

On Online Dispute Resolution: Current Limitations on Enforcing Transnational B2C Online Arbitration Awards

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I. INTRODUCTION

With the proliferation of the online habitat, e-commerce has developed rapidly during the recent decades. Naturally, business-to-consumer ("B2C") transactions occur more frequently in a transnational context.¹ The volume of disputes among these parties also increased with the development of cyberspace, and the means for settling such disputes soon ensued accordingly.²

Compared to litigation, alternative dispute resolution is better tailored to resolving conflicts.³ Enforced by mutual agreement, parties in dispute are more likely to participate actively and resolve the matter timely and efficiently. Additionally, an award settled through the resolution is accepted internationally as a judicial remedy so long as the State where the parties are trying to enforce the award joined the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention").⁴

Further development of cyberspace also led people to consider integrating alternative dispute resolution online, which became the prototype of online dispute resolution ("ODR".) This note aims to explore the possibility of incorporating technologies into different stages of the arbitration process. It will explore the possibility of total integration of ODR within the international arbitration context and consider whether the development of cryptocurrencies can effectively substitute the current cross-jurisdictional issue of enforcing awards obtained through ODR. It also considers the transparency principle of international arbitration and how technology might not improve as much as anticipated.

This note is divided into four parts. First, it will explain the factual and historical background of ODR, starting with alternative dispute resolution, then on international ODR, focusing on OECD guidelines and recommendations on consumer protection, the International Chamber of Commerce, and UNCITRAL's Working Group and its different rounds. Then it will explain the dispute settlement rules of the United States, the European Union, Japan, and the Republic of Korea. The proposed analysis and critique will discuss whether the entire online dispute resolution process could be automated and incorporated into cyberspace to protect consumers effectively, and if not, to what extent is such incorporation possible. Specifically, it will discuss the importance of transparency and reliability, the current limitations to obtaining an award, and briefly touch on the possibility of cryptocurrency as an adequate award. Finally, it will discuss the current difficulties with enforcing awards obtained through ODR.

¹ See Judicial Research Policy Institute, 온라인분쟁해결(ODR)에 관한 연구[The Research on Online Dispute Resolution], (2018).

² See UNCITRAL Technical Notes on Online Dispute Resolution, (April 2017).

³ See *supra* note 1.

⁴ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 330 U.N.T.S. 3 (entered into force June 07, 1959) ("New York Convention").

This note mainly focuses on enforcing the award obtained from transnational B2C online arbitration. Because international laws that develop fast—such as international laws on business—influence other, more slowly developed parts of international law, by limiting the scope of this Note to transactional B2C online commercial arbitration, the reader can have some sense of how both commercial and non-commercial online arbitration could further develop.

II. FACTUAL/HISTORICAL BACKGROUND

A. *What is online dispute resolution?*

Currently, there are multiple definitions for online dispute resolution.⁵ This section will first discuss the general overview of the earlier, narrower definition of online dispute resolution and see how this definition has evolved over time.

ODR started as an electronic alternative dispute resolution.⁶ However, as ODR continued to develop in an online environment, it not only encompassed the early definition of ODR but also described any type of dispute resolution—including adjudication processes—done online.⁷ ODR, rather than possessing a singular and set definition, became a term that emphasizes various technical processes within the online habitat.⁸ Since ODR is usually defined and viewed holistically, this Note will focus specifically on the earlier, narrower definition of ODR—the online version of alternative dispute resolution.

Alternative dispute resolution means "any procedure for settling a dispute by means other than litigation."⁹ There are typically four types of commonly used alternative dispute resolution: negotiation, mediation, conciliation, and arbitration. Negotiation is "a consensual bargaining process [where] the parties [try] to reach [an] agreement on a disputed . . . matter."¹⁰ This process relies on the parties' "complete autonomy" without any third-party intervention.¹¹ Mediation is "a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach

⁵ See Judicial Research Policy Institute, *온라인분쟁해결(ODR)에 관한 연구*[The Research on Online Dispute Resolution], (2018).

⁶ See generally United Nations Commission on International Trade Law ("UNCITRAL"), Technical Notes on Online Dispute Resolution (2017).

⁷ See *supra* note 5.

⁸ See *supra* note 6.

⁹ See *Alternative Dispute Resolution*, BLACK'S LAW DICTIONARY (11th ed. 2019), [https://www.westlaw.com/Document/Ifdbd56af808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Ifdbd56af808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)

¹⁰ See *Negotiation*, BLACK'S LAW DICTIONARY (11th ed. 2019), [https://www.westlaw.com/Document/I025d1dda808511e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I025d1dda808511e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)

¹¹ *Id.*

a mutually agreeable solution."¹² Like conciliation, the mutual third party has no authority to arbitrarily resolve the dispute.¹³ Conciliation is "a process [where] a neutral person meets with the parties to dispute and explore how the dispute might be resolved."¹⁴ It is "a relatively unstructured method [to resolve disputes where] a third party facilitates communication [to help] settle [the parties'] differences."¹⁵ Conciliation is commonly used in family courts.¹⁶ Arbitration is "a process [where] the disputing parties choose one or more neutral third parties to make a final and binding decision [to resolve their] dispute."¹⁷ Because the decision is binding, the arbitration decision could function in lieu of a judgment (as we will see in the following section).¹⁸ Arbitration is also used in UNCITRAL—the U.N. Trade dispute settlement system.

This Note will discuss enforcing awards obtained through online commercial arbitration in transnational B2C transactions.

1. Context of transnational B2C transactions through online arbitration

International Arbitration is "arbitration between companies or individuals in different States, usually by including a provision for future disputes in a contract." Generally, rules regarding the enforcement of awards and agreements are set forth in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention or "Convention"). International arbitration is an effective tool to resolve disputes because it allows enforcement of relief obtained through arbitration in multiple, transnational jurisdictions.¹⁹ The Organization for Economic Co-operation and Development ("OECD"), a separate international organization whose member States may differ from those who joined the New York Convention,²⁰ also covers international arbitration.²¹

¹² See *Mediation*, BLACK'S LAW DICTIONARY (11th ed. 2019), [https://www.westlaw.com/Document/I022e6cbd808511e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I022e6cbd808511e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)

¹³ *Id.* See also *Conciliation*, BLACK'S LAW DICTIONARY (11th ed. 2019), [https://www.westlaw.com/Document/Ifee4c008808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Ifee4c008808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Arbitration*, BLACK'S LAW DICTIONARY, (11th ed. 2019).

¹⁸ See New York Convention, *supra* note 4, Art. III.

¹⁹ See New York Convention, *supra* note 4, Art. III. ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.")

²⁰ See About the OECD, OECD <https://www.oecd.org/about/> (last visited Mar. 6, 2022).

²¹ See *Tax treaties: OECD publishes 30 country profiles applying Arbitration under the multilateral BEPS Convention*, OECD <https://www.oecd.org/tax/beps/oecd-publishes-30-country-profiles-applying-arbitration-under-the-multilateral-beps-convention.htm> (last visited Mar. 6, 2022) [hereinafter *Tax Treaties*].

