

# Online Dispute Resolution: Global issues and Australian applications

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# Overview

- The Internet and dispute resolution
- Trends in e-commerce dispute resolution
- ODR - in principle & in practice
- Policy themes and issues for consumers
- Australian standards & attempts to set international standards
- What the Banking Ombudsman is doing

# Introduction

- The speed and global nature of the Internet have created challenges in all areas:
  - the sovereignty of national parliaments in relation to the rights and obligations of its citizens
  - the regulation of cross border contracts made via the Internet

# Legal Issues in eCommerce: business and consumers

## Business

- Privacy & other laws
- Authentication - identity of the other party
- Verification of ability to enter into a contract
- Evidence of acceptance
- Location
- Certainty of payment

## Consumers

- Privacy of information
- Authentication
- Trust - certainty
- Online terms and conditions
- Location
- Recovery of loss

# Dispute Trends

- Merchandise or service not received
- Misrepresentations about product or service
- Inability to contact merchant or recover loss
- Privacy breaches
- Fraud
- Increase in complaints to Govt agencies about Internet problems
- Trust still an issue

# Dispute Resolution challenges

- In the dispute resolution context the challenges are:
  - Different systems of law
  - Jurisdictional limits and enforcement 'reach' issues for courts
  - Costs of transborder disputes

# Established Trends

- Use of ADR mechanisms - contractually mandated or elective
- Proliferation of online ADR providers, usually private
- Proliferation of trustmarks
- National and international attempts to set & implement standards
- Emerging trend of increasing govt involvement in accreditation of service providers and in trustmarks

# What is ODR?

- Online Dispute Resolution may describe:
  - use of online resources to deliver dispute resolution services, whether or not dispute is ‘land-based’
  - resolution of disputes about online transactions, whether or not dispute resolution is provided ‘on land’
  - online resolution of online disputes using Alternative Dispute Resolution (ADR) techniques

# What does it mean in principle?

- A rational response to jurisdictional limits and cost barriers for ecommerce disputes
- A flexible mechanism allowing the parties to use the digital environment in which they transacted, and the theoretical speed and informality offered by ADR, to resolve disputes quickly and cheaply
- A useful range of mechanisms for resolving offline disputes

# What does it mean in practice?

- Proliferation of private, unregulated schemes
- Majority US based
- Trend towards standard form contracts mandating a particular ODR provider with prejudice to court-based redress
- Different costs arrangements depending on provider



# What is on offer?

- Online arbitration, mediation, assisted negotiation, automated negotiation, e-mail augmented by offline communication
- Automated negotiation - a real time blind bid negotiation process:
- Chat room type communication, video conferencing or web cam use
- Links between suppliers and ODR schemes
- Court and tribunal online access: eg VCAT online

# Consumers International Study December 2000

- None of ODR providers surveyed fully met criteria
- Most are English language only
- Few give adequate assurance of impartiality
- Most have inadequate compliance incentives
- Few help consumers deal with unco-operative merchants
- Most are disproportionately costly
- Most offer inadequate information about structure, personnel and results
- What is the picture in 2003?

# ICC Inventory 2002

- Aim of project - a global inventory of ADR providers offering services for online disputes
- Not all countries included yet, not all of a country's ODR providers included but useful information on languages, cross-border services, industries, online/offline services offered
- Canada 2, China 1, UK 6, US 9
- Need for an Australian inventory - who is doing what

# Issues for ODR providers

- Authentication
  - Verification of the identity and authority of the parties - 'Who's clicking the mouse?'
- Security
  - Complying with privacy and confidentiality obligations when communicating online
- Accountability
  - getting a tick of approval from industry and government
- Flexibility
  - allowing the parties to communicate off-line
- Enforcement
  - giving the outcome teeth

# Issues for consumers

- Is ODR appropriate for your dispute?
- Costs?
- Standards?
- Time it will take?
- Language issues?
- How is the outcome enforced?
- Alternatives?
- OECD 'Resolving E-Commerce Disputes Online: Asking the right questions about ADR'
  - good list of question for potential users

