Confidentiality Barriers in Online Consumer Mediation

Abstract

As a result of the globalization, cross-border trade and international disputes have increased. Accordingly, alternative dispute resolution mechanisms have been applied to settle these disputes such as mediation. Mediation provides a neutral and objective platform to solve the disputes in shorter time and affordable way. Mediation is preferred not only for business disputes but also this mechanism is applied for consumer cases. In current, online shopping is trendy and satisfy consumers’ interests. They have an opportunity to purchase more quality and cheaper goods and services through websites. However, online shopping is not dispute free. In line with, online dispute resolution (ODR) method has been developed to settle the disputes. Later on, disputing parties have faced drawbacks of ODR methods in time. Especially the privacy policy, as a basic principle of the mediation, is being violated in the solution of the disputes in consumers’ online shopping. Therefore, the future of ODR depends on mutual confidence of consumers and sellers. In this study, how the online mediator creates problems in terms of consumers and sellers will be examined and its effect on the method of online conflict resolution will be discussed.

Introduction

Since the last quarter of the twentieth century, the rapid developments in information and communication technology have led to a multi-faceted transformation in the economic, political and legal worlds. This efficient transformation triggered by globalisation has reduced the obstacles of trade barriers, expanded the volume of international trade and has led to an increase to a high technological transfer from developed countries to developing countries. Correspondingly, with the enhanced international financial markets, labour flow between countries has been accelerated; there have been significant improvements in the flow of foreign capital. Additionally, the use of technology - especially internet-based tools, for instance e-mail, online services, in short the ‘Internet Superhighway’ - has become quite prevalent in juridical and business areas thanks to globalisation.[1] Hereby, increased movements of goods, labour and capital between territories have given rise to various disputes which can be attributed to internet trade. There has been a remarkable breakthrough in the traditional attitude of seeking legal recourse in order to settle disputes. Especially in the matters involving e-commerce, the trend of resolving disputes by litigation between businesses and consumers has shifted to ADR that is out of court settlement. The modes of ADR adopted by disputing parties in e-commerce matters are negotiation, mediation and arbitration. The disputing parties prefer ADR because it gives them a chance to settle their disputes amicably, provides them flexibility of procedure, helps them to settle disputes faster and at an affordable cost.[2] In cross border disputes where the disputing parties are away from each other in different countries, ADR is effective, however, it has been observed that under such circumstances as time passed by in trying to settle a dispute, ADR fell short in its efficiency. It means that ADR is still expensive with regard to travel for cross-border consumers in parallel with time consuming, thus online dispute resolution (ODR) has occurred. ODR is therefore a ‘movement’, not a mere whim or fancy.[3] Over recent years, online mediation has had a remarkable effect on consumer disputes due to fact that people
have an opportunity to purchase more quality, cheaper goods from cross-border countries by e-commerce. Hence, between sellers and buyers there have been a number of disputes. For example, delivery issues, products issues, contract cancellation and so on. After all these kinds of issues, the tendency of companies is not to resolve by litigation because of the high cost, the time consumed. Despite these counted advantages, online mediation has a variety of barriers which are likely to challenge the existence of ODR for resolving consumer disputes in the coming future. The most significant barrier is confidentiality in consumer conflicts. There are some significant reasons which prevent to improve and be permanent of online mediation. These obstacles lead to the consumers experiencing a lack of trust in ODR providers and also the internet is a massive and open area which is challenging to control. The last reason is that confidentiality and transparency, which are crucial principles for the consumer in online mediation, may not be provided at the same time. It is owing to this fact that these two principles of transparency and confidentiality are debated to be opposing each other. When transparency means providing consumers complete information regarding the procedure along with precedents with resolved disputes, confidentiality requires that the entire process of consumer dispute resolution is kept a secret. In this essay, all the issues relating to ODR cannot be discussed thoroughly, yet, this essay will explore the fact that although, on paper, confidentiality may be considered to be a fundamental aspect of ODR, however, in reality it is a strong barrier of online resolution method. This prevents to permanent validation of online mediation as a solution in consumer disputes. This fact has been amply proved by official research.