To be able to enforce awards in multiple jurisdictions, international arbiters must be impartial, and the awards granted by them must be final—i.e., non-appealable.²² They must also be flexible and should take their confidentiality duties seriously.²³ One caveat on finality is that although the relief itself is not appealable, the parties can appeal to courts on its enforcement.²⁴ Also, the arbitration process itself must be—or at least try to be—efficient in time and cost.²⁵ Although in practice, most arbitration agreements specifically prohibit parties from uploading information they discover during the arbitration procedure, parties are not bound by confidentiality.²⁶ As we shall see, this could conflict with the fairness principle of the adjudicatory process due to a lack of transparency.²⁷ Because arbitration procedures could be thought of as basically privatizing—i.e., contracting—the procedural law and its applications, it becomes important to understand how the parties in a given case set their arbitration provisions and clauses. When three or more companies are involved in a dispute, it is up to the parties when they agreed to the arbitration agreement whether they would allow a third party to resolve the dispute.²⁸

More specifically, this Note will focus on international arbitrations on transnational B2C transactions. A B2C transaction is a business-to-consumer transaction where a business and a consumer are parties to the transaction.²⁹

2. Process of international arbitration

The general overview of the arbitration process is as follows. Usually, both parties start to bargain with each other before they turn to arbitration.³⁰ When arbitration is initiated, the case can either fall under institutional or *ad hoc* arbitration.³¹ The two follow different procedures.³² Institutional arbitration is arbitration processed through an institution, like the ICC.³³ Under this procedure, arbitration is initiated when a party files a claim to the institution.³⁴ Meanwhile, *ad hoc* arbitration is non-institutional arbitration, initiated by a notification from one party to another.³⁵ Here, it makes sense

²² See Kazuki Okada, *알기쉬운 국제중재* [Easy to Understand: International Arbitration], (Chaelin Jeon, 1st ed., 2017).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *Tax Treaties*, *supra* note 21.

²⁸ *Id.*

²⁹ BLACK'S LAW DICTIONARY (11th ed. 2019), [https://www.westlaw.com/Document/Ifdfc828f808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Ifdfc828f808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (last visited Mar. 6, 2022).

³⁰ See Kazuki Okada, *알기쉬운 국제중재* [Easy to Understand: International Arbitration], 11, (Chaelin Jeon, 1st ed., 2017).

³¹ *Id.* at 11–12.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See *supra* note 31, at 12.

that selecting the right arbiter or arbiters to resolve the issue at hand becomes particularly important.³⁶ After selecting an arbiter or arbiters, the parties then go through the Case Management Conference, where they decide the dominant language, date, and location of the proceedings.³⁷ In the context of ODR, the physical location of the proceeding obviously matters less.³⁸ Once this stage is done, the arbiter(s) proceed(s) with the arbitration process under the agreed schedule as set in the Conference.³⁹ The parties then proceed with the disclosure process.⁴⁰ Here, because Civil Law and Common Law define disclosure differently, the parties should jointly set the scope to streamline the process.⁴¹ Keep in mind, if there are no definitional provisions within the arbitration agreement or if it is insufficiently defined, then the International Bar Association (“IBA”)’s Rules on Taking of Evidence in International Arbitration applies as default.⁴² Next, the arbiter(s) hold hearings.⁴³ Finally, the arbiter(s) grant(s) awards, and the parties proceed with the recognition and enforceability of the awards.⁴⁴

B. Which laws regulate online dispute resolution?

The underlying framework that acknowledges online dispute resolution in a global context is set through international law. Accordingly, the respective States modify or add supplemental materials according to their own circumstances to develop and set the resolution framework.

1. International Law

The United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards, (“New York Convention” or “Convention”) considers awards obtained through international arbitration as a valid result of adjudication.⁴⁵ The New York Convention was formed on June 10, 1958.⁴⁶ It mandates member States to “recogniz[e] and enforce[e] arbitral awards made in [other State] and arising out of differences between persons, whether physical or legal.”⁴⁷

Currently, more than 150 States are parties to the Convention.⁴⁸ The New York Convention is particularly important as countries like the United

³⁶ *Id.*

³⁷ Note here that for the location, the place where awards are enforced is not included in this Note. See *supra* note 30, at 13.

³⁸ Because it uses the online habitat as a forum, ODR, by definition, is not constrained by geographic limitations.

³⁹ See *supra* note 30, at 13.

⁴⁰ *Id.*

⁴¹ *Id.* at 110.

⁴² However, that is outside of the scope of this Note.

⁴³ See *supra* note 30, at 14.

⁴⁴ *Id.* at 15 and 146. Also, some States require both the recognition of the process and a valid arbitration process agreement for a party to the dispute to enforce the award.

⁴⁵ See *supra* note 4, Art. I, Para. 1 and Art. III.

⁴⁶ See *supra* note 4, Art. I, Para. 1.

⁴⁷ See *supra* note 4, Art. I, Para. 1.

⁴⁸ See *Contracting States, THE NEW YORK CONVENTION*, <https://www.newyorkconvention.org/countries> (last visited Mar. 6, 2022).

States, Japan, some European countries, and the Republic of Korea—all of which do an extensive amount of trade—are member States of the Convention.⁴⁹

One caveat to note is that there are two types of reservations that a State can make when it is joining the Convention: one, of reciprocity and, two, of its broadened scope.⁵⁰ A State reserving the former means that the reciprocity principle will only allow applying the Convention to other member States and no non-member State can invoke the Convention when enforcing an arbitral award in that member State.⁵¹ Some member States like Japan, Korea, the United Kingdom, and the United States all reserved to limit the New York Convention's application to other member States that adopted this Convention.⁵²

A State reserving the latter means that a member State will expand the Convention's application to other, non-commercial cases, whereby the State will enforce not just commercial cases, but also non-commercial cases as well.⁵³

Article V of the New York Convention cites certain situations where the “recognition and the enforcement of the award may be refused.”⁵⁴ Paragraph 1 of Article V lists the situations where a refusal could be sought upon the request of either party.⁵⁵ Paragraph 2 lists causes of refusal that the court, where the validity of the arbitration is disputed, can invoke *sua sponte*.⁵⁶ The former lists five items: one, incapacity of a party or other reasons to make the agreement void; two, violation of procedural due process against whom the award is invoked; three, relief awarded on matters that were not a part of the consideration of the agreement; four, failure to follow the agreement on the arbiter's (or arbiters') composition or the arbitration process; and five, immaturity of the effect of the award.⁵⁷ For paragraph 2, there are two causes.⁵⁸ Sub-paragraph (a) states the dispute cannot be settled under the country's law.⁵⁹ For example, if it violates the scope to which the member State has agreed under the New York Convention, the State may refuse to recognize and enforce the award.⁶⁰ Sub-paragraph (b) means that the agreement cannot violate the mandatory rules of the country that the parties have agreed to apply.⁶¹

⁴⁹ *Id.*

⁵⁰ See New York Convention, *supra* note 4, Art. I, Para. 3.

⁵¹ *Id.*

⁵² *Id.* See also *supra* note 22.

⁵³ *Id.*

⁵⁴ See *supra* note 4, at 9–10.

⁵⁵ *Id.*

⁵⁶ See *supra* note 4, at 10.

⁵⁷ *Supra* note 4, at 9.

⁵⁸ *Supra* note 4, at 10.

⁵⁹ *Supra* note 4, at 9.

