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Dispute Resolution for Cloud Services:

Access to Justice and Fairness in Cloud-Based Low-Value Online Services

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Chapter 1 – Introduction

1. The setting

Technology innovation in the markets outpaces innovation in the legal domain. Changes in law could be seen as a reaction to the observed changes in society. Lawmakers react to changes in socio-economical spheres of society, sometimes specifically having in mind the changes that technology innovations bring about.¹ The advent of Internet forced lawmakers and scholars to ponder on the applicability of traditional legal institutions in the information society.² The rise of e-commerce stirred questions on the appropriateness and applicability of legal institutions supporting dispute resolution.³ The major theme was the inadequacy of traditional courts to

¹ John T. Delacourt, *International Impact of Internet Regulation, The*, 38 HARVARD INT. LAW J. (1997); Philip J. Weiser, *Future of Internet Regulation, The*, 43 U.C. DAVIS LAW REV. (2009); Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMMUN. LAW POLICY 445–484 (2001).

² Bert-Jaap Koops et al., *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-liners (Information Technology and Law)*, (2006).

³ ME Katsh, *Dispute resolution in cyberspace*, CONN. L. REV. (1995). Ethan Katsh, M. Ethan Katsh & Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (2001); Ethan Katsh, *ODR : A Look at History*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 21–33 (2012); Koops et al., *supra* note 2.; COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, ECOMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* (2002).

handle online originated disputes, due to the nature of online relationships. Given the easiness of cross-border transactions, courts among others would have to deal with an array of issues associated with the private international law: jurisdiction, applicable law enforcement issues.

In order to circumvent the problems that the judiciary system entails, users have often turned to alternative dispute resolutions (ADR).⁴ ADR, encompassing different methods of out-of-court dispute resolution, provided options for solving disputes not solely on rights-based adjudication but also interest-based negotiation and mediation, which some scholars proclaim to lay in “the shadow of the law”.⁵

Still, it was considered that the courts, as well as traditional ADR providers, will have issues in handling disputes and enforcement in a world which is seemingly borderless, easily accessible and supported by instantaneous communication across the globe. However, from the inertness of the courts, a potential solution arose. As it was suggested by many scholars, most notably Ethan Katsh, disputes that originated online could be best dealt with online, ushering the new field of online dispute resolution (ODR).⁶

Online dispute resolution is a method of resolving disputes using technology as a facilitator or as a “fourth party” in the dispute.⁷ While it resembles to be a natural extension of ADRs, since it includes online negotiation, mediation-arbitration, ODR has also developed innovative methods using technology such as double-blind bidding, visual blind bidding and assisted negotiation.⁸ It has proven to be difficult to define precisely the characteristics and types of ODRs, but there is a consensus that we can divide them on adjudicative (i.e. online arbitration, UDRP) and consensual (i.e. mediation, assisted negotiation).⁹ Proponents of ODR claim advantages (such as accessibility, the speed of the process, asynchronous communication, lower costs, flexibility.) although, at the same time fully aware of corresponding disadvantages (confidentiality issues, higher privacy risks, lack of human “feel “).¹⁰ However, following the

⁴ JEROME T. BARRETT & JOSEPH BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT* (2004).

⁵ RH Mnookin & L Kornhauser, *Bargaining in the shadow of the law: The case of divorce*, YALE LAW J. (1979); R Cooter, S Marks & R Mnookin, *Bargaining in the shadow of the law: A testable model of strategic behavior*, J. LEGAL STUD. (1982), <http://www.jstor.org/stable/724200> (last visited Feb 7, 2016); H Jacob, *The elusive shadow of the law*, LAW SOC. REV. (1992).

⁶ Katsh, Katsh, and Rifkin, *supra* note 3; RULE, *supra* note 3.

⁷ Katsh, Katsh, and Rifkin, *supra* note 3.

⁸ See more on it in chapter 5.

⁹ FELIX STEFFEK, *REGULATING DISPUTE RESOLUTION : ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* (2013).

¹⁰ RULE, *supra* note 3. Consultation Paper, *CONSULTATION PAPER On the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union*, .

initial rise of providers of ODR, in the midst and shortly after of the dot-com bubble, the number of active providers has diminished and only a handful selected ODR providers can claim successful practice.¹¹

Recently ODR developments have entered a new phase with new public support on the horizon. The EU has recognized the potential of ODR and chose to connect the existing network of ADRs in Member States through an ODR platform on the EU level.¹² At the same time, UNCITRAL's Working Party III on ODR was trying to propose a framework for global redress. Both initiatives envisioned a system for solving high-volume low-value buyer/seller disputes. Even though the UN proposal has failed to reach consensus on one model (or two) of a framework for ODR, and the EU model is subject to certain criticism, we could say that we are witnessing bestowing of public trust in the vision of ODR.¹³

Having in mind advantages and characteristics of ODR, relevant authors in the field distinguish ODR for its potential suitability for e-commerce fully-online disputes and consumer protection.¹⁴ With the notable exception of the practice of eBay, PayPal, Squaretrade and few other providers of ODR, we still wait for a wider confirmation of a concept of online dispute resolution in different settings. Even in these exceptions, e-commerce giants like eBay and PayPal have been mostly the providers of ODR for the disputes between their own customers (consumer-to-consumer dispute, C2C) and not direct parties to the disputes. It remains to be seen if ODR (or ADR for that matter) can serve its role of fair resolution in the dispute where there is a significant imbalance in parties' negotiation power. The goal of this thesis is to examine the appropriateness of available dispute resolution mechanisms on such scenarios.

¹¹ Katsh, *supra* note 2. pp. 21–33

¹² COUNCIL OF THE EUROPEAN UNION EUROPEAN PARLIAMENT, REGULATION (EU) NO 524/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21MAY 2013 ON ONLINE DISPUTE RESOLUTION FOR CONSUMER DISPUTES AND AMENDING REGULATION (EC) NO 2006/2004 AND DIRECTIVE 2009/22/EC (REGULATION ON CONSUMER ODR) THE 1–12 (2013).

¹³ J Hörnle, *Encouraging Online Dispute Resolution in the EU and Beyond-Keeping Costs Low or Standards High?*, QUEEN MARY SCH. LAW LEG. STUD. RES. ... (2012).

¹⁴ PABLO CORTÉS, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION (ROUTLEDGE RESEARCH IN INFORMATION TECHNOLOGY AND E-COMMERCE LAW) (2010).P. Cortes, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, 19 INT. J. LAW INF. TECHNOL. 1–28 (2010).Louis F. Del Duca et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims — OAS * Developments*, CI 221–264 (2010).

2. The problem

A more recent trend of e-commerce that achieved significant growth capable of redefining the service industry is cloud computing. Cloud computing in simplified terms could be understood as the storing, processing and use of data on remotely located computers accessed over the internet.¹⁵ More commonly, as a starting point, authors take the broad NIST definition: cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.¹⁶ Cloud services are services, products and solutions, based on cloud computing and consumed in real-time over the Internet.¹⁷

One of a more prominent characteristic of cloud services is a shift in payment model to pay-per-use, which compared to similar IT infrastructure investments and software licensing brings significant savings to enterprises and consumers. It also cuts the costs of upgrading needs of hardware and software. Based on the previous lowering of prices of some of the biggest cloud providers, coupled with the influence of Moore's law and Kryder's law,¹⁸ we also point to the likelihood of an increase in the offer of low-cost services and high utilization of free model (or freemium) for certain cloud services.¹⁹

To obtain cloud computing services users generally accept a predefined contract of adhesion, where the terms should be accepted on "as is" basis.²⁰ Cloud contracts usually comprise Terms of Service (and-or conditions), Acceptable Use Policies, Service Level Agreements and

¹⁵ European Commission et al., COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS UNLEASHING THE POTENTIAL OF CLOUD COMPUTING IN EUROPE.