**The Issue between ODR and Consumer Disputes**

First and foremost, to distinguish the most essential issue, confidentiality, the concept of the online mediation method might be examined briefly. The existence of online mediation needs some factors which are a minimum of two parties who are in conflict with each other and have an agreement with an ODR provider with regard to accepting the terms and conditions. The second is ODR providers which support the agreement area and sometimes neutrals who help parties to settle down. The third is an ODR platform; this is related to technical tools which provide communication between disputants. The crucial factor is neutrals who are accepted by two parties and their duty changes related to ODR approaches which are indicated, facilitative, evaluative. The others are representatives, witnesses. It is generally accepted that the nature of online mediation may be facilitative or evaluative. In terms of facilitative approaches, disputants just receive aid to settle their issue and also there is no neutral decision maker who finds a certain award, for instance, automated negotiation, assisted negotiation and mediation. In evaluative approaches, after analysing the case mediator shows the main issue which the parties need to negotiate and this method is valid solely for monetary issues.

After looking into the concept of online mediation, it might be essential to understand that though online mediation and confidentiality appears to complement each other, in practise they function contrary to popular understanding. Although there is no common definition of this term in the legal area, confidentiality can be defined as follows: ‘confidentiality in the context of ODR could mean the non-disclosure of case information, documentation, and results as well as secrecy of communication’. Further, it may also include non-disclosure of personal information, such as e-mail addresses, phone numbers and credit card information involved in consumer disputes. With respect to the persons, confidentiality may bind only the mediator who helps parties to reach an agreement and the institutions which are aiding the parties to resolve their disputes. In addition, confidentiality might be covered during the online mediation process, not just at the beginning or after the outcome. This is because that aim of confidentiality is to draw an effective conclusion and, to achieve this, the mediator may need
to understand the case deeply and disputants need to trust the online mediation process and explain every point about their issue.

It could be explained why confidentiality is an important principle which needs to be protected in business-to-consumer (hereafter “B2C”) disputes.[16] Consumers are always the weakest side in disputes[17] and they are reluctant to apply to the court because they assume that they are wrong. Therefore, they may not express themselves comfortably in court rooms. Also, they do not wish to incur high costs involved in court procedure for their low cost goods.[18] Besides, the consumers’ willingness to submit these matters to court depend upon the nature of the goods involved. On many occasions, it is found that the goods involved in the transaction are of a personal nature and the consumers are unwilling to discuss them in open court. For instance, if a consumer of a timid and shy nature has been subject to sexual harassment, he/she might purchase medicines or products in order to ensure sexual well-being and health in general. This fact might be a sensitive issue to the consumer and therefore may not be comfortable to bring it up in open court in case of a dispute arising out of that transaction. Thus, consumer will prefer seeking redressal by submitting to online mediation which ensures confidentiality of facts and procedure. Additionally, consumers do not like to disclose their personal information, such as credit card numbers or email addresses. This is owing to fact that this kind of information may be used for illicit purposes, such as fraud. Fraud is a common crime which is committed by using consumers’ personal information. This can be proved by relying on the report submitted in 2001 by the FTC. This report stated that 42% of the 204,000 consumer complaints were regarding fraud. [19] In terms of business, ‘reputation’ is a vital component that needs to be saved.[20] This is because purchasers may consider the sellers’ brand reputation for making their choices when the shop online. The need to protect and improve reputation originates from the fear of losing the trust of the consumers. Hence, companies want to build up their name as a problem solver, not a problem producer. In other words, nobody intentionally purchases goods from problematic sellers. Therefore, companies are attentive to confidentiality when they have a dispute with their consumers owing to fact that they do not want other customers to be affected by negative news. Given the facts, an increasing amount of online mediation users depend on clients’ confidentiality during the process.[21]