⁶⁰ *Id.*

⁶¹ *Id.*

The United States adopted and integrated the New York Convention through legislation.⁶² On a federal level, with certain exceptions,⁶³ the award is enforced as is. However, on a state level, to apply the New York Convention, parties must pass four tests: one, whether there was a written agreement; two, whether the agreed-upon arbitration occurred within the Contracting State; three, whether the agreement arose from a commercial legal relationship,⁶⁴ and; four, when the case involves an unrelated state law question,⁶⁵ whether none of the parties are U.S. citizens.⁶⁶ Additionally, an agreement involving only United States citizens falls under the Convention if it “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”⁶⁷ The Convention’s “relates to” language creates a “low bar” for jurisdiction, unlike the traditional jurisdictional analyses required under the remainder of the Federal Arbitration Act.⁶⁸ A case relates to an arbitration agreement, at a minimum, if it seeks to compel arbitration, confirm an award, or vacate an award, as well as in any other situation in which the agreement or award “could conceivably affect the outcome of the case.”⁶⁹

Although the New York Convention does not specifically mention ODR within its articles, it is presumed that its scope falls under the Convention.⁷⁰ Therefore, for online arbitration to be enforceable against member States, following the specific regulations and laws according to general principles and guidelines set forth in international law and concrete details provided in each respective State would ensure its enforceability.

As the international community regularly acknowledges guidelines, etc., on online dispute resolution, one could perceive acknowledging ODR as becoming closer to customary international law. Even though the recognized documents have no enforceability under international law—primarily

⁶² See 9 U.S.C. § 202, 203.

⁶³ For example, if either enforcement or the award itself would violate the mandatory rules that would make the award null. The New York Convention also cites exceptions. See New York Convention, *supra* note 4, Art. V, Para. 1 and 2.

⁶⁴ See New York Convention, *supra* note 4, at Art. I 3.

⁶⁵ See Wagstaffe Prac. Guide: Fed. Civ. Proc. Before Trial § 6-IV (2021), <https://plus.lexis.com/api/permalink/79601520-cb36-4c90-930e-c9237445c798/?context=1530671> (last visited Mar. 6, 2022) (Citing 9 U.S.C. § 202; *Stemcor USA Inc. v. CIA Siderurgica Do Para Cosipar*, 895 F.3d 375, 379 (5th Cir. 2018) to explain the discrepancy between the New York Convention and the fourth element).

⁶⁶ To clarify, although the U.S. is a member of the New York Convention, it gives deference internally to each state as to whether they will adopt the Convention or not. See *Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 927 F.3d 906, 909–10 (5th Cir. 2019); See also 9 U.S.C. § 202, 203. Also, Article IV of the Constitution’s Full Faith and Credit Clause does not apply to foreign judgments. Rather, “the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty.” See *Hilton v. Guyot*, 159 U.S. 113, 166 (S.D.N.Y. 1895).

⁶⁷ See 9 U.S.C. § 202; See also *Soaring Wind Energy, L.L.C. v. Catic USA Inc.*, 946 F.3d 742, 751–752 (5th Cir. 2020).

⁶⁸ See *Adam Joseph Res. (M) Sdn. Bhd. v. CNA Metals Ltd.*, 919 F.3d 856, 862–63 (5th Cir. 2019).

⁶⁹ See *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int’l GmbH*, 921 F.3d 1291, 1299–1300 (11th Cir. 2019).

⁷⁰ Rafal Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*, 38 *Tol. L. Rev.* 165 (2006) (noting how the commentators all mention online arbitration under “arbitration”).

because each member State recognizes different types of sovereignty—member States are constantly recognizing the duty to implement ODR.⁷¹ Regardless of their differences in opinion as to what the structure of the ODR should be, the duty to implement ODR within their respective States is becoming at least somewhat closer to Soft Law.⁷²

Especially in e-commerce and consumer protection cases, many organizations including the Organisation for Economic Co-operation and Development, the International Chamber of Commerce, and the United Nations Commissions on International Trade Law all advise their member States to implement ODR. This Note will further discuss such sources by each respective intergovernmental organization.

a. Organisation for Economic Co-operation and Development (“OECD”)

OECD is “an international organization that works to build better policies for better lives,”⁷³ focusing on inter-governmental cooperation to “shape policies that foster prosperity, equality, the opportunity[,] and well-being [internationally] for all”⁷⁴ while trying to establish “evidence-based international standards and [find] solutions to a range of [] challenges.”⁷⁵ It does so by cooperation of inter-governmental entities (including different policymakers, citizens thereof).⁷⁶

OECD has passed numerous guidelines and other Soft Law, such as e-commerce guidelines, e-commerce trends and challenges, internet fraud, copy control and digital rights management, cardholder protection, and other related products.⁷⁷ It notably approved the Guidelines for Consumer Protection in the Context of Electronic Commerce in 1999,⁷⁸ recognized the Recommendation on Consumer Dispute Resolution and Redress in 2007,⁷⁹ and the Recommendation in 2016⁸⁰ to protect consumers in e-commerce.

⁷¹ The reader can see from below that since the 1990s, the international community has been constantly acknowledging online dispute resolutions as valid forms of resolving disputes. *See infra* II. A. 1.

⁷² *See* United Nations Commissions on International Trade Law (hereinafter “UNCITRAL”)’s Working Group III.

⁷³ *See supra* note 20.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See* ORG. FOR ECON. CO-OPERATION AND DEV. (hereinafter “OECD”), *Consumers in the Digital Economy*, <https://www.oecd.org/sti/consumer/consumersinthedigitaleconomy.htm>. (last visited April 27, 2023).

⁷⁸ *See* OECD, *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* (1999), <https://www.oecd.org/sti/consumer/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm> (last visited Mar. 6, 2022).

⁷⁹ *See* OECD, *OECD Recommendation on Consumer Dispute Resolution and Redress* (2007), <https://www.oecd.org/sti/ieconomy/oecdrecommendationonconsumerdisputeresolutionandredress.htm> (last visited Mar. 6, 2022).

⁸⁰ *See* OECD, *Recommendation of the Council on Consumer Protection in E-commerce*, OECD PUBLISHING, PARIS, <http://dx.doi.org/10.1787/9789264255258-en> (last visited Mar. 7, 2022).

The purpose of the Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) was to strengthen consumer protection in B2C transactions.⁸¹ It is non-enforceable, but it has an advisory authority⁸² over the States. Recommendation on Consumer Dispute Resolution and Redress (2007) emphasized ODR as a procedural tool to resolve disputes.⁸³ It encompassed alternative dispute resolution and advised member States to provide various alternative dispute resolution methods before adjudication.⁸⁴

As business transactions evolved dramatically, OECD released Consumer Protection in E-commerce: OECD Recommendation (2016).⁸⁵ It revised the Recommendation on Consumer Protection in E-commerce to fit the "[t]echnological advances and market pressures"⁸⁶ in B2C transactions, such as "its approach to fair business practices, information disclosures, payment protections, unsafe products, dispute resolution, enforcement and education,"⁸⁷ as well as "policy guidance on mobile and online payments and intangible digital content products."⁸⁸

b. International Chamber of Commerce

The International Chamber of Commerce's International Action Plan (1999) further recommends that each State should encourage online dispute resolution within its government.⁸⁹ Also, in Best Practices for ODR for B2C and consumer-to-consumer (C2C) transactions (Dec. 2003), along with a fully online-integrated model of online dispute resolution, the International Chamber of Commerce considered a hybrid model of online and offline alternative dispute resolution.⁹⁰

c. United Nations Commission on International Trade Law ("UNCITRAL")

UNCITRAL's Working Groups mostly deal with alternative dispute resolution.⁹¹ Notably, Working Group II works on dispute settlement, including international contract practices (1981–2000) and international sale of goods (1968–1978).⁹² Working Group III deals with investor-state dispute settlement reform, transport law (2002–2008), international legislation on shipping (1970–1975), and online dispute resolution (2010–2016).⁹³

⁸¹ See *supra* note 79.

