



## Online Consumer Dispute Resolution and the ODR Practice in Taiwan – A Comparative Analysis

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### Abstract

Online dispute resolution can be roughly categorised into online negotiation, online mediation, and online arbitration. Online negotiation means direct communication between the parties via electronic means. Online mediation involves a neutral third party communicating with and between the parties by online means to facilitate negotiation and encourage the parties to reach a settlement. Online arbitration involves a neutral third party, the arbitrator, with the competence to hear the arguments of the parties and make a decision on the merits of the dispute. In online arbitration process, submission of documents, text-based hearings, and live hearings may be carried out via electronic communication over the internet. In ODR processes, certain principles have to be followed. The neutrals must be impartial and independent. The ODR services must be affordable for the parties. The dispute resolution process must be transparent. The proceedings must be fair. As far as effectiveness is concerned, the dispute resolution process should not be protracted beyond a reasonable period of time, and the result must be implemented effectively. In Taiwan, ODR can serve as an alternative to civil proceedings to avoid complicated legal issues and enhance consumer confidence. The Taiwanese laws do not prohibit the conducting of ADR processes over the internet. The legal status of electronic signature and electronic document in ODR proceedings is also recognised. There is no legal obstacle for ODR in Taiwan.

**Keywords:** E-commerce, Alternative dispute resolution, Online dispute resolution, ICANN, Electronic signature, Electronic document

### 1. Introduction

For many people today the use of internet has become as usual as an ordinary daily activity. According to a latest statistics in 2009, internet users' population has exceeded 1.5 billion, well over 23% of the entire population of the world. (Note 1) The nature of the internet, with the application of the world-wide web, has made it an ideal platform for commercial activities, including consumer transactions, between parties at distant locations. The convenience brought by B2C e-commerce has its positive impact. A consumer in Taiwan can purchase foreign goods from Amazon.com without travelling abroad. But B2C e-commerce also has its negative side. Disputes might arise under online transactions as well as under conventional offline transactions. Online disputes, especially online consumer disputes, might involve parties with different nationality, which might cause complicated issues of jurisdiction and applicable law should such disputes be submitted to the court of law of a specific country. (Note 2) As a result, the resolution of consumer disputes involving online transactions has become an important issue for e-commerce.

Major economies in e-commerce activities, such as the European Union (EU) and the United States (US), has long ago recognised that online consumer dispute resolution mechanisms help building up consumer confidence in e-commerce. As early as in 2000, the US Federal Trade Commission (FTC) and Department of Commerce (DOC) emphasised in a joint workshop that:

“This online marketplace also has created challenges; among them, how best to resolve disputes involving cross-border consumer transactions. Consumers must be confident that they will have access to redress for problems arising in the online marketplace.” (Note 3)

The European Commission of the EU also stated in 2001 that:

“The continuing development of new forms of commercial practices involving consumers such as electronic commerce, and the expected increased in cross-border transactions, require that particular attention be paid to generating the

confidence of consumers, in particular by ensuring easy access to practical, effective and inexpensive means of redress, including access by electronic means ... for e-commerce to reach its full potential consumer confidence must be enhanced ... by promoting access to alternative dispute resolution systems.” (Note 4)

The United Nations Conference on Trade and Development (UNCTAD) also recognised in its *‘E-Commerce and Development Report 2003’* that “[o]ne of the main challenge facing e-commerce is how to resolve cross-border disputes in the electronic business environment.” (Note 5) It further stated:

“traditional dispute settlement mechanisms may not provide effective redress in e-commerce transactions, there is a need to consider alternative dispute resolution (ADR) mechanisms that would provide speedy, low-cost redress for claims arising from online interactions ... [w]hen ADR takes place using computer mediated communications in the online environment, it is often referred to as online dispute resolution (ODR).” (Note 6)

Consumer International, an international consumer organisation, also made similar comment:

“The lack of effective consumer redress when the parties are in different countries is a major barrier to consumer confidence ... in order to facilitate the continued growth of electronic commerce, consumer confidence ... must be improved, and that in order to improve consumer confidence, the problem of consumer redress in the event of cross-border disputes must be resolved.” (Note 7)

