

CONTENTS

Contents v

Abbreviations ix

Foreword xv

Preface xix

Introduction 1

Chapter 1 The state of play in online dispute resolution 5

I BACKGROUND 5

II THE METHODS OF ODR 10

 II.1 Assisted negotiation 11

 II.2 Automated negotiation 17

 II.3 Online mediation 21

 II.4 Online arbitration 26

 II.5 The ICANN UDRP process 36

 II.6 Cybercourts 40

 II.7 Other forms of ODR and related services 43

III THE PROCEDURAL SETUP OF ODR SCHEMES 45

 III.1 Appointment and independence of neutrals 46

 III.2 Confidentiality and publication 48

 III.3 Binding character of outcome 54

 III.4 Costs 55

 III.5 Duration 58

IV THE MEANS OF COMMUNICATION 60

 IV.1 Functions of electronic communications 60

 IV.2 State of practice 62

V FINANCING 65

Chapter 2	The development and regulation of online dispute resolution	67
I	BACKGROUND	67
II	THE DRIVING FORCES BEHIND ODR	68
	<i>II.1 Access to justice</i>	<i>69</i>
	II.1.1 The problem with traditional courts	70
	II.1.2 Right of access to justice, online arbitration, and Article 6 ECHR	72
	II.1.3 Some economics of ODR: decreasing access barriers	75
	<i>II.2 Confidence in e-commerce</i>	<i>76</i>
	II.2.1 Dematerialization	78
	II.2.2 Desocialization	79
	II.2.3 Dejudicialization	81
III	WHO WANTS ODR AND HOW DO THEY WANT IT?	83
	<i>III.1 Governments</i>	<i>83</i>
	III.1.1 Organization for Economic Co-operation and Development	84
	III.1.2 European Union	86
	III.1.3 USA	91
	III.1.4 Canada	93
	III.1.5 Australia	94
	III.1.6 Spain	96
	<i>III.2 Business organizations</i>	<i>96</i>
	III.2.1 The Alliance for Global Business	97
	III.2.2 Global Business Dialogue on electronic commerce	98
	<i>III.3 Consumer organizations</i>	<i>99</i>
	III.3.1 Transatlantic Consumer Dialogue	100
	III.3.2 Consumers International	101
	III.3.3 European Consumers' Organization	102
	<i>III.4 Organizations active in the area of dispute resolution</i>	<i>104</i>
	III.4.1 The International Chamber of Commerce	104
	III.4.2 The American Bar Association	105
IV	CORE REGULATORY PRINCIPLES	108
	<i>IV.1 Transparency</i>	<i>109</i>
	<i>IV.2 Independence and impartiality</i>	<i>111</i>
	<i>IV.3 Speed</i>	<i>114</i>
	<i>IV.4 Accessibility</i>	<i>115</i>
	<i>IV.5 Fairness</i>	<i>118</i>
	<i>IV.6 Binding character of outcomes</i>	<i>120</i>
V	EXERTING CONTROL OVER ODR PROVIDERS	121
	<i>V.1 Accreditation</i>	<i>122</i>
	<i>V.2 Clearinghouses</i>	<i>125</i>
	<i>V.3 Appellate bodies</i>	<i>128</i>

Chapter 3	Current issues in online dispute resolution	131
I	BACKGROUND	131
II	BRINGING PARTIES TO ODR	132
II.1	<i>Providing information structures</i>	132
II.2	<i>ODR and internal complaint handling procedures</i>	133
II.3	<i>Dispute resolution clauses</i>	135
II.3.1	Mediation clauses	135
II.3.2	Arbitration clauses	138
II.4	<i>Claim forms and processes</i>	145
II.5	<i>Technical aspects</i>	148
II.5.1	Three technical properties of ODR systems	149
II.5.2	ODR as a web service	151
III	NON-BINDING ARBITRATION	153
III.1	<i>The practice of non-binding arbitration</i>	154
III.1.1	Types of non-binding arbitration	154
III.1.2	Illustrations from existing ODR practice	154
III.1.3	Reasons to resort to non-binding arbitration	155
III.2	<i>Legal characterization of non-binding arbitration</i>	156
III.2.1	Definition of arbitration	156
III.2.2	The forms of non-binding arbitration: some distinctions	158
III.2.3	Application of definition and distinctions to non-binding arbitration	159
III.3	<i>Practical guidelines</i>	165
IV	B2C ARBITRATION AGREEMENTS	169
IV.1	<i>Validity requirements for non-binding arbitration agreements</i>	169
IV.2	<i>Arbitrability</i>	170
IV.3	<i>Validity of pre-dispute arbitration agreements</i>	173
IV.4	<i>Additional requirements specific to consumers</i>	179
V	ELECTRONIC COMMUNICATION AND EVIDENCE	181
V.1	<i>When the security of electronic communication matters in ODR and why it is threatened</i>	182
V.2	<i>Electronic documents as evidence</i>	183
V.3	<i>Protecting electronic documents from alteration</i>	190
V.3.1	What is so special about public key cryptography	192
V.3.2	Technical means to protect electronic documents	194
VI	DUE PROCESS IN ONLINE ARBITRAL PROCEEDINGS	197
VI.1	<i>Preliminary remarks</i>	198
VI.2	<i>The elements of due process</i>	200
VI.3	<i>Waiver of due process</i>	204
VI.4	<i>Application to online arbitration</i>	206

VII	ENFORCEMENT OF ODR OUTCOMES	209
VII.1	<i>Ordinary enforcement</i>	211
VII.1.1	Enforcement of settlement agreements	211
VII.1.2	Enforcement of arbitral awards	216
VII.2	<i>Self-enforcement</i>	223
VII.2.1	Indirect self-enforcement: creating incentives to comply ...	225
VII.2.2	Direct self-enforcement: controlling the resources at play	228
	Conclusion	235
	Annexes	239
I	E-DOCUMENTS AS EVIDENCE—SURVEY OF NATIONAL LEGISLATIONS	239
II	ODR PROVIDERS	249
III	ODR PROVIDER SURVEY FORM	278
IV	INTERVIEWS WITH ODR PROVIDER REPRESENTATIVES	293
IV.1	<i>American Arbitration Association</i>	293
IV.2	<i>Chartered Institute of Arbitrators</i>	295
IV.3	<i>ECODIR / 1</i>	302
IV.4	<i>ECODIR / 2</i>	310
IV.5	<i>Eurochambres</i>	312
IV.6	<i>Online Resolution</i>	318
IV.7	<i>SquareTrade</i>	321
	Bibliography	329
	Table of cases	363
	Table of legislation and other texts	369
	Index	375