⁸² If a Convention has only an advisory authority, it means it is not binding by itself. Rather, it suggests or encourages its member States to follow the Convention accordingly.

⁸³ See *supra* note 81.

⁸⁴ *Id.*

⁸⁵ See *supra* note 79.

⁸⁶ See *supra* note 5.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ UNCITRAL, Working Groups, <https://UNCITRAL.un.org/en/content/working-groups> (last visited Nov. 16, 2021).

⁹⁰ See *supra* note 1.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See UNCITRAL, Working Groups, <https://UNCITRAL.un.org/en/content/working-groups> (last visited Nov. 16, 2021).

This Note will be focusing on Working Group III, which led UNCITRAL to officially adopt its Technical Notes on Online Dispute Resolution in 2016.⁹⁴ After collecting years of empirical evidence, UNCITRAL expanded the scope of the parties to more than just consumers in Working Group III (2010).⁹⁵ Because online dispute resolution successfully functioned to resolve B2C disputes, it expanded its application to B2B (business-to-business; as opposed to B2C; business-to-consumer) disputes as well.⁹⁶

During the first stage of the development of UNCITRAL's ODR model, it devised a single package model.⁹⁷ Working Group III (2011), functioning as an electronic dispute resolution process, introduced the package model that first led parties to negotiate, then to facilitate settlements. And when even those fail to resolve the dispute successfully, to arbitrate.⁹⁸ However, with the development of technology and diverse circumstances involving the respective UNCITRAL member States, these factors made the single package model hard to implement.⁹⁹

Considering diverse factors when implementing a uniformed working model, the Working Group III (2012) introduced the two-track model, where it would either require one set of rules that includes the two-track process or two sets of rules.¹⁰⁰ Here, it proposed its applicability to B2B transactions to some jurisdictions by binding the enforceability of the pre-dispute arbitrations.¹⁰¹ B2C and non-binding pre-dispute arbitration jurisdictions would take the other track.¹⁰²

The third Technical Notes became the official document in online dispute resolution.¹⁰³ Here, it integrated tracks of I and II.¹⁰⁴ Although this is still a technical note and therefore is non-binding, it lays out the four foundational principles on transnational online dispute resolution, which are: fairness, transparency, due process, and accountability.¹⁰⁵

The Notes in Section II.10 and 11, define transparency as “[the desirability¹⁰⁶ of disclosing] any relationship between the ODR administrator and a [] vendor, so that users of the service are informed of potential conflicts

⁹⁴ See UNCITRAL, Technical Notes on Online Dispute Resolution (2016).

⁹⁵ See Sungho Bae, *A Study on ODR Enforcement for Disputes Arising from Cross-border E-Commerce—Focusing on the UNCITRAL and EU*, e-비즈니스연구, 17(5), 174.

⁹⁶ *Id.*

⁹⁷ See Sungho Bae, *A Study on ODR Enforcement for Disputes Arising from Cross-border E-Commerce—Focusing on the UNCITRAL and EU*, e-비즈니스연구, 17(5), 174.

⁹⁸ *Id.* at 172–73.

⁹⁹ *Supra* note 92, at 174.

¹⁰⁰ *Supra* note 92, at 174. See also Seok-beom Choi & Chan-hi Park, *UNCITRAL ODR 기술지침의 실무적 활용성에 관한 연구* [A Study on the Practical Utilization of UNCITRAL Technical Notes on Online Dispute Resolution], 33-4 國際商學 [KOREA INTERNATIONAL COMMERCIAL REVIEW] 81, 86 (2018) (S. Kor.).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *supra* note 94.

¹⁰⁴ *Supra* note 86.

¹⁰⁵ See *supra* note 94, at 2.

¹⁰⁶ The Notes do not specifically state this as the duties, because Technical Notes are non-binding.

of interest”¹⁰⁷ and “[of publishing] anonymized data or statistics on outcomes in ODR processes, [to] enable parties to assess its overall record, consistent with applicable [confidentiality principles].”¹⁰⁸ For fairness and due process, it means that the ODR administrator should be neutral and independent from both parties.¹⁰⁹ The Notes also state that the process “should be based on the [parties’] explicit and informed consent[s].”¹¹⁰ The due process principle encompasses both procedural and substantive due process, where the latter is obtained (at least partially) through the accountability principle, i.e., “[the implementation of] an internal oversight [or] quality assurance process” to ensure due process of the ODR.¹¹¹

2. *Types of Awards or Relief Through the Arbitration Process*

Generally, arbitration relief can be categorized into two broad types: monetary or non-monetary relief.¹¹² Monetary relief is the typical form of award that consumers seek to obtain through arbitration.¹¹³ For non-monetary relief, a party may seek specific performance or an injunction.¹¹⁴ There may be some instances, especially under the German Civil Law jurisdiction, where a party is seeking transparency from the other party¹¹⁵ as one of his or her rights as a consumer.¹¹⁶ A consumer might request disclosure from a business entity that is reluctant to release some information that is pertinent to consumers. There is also a partial award, separate from the final award, where the jurisdiction or applicable laws are determined.¹¹⁷ Partial awards must settle matters before the final award; without them, the final relief cannot be awarded.¹¹⁸ Of course, like a default judgment in court, default relief could occur, as well as arbitral awards granted based on the parties’ conciliation.¹¹⁹

3. The Respective States

In accordance with the constant recognition of online dispute resolution as a valid means to resolve modern business disputes, along with the four principles delineated in UNCITRAL’s technical notes, the individual States

¹⁰⁷ *Supra* note 94, at 2.

¹⁰⁸ *Supra* note 94, at 2.

¹⁰⁹ *Supra* note 94, at 2-3.

¹¹⁰ *Supra* note 94, at 3.

¹¹¹ *Supra* note 94, at 3.

¹¹² See Kazuki Okada, *알기쉬운 국제중재* [Easy to Understand: International Arbitration], (Chaelin Jeon, 1st ed., 2017).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ It is being implied that there might be some cases in which those companies did not disclose information in transnational B2C transactions, where the company does not have a place of office within the disputed country and the consumer directly deals with the foreign business, thereby making the administrative procedures in Civil Law jurisdictions ineffective.

¹¹⁶ As we have seen above, the OECD also acknowledges the right to be informed as a right of the consumers.

¹¹⁷ See Okada, *supra* note 30, at 137-38.

¹¹⁸ *Id.*

¹¹⁹ This applies to arbitration cases where the parties also went through the conciliation process. See Organisation for Economic Co-operation and Development, *supra* note 80.

attempted or are attempting to set the rules on ODR according to their respective circumstances.