It also pointed out that “[a]s the global consumer electronic commerce market grows, online versions of ADR specially designed for B2C disputes where the parties are geographically dispersed, are increasingly becoming available.” (Note 8)

In Taiwan, with a total population of 23 millions, the population of online users has already exceeded 10 millions by September 2008. (Note 9) The scale of online sales also reached the scale of approximately 8 billion US dollars, with an annual growth rate of 32%, and it was estimated to exceed 10 billion US dollars with a growth rate of 31% in 2009. (Note 10) Recognising that consumer e-commerce transactions would play an important part in Taiwan economy, the Consumer Protection Commission (CPC) of the Taiwanese government promulgated in late 2001 a *‘Guideline for Consumer Protection in E-Commerce’* (Note 11) with the goals of “ensuring fair transactions, protecting consumer’s interests, establishing consumer confidence in e-commerce, and promoting the development of e-commerce.” (Note 12) Dispute resolution mechanisms that can provide fair, effective, swift, affordable, and accessible redress are mentioned as one major elements of consumer protection in e-commerce. (Note 13)

It is under the above background that this article is inspired to explore the issues regarding the application of ODR in consumer e-commerce dispute, with an introduction of ODR practice in Taiwan. The second part of this article will commence with discussion of basic modes of ODR mechanisms, such as online negotiation, online mediation, and online arbitration, followed by introduction of specific programmes in practice. The third part will discuss the important principles regarding establishing fair and effective ODR mechanisms. The fourth part then will apply the developed standards to examine the effectiveness of current ODR programmes in Taiwan.

## **2. An Overview of Online Dispute Resolution**

A number of ADR models have been established since the outset of the development of out-of-court dispute resolution movement, (Note 14) the most fundamental techniques remain the same: negotiation, mediation and arbitration. (Note 15) Therefore, it is fairly understandable that ODR systems, which are generally ADR mechanisms adapted to the online environment and conducted by electronic means, could equally be sorted by the same categorisation, in combination with various online communication technologies.

### *2.1 Online negotiation*

Negotiation is the most primitive method of dispute resolution. (Note 16) It normally involves parties engaging in the direct exchange of arguments and bargaining over the differences between them. It is generally informal, without reference to specific law or legal proceedings, and there is no third party serving as a neutral entity to facilitate the process or adjudicate the merits. As the parties themselves are in total control of their negotiation process, there would be no external rule or outside interference. The parties can choose when, where, and how to negotiate. (Note 17) Due to these characteristics, the term ‘online negotiation’ could be seen as a reflection of the fact that the parties opt to communicate with each other via electronic means, such as email, instant messaging, or audio or video conferencing, instead of the conventional methods such as meeting in person or telephone communication. (Note 18)

An example of ODR process employing an online negotiation technique is the SquareTrade programme, which is regarded as a major player in the ODR business because of its partnership with eBay, the online auction website, and Sony, the electronics giant. (Note 19) SquareTrade’s aim is to provide a forum for consumers to settle or resolve disputes arising out of e-commerce or traditional transactions. (Note 20) SquareTrade does not charge consumer fees for the use of its online negotiation process, which can be initiated when a complaint is filed online by a disputant filling a form on its webpage. (Note 21) Once a complaint is filed, the opposite party will be informed by SquareTrade through

email. Both parties will receive a password for logging in to a secure webpage specifically created for their case. (Note 22) The parties then can participate in direct negotiation with an attempt to reach an agreement settling their difference via online communication. (Note 23) According to SquareTrade's estimation, approximately eighty percent of disputes filed are resolved by its online negotiation process. (Note 24) For the residual cases which are not settled by direct negotiation, SquareTrade offers online mediation as a back up procedure. (Note 25) Unfortunately, from 2008, SquareTrade has ceased its ODR service. (Note 26)

### *2.2 Online mediation*

Mediation can be described as 'assisted negotiation' in which a neutral third party is involved to facilitate the dispute resolving process. (Note 27) The third party, the mediator, undertakes the task of shuttling between the disputants, in an attempt to induce them to move towards settlement. (Note 28) By moderating and rationalising the exchanged arguments, a mediator works like a communication buffer between the disputants. However, a mediator can only propose or recommend possible solutions, rather than making decisions for the disputants. (Note 29) In other words, a resolution could only be reached by the consent of the disputants, rather than the compulsory imposition by the mediator. (Note 30)

By the use of online communication programmes, mediation can be conducted over the Internet, despite the physical absence of the parties. Whether online mediation is carried out through exchange of email, discussion group, instant messaging, audio or video conferencing, or a combination of some or all of them will depend on the design of the ODR systems and the choice of the parties.