¹⁶ Peter Mell, Timothy Grance & Peter Mell, THE NIST DEFINITION OF CLOUD COMPUTING, RECOMMENDATIONS OF THE NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY SPECIAL PUBLICATION 800-145, <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

¹⁷ See more in chapter 3. Frank Gens, IDC EXCHANGE » BLOG ARCHIVE » DEFINING "CLOUD SERVICES" AND "CLOUD COMPUTING" (2008), <http://blogs.idc.com/ie/?p=190> (last visited Aug 18, 2014).

¹⁸ GORDON E. MOORE, CRAMMING MORE COMPONENTS ONTO INTEGRATED CIRCUITS (1965); Chip Walter, *Kryder's Law*, SCI. AM. (2005), <http://www.scientificamerican.com/article.cfm?id=kryders-law&ref=sciam> (last visited Feb 6, 2014).

¹⁹ Cloud Economics: Visualizing AWS Prices over Time | eScience Institute, , <http://escience.washington.edu/blog/cloud-economics-visualizing-aws-prices-over-time>.

²⁰ Simon Bradshaw, Christopher Millard & Ian Walden, *Contracts for Clouds : Comparison and Analysis of the Terms and Conditions of Cloud Computing Services Contracts for Clouds : Comparison and Analysis of the Terms and Conditions of Cloud Computing Services 1*, (2010). RON SCRUGGS, THOMAS TRAPPLER & DON PHILPOTT, CONTRACTING FOR CLOUD SERVICES (2011); Kristof De Vulder & Sourcing Group, *Legal considerations Cloud computing contracts*, (2010).

Privacy Policies.²¹ Within the Terms of Service as a more general document depicting service agreement, we can usually find dispute resolution clauses which express preferences of jurisdiction and methods for dispute resolution. Even though the services are available globally, the terms in contracts are typically set in favor of provider's local jurisdiction and choice of law. Since most of the offered cloud services are non-negotiable for consumers and SMEs, the provider biased terms are potentially hindering cloud users from access to appropriate redress. Additionally, disputes over services that are being offered for a low price or for free seem disproportionate or inadequate to the costs for waging disputes before courts or traditional models of ADR. Cloud service disputes are a subcategory of e-commerce disputes in general, with the emphasis on the imbalance in negotiation power, cross-border nature, an automatic delivery of services with minimal human involvement and rapid provisioning of services that are fully delivered online.

With awareness of the growth of cloud services and trends of adoption, as well as growing trend of Internet of things, where products in real time rely on cloud services for proper functioning (which could also beg the question of liability in case of malfunction), it is expected to have increase in disputes over services that are cloud-based and cross-border in nature.²² However, do we have the appropriate mechanisms to handle low value cross-border and sometimes technical disputes? Having in mind the previously mentioned limitation of judicial systems, at first glance, it could seem only natural that we use ODR for cloud service disputes. In fact, cloud services (of a modern variant) became widespread after the occurrence of ODR, and it would seem practical for a globally scalable business to cover a large user base. Nevertheless, cloud providers rely on courts, especially in local jurisdictions of the provider, to handle disputes placing a significant part of their global user base in difficult position to obtain redress if they are to obtain redress in the jurisdiction of providers' domicile. On the other hand, private dispute resolution in the shadow of the law does not necessarily guarantee fair and appropriate redress by itself, if the initial positions and negotiation power are significantly in favor of one party.

²¹ Christopher Millard, *Cloud Computing Law*, (2013).

²² DAVE EVANS, *THE INTERNET OF THINGS: HOW THE NEXT EVOLUTION OF THE INTERNET IS CHANGING EVERYTHING* (2011).

3. Approach and Scope

Considering the initial setting of the stage, where cloud users are placed in a position where presumably they are unable to find appropriate redress and access to justice, while at the same time different dispute resolution mechanisms exist and could be appropriated depending on the context of a dispute or environment, we formulate research questions to properly investigate the issue and offer our ideas on how some of the problems could be mitigated or solved. We frame the principal research question as follows:

Do the current dispute resolution mechanisms provide adequate means to resolve cross-border low-value disputes between cloud providers and users, and if not, what legal measures can be taken to improve access to justice and fairness in this domain?

The principal research question is supported and built upon by answering following sub-questions:

- How are access to justice and fairness understood in dispute resolution?
- How parties negotiate on dispute resolution in cloud services?
- What is the international legal framework relevant to dispute resolution over cloud services?
- What are the characteristics of alternative dispute resolution mechanisms for cloud service disputes?
- To what extent the dispute resolution mechanisms under current international legal framework are adequate for cloud service disputes to ensure access to justice and fairness?
- What is the most appropriate legal framework for dispute resolution between cloud providers and users that provide access to justice and fairness?

The first question sets the theoretical framework and seeks an answer on how are access to justice and fairness understood in dispute resolution. To do this, we turn to normative legal theories which are grounded in moral and political philosophy. The second question examines the current practices in contracting cloud services and how the contractual negotiation frames the dispute resolution in cloud domain. The third question provides answers on an international legal framework for dispute resolution over cloud services, by digging deeper into the private

international law and the framework for alternative dispute resolution. Having in mind international framework for ADRs we assess the characteristics and data on alternative dispute resolution mechanisms for cloud service disputes? Building from all the previous discussions in conjunction with the theoretical framework set by answering the first sub-question, we assess to what extent the dispute resolution mechanisms under current international legal framework are adequate for cloud service disputes to ensure access to justice and fairness. Finally, on conclusions from previous parts, we look into the most appropriate legal framework for dispute resolution between cloud providers and users and what legal measure need to be taken for achieving access to justice and fairness in these scenarios.

Even though some of the issues are comparable, e.g. the lack of access to justice, we chose to restrict our research on individual dispute resolution and stayed out of issues of collective dispute resolution. The reflection and approach to the issues of collective redress are different than appropriating the system design to certain types of individual disputes. The number and interests of stakeholders are also quite different. Some issues might be borderline, but due to the resources available for the completion of the thesis and time limitations, we opted for research focusing on individual party dispute resolution.

Also, having in mind the global reach of the cloud services and potential exposure to the multiple jurisdictions we chose to concentrate on a limited number of jurisdictions with the big emphasis on regional and international regulatory framework. Coming from a civil law legal tradition significant emphasis is placed on European civil law systems with small but appropriate consideration and analysis of common law systems, mainly of the United States and the UK. We focus on EU law since it is regional supranational regulatory regime, applicable to 28 Member States, with spillover effects on multiple countries worldwide.

4. Outline and methodology

In Chapter 2, we set the theoretical framework for the whole thesis. To explain what we deem “adequate”, “appropriate” or “suitable” in the context of dispute resolution we need to illustrate why we are emphasizing certain values and elements of dispute resolution and what is the nature of their relationship. Discussion about values and preference of normative solutions invokes normative legal theories to the table. Normative legal theories tend to be grounded in moral and political theories. Therefore, we have to shed some light on associated moral or

political philosophy. We rely on a moral and political theory, particularly on Rawls' theory of justice, as a philosophical construct on which we ground our choices based on values, moving towards normative individualism as a starting point of regulating dispute resolution. Later in the chapter, we will illustrate how principles and ideals of civil law, regarding dispute resolution and its regulation, relate to moral philosophy. We will explore access to justice, its development from initial legal aid ideas to more contemporary notions. We propose a common thread between the philosophy of Rawls and access to justice while at the same time using the Rawlsian principles of justice as fairness on the elements of access to justice, for setting the lens through which we are going to observe available dispute resolution mechanisms while seeking for appropriate setting in cloud service context. In order to get operational framework, we determine four key concepts within access of justice. Then we work out those concept into operational variables/questions which we use in later chapters as a base for comparison.