The States of focus in this Note will be the United States of America, the European Union¹²⁰, Japan, and the Republic of Korea. These States will be assessed to give the reader a general idea of how each member State has developed their respective online arbitration systems.

a. United States

Under 9 U.S.C. § 203, “an action or proceeding falling under the [New York Convention] shall be deemed to arise under the laws and treaties of the [U.S.]”¹²¹ Since the early stages of its discussion, the U.S. has tried implementing ODR, especially in B2C e-transactions.

The American Bar Association (“ABA”) Taskforce, formed in 2000, set the Set Global Online Standards Commission and developed a new form of online dispute resolution.¹²² The Taskforce addresses both B2C and B2B disputes.¹²³ Further, it automates electronic transactions and uses an electronic agent to protect individual consumers.¹²⁴

SquareTrade, used by eBay, was the leading provider for B2C online dispute resolution in the past.¹²⁵ It is a mediating platform that deals with large-scale online dispute resolution and guarantees trust to users.¹²⁶ Providing clients deal with online market providers, it functions to mitigate conflicts between the seller and the buyer.¹²⁷

Although SquareTrade provides services, including warranties and the Trustmark program, it seems that PayPal and eBay handled the development of their dispute resolution processes.

SquareTrade offers two levels of dispute resolution—assisted negotiation and mediation. Recently, it has resolved multiple transnational and translingual disputes.

¹²⁰ Although the European Union is not a member state, for the purposes of this note, it will be regarded as such.

¹²¹ See 9 U.S.C. § 203.

¹²² See Task Force on Electronic Commerce and Alternative Dispute Resolution, THE IT LAW WIKI (last visited Mar. 6, 2022), https://itlaw.wikia.org/wiki/Task_Force_on_Electronic_Commerce_and_Alternative_Dispute_Resolution.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Dispute Resolution Overview, EBAY (last visited Mar. 6, 2022) <https://pages.ebay.com/services/buyandsell/disputeres.html?mkevt=1&mkcid=1&mkrid=711-53200-19255-0&campid=5338683477&customid=&toolid=10001>.

¹²⁶ *Id.*

¹²⁷ *Id.*

b. E.U.

Because of the unique characteristics of the European Union, involving multinational, multilingual, and multicultural disputes since its inception, methods to resolve disputes also naturally developed throughout the E.U.

As a result, E.U. is the epicenter of international online dispute resolution. As listed below, the EU seemed to focus on consumer rights and solving the inefficiencies¹²⁸ arising out of B2C transactions.

European Small Claims Procedure (“ESCP”) (2009)¹²⁹ doesn’t directly set out ODR. However, before developing methods to resolve disputes online, the European Union developed a quick and easy way to resolve small claims transnationally.¹³⁰ Not surprisingly, this later influenced the E.U. when it formed the early framework of online dispute resolution.¹³¹

In the E.U.-Commission’s *Zugag der Verbraucher zum Recht*, the Commission tried to assimilate private law between nations to provide an efficient alternative dispute resolution process.¹³² And *E-commerce Richtlinie* (2000) applied e-commerce transactions to alternative dispute resolution, building the foundations of its ODR processes.¹³³ In Regulation (E.U.) No. 524/2013,¹³⁴ which focuses on e-commerce ODR, *E-commerce Richtlinie* applies.¹³⁵ It tries to formulate a consumer-friendly platform through its online dispute resolution platform.¹³⁶

c. Japan

As an island State, Japan functions as a giant port within the international trade community. It would thus come as a surprise to learn that despite its large volume of trade, the discussion of online dispute resolution

¹²⁸ Like small claims.

¹²⁹ See European Small Claims Procedure, CITIZENS INFORMATION (last visited Mar. 6, 2022), https://www.citizensinformation.ie/en/justice/courts_system/european_small_claims_procedure.html.

¹³⁰ See *supra* note 1.

¹³¹ *Id.*

¹³² See GRÜNBUCH - ZUGANG DER VERBRAUCHER ZUM RECHT UND BEILEGUNG VON RECHTSSTREITIGKEITEN DER VERBRAUCHER IM BINNENMARKT, <https://op.europa.eu/en/publication-detail/-/publication/8fb5c29c-196f-4d31-9e29-40c6e933c482/language-de> (last visited Mar. 6, 2022).

¹³³ See Richtlinie 2000/31/EG des Europäischen Parlaments und des Rates vom 8. Juni 2000 über bestimmte rechtliche Aspekte der Dienste der Informationsgesellschaft, insbesondere des elektronischen Geschäftsverkehrs, im Binnenmarkt (Richtlinie über den elektronischen Geschäftsverkehr) [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (“Electronic Commerce Directive”)], (last visited Mar. 6, 2022) https://beck-online.beck.de/Dokument?vpath=bibdata%2Fges%2Ffewg_rl_2000_31%2Fcont%2Ffewg_rl_2000_31.htm&anchor=Y-100-G-EWG_RL_2000_31.

¹³⁴ See Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), EUR-LEX (last visited Mar. 6, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524>.

¹³⁵ *Id.*

¹³⁶ *Id.*

has been slow. The Japanese seem to have a tendency to eschew arbitration in general—in 2014, it was reported that the Japanese Commercial Arbitration Association (“JCAA”) arbitrated approximately 20 cases annually.¹³⁷ However, as the volume of international trade is increasing, more Japanese are interested in arbitration than before.¹³⁸ Nevertheless, Japan’s effort to be transparent and share information with other states seems worthwhile to note.

There are several features regarding Japanese online dispute resolution processes that are worth highlighting: the first is the International Consumer Problem Resolution Network, the next is Cross-border Center Japan, and finally, a recent study on online dispute resolution from JCAA. Also, due to the current lack of interest in arbitration, cross-border clauses (which will be discussed later in this Note) function more practically than arbitration.¹³⁹ This cross-border clause, however, could incur inefficiencies and unnecessary litigation costs.¹⁴⁰

The International Consumer Problem Resolution Network (“Network”)¹⁴¹ searched for ways to produce and apply e-consumer.gov and OECD/CCP, ICPEN conference results in Japanese to improve its ODR transparency.¹⁴² Although the Network has ceased to operate temporarily, its attempt to implement conference results in its native language helps to enhance the information available to the Japanese and those who can read the language.¹⁴³ Currently, its practical application is questionable since it has halted operation.¹⁴⁴

Operating under the National Consumer Affairs Center of Japan (独立行政法人国民生活センター),¹⁴⁵ Cross-border Center Japan wrote a memorandum of understanding¹⁴⁶ (“MOU”) with other governments, such as Taiwan, Singapore, Vietnam, Russia, Republic of Korea, etc., which helps to share information with other states. This enhances the transparency of information and attempts to assimilate with other nations, and this transparency will be enhanced inadvertently when attempting to promote the procedural due process of online dispute resolution.¹⁴⁷

¹³⁷ See Kazuki Okada, *알기쉬운 국제중재* [Easy to Understand: International Arbitration] (Chaelin Jeon, 1st ed., 2017).

¹³⁸ *Id.*

¹³⁹ See *supra* note 79, at viii.

¹⁴⁰ See *supra* note 79, at 50.

¹⁴¹ See *Consumer Affairs Agency: Policy List*, CONSUMER AFF. AGENCY, GOV’T OF JAPAN, https://www.caa.go.jp/policies/policy/local_cooperation/system_improvement/network/ (last visited Mar. 7, 2022).