As mentioned above, before 2008, SquareTrade also provided customers with an online mediation programme to resolve disputes not settled during the prior online negotiation process. If the disputants fail to agree on a settlement through negotiating directly online, they could request the participation of a mediator as the neutral third party, a go-between, to facilitate positive, solution-oriented discussion. (Note 31) This online mediation service was not necessarily free, however. Whether it was free depends on the various 'marketplaces' where the transactions are carried out. For example, for disputes arising out of transactions via eBay, the disputants were required to pay 29.95 USD to involve a mediator from SquareTrade, whilst if Sony was involved, online mediation service was free to consumers, with Sony being charged separately. (Note 32) During the online mediation process, the mediator's task was to assist the disputants to resolve their dispute effectively. The mediator would help each party see the other's perspective, and guide them toward a solution. The mediator would ask the parties questions and provide information that helps them look at each other's needs and interests, generate their own options for settlement, and attempt to reach a mutually acceptable agreement. (Note 33) Usually such an agreement requires both parties to compromise their original claims, but it is important that the result satisfies both sides. (Note 34) Under the guidance from the mediator, the parties should be able to find a solution by themselves. If not, the mediator could recommend some solution based on the information provided by the parties and principles of fairness. (Note 35)

If a dispute was not resolved through the mediation process, the parties retain their rights to seek redress through traditional legal methods. (Note 36) However, if a settlement agreement was concluded, a binding contract would be made by the disputants. (Note 37) If either party failed to implement the agreement, enforcement could be sought through a proper national court of law. (Note 38)

SquareTrade promulgated its own standards of practice, in which it asserted the adherence to important principles concerning impartiality, competence and qualification of the neutrals, confidentiality, privacy and security, fair and transparent process, and accessibility. (Note 39) It also published ethical standards for its neutrals. (Note 40) According to its own statistics, SquareTrade had handled over 1 million disputes across 120 countries. (Note 41)

### *2.3 Online arbitration*

Arbitration is the most formal process in the ADR family. Like mediation it also involves the participation of a neutral third party, which is the arbitrator. However, unlike a mediator, an arbitrator is, under most circumstances, empowered to adjudicate the merits and make binding decisions upon the parties with the existence of an agreement to arbitrate as a condition precedent. (Note 42) Moreover, arbitration is considered, to some extent, as a quasi-judicial process. The conducting of arbitration normally involves certain procedural rules, as the parties may exchange written documents and present evidence. Substantive laws may be referred to as the arbitrator considers the merits before rendering the award. Nevertheless, 'party autonomy' remains the underlying principle as issues like the selection of applicable laws (both procedural and substantive) and the appointment of an arbitrator are generally decided by the parties. (Note 43) In short, arbitration could be described as 'privatised' litigation as the parties involved tailor the proceedings to their will.

Although arbitration is generally more formal than other ADR models, it could still be migrated to the online environment with some proper adjustments of communication techniques. Submitting and exchanging of relevant documents between the parties and the arbitrator can be done through email (or attached files in an email programme). It can also be conducted in a discussion group environment where one party posts an argument on the webpage then the

other party posts responding messages subsequently. When more synchronous interaction is needed, instant messaging or chat room programmes can be employed to simulate a hearing. To reach the maximum degree of real time communication supported by current technology, video conferencing can provide a face-to-face hearing without the physical presence of the parties and the arbitrator.