Chapter 3 builds on technology description and definitions of cloud computing and then moves forward to the second part to the more appropriate definition for the services from the point of view of users. In the third part, it discusses contracts as the legal foundation for cloud services, and in the fourth part, it examines dispute resolution in cloud contracts and analyzes data from a significant number of cloud providers' terms of services. We have undertaken a substantial sample for our empirical data gathering from available cloud providers which validates the relevance of the findings in subsequent data analysis. This will provide the basis for the analysis and cross-reference in following chapters. Finally, the last part of the third chapter addresses the problem of adequacy of existing dispute resolution practices according to cloud contracts in relation to access to justice and fairness.

In Chapters 4 and 5, we use the critical-descriptive method for state of the art and critical-analytical and comparative approach on the traditional source of legal and policy document, and literature study. In these chapters, we analyze relevant international and regional legal framework for dispute resolution. We start in Chapter 4 with an overview of the private international law and its principles. We analyze national rules in setting jurisdiction of selected number of states. Then we move on to the legal framework established by the European Union through regulations and directives. At the same time, research pays attention to the Hague Convention on Private International Law as one of the most relevant international instruments working on the issues of PIL. In Chapter 5 we describe developments and applications of different alternative dispute resolution mechanisms with an analysis of respective legal framework in an international context. We conclude chapters 4 and 5 with analysis of the

available characteristics and data of mentioned dispute resolution bodies in cross-reference to criteria established in Chapter 2.

Given the parameters of theoretical framework established in Chapter 2, we conduct comparison of the most relevant forms of dispute resolution for the cloud service disputes in Chapter 6, to assess how the different dispute resolution entities fare in context of cloud service disputes and which method currently is the most appropriate or achieve the most in the context of our theoretical framework. Based on of our assessment we get to answer to what extent the current legal framework is adequate for cloud service disputes. We examine adequacy in the sense of criteria established in Chapter 2, given the available data at the time of writing of the chapter.

Chapter 7 examines online dispute resolution as a relatively newer dispute resolution mechanism that relies on new technologies. We analyze the legal framework for dispute resolution in international law value disputes scenarios, as presumed most appropriate mechanism for the likes of cloud service disputes. Building on criticism and inconsistencies, based on our theoretical framework for appropriate dispute resolution we are recommending guidelines for the design of fair dispute resolution body that allow access to justice in cloud service disputes.

Chapter 2 –Access to Justice as Fairness

1. Introduction

The very fact that we have a variety of different tools or mechanisms to cope with disputes is a good indicator that there is a need for research on appropriate mechanisms under different circumstances. How to establish what is an appropriate or adequate approach to dispute resolution, especially in the context of cloud services, which very often have burdening facts of international element, power imbalance and lack of effective remedies?²³ We will attempt to assess the appropriateness of general elements of dispute resolutions, inspired by the access to justice movement and Rawls' theory of justice, and to address them in different contexts of cloud service disputes. Said framework will be the foundation for assessing various aspects of cloud service disputes and dispute resolution regimes in the following chapters.

²³ See Ch.3

No matter which form dispute resolution has taken, or whether the dispute at hand has been guided by contract and the will of the parties or if the rules have been more or less mandated by the state or an international organization²⁴, at the center of the dispute we have at least two parties. We choose to put the parties and their interests as a starting point of any discussion about dispute resolutions, as opposed to interests of the states or any other groups. In the end, parties will be the ones who will certainly bear the consequences of the disputes. For that reason, we observe the problem and appropriateness of solutions from a normative individualism point of view. Normative Individualism places individuals at the center of regulatory issues and demands justification for a limitation of individual freedoms by powers that determine the rules.²⁵ Party autonomy is one of the basic pillars in normative individualism, guaranteeing that the will of the parties to the contract has to be obeyed. However, placing that much legal significance on parties' self-regulation and distribution of rights and obligations, makes us question what kind of a role fairness plays, especially when a single party has bigger negotiation power to dictate the terms of an agreement. Hence, we look into fairness between "autonomous parties" and how society has intervened by regulating practices that were deemed unfair.

Normative Individualism is also crucial when we observe the dominant ways of establishing jurisdiction in e-commerce contracts, i.e. the will of the parties or the party autonomy and the way it influences regulation. The issue of fairness in imposing jurisdiction of one party has been debated in academia for a while. We will offer our take on it using cloud services as an example of imposed unfair contract terms in regards to dispute resolution clauses in the third chapter. From the normative individualism point of view, on the following pages, we reflect on principles of fairness to guide us in access to justice.

The title of this chapter is casting a wide net and could lead the reader to several different paths on what is it about. To simplify, in this chapter we are attempting to define appropriateness in dispute resolution by going to its core function of solving conflicts, with regard to parties' relationship, established standards of access to justice and specific expectation within parties' domains. In another wider sense, we are looking into the interplay between principles of

²⁴ Such as Uniform Dispute Resolution Policy by ICANN, see <https://www.icann.org/resources/pages/help/dndr/udrp-enor>, or World bank's International Center for Settlement of Investor Disputes – ICSID, see <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>;

²⁵ Felix Steffek, PRINCIPLED REGULATION OF DISPUTE RESOLUTION - TAXONOMY, POLICY, TOPICS (2013). STEFFEK, *supra* note 9.

fairness and access to justice within a specific field of the application. But we first need to answer what are disputes and what is the connection of dispute resolution and these principles?

1.1. Disputes: where, how and is it worth it?

In order to get to the elements of dispute resolution and the regulatory choices, we will shed some light on the nature of dispute resolution and its functions. History books are filled with stories about conflicts and disputes between individuals, groups or nations.²⁶ Conflict arises wherever two or more actors have incompatible desires concerning the future state of the world, and then try to do something about it.²⁷ Brian Barry distinguishes the following social decision procedures for solving conflicts: combat, bargaining, discussion on merits, voting, chance, contest and authoritative determination.²⁸ All these types, except authoritative determination, are one way or the other settling the dispute by the parties themselves. Bargaining and discussion on merits are forms of negotiation. Inversely, authoritative determination is a type of social decision procedure where a third-party, recognized by all as a legitimate, resolves the dispute.²⁹ These types of social decision procedures respond to the more modern distinction between consensual and adjudicatory dispute resolution methods.³⁰ The adjudicatory method involves a binding authoritative third-party decision about the dispute, while the consensual dispute resolution is dependent on the parties will to participate and come to a solution.³¹

Due to its variety, frequency, and effects, disputes and conflicts had to be managed by organized societies, ultimately leading to a separate branch of government in modern states.³² The judiciary branch of government or judicial system is vested with the power to resolve disputes through judicial processes, however, even though the state reserves the monopoly over the use of force, it doesn't have a monopoly over dispute resolution methods. In the case of a dispute, parties are often faced with the choice of where and how they're going to resolve it.

²⁶ We use terms conflict and dispute interchangeably, although some scholars prefer to use "conflict" for social sciences and "dispute" for legal studies.

²⁷ BRIAN BARRY, 3 POLITICAL ARGUMENT: A REISSUE WITH NEW INTRODUCTION (1965). p. 84

²⁸ *Id.*, p.86.

²⁹ *Id.*, p. 90.

³⁰ THE HANDBOOK OF DISPUTE RESOLUTION, (2012). p.318, 350

³¹ *Id.*

³² The Spirit of laws : Montesquieu, Charles de Secondat, baron de, 1749, <https://archive.org/details/spiritoflaws01montuoft> (last visited Oct 11, 2015).

Every dispute has a certain context, and possible varieties make it impossible to claim a single ultimate fashion of dispute resolution as superior. In order to argue the appropriateness of certain mechanisms within a certain field, we need to understand the disputants, the context of dispute and possible processes of resolution.

Classical argumentation mandates the question of the forum of disputes prior to any discussion of merits.³³ Without accepting the forum where participants are going to have a discussion, either by the will of the parties or by the law, it is futile to get into a discussion about specifics of the dispute mechanisms as the other party will consider it inappropriate, illegal or irrelevant.