¹⁴² 有限責任中間法人 EC ネットワーク [Limited Liability Intermediate Corporation EC Network], 国際的な電子商取引を巡るトラブル解決のあり方に関する調査研究 [Survey and Research on How to Solve Problems in International Electronic Commerce], (2009) <https://www.ecnetwork.jp/public/METreport06.pdf>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ NAT’L CONSUMER AFF. OF JAPAN, <http://www.kokusen.go.jp/> (last visited Mar. 7, 2022).

¹⁴⁶ A memorandum of understanding (“MOU”) is a non-binding agreement between the parties where they declare their intent to further a common goal.

¹⁴⁷ See *supra* note 41.



d. The Republic of Korea

In the Republic of Korea, almost all practitioners seem to consider ODR as part of alternative dispute resolution.¹⁴⁸

Although the Korean Commercial Arbitration Board (“KCAB”)¹⁴⁹ uses online dispute resolution as a form of alternative dispute resolution, not much information can be gleaned from the KCAB’s website on online arbitration. The Board arbitrates both domestic and international matters.¹⁵⁰ Its international arbitration rules only apply when “at least one of the parties to the arbitration agreement has its place of business [not in the Republic of Korea and somewhere else], or the place of arbitration set out in the arbitration agreement is [not in the Republic of Korea.]”¹⁵¹

Fig. 1: Image of the e-mediation/settlement agreement clause (boxed).¹⁵²

The Board only comes in when both parties have agreed to arbitrate under the Board’s governance upon forming their contract.¹⁵³ And as for the language used in arbitration proceedings, under the model rules provided by the Board, the parties can set it as they please.¹⁵⁴

¹⁴⁸ See Judicial Research Policy Institute, 온라인분쟁해결(ODR)에 관한 연구[The Research on Online Dispute Resolution], (2018).

¹⁴⁹ See KOREAN COM. ARB. BD. INT’L, <http://www.kcab.or.kr/servlet/main/1000> (last visited Mar. 7, 2022).

¹⁵⁰ See *KCAB International Arbitration Rules*, KOREAN COM. ARB. BD. INT’L http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101&CURRENT_MENU_CODE=MENU0008&TOP_MENU_CODE=MENU0007 (last visited Mar. 6, 2022).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at Art. 3.

¹⁵⁴ *Id.* at Art. 28, para. 1.

KG Inicis Co., Ltd. is a Korean company that provides e-payment in B2C and B2B transactions.¹⁵⁵ Not only does it handle e-commerce transactions, but it also provides settlement services in case anything goes wrong.¹⁵⁶ As one of the leading companies in the nation, it effectively resolves conflicts in B2C e-commerce transactions through its own mediation/settlement processes. Entering into an ODR contract is simple and convenient for the consumers. If a consumer wishes to use this service, one must pay an additional small amount upon purchasing the good/service by clicking on a separate box within the portal consumers use to pay for the actual product as a proof of agreement¹⁵⁷ to enter into an ODR contract should a dispute ever arise.¹⁵⁸

Since the Republic of Korea is a member of several conventions covering international arbitration agreements and disputes, Korean courts acknowledge foreign arbitral awards.¹⁵⁹ Under the New York Convention, Korea only declared and reserved the reciprocity principle—international arbitration is only enforceable when the original arbitration relief was awarded in member states who also joined the Convention.

III. ANALYSIS: ON THE ISSUES OF TRANSPARENCY AND ENFORCEABILITY

Even in the traditional international arbitration system, transparency and reliability are important.¹⁶⁰ Some developing nations have corrupt, non-impartial officials, causing others to distrust those countries' judicial systems.¹⁶¹ Here, rather than going to trial, parties can (try to) obtain impartiality by agreeing to arbitrate in a third country.¹⁶² And in that case, arbitration is the only legal procedure where both parties can resolve disputes adequately.¹⁶³ Particularly, cross-jurisdictional clauses,¹⁶⁴ often

¹⁵⁵ See KG이니시스 소개 [Introducing KG Inicis], <https://www.inicis.com/intro-inicis> (last visited Mar. 6, 2022).

¹⁵⁶ *Id.*

¹⁵⁷ Instead of “consideration,” “proof of agreement” is the more appropriate context here because consideration is not a requirement to form a valid contract in the Republic of Korea.

¹⁵⁸ See KG이니시스 [KG Inicis], “안심하고 쇼핑물 구매” ..KG이니시스 ‘이니안심서비스’ 100만건 돌파 [“Safely shop with confidence”... KG Inicis’ ‘IniSafe Service’ exceeded one million cases], <https://www.inicis.com/blog/archives/86853> (last visited Mar. 6, 2022).

¹⁵⁹ See Daebeobwon [S. Ct.], Dec. 13, 2018, 2016Da49931(S. Kor.) (the Court acknowledges that unless there is an exception to its application, the foreign arbitral awards joined under the appropriate international treaty are enforced.); See also Art. 6 of the Constitution of the Republic of Korea.

¹⁶⁰ See Kazuki Okada, *알기쉬운 국제중재* [Easy to Understand: International Arbitration], vi, (Chaelin Jeon, 1st ed., 2017).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ A cross-jurisdictional clause refers to the application of the other party’s jurisdictional law when a party breaches its duty. For example, clauses like “the arbitration shall be held in Paris, France if [the] Japanese Party requests the arbitration, or Tokyo, Japan, if [the] French Party [so] requests” are cross-jurisdictional clauses. This type of clause is frequently used in arbitration agreements where a Japanese legal entity enters into an international business agreement. See UNCITRAL, *supra* note 91, at viii, 50.

mentioned in the arbitration agreement, would lose their function completely.¹⁶⁵

Because maintaining reliability and transparency is important in online dispute resolution as well as alternative dispute resolution, the characteristics of being in an online habitat broaden the geographic scope more than those of alternative dispute resolution. And the proliferation of e-commerce could lead to more consumers who have never dealt before with local companies encountering more disputes. Thus, the focus should be on how the consumers in the dispute, who might not have gone through ODR before, could trust the procedures. To do this, transparency of information gathered during the process is paramount.¹⁶⁶

Transparency could be viewed on two levels: system-wide and individual. On a system-wide level, sharing information between member States might be helpful to maintain transparency. Bear in mind that, since this is a B2C transaction, unless the business is cooperative with its respective State's government, information shared with the member States might be limited in scope.

By nature, online dispute resolution requires voluntariness between the parties and their willingness to resolve the dispute. Therefore, it seems more likely that the parties' role in maintaining information transparency would affect the outcome of online dispute resolution. The system-wide ODR could be further enhanced if the member States pass legislation on enforcing information transparency between the parties. So, currently, transparency can only be achieved by the voluntary sharing of information.

On an individual level, especially in mediation and arbitration, the role of a non-partial mediator or arbitrator is crucial. Even if someone acted

¹⁶⁵ UNCITRAL, *supra* note 91, at viii.

¹⁶⁶ Providing necessary information to the consumers is a duty imposed on the companies. For consumer protection purposes, obtaining information is one of the things in which the consumer might be interested, even if it is not for monetary relief. See Sobijyaggibonbeob [Framework Act on Consumers] Art. 11 (S. Kor.).