Nevertheless, it might be observed that there are a great number of confidentiality issues in B2C practice. The first issue originates from the ODR providers. Whereby the ODR providers all the information about cases, they make available confidential consumers’ information in public domain for the sake of publishing their securities. Also as consumers do not have a choice, ODR providers are supplied by sellers and consumers might just accept them. Therefore, there might be a risk that online mediation might not provide expected benefits in reality, due to the fact that ODR providers may not be trustworthy in terms of keeping consumers’ personal data and sharing, selling or renting them to other interested merchants or subsidiary companies.[22] Apart from these issues, although these problems in online dispute resolution methods, there are no adequate international agreements on the protection of consumers’ personal data apart from national laws and proposals, such as the Australian Privacy Act and the EU Proposal for online mediation. In addition, there is no guarantee that documents will not be conveyed or replicated without authorisation[23] because the majority of websites and ODR providers do not obey the principal security standards. Thus, the veracity of security and record keeping may be challenged as records with the ODR providers is saved automatically. This digital data might be manipulated by them and it is difficult to rectify such activities.[24] ‘Other practical issues involve concerns about proof of consent, use of personal data, privacy and discovery’. [25] Perhaps these risks might be revealed by Marc Rotenberg, Executive Director of the Electronic Privacy Information Centre,
who has said that ‘when you start to get into your details, it is scarier than you might suspect’. [26]

It could be pointed out that ODR providers have skills for data collections and storage. [27] Although parties apply to online mediation methods to safeguard their confidentiality, this guarantee given to the consumers might be breached by ODR providers. This can be proved by ‘toysmart.com’, case where the company was in bankruptcy sold its all customers information list to another company without consumer consent even though it had a policy of on never sharing customers’ information with third parties. [28] It is necessary that ‘international companies respect people’s privacy rights, regardless of whether the company is in the black or in the red’. [29] Therefore, in this case there is an infringement of confidentiality. The meaning of the term to sell customers’ information to other related companies or shareholders may be debated. It might be basically exemplified that sellers could advertise their goods and services by using a bought customers’ emails list. Hence, many e-commerce users may not understand where advertising mails come from and they complain that their mail boxes are full because of advertisements. This situation is an insignificant one: nobody can know exactly how their personal information is used. Given this fact, customers trust diminishes gradually in relation to online dispute resolution parallel to e-commerce. Further, they do not have legal basis to protect consumers for cross-border shopping.

However, others claim that e-commerce is a new area to protect the traditional contract rights, such as privacy, owing to the fact that this area has just been regulated. Therefore, the customary contract rules, in an intangible environment such as the internet, are not always valid for every activity. [30] Thus, this view brings online consumer mediation on an intangible ground and it might be difficult to uphold the ensured rules in favour of the customers, for instance confidentiality. It may be unfair to blame ODR providers and online mediation methods due to the fact that they struggles to be more secure by using developing technology tools. One of the examples is that a well-known security program was created by Microsoft called ‘Content Guard’, which does not allow the forwarding of data to a third party or printing. [31]

In spite of developments in technology, the internet may be still pervious towards information data which is forwarded electronically. [32] In addition, there is another risk that unauthorised persons such as hackers might break into computers and manipulate some information. [33] This is the main point to be emphasised: that it is challenging to manage the risks of the online mediation method although strict security measures are taken, for example digital signatures, firewalls and encryption. This is owing to the fact that hacker technology is improving with security technology simultaneously. [34] Therefore, the development of new security systems remains effective only for a short time. After these new security systems, it might be easy for the hackers to obtain information. This circumstance may be called an expert-hacker fight. Despite these drawbacks of internet communication, there are some acts and punishments to safeguard data against unauthorised access, such as the Data Protection Act 1998. [35] This kind of legislation attracts strictures only after law is violated and the illegal activity of hacking has been carried out but do not deter the hackers from carrying out the crime of hacking at the outset. However, there are mixed views regarding procedures involved in online and offline mediation. Some disputing parties are of the view that communication for resolving disputes via online mediation. [36] In this aspect, it may be conceivable that what extend sending documents by courier or registered post serves the purpose of ODR. This is because ODR is preferred to be quicker and simplify long process. However, this angle may disregard all these aims just to preserve personal data and case information, providing confidentiality. Also the goal of ODR is not just to settle B2C disputes but also to increase buyers’ confidence in e-commerce. [37] The most significant point is to provide all these factors which
have to be in an ODR process. If speed or flexibility reduce beside cost increases to conserve confidentiality or vice versa, ODR may lose popularity owing to the fact that there are no differences from litigation. Thus, parties may not take risk of privacy and want to pay a high fee for non binding awards in some cases. Therefore, it might not be argued that parties can choose which factors outweigh.

