone

In person

Other

##### 4.3. Is translation/interpretation provided/available?

##### 4.4. Are there time limits to the proceedings?

##### 4.5. Can the parties be represented or assisted?

##### 4.6. Is there a right/opportunity for a face-to-face hearing?

##### 4.7. Adversarial procedure:

Are parties required to provide details of their arguments to each other?

Are parties able to respond to each other's arguments?

**4.8. Accessibility and Transparency:**

What kinds of advertising/marketing does the ADR programme engage in?

How does the ADR programme make the parties aware of its existence?

At what point in a transaction is the availability of an ADR programme disclosed (e.g. home page, user agreement page)?

How is such a disclosure made?

What information about the ADR programme is provided?

**5. NEUTRAL (S)****5.1. Who chooses the neutral:**

The parties

The ADR provider

**5.2. Can the parties choose a three-person or other type of panel? If so, how?****5.3. From where are the neutral(s) chosen?**

List offered by the ADR provider?

List offered by another ADR entity, such as a professional association of ADR providers?

Other

**5.4. Can the parties challenge the appointment of an intermediary? If so, how?****5.5. What experience is required of an intermediary?**

IT

Legal

Experience of ADR techniques

Expertise related to topic of dispute

Professional Organisation Certification

Other

**5.6. What is the role of the intermediary:**

- Assist the parties to reach an agreement
- Evaluate the substantive merits of the case
- Evaluate the procedural merits of the case
- Determine the investigations to be made
- Recommend interim orders or emergency relief
- Recommend the outcome
- Impose the outcome
  - a) In writing
  - b) With reasons

**5.7. Is impartiality of a neutral required? If so, how is this ensured?**

**5.8. Does the neutral volunteer his/her services?**

**6. CONFIDENTIALITY**

**6.1. Are the neutral and ADR provider required to keep the following information confidential?**

- The existence of proceedings
- Information exchanged during proceedings
- The outcome of proceedings

**6.2. Are the parties required to keep the following information confidential?**

- The existence of proceedings
- Information exchanged during proceedings
- The outcome of proceedings

**6.3. How much information regarding individual decisions is made public, such as the factual circumstances of the case, the outcome only, etc.? How is the disclosure decided upon?**

**6.4. Are the parties, neutrals and ADR providers permitted to refer complaints/disputes/outcomes about fraudulent or deceptive ADR practices to law enforcement?**

## **7. SECURITY**

**7.1. Are security measures taken to protect the confidentiality and integrity of personal information held by the ADR provider? If yes, how (e.g. password/encryption/ authentication)?**

**7.2. Are security measures taken to protect the confidentiality and integrity of communications during the proceedings? If yes, how (e.g. password/encryption/authentication)?**

## **8. OUTCOME OF ADR**

**8.1. Is the outcome notified to third parties?**

**8.2. If the parties do not voluntarily perform the decision rendered under the ADR programme, does the ADR programme have any mechanism to enforce the decision (e.g. posting a bond, using chargebacks, revoking a seal, etc.)?**

**8.3. If a party wishes to dispute an outcome:**

Are the grounds for the dispute specified by the ADR scheme?

Is the applicable law prescribed in advance?

Is the applicable forum prescribed in advance?

**9. DISPUTES WITH ADR PROVIDER**

**9.1. Does the ADR provider limit its legal liability?**

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**9.2. If a party wishes to dispute that liability:**

Is the applicable law prescribed in advance?
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Is the applicable forum prescribed in advance?
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