The Regulation on Consumer Protection Cooperation (CPC) is applicable in the European Economic Area. The consumer authorities of Norway, Iceland, and Liechtenstein are therefore authorities of the CPC Network. The International Consumer Protection and Enforcement Network is a worldwide organization involving more than 40 countries, most of which are members of the Organization for Economic Cooperation and Development (OECD). The aim of the Network is to share information about cross-border commercial activities that may affect consumer interests and to encourage international cooperation among law enforcement agencies. The OECD addresses a wide range of issues relevant to consumers.

The United Nations Guidelines for Consumer Protection, which were adopted in 1985 and revised in 1999, propose a list of objectives described as "legitimate needs": the right to be heard, right to information, right to safety, right to choose, right to consumer education, and the promotion of the economic interests of consumers.

Article 3 of the Act declares that businesses have a duty to provide consumers with necessary information.

This author is implying that there might be some cases in which those companies did not disclose information in a transnational B2C transaction where the company did not have a place of office within the disputed country. The consumer directly deals with the foreign business, thereby making the administrative procedures in Civil Law jurisdictions ineffective.

impartially, the parties will distrust the fairness of the procedure if the parties do not think that their opinions are adequately considered. Such consideration should be evaluated under multiple factors. Not only does understanding the transnational, interlingual, intercultural, and trans-legal substance help enhance credibility, but giving clients outward credentials to make them trust the third party is equally important.¹⁶⁷

A one-size-fits-all system cannot satisfy all parties from different cultures.¹⁶⁸ Considering the basic moral principle that “our species is one, and each of the individuals who compose it is entitled to equal moral consideration,”¹⁶⁹ the role of culture deeply affects each States’ law practitioners and its laypeople’s assumptions and cognitive behaviors.

To make one unified system work effectively in all member States, private law must be assimilated before implementing an online dispute resolution system, as seen in the E.U. European countries have a common linguistic and historical nexus. However, as many different jurisdictions operate differently, as they have diverse legal standards and rules, enforcing awards becomes more difficult than just reaching a conclusion.¹⁷⁰ Not only must individuals agree upon the award, but both the process of obtaining an award and the substance on which the award was based must also not have violated the mandatory rules of the respective States. Not to mention the presumption respective States have with their function of the law, resulting in the various interpretations of the law.¹⁷¹ Even within Civil Law jurisdictions, their treatment of law and system vastly differ from one another.¹⁷² The French Civil Law system is similar to the U.S. common law jurisdiction.¹⁷³ The German Civil Law jurisdiction is “the most scientific, precise, with the technical language used throughout . . . [where it attempts] to provide a legal system that was designed for professionals, not the general public.”¹⁷⁴ In States that follow the German Civil Law, such as Germany,

¹⁶⁷ There is empirical evidence on how such attributes give credentials to people. See ROBERT CIALDINI, *PRE-SUASION: A REVOLUTIONARY WAY TO INFLUENCE AND PERSUADE* (2016) (noting how the government of the Republic of Korea was able to successfully evacuate Koreans from Afghanistan within a short period of time).

¹⁶⁸ Studies show that different cultures have different values. See 山本七平、『「空気」の研究』 (2018); see also 허태균, 『어쩌다 한국인』 (2015); See also *United States v. Virginia*, 518 U.S. 515 (1996); Cf. *Hunbeobjaepanso* [Const. Ct.], May 30, 2013, 2009Hunma514 (S. Kor.) (both cases show the stark difference on how the respective courts (that review the constitutionality of cases) concluded the constitutionality of an institute’s policy that excluded the admission of one sex (or gender)).

¹⁶⁹ See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 245 (2d ed. 2009).

¹⁷⁰ Of course, under the New York Convention, if both parties are member States and its awards violate their respective law, the award theoretically should be permitted under the New York Convention. However, in practice that could raise the problem of conflict of laws—i.e., domestic law and international law, but that is outside the scope of this Note. Also, since the United States has not ratified the Convention, the enforcement of arbitral awards could still be an issue if the U.S. is a party to the dispute.

¹⁷¹ See JOHN B. THORNTON, *U.S. LEGAL REASONING, WRITING, AND PRACTICE FOR INTERNATIONAL LAWYERS* 14 (2014).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

Japan, and the Republic of Korea, even the slightest misuse of the legal jargon could result in a different outcome.¹⁷⁵ Naturally, the complexity and the legal customs within each jurisdiction could further hinder the enforceability of awards.¹⁷⁶

To accommodate a broader range of member States, it seems less likely that this would be a viable option. Like other international laws that focus on transnational businesses, unless each State has dealt with every other foreign State, or formulated enough reasonable expectations towards other States, it seems unlikely that multinational online dispute resolution that resolves these types of disputes could occur. Of course, as seen in dispute resolution using SquareTrade, where the dispute in question is fairly simple, the existing method could seem effective enough for many to use the system.

However, especially in a class action B2C arbitration case, it could have complications when enforcing awards. There might be different regulatory rules that the system has to follow, depending on each party's respective State. The law of respective States affects both the substantive matter and procedural process of the dispute resolution. In that case, depending on the jurisdiction, the total incorporation of an automated third party (as an arbitrator or a mediator, etc.) is not practical. Of course, assigning experts who have expert knowledge of the laws in multiple jurisdictions as arbiters would certainly help, as long as they encompass all the jurisdiction that may come up. But it is questionable whether technology can automate the different nuances and ramifications each law has and combine all of them together to make an accurate decision—at least not in the near future.

And as briefly mentioned above, not only is the parties' voluntariness an important factor in its transparency of information, but also, the main approach to its procedures, its application, and execution of awards naturally

¹⁷⁵ See *Daebeobwon* [S. Ct.], May 17, 2018, 2017Do4027 (S. Kor.), (*per curiam*) (parties invoking judicial remedies confused the legal principles from the Commonwealth jurisdiction and those from the German Civil Law. For example, under the Civil Code, the court of the Republic of Korea allows, as a general measure for relief, the party to claim specific performance when that party claims compensation damages as a general measure for relief. This right to claim specific performance, as the Court noted, is one of the key differing factors between Civil Law and Common Law jurisdictions. Therefore, since the default remedy in Korean Courts is specific performance, the Common Law theory that a buyer can adequately obtain relief through monetary damages under either efficient breach or nonperformance of contract does not fit within the principles of Civil Law when a seller of real estate intentionally disregarded the original contract and sold one's property to someone else.); See *Daebeobwon* [S. Ct.], July 12, 2013, 2013No603 (S. Kor.), (allowing a party to set off under the Foreign Exchange Transactions Act solely because it has a similar, yet not identical, legal concept means that the party has not comprehended the law.); See also *Daebeobwon* [S. Ct.], Dec. 13, 2018, 2018Da240387 (S. Kor.), (one party failed to comply with the basic legal rules of the Republic of Korea bars granting nor enforcing the arbitral award obtained through international arbitration); See also *Daebeobwon* [S. Ct.], Dec. 13, 2018, 2016Da49931 (S. Kor.), (enforcing an award obtained through international arbitration that conflicts with the Civil Remedies Law bars the enforcement thereof.).

¹⁷⁶ *Id.*

rely heavily on the parties' voluntariness.¹⁷⁷ Therefore, obtaining an award that both parties can satisfy becomes an issue.