The Uniform Domain Name Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN) is an example of online arbitration programme. ICANN is a private, not-for-profit corporation currently in charge of the management of the Internet's domain name system (DNS), (Note 44) under the authority of a series of understandings with the US Department of Commerce. (Note 45) One of ICANN's missions was to create a dispute settlement mechanism to provide expeditious and cost-effective resolution of conflicts regarding rights to domain names. (Note 46) In order to achieve this ICANN approved the UDRP and its procedural Rules in 1999. (Note 47) Although ICANN is a private entity with no inherent legal authority, the implementation of UDRP is ensured through agreements between the relevant participants. ICANN imposes the UDRP on domain name registrars through its accreditation agreements. The UDRP is then incorporated into the registration agreement between a registrar and a domain name holder. (Note 48)

As a result of UDRP being implanted into domain name registration agreement, a domain name holder 'represents and warrants' that, the domain name he possesses does not infringe on 'the rights of any third party' and the domain name is not registered for 'an unlawful purpose.' (Note 49) Furthermore, the domain name holder agrees to submit to a mandatory 'administrative' proceeding in the event that a third party files a complaint regarding trademark infringement against him under UDRP. (Note 50)

The UDRP in a sense serves as substantive laws deciding whether the use of a domain name causes trademark infringement as certain requirements and criteria concerning fact-intensive issues are stipulated. Firstly, in terms of the applicability of a domain name dispute, a complainant must assert and prove that the disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights, (Note 51) and that the domain name holder has no rights or legitimate interest with regard to the domain name, (Note 52) and that the domain name has been registered and is being used in bad faith. (Note 53)

Secondly, the UDRP provides an illustrative list of circumstances that are evidence of 'bad faith.' These instances include that the disputed domain name was acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name to a trademark holder for consideration in excess of out-of-pocket cost directly related to the domain name, (Note 54) or that the domain name was registered to prevent the trademark holder from reflecting its mark in a domain name and the domain name holder has engaged in a pattern of such conduct, (Note 55) or that the domain name was registered primarily for the purpose to disrupt a competitor's business, (Note 56) or that the domain name is used with an intentional attempt to attract, for commercial gain, online users who confuse the name with a complainant's trademark. (Note 57)

A further set of criteria under the UDRP deals with an illustrative list of possible defences for the domain name holder to prove his right to and legitimate interest in the disputed domain name against the complainant if the respondent could demonstrate that, before the dispute, the domain name holder used, or made demonstrable preparation to use, the domain name in connection with a bona fide offer of goods or services, (Note 58) or that the domain name holder has been commonly known by the domain name, (Note 59) or that the domain name holder is making a legitimate non-commercial or fair use of the domain name without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark at issue. (Note 60)

As far as procedure is concerned, ICANN itself does not participate in the dispute resolution proceedings. A complainant must select an approved domain name dispute resolution service provider to file his case. Currently there are four approved providers, including Asian Domain Name Dispute Resolution Centre (ADNDRC), CPR Institute for Dispute Resolution (CPR), The National Arbitration Forum (NAF), and the World Intellectual Property Organisation (WIPO). (Note 61) ICANN's Rules for UDRP and the subordinate supplemental rules of the approved providers govern the proceedings. (Note 62) According to the Rules for UDRP the initial complaint and response must be submitted in both hardcopy and electronic form. (Note 63) Subsequent communications between the disputants are to be carried out via the method chosen by the disputants, which may be fax, email, postal or courier service. (Note 64) The respondent must be notified by the provider within three calendar days after the provider receives the filing fees. (Note 65) The respondent is required to submit a response to the provider within twenty days from the commencement of the proceedings. (Note 66)

The disputants can choose between a sole arbitrator and a panel of three to hear their case, and the provider will appoint the arbitrator or panellists accordingly. (Note 67) The fees are to be paid entirely by the complainant, regardless of the number of arbitrators he chooses. (Note 68) However, if the complainant chooses to have a sole arbitrator but the respondent insists on having a three-member panel, the fees are split between the disputants. (Note 69) The fees are set by the providers and vary depending on the number of arbitrators appointed and domain name disputed. For example,

the fees charged by CPR range from 2000 USD for disputes involving one to two domain names and a sole arbitrator, to 6000 USD for disputes involving three to five domain names and a three-member panel, (Note 70) whilst WIPO charges 1500 USD for cases involving one to five domain names heard by one arbitrator, and 5000 USD for cases involving six to ten domain names heard by three-member panel. (Note 71)

