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## Delivering Due Process and Procedural Efficiency at Low Cost: The Grail Quest of International Online Arbitration by J.B. Martin

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# Delivering Due Process and Procedural Efficiency at Low Cost: The Grail Quest of International Online Arbitration

Josh B. Martin\*

## Abstract

*Designing an online arbitration procedure which delivers the cornerstone requirements of efficiency, value and fairness has been described as the ‘grail quest’ for online dispute resolution (ODR). Focusing on the incipient global legal framework for both business-to-consumer (B2C) and business-to-business (B2B) arbitration, this paper explores whether current due process or consumer protection laws might be preventing the creation of an international system of binding low-value online ODR. Intending to stimulate innovation in this nascent industry, evaluation is made of the unsuccessful efforts to develop a transnational online arbitration model at the United Nations Commission on Trade Law, the newly launched European Union online dispute resolution platform, and the extant Uniform Domain Name Dispute Resolution Policy.*

*Through comparison of EU and US approaches to mandatory consumer arbitration clauses, it questions whether such clauses would need to become enforceable ex ante before an international consumer arbitration system can ever be fully fledged. It also explores the minimum procedural requirements for low-value B2B and B2C arbitration and, as such, may be of great interest to dispute resolution entrepreneurs, professionals and regulators wishing to capitalise on the growing millions of high-volume low-value cross-border legal claims not being internally managed by online intermediaries or service providers. By reviewing various developments in the industry, such as fast-track arbitration and consumer ODR systems, it will attempt to resolve the ever-present dilemma of maintaining each fairness and efficiency within an affordable and expedient online arbitration process. Naturally, therefore, various elements of online arbitration procedural design are closely examined, appraising matters such as documents-only hearings, fees & funding, document disclosure, time limits, transparency, award reasoning and applicable law.*

## I. Introduction

The need for an international framework to provide redress for low-value cross-border disputes through online arbitration is now well accepted. Research continues to confirm that while ecommerce is growing healthily worldwide, the percentage of ecommerce sales actually being cross-border is actually reducing, primarily from a lack of consumer confidence over opportunities for redress.<sup>1</sup> At the *United Nations Commission for*

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<sup>1</sup> Commission of the European Communities, *Report on Cross-Border E-Commerce in the EU*, (2009), Working Document SEC 283, Brussels, 26 ([http://ec.europa.eu/consumers/consumer\\_research/market\\_studies/docs/com\\_staff\\_wp2009\\_en.pdf](http://ec.europa.eu/consumers/consumer_research/market_studies/docs/com_staff_wp2009_en.pdf)); According to *eMarketer*, global e-commerce sales are currently valued at around \$1.95 trillion and are estimated to exceed \$4 trillion by 2020, 22nd August 2016 ([www.emarketer.com/Article/Worldwide-Retail-Ecommerce-Sales-Will-Reach-1915-Trillion-This-Year/1014369](http://www.emarketer.com/Article/Worldwide-Retail-Ecommerce-Sales-Will-Reach-1915-Trillion-This-Year/1014369)); Galves, F., “Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient and Secure”, (2009), *University of Illinois Journal of Law Technology & Policy* 1, 3; EU Commission, *Memorandum - Frequently Asked Questions: The Review of EU Consumer Protection Rules “The Review of the Consumer Acquis”*, (2007), MEMO/07/48 ([http://europa.eu/rapid/press-release\\_MEMO-07-48\\_en.htm](http://europa.eu/rapid/press-release_MEMO-07-48_en.htm))

*International Trade Law* (UNCITRAL) a Working Group on Online Dispute Resolution spent many years attempting to craft an international solution, through the development of recommended institutional rules for online dispute resolution (ODR) providers. Eventually, despite years of concerted effort, this ambitious undertaking proved unsuccessful given the amount of time it was taking to achieve consensus on numerous elements of online arbitral procedure. In Europe, however, the European Union (EU) has managed to launch its own Online Dispute Resolution Platform (ODR Platform) in February 2016.

This paper will explore UNCITRAL's efforts, between 2010-2016, to make such low-value arbitrations enforceable through the widely ratified 1958 *UNCITRAL New York Convention on the Recognition and Enforcement of Foreign Awards* ("New York Convention").<sup>2</sup> Questioning, in particular, whether the due process safeguards – providing for a fundamentally fair arbitration procedure – are sufficient under the New York Convention in the context of low-value contract claims and, if they are not, what the alternative solutions could be. It further questions the consumer protection principle of ensuring consumers retain the option whether or not to be bound by pre-dispute arbitration clauses. Or whether, if neither party is compelled into binding arbitration by pre-dispute agreements, there is ever likely to be a successful online arbitration framework.

Assuming that a level of harmonisation is needed at the international level to compel both merchant and consumer into a binding online dispute resolution process, this paper will then question whether pre-dispute agreements could be made enforceable. Based on research across the commercial and consumer arbitration, as well as ODR disciplines, it first evaluates from a theoretical and then a practical viewpoint, how parties in low-value should be provided with procedural fairness, accounting for the fact that many will lack effective bargaining power, while also ensuring that the arbitration process remains cheap and expedient. It will address various procedural elements of online arbitration, including restrictive time limits, applicable law, document disclosure, fees & funding, arbitrator and ODR provider appointment, class actions, agreement & award form, award reasoning and rules on ODR provider transparency. It asks whether, given the lack of any alternative means of redress, we may need to accept a diminished role for "truth-seeking" within any low-value arbitration process and will instead need to focus on recalibrating party bargaining inequalities. Finally, it shows that given the overriding objective of maintaining a fast and quick arbitration process, there will likely be a diminished role for party and arbitrator procedural autonomy in acquiescence to pre-determined institutional controls. Overall, the paper provides inspiration and guidance to aspiring dispute resolution professionals and entrepreneurs wishing to capitalise on the growing number of high-volume low-value cross-border claims that do not fit comfortably with the expensive and time-consuming traditional international commercial arbitration model.

## II. Minimum Due Process in International Arbitration

'Due process' is a broad phrase denoting the requirement for a fundamentally fair procedure in any legal adjudicatory process. In international arbitration it "*is often understood as a 'hard' rule of law, a kind of ... foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award.*"<sup>3</sup> Thus it operates at both the

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<sup>2</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, June 1958)

<sup>3</sup> Strong, S. I., (2008), "Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns", 30 *University of Pennsylvania Journal of International Law* 1, 55; Magnusson, A., (2008), "Fast

seat of arbitration and at the stage of cross-border enforcement to provide minimum procedural protections working to uphold the legitimacy of the arbitral process and to prevent the attachment of legal force to arbitrations that are intrinsically unfair. Given the transnationality of cross-border dispute resolution and the varying types of cross-border claims, its exact definition and details are never precise and can be subject to variation.<sup>4</sup> In this sense it has been described as “*elastic*”,<sup>5</sup> “*elusive*”,<sup>6</sup> and “*flexible*”,<sup>7</sup> moulding itself to fit each particular case.

The phrase itself has been adopted into the international context from similar wording in common law civil procedure. However, every other nation has similar doctrines such as *natural justice* in the United Kingdom, *procedural fairness* and the commonly held notion of *principle de la contradiction* in civil jurisdictions.<sup>8</sup> Across the various judicial and academic efforts to summarise the basic tenets of due process in international commercial arbitration, there are two common and recurring principles, being the *opportunity to present one’s case* and *equality between the parties*.<sup>9</sup> Kaufmann-Kohler also highlights how increasingly the concept of *procedural efficiency* is also being regarded as a potential due process principle, but that it has not achieved the same recognition as the other principles.<sup>10</sup> Furthermore, increasing reference is being made to a concept of *international due process*. Much like *transnational public policy*, it is in effect minimum principles of procedural law which are commonly found across the world’s legal systems and which comprise of the most fundamental notions of fair procedure.<sup>11</sup> The ALI/UNIDROIT Principles of Transnational Civil Procedure, which were drafted as a soft law codification of principles forming minimum “*standards for adjudication of transnational commercial disputes*” is an important piece of comparative research in this field.<sup>12</sup> The guide highlights several key procedural principles which could be considered pertinent to any fair adjudicative procedure, including the “*independence*” and “*impartiality*” of the judges,<sup>13</sup> jurisdiction over the parties,<sup>14</sup> and procedural equality of the parties.<sup>15</sup> It also determined that judgments cannot be made without due process of law which includes “*effective...notice*” and “*right to submit relevant*

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Track Arbitration: The SCC Experience”, Summary of Mrs Magnusson's speech at the Introduction to Arbitration seminar held in Stockholm on 13 - 16 June, 2001, 5 ([http://sccinstitute.com/media/56055/fast\\_track\\_arbitration.pdf](http://sccinstitute.com/media/56055/fast_track_arbitration.pdf))

<sup>4</sup> Kaufmann-Kohler, G., (2003), “Globalization of Arbitral Procedure”, 36 *Vanderbilt Journal of Transnational Law* 1313, 1322; Protosaltou, D., Schultz T., & Magnenat-Thalmann, N., (2006), “Taking the Fourth Party Further? Considering a shared virtual workspace for arbitration”, 15 *Information & Communications Technology Law* 157, 168; Kurkela, M. & Turunen, S., (2010), *Due Process in International Commercial Arbitration*, 2<sup>nd</sup> Ed, Oxford University Press, 7-8

<sup>5</sup> International Law Association, (2008), *International Commercial Arbitration: Final Report on Ascertainning the Contents of the Applicable Law in International Commercial Arbitration*, Rio De Janeiro Conference, 20

<sup>6</sup> *Hannah v. Larche*, 363 U.S. 420 (1960), 442 (US)

<sup>7</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972), 481 (US)

<sup>8</sup> *Supra* n4 Kaufmann-Kohler, 1321-1322

<sup>9</sup> Waincymer J., (2012), *Procedure and Evidence in International Arbitration*, Kluwer Law International, 16; Mohtashami, R., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 97; *Supra* n4 Kurkela & Turunen, 185; 1985 UNCITRAL Model Law of International Commercial Arbitration, Last Amended 2006, (“UNCITRAL Model Law”), Article 18

<sup>10</sup> *Supra* n4 Kaufmann-Kohler, 1321-1322

<sup>11</sup> Carodine, M.D., (2006), “Political Judging: When Due Process Goes International”, 48 *William and Mary Law Review* 1159

<sup>12</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, adopted by UNIDROIT Governing Council in 2004, (<http://unidroit.org/instruments/transnational-civil-procedure>)

<sup>13</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 1

<sup>14</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 2

<sup>15</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 3

*contentions of law and fact and to offer supporting evidence*".<sup>16</sup> This therefore forms an excellent starting point from which to gain a basic understanding of some common principles of due process.<sup>17</sup>

It could be said that the fluidity of due process serves to raise the level of due process based on the relative political or public value of the case in hand: It is logical and perhaps obvious that the level of due process required in a war crimes trial should be different to that in a low-value consumer warranty dispute.<sup>18</sup> Given the overpowering role of party autonomy and the parties' freedom to privately contract for almost anything, as well as the pro-enforcement bias of the New York Convention, the level of due process required in international commercial arbitration is accordingly far less than that compared with other civil or criminal procedures in public courts.<sup>19</sup> It is thus fundamental to note that "*the emphasis during an enforcement action is on whether the process was proper and in accordance with the arbitration agreement, not whether the result and procedure would have been the same under the law and procedure of the enforcing state.*"<sup>20</sup> Instead, the New York Convention calls for an almost commonsensical approach, using "*limited, standard and uniform standards*" and only sanctioning "*very serious irregularities,*"<sup>21</sup> which clearly impact on the case outcome,<sup>22</sup> based on the courts own rationalisation of what is *fundamentally* unfair. It is thus an incredibly narrow protection, mostly concerned with seeking out clear-cut cases of flagrancy, corruption or bias.<sup>23</sup> This minimal protection is based on the contractual freedom of arbitration's customers to waive various procedural rights.<sup>24</sup> Indeed, if the parties are truly

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<sup>16</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 5

<sup>17</sup> Kotuby, C.T., (2013), "General Principles of Law, International Due Process, and the Modern Role of Private International Law", 23 *Duke Journal of Comparative and International Law* 411, 428

<sup>18</sup> Park, W.W., (2010), "Arbitrators and Accuracy", 1 *Journal of International Dispute Settlement* 25, 34; *Mathews v. Eldridge*, 424 U.S. 319 (1976), 334 (US)

<sup>19</sup> Yves Fortier, L., (1999), "The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – A Few Plain Rules and a Few Strong Instincts", in *Improving Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (van den Berg, A.J., Ed.), ICCA Congress Series No.9, Kluwer Law International, 398; International Law Association, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference, (2002), (available at [www.ila-hq.org](http://www.ila-hq.org))

<sup>20</sup> *Supra* n3 Strong, 91-92; *Supra* n9 Waincymer, 28; Wetter, J.G., (1985), "The Conduct of Arbitration", 2 *Journal of International Arbitration* 33

<sup>21</sup> Poudret, J. & Besson, S., (2007), *Comparative Law of International Arbitration*, 2<sup>nd</sup> Ed, Sweet & Maxwell, 818-820

<sup>22</sup> Welser, I. & Klausegger, C., (2009), "Fast-Track Arbitration: Just Fast or Something Different?", in *Austrian Arbitration Yearbook 2009*, Manzsche Verlags, 270; Caprasse, O., (2010), "Arbitrability, due process and public policy in set aside proceedings", in *Arbitration News*, Newsletter of the International Bar Association Legal Practice Division, Vol 15(1), 113-114

<sup>23</sup> Gharavi, H., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 128; De Boissésou, M., (2007), "New Tensions between Arbitrators and Parties in the Conduct of Arbitral Procedure", 10 *International Arbitration Law Review* 177, 179 - The violation of the French law, for example, must be "*flagrant, effective and concrete*" & United States courts often expect a "*substantial injustice or prejudice*"; *Supra* n4 Kurkela & Turunen, 37 – Essentially calls to "*truly international due process requirements*"

<sup>24</sup> *Supra* n9 Waincymer, 80; Böckstiegel, K.H., (1997), "The Role of Party Autonomy in International Arbitration" 52 *Dispute Resolution Journal* 24, 25; *Supra* n4 Kaufmann-Kohler, 1322; Carbonneau, T.E., (2003), "The Exercise of Contract Freedom in the Making of Arbitration Agreements", 36 *Vanderbilt Journal of Transnational Law* 1189, 1192-1193

concerned about any specific higher level due process rights, there is nothing to prevent them from negotiating them into the procedural construction.<sup>25</sup>

It is also important to remember how differing legal cultures can very heavily impact on the definition of due process. A well-known example is the differing attitudes towards document discovery as a due process right in common and civil law countries.<sup>26</sup> Similarly, Nariman calls us to recognise that our Western concepts of due process are different from the East, such as in Korea or Japan, where the majority of disputes are resolved through mediation and conciliation, rather than the “adversarial” style familiar to the West.<sup>27</sup> Thus, determining a static and readily accessible set of transnational due process principles is incredibly difficult, for it is highly contextual and circumstantial.<sup>28</sup> Kurkela has further highlighted how national laws regulating arbitral due process are a difficult starting point from which to derive a definition, for many national due process laws are purposefully defined in a vague and “open” manner providing greater interpretative discretion, plus many jurisdictions have conflicting views on whether certain procedural rules are mandatory or non-mandatory.<sup>29</sup> Nevertheless, the same overwhelming deference to party agreement is patently clear in all national laws regulating international arbitration.<sup>30</sup> For example, most of the rules within the *UNCITRAL Model Law on International Commercial Arbitration* (UNCITRAL Model Law) are subject to party autonomy, save for a small fraction of mandatory rules.<sup>31</sup> Even Article 19 dealing with the “*admissibility, relevance, materiality and weight of any evidence*” is subject to control by the parties. Thus, the due process “minimums” within international arbitration are, as a result of freedom of contract, exceptionally minimal.

Under the New York Convention, which commonly controls cross-border enforcement of arbitration agreements and awards, Article V(1)(b) is perhaps the most regularly cited article in reference to due process. It holds that recognition and enforcement of an arbitration may be refused if the party against whom it is invoked can provide proof that he “*was not given proper notice of the arbitration proceedings or was otherwise unable to present his case.*” There has been some confusion amongst courts and commentators as to which due process laws and values they should be considering when making a ruling: is it the forum’s laws on due process or the law at the place of arbitration?<sup>32</sup> The majority - and correct – view, based

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<sup>25</sup> *Supra* n9 Waincymer, 4; Lévy, L., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 65

<sup>26</sup> Clermont, K.M. & Sherwin, E., (2002), “A Comparative View of Standards of Proof”, 50 *American Journal of Comparative Law* 243; Lind, E.A., Erickson, B.E., Friedland N. & Dickenberger, M., (1978), “Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study”, 22 *Journal of Conflict Resolution* 318

<sup>27</sup> Nariman, F., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 238

<sup>28</sup> O’Hare, J., (1996), “The Denial of Due Process and the Enforceability of CIETAC Awards Under the New York Convention: the Hong Kong Experience”, 13 *Journal of International Arbitration* 179, 184

<sup>29</sup> *Supra* n4 Kurkela & Turunen, 2; *Supra* n19 Yves Fortier, 398

<sup>30</sup> Kronke, H., Nacimiento, P., Otto, D. & Port, N.C., (2011), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Kluwer Law International, 240; Pryles, M., (1997), “Limits to Party Autonomy in Arbitral Procedure”, 24 *Journal of International Arbitration* 327, 321-323; Blackaby, N., Partasides, C., Redfern A. & Hunter M., (2009), *Redfern and Hunter on International Arbitration – Student Version*, 5<sup>th</sup> Ed, Oxford University Press, 3.45; *Supra* n24 Carbonneau, 1217

<sup>31</sup> One such mandatory rule is suggested to be Article 18 which requires procedural equality and a full opportunity for parties to present their case – *Ibid.*, Pryles, 29; Holtzmann, H.M. & Neuhaus, J.E., (1995), *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law International, 583

<sup>32</sup> *Supra* n3 Strong, 63-64, 89; *Supra* n28 O’Hare; *Supra* n30 Kronke *et al*, 237-240

on a reading of the New York Convention, is that when considering Article V(1)(b) the enforcing court should apply *its own notions* of due process.<sup>33</sup>

The ability to present one's case is also a common mandatory rule within most national arbitration laws<sup>34</sup> and at least to some it "*appears to be the most fundamental due process rule.*"<sup>35</sup> Certainly in the United States, the most fundamental requirement of procedural due process is "*the opportunity to be heard at a meaningful time and in a meaningful manner.*"<sup>36</sup> Mantilla-Serrano informs us that this principle includes receiving proper notice of each relevant stage, being given a reasonable time and opportunity to respond, and respecting the general right to an adversarial proceeding.<sup>37</sup> As a principle it is purposefully vague<sup>38</sup> and what is a sufficient level of "opportunity" can be explicated in the law governing the arbitration at the seat,<sup>39</sup> although widely it is expected that the arbitrator ultimately decides which evidence needs to be heard or which evidence is only going to unnecessarily delay or increase the cost of the arbitration.<sup>40</sup> At its core, however, parties must be kept informed at every stage of the proceedings<sup>41</sup> and must be given an opportunity to refute any evidence that is raised in the process.<sup>42</sup>

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<sup>33</sup> This is made even more clear by the fact that Article V(1)(d), handling the composition of the tribunal and design of the procedure, explicitly refers to the arbitration laws at the seat of arbitration; *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'industrie Du Papier (RAKTA)*, 508 F.2d 969 (1974), (US), 975-976 – Article V(1)(b) of the New York Convention "*essentially sanctions the application of the forum state's standards of due process*"; Inoue, O., (2000), "The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard", 11 *American Review of International Arbitration* 247; *Supra* n11 Carodine, 1226; *Jiangsu Changlong Chem. Co. v. Burlington Bio-Med. & Sci. Corp.*, 399 F. Supp. 2d 165 (2005), 168 (US)

<sup>34</sup> Eg Article 18 UNCITRAL Model Law; Article 1042(1) Deutsche Zivilprozeßordnung (ZPO); Article 1485 French Code of Civil Procedure; Chapter 609(46) Hong Kong Arbitration Ordinance; Section 33 English Arbitration Act; 24(2) Arbitration (Scotland) Act - Schedule I

<sup>35</sup> *Supra* n4 Kurkela & Turunen, 38

<sup>36</sup> *City of Los Angeles v. David*, 538 U.S. 715 (2003), 717 (US); *International Transactions, Ltd. v. Embotelladora Agral Regiomontana*, SA de CV, 347 F.3d 589 (2003), 594 (US); Harding, M.M., (2004), "The Limits of Due Process Protocols", 19 *Ohio State Journal on Dispute Resolution* 369, 393

<sup>37</sup> Mantilla-Serrano, F., (2004), "Towards a Transnational Procedural Public Policy", 20 *Arbitration International* 342

<sup>38</sup> *Supra* n4 Kurkela & Turunen, 37

<sup>39</sup> Distinguish for example Section 33 of English Arbitration Act 1996 which calls for a "reasonable" opportunity with Article 18 UNCITRAL Model Law which requires a "full" opportunity; Lew, J., Mistelis, L. & Kröll, S., (2003), *Comparative International Commercial Arbitration*, Kluwer Law International, Para. 26-87; *Supra* n23 De Boissésou, 178

<sup>40</sup> *Supra* n30 Kronke *et al.*, 250; *Supra* n22 Welser & Klausegger, 267; Park, W.W., (2004), "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", 19 *Mealey's International Arbitration Report* 1, 4-5; *Supra* n9 Mohtashami, 103-104; *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, (1997), 1130 (US); *Killam v. Brander Smith* [1997] BCJ No 456, paras 14-15 (Canada); OLG Hamburg, (6<sup>th</sup> September 1984), Docket No. 6 U 50/84, 31 RIW 490 (1985) (Germany); OGH, (27<sup>th</sup> November 1991), Docket No. 3 Ob 1091/91, 33 ZfRV 309 (1992) (Austria); OLG Köln, Docket No. 9 Sch 01-03, (April 3<sup>rd</sup> 2004), XXX Yearbook Commercial Arbitration 560 (2005) (Germany); *U. v. Epoux G.*, ATF 117 II 346 (1<sup>st</sup> July 1991) / BULL. ASA 415 (1991) (Switzerland); *Sheet Metal Workers International Association v. Kinney Air Conditioning Co.*, 756 F.2d 742 (1985), 744 (US); *Federal Deposit Insurance Corporation v. Air Florida System, Inc.*, 822 F.2d 833 (1987), 842 (US); Note, for example, how Section 33 of English Arbitration Act 1996 calls for opportunity to present case while also adopting "*procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense*"