Therefore, prior to discussing the fairness of procedural rules guiding dispute resolution mechanism we should also take into account the fairness of selection of dispute resolution forum. As we will see in Chapter 4, a significant amount of legal knowledge and rules about establishing the jurisdiction of a court or arbitration is a backbone of judicial systems. This is especially relevant in an international context, where often national jurisdictions overlap, which led to significant advancements in conflicts of laws as a field of law.

Having this in mind, to discuss the appropriateness of dispute resolution mechanism we need to answer both where and how resolution takes place in order to be fair. Then again, even the forum that is acceptable to both parties and which has the procedure with all the elements of fairness, by itself does not mean that it is the best or the most appropriate way for every dispute possible. The previous distinction of social decision procedures indicates that in some situations certain mechanisms are more appropriate than the others relative to its context. The context of the dispute is also essential for the party's decision to escalate a conflict to some form of a social decision or to proceed with imposed process. The decision of a rational party should be influenced by certain estimations or expectations of the dispute resolution process and potential gains of it. So our task is to establish where, how and under which circumstances certain dispute resolution method is appropriate or adequate.

Nevertheless, prior to discussing the specific context in Chapter 3, we need to establish general criteria and preferences based on which we will be able to assess the context and draw conclusions about the appropriateness. Having in mind the general function of dispute

³³ The concept of *stasis of place* or conjecture point of argumentation as described in Antoine Braet, *The Classical Doctrine of "Stasis" and the Rhetorical Theory of Argumentation*, 79–93 (1987). And "Stasis" in *Encyclopedia of Rhetoric* - Oxford Reference, p. 741–745. , <http://www.oxfordreference.com/view/10.1093/acref/9780195125955.001.0001/acref-9780195125955> (last visited Jan 27, 2015).

resolution mechanisms i.e. solving disputes, and starting from a presumption that participants prefer just outcomes, we will establish our criteria by looking at the concept of access to justice, that developed as a societies' demand on fairness within the rule of law, and then we look into a more general idea of fairness as a guiding concept to deal with specific issues and to prioritize between different criteria within access to justice. The movement of access to justice has been dealing with the requirements for justice and dismantling the obstacles to the proper role of the third party as an administrator of justice.

2. Access to justice

Access to justice as a concept has changed over time. With the development of the notion of the rule of law, access to justice emerged as a treat of equality or equal rights. Steadily over time, the idea of access to justice evolved from issues of legal aid and legal representation of collective or diffused interests to more modern interpretations.³⁴

Access to justice is not easily defined. Black's Law Dictionary centers on the traditional definition: "the ability within a society to use courts and other legal institutions effectively to protect one's rights and pursue claims".³⁵ The United Nations Development Programme defines access to justice as the "ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards".³⁶ Cappelletti and Garth defined the term through its function within the system. According to them, it serves the basic principles of the legal system by vindicating rights and resolving disputes.³⁷ They emphasize that the legal system must be equally accessible to all, and it must lead to results that are individually and socially just.³⁸ However, even though they put a strong emphasis on effective access, they also remind us of importance on social justice that, according to them, presupposes any notion of justice stemming from effective access.³⁹

³⁴ SUTATIP YUTHAYOTIN, ACCESS TO JUSTICE IN TRANSNATIONAL B2C E-COMMERCE: A MULTIDIMENSIONAL ANALYSIS OF CONSUMER PROTECTION MECHANISMS (2014).

³⁵ B. A. Garner (ed.), Black's Law Dictionary (9th edn, St. Paul, MN: Thomson Reuters, 2009), p. 16.

³⁶ UNDP (2005), Programming for Justice: Access for All, Bangkok: United Nations Development Programme.

³⁷ MAURO CAPPELLETTI, ACCESS TO JUSTICE: A WORLD SURVEY. EDITED BY MAURO CAPPELLETTI AND BRYANT GARTH (Mauro Cappelletti & Bryan Garth eds., 1978).p.6.

³⁸ *Id.*

³⁹ *Id.*

In the following section, we will give a historic overview of the development of access to justice and how the concept changed over time. The overview is largely based on extensive work by the people behind the “Access to Justice Project” or the “Florence Project”, undertaken at the European University Institute in Florence. Then we will briefly discuss the connection of access to justice with due process/ procedural justice and how these concepts are represented by positive law, primarily through international conventions. We will exemplify social justice aspect by illustrating consumer protection ideas and also how effectiveness and efficiency come to play with alternative dispute resolution methods and how they relate to access to justice.

2.1. Development of access to justice

Historically, industrialization had pushed the development of the rule of law in the early 19th century, and its basic concept of equal rights.⁴⁰ Reforms have been put in place to make laws easily understandable and enforceable through universally applicable judicial processes. Unfortunately, even though the equal rights have been proclaimed, equality under the law was hampered by the high costs of judicial processes, making protection of rights accessible to more privileged, but not to all. At the time states were not concerned with the effects of “legal poverty”, and it was only in the middle of the 20th century that the notion of assisting in the legal representation of poor became a strong influence of legal reforms.

Starting from the 1960’s, a new push to the public policies of the protection of certain groups of the society that were deemed worse off in specific legal situations (poor, consumers, employees, lessees) broadened the scope of access to justice movement.⁴¹ Initially, the focus of reforms was on legal representation, primarily of the poor. Cappelletti and Garth called it “the first wave” of access to justice movement. The idea was to enable them to participate in judicial proceedings with free legal representation funded by state legal aid agencies.⁴² This reform corresponded with the development of welfare states, putting into practice the ideas the

⁴⁰ YUTHAYOTIN, *supra* note 34. , L. M. Friedman, On Legal Development, 24 Rutgers Law Review 11–53 (1969–1970) and E. Sotrskrub and J. Ziller, Access to Justice in European Comparative Law, p. 178–9.

⁴¹ The most important research in the field of access to justice has been done by the Access-to-Justice Project (Florence Project) carried by Mauro Cappelletti at the European University Institute, Florence, during 1970s. See CAPPELLETTI, *supra* note 37.

⁴² *Id.* p.22

states should provide for social services, and especially should take care of underprivileged.⁴³ Even though Universal Declaration of Human Rights was enacted in 1948 by United Nations, the rights recognized in this Declaration lacked the proper implementation in different states.

In the second half of the 60s, the idea of access to justice has spread further to new categories, allowing “the second wave” of access to justice. Only during the 60s, the ideas of consumer protection became prevalent and obvious, expanding access to justice to new groups, as Cappelletti and Garth call it, “of diffuse and fragmented rights”.⁴⁴ The common theme about these groups points to the fact that individual members for various reasons (costs, speed, difficulty) would face much lesser chances in courts if aggregate interests, potential injuries, and damage to the wider group would not be taken into account, i.e. the context. Collective interests of these groups and their impact on the population pushed the initiatives within legal systems to introduce group litigation, class actions, representative actions, etc. The United States introduced the public advocate, or the public institution to protect public interests in litigation, especially in the fields of consumer, labor, and environmental protection. In Europe, Sweden introduced the Consumer Ombudsman, to represent collective consumers’ interests, including the litigation against businesses engaging in unfair practices.⁴⁵ Sweden’s model was influential in continental Europe. However both the European and US government agencies required significant funding for the effective scale of protection of diffuse and fragmented rights of various groups. The economic reasons steered governments to look for alternatives in the private sector. Laws emerged encouraging private groups to litigate the smaller cases in the interests of their individual members and the public.⁴⁶ These solutions led to a more efficient way of dealing with cases through a group action⁴⁷, where an individual party represents a larger group suffering from the same injury or harm. The invention of collective actions reinforced consumers’ rights and bargaining power when faced with big business. Especially in the US we have seen the growth of the culture of private group actions in consumer protection, but also in environmental and health claims. ⁴⁸

⁴³ See Ramsay, *Consumer law and Policy, Text and Materials on Regulating Consumer Markets 4* (2007). p 14, also see E. Sotrskrubb and J. Ziller, *Access to Justice in European Comparative Law*, in F. Francioni (ed.), *Access to Justice as a Human Right* 177, 178 (2007) p 179,

⁴⁴ *Id.* 34-35

⁴⁵ see <http://www.konsumentverket.se/>

⁴⁶ England and Australia and Germany, see YUTHAYOTIN, *supra* note 34. page 43

⁴⁷ Depending on the jurisdiction it is also known as class action, collective action or public-interest action.