During the proceedings there are no in-person hearings unless the arbitrator considers, 'as an exceptional matter,' that it is necessary to determine the complaint. (Note 72) Under most circumstances a decision shall be rendered within fourteen days of the appointment of the arbitrator or panel, (Note 73) and the decision will be published on a publicly accessible website. (Note 74) The remedies available under the UDRP are cancellation of the disputed domain name or transfer of the domain name to the complainant. (Note 75) Nevertheless, the process is not genuinely mandatory as it does not preclude the filing of a lawsuit in any competent court of law either before, during, or after the proceedings. (Note 76) The decision is not final, either, as the respondent, a domain name holder, retains the right to bring an action against an unfavourable decision in court. (Note 77)

As of 10 May 2004, there have been more than nine thousand cases filed under ICANN's UDRP. Amongst them 7790 cases involving 13,311 domain names had been disposed by decision. (Note 78)

### **3. Fundamental principles concerning consumer ODR**

Since there are various application tools and models, when ODR mechanisms are adopted to deal with B2C e-commerce disputes, how could the participants, consumers in particular, be assured that they will benefit from the advantages of ODR, and be spared with the disadvantages of it? In other words, is there any guidance toward an ideal ODR model for B2C e-commerce dispute? What are the most fundamental principles underlying an effective and fair ODR system?

Fortunately, some studies have been conducted by various governments, international organisations and consumer advocate institutions to provide answers that address the above issues. In 2000, a joint workshop on alternative dispute resolution for online consumer transactions was held by the US Federal Trade Commission and the Department of Commerce. One of the focuses of discussion was on how to ensure fairness and effectiveness of the dispute resolution process. (Note 79) In 2001, the European Commission of the EU published a recommendation pointing out several important principles for out-of-court bodies involved in the consensual resolution of consumer disputes. (Note 80) In 2000, Consumer International, an international consumer advocate organisation, published a report in which ODR practice in cross-border consumer disputes was assessed by a set of key criteria concerning fairness and effectiveness. (Note 81) An update was subsequently published in 2001. (Note 82) From these works, at least several most common and fundamental principles could be distilled and discussed in the following sections.

#### *3.1 Impartiality and independence*

Impartiality of the neutrals is an essential element of fairness in the dispute resolution process. (Note 83) Participants, in particular the consumers, will lose confidence in a dispute resolution mechanism if they consider the neutral is biased. Independence of the neutrals from the parties and the independence of the ODR service provider from the businesses are also crucial. If an ODR system is separated and independent from the businesses, and the professionals involved (such as mediators or arbitrators) have no direct interest in the disputes, or financial or personal relationship with the disputants, the consumers are more likely to consider the ODR process to be fair. If an ODR system is financially dependent on the businesses, or the neutrals have connection with the business-disputant, it is difficult to persuade consumers to view the ODR process as impartial. Consumers may consider the process as biased and not participate at all. As a result, an ODR system failing to ensure the independence and impartiality of its neutrals would be unable to attract consumers to use its service.

In short, to ensure independence and impartiality of an ODR process for consumer disputes, it is better that the ODR service provider is independently operated. There should be a balanced governing structure, which equally presents business and consumer interests, and a neutral funding source. (Note 84) More importantly, it is essential to uphold the neutrality of the mediators and arbitrators, as they are the personnel who are actually facing the consumers and dealing with the disputes. Receiving adequate training in the form of the dispute resolution they practice and abiding by a code of conduct including rules such as conflict of interests would be the minimum requirement to achieve this goal. (Note 85) Moreover, by no means should the rewards to the neutrals be related to the outcome of the disputes. Dismissal of the neutrals should be based on justifiable causes. The appointment of neutrals to specific cases should be made by a third party (the service provider, for example), rather than the disputants. The appointment should be made randomly to avoid neutral-shopping. (Note 86) These efforts would be crucial to increase consumer confidence in ODR and encourage them to participate in ODR process.