<sup>41</sup> van den Berg, A.J., (2007), "New York Convention of 1958: Refusals of Enforcement", 18 *ICC International Court of Arbitration Bulletin* 1, 20; *Guang Dong Light Headgear Factory Co. v. ACI International, Inc.*, (10<sup>th</sup> May 2005), XXXI Yearbook Commercial Arbitration 1105 (2006), 1118 (US); *Russian Seller v. German Buyer*, (16<sup>th</sup> March 2000) XXVII Yearbook Commercial Arbitration 445 (2002) (Germany); *Buyer v. Seller*, (10<sup>th</sup> June

The other common due process requirement of *equality between the parties* usually derives from mandatory rules of the *lex loci arbitri*.<sup>43</sup> This principle does not mean that the parties need to be treated identically,<sup>44</sup> but that both parties should be treated in a way that does not disadvantage them in the circumstances. Such as requiring that the arbitrators are not biased through a conflict of interest. However, again the interpretation here is very narrow.<sup>45</sup> For example, national courts have interpreted that the arbitrator must have ‘actual bias’, rather than an ‘appearance of bias’.<sup>46</sup> Finally, two other New York Convention articles are regularly cited in reference to due process. Article V(1)(d) of the New York Convention which calls for conformity with party agreement is also extremely narrow in application and rarely ever succeeds as a defence.<sup>47</sup> It is generally agreed that if parties do not object at any point during the arbitration, they are estopped from claiming a breach of their agreement at the courts.<sup>48</sup> Finally, Article V(2)(b) provides the notorious catch-all public policy defence to enforcement, although it is widely accepted that procedural public policy commonly encapsulates and overlaps with the other due process defences.<sup>49</sup>

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1976), IV Yearbook Commercial Arbitration 258 (1979) (Germany); *Firm P v. Firm F*, (3<sup>rd</sup> April 1975), II Yearbook of Commercial Arbitration 241 (1977) (Germany)

<sup>42</sup> *Ière Cour de droit civil*, 4P.4/2007, (26<sup>th</sup> September 2007), 26 ASA Bulletin, (2007), 151 (Switzerland); Cour de Cassation, (14<sup>th</sup> March 2006), *Revue d'Arbitrage*, (2006), 653 (France); *Company A v. Trustee in Bankruptcy of Company X*, Docket No. 12 0 184/1981, (20<sup>th</sup> January 1986), XII Yearbook Commercial Arbitration 486 (1987) (Germany); *Firm P v. Firm F*, (3<sup>rd</sup> April 1975), II Yearbook of Commercial Arbitration 241 (1977) (Germany); *Chrome Resources S.A. v. Léopold Lazarus Ltd.*, (8<sup>th</sup> February 1978), XI Yearbook Commercial Arbitration 541 (1986) (Switzerland); *Supra* n41 van den Berg, 20

<sup>43</sup> Article 18 UNCITRAL Model Law - "*the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*"; Article 33 English Arbitration Act 1996 - "[*The tribunal shall*] *act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*"

<sup>44</sup> *Supra* n9 Waincymer, 16-17, 19; *Supra* n4 Kurkela & Turunen, 190

<sup>45</sup> *Supra* n30 Kronke *et al*, 282-283, 388-391; *Supra* n4 Kurkela & Turunen, 29; Per Lord Wilberforce in *Calvin v. Carr* [1980] All ER 440 (PC) – "*While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency ... should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced.*"

<sup>46</sup> *AT&T Corporation v. Saudi Cable Company* [2000] 2 All ER (Comm) 625 (England & Wales); Oberlandesgericht Stuttgart, (18<sup>th</sup> October 1999) and *Dutch Shipowner v. German Cattle and Meat Dealer*, (1<sup>st</sup> February 2001), XXIX Yearbook Commercial Arbitration 700-714 (2004) (Germany); United States, Southern District Court of New York, (27<sup>th</sup> June 2003) and *Lucent Technologies Inc., et al. v. Tatum Co.*, (3<sup>rd</sup> August 2004) XXX Yearbook Commercial Arbitration 747-761 (2005) (US); *Gao Haiyan and another v Keeneye Holdings Ltd and another* [2012] 1 HKC 335 (Hong Kong)

<sup>47</sup> *Compagnie des Bauxites de Guinée v. Hammermills Inc.*, 1992 WL 122712 (1992) (US) – Only those violations of agreed rules that work "*substantial prejudice to the complaining party*" are covered by Article V(1)(d); *China Agribusiness Development Corporation v. Balli Trading* [1998] 2 Lloyd's Rep 76 (England & Wales); *Supra* n3 Strong, 70; *Supra* n21 Poudret & Besson, 892; Choi, S., (1995-1996), "Judicial Enforcement of Arbitration Awards under the ICSID and New York Convention", 28 *New York University Journal of International Law and Politics* 175, 189

<sup>48</sup> *International Standard Electric Corp. (ISEC) v. Bidas Sociedad Anonima Petrolera, Industrial Y Commercial* 745 F. Supp. 172 (1990), 180 (US); *Supra* n25 Lévy, 68

<sup>49</sup> Harris, T.L., (2007), "The 'Public Policy' Exception to Enforcement of International Arbitration Awards Under the New York Convention: With Particular Reference to Construction Disputes", 24 *Journal of International Arbitration* 9, 10, 17; *Italian Party v. Swiss Co.*, XXIX Yearbook Commercial Arbitration 819 (2004), 829 (Switzerland); *Supra* n19 Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, Para. 29; *Supra* n39 Lew *et al*, Para. 26-117 – "*possible procedural public policy grounds include fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; annulment at place of arbitration.*"



It is apparent on a review the very few cases that have succeeded in setting aside or avoiding enforcement through a due process argument, that unfairness usually requires that the dissatisfied party was *not in control of the unfair portion of the procedure*.<sup>50</sup> A well known case for example is *Iran Aircraft Industries v. Avco Corp.*<sup>51</sup> Here a change in the composition of the tribunal meant that Avco were effectively misled on the level of detail they needed to provide in their evidence.<sup>52</sup> Similarly, in another case, a party could not argue that their rights had been breached when an inspection was held in their absence, because they had been informed of the inspection and did not request another one with them present.<sup>53</sup> Very often, therefore, a party cannot claim a due process breach for their own failure to attend or object to any aspect of the procedure,<sup>54</sup> even in one case where non-attendance was outside of their control but could be remedied by sending a proxy.<sup>55</sup>

In summary, the New York Convention, the institutional rules and the national laws all regulating international arbitration have been drafted in light of the fact that the vast majority of international arbitration's customers are commercial parties of roughly equal bargaining power and often possessing the financial resource to invest in proficient legal advice and representation.<sup>56</sup> They therefore pay a significant level of deference to party autonomy and to their freedom to devise their own procedure, fair or unfair, providing only the absolute minimum in due process protections. As Lévy has said of its due process, "*it is not anything goes, but it is almost anything goes.*"<sup>57</sup> As a result, the procedural construction within commercial arbitration is usually left to ingenuity of both the arbitral tribunal and parties working synergistically and creatively, with a fair amount of reference to soft principles<sup>58</sup> which "*arbitrators are free to ignore and often do*",<sup>59</sup> as well as to the arbitrators' and parties' own experience and intelligence.<sup>60</sup> This makes sense where parties of equal

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<sup>50</sup> *Supra* n41

<sup>51</sup> *Iran Aircraft Industries v. Avco Corporation*, 980 F.2d 141 (1992), 146 (US)

<sup>52</sup> *Supra* n33 Inoue, 255

<sup>53</sup> *Hebei Import and Export Corporation v. Polytek Engineering Company Limited*, (9<sup>th</sup> February 1999) XXIV Yearbook Commercial Arbitration 652 (1999) (Hong Kong)

<sup>54</sup> *Supra* n30 Kronke *et al*, 253; *Supra* n33 Inoue (2000), 249-250; *Orion Pictures Corporation v. Writers Guild of America, West Incorporated*, 946 F.2d 722 (1991), 723 (US); *Val-U Construction Company v. Rosebud Sioux Tribe*, 146 F.3d 573 (1998), 577-580 (US); *Bernstein Seawell & Kove v. Borsage*, 813 F.2d 726 (1987), 729-730 (US); Swiss Federal Tribunal [1980] SJ 65 (8<sup>th</sup> February 1979) (Switzerland); *C v. Dr. Vladimir Z*, OGH, (21<sup>st</sup> March 2005) XXXI Yearbook Commercial Arbitration 583 (2006) (Austria); *Norbrook Laboratories v. A Tank and Moulson* [2006] WL 1333300 (Comm) (England & Wales)

<sup>55</sup> *Consortio Rive, SA de CV v Briggs of Cancun Inc*, 134 F. Supp. 2d 789 (2001), 796 (US)

<sup>56</sup> Shell, R., (1988), "The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v McMahon", 26 *American Business Law Journal* 397, 418-419; Drahozal, C.R., (2001), "'Unfair' Arbitration Clauses", *University of Illinois Law Review* 695, 700-703; Rutledge, P.B., (2007), "Who Can Be against Fairness - The Case against the Arbitration Fairness Act", 9 *Cardozo Journal of Conflict Resolution* 267, 270

<sup>57</sup> *Supra* n25 Lévy, 70; Also *Team Design v. Gottlieb*, 104 S.W.3d 512 (2002), 518 (United States, Tennessee Court of Appeal) – suggesting that as long as they are agreed to by competent parties who are "dealing at arm's length," even procedures such as "*flipping a coin, or, for that matter, arm wrestling*" will be upheld

<sup>58</sup> *Supra* n4 Kurkela & Turunen, 7-8; Examples include the UNCITRAL Notes on Organising Arbitral Proceedings; the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration, International Bar Association's Guidelines on Conflicts of Interest in International Arbitration; and the International Arbitration Committee of the ICC Report 'Techniques for Controlling Time and Costs in Arbitration' (ICC Publication No. 843, 2007)

<sup>59</sup> *Supra* n40 Park, 8

<sup>60</sup> *Supra* n19 Yves Fortier, 401; *Supra* n23 De Boissésou, 180; Rau, A.S., (2008), "Arbitral Jurisdiction and the Dimensions of Consent," 24 *Arbitration International* 199, 204

bargaining power each have the ability to influence the procedural design. However, it makes little sense within international ultra-low-value arbitration where – given the regular inequality of bargaining power, the regularity of small-print contract terms, and the potential for pre-designed arbitration agreements hidden within boilerplate terms – there is little opportunity for the consumer to “negotiate” on procedure or, thus, to introduce due process safeguards.<sup>61</sup>

### III. Unpacking Consumer Online Arbitration

#### a) Online consumer arbitration

Over the past two decades there has been an abundance of literature discussing the various strengths, weaknesses, opportunities and threats of dispute resolution processes in cyberspace such as online arbitration, mediation and software-assisted negotiation.<sup>62</sup> The increasing concern over the millions of often low-value contractual arising across borders, as a result of ever-increasing levels of cross-border ecommerce, has understandably driven this commitment to developing an international framework to support low-value claims through ODR.<sup>63</sup> The difficulty of pursuing cross-border consumer and low-value trade claims through traditional court procedures is well accepted<sup>64</sup> and the costs of conducting cross-border dispute resolution through ODR are likely to be a fraction by comparison.<sup>65</sup> This makes “*ODR not so much an option, as the only option*”<sup>66</sup> for low-value disputes, where the average value of a dispute in the consumer context, at least, is estimated to be around \$146.<sup>67</sup> Therefore, the academic and professional community, as well as UNCITRAL, OECD and the

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<sup>61</sup> Hörnle, J., (2009), *Cross-Border Internet Dispute Resolution*, Cambridge University Press, 128; *Supra* n4 Kurkela & Turunen, 54-56; *Supra* n9 Waincymmer, 15; Gibbons, L.J., (2002), "Creating a Market for Justice; A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration", 23 *Newark Journal of International Law & Business* 1, 62; Cortés, J. & de la Rosa, F.E., (2013), “Building a Global Redress System for Low-Value Cross-Border Disputes”, 62 *International and Comparative Law Quarterly* 407, 410; Rogers, C.A., (2007), “The Arrival of the Have-Nots in International Arbitration”, 8 *Nevada Law Journal* 341, 341

<sup>62</sup> See in particular the Symposium on Online Dispute Resolution from the University of Toledo Law Review (Volume 38), especially Katsh, E. & Wing, L., “Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future”, (2006), 38 *University of Toledo Law Review* 19; Haloush, H.A. & Malkawi, B.H., “Internet Characteristics and Online Alternative Dispute Resolution”, (2008), 13 *Harvard Negotiation Law Review* 327; Ahalt, A.M.M., “What You Should Know About Online Dispute Resolution”, (2009), March 2009 *Practical Litigator* 21; Friedman, G.H., “Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities”, (1997), 19 *Hastings Communications & Entertainment Law Journal* 695

<sup>63</sup> *Supra* n1

<sup>64</sup> Patrikios, A., “The Role of Transnational Online Arbitration in Regulating Cross-Border e-Business – Part I”, (2008), 24 *Computer Law and Security Report* 66, 68-69; Rule, C. Del Duca, L. & Rogers, V., “Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments”, (2010), 42 *Uniform Commercial Code Law Journal* 221, 226, 228; Riefa, C. & Hörnle, J., “The Changing Face of Electronic Consumer Contracts in the Twenty-first Century: Fit for Purpose?”, (2009), in *Law and the Internet*, 3rd Ed., (Edwards, L. & Waelde, C., Eds.), Hart Publishing, 102-17

<sup>65</sup> Hörnle, J., “The Jurisdictional Dilemma of the Internet”, (2009), in *Law and the Internet*, 3rd Ed., (Edwards, L. & Waelde, C., Eds.), Hart Publishing, 153-154; Rabinovich-Einy, O., “Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape”, (2003), 6 *Yale Journal of Law & Technology* 1, 22

<sup>66</sup> Stylianou, P., “Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border e-Commerce Disputes”, (2008), 36 *Syracuse Journal of International Law & Commerce* 117, 123-124

<sup>67</sup> Gilliéron, P., “From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?”, (2008), 23 *Ohio State Journal on Dispute Resolution* 301, 302

EU, have all been pressing for such a system, stressing that low consumer and business confidence in purchasing goods and services from overseas is inhibiting the development of e-commerce and industry, adversely impacting on the global economy.<sup>68</sup> However, although “*much has been written about what an ODR system should look like, the question of how any such system would be implemented remains problematic.*”<sup>69</sup>

After a series of consultations and Green Papers,<sup>70</sup> in 2007 the EU set about its plans to create a Europe-wide system to provide e-consumers with greater access to cross-border dispute resolution processes. Starting first with the development of the fast-track small claims procedures through the courts,<sup>71</sup> then passing a Directive on the supervision and regulation of consumer ADR (and ODR) providers and their due process values (the “EU Directive”),<sup>72</sup> with which Member States have needed to comply since July 2015, and culminating in a regulation launching the ODR platform (the “EU Regulation”).<sup>73</sup> The ODR Platform, launched in February 2016, is the first large-scale central online portal and is intended to be a space where ODR providers, consumers and merchants can all interact and file ODR claims. The EU ODR framework is presently solely focused on consumer protection and, accordingly, on increasing consumer confidence in buying products or services from other EU countries. *Inter alia*, the EU Directive on ADR introduces a list of eight core fairness principles with which all ODR providers must comply before they can be listed on the new ODR Platform, thus essentially becoming accredited. In their title form, these principles are: *Accessibility, Expertise, Independence, Impartiality, Transparency, Effectiveness, Fairness, Legality and Liberty.*<sup>74</sup>

Similarly, after a series of consultations calling on the need for an international system to provide redress for online consumers and businesses, UNCITRAL formed its Working Group III on ODR in 2010.<sup>75</sup> The decision of UNCITRAL was to not just limit its focus to

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<sup>68</sup> On EU and UNCITRAL see below; OECD, *Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy*, (2009), (<http://oecd.org/ict/econsumerconference/44047583.pdf>)

<sup>69</sup> Bowers, M.G., “Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework”, (2011), 40 *Vanderbilt Law Review* 1265, 1267

<sup>70</sup> EU Commission Green Paper of 9<sup>th</sup> February 2000 on Judicial Cooperation in Civil Matters: the Problems Confronting the Cross-Border Litigant, COM(2000)51 final; EU Commission Green Paper of 20<sup>th</sup> December 2002 on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM(2002)0746 final; EU Commission Green Paper of 19<sup>th</sup> April 2002 on Alternative Dispute Resolution in Civil and Commercial Matters, COM(2002)196 final; European Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes, OJ L109/56

<sup>71</sup> EU Regulation (No. 861/2007) of 11<sup>th</sup> July 2007 establishing a European Small Claims Procedure, OJ L199/01 – devised for cross-border court claims valued below €2,000; Another relevant directive was the EU Directive (No. 2008/52/EC) of 21<sup>st</sup> May 2008 on certain aspects of mediation in civil and commercial matters, OJ L136/3

<sup>72</sup> EU Directive (No. 2013/11/EU) of 21<sup>st</sup> May 2013 on alternative dispute resolution for consumer disputes, OJ L165/63

<sup>73</sup> Accessible at <http://ec.europa.eu/odr>; EU Regulation (No. 524/2013) of 21<sup>st</sup> May 2013 on online dispute resolution for consumer disputes, OJ L165/1

<sup>74</sup> The “Due process” principles are contained in the EU Directive Articles 5-11 with further details therein; The role of Member State “competent authorities” in accrediting ADR providers is also contained in Articles 18-20 of the EU Directive

<sup>75</sup> UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session*, (Vienna, 13-17 December 2010), A/CN.9/716, 17 January 2011; Initial discussions began in 2000 – UNCITRAL, *Official Records of the General Assembly*, Fifty-fifth Session, Supplement No. 17, A/55/17, (New York, 12 June-7 July 2000), Para. 385; The work of the UNCITRAL Working Group between 2010 and 2016 can be reviewed at [www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)

consumer disputes, but also to include B2B contracts as well.<sup>76</sup> Instead, therefore, UNCITRAL decided a better route would be demarcating the *types* of claims which would be eligible, by specifically focusing on claims: (a) for goods or services not delivered, not delivered on time, not properly charged or debited, or not provided in accordance with the contract; or (b) where payment has not been received for goods or services rendered.<sup>77</sup> Spending most of their time on the development of suitable arbitration procedural rules, the UNCITRAL Working Group had hoped to later tackle issues such as an enforcement protocol and the regulation of ODR providers.<sup>78</sup> In this sense, Hörnle has said how UNCITRAL seemed less concerned with protecting due process principles than the EU system.<sup>79</sup> The EU system, by comparison, does not provide any specific guidance on recommended procedure, but provides the minimum baseline of standards with which private and public ADR providers must comply.

It is also important to note *why* UNCITRAL focused on both B2B and B2C disputes. Firstly, it is now largely accepted that clearly distinguishing online consumers and small-scale traders is a difficult task, with millions of internet users engaging in business-like activities in a consumer-like manner.<sup>80</sup> Secondly, even if you remove all of those disputes which can be managed internally by online intermediaries (*eg* credit/debit card and payment providers) and online service providers (*eg* Amazon, eBay, Facebook) (see *infra*), there remains many millions of other cross-border contracts which are entered into outside of these systems, including direct sales through websites, email-based contract negotiations, and contracts completed through thousands of other agency or listing sites.<sup>81</sup> These interactions will include not just consumers, therefore, but also thousands of small-scale traders, SMEs and other organisations. All combined this suggests a vast multi-billion-dollar incipient industry for high-volume low-value online dispute resolution.<sup>82</sup> This article, therefore, examines both B2C and low-value B2B contracts by more specifically assessing contractual claims in a

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<sup>76</sup> Del Duca, L., Rule, C. & Loebl, Z., (2013), "Facilitating Expansion of Cross-Border ECommerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)", 1 *Penn State Journal of Law & International Affairs* 59, 82

<sup>77</sup> UNCITRAL, *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I)*, Report of Working Group III on ODR (Online Dispute Resolution), Thirtieth Session, 20-24<sup>th</sup> October 2014, (8 August 2014), A/CN.9/WG.III/WP.131, Draft Article 1(2); *Supra* n61 Cortés & de la Rosa, 414 – Suggests excluding claims for delivery without payment so that the majority of captured B2C claims are where the claimant is the consumer

<sup>78</sup> UNCITRAL, *Working Group III (Online Dispute Resolution) Note by the Secretariat*, 28 February 2012, A/CN.9/WG.III/WP.112, para. 3 – UNCITRAL planned to eventually draft the following six 'model' rules and guidelines: (1) Procedural Rules for ODR, (2) Guidelines for Neutrals, (3) Minimum Standards for ODR Providers, (4) Supplementary Rules for ODR Providers, (5) Substantive Legal Principles for Resolving Disputes, and (6) Cross-border Enforcement Mechanisms

<sup>79</sup> Hörnle, J, (2012), "Encouraging Online Dispute Resolution in the EU and Beyond-Keeping Costs Low or Standards High?", *Queen Mary School of Law Legal Studies Research Paper* 122, 147-148

<sup>80</sup> *Supra* n76

<sup>81</sup> American Bar Association, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report of The American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution*, (2002), University of Washington School of Law, 7-8; Rule, C., (2002), *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, John Wiley & Sons, 121-134

<sup>82</sup> European Commission, *Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law*, 2011/0284 (COD), COM(2011) 635 final, (11 October 2011), 2-4; Eurobarometer, *European contract law in business-to-business transactions, Analytical Report*, Flash EB No. Series 320, Conducted by The Gallup Organization, Hungary European Commission, ([http://ec.europa.eu/public\\_opinion/flash/fl\\_320\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_320_en.pdf))

lower value bracket (eg below €10,000), which also fall outside the possibility for internal enforcement through such intermediaries or online service providers.