The two types of awards that the parties can obtain are monetary and non-monetary relief, e.g., being provided of the pertinent information, specific performance and injunction.¹⁷⁸ For now, particularly for non-monetary relief, whether the parties can actually obtain them is mostly dependent on the parties' voluntariness. For the total incorporation of automated cyberspace dispute resolution, some scholars have argued that e-currency is an adequate remedy for monetary relief.¹⁷⁹ However, that seems unlikely—at least not for the time being.

Although cryptocurrencies do have the potential to be enforced faster than regular monetary relief in a transnational setting, there are obstacles that the international community has to pass, especially when consumers are from different States.¹⁸⁰ In an international or a transnational dispute, not only do parties themselves have different reactions to electronic currencies but even when assuming they both are open to them, each party's governmental allowance/regulation from their States might hinder them from obtaining an efficient remedy.¹⁸¹

Some states could regulate e-currency,¹⁸² making the execution of monetary relief moot. Although it could incorporate something like the

¹⁷⁷ See Judicial Research Policy Institute, 온라인분쟁해결(ODR)에 관한 연구[The Research on Online Dispute Resolution], (2018).

¹⁷⁸ *Id.*

¹⁷⁹ See Sara Hourani, *Access to Justice and Blockchain-Based Arbitration*, 26 DISP. RESOL. MAG. 20, 20 (2020); see also Pietro Ortolani, *Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin*, 36 OXFORD J. OF LEGAL STUD. no. 3, 595, (2016).

¹⁸⁰ For example, cybersecurity. DPRK (North Korea) has hacked and obtained information from multiple people by hacking a public-accessed website as more people started using the internet. See Kwang-Gyu Nam, 북한의 한국 내 주요 시설 해킹과 사이버 전력 [North Korea's Hacking of Major Facilities in South Korea and Cyber Warfare], THE EPOCH TIMES (July 15, 2021) https://kr.theepochtimes.com/%EB%B6%81%ED%95%9C%EC%9D%98-%ED%95%9C%EA%B5%AD-%EB%82%B4-%EC%A3%BC%EC%9A%94-%EC%8B%9C%EC%84%A4-%ED%95%B4%ED%82%B9%EA%B3%BC-%EC%82%AC%EC%9D%B4%EB%B2%84-%EC%A0%84%EB%A0%A5_589810.html.

¹⁸¹ When cryptocurrencies became popular enough that the government started looking into them to figure out whether they fit under the category of securities, the government of the Republic of Korea banned the currency dealers from operating in the country. See Jeong-hoon Shin, *靑 뒤늦게 '속도 조절'...정부, 가상화폐 대책 '오락가락'* [The Blue House belatedly "controlling the speed"...The government going back and forth on policy on cryptocurrencies] <https://news.naver.com/main/read.naver?mode=LSD&mid=sec&sid1=001&oid=448&aid=0000232268> (Jan. 11, 2018). Also, FSS (Financial Supervisory Service; the Republic of Korea's version of SEC) did not consider cryptocurrency as a security at the time. Cryptocurrencies lead the market without any consumer protection. See Hong Jeong-gyu, "금감원 직원, 가상화폐 투자했다가 정부발표 직전 매도" [Financial Supervisory Service Employee sells cryptocurrencies he/she previously invested right before disclosure of government sanction to the public] (Jan. 18, 2018) <https://www.yna.co.kr/view/AKR20180118067800002>.

¹⁸² Constitutional Court of Korea, 정부의 가상통화 관련 긴급대책 등 위헌확인 헌법소원 [Confirmation of unconstitutionality of Government's emergency measures related to virtual currency], <https://www.ccourt.go.kr/site/kor/info/selectDiscussionVideoView.do?bcIdx=20002> (last viewed Mar. 7, 2022).

"Google Tax" Law,¹⁸³ making the place of the consumers an area in which awards could be executed. But not all States have uniform law on these issues. So, the possibility of total incorporation including its execution of awards does not seem to be feasible. Unless there's a unified currency, and unrestricted access to resources, including information, e-currency seems an unlikely remedy.

It also does not seem feasible to make a uniform ODR process solely on non-human infrastructure. Multifaceted human life experience comes into play to make a satisfactory decision.¹⁸⁴ Where there is no set of uniform rules, especially with multinational transactions, litigations, and alternative dispute resolutions, it seems highly unlikely that ODR process could perfectly substitute those considerations.¹⁸⁵ Likewise, entirely relying on online dispute resolution seems unlikely due to different restrictions and variables that the internet just cannot encapsulate.¹⁸⁶

Before total incorporation of automated online dispute resolution, member States should at least come together to form an assimilated law in the private sector to form a framework like the E.U. for effective implementation of online dispute resolution.

Only then, as well as settling on the acceptable business norms, can the transnational translingual online dispute resolution start to work as a baseline. Of course, even with such implementation, there would still be times when enforcement of the award would burden the enforcing party.¹⁸⁷ For example, in practice, it is unclear exactly what an injunction or a specific performance is referring to when enforcement of it would necessarily be difficult.¹⁸⁸ However, even without considering such complicated factors, it seems unlikely that total incorporation is likely to occur in the near future.

IV. CONCLUSION

¹⁸³ Jiyoung Sohn, *Google, Apple Hit by First Law Threatening Dominance Over App-Store Payments*, WALL ST. J. (Aug. 31, 2021, 10:42 AM), <https://www.wsj.com/articles/google-apple-hit-in-south-korea-by-worlds-first-law-ending-their-dominance-over-app-store-payments-11630403335>; See also, Gukjaeoesaejoejungheh gwuanhan beobyul [Gukjaeojungbeob] [Adjustment of International Taxes Act] Art. 27, Para. 1, Art. 28 and Art. 63 (S. Kor.) (provisions on fine for negligence).

¹⁸⁴ Part of the reason why the three-track model was implemented was that the global community was considering the diverse background of individual states. See *supra* note 91.; See also *supra* note 153 (on cultural differences).

¹⁸⁵ Douglas Heaven, *Why deep learning AIs are so easy to fool*, NATURE (Oct. 9, 2019), <https://www.nature.com/articles/d41586-019-03013-5>.

¹⁸⁶ See *supra* notes 92.

¹⁸⁷ See Seolah Park, *외국중재판정에 대한 집행결정: 집행가능성 요건을 중심으로* [Enforcement of Foreign Arbitral Awards: Focused on Enforceability], 27 Korean Forum on International Trade and Business Law 1, 69, 70 (2018). Although numerous factors can hinder the enforceability of foreign arbitral relief, in practice, most cases carry uncertainty as to what the injunction or specific performance is seeking when such measures become non-monetary relief. In the article, the author focuses on this specific problem when the definitional part of the arbitration awards is unclear. She also notes that depending on whether the New York Convention applies to the arbitral award, the requirements, and procedures of its recognition, and enforcement differ.

¹⁸⁸ *Id.*

Society is changing rapidly more than ever. Even with the proliferation of the internet, that by itself cannot aid in making arbitration procedures fully transparent. As mentioned in the reasoning set above, although it would help the efficiency of arbitration, under the current system of ODR, a total automated arbiter process is not likely to happen. Accordingly, enforcing awards will also continue to have barriers because the development of technology and of the law on enforcing awards are currently incongruous. Perhaps, the entire process, including its enforcement of ODR would work more efficiently only when countries assimilate their systems—like how members of the E.U. first assimilated their laws.