An example of upholding independence and impartiality of the neutrals can be seen in the practice of National Arbitration Forum (NAF), (Note 87) which provides arbitration service conducted via the internet. (Note 88) In any given case, an appointed arbitrator can be disqualified if certain circumstances exist that "create a conflict of interest or

cause the [a]rbitrator to be unfair or biased.” (Note 89) Also, as a general assurance, NAF established a ‘code of ethics’ for its neutrals to follow. (Note 90)

### 3.2 Affordability

From the consumers’ standpoint, ODR services should optimally be free. Costs charged to consumers, whether it is pre-paid or paid-if-you-lose, may discourage consumers from participating in the ODR process. (Note 91) In reality, due to funding or profitability considerations, ODR services is not necessarily free to its users, as it has been demonstrated in previous introduction to certain ODR systems. Nevertheless, if consumers are to be charged to use ODR, it is suggested that at least the costs should be relatively low compared to the value of disputes. (Note 92) An ODR process would be literally ineffective if it costs more than the value of the dispute, as one of ODR’s key advantages is that it is supposed to be less expensive than conventional litigation in national court of law. According to statistics, in the US there are around 100 million Americans denied access to the justice system due to the high cost of litigation. (Note 93) It is clear that cost affects affordability, which in turn controls access to redress. If ODR incurs unreasonable and unbearable costs to consumers, it will become unaffordable, thus unapproachable for consumers. As a result it will be impractical to adopt ODR in consumer disputes if such service is wrongfully priced.

### 3.3 Transparency

Availability and accessibility of information about all aspects of a dispute resolution service is also critical for consumers who intend to participate in ODR, the online version of ADR, as it is addressed that ‘ADR systems should function according to published rules of procedure that describe unambiguously all relevant elements necessary to enable customers seeking redress to take fully informed decisions on whether they wish to use the ADR offered or address themselves in a court of law.’ (Note 94) With such transparency, potential customers, consumers in particular, could have the opportunity to evaluate the independence and effectiveness of an ODR process. To achieve this, an ODR service provider should at least disclose, on a regular basis, general statistics on ODR activities including its procedural and substantive rules, costs, the manner of settlement or decision-making, the numbers of submitted, settled or decided disputes, and the percentage of results in favour of the consumer or business, by the nature of the disputes and the ODR model employed. When online arbitration is adopted, information pertinent to the decisions should also be published. (Note 95)

Publication of arbitration decisions is a key factor for the need of transparency in the online arbitration process. With arbitration rulings being published and examined by the general public, online arbitration’s accountability could be gradually aggregated. Moreover, consumers would be able to assess previous arbitration decisions, not just to judge whether to participate in ODR, but also to decide whether to transact with specific online vendors. As far as confidentiality is concerned, publication of arbitration decision containing merely the business’s name, the type of dispute, and the nature of resolution, excluding communications between the parties during the proceedings and the consumer’s name, seems justifiable for the general public’s good. (Note 96)

A good example of ODR provider adhering to the principle of transparency can be seen in the domain name dispute resolution process administered by the Science and Technology Law Center (STLC), a Taiwanese non-for-profit incorporation authorised by the Taiwan Network Information Center (TWNIC) to adjudicate the ‘.tw’ domain name disputes. (Note 97) The STLC discloses its domain name dispute resolution rules, both procedural and substantive, on its website. (Note 98) In addition, a flowchart of the process is also provided so the disputants might have a clear understanding about the entire procedure. (Note 99) Moreover, a list of neutrals that may be appointed in specific cases is also published on its website. (Note 100) Finally, the STLC regularly publishes domain name dispute decisions on its website, (Note 101) so its credibility can be scrutinised by the general public.

### 3.4 Procedural fairness

The ODR process could be conducted in different forms, through either amicable models such as online negotiation or online mediation, where the parties try to reach mutual agreement as to how their difference could be resolved, or through adversarial models like online arbitration, where the merits are to be adjudicated by a third party. In an adjudicatory ODR process, such as online arbitration, a dispute is resolved by the decision-maker’s ruling rather than the mutual compromise of the disputants. Therefore it is crucial that such an adjudicatory ODR process is designed to provide the parties with sufficient opportunity to present their case, to respond to opponent’s arguments, and to receive decisions with full reasoning attached. (Note 102) Although costs and timeliness are also major concerns of the ODR process, endeavours should be made to reach the optimal balance between procedural efficiency and due process. Issues like the time limits on submissions and defences or permissible means of online communication method during the proceedings should be carefully weighted against costs and time consumption to the extent that the parties, in particular the consumer, could ultimately endure.

