ALTERNATIVE DISPUTE RESOLUTION METHODS

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Abstract

This article written by Teresa Rodríguez de las Heras Ballell, Associate Professor in Commercial Law at the Carlos III University of Madrid, Spain and the author of the book on legal aspects of E-Markeplaces El régimen jurídico de los Mercados Electrónicos Cerrados (e-Marketplace), clarifies the electronic commerce dispute resolution strategies, as well as the current trends, arbitration procedure, mediation and conciliation and how to prevent disputes.

Current trends

Dispute resolution mechanisms play a valuable role in facilitating commerce. The predictability of methods for resolving conflicts, the rationality of the criteria for jurisdiction or the submission of a dispute, the cost of the procedure, the enforceability of resolutions and the perception of that the decision-making body is independent are decisive factors contributing to the legal and other certainty associated with commercial transactions. Where transactions take place in an electronic environment, in addition to the difficulties associated with cross-border dispute resolution are those deriving from the fact that the acts take place in a space with no obvious geographical connection enabling the usual criteria of jurisdiction to be applied in any predictable manner.

In consequence, as electronic commerce grew in terms of the number and volume of transactions, two basic strategies have gradually been developed amongst economic operators.

On the one hand there is recourse to extrajudicial dispute resolution methods (ADR, Alternative Dispute Resolution) intended to achieve greater streamlining, greater flexibility, a high level of sector specialisation, compliance based on mutual agreement and an effective balance of interests. In line with this, it is increasingly usual to provide for arbitration and mediation as first-stop methods of resolving disputes1.

At the same time we have the introduction of online dispute resolution mechanisms with the primary objective of capitalising on the advantages as regards cost reduction, efficiency, speed and ubiquitous availability associated with new technology. This has led to ODR

1 In the European Union, the most fruitful development in institutional terms has been in consumer protection, family law and industrial relations, creating a model of practice and response which, with the appropriate adaptations, is believed to be a good starting point for drawing up ADR initiatives in civil and commercial matters. See the Green paper on alternative dispute resolution in civil and commercial law, presented by the Commission, COM (2002) 196 final, p. 17 et seq.
(Online Dispute Resolution) methods being developed and used in various sectors of the economy. ODR methods are electronic dispute resolution mechanisms suited to resolving disputes arising in electronic and even non-electronic dealings. That is to say, ODR has not come into being linked to closed electronic environments, but to open electronic environments, such as the Internet. Indeed, ODR methods seek to tailor the dispute resolution process to the cross-border and decontextualised nature of the Internet.

Arbitration

Arbitration is an extrajudicial procedure by which a dispute is submitted, by agreement of the parties, to an arbitrator or arbitral tribunal which will make a decision on the dispute which will be binding on the parties.

Unless recourse to arbitration is mandatory under the applicable legislation, which is indeed exceptional, what distinguishes arbitration is the fact that it is voluntary. It is the parties who are able to decide to submit to arbitration all disputes or certain disputes which have arisen or may arise in the context of a particular relationship. This agreement may be in the form of an arbitration agreement in a contract or of a separate jurisdiction agreement. If the arbitration clause forms part of a pre-formulated standard agreement, regard must be had to the rules governing general conditions for the protection of those entering into pre-formulated standard form agreements (generally also consumers) intended to ensure that they are aware of the clause and have expressly agreed to it, and to prevent unfair clauses.

Although submitting the dispute to arbitration depends on the wishes of the parties, the arbitrator's award is binding on them.

The appointment of the arbitrators and procedural rules can also be determined by agreement between the parties. However, nationally and internationally, specialised sectors already have bodies responsible for certain arbitration proceedings and have uniform rules of procedure.

There is substantial and varied legislation in comparative law. In the international arena, a benchmark is to be found in the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) and its 1976 Arbitration Rules, currently under review.

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2 In this context, under open environment parameters, the first on-line dispute resolution pilot projects were devised: The Virtual Magistrate Project, the University of Maryland Online Mediation Project, The University of Massachusetts Online Ombuds Office.

3 For example, internationally, in relation to intellectual property disputes, and specifically domain names, WIPO (the World Intellectual Property Organisation) has a list of arbitrators and has drawn up Arbitration Rules. Nationally, one often finds, amongst others, specialised consumer arbitration panels.
which include, as well as an arbitration procedure, a model arbitration clause to be included in agreements, and provisions relating to the arbitral award.

**Mediation or conciliation**

Mediation is an extrajudicial procedure under which the parties concerned request a third party or third parties (the "conciliator" or "mediator"), to assist them in their attempt to reach an amicable agreement in a dispute deriving from a specific contractual relationship. The conciliator seeks to bring together the positions of the parties in dispute but will have no power to impose a solution to the controversy on the parties. Unlike an arbitrator, a mediator or conciliator does not make decisions.

It is the parties who agree to submit their dispute to mediation, and who, in principle, set the procedure, either directly or by referring to a set of rules. It is also a discreet and confidential process. They can abandon the process at any time if it no longer accords with their interests.

The rules governing mediation, if there are any, sometimes depend on the nature of the dispute (a family or school matter, for example). In such case, there may be specific rules which are applicable or bodies specialised in certain disputes. The 2002 UNCITRAL Model Law on International Commercial Conciliation and the 1980 Conciliation Rules are useful references in international commercial disputes.