⁴⁸ STEFAN WRBKA, STEVEN VAN UYTSEL & MATHIAS SIEMS, *COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS?* (2012).

Moving away from focusing only on legal justice, representation, and diffuse/collective interests, scholars gathered around the Florence Project pushed the notion of access to justice to encompass a more preventive aspect of dispute resolution.⁴⁹ Motivated by bringing the equal access to justice to members of society, these scholars place emphasis on effectiveness, relying on other methods, and not relying solely on traditional judicial dispute handling, ushering “the third wave” of access to justice movement. However, when it comes to dispute resolutions as a way of administering justice, the new approach popularized alternative dispute resolution (ADR) methods such as mediation, conciliation, and arbitration, which were depicted as simple, fast, convenient and accessible. Several states integrated ADRs into their legal system, experimenting with compulsory forms in certain processes.⁵⁰ The ideas of ADR’s complementary role to the traditional judiciary, with all the perceived benefits, is active today and it drives new initiatives for the protection of rights, especially in commerce and consumer protection.⁵¹

Another sway on legal systems that more wholesome idea of access to justice had (influenced by economic/organizational research⁵²) was introducing specialized courts or specialized agencies to deal with specific types of claims, like low-value claims.⁵³ The traditional court system with a general approach to all cases could not serve efficiently specific needs of certain claims as well as specialized courts. Hence, from economic reasons (meaning in less time more specialized professional is dealing with the case in more effective manner) reform of court systems meant more access to justice due to effectiveness.

To add to these procedural reforms, a more holistic approach of the generalists’ access to justice, which advocated the welfare state in various facets of society, also came to fruition in a certain number of states.⁵⁴ This included legal aid initiatives as mentioned before, but also improving the position of the less privileged in education, labor, medical services, etc. Though this processes had happened roughly at the same time as the publication of Rawls’s theory of justice as we will see later⁵⁵, nobody claims that Rawls or philosophy of justice in distribution influenced any of these moments. The idea of improving the position of less privileged in

⁴⁹ For the list of Scholars participating Florence project, see CAPPELLETTI, *supra* note 37.

⁵⁰ *Id.* p.60-61.,

⁵¹ EU, UNCITRAL among some of them, see more in chapter 5.

⁵² HÉCTOR FIX FIERRO, COURTS, JUSTICE, AND EFFICIENCY: A SOCIO-LEGAL STUDY OF ECONOMIC RATIONALITY IN ADJUDICATION (2003).

⁵³ CAPPELLETTI, *supra* note 37.p. 67.

⁵⁴ *Id.* 21.

⁵⁵ John Rawls, JUSTICE AS FAIRNESS PHILOSOPHICAL REVIEW 67/2 (1958) 164–194 (1958).

various scenarios within access to justice movement was more likely an intuitive reaction to the notion of what is fair or just under certain circumstances.

Contemporary scholars are offering a multifaceted or multidimensional approach to access to justice. Recalling the history of development, they're pointing to new steps, offering more interdisciplinary observations. Stefan Wrбка is considering the concept from the point of value-oriented justice.⁵⁶ Andre Tunc is building his point of view in several stages, going from access to legal justice, to access to the machinery of justice of the welfare states, finally coming to that stage of equality and social justice.⁵⁷ Sutatip Yuthayotin is proposing multileveled access to justice for consumers which couples legal protection with economic mechanisms for consumer protection.⁵⁸

The issues of collective redress in cross-border cases have also been researched in more recent times, as the number of these cases grows with the development of the internet as a global means of communication and commerce.⁵⁹ It provides a clear example of development and protection of collective and diffuse interests colliding with issues of new technologies and the global economy.

Given this brief historical overview of the development of access to justice, we could notice that it has been developed in layers over time. The initial layer (or wave) was primarily focused on legal justice, allowing access to dispute resolution mechanisms (primarily courts; though ADR existed they were not in focus as much) and legal representation for the underprivileged, and allowing the remedies and removing barriers from rights to redress. Building on the first, the second layer is all about introducing and protecting collective and diffuse interests. These two layers have been universally recognized in various national legal systems. Additional layers of more holistic flavor, offering solutions that are intertwined with social politics and economic philosophy have had a different level of success in different states. At the outset of the thesis we chose to focus primarily on legal justice, by assessing legal aspects without going into economy or social implications of access to justice, although we will search inspiration

⁵⁶ STEFAN WRBKA, 20 EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED (2014).6.

⁵⁷ Andre Tunc, *The Quest for Justice*, in ACCESS TO JUSTICE AND THE WELFARE STATE (Mauro Cappelletti ed., 1981).p. 315, 315–17 (1981)..

⁵⁸ YUTHAYOTIN, *supra* note 34.

⁵⁹ See chapter 4. And 5. Also see STEFAN WRBKA, STEVEN VAN UYTSEL & MATHIAS SIEMS, COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS? (2012).

later in a more general all-encompassing concept of fairness through Rawls` philosophy that by itself has implications for the social and economic order.

2.2. Forms of access to justice and positive law

Looking at the history and development of the concept, we can say that access to legal justice is a cornerstone of a more general approach still being expanded today. Legal access to justice in this sense would be a set of established procedural rules that governs dispute resolution mechanisms towards just outcomes. The Florence project, identified in the first wave the need for legal aid for pure to access the justice and placed focus on access to a fair trial under guarantees of due process of law. In the second wave, the diffuse and collective interests of categories like consumers have been given protection, by giving them specific treatment before various institutions. In each of the waves beneficiaries of the protection were becoming entitled to access the relevant institution dealing with disputes and guaranteed the fair trial and due process. The provisions concerning access to justice can be found in numerous regulations, conventions, and acts of different levels: international, regional or national. Without disregard to more modern approaches and focusing on its core foundation we place access to justice on the intersection between human rights, and procedural laws and certain laws dealing with substantive protection of various categories (consumer protection, environmental protection, labor, etc.). We`re now going to take a look at the relationship of access to justice with these disciplines, focusing on consumer protection in the last segment.

2.2.1. Access to justice and human rights

Human rights scholars consider the development within the first wave of access to justice as the development of the right to a fair trial and the right to effective remedy.⁶⁰ Though the scholars leading the Florence project were not coming primarily from a human rights perspective, they recognized the overlap between universal doctrines. Both the right to a fair trial and the right to an effective remedy, became an integral part of the international and the

⁶⁰ ANTÔNIO AUGUSTO CANÇADO TRINDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE, TOM 18; TOM 937 (2011).

regional conventions on human rights, as well as a constitutional guarantee in the large majority of states.

The Universal Declaration of Human Rights (UDHR) in its art 10 proclaims that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal; in article 8 it provides for the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law. The Universal declarations framing certainly influenced a great deal of international and national provisions, dealing with equal rights to a fair trial.

At the European level, access to justice guarantees fall under the article 6 (the right to a fair trial) and the article 13 (the right to an effective remedy) of the European Convention on Human Rights (ECHR)⁶¹, and in the article 47 (both right to a fair trial and right to an effective remedy) of the Charter of Fundamental Rights of the European Union. The European Convention on Human Rights in its Article 6. Section 1. states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 13 of ECHR says: *“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”*.