In 2015, and 5 years after the formation of the UNCITRAL ODR Working Group, it was decided that such detailed work on an international ODR system was just too large a project at the present time and that scarce resources at UNCITRAL should be redistributed elsewhere.<sup>83</sup> Instead they would simply reformulate the procedural rules and those general principles so far agreed into a final document entitled Technical Guidelines on Online Dispute Resolution (“UNCITRAL Guidelines”).<sup>84</sup> During negotiations, it had been decided that because of issues with mandatory consumer arbitration clauses in many jurisdictions (see *infra* Section III(a) & (b)), it would be preferable to develop two ‘tracks’ of ODR rules: one for a process in which the parties are contractually bound to the ODR procedure and culminating in a binding award or outcome (Track I); and one for those jurisdictions where the parties are not legally bound by the ODR process (Track II).<sup>85</sup> However, upon deciding to wind the project up, it was conceded that the resulting UNCITRAL Guidelines would have to be far broader and have sufficient flexibility to incorporate both ‘tracks’ under a ‘third proposal’.<sup>86</sup> The Guidelines were therefore intended to work with both types of pre-dispute agreements (binding and non-binding), and instead include an opportunity for those parties who are not legally bound to become so bound during the ODR process.<sup>87</sup> For those other non-legally binding decisions, resulting in ‘Recommendations’, the intention was that such decisions can be eventually enforced via intermediaries and providers such as by trustmarks, reputation schemes or payment chargeback options.<sup>88</sup>

In July 2015, the UNCITRAL Commission gave the ODR Working Group only two further sessions to round up their work.<sup>89</sup> It was in this brief period that negotiations were quickly halted and reworked into completing broad-based Guidelines. Overall, this resulted in an unfinished and unoriginal draft set of principles and hortatory recommendations. Nevertheless, the work done should not be seen as wasted. Until this point, there had taken place a detailed inter-jurisdictional and cross-cultural negotiation on suitable rules for a low-value online arbitration procedure. These negotiations, naturally, had to grapple with some of the most challenging aspects of legality and procedural fairness within future international ultra-low-value arbitration systems. The ODR procedural rules which were nearing

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<sup>83</sup> UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session*, (New York, 9-13 February 2015), 3 March 2015, A/CN.9/833, paras. 16 & 18 – “the Commission had ... expressed concerns about the length of time that some Working Groups had taken to finalize their texts”

<sup>84</sup> UNCITRAL, *Online dispute resolution for cross-border electronic commerce transactions, Note by the Secretariat, Draft outcome document reflecting elements and principles of an ODR process*, A/CN.9/WG.III/WP.140, 22 December 2015; UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session*, (New York, 29 February-4 March 2016), 11 March 2016, A/CN.9/868

<sup>85</sup> UNCITRAL, *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules*, 11 March 2013, A/CN.9/WG.III/WP.119, paras. 5-20

<sup>86</sup> *Supra* n83 & n84; UNCITRAL, *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I), Addendum, Note by the Secretariat*, A/CN.9/WG.III/WP.133/Add.1, 1 December 2014

<sup>87</sup> UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session*, (New York, 9-13 February 2015), 3 March 2015, A/CN.9/833, para. 24 & 25; UNCITRAL, *Report of Working Group III (Online Dispute Resolution), on the work of its thirtieth session*, (Vienna, 20-24 October 2014), A/CN.9/827, 4 November 2014, paras. 70-74

<sup>88</sup> *Ibid.*

<sup>89</sup> UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session*, (Vienna, 30 November-4 December 2015), 16 December 2015, A/CN.9/862, para. 5

completion at UNCITRAL therefore (“UNCITRAL Rules”),<sup>90</sup> although formally unfinished when work on them stopped in early 2015, can still be examined in parallel with the Guidelines later in Section V which looks at individual procedural elements of low-value arbitration.

It should not be forgotten that ODR consists of more than just online arbitration and, in fact, the majority of online disputes are likely to be settled by private negotiation or mediation.<sup>91</sup> However, the importance of developing a successful and binding online arbitration process cannot be understated, for no one is likely to be willing to engage in protracted negotiation or mediation processes unless there is a significant risk that a legally binding adjudication will be forthcoming in the event of an impasse.<sup>92</sup> In fact, the step-like progression through ADR processes from negotiation to mediation to arbitration (‘escalating’ or ‘stepped’ ADR procedure)<sup>93</sup> was the intended model of procedure under the UNCITRAL Rules, with the hope that the costs of the process should correspond with where along in the procedure the dispute is resolved.<sup>94</sup>

In addition to the work done at EU and UNCITRAL, there are other privately created ODR systems of note which operate through online intermediaries and service providers, and which have arisen over the duration of ODR’s first 20 years. For example, the *eBay Dispute Resolution Program*,<sup>95</sup> credit card chargeback systems<sup>96</sup> and the *ICANN Uniform Domain Resolution Policy* (UDRP).<sup>97</sup> The eBay Program was the forerunner to similar programs now in existence at other online service providers such as *Amazon*<sup>98</sup> and *Paypal*.<sup>99</sup> Dispute management and claim filing systems are increasingly common in such large social and ecommerce networks and they enjoy the specific advantage of effective internal enforcement mechanisms. For example, failure to follow the rules or enforce resulting judgements can result in an adverse trading reputation or rating, or in community ostracism or suspension, or can simply result in a payment being reversed. Administrated internally by online intermediaries and service providers – and usually co-regulated by public authorities therein<sup>100</sup> – these systems largely manage themselves in relative isolation from the public judicial system. They are therefore not the specified focus of this paper.<sup>101</sup> It is also worth noting, from a broader perspective, that traditional arbitration and mediation providers are

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<sup>90</sup> UNCITRAL, *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules*, Note by the Secretariat, 29 November 2014, A/CN.9/WG.III/WP.133 – hereafter referenced as “UNCITRAL Draft Rules”

<sup>91</sup> Kaufmann-Kohler, G. & Schultz, T., (2004), *Online Dispute Resolution: Challenges for Contemporary Justice*, 1<sup>st</sup> Ed, Kluwer Law International, 169

<sup>92</sup> Schmitz, A., (2013), “American Exceptionalism in Consumer Arbitration”, 10 *Loyola University Chicago International Law Review* 83, 102; *Supra* n79 Hörnle 133-134

<sup>93</sup> “Escalation” or “Tiered” clauses are common in international commercial dispute resolution, especially in the East, where negotiation and mediation are anticipated as a first stage with progression to a binding arbitral decision only if the first stage fails – *Supra* n9 Waincymmer, 160-167

<sup>94</sup> *Supra* n61 Cortés & de la Rosa, 423

<sup>95</sup> *Supra* n76 Del Duca *et al*, 63-64

<sup>96</sup> *Supra* n76 Del Duca *et al*, 70-72

<sup>97</sup> See *ICANN Domain Name Dispute Resolution Policy*, ICANN, (<http://icann.org/en/help/dndr/udrp>)

<sup>98</sup> See Amazon Buyer Dispute Program (<http://pay.amazon.com/help/201751580>)

<sup>99</sup> See Paypal Resolution Center (<http://paypal.com/webapps/mpp/first-dispute>)

<sup>100</sup> Marsden, C.T., (2011), *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, Cambridge University Press

<sup>101</sup> See *eg* Kohl, U., (2013), “The rise and rise of online intermediaries in the governance of the Internet and beyond – connectivity intermediaries”, 26(2-3) *International Review of Law, Computers and Technology* 185; Kohl, U., (2013), “Google: the rise and rise of online intermediaries in the governance of the Internet and beyond (Part 2)”, 21(2) *International Journal of Law and Information Technology* 187

increasingly developing their systems or procedural rules to be accessible online<sup>102</sup> or via fast-track procedures.<sup>103</sup> Similarly, national legislatures are increasingly looking at ODR as a method for keeping domestic disputes out of the court system.<sup>104</sup>

### *b) Uniform Domain Resolution Policy (UDRP)*

The UDRP, which has been in operation now for over two decades, presents a very useful template from which to draw research to assist with developing a cross-border online arbitration framework. Devised by the not-for-profit privately-run *Internet Corporation for Assigned Names and Numbers* (ICANN), the UDRP is solely intended to protect trademark owners from “cybersquatting”, where domain registrants intend to profit in bad faith from the goodwill attached to a domain name similar to a trademark owned by another.<sup>105</sup> The UDRP are in essence basic arbitration procedural rules that every domain name owner will contract into when they enter purchase a domain through a domain registrar.

The primary goals of the UDRP, to provide high expediency and affordability when adjudging cases of cybersquatting, could be said to have been achieved to great success. However, paradoxically, affordability comes at a price.<sup>106</sup> There have been many objections made over the due process values of the UDRP, chief among these are perhaps the provision of strict time limits, the disposal with substantive law, the lack of oral hearings and oral evidence, and the ‘repeat player’ and partiality risks arising from unilateral controls over the institutional appointment.<sup>107</sup> The imposition of strict time limits is perhaps the biggest criticism of the UDRP, wherein the respondent (domain owner) only has 7 days to present its defence after a claim has been notified to them, even though the complainant has as long as they wish to prepare their claim.<sup>108</sup> Furthermore, the arbitrators are bound to render a decision within only 14 days from appointment.<sup>109</sup> Many of these issues will therefore be addressed in Section V, which looks more closely at the elements of online arbitration procedure.

Furthermore, the UDRP is interesting in that it too serves as a non-legally binding process. By having its own internal enforcement mechanism, *ie* the automatic transfer of a domain

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<sup>102</sup> For example, the AAA-ICDR Supplier/Manufacturer Online Dispute Resolution Protocol (<http://icdr.org/icdr/faces/icdrservices/msodr>)

<sup>103</sup> See *infra* Section IV on Fast-Track Arbitration

<sup>104</sup> For example the English Civil Justice Service set up an advisory group to investigate the role ODR could play in domestic civil disputes, 23<sup>rd</sup> April 2014, (<http://judiciary.gov.uk/announcements/cjc-sets-up-advisory-group-for-online-dispute-resolution>)

<sup>105</sup> Two well known cases are *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 189 F. Supp. 2d 367 (E.D. Va. 2002), rev'd, 330 F.3d 617 (4th Cir. 2003) (US) and the *JimiHendrix.com* case (WIPO D2000-0364)

<sup>106</sup> Thornburg, E.G., (2001), "Fast, Cheap & Out of Control: Lessons from the ICANN Dispute Resolution Process", 7 *Journal of Small & Emerging Business Law* 191, 213

<sup>107</sup> *Ibid.* Thornburg; *Supra* n61 Hörnle, 190-198; Thornburg, E.G., (2000), “Going Private: Technology, Due Process and Internet Dispute Resolution”, 34 *UC Davis Law Review* 151, 193; Cortés, P., (2008), “The UDRP Reviewed: The Need for a ‘Uniform’ Policy”, 14 *Computer and Telecommunications Law Review* 133; Cortés, P., (2008), “An Analysis of the UDRP Experience: Is It Time for Reform?”, 24 *Computers Law and Security Report* 349; Donnahey, S., (2002), "The Uniform Domain Name Dispute Resolution Process and the Appearance of Impartiality - Panelists Impaled on the Horns of a Dilemma", 19 *Journal of International Arbitration* 33; Donnahey, S., (2000), "The UDRP and the Absence of the Rule of Law", 4 *Journal of Internet Law* 15

<sup>108</sup> *Supra* n106 Thornburg, 216

<sup>109</sup> UDRP Rules Paragraph 15(b)

name to the complainant party, the UDRP is an *effective* arbitration process, but which is still subject to full judicial review should a party wish to expend the time and money to appeal any internally enforced judgement.<sup>110</sup> This highlights the importance of the current search for online enforcement mechanisms in a consumer ODR framework.<sup>111</sup> Indeed, not only does the development of powerful and effective internal enforcement mechanisms work to avoid reliance on domestic courts,<sup>112</sup> but it further heavily impacts on the procedural and due process design of any ODR framework. For, if internal enforcement mechanisms can be developed which are “powerful” enough, there is no need to make the arbitration ODR process reliant on the courts. Instead, the process can be legally non-binding and parties could be free to appeal ODR awards to a full judicial review if they so wish, as is the case with the UDRP and other intermediary systems (*supra*). If the enforcement mechanisms are “weak” in force, then there becomes more of a need for online arbitration awards to be given legal attachment, as parties may feel at liberty to ignore any unfavourable award, then calling into question the due process protections of the New York Convention.<sup>113</sup> The plan for the UNCITRAL scheme, as well as the present EU project, seems to be that of focusing on reputation-based enforcement mechanisms. In particular, providing trustmarks to merchants who are compliant with ODR outcomes and settlements. However, whether such an “enforcement” system is to provide enough force to ensure internal compliance remains uncertain and, in some cases, highly doubted.<sup>114</sup>

### c) *The UNCITRAL and EU Schemes*

The fact that the UNCITRAL Working Group on ODR was forced to abandon efforts at crafting an international ODR framework just how difficult the task is that lies ahead. One example of a key arbitral due process challenge which faced the UNCITRAL Working Group was that of applicable law in the arbitration. The idea most in favour was to empower arbitrators to decide disputes *ex aequo et bono*, *ie* with less of a concern with applicable law and more with what is ‘right and good’.<sup>115</sup> On an initial glance this makes sense, for in the interests of expediency and considering the incredibly low value of the claim (where disputes may need to be decided in a matter of minutes), it is wholly impractical to expect arbitrators to explore sometimes complex legal questions in great detail or, given its international

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<sup>110</sup> UDRP Rules Paragraph 4(k) provides that parties retain the right to go to court at any point, including to appeal a final decision; Kao, C.C., (2009), “Online Consumer Dispute Resolution and the ODR Practice in Taiwan - A Comparative Analysis”, 5 *Asian Social Science* 113, 117; Schmitz, A., (2010), “Drive-Thru Arbitration in the Internet Age: Empowering Consumers Through Binding ODR”, 62 *Baylor Law Review* 178, 208

<sup>111</sup> UNCITRAL, *Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms*, Note by the Secretariat, (Vienna, 18-22 November 2013), 13 September 2013, A/CN.9/WG.III/WP.124; Cortés, P., “Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes” (2008), 17 *Information & Communications Technology Law* 221, 227

<sup>112</sup> *Supra* n64 Rule *et al*, 230; Donnahey, S., “The UDRP Model Applied to Online Consumer Transactions”, (2003), 20 *Journal of International Arbitration* 475

<sup>113</sup> *Supra* n61 Cortés & de la Rosa, 420; Rogers, V., “Managing Disputes in the Online Global Marketplace - Reviewing the Progress of UNCITRAL Working Group III on ODR”, (2013) 19 *Dispute Resolution Magazine* 20, 22

<sup>114</sup> *Supra* n61 Gibbons, 23; Patrikios, A., “The Role of Transnational Online Arbitration in Regulating Cross-border e-Business – Part II”, (2008), 24 *Computer Law and Security Report* 129, 131; Cortés, J.P., “A European Legal Perspective on Consumer ODR”, (2009) 14 *Computer and Telecommunications Law Review* 90, 98-100; Galves, F., “Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient and Secure”, (2009), *University of Illinois Journal of Law Technology & Policy* 1, 3

<sup>115</sup> UNCITRAL Rules Draft Article 7(8)



context, to regularly conduct research across a multitude of applicable foreign laws. It also makes sense when one considers that, given the potential case volumes, low-value ODR arbitrators are unlikely to be experienced international commercial arbitrators and more likely to have limited legal experience.<sup>116</sup>

However, one key problem does arise in the context of mandatory law. In every jurisdiction there are consumer protection laws which could be viewed as internationally mandatory, thus not subject to waiver by party agreement. Schultz has said that to consider such laws could add much complexity to each case.<sup>117</sup> Conversely, many authors have said that such laws should be applied for they provide a fundamental due process protection to consumers as weaker parties.<sup>118</sup> This is a difficult issue, as is the question of international mandatory law generally.<sup>119</sup> Perhaps, therefore, there is an argument that even an inexperienced arbitrator could decide *ex aequo et bono*, ‘taking account of any internationally mandatory laws raised by the parties.’ This at least shifts the burden on to the party intending to rely on the mandatory law to provide the arbitrator with the detail of the mandatory law on which they rely and to argue its mandatory nature, therefore relieving the arbitrator of a duty to raise mandatory laws *ex officio*. Also, the phrase “taking account of” does not place a strict requirement on arbitrators to necessarily take full account of the law. Further, a failure by a party to raise the mandatory law during the arbitration could risk their ability to oppose enforcement in court later. Whether this would be sufficient, however, to satisfy Article 9 of the EU Directive on ADR which requires that mandatory consumer law is applied to any binding ADR process is as yet unknown, but perhaps unlikely.<sup>120</sup>

It seems an unusual approach, as UNCITRAL were trying to do for several years, to develop a single set of recommended procedural rules for online arbitration. Institutional variety can be of great benefit in terms of tailoring services and rules to suit particular disputes and can increase competition effects and industrial creativity between institutions.<sup>121</sup> Nevertheless, the process of creating recommended rules can really help to focus on model procedural practices from the outset and, importantly, kickstart the possible development of public and private ODR providers.<sup>122</sup> Under the Rules, there were challenging due process issues with the intended use of escalated procedure (*ie* from negotiation to mediation to arbitration). For example, appointing a neutral as arbitrator who has already acted as mediator impacts heavily on the due process requirement of independence and avoidance of conflict of interests and yet it is impractical – in terms of cost and time – to appoint a new neutral to act as an arbitrator replacing the mediator.<sup>123</sup> Furthermore, if the neutral receives higher fees for settling the case

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<sup>116</sup> See ‘Tribunal Construction and Appointment’ in Section V

<sup>117</sup> Schultz, T., (2011), “Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle” 19 *International Journal of Law and Information Technology* 153, 161-162

<sup>118</sup> *Supra* n61 Gibbons, 23-24; *Supra* n61 Cortés & de la Rosa, 411, 420; Schmitz, A. J., (2011), “Building Bridges to Remedies for Consumers in International eConflicts”, 34 *UALR Law Review* 779, 790; *Supra* n61 Hörnle, 69; *Supra* n4 Kurkela & Turunen, 206 – “Arbitration also has to be of such a nature that it de facto makes it possible for a party to enforce his substantive rights”

<sup>119</sup> Martin, J.B., (2016), “Contractualists versus Jurisdictionalists: Who is Winning the Mandatory Law Debate in International Commercial Arbitration?”, 27(4) *American Review of International Arbitration*, Forthcoming

<sup>120</sup> Similarly, whether it conforms with the OECD, *Guidelines for Consumer Protection in the Context of Electronic Commerce*, (published in 1999), which provide for a similar recommendation on mandatory law at Page 18; Applicable law is discussed further in Section V

<sup>121</sup> *Supra* n61 Cortés & de la Rosa, 411, 434; *Supra* n40 Park

<sup>122</sup> Philippe, M., (2010), “Now Where do we Stand with Online Dispute Resolution (ODR)?”, *International Journal of Business Law* 563, 568

<sup>123</sup> *Supra* n61 Cortés & de la Rosa, 418, 426; *Supra* n4 Kurkela & Turunen, 107-108; Fullerton, R., (2010), “Med-Arb and its Variants: Ethical Issues for Parties and Neutrals”, *Dispute Resolution Journal*, May-October

in the final stage of arbitration, there could be less of a motivation on them to assist early settlement<sup>124</sup> and there remain questions over whether the neutral, or a second-appointed neutral at the following stage, should in the interests of efficiency have access to prior negotiations of the parties, which would normally be confidential.<sup>125</sup> Also, the idea of mandatory mediation is questionable from a theoretical standpoint as “*to many ADR theorists mandatory mediation is an oxymoron*”.<sup>126</sup> Other due process issues relating to the failed UNCITRAL scheme, such as these, will be raised in Section V.