# Policy themes for government

- Similar to those for electronic commerce generally
  - **Building trust**
  - **Should there be regulation?**
  - **If so, ‘light touch’ or heavy-handed?**
  - **Should there be minimum standards?**
  - **If so, who should set them?**
  - **Does ODR require a different approach to ‘land-based’ dispute resolution?**
  - **Can diverse national standards translate into global best practice?**

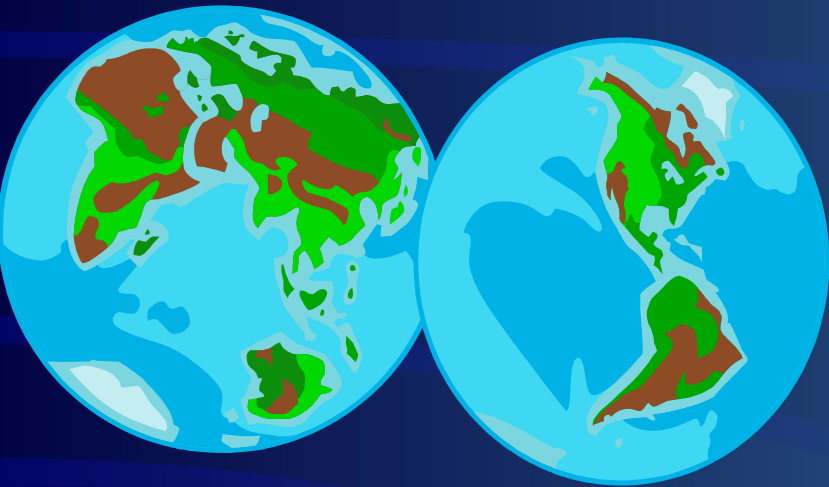
# Australian Standards and Guidelines

- Australian Government: Electronic Commerce Best Practice Model, May 2000, voluntary (online specific)
- ASIC: PS 139 - approval of ADR schemes for financial services licence holders, July 1999, mandatory
- Australian Standard 4269, mandated for EFT Code internal dispute resolution - check whether the business complies

# Attempts to set International DR Standards - a selection

- Trans Atlantic Consumer Dialogue, Feb 2000
- US Government Workshop on ADR, June 2000
- International Standards Organisation, (not online specific)
- European Commission Principles for ADR, March 1988 (not online specific)
- Global Business Dialogue E Commerce, September 2000
- OECD Conference December 2000 and 2003 update report

# Issues in Setting International ODR Standards



- Different groups identify different criteria;
- Regional preferences which mirror e commerce policy differences on how much to regulate
- Australian standards generally represent a mid point approach between US and EU

# Solutions to divergent standards for ODR

- Work on consolidation of criteria
- Distinguish between principles and mechanisms
- Online environment does not require different criteria - technology is relevant to mechanisms not principles

## *Consolidated criteria in order of acceptance*

- Fair
- Accessible
- Independent
- Without prejudice to legal redress
- Efficient
- Low cost or free
- Effective
- Accountable

# The Banking and Financial Services Ombudsman

- An ASIC approved ADR scheme meeting Policy Statement 139 criteria
- Members are Australian-based banks, local presence banks and their related entities - now has non bank members
- Proportion of disputants reside in another country
- Accept e commerce disputes including EFT
- Use online tools - web based and email plus offline communication

# BFSO Online Dispute Service

- Enables disputants to lodge a dispute directly to the BFSO webserver via a secure encrypted area
- ‘Lodging your dispute’ web page provides information about our processes and a link to the dispute form
- Online jurisdiction checker and links to other information which may help in resolving or lodging dispute

# Special Bulletin on Electronic Commerce

- Follow up to Treasury Discussion Paper on e commerce dispute resolution
- Identified & discussed emerging issues - online banking & online credit card transactions
- [www.abio.org.au](http://www.abio.org.au) Bulletin 35
- Issues - system design, recovery of mistaken payments disclosure, chargebacks and the Credit Card scheme rules, liability exclusions
- Discussion fora in Sydney & Melbourne 2003. Aim: practical solutions consistent with legal principle

# Conclusion

- ODR, like the Internet itself, is an exciting development but important not to get over-excited
- Retain established consumer protection principles and ADR benchmarks so that access to justice is not compromised
- Trust in ODR mechanisms and providers will increase trust in e commerce generally
- Global standards desirable and are possible