We witness devotion to the idea of equality in rights as well as proclaimed procedural guarantees in civil and criminal proceedings. As we recall, the mere proclamation of equality of rights does not necessarily mean that everyone has equal access to judicial instances, which gave birth to the first wave of access to justice: legal aid for the poor. Francesco Francioni, makes the logical argument, that without legal aid, judicial remedies would be available only to those who dispose of with sufficient financial resources;⁶² therefore, equality in human rights

⁶¹ The European Convention on Human Rights was drafted in 1950 by the new body-Council of Europe, it entered into force on 3 September 1953.

⁶² F. Francioni, ‘The Rights of Access to Justice under Customary International Law’ in F. Francioni (ed.), Access to Justice as a Human Right (Oxford University Press, 2007), p. 1.

requires legal aid for those who can't afford access to the judicial system and/or its own defense within it.

The Charter of the Fundamental Rights of the European Union, after confirming the same rights as in the ECHR, also literally refers to first wave of access to justice by adding: “*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*”⁶³ Similar formulation that confirms success of the first wave of access to justice can be found in national constitutions of EU Member States.⁶⁴

The American Convention on Human Rights (ACHR) in article 8 (the right to a fair trial) and in Article 25 (the right to an effective remedy) confers the same rights as in UDHR and ECHR. Both Inter-American Courts of Human Rights and European Courts of Human Rights, although hesitantly in the beginnings, confirmed that effectiveness of the right to the effective remedy is to be measured in the light of the criteria of the guarantees of the due process of law (Article 6 of the ECHR).⁶⁵ Mertens proposes, that Articles 6 and 13 of the ECHR – which correspond to Articles 8 and 25 of the ACHR – should be “invoked together”.⁶⁶ Although said conventions primarily place foundation for states’ obligations, scholars like Trindade clearly recognize individual right to initiate proceedings before international human rights courts, and more importantly the guarantees of due process of law, and the right to protection by means of compliance with judicial decisions, which according to him constitutes a right of access to justice.⁶⁷

The European Union Agency for Fundamental Rights (FRA), in a recent study, evaluated access to justice within the context of human rights and antidiscrimination laws. While trying to define access to justice, FRA’s experts came to the conclusion that it is a multifaceted concept which could be portrayed through five different rights:

1. the right to effective access to a dispute resolution body;
2. the right to fair proceedings;
3. the right to timely resolution of disputes;
4. the right to adequate redress;

⁶³ Charter of Fundamental Rights of the European Union, OJ 2000 No. C364/1.

⁶⁴ Article 18, sec 2, of the Dutch Constitution; Article 24, Sec 3, of the Italian Constitution states that: “the poor are entitled by law to proper means for action or defense in all courts”

⁶⁵ A.Trindade, ‘The Access of Individuals to International Justice’ (Oxford University Press, 2011)

⁶⁶ P. Mertens, *Le droit de recours effectif devant les instances nationales en cas de violation d’un droit de l’homme*, Bruxelles, Éd. de l’Univ. de Bruxelles, 1973, pp. 19–20, 24–5, 27–9, and cf. pp. 37–9 and p.93.

⁶⁷ A.Trindade, p. 71.

5. the principles of efficiency and effectiveness'.⁶⁸

These rights have been an integral part of several international human rights legal frameworks and have been transposed to national legislations as the essential principles of law. Due process or procedural justice guarantees are at the conjoining point of human rights and procedural law, governing civil and criminal proceedings. Since we are mainly interested in dispute resolution in civil matters, we are interested to see in what way universal principles of civil law could be extracted and how do they correspond to access to justice.

2.2.2. Access to justice and principles of civil law

In the previous section, we source and connect equality, legal aid and due process to human rights conventions. Article 6 of the ECHR, according to the jurisprudence of European Court of Human Rights in Strasbourg, consists of three elements:

- a tribunal established by law and fulfilling the imperatives of independence and impartiality;
- a tribunal endowed with a sufficiently wide jurisdiction to pronounce on all the aspects of a complaint to which Article 6 of the Convention is applicable;
- a tribunal to which individuals have free and full access⁶⁹

We can also add trial within a reasonable time, as a growing number of cases before European Court of Human Rights is confirming the significance of the element of timeliness or efficiency in the administration of justice.⁷⁰ Nevertheless, when we speak about disputes within cloud services context we usually have in mind an international element, so we need principles that transcend national procedural rules.

The American Legal Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) have undertaken the task of identifying and interpreting a certain number

⁶⁸ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, 'Access to Justice in Europe: An Overview of Challenges and Opportunities', report, (2010), p. 14, available at fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf.

⁶⁹ A. Grotrian, Article 6 of the European Convention on Human Rights – The Right to a Fair Trial, Strasbourg, Council of Europe (Human Rights Files n. 13), 1994, p. 27.

⁷⁰ István Varga, *BREACH OF THE REASONABLE TIME REQUIREMENT IN HUNGARIAN LAW AND IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS*, ; Varicak Marica Croatia Osiguranje & Els Dinjens Warda Henning, *Undue Delay in the case-law of the European Court of Human Rights*, (2001).

of legal principles that they called principles of transnational civil procedures.⁷¹ They itemized 31 main principles, which we consider all elemental procedural aspects for access to justice in judicial/adjudicatory methods of dispute resolution: independence, impartiality, and qualifications of the court and its judges, jurisdiction over parties, procedural equality of the parties, due notice and right to be heard, languages, prompt rendition of justice, provisional and protective measures, structure of the proceedings, party initiative and scope of the proceeding, obligations of the parties and lawyers, multiple claims and parties; intervention, *amicus curiae* submission, court responsibility for direction of the proceeding, dismissal and default access to information and evidence, sanctions, evidentiary privileges and oral and written, public, burden and standard of responsibility for determinations of fact and decision and reasoned costs, ,immediate enforceability of judgments, appeal, *lis pendens* and *res judicata*, effective enforcement, recognition, international judicial cooperation.

Neil Andrews produced a similar but succinct list in his efforts of categorizing principles of civil justice which he placed under 4 main headings⁷²:

Regulating access to court and to justice

1. access to court and to justice (including, where appropriate, promoting settlement and facilitating resort to alternative forms of dispute resolution, notably mediation and arbitration)
2. rights of legal representation (right to choose a lawyer; confidential legal consultation; representation in legal proceedings)
3. protection against bad or spurious claims and defenses

Ensuring the fairness of the process: a responsibility shared by the court and the parties

4. judicial independence
5. judicial impartiality
6. publicity or open justice
7. procedural equality (equal respect for the parties)
8. the fair play between the parties
9. judicial duty to avoid surprise: the principle of due notice
10. equal access to information, including disclosure of information between parties

⁷¹ ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE: COUNCIL DRAFT NO. 2 (SEPTEMBER 29, 2003), (2003).

⁷² NEIL ANDREWS, *THE THREE PATHS OF JUSTICE: COURT PROCEEDINGS, ARBITRATION, AND MEDIATION IN ENGLAND* (2011).

Maintaining a speedy and efficient process

11. judicial control of the civil process to ensure focus and proportionality (tempered, where appropriate, by procedural equity; the process is not to be administered in an oppressive manner)
12. avoidance of undue delay

Achieving just and effective outcomes

13. judicial duty to give reasons
14. the accuracy of decision-making
15. effectiveness (provision of protective relief and enforcement of judgments)
16. finality

Principles of civil justice or principles of procedural law were already quilted in legal systems through a multitude of international conventions and constitutional guarantees. For our consideration, of particular importance should be principle number one, which asserts access to justice by promoting alternative dispute resolutions, as an equal or more adequate form of dispute resolution in cases where it is appropriate. Having in mind Andrews' principles were arranged for a single legal system based on observation in England, we will reflect later on access to justice through ADRs having in mind appropriateness in cloud computing services context.