By focusing first on due process minimums, rather than any recommended procedure, the EU system has provided a greater level of autonomy to the ODR market, enabling providers to cater their services for various niches and to develop diversity across the industry to the fullest extent. Since July 2015, every consumer ADR provider in the EU has needed to ensure they comply with the 8 Core Principles of the EU Directive.<sup>127</sup> The main issue however – and why the EU ODR scheme remains low in terms of adoption – is the Article 10 principle of *Liberty*, which essentially bars adhesionary mandatory arbitration clauses made “*before the dispute has materialised*”.<sup>128</sup> The result is that only agreements to enter into arbitration made *post-dispute* are binding on consumers in Europe (see *infra*). This commitment to consumer protection, through the removal of pre-dispute clauses, had a significant knock-on effect at UNCITRAL where, as noted earlier, the Working Group had attempted to develop *two* sets of rules to manage national laws which view mandatory arbitration clauses as either binding or non-binding.<sup>129</sup>

#### *d) Adhesionary Mandatory Arbitration Clauses and the United States Debate*

The enforceability of standard-term mandatory arbitration clauses presents a real dilemma when considered in the context of online consumer arbitration. The debate has actually been raging in the United States for some time regarding domestic consumer arbitration. There, under a more liberal market regulatory model, the Supreme Court consistently rules that the *Federal Arbitration Act* has a strong pro-arbitration policy and that consumers, employees and other “weaker” parties should all subscribe to buyer-beware principles when signing standard-term contracts. Thus, there is an increasing acceptance by the Supreme Court that more powerful organisations are able to include mandatory arbitration clauses in their small-print standard-terms and not only strip weaker bargaining parties of their right to go to court but, just as significantly, to devise procedural rules largely at their own discretion.<sup>130</sup> In this

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2010, 52-61; Philips, G.F., (2008), “Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, but Party Sophistication is Mandatory” 26 *Alternatives to High Cost Litigation* 101; *ADR Practical Guide No.1: Common ADR Processes – A Snapshot*, (2014), Herbert Smith Freehills, 2

<sup>124</sup> Abrahams, H.I., (1999), “Protocol For International Arbitrators Who Dare To Settle Cases”, 10 *American Review of International Arbitration* 1, 1

<sup>125</sup> *Supra* n61 Cortés & de la Rosa, 419; also see *Supra* n79 Hörnle, 135

<sup>126</sup> Quek, D., (2010), “Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program”, 11 *Cardozo Journal of Conflict Resolution* 479

<sup>127</sup> Contained in EU Directive Articles 5-11; Edwards, L. & Wilson, C., “Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions” 21 *International Review of Law Computers and Technology* 315, 321-322

<sup>128</sup> EU Directive Article 10(1)

<sup>129</sup> UNCITRAL, Report of Working Group III (Online Dispute Resolution) on the work of its twenty-seventh session (New York, 20-24 May 2013), Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.119), Paras. 5-20; Throughout this paper reference will be made to the binding rules under Track I

<sup>130</sup> Sternlight, J.R., (1996), “Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration”, 74 *Washington University Law Quarterly* 637; Menkel-Meadow, C., (1999) “Do the

sense, it has become common for powerful merchants to devise arbitration procedures that remove document discovery procedures, remove class actions, provide unilateral rights for the stronger party to take up court action and which impose onerous fees or travelling requirements on consumers.<sup>131</sup> Another issue, also prevalent in the context of the UDRP,<sup>132</sup> is the issue of “repeat player” syndrome and the fact that arbitrators and arbitration institutions have a strong financial interest in merchants electing them in their standard-terms. This creates a potential partiality risk on the part of the arbitration providers in that they have a strong financial interest in securing future work from the repeat players.<sup>133</sup>

There have been strong calls from many quarters for the *Arbitration Fairness Act* to be passed, blanket banning any adhesionary mandatory arbitration clauses and only permitting consumer and employee arbitrations to be entered into post-dispute.<sup>134</sup> Their primary argument is that if arbitration is of such great benefit to weaker bargaining parties, being cheaper, quicker and more informal, then there is no reason why they would not agree to arbitration post-dispute; the main point being that they have a *choice*.<sup>135</sup> The other side see that arbitration brings many benefits to consumers and employees above court litigation and see no reason why the market cannot be regulated simply by a federal law providing codified due process rules to be enforced by courts at the stage of agreement or award enforcement.<sup>136</sup> Currently, the courts are only able to rely on vague and unpredictable common law principles, particularly that of *unconscionability*, to find arbitration agreements or awards unenforceable on consumers.<sup>137</sup> Furthermore, authors raise the very valid concern that if

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‘Haves’ Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR”, 15 *Ohio State Journal of Dispute Resolution* 19; Stempel, J.W., (1996), “Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent”, 62 *Brooklyn Law Review* 1381, 1410–14; *Supra* n61 Rogers, 343; *Supra* n107 Thornburg, 179-184

<sup>131</sup> *THI of New Mexico at Hobbs Center, LLC v. Lillie Mae Patton*, D.C. No. 2:11-CV-00537-LH-CG (2014) (US); *Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (US); *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 763 (1999) (US); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011) (US) – Removal of class action rights within adhesionary arbitration clauses by traders is permissible; Sternlight, J., (2012), “Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice”, 90 *Oregon Law Review* 703; *DIRECTV, Inc. v. Imburgia*, 577 U.S. \_\_ (2015)

<sup>132</sup> *Supra* n107; *Supra* n106 Thornburg, 214; *Supra* n107 Thornburg, 193, 209

<sup>133</sup> Bales, R.A., (2005), “The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest”, 21 *Ohio State Journal of Dispute Resolution* 165, 190; Bingham, L.B., (1997), “Employment Arbitration: The Repeat Player Effect”, 1 *Employee Rights & Employment Policy Journal* 189; Reuben, R.C., (2000), “Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice”, 47 *UCLA Law Review* 949, 1063; *Supra* n3 Strong, 85; Craine, V.C., (1999), “The Mandatory Arbitration Clause: Forum Selection or Employee Coercion?”, 8 *Boston University Public Interest Law Journal* 537, 550; Bingham, L.B., (1997), “On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards”, 29 *McGeorge Law Review* 223

<sup>134</sup> Alderman, R.M., (2009), “Why We Really Need the Arbitration Fairness Act”, 12 *Journal of Consumer and Commercial Law* 151; Schwartz, D.S., (2009), “Mandatory Arbitration and Fairness”, 84 *Notre Dame Law Review* 1247; Pittman, L.J., (2011), “Mandatory Arbitration: Due Process and other Constitutional Concerns”, 39 *Capital University Law Review* 853, 888; *Supra* n130 Sternlight

<sup>135</sup> *Supra* n56 Drahozal, 697

<sup>136</sup> Carbonneau, T.E., (2008), “Arguments in Favour of the Triumph of Arbitration”, 10 *Cardozo Journal of Conflict Resolution* 395, 401; Ware, S.J., (2006), “The Case for Enforcing Adhesive Arbitration Agreements - with Particular Consideration of Class Actions and Arbitration Fees”, 5 *Journal of American Arbitration* 251; *Supra* n56 Rutledge, 270; Schmitz, A.J., (2009), “Regulation Rash? Questioning the AFA’s Approach for Protecting Arbitration Fairness”, 28 *Banking & Financial Services Policy Report* 16, 23-29; Schmitz, A.J., (2008), “Curing Consumer Warranty Woes Through Regulated Arbitration”, 23 *Ohio State Journal on Dispute Resolution* 627, 627-686; *Supra* n134 Pittman, 844-845

<sup>137</sup> *Supra* n61 Rogers, 355; Drahozal C.R. & Zyontz, S., (2011), “Private Regulation of Consumer Disputes”, 79 *Tennessee Law Review* 289, 290-291; Randall, S., (2004), “Judicial Attitudes Toward Arbitration and the

arbitration becomes optional at post-dispute stage it will not be utilised. Parties at the post-dispute stage find it hard to agree on anything and, more importantly, powerful parties who are uncertain of a successful outcome could simply refuse to enter into any dispute resolution process which is more affordable and accessible for a weaker party once a dispute arises.<sup>138</sup>

Given the deference to private regulation of arbitration, there are increasing references to privately drafted due process principles created by arbitration institutions, such as the AAA's *Consumer Due Process Protocol*.<sup>139</sup> These principles are enforced by the institutions purportedly refusing appointments where the terms of the arbitration agreement do not conform. Despite empirical evidence that this private regulation has a positive impact,<sup>140</sup> it surely makes no sense to enforce and control important due process protections at the private level, without *effective and predictable* public measures of control.<sup>141</sup> There seems no reason why a codified and accessible set of due process principles cannot be created by the legislature to be interpreted by courts when reviewing the fairness of any adhesionary arbitration agreements or awards. This would harmonise practice across arbitration institutions and US corporations, increase the consistency of court interpretations and create familiar clauses by which arbitrations will regularly be conducted.<sup>142</sup>

In Europe, there are minor variations, but on the whole, it is largely accepted that weaker parties cannot be compelled to enter into legally binding arbitration through a standard-term contract unless they agree to it post-dispute.<sup>143</sup> This sits well with Europe's pro-consumer protection attitude.<sup>144</sup> The primary instrument operating in the EU in the protection of consumers is the *1993 Directive on Unfair Terms in Contracts*, which under Article 3 and its accompanying annex at point (q), bars consumer contract terms "*excluding or hindering the consumer's right to take legal action.*"<sup>145</sup> Being a relatively ambiguous Directive, it leaves a lot of discretion to Member States to design the rules on pre-dispute arbitration agreements.

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Resurgence of Unconscionability", 52 *Buffalo Law Review* 185, 194-196; Schmitz, A.J., (2007), "The Dangers of Deference to Form Arbitration Provisions", 8 *Nevada Law Journal* 37, 37

<sup>138</sup> *Supra* n106 Schmitz, 101-102; *Supra* n118 Schmitz, 785; *Supra* n56 Rutledge, 278-279; Estreicher, S., (2001), "Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements", 16 *Ohio State Journal on Dispute Resolution* 559, 567-569; Sternlight, J., (2007), "In Defense Of Mandatory Arbitration (If Imposed On The Company)", 8 *Nevada Law Journal* 82, 83-84; *Supra* n56 Drahozal, 748-749

<sup>139</sup> AAA *Consumer Due Process Protocol*, National Consumer Disputes Advisory Committee (17<sup>th</sup> April 1998); Also *JAMS Consumer Arbitration Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS (15<sup>th</sup> July 2009); *Statement of Ethical Principles for American Arbitration Association, an ADR Provider Organization*, American Arbitration Association; *AAA Employment Due Process Protocol*, American Arbitration Association (5<sup>th</sup> May 1995); *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS (15<sup>th</sup> July 2009)

<sup>140</sup> *Supra* n118 Schmitz, 786; *Supra* n137 Drahozal & Zyontz; *Supra* n36 Harding, 372; Drahozal, C.R., (2006), "Is Arbitration Lawless?", 40 *Loyola of Los Angeles Law Review* 187; *Consumer Arbitration Before the American Arbitration Association - Preliminary Report*, Searle Civil Justice Institute, (March 2009), 110-111

<sup>141</sup> *Supra* n118 Schmitz, 781; *Supra* n137 Drahozal & Zyontz, 289; *Supra* n137 Schmitz, 37

<sup>142</sup> *Supra* n137 Schmitz, 50-51; *Supra* n136; One argument may be the preference for developing law through the common law of the courts rather than at constitutional level

<sup>143</sup> Rutledge, P.B. & Howard, A., (2010), "Arbitrating Disputes Between Companies and Individuals – Lessons From Abroad", *Dispute Resolution Journal*, February/April 2010, 30-36; *Supra* n106 Schmitz, 97-98

<sup>144</sup> For example, the EC Maastricht Treaty – Provisions Amending The Treat Establishing The European Economic Community With a View to Establishing the European Community (7<sup>th</sup> February 1992) at Article 3(s) declares that the activities of the Community shall include "*a contribution to the strengthening of consumer protection*"

<sup>145</sup> EU Council Directive 93/13/EEC of 5<sup>th</sup> April 1993 on unfair terms in consumer contracts, OJ L095; Also Commission Recommendation 98/257/EC of 30<sup>th</sup> March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L115, Principle VI

But all Member States, in some form or other, carefully control or ban pre-dispute consumer arbitration agreements.<sup>146</sup> This strong consumer-protectionist attitude has also been emphasised again by the aforementioned EU Directive on ADR and its Article 10 Principle of Liberty. A key question in this area of law was recently forwarded to the Court of Justice of the European Union (CJEU). In February 2017, the District Court of Verona referred to the CJEU on whether Italian legislation – in this case requiring compulsory consumer mediation before an appeal to the courts can be made – is compliant with the 2013 EU Directive on ADR Article 10.<sup>147</sup> It is perhaps likely that the CJEU will make a similar determination to that in *Alassini & Others*,<sup>148</sup> which saw compulsory mediation as permissible as long it does severely disadvantage consumers or foreclose access to the courts following efforts at mediation. All of this makes it clear, however, that any form of *binding* arbitration which *would* foreclose access to public courts, is not going to be permissible under EU consumer protection legislation.

The major difficulty facing the success of any international low-value ODR scheme is surely the ability to compel *both* parties into the process. This is simply because traditional cross-border court procedures, usually being the only legally-binding alternative to online arbitration, is not really an alternative.<sup>149</sup> The high cost, inaccessibility and inconvenience of traditional cross-border processes makes ODR “*not so much an option, as the only option.*”<sup>150</sup> Therefore, unless the EU compliant-merchant trustmarks and reputation-based mechanisms turn out to be a surprise success story – which on the evidence so far looks quite unlikely<sup>151</sup> – the majority of online merchants are probably likely to be more willing to avoid mass consumer redress and refuse to enter into those online arbitrations where they feel uncertain of a successful outcome.<sup>152</sup> They would do so safe in the knowledge that rarely will a disgruntled consumer pursue court action for any dispute valued below several thousand Euros. The only other alternative could be the provision of efficient online courts, capable of handling mass volumes of low-value online disputes. Some jurisdictions around the world are slowly developing the concept and technology of online courts. However, in each instance, the projects are in their absolute infancy and certainly, given their important mandate to ensure high accuracy and strict adherence to the rule of law, do not appear capable of handling vast volumes of cross-border claims anytime soon.<sup>153</sup>

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<sup>146</sup> *Supra* n143; Piers, M., (2011), “Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations”, 2 *Journal of International Dispute Resolution* 209, 215; Note also how Art 2061 of the French Civil Code which disallows consumer arbitration clauses does not appear to apply to international contracts, (*Meglio v. Societe V2000*, Cass. le Civ, (21<sup>st</sup> May 1997) – French court confirmed this interpretation, although in the context of a high value transaction)

<sup>147</sup> *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare — Società Cooperativa*, CJEU C-75/16, (16 February 2017)

<sup>148</sup> *Rosalba Alassini v. Telecom Italia SpA*, CJEU C-317/08, *Filomena Califano v. Wind SpA*, CJEU C-318/08, *Lucia Anna Giorgia Iacono v. Telecom Italia SpA*, CJEU C-319/08, *Multiservice Srl v. Telecom Italia SpA*, CJEU C-320/08, (18 March 2010)

<sup>149</sup> *Supra* n64 and n65

<sup>150</sup> *Supra* n138 Sternlight, 88

<sup>151</sup> Cortés, P., (2012), “Improving the EU’s Proposals for Extra-judicial Consumer Redress” 23 *Computers & Law* 26, 28 – Cortés suggests some further various “carrot and stick” methods to encourage merchants to take part in ODR processes

<sup>152</sup> *Supra* n138; *Supra* n79 Hörnle, 147

<sup>153</sup> For example, the *Court Services Online* provided in British Columbia, Canada (<https://justice.gov.bc.ca/cso/index.do>) and see Online Dispute Resolution Advisory Group, Online Dispute Resolution for Low Value Civil Claims, 2015, (Susskind, R. *et al.*, Eds.), Civil Justice Council, UK ([www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf))

Essentially then we will be back right where we started: with no ODR solution at all. Furthermore, there will be a continuing diminution in the rule of law and justice, as merchants (or, not forgetting consumers, *eg* for non-payment or failure to return goods) simply cherry-pick which arbitrations they are willing to enter into.<sup>154</sup> The EU system has attempted to remedy this as far as possible by, for example, requiring that EU e-merchants provide their consumers with information regarding the ODR platform,<sup>155</sup> yet they are still not bound to enter into any ODR process.<sup>156</sup> Similarly, there is provision within the Directive for Member States to asymmetrically bind only merchants into arbitration. However, Member States so far seem very reluctant to do this considering the costs and potential restrictions it could place on their domestic businesses.<sup>157</sup> By making *some types* of pre-dispute arbitration agreements enforceable, both the consumer and merchant would be free to bind themselves into using arbitration to resolve their disputes and cannot be at *liberty* to avoid a legally binding process altogether.<sup>158</sup> Merchants must be convinced to agree to ODR procedures at the pre-dispute stage and the only way this is likely is if *both* parties are bound to use the procedure, otherwise there may be little benefit to the merchant to later ‘opt-in’ to all claims against them.<sup>159</sup> If it were in fact therefore possible to enforce some limited forms of adhesionary arbitration agreements upon consumers, then we would need to develop stricter due process rules to protect the consumers who become bound by such agreements and to assist courts in interpreting the fairness (and thus enforceability) of any arbitration agreement or award.<sup>160</sup>

#### *e) Enforceability under the New York Convention*

Almost all international arbitrations – except for those under an Article I(3) Commercial Reservation, or from or in those few states that are non-signatories, or which come under the jurisdiction of an alternative multilateral treaty such as the *International Convention on the Settlement of Investment Disputes*) – are enforced cross-border under the New York Convention. As discussed in Section II, the New York Convention was drafted in light of the fact that the vast majority of international arbitration’s customers have been commercial parties of roughly equal bargaining power and often possessing the financial resource to invest in proficient legal advice and representation. It therefore pays a significant level of deference to freedom of contract and party autonomy and provides only minimal due process protections. Similarly, the national laws that govern international arbitration operate under the same principles and respect the parties’ rights to almost select their own due process rules. Furthermore, in the context of low-value online arbitrations, the courts at the seat of

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<sup>154</sup> *Ibid.*; *Supra* n127 Edwards & Wilson, 322

<sup>155</sup> Under Articles 13 and 21 of the EU Directive

<sup>156</sup> *Supra* n45 Cortés, 28

<sup>157</sup> *Alternative dispute resolution for consumers: implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation*, Department for Business, Innovation & Skills, (11<sup>th</sup> March 2014), ([www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers](http://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers)), 22 – “A *blanket compulsory requirement on businesses to use ADR for every dispute would come at considerable cost to business, who pay the cost of ADR through annual fees and/or case fees*”

<sup>158</sup> *Supra* n138; *Supra* n106 Schmitz, 101-102

<sup>159</sup> *Supra* n138; *Supra* n118 Schmitz, 790-791; cf Haloush, H.A. & Malkawi, B.H., (2007), "The Liberty of Participation in Online Alternative Dispute Resolution Schemes" 11 *SMU Science & Technology Law Review* 119., 124

<sup>160</sup> *Supra* n61 Hörnle, 186; *Supra* n61 Cortés & de la Rosa, 429-430; *Supra* n61 Rogers, 374

arbitration may be not only geographically inaccessible, but also practically inaccessible in terms of language barriers for example.<sup>161</sup>

If the EU ODR system continues with its low adoption by merchants and consumers, we might then need to realistically consider how we can make adhesionary consumer and low-value arbitration agreements enforceable – to the benefit of *both* parties – without preventing a consumer’s right to their day in court.<sup>162</sup> To this there are perhaps three possible solutions. Firstly, there is the continuing development towards online court processes as mentioned earlier. These could effectively provide consumers with their day in court, provided they were tailored to handle low-value cross-border consumer claims in the defendant’s territory (thus removing the need for cross-border enforcement measures). Not only are there likely prohibitive legal and logistical challenges with this idea, but ever-tightening government budgets for judicial administration across the world, may well rule out any government-built solution capable of resolving such vast volumes of cross-jurisdictional claims. Secondly, there is the creation of effective online enforcement mechanisms, for example through collaboration of credit card companies and online payment processors with an international, publicly regulated, register of accredited ODR providers.<sup>163</sup> This could mean that the ODR process need not be legally binding, but simply internally binding as a condition of a consumer’s contract.<sup>164</sup> This would be a highly effective solution, which would bolster to effectiveness of the EU Commission’s work on ODR, yet it would be an incredibly complex and difficult challenge to pull off at an international scale. Especially when one considers the immensely complex and amorphous features of cyberspace, with its countless regulatory grey spots, its indifference to mass regulation and its tendency towards complex models of co-regulation.<sup>165</sup>

The final alternative, which may be achievable in the immediate global online environment, may simply be that consumers *are* deprived of their day in court. There is no reason why, providing there are sufficient and well-regulated due process safeguards at the point of enforcement, arbitration cannot be effectively used to resolve low-value consumer disputes in lieu of the courts.<sup>166</sup> The answer here might well be the demarcation of the *types of claims* which are eligible to be subject to mandatory arbitration – much like the UNCITRAL Rules which were eventually put on hold.<sup>167</sup> Thus, in the context of consumer contracts, the adhesionary arbitration clause could make arbitration of claims only mandatory where the claim relates to failure to deliver or pay for goods and services which match their description.<sup>168</sup> For all other claims resulting from the contract outside this narrow definition (for example, a tortious claim resulting from defective goods), they would be subject to court litigation in the usual way. Where the type of claim is outside this mandatory definition,

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<sup>161</sup> *Supra* n117 Schultz, 160

<sup>162</sup> EU Commission Recommendation 98/257/EC of 17<sup>th</sup> April 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L115/31, at 33 – “*out-of-court alternatives may not deprive consumers of their rights to bring the matter before the courts, unless they expressly agree to do so in full awareness of the facts and only after the dispute has materialised*”

<sup>163</sup> *Supra* n79 Hörnle, 125; *Supra* n64, Del Duca *et al.*, 74; Bowers, M.G., “Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework”, (2011), 40 *Vanderbilt Law Review* 1265

<sup>164</sup> *Supra* n61 Cortés & de la Rosa, 438

<sup>165</sup> *Supra* n100, Marsden

<sup>166</sup> *Supra* n106 Schmitz, 101-102; *Supra* n56 Rutledge, 277; *Supra* n136 Carbonneau, 402

<sup>167</sup> *Supra* n106 Schmitz, 101; *Supra* n61 Cortés & de la Rosa, 410; *Supra* n79 Hörnle, 129

<sup>168</sup> See *supra* n83, n84 & n86

because the parties already have an arbitral institution in place for simpler claims, we could find an increasing agreement to arbitration at the post-dispute stage as well.