Procedural fairness is more important in online arbitration than in online negotiation or mediation. Disputes submitted to arbitration may involve higher values than the average B2C e-commerce transactions. They may also involve claims

based on the consumers' statutory rights. If a consumer does not know how to present his case in a legal fashion or how to make understandable and sustainable argument against the other party, he may lose his substantive rights due to procedural incompetence. In other words, consumers having very little or no experience in any form of dispute resolution process, including arbitration, are very likely to lose their substantive claims due to procedural inexperience, if no professional assistance, such as attorney, is available. The arbitrators have to remain neutral to both of the parties under the requirement of impartiality, thus they are not allowed to grant any procedural favour to the consumer even if the consumer is indeed in need of legal assistance. Unless the value of the dispute in question reaches a certain amount that thereby necessitating the hiring of a lawyer, the consumer will have to prepare the case on his own. The merchants, on the other hand, may have already engaged in a business operation for a certain period of time, and aggregated considerable experience in arbitral proceedings. Therefore, be it with or without legal representation, the merchant will almost certainly stand on a more advantageous position in the arbitral proceedings than the consumer. Such 'repeat-player' advantage may be inherent in the business-consumer relationship, but it is not justifiable. The repeat-player advantage of the business side has to be mitigated. Otherwise it would be unfair for consumers participating in arbitration to lose their substantive claims simply because of procedural inexperience.

### 3.5 Effectiveness

Two issues should be taken into account as the requirement of an effective ODR process. Firstly, as far as time consumption is concerned, the parties generally welcome a swift resolution of the dispute. Under most circumstances, it is fairly reasonable to suppose that disputants would like to settle their differences in a timely manner. A speedy ODR process is especially essential to consumers as they would not opt to engage in a prolonged ODR process just to settle disputes of relatively small monetary value. Other issues include whether there should be binding effects on the decision made by the neutral, and if so how such a binding decision could be enforced if the losing party fails to implement it voluntarily. Take online arbitration for example, there were divergent opinions as to whether there should be binding arbitration decisions for consumer disputes. Binding arbitration could produce a final decision which cannot be challenged unless under very limited conditions. Some suggested that therefore binding arbitration provides consumers with certainty, finality and efficiency. (Note 103) Others opposed the idea of binding arbitration because it deprives consumers the right to sue in a national court of law. (Note 104)

As far as the binding effect of arbitration is concerned, it is suggested that an arbitration decision be binding only on the business but not the consumer, who is entitled to pursue civil proceedings in national court of law if they are not pleased with the arbitrator's ruling. (Note 105) It is argued that such an imbalance is justifiable as it could increase consumer trust and confidence in e-commerce. (Note 106) In reality, under most circumstances, a consumer would only file a lawsuit against a business if the consumer lost his claim in the preceding arbitration. In this case even if the consumer is still allowed to sue in a court of law, the financial burden and time consumption remains a challenge for the consumer. Considering the asymmetry in terms of resources between businesses and consumers, such a proposal is not necessarily an overstatement. The enforcement of an arbitral award in the case of non-compliance with the result of the arbitration is also a difficult task in the context of international consumer disputes.

## 4. ODR in Taiwan

From the above paragraphs, examples of ODR programmes in operation have been introduced, and principles concerning effective ODR mechanisms have been discussed. The next phase is to examine the effectiveness of ODR programmes in Taiwan. However, before the discussion begins, it would be useful to introduce the laws regarding ADR under the Taiwanese legal system.

### 4.1 The laws regulating ADR

With regard to arbitration, the first issue would be the arbitrability of consumer disputes. According to the Taiwanese Arbitration Act, a given dispute can only be submitted to arbitration if it can be settled by the disputants in accordance with the law. (Note 107) This generally means that a dispute is arbitrable if the rights or obligations involved are disposable by the parties, given that such disposition is not against the mandatory rules of the law nor public policy. (Note 108) Accordingly, issues of commercial and civil nature, excluding matters of family law and inheritance, are allowed to be arbitrated.

The second issue is about the legitimacy of conducting of arbitral proceedings via online communication. In this regard, the Taiwanese arbitration act reads that "the rules regarding arbitral proceedings of this act are applicable where the parties have no agreement on procedural issues." (Note 109) If the parties submit their dispute to an arbitration institution, which provides arbitration rules using online communication mechanisms, such institutional rules will take priority to the provisions of the Taiwanese Arbitration Act.