Alan Uzelac synthesizes goals of civil justice to the two main goals in the broadest sense: one, resolution of individual disputes by the system of state courts, and two, implementation of social goals, functions, and policies.⁷³ However, as he admits, the goals of civil justice are never fully separated, and social goals and policies may play a role at the level of system design.⁷⁴ He illustrates the interplay between goals with two extreme examples from history. First, in the 19th century, laissez-faire economy civil litigation considered courts as referees on private proceedings, where parties could dispose of their claims freely, and the only role of a court was to put an end to a dispute. However, the logic behind simple referees indicated that the matter is *res judicata* only for the parties (and their conflict) but should not be a public's business.⁷⁵ Second, was the Marxist critique of private law, which proclaimed that all bourgeois law is

⁷³ A Uzelac, *Goals of Civil Justice and Civil Procedure in the Contemporary World*, GOALS CIV. JUSTICE CIV. PROCED. (2014). p.6.

⁷⁴ *Id.* p.6-7.

⁷⁵ *Id.*

private law, reflecting an imperialistic capitalistic exploitative system of a government.⁷⁶ We could say that the access to justice movement represents balancing of goals of civil justice; its policies, somewhat painted welfare state ideals, and at least from a civil law/procedural law aspect were universally accepted when it comes to first two waves of access to justice.

Principles of civil law will be further discussed in Chapter 4 where we examine legal framework for disputes over cloud services, and we pay special attention to private international law rules determining jurisdiction as they are vital to the issues of access. Our focus is influenced by the nature of cloud computing as a cross-border service model with difficulty of establishing jurisdiction, and one of the primary concerns of users is being unable to access redress in case of need.

Looking at the Neil Andrews' four headings under which he classifies principles of civil justice we easily notice the similarities with FRA's multifaceted definition of access to justice. Since we're looking at the broader scope of dispute resolution, and not just civil law litigation, we need to set the common denominators relative to alternative dispute resolution as well. These common denominators could be also seen as indicators but also as goals of said principles. We propose four indicators of access to justice that encompass most common methods of dispute resolution:

1. Access to a dispute resolution body
2. Fairness of the process
3. Efficiency of the process
4. Effectiveness of the outcomes

Each rational party would prefer a maximum level on any of the indicators. However, having in mind the diverse characteristics of different methods of dispute resolution, it is not expected of different conflict resolution types to score equally on the spectrum that any of these indicators have. Even between two same dispute resolution bodies (e.g., civil courts within a single city or a country), we could get different results if we would have researched the cases and the obtained level on those indicators after the final outcomes of the cases. Those results could vary depending on different aspect or approach to access to justice and also could vary

⁷⁶ *Id.* p7-8.

between different jurisdictions.⁷⁷ Obviously, the data-gathering process is very complicated and difficult having in mind some dispute resolution methods are by their nature private and closed to the public.

But we are not focusing on the empirical measurement of the quality of the access to justice as that would be the completely different approach in research that would heavily rely on accurate empirical data gathering, especially on the outcomes of procedures.⁷⁸ Such research would demand significantly more resources to be able to draw conclusions even on a national scale, let alone international.⁷⁹ We are approaching access to justice from the point of parties expectations based on largely non-contestable characteristics of the systems.

2.2.3. Access to justice and consumer protection

One of the more interesting effects of the Florence project was that Cappelletti and Garth introduced the notion of “diffuse interests”⁸⁰- the articulation necessary for the groups of people who lack access to justice regarding some issues and whose individual position does not suffice for adequate protection before courts even with guaranteed equality in rights. Diffuse interests have been recognized in consumer, labor, environment, lessees’ issues, etc. and they become more apparent when faced against disputant from the opposite side and its relative power. Only with the recognition of the inferiority of the legal position of individuals and the need to regulate the issue at the collective level, as it touches upon the diffuse interests of the group, the regulators could address problems properly and amend inadequacies within regulations. This recognition brought forward a significant number of policies and legislative initiatives concerning the protection of groups of diffuse interests, introducing both substantive and procedural norms to address the issues.

⁷⁷ Martin Gramatikov, Maurits Barendrecht & Jin Ho Verdonchot, *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, SSRN ELECTRON. J. (2008).

⁷⁸ For example see Lisa Blomgren Bingham, *How Can We Measure Justice and Fairness in Arbitration Programs*, 19 DISPUT. RESOLUT. MAG. (2012).

⁷⁹ See Edgar Lind et al., *THE PERCEPTION OF JUSTICE* (1989), <http://www.rand.org/pubs/reports/R3708.html> (last visited Oct 12, 2015).

⁸⁰ CAPPELLETTI, *supra* note 37.p.35.

The European Union promotes itself as a leader in the field with a long tradition of strong consumer protection.⁸¹ Consumer protection as a policy in the EU has been fruitful in a number of directives and regulations. Substantive mechanisms of consumer protection include regulating misleading advertising, provisioning remedies for the poor or defective quality of goods and services, unauthorized use of personal data and other ways businesses can use deceptive and unfair practices against consumers. The EU also introduced significant substantive rules regulating contract law when it comes to consumers, specifically: standard terms (e.g., Consumer Rights Directive⁸² and E-Commerce Directive⁸³) and unfair terms (Unfair Terms Directive⁸⁴), information disclosure rules, withdrawal rules, privacy protection rules (Data Protection Directive⁸⁵), etc. These rules are going to be discussed in upcoming chapters as they are essential for both the context of the disputes and legal environment.

Correspondingly, substantive rules were complemented with procedural rights that were deemed necessary in order to guarantee effective rights and access to justice to consumers. Specific mechanisms oriented towards consumers were mechanisms for small claims, collective redress, and regulatory agencies dealing with consumers.

Small claim procedure as an instrument consumer protection was introduced by regulation in 2007.⁸⁶ Its primary purpose is not to replace national authorities in dispute resolution, but to offer an alternative for cross-border civil and commercial cases when the value of the case is not exceeding €2000 (in July 2017 threshold will be raised to €5000). Small claims regulation was not intended to be reserved for business- to-consumer (B2C) disputes but also for business-to-business (B2B) disputes of low value. The intention was to provide a low-cost, efficient and simplified form of cross-border redress on the EU level exclusively for transnational disputes.

⁸¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A European Consumer Agenda - Boosting confidence and growth Brussels, COM(2012) 225 final, 22.5.2012

⁸² DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

⁸³ 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 e-commerce, in the Internal Market

⁸⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms

⁸⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

⁸⁶ Regulation (EC) No. 861/2007 of the European Parliament and of the Council establishing a European Small Claim Procedure of 11 July 2007

As we will see later, the feasibility of the idea of European small claim procedure largely depends on extensive use of information and communication technologies.

While one's rights may be recognized as a member of a group or collective, this doesn't mean that consumers seek collective redress on every occasion. Collective redress mechanisms in its several forms are designed to allow collective litigation of the group affected by the same unfair practice. Recently the EU Commission initiated a discussion on a series of common, non-binding principles for collective redress mechanisms in the Member States so that citizens and companies can enforce the rights granted to them under EU law where these have been infringed.⁸⁷ At this point, it seems that the European Union and its Member States are still not on the level of development of collective redress mechanisms of the United States. Nonetheless, many scholars consider collective redress mechanisms on the appropriate way to handle a huge number of weaker claimants against big business.⁸⁸

Regulatory agencies play a bigger role on the member state's level as there is no European consumer ombudsman or similar kind of agent on the EU scale. However, on the national level, consumer ombudsmen⁸⁹ or independent agencies provide significant support and sometimes take legal action on behalf of consumers. The role and effectiveness of ombudsman or agency largely depend on national regulation and vested powers.

From a procedural point of view, we need to mention also the Injunctions Directive⁹⁰ and the Legal Aid Directive⁹¹ as important instruments in consumer protection and providing legal aid in cross-border cases, since international element to the dispute adds to the disadvantaged position of consumers.