An alternative method for demarcating claims may be based along claim value. For example, any claim valued at above €1,000 is not subject to mandatory arbitration. Such a solution may appear simpler through the use of a bright line rule. However, it does not take account of the complexity of the claim: a low-value IP-related claim may still be very technical in a legal sense. Furthermore, it is not always clear at the outset what the exact value of a claim may be, before more detailed investigations are made as part of the procedure. Demarcating the types of claim like this would need to deal with or remove the opportunity for counterclaims, otherwise a respondent might counterclaim an alternative claim to move the dispute outside the remit of the mandatory scheme.<sup>169</sup> In summary, unless effective online enforcement mechanisms can be developed for an international consumer arbitration framework, what will probably be needed is a solution addressing the enforceability of certain types of online adhesionary arbitration agreements.<sup>170</sup> Much like that which is needed in the context of American consumer and employment arbitration, this law would need to specifically codify due process principles with which the arbitration agreement, procedure, institution, arbitrators and parties would all need to comply.<sup>171</sup>

What does this mean for the New York Convention? Firstly, if an international convention addressing recognition and enforcement of certain forms of consumer ODR agreements and awards could be created and widely ratified, it would be possible to supersede the New York Convention under Article 30(3) of the *Vienna Convention on the Law of Treaties*.<sup>172</sup> Assuming that such an incredible feat of international cooperation proves simply too difficult for now, some suggestions have been made about how else online low-value claims may be carved out from the New York Convention. One suggestion has been for courts to rely on the Article II(2) writing requirement of the New York Convention to remove *online* disputes from the purview of the Convention.<sup>173</sup> However, this seems like a risky and unnecessary approach, going against a purposive interpretation of the instrument and removing all future online arbitrations, of any type, from its purview.<sup>174</sup> Another suggestion has been the use of the Article I(3) ‘Commercial Reservation’ of the New York Convention, enabling all signatory states to specifically apply the Convention to differences arising out of legal relationship “*considered as commercial under the national law of the State making such declaration*”.<sup>175</sup> While this appears a simple solution, it becomes more complicated when one considers that many jurisdictions may define ‘commercial’ in a variety of ways, for example in the United States ‘commercial relationship’ includes consumer and employment relationships.<sup>176</sup> Another idea may be through the operation of internationally mandatory arbitration laws at every seat of arbitration, such as through the creation of an additional Protocol to the UNCITRAL Model Law of International Arbitration, which requires certain consumer disputes to be subject to additional *mandatory* due process safeguards and arranges

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<sup>169</sup> *Supra* n61 Cortés & de la Rosa, 419

<sup>170</sup> *Supra* n106 Schmitz, 102; *Supra* n61 Gibbons, 12; *Supra* n107 Thornburg, 220; *Supra* n137 Schmitz, 50

<sup>171</sup> *Supra* n61 Gibbons, 32 – also questions whether instead of regulation, which could lag behind technological change and be subject to varying governmental influence, we should have the promulgation of soft law in the form of best practice guides; see also *supra* n36 Harding, 370-371

<sup>172</sup> United Nations Convention on the Law of Treaties (Vienna, 23<sup>rd</sup> May 1969)

<sup>173</sup> *Supra* n61 Gibbons, 51-52

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, 62; *Supra* n61 Rogers, 361

<sup>176</sup> *Ibid.*, Rogers; Kuner, C., (2000), “Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce”, 5 *Electronic Commerce & Law Report* 773, 778; *Supra* n61 Gibbons, 53-55



for a reciprocal recognition agreement.<sup>177</sup> However, there is still the risk of forum shopping and also that potential enforcement courts would not view such rules as internationally mandatory and capable of overpowering party autonomy.<sup>178</sup>

Furthermore, how the new law will regulate arbitration at the procedural level remains uncertain. For example, provided an EU consumer arbitration provider complies with the minimal requirements of the EU Directive's eight core principles, there is no codified set of rules to guide arbitration procedural design to ensure that merchants do not control and impose unfair procedural rules through such providers.<sup>179</sup> Assessing each arbitration agreement or award on its due process merits across a multitude of national enforcement courts, even with an instrument for guidance, could also lead to many inconsistent interpretations.<sup>180</sup> One solution could be an extension of the current approach of directly regulating ODR providers – but further accrediting or discrediting their due process rules and practices directly – then ultimately only enforcing arbitration agreements or awards which go through accredited providers.<sup>181</sup> In summary, however, there is likely to be far more work ahead of us. *How* the introduction of mandatory due process rules to into an international scheme dealing with low-value arbitration is to be done, enabling certain types of pre-dispute arbitration clauses to become enforceable upon *both* parties, requires further focus and hopefully these questions can be picked up by UNCITRAL again, or another international organisation, in the coming years.

#### **IV. Theoretical Challenges of Due Process within International Low-Value Arbitration**

In this second half of the paper, we will be investigating what types of due process protections one might expect to see within an international consumer ODR framework, assuming that expediency, affordability and accessibility are three mandatory requirements of any successful ODR process.<sup>182</sup>

##### *a) Arbitral Accuracy and the Acceptance of “Rough Justice”*

Due process comes at a cost.<sup>183</sup> To have the highest level of due process possible – permitting the parties every opportunity for example to extend time limits, to present every potential article of evidence, fully cross-examine every witness, conduct extensive discovery, appoint and cross-examine experts, request a 3-arbitrator tribunal, challenge arbitrators freely on weak allegations of bias and hold extensive oral hearings – would result in extremely high costs and a long drawn-out arbitration (in this example perhaps taking years). On the flip-side, given that the average consumer dispute is estimated to value \$146, realistically

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<sup>177</sup> *Supra* n61 Rogers, 375

<sup>178</sup> *Supra* n30 Kronke *et al*, 286; *Supra* n21 Poudret & Besson, 890-891; Waincymer, J., “International Commercial Arbitration and the Application of Mandatory Rules of Law”, (2009), 5 *Asian International Arbitration Journal* 1, 41-42

<sup>179</sup> Thompson, D., (2012) “Online Dispute Resolution Expansion in the EU” 22 *Computers & Law* 31, 33

<sup>180</sup> *Supra* n132 Piers, 229; *Supra* n61 Gibbons, 13

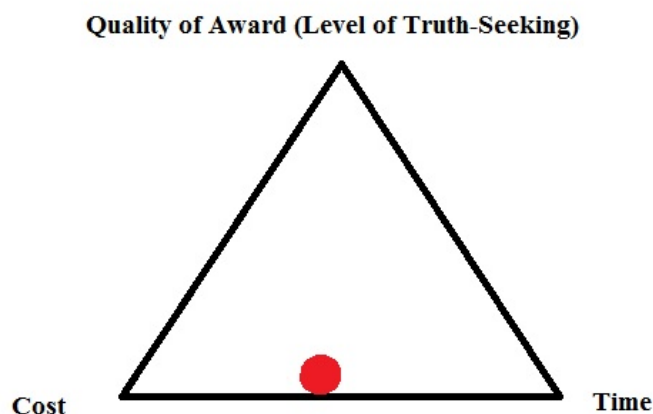
<sup>181</sup> Cortés, P., (2011), ‘Developing online dispute resolution for consumers in the EU: a proposal for the regulation of accredited providers’, 19(1) *International Journal of Law and Information Technology* 1; *Supra* n151 Cortés, 28; *Supra* n61 Gibbons, 40; *Supra* n61 Cortés & de la Rosa, 425, 430; *Supra* n110 Schmitz, 233-235

<sup>182</sup> *Supra* n106 Schmitz, 103; Davies, G., (2010), “Can Dispute Resolution Be Made Generally Available?”, 12 *Otago Law Review* 305, 308-316

<sup>183</sup> *Supra* n25 Lévy, 46

consumer arbitration should be conducted within the timescale of a few minutes, or at most, hours, in terms of arbitrator time. Due process therefore negatively correlates with the time and costs of the arbitration: you cannot have all three.

Park famously details this play-off between time, cost and quality of award in his article, *Arbitrators and Accuracy*.<sup>184</sup> Park encourages arbitrators to empower commercial parties early in the process to make a choice between these 3 competing objectives.<sup>185</sup> He represents the tangential nature of the choice by showing a triangle with the 3 objectives at each corner and requesting parties to place a dot in the triangle to highlight where their preferences lie. He warns overall that in the context of commercial disputes, arbitration should not lose its “moorings” as an adjudicatory truth-seeking process.<sup>186</sup> And indeed, the importance of keeping arbitration as a high quality truth-seeking process makes sense in the context of high-value disputes, given the often significant value of the decision and the lack of opportunities for appeal.<sup>187</sup> In the context of low-value consumer disputes, however, time and costs simply *need* to assume a far higher importance than the “truth-seeking” quality of the arbitration process, for “*the constraints on time and costs are not mere irksome idealized requirements, they are strict cut-offs on the ladder of feasibility.*”<sup>188</sup> Therefore, Park’s triangle which represents these 3 competing concerns may look something like this for low-value online consumer disputes.



<sup>184</sup> *Supra* n18 Park; See also Damaska, M.R., (1986), *The Faces of Justice and State Authority: A Comparative Approach to Legal Process*, Yale University Press, 122–3

<sup>185</sup> It is standard within international arbitration to address these issues directly at the preliminary meeting – *Supra* n9 Waincymer, 21; Risse, J., (2012), “Ten Drastic Proposals for Saving Time and Cost in Arbitral Proceedings”, 29 *Arbitration International* 453, 465; Earnest, D., Gallardo, R., Gunnarsson, G.V. & Kaczor, T., (2013), “Four Ways to Sharpen the Sword of Efficiency in International Arbitration”, *Young ICCA Group Paper 2012-2013*, 17; Böckstiegel, K., (2013), “Party Autonomy and Case Management — Experiences and Suggestions of an Arbitrator”, 11 *Schieds (2013)* 1, 2; Williams, D., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 78

<sup>186</sup> *Supra* n18 Park, 27-28

<sup>187</sup> Bernadini, P., (2004), “The Role of the International Arbitrator”, 20 *Arbitration International* 121, 126; *Supra* n9 Waincymer, 12-14

<sup>188</sup> *Supra* n117 Schultz, 156; *Supra* n64 Rule *et al*, 230

Quite clearly this demonstrates that in the context of low-value disputes, the quality of the arbitral procedure as a *truth-seeking process* will be severely diminished. Note also the slight tilt towards lower ‘costs’ than ‘time’, given that a neglect of cost-saving in particular could jeopardise the entire feasibility of ODR.

In addition to balancing these three objectives, the further balancing of the twin objectives of fairness and efficiency has become a familiar practice undertaken by international commercial arbitrators under their autonomous powers.<sup>189</sup> To some, efficiency is in itself a due process value; invoking the adage ‘*justice delayed is justice denied*’.<sup>190</sup> And certainly its observance could be seen as a vital rule of arbitral procedural law in some jurisdictions.<sup>191</sup> It is therefore sometimes observed that the two are not necessarily always in opposition and in fact that poor efficiency can denote an unfair procedure.<sup>192</sup> In fact, the most important aspect of fairness is often said to be the perception of fairness. Indeed, parties are less likely to question a result if they felt the procedure was fair and that they were empowered to influence the outcome.<sup>193</sup> To this end, some might say that any outcome is just, provided the procedure was just.<sup>194</sup> In the context of low-value disputes, therefore, providing a process which is both fair and efficient is an intriguingly complex challenge.

This is the crux of the dilemma for due process within international consumer arbitration.<sup>195</sup> Not many authors have attempted to answer this very challenging conflict between time, costs and due process within consumer arbitration directly.<sup>196</sup> Hörnle argues that given the public importance of consumer protection, the due process safeguards in consumer ODR

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<sup>189</sup> Yves Fortier, L., (2001), “International Arbitration and National Courts: Who Has the Last Word?”, in *International Arbitration and National Courts: The Never Ending Story*, ICCA Series No. 10, (van den Berg, A., Ed.), Kluwer Law International, 69; Tavender, E.D.D., (1996), “Considerations of Fairness in the Context of International Commercial Arbitrations”, 34 *Alberta Law Review* 509; *Supra* n9 Waincymmer, 12; *Supra* n19 Yves Fortier, 402-403; for example, Article 14 of the LCIA Rules and Article 22 of the ICC Rules both call for a balance between competing notions of fairness and efficiency

<sup>190</sup> Vasani B.S. & Tallent, K.D., (2008), “Proportional Autonomy: Addressing Delay in International Arbitration through a Deadline for the Rendering of Final Awards”, 2 *Dispute Resolution International* 255, 258-261; Bishop, D., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 99

<sup>191</sup> Eg Article 1(a) English Arbitration Act 1996 – “*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*”

<sup>192</sup> *Supra* n9 Waincymmer, 15; *Supra* n4 Kaufmann-Kohler, 1321-1322; For example, Section 33 of the English Arbitration Act 1996 and Article 15(7) of the Swiss Arbitration Rules both require efficiency within the arbitration procedure; *Supra* n190 Bishop, 98-99

<sup>193</sup> IBA Rules of Ethics for International Arbitrators, 2; Tyler, T.R., (1997), “Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform”, 45 *American Journal of Company Law* 871, 882-883; *Supra* n61 Rogers, 355; Peters, C.J., (2002), “Participation, Representation, and Principled Adjudication”, 8 *Legal Theory* 185, 197-198; *Supra* n4 Kurkela & Turunen, 205; *Supra* n9 Waincymmer, 13-14

<sup>194</sup> *Supra* n9 Waincymmer, 14

<sup>195</sup> *Supra* n61 Cortés & de la Rosa, 410; *Supra* n61 Gibbons, 14, 36; *Supra* n56 Rutledge, 281 – “*We all can rally around the common mantra that we all want a system providing just outcomes at a fast pace and at a low cost. Far harder is it to agree on the contours of that system*”; Ware, S.J., (2001), “Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 *Journal of Dispute Resolution* 89, 99-100. “*It is easy to insist upon ‘due process’ in consumer arbitration, indeed ‘due process’ is as widely-cherished as ‘mom and apple pie,’ but the hard thinking begins when one asks who pays the price of process and how much they pay.*”

<sup>196</sup> cf *Supra* n4 Kurkela & Turunen, 12 – promote the idea that due process levels should increase the more limits there are to access to court procedures

should be very *high*.<sup>197</sup> She calls for the outright application of mandatory consumer protection law, no word limits for written submissions, extended time limits, an entitlement to discovery and a relative freedom for parties to request a hearing.<sup>198</sup> She even spends time suggesting the application of Article 6 of the European Convention on Human Rights into online consumer arbitration.<sup>199</sup> Two subsequent reviews of her work, however, rightly question her optimistic thinking.<sup>200</sup> Schultz points out that the requirement of incredibly low costs and quick results simply cannot permit such high levels of due process. In low-value ODR “*arbitration is no longer the truth-seeking process that it is for commercial, investment or interstate disputes, but a process to avoid crass disrespect of the contract or basic legal obligations in a consumer transaction.*”<sup>201</sup> Nonetheless, he leaves a lot of the hard questions still unanswered in terms of how this ‘rough-justice’ world could become widely accepted, admitting that the search for answers “*has been the Grail quest ... for the last decade.*”<sup>202</sup>

Instead of focusing on due process protections that provide low-value consumers with a raised level of due process, such as might be expected within high-value commercial arbitration or within civil proceedings, maybe the focus should be on *recalibrating the bargaining inequalities between the parties*. Provided *both* parties are given an affordable and expedient process – the “rough justice” as Schultz calls it – then both parties should be more willing to accept the end result.<sup>203</sup> The main point being that merchants should not be given a wide and unfettered control over the design of arbitration procedure or the appointment of the arbitrators. Public regulation must come in ensuring that the only enforceable arbitration agreements and awards are those that do not cause any significant *disadvantage* to the consumer. More importantly, they should not be excessively concerned with giving consumers a substantial opportunity to present their case or request extensive truth-seeking, considering the concurrent objectives of speed and affordability. It is important, however, to distinguish here between “truth-seeking” and equality. Under this system, there would only be a significant reduction in the level of truth-seeking in low-value arbitrations. However, this does not have to mean a reduction in equality between the parties. For both parties would be on level terms and would respect the diminished role of truth-seeking, instead “seeking” a quick and affordable resolution.<sup>204</sup> Whether this sort of rough justice will ever be to the taste of European legislatures is perhaps unlikely,<sup>205</sup> but given the potentiality of a low take-up of the ODR platform by merchants, it could simply be a case of “*rough justice - or no justice*”.<sup>206</sup>

It is a very valid question, therefore, to ask whether such low-value arbitration in any sense resembles the international arbitrations that we know and understand. Or whether, as is perhaps more likely, all consumer disputes will be managed through informal, internal and user-friendly online programs, guiding users through a procedural step-like process akin to eBay, Amazon and Paypal programs. Nevertheless, even if such non-traditional ODR programs continue as the norm for online consumer disputes, there are millions of cross-

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<sup>197</sup> *Supra* n61 Hörnle, 169-219

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*, 98-108

<sup>200</sup> Cortés, P., (2010), “Book Review of J Hörnle, Cross-Border Internet Dispute Resolution”, 73 *Modern Law Review* 171, 173; *Supra* n117 Schultz, 156-157

<sup>201</sup> *Ibid.*, Schultz, 156; Also *Supra* n61 Cortés & de la Rosa, 410

<sup>202</sup> *Ibid.*, Schultz, 154

<sup>203</sup> *Supra* n193 Peters, 197-198; *Ibid.*, Schultz, 155, 160

<sup>204</sup> *Supra* n56 Drahozal, 741-742, 751; *Supra* n185 Risse, 454-455; *Supra* n117 Schultz, 156

<sup>205</sup> *Supra* n61 Rogers, 366

<sup>206</sup> *Supra* n117 Schultz, 160

border civil disputes, of all types, which fall within a low-value category (below €10,000). Recognising these ever-growing millions of high-volume low-value claims should leave no doubt about growing demands for formal dispute resolution mechanisms offering the three cornerstone principles of expediency, efficiency and accuracy in the coming century. The remainder of this paper, therefore, should provide crucial inspiration for dispute resolution entrepreneurs and professionals, as well as regulators, in developing suitable arbitration procedures in this imminent and exciting, yet incipient, industry.

### *b) Deference to Institutional Rules and the Diminution in the Role of Party & Arbitrator Autonomy*

Within this new international consumer arbitration framework there is likely to be a fundamental shift from the party/arbitrator/institution balance as it currently exists in international commercial arbitration. As detailed, presently in international arbitration there is a wide deference to party autonomy. There is also a wide level of arbitrator autonomy, wherein the arbitrators are empowered under the *lex loci arbitri* or institutional rules to possess a broad level of procedural control.<sup>207</sup> Arbitrators are usually mandated to be adaptable and to cooperate with the parties in developing a procedure that fits the type of dispute and the expectations of the parties, both in terms of cost and time, but also in terms of the parties' cultural backgrounds.<sup>208</sup>

The institutions in international commercial arbitration, on the other hand, play a secondary role. Often their rules are subject to wide alteration by party autonomy and only a small fraction of their rules can be classed as 'mandatory'.<sup>209</sup> Furthermore, given this broad cultural diversity of parties and types of dispute, institutional rules almost act as a blank canvas, leaving a wide berth to the ingenuity of the arbitration tribunal working with the parties to develop a suitable procedure in each case.<sup>210</sup> Park, in another insightful article of his, promotes a move away from this practice.<sup>211</sup> He feels that institutions essentially side-step the hard questions that come from developing a procedure that satisfies both parties, for in reality, many difficult procedural decisions that arbitrators need to make *in situ* are often welcomed by one party and seen as unfair by the other, often putting arbitrators in a difficult position *vis-à-vis* their autonomy, further risking allegations of bias.<sup>212</sup> He saw no reason why a large variety of institutional rules, wherein many of these hard questions have already been laid out in a procedural template, could not be available on the market. Parties would still be at liberty to alter these rules, provided *both* parties agree, however the default procedure in the absence of agreement *inter partes* would be already mapped out.

Many authors, however, reserve high praise over the flexibility that arbitrator autonomy brings to international commercial arbitration. Indeed, procedural malleability is one

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<sup>207</sup> *Supra* n9 Waincymer, 6; *Supra* n40 Park, 4; *Supra* n24 Böckstiegel, 29-30

<sup>208</sup> *Supra* n24 Carbonneau, 1216; *Supra* n19 Yves Fortier, 397-398; *Supra* n23 De Boissésou, 180; Schaner, N., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 63; *Supra* n190 Bishop, 102

<sup>209</sup> *Supra* n185 Böckstiegel, 2; *Supra* n30 Pryles, 3-4; *Ibid.*, Schaner, 64; *Supra* n23 Gharavi, 127; For example, it is generally believed that Article 27 of the ICC Rules requiring scrutiny of awards by the ICC Court is a mandatory rule which cannot be contracted around

<sup>210</sup> *Supra* n208; *Supra* n19 Yves Fortier, 395; *Supra* n137 Schmitz, 43-44

<sup>211</sup> *Supra* n40 Park

<sup>212</sup> *Supra* n9 Waincymer, 18; *Supra* n190 Bishop, 99-100; *Supra* n40 Park, 6

international arbitration's flagship advantages.<sup>213</sup> There is logic in both arguments, although there would perhaps be no harm in having greater levels of competition and variety across the institutional market.<sup>214</sup> Furthermore, wider procedural autonomy not only calls for skilled and experienced (and therefore expensive) arbitrators, but it also risks higher costs and timescales, both as a result of extensive time being spent on important procedural decisions, but further as a result of stronger parties pushing for more extensive and costly procedures in the hope of forcing the other party into early settlement.<sup>215</sup>

This is where we have in recent years seen the development of “fast-track” or “expedited” arbitration rules across many leading international arbitration institutions.<sup>216</sup> Respecting the fact that a large number of international arbitration's customers want their disputes resolved in a highly expeditious and affordable manner,<sup>217</sup> institutions are providing parties with the option to pursue the fast-track route. These institutional rules, which parties can either elect post-dispute or within their original arbitration clause, essentially impose restrictive time limits at the various stages of arbitration procedure, as well as limit the types of permissible evidence, *unless* both parties agree.<sup>218</sup> They still often contain an element of arbitrator autonomy to bend the rules based on the circumstances, but the significance of them is that *they impose procedural restrictions (or defaults) at the outset*, such as dispensing with the need for oral hearings or a strict limitation on discovery processes.<sup>219</sup> Many institutions are therefore reporting the increasing use and popularity of such fast-track procedures.<sup>220</sup>

This is all highly pertinent to the development of international consumer arbitration. Relying too much on arbitrators in cooperation with the parties to draw up the procedural framework at the outset simply costs too much, requires experience on the part of the arbitrator, risks the extension of time limits beyond necessary limits, risks the inclusion of unnecessary evidential procedures and further risks the appearance of bias of the arbitrator. It is well accepted that by invoking institutional rules into their arbitration agreement, parties are taken to include all

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<sup>213</sup> *Supra* n9 Waincymer, 7, 19; *Supra* n185 Böckstiegel, 2; *Supra* n23 De Boissésou, 180; Stipanowich, T.J., (2009), “Arbitration and Choice: Taking Charge of the New Litigation”, *DePaul Business and Commercial Law Journal* 383, 407; cf *Supra* n40 Park, 5 - “*the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good; and arbitration's malleability often comes at an unjustifiable cost*”

<sup>214</sup> *Supra* n9 Waincymer, 39; Choi, S.J., (2003), “The Problem of Arbitration Agreements”, 36 *Vanderbilt Journal of Transnational Law* 1233

<sup>215</sup> *Supra* n9 Waincymer, 23-24; *Supra* n185 Risse, 453; *Ibid.*, Choi, 1235; *Supra* n24 Carbonneau, 1208

<sup>216</sup> The number of fast-track arbitration routes in international commercial arbitration continues to grow and examples are abound. For example the Stockholm Chamber of Commerce, Swiss Chamber of Commerce, Deutsche Institution für Schiedsgerichtsbarkeit (DIS), World Intellectual Property Office (WIPO), American Arbitration Association (AAA), China International Economic Trade Arbitration Commission (CIETAC), Australian Centre for International Commercial Arbitration (ACICA), Hong Kong International Arbitration Centre (HKIAC) and Kuala Lumpur Regional Centre for Commercial Arbitration (KLRCA) all offer fast-track programs (generally recommended for claims valued below \$50,000)

<sup>217</sup> Berger, K.P., (2008), “The Need for Speed in International Arbitration: Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration (DIS)”, 25 *Journal of International Arbitration* 595, 595; *Supra* n185 Risse, 453; Serbest, F., (2013), “Fast-Track Arbitration - Should it be Encouraged in International Commercial Disputes?”, *Reopening the Silk Road in the Legal Dialogue Between Turkey and China*, International Law Conference, 12-14 June 2012, Law School of Marmara University, (Yenidünya, C., Erkan, M. & Asat, R., Eds.), Adalet Yayinevi, 309-336, 325

<sup>218</sup> *Supra* n190 Vasani & Tallent, 331; *Supra* n22 Welser & Klausegger, 259

<sup>219</sup> *Eg* Section 5(3) DIS Rules Expedited Arbitration Rules; Section 5 HKIAC Small Claims Rules; Articles 21 and 23 ACICA Expedited Arbitration Rules

<sup>220</sup> *Supra* n190 Vasani & Tallent, 321-322; *Supra* n22 Welser & Klausegger, 259-260; *Supra* n217 Serbest, 321-322

those rules as part of their agreement,<sup>221</sup> thus it would not be countering party autonomy rights to impose pre-determined rules which parties can only alter if *both* parties agree. These rules can therefore be developed to ensure the procedure is eminently cheap and quick, while also ensuring that stronger bargaining parties cannot later adapt the procedure to their advantage.<sup>222</sup> As a result, institutions within low-value consumer arbitration are likely to play a much larger role in designing and administering arbitrations,<sup>223</sup> and their rules are likely to be significantly more detailed than the kinds of institutional rules familiar in international commercial arbitration.<sup>224</sup> Furthermore, arbitrators and parties need not be highly knowledgeable in arbitral procedure, as they will not be relied on less to flexibly develop procedural rules *ad hoc*<sup>225</sup> and, more importantly, weaker parties cannot be compelled to accept a disadvantageous alteration in procedure *unless* both parties agree.<sup>226</sup>

## V. Delivering Due Process, Value and Efficiency in Online Arbitration Procedural Rules

### a) Tribunal Construction and Appointment

On many occasions, it has been said the selection and appointment of the tribunal is one of the most important aspects of arbitration, for it is the arbitrators who both guide the entire procedure and make the final determinations of fact and law.<sup>227</sup> Nevertheless, the appointment process can become very time-consuming if not controlled. Firstly, in terms of low-value consumer arbitration, rarely is it suggested that the standard should be for 3-arbitrator tribunals, rather than a single arbitrator.<sup>228</sup> The benefits of a 3-party tribunal make sense in the context of high-value and often complex disputes in international arbitration, but given the low-value of consumer disputes, it is not economically rational to expect a 3-party tribunal, unless the parties *both* decide at the post-dispute stage (with the consequent tripling of arbitrator fees).