**Preventing disputes**

It is stating the obvious to say that the best way to prevent disputes and reduce levels of conflict is to comply fully with all precontractual disclosure and transparency obligations and to perform contractual terms properly in accordance with good faith and fair commercial practice. Setting up wide-ranging disclosure mechanisms, making the negotiation process transparent, designing simple contracting procedures enabling errors to be detected and corrected, drafting contracts clearly and establishing formulae to monitor proper compliance with contractual obligations are self-evident strategies and much to be recommended in order to minimise the probability of disputes in commercial relationships.

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4 For example, internationally, in relation to industrial and intellectual property disputes, WIPO (the World Intellectual Property Organisation) has a list of expert Mediators and has drawn up Mediation Rules.
That notwithstanding, a long list of good practices is not always capable of eliminating every future dispute. Indeed, provision for appropriate, flexible and effective dispute resolution mechanisms is precisely part of a proper set of good practices.

Disputes arising in the context of electronic commerce entail a series of factors which call for recourse to more flexible, more streamlined and less costly dispute resolution mechanisms which, by ensuring a degree of discretion, prevent damage to reputation and are better adapted to international transactions. It is therefore desirable to use extrajudicial mechanisms such as arbitration and mediation and other alternative forms of dispute resolution which incorporate the benefits of using electronic means.

**Resolving disputes: strategies**

1. **Establishing internal initial dispute resolution mechanisms.** Setting up in-house systems for resolving disputes discreetly and quickly, informally and generally amicably, is an excellent strategy for generating confidence and loyalty in those involved and reducing damage to reputation. An electronic marketplace, platform or auction site can design its own arrangements (whether compulsory or voluntary) which, serving as a first phase in bringing the parties together and seeking an agreed solution, means that disputes generated within that environment can be resolved without recourse to a court or arbitrator. Use of these systems does not bar or restrict use of other judicial or extrajudicial mechanisms to resolve disputes arising between those participating in the market, but merely facilitates agreement, affording speed, efficiency and confidentiality.

These internal dispute resolution methods can take various forms according to the type of market, the nature of those participating in it and the frequency and quantity of transactions. In order to benefit from the advantages of the electronic environment, they usually take the form of ODR. In that way, added to the many advantages associated with ADR – speed, effectiveness, confidentiality, professionalism, flexibility –, one has the efficiencies deriving from electronic means when designing ODR, Online Dispute Resolution methods.

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6 Expert systems such as Cybersettle, specialising in financial disputes Cybersettle (www.cybersettle.com), SmartSettle (www.smartsettled.com), or Square Trade’s “Direct Negotiation” software.
For example, in the case of eBay, under an agreement with SquareTrade.com, the system has two phases for resolving disputes between buyers and sellers.

a). First, a direct, web-based negotiation system, completely free of charge, is offered. In line with the function they perform here, ODR methods have been described graphically as four-hander models in which, alongside the neutral third party typical of ADR, a “fourth party” appears, the IT system. In fact, the technological architecture on occasion becomes the dominant presence, sometimes "replacing" intervention by the impartial third party. These automatic negotiation systems – blind bidding, blind negotiation or electronic settlement negotiation – are not technically dispute resolution mechanisms in the true sense but merely electronic "facilitators" of direct negotiation between the parties. However, from a strategic point of view they play a valuable role in generating confidence and providing a quick and, in the majority of cases, free, mechanism and, above all, one which is enormously discreet.

b). If the parties are not successful in the negotiation phase, they have the option of resorting to the mediation system offered by the marketplace on payment of a fee.

2.- If one elects to include arbitration or mediation clauses in agreements, complying with the rules governing pre-formulated standard agreements with general conditions – which all agreements for access and use of electronic marketplaces, auction sites and trading platforms usually are. If the contracting party is a consumer, although, on occasion, it may also be another person acting in the course of a trade or profession, the rules governing general conditions mean that certain measures must be taken to ensure that the contracting party is informed of the terms of the contract, has the opportunity to review it, expressly accepts it and has access to a copy of it. Under the applicable legislation it will be necessary also take into consideration whether this kind of clause is admissible or is regarded as unfair and, therefore, void. One should be guided on this point by the model arbitration or mediation agreements drawn up by a number of international organisations (for example, the United Nations (UNCITRAL) or WIPO).

3.- If the service provider is a member of a dispute resolution system (consumer arbitration, for example), it is important to make this fact properly visible since it increases confidence in the transaction. This is done using stamps or certificates in a prominent place on the website, at all times before and during the transaction.

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7 They fall outside the definition of alternative dispute resolution, defined as out-of-court dispute resolution processes conducted by a neutral third party, since they involve no human intervention. Green paper on alternative dispute resolution in civil and commercial law, presented by the Commission, COM (2002) 196 final, note 1, p. 6, which refers specifically to the "automatic negotiation systems" with no human intervention, proposed by the ISSPs.
4.- If the service provider has its own Code of Conduct or has signed up to a general Code of Good Practice for dispute prevention and resolution, publicising this fact and making it properly visible.

5.- Having preventive market mechanisms. Since, once again, it is obvious that the best strategy is to prevent the dispute, alongside all the strategies described above, service providers, especially if they are electronic trading marketplaces or platforms, can put in place other, preventive, market monitoring mechanisms to mitigate the level of disputes. Ratings can be introduced which rank the solvency and reliability of participants in the market according to the mark allocated by other participants when they contract with each other. In this way the probability of disputes arising with the most problematic participants is reduced. The marketplace manager itself can also devise supervision mechanisms so that, if a participant fails to comply with any of the rules of the marketplace (Rules Book), the manager penalises it by suspending access, expulsion or, for example, increasing its charges. This generates confidence that the purchasing environment is secure and regulated.