The second confidentiality issue for consumers in online mediation is that it is generally debated that transparency might have a controversial issue with confidentiality.[38] It may be necessary to examine the definitions of transparency and confidentiality. Transparency might be generally defined as an information concept of consumer ODR procedure which language is used to settle disputes, the costs of the ODR method, applicable law, the nature of decisions and which decisions are binding besides rights of appeal.[39] In addition, it is asserted that transparency involves publishing the outcomes of mediation on providers’ and sellers’ websites.[40] As defined above, confidentiality might be basically clarified as keeping all information during the process, from the beginning of mediation to after having outcomes.[41] When looking at these two definitions, it might be recognised that transparency is a breach of confidentiality. In other words, these features of B2C online mediation are in opposing positions to each other[42] and it may be unrealistic to seek both factors in online mediation at the same time. This is due to the fact that transparency services informing consumers that how online mediation can be used, benefits and drawbacks of it by indicating some case results and statistics as examples on consumer ODR. Further, it is for encouraging consumers to online mediation owing to the fact that consumers are the weaker side in B2C disputes and they do not have adequate information about how they can defend their rights. From another perspective of the issue, confidentiality is obviously the opposite of publicity due to the fact that confidentiality safeguards parties’ privacy to resolve matters more easily and quickly.[43] Parties might tell their story frankly and honestly if they are assured of confidentiality. Otherwise, companies have power and information to resolve disputes owing to the fact that it is likely that companies might have a number of online mediation cases in e-commerce and this process is forever repeating for them.[44] Therefore, transparency may be seen as an essential factor to save consumers and incline them to adopt online mediation. As a result of opposing principles, consumers may have the right to be informed of the process of ODR to find a balance between parties.

Regarding with another view of balance between two parties, consumers have a considerable amount of power to fight with online sellers. For instance, they might comment or complain about sellers and their goods on websites and in the social media, despite the fact that consumers seem weak vis-a-vis sellers.[45] The effect of social media on consumers may not be ignored. Thus, it might be considered that consumers do not have to be conserved by transparency. This is owing to the fact that the aim of the transparency principle is to secure justice between parties, such as informing consumers about online mediation. However, looking at the balance of power between disputants, transparency loses the meaning regarding with consumers might learn everything from the social media easily. Thus, there is no problem between these two principles which is argued to find a balance to protect the two parties and to be fair in B2C disputes. This is because both parties have equal power to settle their disputes.

Yet, it may be noticed that confidentiality reduces to provide transparency in consumer online mediation. This can be exemplified by the Hague Conference on Private International Law (HCPIL) which recommends some principles for consumer disputes online. In this conference, there is no confidentiality among counted principles. However, transparency exists.[46] It may be shown that publicity is more deficient principles than confidentiality in B2C disputes to save equality between the parties. However, some argues that consumers do not care about confidentiality, apart from their credit card information.
They give importance to costs and speed respectively. Yet, it might be overlooked that disputes occur between a minimum of two parties and it may not be enough to consider just one side’s benefits, such as informing consumers about the process and the results of online mediation cases. In terms of sellers, protecting their reputation is more crucial than transparency, due to consumers being interested in trusting companies when they purchase goods; advertisements are coming before goods and costs in the business area. The future of companies depends on their name and they have right that protecting their logo. In other words, the lost results of ODR cases might affect sellers in the long term.

When looking at both sides, transparency conserves consumers. However, confidentiality saves businesses. The problem is to find a balance between these two principles. Logically, a balance may not be found between opposing principles, yet there are some different angles on transparency which have the opportunity to be fair for both parties. This angle is defined transparency as responding how, who, cost, time questions and statistics. According to Wahab, publication includes just the main documentation, duration, rights of disputants and policy, and the service agreement. Thereby, confidentiality is not violated by transparency. However, ‘some feel that transparency also requires an up-front and public disclosure of ODR providers’ track records’. It could be focused on the purpose of transparency and confidentiality. In the sense of transparency, this principle may be just for raising the awareness of consumers to use online mediation. In terms of confidentiality, the aim of it is to protect parties’ privacy; for instance, case stories, personal information and so on. When these two purposes of the principles are considered, it might be pointed out that a balance can be found between them both. This is because transparency does not damage confidentiality in this area; it is just general information about online mediation. Transparency may not disclose specific case information or persons, companies. Further, confidentiality does not prohibit being informed to consumers due to the fact that it might be against to its purpose. For example, confidentiality is also advantages of ODR to increase the use of the online mediation method in B2C disputes. In other words, basically transparency and confidentiality exist for the same purpose, which grabs parties’ attention to ODR and settles disputes smoothly.