The more challenging question relates to the selection and challenge of the appointed arbitrator. In international commercial arbitration it is often left to the parties to agree on an arbitrator, failing which the institutional provider will make the appointment.<sup>229</sup> However, many authors have disagreed on the extent to which parties should control the appointment of

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<sup>221</sup> *Supra* n4 Kurkela & Turunen, 26; *Supra* n9 Waincymer, 52-53; *Supra* n24 Böckstiegel, 28-29; *Supra* n217 Serbest, 339

<sup>222</sup> Bone, R.G., (2003), "Agreeing to a Fair Process: The Problem with Contractarian Theories of Procedural Fairness", 83 *Boston University Law Review* 485, 496-501; *Supra* n24 Carbonneau, 1209

<sup>223</sup> *Supra* n61 Rogers, 379

<sup>224</sup> *Supra* n9 Waincymer, 20, 38

<sup>225</sup> *Supra* n214 Choi, 1234

<sup>226</sup> *Supra* n137 Schmitz, 44

<sup>227</sup> *Supra* n24 Carbonneau, 1209; *Supra* n30 Blackaby *et al*, Para 4.01; OTHER LINK?; Rowley, W., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference 2009, 70-71

<sup>228</sup> UNCITRAL Guidelines, para. 47(e); de Witt, N., (2001), "Online International Arbitration: Nine Issues Crucial to its Success", 12 *American Review of International Arbitration* 441, 447; Kirby, J., (2009), "With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated", 26 *Journal of International Arbitration* 337; *Supra* n22 Welser & Klausegger, 331; Rubino-Sammartano, M., (2014), *Arbitration Law and Practice*, 3<sup>rd</sup> Ed, JurisNet LLC, 835-837; cf *Supra* n61 Hörnle, 125-126

<sup>229</sup> Article 8 UNCITRAL Arbitration Rules (as amended in 2010); Articles 12 and 13 ICC Rules; LCIA Rules Articles 1.1(e); and 2.1(d); AAA Arbitration Rules, Article 6; although some institutions influence the appointment process more than others, see Article 24 CIETAC Rules of Arbitration

arbitrators in low-value consumer arbitrations, where given the common party types, direct conflict of interests are likely to be more rare:<sup>230</sup> if the pure objective is high speed and low cost, then the institution's appointment should be less open to challenge. However, being able to select your own judge is a fundamental aspect of arbitration and a useful due process safeguard in avoiding partiality.<sup>231</sup> The standard in most fast-track arbitration procedures is to reduce the time limits within which the parties can challenge,<sup>232</sup> for example the ACICA and KLRCA expedited arbitration rules set 7 days instead of the usual 14<sup>233</sup> and the CIETAC expedited rules 10 days.<sup>234</sup> The EU ADR Directive provides general disclosure rules of circumstances which may be seen to impact independence and impartiality, with provision for institutions to make replacements where parties object.<sup>235</sup> In terms of party equalising, however, this might not provide the ideal protection, as the most important aspect of the appointment process should perhaps be ensuring that all parties have an "equal voice" in the appointment of the arbitrator.<sup>236</sup>

The UNCITRAL Guidelines also suggest that neutrals should disclose any circumstances that may raise doubts as to their impartiality.<sup>237</sup> However, within the unfinished UNCITRAL Rules, it was being debated whether to introduce a freedom for parties to reject neutrals recommended to their case by the ODR provider within a 2-day time limit.<sup>238</sup> Further permitting both parties to reject up to a maximum of three neutrals without giving reasons for doing so. Although the intention was good, this does not seem like a logical procedural protection: doing so could permit the procedure to be freely extended an additional 14 days and ultimately there is no guarantee that either party would have been happy with the 7<sup>th</sup> and final appointment. Although these rules are not mandatory, but provide only a recommendation, a better suggestion which would ensure that both parties are given an "equal voice" in the appointment of the arbitrator could be to use a 'pool of arbitrators' system.<sup>239</sup> de Witt suggests emulating the NYSE Rules wherein parties are presented with 5 arbitrators and a brief synopsis of their skills, experience and background, from which both parties rank them in order of preference 1-5.<sup>240</sup> Certainly, the use of arbitrator pools is a well-respected method for empowering parties to make expedient selections while still protecting the opportunity to avoid potential bias.<sup>241</sup> However, it needs to be carefully designed so as not to become cumbersome or time-consuming.<sup>242</sup> Similarly, there should perhaps be a back-up provision for the institution to make an impartial appointment where a recalcitrant party refuses to engage in the appointment process.

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<sup>230</sup> *Supra* n61 Hörnle, 123; *Supra* n4 Kurkela & Turunen, 111; cf *Supra* n107 Thornburg, 208-209

<sup>231</sup> *Supra* n228 de Witt, 450; Rogers (2007), 379; *Supra* n4 Kurkela & Turunen, 107; *Supra* n110 Kao, 117

<sup>232</sup> *Supra* n22 Welser & Klausegger, 262-263

<sup>233</sup> 2011 ACICA Expedited Rules Article 10; 2012 KLRCA Fast-track Rules Article 15

<sup>234</sup> 2012 CIETAC Rules Article 30

<sup>235</sup> EU Directive Article 6 provides further details on the Impartiality, Independence and Expertise requirements of neutrals, including some rules on disclosure; *Supra* n79 Hörnle, 132:

<sup>236</sup> This is actually the phrase taken from Principle 3 of the AAA Consumer Due Process Protocol; *Supra* n137 Schmitz, 53; *Supra* n110 Kao, 119; *Supra* n106 Schmitz, 103; *Supra* n56 Drahozal, 751

<sup>237</sup> UNCITRAL Guidelines, para. 47(b)

<sup>238</sup> UNCITRAL Rules, Draft Article 9(4)-(6)

*Supra* n61 Cortés & de la Rosa, 418-419

<sup>239</sup> *Supra* n118 Schmitz, 780

<sup>240</sup> New York Stock Exchange Rules (as amended in 2007), Rule 607(c); *Supra* n228 de Witt, 448-449

<sup>241</sup> *Supra* n106 Schmitz, 103; Baker, M., (2009), *Due Process in International Arbitration: Transcripts*, at International Bar Association 12<sup>th</sup> Annual Conference, 50

<sup>242</sup> *Supra* n9 Waincymer, 263



The more important question then is how ODR institutions would compile each pool of arbitrators and their role in ensuring the available pool is well-balanced in the circumstances of the case and the parties involved.<sup>243</sup> One suggestion which has not received enough academic attention is providing parties with an equal voice not just in the appointment of the arbitrators, but also the appointment of the ODR provider itself.<sup>244</sup> A major concern in terms of repeat player advantage in mandatory arbitration in the US is the power of the stronger party to pre-select the arbitration provider in their standard terms.<sup>245</sup> Furthermore, there is evidence that the most popular providers of UDRP arbitration are those that decide most often in favour of the claimant – the party who chooses the provider.<sup>246</sup> However, presuming ODR providers comply with transparency rules around their processes and provide information and statistical data which can be utilised by the parties making the selection, then the fairest method of avoiding any institutional bias might be leaving their appointment to the post-dispute stage in a procedure that enables both parties to control the appointment.<sup>247</sup> This could be challenging in practice, but it has the ability to instantly and entirely remove all ongoing concerns over institutional bias, forum shopping and repeat player advantages.<sup>248</sup> There is already provision under Article 9(3) and (4) of the EU Regulation for the ODR platform to provide recommended ADR entities to disputants based on their case circumstances, however there is no obligation on the respondent party to accept any of the recommendations.<sup>249</sup> If binding clauses were permissible, perhaps it would be possible for the platform to recommend 3 providers and ask the parties to rank their preferred providers in order 1-3.

The qualifications and training of the arbitrators is another challenging area. Everyone accepts that given the low-value of ODR disputes and the low fees, the arbitrators appointed are not likely to be experienced arbitrators or even lawyers.<sup>250</sup> Yet they might perhaps be expected to have some legal knowledge.<sup>251</sup> Rule *et al* pointed out how in the case of eBay's Dispute Resolution program the neutrals are not legally qualified but that language fluency is a useful asset.<sup>252</sup> A logical place to look would be law students and graduates; they would expect modest fees and would be motivated to gain experience in international dispute resolution.<sup>253</sup> Interestingly, the training of the neutrals has also been raised.<sup>254</sup> Cortés has suggested that training should not be self-regulated,<sup>255</sup> although there seems little strength in this argument. Provided the ODR providers are required to be transparent in their practices,

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<sup>243</sup> See next section on Transparency. *Supra* n61 Cortés & de la Rosa, 419; *Supra* n134 Pittman, 864-865; *Disputes in Cyberspace: Online Dispute Resolution for Consumers in Cross-Border Disputes - An International Survey*, Consumers International, (2000), 16

<sup>244</sup> *Supra* n61 Gibbons, 19; Haagen, P.H., (1998), "New Wineskins for New Wines: The Need to Encourage Fairness in Mandatory Arbitration", 40 *Arizona Law Review* 1039 – Discusses this idea in the context of US domestic arbitration

<sup>245</sup> *Supra* n136 Carboneau, 413-414; *Supra* n134 Schwartz, 1310; *Supra* n134 Alderman, 155; *Supra* n134 Pittman, 854-857; *Supra* n107 Thornburg, 184; cf *Supra* n56 Drahozal, 757

<sup>246</sup> *Supra* n107 Thornburg, 220; *Supra* n61 Hörnle, 190-191

<sup>247</sup> *Supra* n134 Pittman, 866-869 - Discusses how the Arbitration Fairness Act should be developed to ensure the parties can only be compelled to arbitrate if they can have access to a neutral forum

<sup>248</sup> *Supra* n133 and n245; *Supra* n107 Thornburg, 210; *Supra* n61 Hörnle, 124-129, 172; cf Brekoulakis, S. (2013), "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making" 5 *Journal of International Dispute Settlement* 553; *Supra* n56 Rutledge, 274; *Supra* n110 Kao, 119

<sup>249</sup> *Supra* n151 Cortés, 28

<sup>250</sup> *Supra* n61 Rogers, 379-380

<sup>251</sup> *Supra* n67 Gilliéron, 325; *Supra* n61 Cortés & de la Rosa, 417-418, 434

<sup>252</sup> *Supra* n64 Rule *et al*, 239

<sup>253</sup> *Supra* n61 Rogers, 379-380

<sup>254</sup> *Supra* n61 Gibbons, 22

<sup>255</sup> *Supra* n61 Cortés & de la Rosa, 417-418

then their training requirements and processes should be included within this.<sup>256</sup> Then there is also the nationality of the arbitrators. It was suggested that the UNCITRAL Rules ensure that ODR providers take the nationality of the parties into account when appointing a neutral.<sup>257</sup> There is institutional variety in the weight attached to the nationality of appointed arbitrators,<sup>258</sup> yet in the context of ODR it has been suggested that there might be an uneven distribution of alternative nationalities of arbitrators to the nationalities of common consumers of the service.<sup>259</sup> Given the geographical diversity of the online community and the likely availability of low-value arbitrators, it seems doubtful that there will be a lack of arbitrator diversity and it might perhaps *eventually* become common practice to appoint an arbitrator of a 3<sup>rd</sup> nationality where the two parties' nationalities differ.

### *b) Time Limits*

The very first thing that is noticeable about the UNCITRAL Rules, the UDRP and all other fast-track arbitration systems<sup>260</sup> is the imposition of strict time limits. As mentioned, the UDRP provide the respondent only 7 days to prepare and file their response and the arbitrator only 14 days from appointment to deliver their binding decision. The UNCITRAL Rules were still uncertain on the correct time limits for the arbitrator to produce an award by the time negotiations were brought to a halt. The last draft provided the parties with a time limit of “*no later than 10 days*” between the ‘facilitated settlement’ stage and the arbitrator’s deadline for decision,<sup>261</sup> with a further requirement that the award “*be rendered promptly, preferably within ten calendar days [from a specified point in proceedings]*”.<sup>262</sup> The EU Directive is far more flexible in this regard, in that it only requires an entire procedure to be completed within 90 days,<sup>263</sup> although the EU Regulation anticipates that disputes through the ODR platform will be completed within a total of 30 days.<sup>264</sup> Hörnle has highlighted how these proposed time limits of UNCITRAL and the EU ODR platform are severely restrictive and unrealistic,<sup>265</sup> pointing out that the Dutch Consumer Complaints Board, an existing successful domestic ODR system, provides respondents with 4 weeks to prepare a response.<sup>266</sup>

Nevertheless, the imposition of strict time limits is a vital and necessary protection against the escalation of costs, timescales and dilatory tactics.<sup>267</sup> Realistically, time limits should be proportional to the value of the claim: To spend weeks and weeks over a \$150 dispute is an

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<sup>256</sup> *Supra* n110 Kao, 117; *Disputes in Cyberspace: Online Dispute Resolution for Consumers in Cross-Border Disputes - An International Survey*, Consumers International, (2000), 16; *Recommended Best Practices for Online Dispute Resolution Providers*, American Bar Association Task Force on Ecommerce and ADR, 9

<sup>257</sup> *Supra* n61 Cortés & de la Rosa, 418-419

<sup>258</sup> *Supra* n228 de Witt, 449

<sup>259</sup> *Supra* n61 Cortés & de la Rosa, 418-419

<sup>260</sup> *Supra* n22 Welsch & Klausegger, 333-334

<sup>261</sup> UNCITRAL Rules, Draft Article 7(1)

<sup>262</sup> UNCITRAL Rules, Draft Article 7(6)

<sup>263</sup> EU Directive Article 8(e) under the Principle of Effectiveness

<sup>264</sup> EU Regulation Article 9(b)

<sup>265</sup> *Supra* n79 Hörnle, 127-128; *Supra* n151 Cortés

<sup>266</sup> *Ibid.*, Hörnle; Hodges, C., Benöhr, I. & Creutzfeld-Banda, N., (2012), *Consumer ADR in Europe*, Hart Publishing Oxford, 142; *Supra* n228 Rubino-Sammartano, 837

<sup>267</sup> *Supra* n56 Drahozal, 760-761; *Supra* n27 Nariman 240-241; *Supra* n19 Yves Fortier, 402-403; *Supra* n136 Schmitz, 56; For example, Art 20(1) of ICC Rules states that the tribunal shall proceed “*within as short a time as possible to establish the facts of the case by all appropriate means*”; *Supra* n4 Kurkela & Turunen, 192; Donnahey, S., (2000), “Reflections on the First ICANN Arbitration”, *Dispute Resolution Magazine* 12-19, Winter 2000, 16

irrational expectation from a simple cost-benefit analysis of party and arbitrator time.<sup>268</sup> Furthermore, keeping the process time-limited encourages the practice of front-loading, so that parties are aware of all the evidence before them early on, leading to higher settlement rates and removing 11<sup>th</sup> hour submissions.<sup>269</sup> In terms of general enforceability within commercial arbitration, it appears that given the recognition of efficiency as a core objective, the imposition of restrictive time limits is *less* of a concern than the removal of opportunity to comment on evidence.<sup>270</sup> However, there are also strong arguments for being able to extend time limits to enable the parties sufficient time to settle or to consider offers of settlement or, just as importantly in terms of due process protections, to permit parties to the necessary time to locate evidence or to ascertain their legal rights.<sup>271</sup>

This remains a highly challenging issue. One logical solution may be to have pre-determined institutional timescales, within which the parties must comply, but the arbitrator should perhaps have full authority, as is the case with most standard commercial arbitration institutional rules,<sup>272</sup> to extend time limits where the facts specifically demand it.<sup>273</sup> Some obvious situations where an extension might be necessary include when the parties' languages are incompatible and there are translation needs; where the arbitrator serves a document request on a party; where both parties request a standstill to permit time for private negotiations; where there has been delays outside the parties' control; where the dispute is clearly more complex; or where a party in good faith requests an extension in order to investigate their legal entitlements more closely. Nevertheless, this authority to extend should be narrowly defined and *solely* reside within the arbitrator's autonomy, thus – given the overriding objective of expediency and that time limits have been pre-determined 'by the parties' in the case of non-extension – a party should not be able to complain that their due process rights have been breached simply by an arbitrator not granting an extension.<sup>274</sup> This is likely to be a contentious issue and one which must be carefully designed: on the one hand, the ability to extend time limits plays an imperative due process protection, and on the other, it risks the inclusion of dilatory tactics, such as those commonplace in commercial arbitration.<sup>275</sup> Therefore, arbitrators would need to be vigorously trained and to observe a clearly laid-out set of guidelines on granting or refusing extensions.

### *c) Document Disclosure*

The role of document disclosure is perhaps one of the more intriguing questions facing international low-value arbitration. Document discovery, particularly in common law jurisdictions, is regarded as a valuable "*party equalising*" procedure: by parties laying all the

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<sup>268</sup> *Supra* n9 Waincymer, 25; *Supra* n136 Schmitz, 56; *Supra* n110 Kao, 119; Rule 7 of IBA Rules of Ethics For International Arbitrators

<sup>269</sup> *Techniques for Controlling Time and Costs in Arbitration*, Report from the ICC Commission on Arbitration, (ICC Publication No. 843, 2007), 11; *Supra* n22 Welser & Klausegger, 266

<sup>270</sup> *Supra* n30 Kronke *et al*, 387; *Supra* n22 Welser & Klausegger, 271; *Supra* n190 Vasani & Tallent, 271-272; *Supra* n217 Berger, 595

<sup>271</sup> *Supra* n61 Cortés & de la Rosa, 416; Abraham, S., "Fast-Track Arbitration: An Idea Whose Time Has Come?", in *Arbitration News*, Newsletter of the International Bar Association Legal Practice Division, Volume 15(1), 24; *Supra* n110 Kao, 118; Philippe, M., (2010), "Are Specific Fast-Track Arbitration Rules Necessary?", in *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, Peace Palace Papers 253-284, Series 3, 257; *Supra* n22 Welser & Klausegger, 267

<sup>272</sup> *Supra* n19 Yves Fortier, 404-405; *Supra* n190 Vasani & Tallent, 257; ICC Arbitration Rules Article 32

<sup>273</sup> *Supra* n228 Rubino-Sammartano, 835; *Supra* n30 Kronke *et al*, 244

<sup>274</sup> *Supra* n190 Vasani & Tallent, 273-274; Critchlow, J., (2002), "The Authority of Arbitrators to Make Rules", 68 *Arbitration* (2002) 369, 369; *Supra* n23 De Boissésou, 177-178

<sup>275</sup> *Supra* n217

available information on the table it provides a fuller account to the trier of fact and, equally, provides weaker parties with a much fairer opportunity to bring their claims against stronger parties who hold more information at their disposal and might be withholding adverse evidence.<sup>276</sup> Document disclosure has played an increasing role in international commercial arbitration.<sup>277</sup> However, it is also one of the principal features “*which contributes most to the time and costs explosion.*”<sup>278</sup> Given that discovery is well-known to cause excessive costs and timescales in commercial arbitration,<sup>279</sup> it seems an unlikely candidate for low-value consumer arbitration.<sup>280</sup> This has perhaps more of an impact on those familiar with common law style procedures<sup>281</sup> given that, as Risse says, civil law jurisdictions have managed perfectly well without “*the truth on the table – concept*” of Anglo-American cultures.<sup>282</sup> Certainly it would seem unreasonable to many civil lawyers that one could bring an action against someone in the hope that supporting evidence in the possession of the other party *might* come to light.<sup>283</sup> Further, there is often no guarantee that companies will disclose all documents according to their instruction and rarely does document production generate that crucial document that heavily swings the determination of the case.<sup>284</sup>

Nevertheless, there is a sound counter-argument that document production could play this vital party equalising role in consumer arbitration.<sup>285</sup> Consumers or small-scale traders, being the weaker party and with less available information at their disposal, may be justified in asserting that certain internal company documents would support their arguments. There is still a method, however, by which document discovery can play this vital role in fast and cheap arbitration. Firstly, as was the case in the proposed UNCITRAL Rules and in the UDRP,<sup>286</sup> arbitrators should be empowered to request certain specific documents from a party.<sup>287</sup> Secondly, which is not a part of the UDRP<sup>288</sup> but was anticipated within the UNCITRAL Rules,<sup>289</sup> the arbitrator should be empowered to draw adverse inferences from any failure to produce requested documents.<sup>290</sup>

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<sup>276</sup> Kauffmann-Kohler, G. & Bärtsch, P., (2004), “Discovery in International Arbitration: How Much is Too Much”, (2004), 17 *Zeitschrift für Schiedsverfahren* 13, 17; *Supra* n106 Thornburg, 216; *Supra* n107 Thornburg, 200

<sup>277</sup> *Supra* n4 Kaufmann-Kohler, 1325

<sup>278</sup> *Supra* n185 Risse, 460; Also 2010 *International Arbitration Survey: Choices in International Arbitration*, Queen Mary University of London, 32 – Empirical research concluding that document disclosure is felt to be the biggest cause of cost escalation in commercial arbitration

<sup>279</sup> *Supra* n24 Carbonneau, 1208

<sup>280</sup> *Supra* n107 Thornburg, 200; For example the AAA Consumer Due Process Protocol does not suggest a right to discovery; *Supra* n56 Drahozal, 752-753; Kramer, K.M., (2010), “JAMS’ Expedited Rules: Returning Arbitration to its Roots”, 28 *Alternatives to High Cost Litigation* 191 – Also discusses how the JAMS Expedited Rules carefully control disclosure rights

<sup>281</sup> Martin, M.S., (2002), “Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce”, 20 *Boston University International Law Journal* 125, 157; *Supra* n24 Carbonneau, 1216

<sup>282</sup> *Supra* n185 Risse, 460

<sup>283</sup> *Supra* n18 Park, 39; *Supra* n9 Waincymer, 15; *Supra* n4 Kaufmann-Kohler, 1325

<sup>284</sup> *Supra* n185 Risse, 460; *Supra* n185 Böckstiegel, 6

<sup>285</sup> *Supra* n118 Schmitz, 785; *Supra* n107 Thornburg, 203-204; *Supra* n67 Gilliéron, 318

<sup>286</sup> UNCITRAL Rules, Draft Article 11(3); UDRP Rules, Rule 10

<sup>287</sup> UNCITRAL Rules, Draft Article 7

<sup>288</sup> *Supra* n106 Thornburg, 216-217

<sup>289</sup> UNCITRAL Rules Draft Article 7(2) – “Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.”

