CONTENTS

	List of illustrations page x
	List of tables xi
	Table of cases xii
	Table of UK statutes xx
	Table of UK statutory instruments xxiii
	Table of European Communities legislation and documents xxiv
	Table of foreign statutes xxvi
	Table of treaties and conventions xxix
	Acknowledgements xxx
	List of abbreviations xxxi
1	Introduction 1
2	The concepts of fairness 4
	2.1 Introduction 4
	2.2 Definition of fairness in dispute resolution 5
	2.2.1 Equal treatment of the parties 5
	2.2.2 A rational approach to dispute resolution 6
	2.2.3 Effectiveness 6
	2.2.4 Conclusion 8
	2.3 Process values and forms of procedural justice 8
	2.3.1 Process values 9
	2.3.2 The Rawlsian concept of procedural justice 10
	2.4 Due process 13
	2.5 The difference principle: counter-balancing existing
	inequalities 14
	V

	2.6 The inherent conflict between due process and effectiveness	17
	2.7 Conclusion 18	
3	Internet disputes 19	
	3.1 Introduction 19	
	3.2 Characteristics of the Internet 19	
	3.2.1 Location irrelevant for functionality 20	
	3.2.2 Difficulty of establishing location of Internet users	21
	3.2.3 Increase in transnational contacts – a quantitative and	
	qualitative change 23	
	3.2.4 Conclusion: the implications for Internet disputes	25
	3.3 Examples of Internet disputes 26	
	3.4 Contract and tort 28	
	3.5 Power in dispute resolution 29	
	3.5.1 Resources 29	
	3.5.2 'Repeat player' effect and power 29	
	3.5.3 Vulnerability 31	
	3.6 Definition of relevant disputes in respect of the parties	32
	3.6.1 Meaning of 'consumer' under different laws and	
	regulations 32	
	3.6.2 A preliminary definition: widening the scope 35	
	3.6.3 The definition of relevant Internet disputes and its	
	purpose 36	
	3.7 Definition of relevant disputes in respect of the size of the	
	claim 37	
	3.8 Chargebacks and refunds by payment service providers	38
	3.8.1 Credit-card chargeback and joint liability 38	
	3.8.2 PayPal 42	
	3.8.3 Conclusion 43	
	3.9 The jurisdictional challenge of the Internet 44	
	3.10 Conclusion 45	
4	4 ADR and applicable law 47	
	4.1 Introduction 47	
	4.1 introduction 17	
	4.2 ADR 40 4.2.1 Mediation 50	
	4.2.2 Arbitration 58	
	4.3. Applicable law 60	
	4.3 Applicable law 4.3.1 Law of the arbitration agreement, the <i>lex arbitri</i> and	applicable
	law distinguished 60	
	4.3.2 Options 61	
	4.J.Z Options 01	

Contents vii

	4.3.3 Determination of the applicable law 63
	4.3.4 Conclusion: the challenge of applicable law 65
	4.3.5 Mandatory laws 66
	4.4 Conclusion 73
	ODD - 1
5	ODR and access 74
	5.1 Introduction 74
	5.2 Definition of ODR 74
	5.3 Forms of ODR 75
	5.3.1 Brief overview 75
	5.3.2 Case study: Austrian Internet Ombudsman 76
	5.4 Technologies used 78
	5.4.1 Online mediation 79
	5.4.2 Automated negotiation – negotiation assistance 81
	5.4.3 Automated negotiation – blind bidding 81
	5.4.4 Online juries / mock trials 82
	5.4.5 Online arbitration 82
	5.5 Transformative power of ODR 86 5.5 Trechnology as the fourth party in ODR 86
	3.3.1 Teemfology as the router party in a = 1
	5.5.2 Transformative power: greater access to justice 89 5.6 Conclusion 90
	5.6 Conclusion 90
6	Arbitration and due process 91
	6.1 Introduction 91
	6.2 Sources of legal due process 91
	6.2.1 Professional codes of conduct and contract for arbitral
	services 92
	6.2.2 Institutional and other arbitration rules 93
	6.2.3 National arbitration legislation 95
	6.2.4 English common law 97
	6.2.5 Human rights standards 98
	6.2.6 International conventions and standards 110
	6.2.7 Conclusion 112
	6.3 Impartiality and independence in adjudication 112
	6.3.1 Impartiality and independence of judges 112
	6.3.2 Impartiality and independence of arbitrators 118
	6.3.3 Conclusion 129
	6.4 Fair hearing 130
	6.4.1 Prior notice 130
	6.4.2 Opportunity to present one's case and rebut that of the other
	party – fair hearing in a narrower sense 131
	6.5 Duty to give reasons 140

6.6 Transparency versus confidentiality 144	
6.6.1 The case for transparency 145	
6.6.2 Presumption of confidentiality in arbitration 149	
6.6.3 What should be kept confidential? 149	
6.6.4 Who is under a duty of confidentiality? 150	
6.6.5 Contract and institutional rules 150	
6.6.6 Arbitration laws 152	
6.6.7 Conclusion: an inadequate balance under English law	159
	60
6.8 Conclusion 167	
7 Internet disputes and fair arbitration 169	
7.1 Introduction 169	
7.2 Legal controls on the use of arbitration clauses in consumer	
contracts 171	
7.2.1 Subject-matter arbitrability 173	
7.2.2 Control of consumer arbitration under English law	174
7.2.3 Control of adhesion contracts under US state law	180
7.2.4 A critique of consumer arbitration 182	
7.2.5 Conclusion 185	
7.3 UDRP as a model for ODR 186	
7.3.1 Brief description of the UDRP 186	
7.3.2 A critique of the UDRP 190	
7.3.3 Conclusion 214	
7.4 Proportionate model of dispute resolution 214	
7.4.1 Two spheres: one public and one private 215	
7.4.2 The waiver doctrine – fully informed and voluntary	
approach 215 7.4.3 Internet disputes and the waiver doctrine 216	
/ III The proportion in a	
7.5 Conclusion 218	
8 A model of dispute resolution for the Internet 22	0
8.1 Introduction 220	
8.2 Bringing the parties to arbitration 221	
8.2.1 Contractually mandated schemes 223	
8.2.2 Compulsory statutory arbitration 230	
8.3 Standards for online arbitration of Internet disputes – findin	gs from
previous chapters 238	<i>6</i>
8.3.1 Applying the 'weaker' party's mandatory laws 23	9
8.3.2 Independence and impartiality of the provider and the	
arbitrators 239	
8.3.3 Fair hearing 242	

CONTENTS

	8.3.4 Reasons for decisions and transparency 243	
	8.3.5 Judicial review/appeal 244	
8.4	Implementation of the standards 244	
	8.4.1 Institutional rules 245	
	8.4.2 National legislation 246	
	8.4.3 An international convention on enforcement of awards 2	46
	8.4.4 Referral systems / clearing house 247	
8.5	Proportionality, costs and state funding 249	
8.6	The model: resolution of Internet disputes 254	
	8.6.1 Non-binding forms of ODR 255	
	8.6.2 Payment-reverse mechanisms 255	
	8.6.3 Online arbitration 255	
	8.6.4 Litigation 260	
8.7	Conclusion 260	
8.8	Recommendations 261	
	8.8.1 For online platforms 261	
	8.8.2 For Internet access providers 261	
	8.8.3 For E-commerce websites generally 261	
	8.8.4 For payment service providers 262	
	8.8.5 For providers of dispute resolution services 262	
	8.8.6 For governments and regulators 262	
Bi	bliography 264	

Index 274