On the other hand, Ethan Katsh claims that transparency will substitute of confidentiality in the long term. It might be in natural circumstances. This is because the information flow is simple between internet users and they can be aware of everything, consciously or unconsciously. It may be a remarkable and irresistible outcome of the internet. This is owing to the fact that the internet is a broad world to control and consumers might not want to take the risk of low cost disputes without transparency. They want to see the future of disputes. Supporting to resolve disputes by online, it may be necessary to be clear and to assure consumers. As can be seen from a survey which was conducted by Cohn and Wolfe, 68% of the consumers surveyed demanded transparency (in London, 2012).

Conclusion

To sum up, the use of e-commerce has increased remarkably in B2C, accompanied by transactions of goods and services between territories in recent decades thanks to some advantages, such as trade being quicker, cheaper, more affordable, with greater diversity, and so on. This is owing to the fact that consumers want to benefit from the outcomes of globalisation. However, these outcomes have brought some issues - for instance, online disputes between consumers and sellers. On this point, consumers and sellers have started to apply to online mediation to benefit from its flexibility, duration, low cost and especially its confidentiality. And yet confidentiality has a great number of drawbacks, even though it
seems to be advantageous, and difference of ODR from courts in consumer disputes. This is owing to the fact that ODR providers do not care about the consumer’s right to privacy. Technology is too broad a world to control and manage the risk of breaching confidentiality, manipulating personal data and case information. Besides, ODR has two principles which are incompatible with each other, transparency and confidentiality. It means that transparency displaces confidentiality due to consumers’ information rights about online mediation methods. Plus, there is no adequate legal arrangement to protect parties’ details and to reach a standard of ODR providers.[56] In response to these issues, confidentiality is the most essential principle to be conserved and implemented, owing to the fact that this feature provides the future of online mediation and effects on disputants’ preferences regard with resolution of their disputes. Yet it may be emphasised once more that technology is an ever-developing area which might not be leaded. Notwithstanding the measures taken for complying with the developing technology, it might not work because breaching comes with measures in parallel. In addition, legislation may just influence after infringement of confidentiality. In other words, it has no preventive effect on breaking laws about confidentiality. Hence, it may not be important to indicate confidentiality as a principle of online mediation. In terms of transparency, it might be true that consumers are the weakest side in B2C disputes because of their affordability.[57] Thus, they should be informed about the ODR process, such as appealing, duration, cost and enforcement, but not given much information, for instance, on the previous results of cases. Except for the identities of parties, case results and case information are published on websites, information on the online mediation process does not violate confidentiality, and, however, the overall tendency is to publish the results of cases in reality. Therefore, this is also a strong barrier to keep the online mediation process confidential.

In light of the privacy problem, they might lose reliability of the online mediation method due to the fact that the approach has vital disadvantages, such as disclosing consumers’ personal information, and also there is no standard definition of transparency. Thus, ODR providers might define transparency according to their view, such as the results of cases or just general information about ODR. Consumers cannot have information about the ODR process whether how transparency is interpreted. In terms of companies, confidentiality is the main factor to appeal to online mediation to protect their reputation. Yet, as seen from general approaches tend to transparency instead of confidentiality. Inherently, sellers might be damaged in practice.

Returning to the hypothesis posed at the beginning of this essay, it may be possible now to state that both disputants might be damaged not to be implemented neither full transparency nor full confidentiality in online mediation. Furthermore, technological problems might influence both of the parties, such as not providing security and as a natural result of it is to breach confidentiality. Therefore, confidentiality is a strong barrier to online mediation in consumer disputes due to the fact of losing parties’ trust. Even though a confidentiality guarantee is given on paper and this barrier might be effect overwhelmingly on the future of online mediation methods in B2C disputes.

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