A final issue is with regard to the recognition of the legal effective of arbitral proceedings conducted via electronic means. According to the Taiwanese Electronic Signature Act, any data that is processed and recorded in electronic form can be regarded as "document in writing" as long as its content can be demonstrated via electronic agent. (Note 110) So

an electronic document is equally valid as a document in writing. Moreover, as long as the parties agree, the exchange of electronic documents between the parties is recognised as with full legal force. (Note 111) In short, there is no legal obstacle for arbitration to be conducted via the internet.

With regard to mediation, the relevant legislations regulating ADR for consumer dispute are the Taiwanese Local Government Mediation Ordinance, and the Taiwanese Consumer Protection Act. The former establishes 'Mediation Committee' under the organisation of various local governments, providing mediation service for all types of civil and commercial disputes, (Note 112) while the later authorises consumer advocate organisations the competence to mediate specifically consumer disputes. (Note 113) There is no specific procedural rule regarding the conducting of mediation proceedings under both laws. However, it is worth noting that a settlement agreement made under the mediation process is with the same legal force as a final civil judgement rendered by the state court, (Note 114) which means that such settlement agreement can be enforced as a final civil judgement should one party fail to perform his obligation under it. According to article 46, second paragraph, of the Consumer Protection Act, the binding force of the settlement agreement provided under the Local Government Mediation Ordinance is also applicable to mediation conducted by private consumer advocate organisation in accordance with the Consumer Protection Act. As a result, both mediation processes could produce binding result.

#### 4.2 ODR programmes in operation

With regard to ODR practice, there are currently two ODR programmes in operation. The SOSA, considering one of its missions as to 'facilitate the resolution of disputes between consumers and online merchants,' (Note 115) provides an online mediation process, which allows consumers to file complaints electronically on SOSA's ODR webpage. (Note 116) Another ODR service provider is the Net Consumers Association, (Note 117) which in 2006 implemented a 'Shoppers Compensation Scheme' providing online complaint filing for mediation process. Member merchants of the Net Consumers Association have to deposit a fixed sum of money into the Association's designated bank account as the compensation fund. If the result of mediation recommends compensation for the consumer, the association will pay directly from the compensation fund. (Note 118)

Both SOSA and the Net Consumers Association are non-for-profit corporations recognised by the Consumer Protection Act and are competent in handling consumer disputes. (Note 119) The only problem with them is that they may not be able to handle disputes involving foreign merchants as currently their member merchants are domestic businesses only. (Note 120)

### 5. Conclusion

This article has examined various types of ODR processes. Online negotiation means direct communication between the parties via electronic means. The online negotiation process provided by SquareTrade is an example. Online mediation involves a neutral third party communicating with and between the parties by online means to facilitate negotiation and encourage the parties to reach a settlement. SquareTrade also provides online mediation for disputes not resolved by its online negotiation process. Online arbitration also involves a neutral third party, the arbitrator. The duty of the arbitrator is to hear the arguments of the parties and make a decision on the merits of the dispute. Submission of documents may be carried out via email attachment or file transfer programmes. Text-based hearings could be conducted in a purpose-built chat room or instant messaging programme. Live hearings, if necessary, could be held with the use of Internet conferencing, where face-to-face communication may be reconstructed.

Amongst the various ODR mechanisms, there are certain principles that have to be followed. The neutrals involved must be impartial and independent. The ODR services must be affordable for the parties. The dispute resolution process must be transparent. The proceedings must be fair. As far as effectiveness is concerned, the dispute resolution process should not be protracted beyond a reasonable period of time, and the result must be implemented.

In Taiwan, a significant percentage of online users participate in B2C e-commerce transactions. ODR programmes can serve as an alternative to civil proceedings should disputes arise. Thus complicated legal issues can be avoided and consumer confidence can be enhanced. Under the Taiwanese legal framework, the law does not prohibit the conducting of ADR processes over the internet. The legal status of electronic data transmitted during the ODR proceedings is also recognised as having the same legal force as writing documents. There is no legal obstacle for ODR in Taiwan. However, currently there are only two private ODR service providers in operation. There is still room for ODR development in Taiwan.

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Note 13. *ibid*, VIII. Consumer Dispute Resolution.

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