<sup>290</sup> *Supra* n185 Risse, 459-460; *Supra* n22 Welser & Klausegger, 266; *Supra* n4 Kurkela & Turunen, 147; Similarly, within international commercial arbitration, Article 9(4) of the IBA Rules of Evidence suggests that a

The arbitrator is therefore authorised, in essence, to *reverse the burden of proof* from the consumer to the merchant.<sup>291</sup> This reversal of the burden of proof would also be in harmony with mandatory consumer protection law in many jurisdictions.<sup>292</sup> Nevertheless, the last draft of the UNCITRAL Rules proposed that burden reversals should only be done in “*exceptional circumstances*”.<sup>293</sup> This therefore leaves us questioning what these ‘circumstances’ could have been. Clearly, whenever procedural rules for international low-value arbitration are eventually designed, such circumstances will need to be expounded further. Document requests themselves should really be carefully controlled and their rules carefully defined. For example, the types of document requests the arbitrator can make should be specific and narrow, so as not to call for extensive “judicialized” disclosure practices<sup>294</sup> or to promote overly optimistic requests.<sup>295</sup> Furthermore, requests should be based on justified beliefs that such adverse documents exist and are relatively accessible:<sup>296</sup> it would thus remain a relative burden on the consumer to argue the justification (or legality - if contained within mandatory law) for such requests. Arbitrators will also therefore need to be thoroughly trained in the use of burden reversals and document disclosure.<sup>297</sup> As a natural consequence, where a document is requested by an arbitrator, there should also be the flexibility for consequent extension of time limits to enable the respondent party to supply the documents. This has been a significant criticism of the UDRP, where arbitrators are able to request documents, but given their strict 14-day time limit from appointment to make an award, such requests are virtually never made.<sup>298</sup> This system of proof burden reversals therefore needs much further refinement and will hopefully be accompanied with clear guidance on its role.

#### *d) Documents-Only Arbitration*

It seems well accepted now, especially in the light of common fast-track rules, that the parties are capable of conducting “documents-only” arbitration, *ie* where there is no oral hearing or

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tribunal may draw adverse inferences “where a party fails without satisfactory explanation to produce any document requested.”; ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 21.3

<sup>291</sup> *Supra* n244 Haagen, 1044

<sup>292</sup> *Supra* n79 Hörnle, 125; UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session*, (New York, 21-25 May 2012), 7 June 2012, A/CN.9/744, para. 111; Article 3(3) of the EU Directive on Unfair Terms in Consumer Contracts and its accompanying annex at Point (q) requires that consumers cannot be expected to bear the burden of proof which, according to the applicable law, should lie with the other party; An example of a proof burden reversing law is Article 5 (3) of EU Directive 1999/44/EC of the 25<sup>th</sup> May 1999 on the Sale of Consumer Goods and Associated Guarantees of (OJ L171/12 of 7) as amended by the EU Consumer Rights Directive 2011/83/EU, which provides that any defect which becomes apparent within six months of the sale of the goods is presumed to have existed at the time of the sale

<sup>293</sup> *Supra* n289

<sup>294</sup> *Supra* n137 Schmitz, 57; *Supra* n18 Park, 28-29; cf Ware, S.J., (2001), “Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements”, 2001 *Journal of Dispute Resolution* 89, 96-97

<sup>295</sup> For example, under English Civil Procedure Rules, Practice Direction 31A(2), disclosure is subject to the tests of reasonableness and proportionality and is based on the value and type of the claim and the complexity of the case (under Rule 1.1(2)(c)); *The Rules on the Taking of Evidence in International Commercial Arbitration*, 1999, International Bar Association, Article 3(3) – requests must identify either a single document or a narrow and specific category of documents, coupled with a description of their relevance and materiality to the outcome of the case; *Supra* n280 Kramer, 193-196; Rivkin, D.W., (2008), “Towards a New Paradigm in International Arbitration – The Town Elder Model Revisited” 24 *Arbitration International* 375

<sup>296</sup> *Supra* n4 Kaufmann-Kohler, 1326; *Ibid.*, IBA Rules

<sup>297</sup> Elgueta, G.R., (2011), “Understanding Discovery In International Commercial Arbitration Through Behavioural Law and Economics: A Journey Inside the Minds of Parties and Arbitrators”, 16 *Harvard Negotiation Law Review* 165, 172-176

<sup>298</sup> *Supra* n61 Hörnle, 200 – Provides a study showing that within a sample of 9,008 UDRP cases, further document requests were only made 0.42% of the time; *Supra* n107 Thornburg, 201

examination of oral evidence.<sup>299</sup> These practices are accepted as a method for keeping costs and timescales minimised. Furthermore, documents-only arbitration is suited to claims where relatively simple fact determinations need to be made.<sup>300</sup> Given the likely demarcation of types of claim within mandatory consumer arbitration, it is likely that the simple types of claim with which we are dealing are entirely suited to documents-only arbitrations.<sup>301</sup> There are two challenging aspects however. Firstly, national arbitration legislation seems to vary on the right of parties to call for a hearing, although in most jurisdictions it tends to be a waivable right.<sup>302</sup> The UNCITRAL Model Law only permits a prior agreement to dispense with hearings (such as contained in the ODR provider's standard rules) to be altered on agreement of *both* parties.<sup>303</sup> In the avoidance of driving up costs and dilatory tactics against weaker parties, this system would be preferable also in the ODR context and should be the standard under ODR provider rules.<sup>304</sup>

The second concern is a due process issue with documents-only procedure generally. Many would argue, especially those of a common law predisposition,<sup>305</sup> that oral testimony of parties and witnesses provides a fundamental truth-seeking role in adjudicatory proceedings.<sup>306</sup> It is certainly more challenging to evaluate the veracity of evidence through the production of only written materials.<sup>307</sup> This might be seen as an issue when one considers that the consumer or small-scale trader will *often* bear the burden of proof and any 'tie' in terms of the weight of the written evidence could go in favour of the seller.<sup>308</sup> Nevertheless, given the severely limited role for truth-seeking within consumer arbitration as well as the possibility of proof burden reversing, it seems unlikely that online hearings, such as through videoconferencing,<sup>309</sup> would become the norm.<sup>310</sup> Although, this would naturally depend on the value of the claim.

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<sup>299</sup> *Supra* n228 Rubino-Sammartano, 838; *Supra* n4 Protopsaltou *et al*, 166; Rubino-Sammartano, M., (2000), "The European Court of Arbitration and its 1997 Rules", 11 *ARIA* 200, 204; *Supra* n22 Welser & Klausegger, 261; eg *InterCarbon Benuuda Ltd. v. Caltex Trading and Transport Corporation*, (19<sup>th</sup> January 1993) XIX Yearbook Commercial Arbitration 802 (US) – "Hearings will not be required just to see whether real issues surface"

<sup>300</sup> *Practical Guideline 5: Guidelines for Arbitrators regarding Documents-Only Arbitrations*, Chartered Institute of Arbitrators, Point 3 – "A documents-only procedure ... can also be appropriate where the dispute involves simple issues of fact and opinion"; *Supra* n22 Welser & Klausegger, 268-269, 274; *Supra* n217 Serbest; *Supra* n271 Abraham, 24

<sup>301</sup> *Supra* n107 Thornburg, 206; *Supra* n217 Serbest, 340; Whitley, A.D., (2010), "Is There a Better Way to Resolve Smaller Disputes?", *Texas Construction Journal*, 10<sup>th</sup> January 2010, ([http://texas.construction.com/opinions/construction\\_law/2010/0101\\_ResolveSmallerDisputes.asp](http://texas.construction.com/opinions/construction_law/2010/0101_ResolveSmallerDisputes.asp)); *Supra* n127 Edwards & Wilson, 321

<sup>302</sup> *Supra* n4 Protopsaltou *et al*, 169; *Supra* n228 Rubino-Sammartano, 840; *Russian Oil Products Ltd v. Caucasian Oil Co. Ltd* (1928) 31 Lloyd's Report 109 (England & Wales); *Technor v. Ste Images de France*, (12<sup>th</sup> July 1971), 1973 *Revue d'Arbitrage*, 74 (France)

<sup>303</sup> Article 24(1) of the 1985 UNCITRAL Model Law of International Commercial Arbitration (as amended in 2006), for example reflected in section 24(1) of the Swedish Arbitration Act, Section 1047 ZPO, Article 182(3) of the Swiss Loi fédérale sur le droit International privé (LDIP), Article 1039(3) of the Dutch Burgerlijke Rechtsvordering, and Article 1694(2) of the Belgian Code Judiciaire; This model is also adopted in ICC Rules Article 25(6), LCIA Rules Article 19(1), and Article 17(3) of the UNCITRAL Rules of International Arbitration

<sup>304</sup> *Supra* n228 de Witt, 458

<sup>305</sup> *Supra* n4 Kaufmann-Kohler, 1327

<sup>306</sup> *Supra* n107 Thornburg, 205; *Supra* n61 Hörnle, 135

<sup>307</sup> *Supra* n106 Thornburg, 217-218

<sup>308</sup> *Supra* n107 Thornburg, 207; *Supra* n106 Thornburg, 218

<sup>309</sup> *Supra* n106 Thornburg, 219

<sup>310</sup> The UNCITRAL Rules did not anticipate any form of remote hearings; Hearings are rarely the norm in fast-track arbitration and are "virtually prohibited" under the UDRP, Rule 13 – *Supra* n106 Thornburg, 217; *Practical Guideline 5: Guidelines for Arbitrators regarding Documents-Only Arbitrations*, Chartered Institute

It is a commonly accepted due process principle that where an arbitrator is to inspect evidence they should do this in the presence of both parties, enabling the parties to guide and comment during the inspection. Perhaps in this instance it might also be advisable that such processes are conducted through some form of live videoconferencing technology with all parties present. The last draft of the UNCITRAL Rules operated solely under documents-only procedure and the EU Directive simply states at Article 9(1)(a) “*the parties [should] have the possibility, within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them.*”

Essentially this reinforces the point that more important than the right to an oral hearing is providing the parties with sufficient opportunity to comment and respond to all evidence raised during proceedings. In terms of procedural structure, it is likely that online consumer arbitration will work by front-loading,<sup>311</sup> *ie* by ensuring that the initial statement of claim and response to claim contain the fullest account within a reasonable word limit<sup>312</sup> and including any evidence such as written witness statements in an accompanying annex. This front-loading will help the arbitrators to properly identify the issues of the dispute at an early stage and may also encourage settlements between the parties as they become fully aware of each side’s position.<sup>313</sup> Following this, the appointed arbitrator should be able to request any further documents or to reverse any proof burdens. Finally, the parties should have at least one more opportunity to comment on *all* evidence raised before any final determinations are made.<sup>314</sup>

The use of written witness and expert statements is increasingly common in international arbitration,<sup>315</sup> especially within fast-track rules. For example, the European Court of Arbitration requests that witness statements are accompanied by a ‘*Statement of Truth*’ and provide a warning against possible criminal sanctions for false statements. Providing such a warning seems reasonable considering the diversity in perjury laws across jurisdictions that deal with witnesses providing false statements in arbitration,<sup>316</sup> although ultimately it is left to the tribunal to decide the veracity of any evidence.<sup>317</sup> Given the limited role for cross-examination in consumer arbitration, therefore, this demonstrates a further move away from common law styles of adjudication. Another key transition would be the fact that the neutral is likely to be more inquisitorial and to take a more active role in the procedure than the parties themselves.<sup>318</sup> This might include, for example, the appointment of any 3<sup>rd</sup> party

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of Arbitrators, Point 1.2 – “*Most of the consumer arbitration schemes administered by the Institute, and other consumer arbitration rules, require disputes to be resolved on documents only*”; *Supra* n67 Gilliéron, 318; *Supra* n64 Rule *et al*, 239, *Supra* n4 Protopsaltou *et al*, 166; AAA Consumer Due Process Protocol, Principle 12(1)

<sup>311</sup> *Supra* n217 Berger, 604-605

<sup>312</sup> *Supra* n185 Risse, 456; *Supra* n22 Welser & Klausegger, 261; *Techniques for Controlling Time and Costs in Arbitration*, Report from the ICC Commission on Arbitration, (ICC Publication No. 843, 2007), 11

<sup>313</sup> *Supra* n185 Earnest *et al*, 17

<sup>314</sup> *Supra* n61 Hörnle, 132

<sup>315</sup> *Supra* n39 Lew *et al*, Para 22.42; *Supra* n4 Kurkela & Turunen, 157

<sup>316</sup> *Supra* n4 Kurkela & Turunen, 164-165; *Supra* n9 Waincymmer, 920-921

<sup>317</sup> *Supra* n39 Lew *et al*, Para 22.45; IBA Rules on the Taking of Evidence, Rule 8(3) – “*The panel should determine the manner in which testimony is affirmed*”

<sup>318</sup> *Supra* n61 Hörnle, 138

witnesses or information providers (following agreement from the parties), who would likely be appointed and questioned by the neutral and not by the parties themselves.<sup>319</sup>

### e) Fees & Funding

Naturally, given the pre-occupation with maintaining extremely low costs in consumer low-value arbitration, the question about how any scheme is to be funded poses a dilemma. A key question is whether the merchants who opt into an online arbitration scheme should be required to pay more towards the arbitration than their customers.<sup>320</sup> Certainly in the United States, the common law doctrine of unconscionability operates to negate mandatory arbitration where the fees to the consumer are clearly unreasonable in contrast to the value of the claim or the cost of pursuing a similar claim in the courts.<sup>321</sup> Similarly, the EU Directive requires that ADR procedures are “*free of charge or available at a nominal fee for consumers*”.<sup>322</sup> This presents a real problem in ODR, however, for it is the merchants who currently must be convinced to sign up to an ODR procedure in the knowledge that the consumer has no alternative means of redress. Nominal fee arrangements can and do make sense in domestic ADR context, where the alternative of small claims litigation is a significant reality.<sup>323</sup> Nevertheless, in order to convince merchants to willingly adopt low-value cross-border ADR processes, there may be a strong argument for a fairer and more equal fee structure, backed by a due process safeguard against excessive fees for the consumer or against fee structures which in any way prevent the consumer bringing their claim.<sup>324</sup>

Some authors promote the idea of utilising government funding, as well as a role for not-for-profit organisations as ADR entities,<sup>325</sup> although this might be difficult to achieve considering the costs and potential demand for services.<sup>326</sup> Just as it has been in all other areas of ADR, be it domestic or international, there seems no reason why a competitive market of private entities should not be able to deliver a fair and affordable procedure, while still providing opportunities for public, semi-private and not-for-profit entities to also compete for services. Also, it is worth noting that the fees will likely be a set figure based on the value of claim, and will not be based on hourly rates or other factors, where they exceed the expectations of the parties.<sup>327</sup> Nevertheless, ODR providers will likely include terms to incur additional fees when further procedural processes are agreed by *both* parties, such as a video-conferenced hearing, a 3-party tribunal or appointment of an expert. The role of cost awards or fee-

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<sup>319</sup> *Supra* n9 Waincymer, 932-940 – Appointing experts is usually done by the tribunal in civil law jurisdictions and done by the party in common law jurisdictions; *Supra* n18 Park, 34-35

<sup>320</sup> *Supra* n61 Rogers, 378; *Supra* n64 Rule *et al*, 238; Abel, R.W., (2002), “The Unanswered Question from Green Tree Financial Corp. v. Randolph: How Much is Too Much Before the Costs of Arbitration Become a Barrier to Due Process?”, 56 *University of Miami Law Review* 1009; Schultz, T., “Does Online Dispute Resolution Need Government Intervention? The Case for Architectures of Control and Trust”, (2004) 6(1) *NC Journal of Law & Technology* 71, 72; AAA Consumer Due Process Protocol, Principle 6(1)

<sup>321</sup> *Brower v. Gateway 2000, Inc.*, 676 N.Y.S. 2d 569 (1st Dept. 1998); *Green Tree Financial Corp. v. Larketta* 531 U.S. 79 (2000), 92; *Cole v. Burns International Security Services* 105 F.3d 1465 (D.C. Cir. 1997) 1482-83; *Shankle v. B-G Maintenance Management of Colorado Inc.*, 163 F.3d 1230 (10<sup>th</sup> Cir. 1999), 1233-35

<sup>322</sup> EU Directive Article 8(c); UNCITRAL was yet to examine the issue of funding

<sup>323</sup> *Supra* n228 Rubino-Sammartano, 837; eg The CIArb - Ford Rules, guiding arbitrations between Ford and its customers provide a fixed registration fee of £100 per claim to consumers with the rest of the expenses born by Ford; *Supra* n320 Abel, 1028-1029; AAA Consumer Due Process Protocol, Principle 5

<sup>324</sup> *Supra* n118 Schmitz, 782; *Supra* n137 Schmitz, 54

<sup>325</sup> *Supra* n106 Thornburg, 230-231; *Supra* n61 Gibbons, 35

<sup>326</sup> *Supra* n110 Kao, 118

<sup>327</sup> *Supra* n61 Rogers, 378; *Supra* n137 Schmitz, 54; *Supra* n24 Carbonneau, 1209



shifting, and whether they could operate to reduce the fees for the successful party, may also be a matter of institutional variety,<sup>328</sup> although cost awards should perhaps enable a claimant to pay an uncooperative respondent's filing fee upfront and later reclaim it.<sup>329</sup>

#### *f) Applicable Law & Seat*

It has already been mentioned that arbitrators are likely to decide *ex aequo et bono* under many procedural rules.<sup>330</sup> Further, that mandatory consumer protection law should play some role within international low-value consumer arbitration given that such rules are intentionally devised to protect the interests of consumers as weaker parties to any contractual bargain and ensuring that protection is transposed into the transnational context *as far as practicable*.<sup>331</sup> In addition, the academic opinion that transnational legal rules should be applied within low-value consumer arbitration also attracts wide subscription.<sup>332</sup> Perhaps even leading to a new form of *lex mercatoria*, known as the *lex informatica*, wherein common principles and usages could become recognised. This “*transnationalism would increase the fairness of the system, by making it more predictable, less costly, thus more workable and providing greater access.*”<sup>333</sup> Given the likely demarcation of claim types, it may therefore become common to observe institutional rules invoking transnational principles, such as the Lando Principles,<sup>334</sup> and thereby avoiding complex questions of applicable law, as well as the imposed pre-selection of laws by a stronger party on to a weaker party.<sup>335</sup> Furthermore, by applying laws reached by sufficient unanimity amongst the international community, this prevents the inconsistency and unpredictability that could come from empowering inexperienced arbitrators to freely create their own principles of law,<sup>336</sup> which has been another key criticism which has been made of the UDRP.<sup>337</sup> Developing common norms, however, might require a higher burden on ODR providers to publish details of their awards (see *Transparency* below).

It is well-known that the applicable seat which provides the governing arbitration law in international arbitration is nowadays something of a “fiction”, where arbitrations rarely actually take place within the geographical boundaries of the applicable seat.<sup>338</sup> Given the delocalised nature of cyberspace, this detachment from physical location and the resulting

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<sup>328</sup> *Supra* n56 Drahozal, 759-760

<sup>329</sup> *Supra* n22 Welser & Klausegger, 275

<sup>330</sup> Rule 28 of the Better Business Bureau Consumer Arbitration Rules provides that “[a]rbitrators are not bound to apply legal principles in reaching what the arbitrator considers to be a fair resolution of the dispute”; Almaguer A. & Baggott R.W. (1998), “Shaping New Legal Frontiers: Dispute Resolution for the Internet”, 13 *Ohio State Journal on Dispute Resolution* 711, 726 – The original online dispute resolution service, Virtual Magistrate, said that it would apply a standard of “*reasonableness in light of all available information*”; *Supra* n107 Thornburg, 216

<sup>331</sup> *Supra* n61 Gibbons, 23-24; *Supra* n61 Cortés & de la Rosa, 411; *Supra* n118 Schmitz, 790; *Supra* n61 Hörnle, 69; *Guidelines For Consumer Protection in the Context of Electronic Commerce*, Organisation for Economic Cooperation and Development (OECD), (9<sup>th</sup> December 1999), 18

<sup>332</sup> *Supra* n228 de Witt, 452; *Supra* n64 Rule *et al*, 229

<sup>333</sup> *Supra* n117 Schultz, 163

<sup>334</sup> The Principles of European Contract Law (Lando Principles); The United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts were purposefully drafted for B2B contracts so as to avoid protective mandatory consumer laws, nevertheless they could still work as a base applicable law on to which consumers could argue the inclusion of their mandatory rights

<sup>335</sup> *Supra* n106 Thornburg, 213

<sup>336</sup> *Supra* n110 Schmitz, 211

<sup>337</sup> *Supra* n106 Thornburg, 211

<sup>338</sup> *Supra* n4 Kaufmann-Kohler, 1318

independence of parties to creatively select governing laws, is even more intensified.<sup>339</sup> Parties in commercial arbitration usually determine the seat in the arbitration agreement, failing party agreement it falls to be determined by the arbitrators.<sup>340</sup> However, acknowledging the party equalising role that due process protection should take in international low-value arbitration, it would be reasonable to expect that merchants should not be able to pre-select the governing law of the arbitration, as this could empower them to select rules of governing law unfavourable to the consumer or weaker party.<sup>341</sup> de Witt has suggested implementing asymmetric jurisdictional rules, so that the consumer's domicile is routinely the place of arbitration.<sup>342</sup> Arguably this does give the consumer easier access to take an action for set-aside.<sup>343</sup> However, it could create complex and time-consuming definitional challenges for arbitrators. Some commentators go even further and suggest that online arbitration be completely transnational and free of any curial law,<sup>344</sup> although this creates uncertainty in terms of enforcement and recognition given the lack of 'awarding' state.<sup>345</sup> Providing the arbitrator with authority to decide, depending on the case circumstances, could also create unpredictability, extend timescales and risks perceptions of bias. An alternative may be based on reciprocity between states so that only when the elected place of arbitration subscribes to the same standardised set of procedural laws governing international consumer arbitration can resulting awards become enforceable.

### *g) Transparency*

Given that the UNCITRAL Guidelines were hastily negotiated as the clock was running down, their effort to address the important issue of arbitration procedural transparency left many gaps and uncertainties. For example, they required vendors simply to disclose the details of their contractual relationship with their ODR provider, but did not give any detail on the types of information that should be included.<sup>346</sup> Does this mean merely disclosing the existence of the contractual relationship? Or does it go further and include matters such as the monetary value of the contract. Or, notice of any modified procedural rules that favour the vendor? Or, the number of awards that the ODR provider has given in favour or against vendors? There were two other transparency rules contained in the UNCITRAL Rules. However, one is non-obligatory ("*the vendor may wish to publish anonymized data*")<sup>347</sup> and the other is a hortatory recommendation which provides very little ("*All relevant information should be available on the ODR administrator's website...*").<sup>348</sup>

By contrast, Article 7 of the EU Directive provides a fair level of detail on the level of transparency required by consumer ADR entities in the EU.<sup>349</sup> The EU transparency rules

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<sup>339</sup> Haloush, H.A., (2008), "Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches", 42 *International Lawyer* 1129

<sup>340</sup> For example: UNCITRAL Arbitration Rules, Art. 12; ICC Arbitration Rules, Art. 14(1); Distinguish however the LCIA Arbitration Rules, Art. 16(1), which sets London as the place of arbitration in cases of non-agreement

<sup>341</sup> *Supra* n122 Philippe, 572

<sup>342</sup> *Supra* n228 de Witt, 452

<sup>343</sup> *Supra* n4 Protosaltou *et al*, 168

<sup>344</sup> Yu, H. & Nasir, M., (2003), "Can Online Arbitration Exist Within the Traditional Arbitration Framework?", 20 *Journal of International Arbitration* 455, 463-64; *Supra* n110 Schmitz, 211

<sup>345</sup> *Supra* n228 de Witt, 461

<sup>346</sup> UNCITRAL Guidelines, para. 10

<sup>347</sup> UNCITRAL Guidelines, para. 11 [Emphasis added]

<sup>348</sup> UNCITRAL Guidelines, para. 12

<sup>349</sup> EU Directive Article 7

include publication of annual statistical data relating to the types of claims received, the average time taken to resolve disputes and the rate of compliance, along with details including the entities' fees, costs, procedural rules, available languages and information about their neutrals.<sup>350</sup> Accessibility to internal information of ODR providers not only provides vital empirical data to the relevant legislatures and governmental bodies, but further it provides a far fairer system of ODR for the parties: by the parties being able to access the procedural provisions, training processes, previous awards, fee structures and other statistical data of existing ODR providers, they are likely to have a better understanding of the merits of their case and of using various providers, leading to higher settlement rates and further removing repeat player advantages for stronger parties.<sup>351</sup>

Certainly, the publication of decisions rendered under the UDRP has been a successful and commendable practice.<sup>352</sup> Nevertheless, there is still a balancing act to be done: to expect ODR providers to publish details on every award (with party names removed) might be unrealistic given the potential case volumes. Furthermore, many might argue for upholding arbitration's confidential nature.<sup>353</sup> Certainly there is a feeling that *important* decisions made through consumer arbitration should be made public and shared with consumer protection agencies, to keep consumers informed and to prevent wide trading misconduct.<sup>354</sup> Currently the EU Directive only requires ODR providers to report "*any systematic or significant problems that occur frequently... in order to raise traders' standards and to facilitate the exchange of information and best practices.*"<sup>355</sup> Whether this has struck a fair balance between confidentiality and maintaining transparency remains to be seen. However, there is one vital rule that could be said to be missing from the Directive. Unlike in commercial arbitration,<sup>356</sup> consumer and low-value ODR providers should be required to be fully transparent in their appointments process and how they recommend neutrals to each claim.<sup>357</sup> Currently, the EU Directive Article 7(c) requires providers to publish "*the natural persons in charge of ADR, the method of their appointment and the length of their mandate*". But it does not seem as though the term 'method of appointment' sufficiently covers the methodology by which neutrals are assigned individual cases.

#### *h) Other Due Process Issues*

The utility, feasibility and enforceability of US style **class actions** in general international arbitration, wherein groups of 'smaller parties' can joinder into the arbitration as a single party, still remains unresolved.<sup>358</sup> The advantages of class actions to weaker parties such as

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<sup>350</sup> EU Directive Article 7; *Recommended Best Practices for Online Dispute Resolution Providers*, American Bar Task Force On Ecommerce and ADR, 4 – Providing existing and previous employment details about neutrals helps parties to identify potential conflicts of interests

<sup>351</sup> *Supra* n122 Philippe, 566; *Supra* n79 Hörnle, 133; *Supra* n118 Schmitz, 788-79; *Supra* n228 de Witt, 460-461; *Supra* n67 Gilliéron, 317; *Supra* n110 Schmitz, 238-241; *Supra* n61 Cortés & de la Rosa, 430

<sup>352</sup> *Supra* n107 Thornburg, 211

<sup>353</sup> *Supra* n79 Hörnle, 124; *Supra* n61 Hörnle, 144-145, 153

<sup>354</sup> *Supra* n61 Cortés & de la Rosa, 420 – Consumer protection agencies should also be able to report awards; *Supra* n79 Hörnle 139-141; *Supra* n151 Cortés, 37

<sup>355</sup> EU Directive Article 7(2)(b)

<sup>356</sup> *Supra* n25 Lévy, 48

<sup>357</sup> *ICC Best Practices for Online Dispute Resolution (ODR) for B2C and C2C Transactions*, Task Force on Consumer Policy for E-Business, International Chamber of Commerce, 5; *Recommended Best Practices for Online Dispute Resolution Providers*, American Bar Association Task Force on Ecommerce and ADR, 5; *Supra* n110 Kao, 117; *Supra* n106 Thornburg, 221 – Points this out in the context of the UDRP

<sup>358</sup> Dreyfuss, R.H., "Class Action Judgment Enforcement in Italy: Procedural 'Due Process' Requirements", 10 *Tulane Journal of International and Comparative Law* 5; Weidemaier, W.M.C., (2007), "Arbitration and the

consumers are obvious, for they enable parties to collectively amass enough finance to bring a more forceful action against larger corporations and avoid multiple cases where only a single case would suffice.<sup>359</sup> Nevertheless, despite their potential advantages, it appears unlikely that class actions will be a feature of international online consumer arbitration. Firstly, forming a collective action by bringing together a vast group of geographically diverse e-consumers would be incredibly difficult, almost impossible, task. Secondly, the very goal of ODR procedure design is to ensure that smaller parties can bring fair and successful actions against larger parties without the need for collective financial resource. Finally, the narrow demarcation of the types of claim which are eligible to mandatory online procedure will mean that the only types of claim will be low-value and low-complexity.

There is a general expectation that the process should be simple enough that parties will not need legal **representation**, but that if they do wish to, they should be permitted to appoint anyone including non-legally qualified persons.<sup>360</sup> Some debate has centred on the proper **form of award** in international consumer arbitration. Even if the New York Convention remains the primary instrument for cross-border enforcement, it is likely that courts could purposively interpret the “*authenticated original or certified copy*” requirement to include digitised awards and signatures contained in emails.<sup>361</sup> Similarly, the EU Directive only requires that awards are available on a “durable medium”,<sup>362</sup> which would include email-based awards.<sup>363</sup> It also seems possible that **basic award reasoning** will become standard practice.<sup>364</sup> Not only would it increase the chances of enforcement, but it would assist in raising levels of voluntary compliance and would further serve to quell any perceptions of bias or unfairness in the procedure.<sup>365</sup>

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Individuation Critique”, 49 *Arizona Law Review* 69, 90; Sternlight, J., (2000), “As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?”, 42 *William and Mary Law Review* 1

<sup>359</sup> Sternlight, J. & Jensen, E., (2004), “Using Economic Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?” 67 *Law and Contemporary Problems* 75; Bland, F.P. & Prestel, C., (2009), “Challenging Class Action Bans in Mandatory Arbitration Clauses”, 10 *Cardozo Journal of Conflict Resolution* 369; Sternlight, J.R., (2006), “Consumer Arbitration”, in *Arbitration Law in America: A Critical Assessment*, 127-184, Cambridge University Press, 175

<sup>360</sup> *Supra* n4 Kurkela & Turunen, 191; EU Directive Article 8(b)

<sup>361</sup> *Supra* n127 Edwards & Wilson, 323; *Supra* n228 de Witt, 460-461; *Supra* n110 Schmitz, 211; Article 31 of Vienna Convention on the Law of Treaties requires that the New York Convention is interpreted in good faith, in the light of its object and purpose; Also note the potential role of Article 8 United Nations Convention on the Use of Electronic Communications in International Contracts where this has been adopted; Also UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on Electronic Commerce, the EU Directive on Electronic Commerce and the U.S. Electronic Signatures in Global and National Commerce Act all contain provisions seeking a purposive construction of written requirements in the e-commerce context; *Lombard-Knight and another v. Rainstorm Pictures Inc*, [2014] EWCA Civ 356 (England & Wales) – Presenting a photocopy of the agreement to the court is sufficient

<sup>362</sup> EU Directive Article 9(c); However, many jurisdictions have been known to request a physical copy of the award – van Houtte, H., (2005), “The Delivery of Awards to the Parties”, 21 *Arbitration International* 177; *Supra* n64 Patrikios, 76

<sup>363</sup> *Supra* n114 Patrikios, 134

<sup>364</sup> UNCITRAL Rules, Draft Article 7(5); EU Directive Article 9(c); *Supra* n107 Thornburg, 212; *Supra* n64 Rule *et al*, 239; AAA Statement of Principles, Principle 15; Better Business Bureau Consumer Arbitration Rules, Rule 28; *Supra* n61 Hörnle, 141-142; *Disputes in Cyberspace: Online Dispute Resolution for Consumers in Cross-Border Disputes - An International Survey*, (2000), Consumers International, 19

<sup>365</sup> Fuller, L., (1978), “The Forms and Limits of Adjudication” 92 *Harvard Law Review* 353, 378-388; *Supra* n30 Kronke *et al*, 376; *Supra* n24 Carbonneau, 1222; *Supra* n22 Welser & Klausegger, 272

The correct form of **arbitration agreement** in online transactions will be a matter for later debate.<sup>366</sup> The EU Directive requires that where consumers agree to enter into arbitration post-dispute, that they are informed of its binding nature and that it would remove their freedom to pursue court action, and “*specifically accept this*”.<sup>367</sup> However, if certain types of narrow pre-dispute arbitration agreements were ever to become binding on small-scale traders and consumers in the EU, then some might argue for a requirement that such consumers *specifically and separately* agree to the terms of the arbitration agreement at the point of sale, separate to the merchant’s standard terms.<sup>368</sup> For example, consumer arbitration agreements in Germany must be contained in a separate document that is signed by the consumer.<sup>369</sup> Similarly, in the US, the AAA Due Process Protocol recommends that consumers should also have “*clear and adequate notice*”, but accepts relative flexibility depending on the type of contract negotiation (*eg* standard-term compared with face-to-face).<sup>370</sup> Whether the practice of providing an additional stage in a website’s buying process, informing consumers of an arbitration agreement, would be widely adopted by e-merchants across the EU may be doubtful.<sup>371</sup> This further casts uncertainty on whether mandatory arbitration can ever be possible in the EU and, accordingly, whether such a consumer ODR framework could ever become fully-fledged.

## VI. Conclusion

It has become apparent throughout the research conducted in this paper that providing firm answers to the questions of due process within international online consumer arbitration is an almighty task. It is such a vast and unpredictable area of transnational legal development that it will only create many academic debates in the decades to come. In the meantime, it seems only possible to provide conjectural discussion on what may or may not become important due process debates in the future, once fully-fledged regional and international low-value dispute resolution frameworks are in place – indeed if they ever can be. The direction taken by UNCITRAL in their final few sessions was instead to focus on the other option, raised in Section III, of non-legally binding ODR processes but which are virtually enforced via private online enforcement mechanisms.<sup>372</sup> The development of effective online enforcement mechanisms therefore, and how these will be meta-governed on a transnational basis by

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<sup>366</sup> The “in writing” requirement of the New York Convention is perhaps less of an issue, see n342 above; cf *supra* n61 Rogers, 368

<sup>367</sup> EU Directive Article 9(2)(c) and 10(2); AAA Consumer Due Process Protocol, Principle 11

<sup>368</sup> EU Directive Preamble Paragraph 47 also requires that where a trader does commit to using an ADR entity, that the details and contact information of that ADR entity are made easily available to their customers; *Supra* n118 Schmitz, 780; *Supra* n134 Pittman, 869-871; *Supra* n358 Weidemaier, 87; *Supra* n137 Schmitz, 40, 53; Sein, K., (2010), “Protection of Consumers Against Unfair Jurisdiction and Arbitration Clauses”, XVIII *Juridica International* 54, 55; *Mostaza Claro v Centro Movil Milenium*, CJEU Case C-168/05, (26<sup>th</sup> October 2006) – the ECJ determined that the consumer could still later claim the arbitration agreement was unfair in court, even though they were originally given 10 days notice to repudiate the arbitration agreement and take legal action in court

<sup>369</sup> Zivilprozeßordnung [ZPO] § 1031(5); *Supra* n61 Rogers, 368; *Supra* n61 Cortés & de la Rosa, 429

<sup>370</sup> Hillman, R.A. & Rachlinski, J.J. (2002), “Standard Form Contracting in the Electronic Age”, 77 *New York University Law Review* 429, 459-461; *Supra* n61 Rogers, 368; AAA Consumer Due Process Protocol, Principle 11

<sup>371</sup> *Supra* n137 Schmitz, 45-46; Schmitz, A.J., (2010), “Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms”, 15 *Harvard Negotiation Law Review* 115 – Sheds doubt on whether disclosure of details of arbitration agreement would positively impact on consumer buying behaviour

<sup>372</sup> UNCITRAL, *Online dispute resolution for cross-border electronic commerce transactions*, Submission by Colombia and the United States of America, Note by the Secretariat, 30 November 2015, A/CN.9/WG.III/XXXII/CRP.3

public regulators, is another key question for future research.<sup>373</sup> While it appears likely that intermediaries (payment providers and credit and debit card providers) and websites (eg eBay, Amazon, Facebook) will play an ever-increasing role in managing small-scale consumer disputes, for those growing millions of cross-border claims outside of this, which are also too small in value and complexity to be suited to standard international arbitration providers (eg below €10,000), there is now a pressing need for a cheap, expedient and efficient online solution. Hopefully this paper has provided useful predictions and perspectives on the likely procedural rules and fairness requirements within the future online arbitration industry.

There are several other due process issues which are relevant in the context of low-value arbitration, but which were beyond the restricted scope of this paper, for example the serving of proper notice,<sup>374</sup> the language of proceedings<sup>375</sup> and the potential role of appeals & judicial review.<sup>376</sup> However, the research conducted here has hopefully consolidated some of the key issues in the debate and has provided, in some instances, useful recommendations to guide the development of international low-value arbitration. These findings can be summarised as follows:

- Due process as enforced under traditional commercial arbitration relies too much on the operation of party autonomy and the freedom of parties to invoke or remove due process principles through private negotiation. This would not be satisfactory in the context of consumer and low-value arbitration given the significant inequality of bargaining power between parties and the likely freedom of stronger corporations to invoke unfair procedural rules in standard terms.
- The impending EU ODR scheme, with its Principle of Liberty and the right of parties in consumer contracts to opt for court processes when already tied to an arbitration agreement, is unlikely to deliver a viable solution to the currently low take-up of ODR. Both parties must be compelled into arbitration otherwise either party will be at liberty to avoid resolution processes altogether given the lack of any alternative redress.
- Unless the EU can find a way to asymmetrically compel merchants into binding ODR processes without significant costs to the economy, new legislation may be needed to control consumer arbitration transnationally. This will provide higher due process protections than the New York Convention and, through such due process protections, will permit certain ‘simple’ types of claim arising from consumer contracts to be mandatorily subject to new arbitration laws.
- Parties within the new arbitration scheme will have to accept a severely diminished role of “truth-seeking” within any arbitration, given the overpowering objectives of speed and affordability. Nevertheless, due process principles should operate to provide an *equal*

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<sup>373</sup> Eg MacCarthy, K., (2010), ‘What Payment Intermediaries are Doing about Online Liability and Why It Matters’, 25(2) *Berkeley Technology Law Journal* 1037; Reidenberg, J.L., (2003), ‘States and Internet Enforcement’, 1 *University of Ottawa Law & Technology Journal* 213

<sup>374</sup> *Supra* n61 Hörnle, 128-131, 197-198; *Supra* n79 Hörnle, 127; *Supra* n3 Strong, 57-62; *Supra* n61 Cortés & de la Rosa, 429-430; *Supra* n30 Kronke, 241; *Supra* n4 Kurkela & Turunen, 187; *Unión de Cooperativas Agrícolas Epis-Centre v. La Palentina SA*, (17<sup>th</sup> February 1998), XXVII Yearbook Commercial Arbitration 533 (2002), 538 (Spain)

<sup>375</sup> UNCITRAL Rules, Draft Article 15; EU Regulation Article 9(3) and (4); EU Directive Article 7(h); *Supra* n79 Hörnle, 129; *Supra* n61 Hörnle, 207-209; *Supra* n61 Cortés & de la Rosa, 417; *Supra* n22 Welser & Klausegger, 267-268; *Supra* n30 Kronke, 251; *Supra* n27 Nariman, 244-245

<sup>376</sup> UNCITRAL Rules, Draft Article 7 (Accompanying Notes 33-38); *Supra* n110 Kao, 119; *Supra* n61 Hörnle, 162-167; *Supra* n214 Choi, 1238

procedure between the parties and to avoid any repeat player advantages accruing to more powerful parties.

- There is likely to be the imposition of relatively strict time limits within the scheme, with sufficient flexibility for the arbitrator extend time limits dependant on clearly defined circumstances.
- Both consumer and merchant should be provided with an “equal voice” not only in the appointment of arbitrators to hear their claims, but also in the appointment of the ODR provider. Furthermore, merchants should not be at liberty to have unilateral controls over the procedure, applicable law and seat of arbitration.
- There is likely to be a diminished role for document disclosure. However, through the operation of proof burden reversing and specific document requests, there will still be still be a supporting role for document disclosure in providing some consumer protection.
- Parties will primarily operate under “documents-only” procedure, utilising personal statements, witness statements and inspection of goods as common means of evidence.
- On the whole, it is likely that a majority of decisions will be decided *ex aequo et bono*, given the constraints on time and costs. It remains uncertain the extent to which mandatory consumer protection laws will operate within such a scheme, although it seems likely that they will be included to the furthest extent practicable.
- ODR providers will need to be heavily transparent, providing regular publications on their rules, practices and training procedures, plus providing statistical data relevant to the types of claims they hear, the resulting awards and their fees. Further, they should be compelled to be completely transparent in how they recommend neutrals to each claim. However, whether they will be expected to publish every award remains uncertain.

More than anything the research in this paper has highlighted the almost insurmountable difficulty of the task ahead. It perfectly demonstrates some of the key reasons why, even in the light of two decades of concerted effort by international and regional institutions, we are still a very long way from the vision of an international ultra-low-value arbitration framework. Indeed, it even sheds doubt on whether we will *ever* be able to build such a system, given the ever-conflicting objectives of truth-seeking, time and costs. Without extensive truth-seeking procedures, any adjudicatory process is likely to be viewed as unfair - yet there seems to be no alternative. Perhaps our only choice remains “*rough justice – or no justice.*”<sup>377</sup>

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<sup>377</sup> *Supra* n117 Schultz, 160