Above-mentioned institutions were designed to provide effective redress and access to justice for consumers, as well as to act preventively (consumer's Ombudsman), in order to balance pre-existing inequalities and distribution of power between sellers and consumers, from an

⁸⁷ See http://ec.europa.eu/consumers/solving_consumer_disputes/judicial_redress/index_en.htm

⁸⁸ STEFAN WRBKA, STEVEN VAN UYTSEL & MATHIAS SIEMS, COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS? (2012).

⁸⁹ Example of successful consumer ombudsman could be found in Norway, Sweden, Finland and several other European countries even though there is a difference in level of ombudsman authority between states.

⁹⁰ DIRECTIVE 2009/22/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on injunctions for the protection of consumers' interests

⁹¹ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

economic and informational stance. We will address specifics of mentioned redress mechanisms later in following chapters.

Additionally, of particular importance from the point of view of access to justice are the mechanisms supporting alternative dispute resolution and online dispute resolution in the EU.

2.2.4. Access to justice and methods of dispute resolution

According to the Black's Law Dictionary, alternative dispute resolution is the procedure for settling a dispute by means other than litigation, such as arbitration or mediation.⁹² This is a simplified definition that focuses on the extrajudicial character of ADRs. Looking at the methods of alternative dispute resolution, we recognize the same consensual (like negotiation, mediation, conciliation, etc.) and adjudicatory (arbitration) dichotomy. The United States have a long tradition of using private dispute resolution mechanisms to solve conflicts in different fields of application. The rise of ADRs could be attributed to the costs and inefficiencies of traditional (especially common law) court systems.⁹³ Praised for the flexibilities and lower costs these mechanisms found fruitful grounds in international commerce.⁹⁴ After all, their first significant usage came with the development of Lex Mercatoria in medieval Europe as a response to conflicts in cross-border trade.⁹⁵ With the rise of e-commerce, it is perfectly understandable that the use of ICT's and the Internet led to the appearance of online dispute resolution (ODR)-an extension of existing ADR practices by means of new technologies.⁹⁶

The promise of cheap, efficient, easy to access dispute resolution mechanisms as seen in ADR and ODR, has sparked the interest of EU policymakers in the field of the consumer protection; especially its usefulness for cross-border disputes was the selling point in various policy documents in last 20 years.⁹⁷

⁹² BRYAN A. GARNER, BLACK'S LAW DICTIONARY (2009). p.91.

⁹³ BARRETT AND BARRETT, *supra* note 4.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ This simplified definition is discussed more thoroughly in Ch.5.

⁹⁷ Background Report, *OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace*, (2005). 1993 Consumer Access to Justice Green Paper, p. 57., Communication from the Commission on 'the out-of-court settlement of consumer disputes', 30 March 1998, COM(1998) 198 final (1998 ADR Communication).

In the first communications on ADR, The EU Commission focused on introducing the standardized complaint form which would facilitate communication and beginning phases of dispute resolution in a single fashion.⁹⁸ It was a starting step that paved the way for further legislation in the upcoming years, most notably: the Mediation Directive, the ADR Directive, and the ODR Regulation.

The Mediation Directive 2008/52/EC was intended to facilitate cross-border amicable settlement of disputes encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.⁹⁹ Albeit it wasn't aimed solely at consumers, the Mediation Directive did not suffice in promoting alternative dispute resolutions, which resulted in subsequent and more innovative proposals and finally accepted regulations.

The ADR Directive 2009/22/EC has a more ambitious agenda on harmonizing various different ADRs under a single framework, setting the EU standards in the field and giving mandatory instructions to the Member States to set the relevant institutions in support to ADRs under a new framework.¹⁰⁰ Its scope applies only to consumer disputes, but its provisions are applicable to both domestic and cross-border disputes, covering almost every possible alternative dispute resolution mechanism. By setting EU standards for ADR and Members states, The Commission opened the door by facilitating even easier access to ADRs through a pan-EU ODR platform which was introduced in the parallel proposal and adoption of the ODR Regulation.

The ODR Regulation's goals is to create an ODR platform at European Union level and that such platform should take the form of an interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court which have arisen from online transactions, by allowing filing in e-complaint form on all of the official languages of the EU.¹⁰¹ The success of the ODR platform will largely depend on standards and harmonization set by the ADR Directive, applicable to the network of available ADRs in Europe. This network

⁹⁸ Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, 30 March 1998, OJ 2008 No. L115/31 (1998 ADR Recommendation).

⁹⁹ Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 21 May 2008, OJ 2008 No. L136/3.

¹⁰⁰ Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 21 May 2013, OJ 2013 No. L165/63.

¹⁰¹ Recital 18 of Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 21 May 2013, OJ 2013 No. L165/1.

builds on the practices of a network of European Consumer Centres (ECC-Net).¹⁰² We will discuss in the chapters 5 and 6 positive and negative sides of said regulations and possible side-effects they could have.

The previous section illustrates EU's effort to facilitate access to justice by allowing consumers the most accessible redress through ADRs. Sometimes, it is the only realistic means of settling the disputes, having in mind context of cross-border shopping where placing consumers in unfair legal position leads to a lack of trust in e-commerce in general and lack of access to justice in the view of the relevant international legal framework.

By enhancing consumer protection, the European Union reveals its preference to just advancements in positions of certain less advantaged groups, of Cappelletti and Garth's diffuse interest. Even though all the policies and actions were not coming from specific philosophical stances or by invoking philosophical discussions, we can look for understanding or support of these social policies within philosophical discourses, especially on the distribution of social responsibilities and fairness of institutions. For that purpose, we need to explain what we consider to be just distribution or fairness in distribution.

3. Justice as fairness

3.1. The concept of justice

The notion of justice has been contemplated in the minds of philosophers for a long time. It has been also very common theme in art, giving rise to a somewhat vague concept of "poetic justice", whose origins could also be traced to Plato.¹⁰³ It usually represents the deserved punishment of an actor in the story. Such artistic concept could be linked in an ethical or philosophical discussion about justice and its relation with moral desert- the concept of

¹⁰² See more at http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm

¹⁰³ MANUELA GERTZ, POETIC JUSTICE IN WILLIAM FAULKNER'S "ABSALOM ABSALOM" (2010). p.4.

deserving something according to one's actions or virtues.¹⁰⁴ Insightful and concise description of justice was the subject of writings of many philosophers, but the difficulty of a clear definition of the concept of justice had always confronted them, by strenuous effort to produce abstract concept applicable to all or majority of situations.¹⁰⁵

The earliest notable contemplations about justice and its role in society in western philosophy are attributed to Plato and Aristotle. In Plato's "Republic", justice is mentioned as a compilation of virtues in Socrates' treaties on issues of justice in the city, but also the idea (spoken by Polemarchus) that justice is all about giving people what is their due according to our sense of right.¹⁰⁶ However, a more concrete definition of what is might not articulated in the discussion of Plato's Republic.

Aristotle in an attempt to describe justice, proposes at maxim to treat equal things equally and unequal things unequally.¹⁰⁷ Aristotle also proposed a distinction between distributive and corrective justice.¹⁰⁸ Distributive justice, according to Aristotle, is dividing benefits and burdens fairly among members of a community. Corrective justice would be a way to restore a fair balance in interpersonal relations where it has been lost. When a member of a community has been unfairly benefited or burdened with more or less than is deserved in the way of social distributions, then corrective justice can be summoned by a court of law or some other mechanism. His division would later be in theory widely accepted and built upon in distinguishing distributive and retributive justice. It also relates to the distinction between distributive and procedural justice, which is more widely used in contemporary political philosophy.

Still, the question of justice in law remains. Even though he makes reference to Aristotelian concepts of justice as the proper balance of rights duties and goods between two parties¹⁰⁹,

¹⁰⁴ BARRY, *supra* 27.

¹⁰⁵ See Aristotle, *Politics and Nicomachean*, book V; Plato, *Republic* trans. Robin Waterfield Oxford University Press, 1984; John Stuart Mill, *Utilitarianism in On Liberty and Other Essays* ed. John Gray, Oxford University Press, 1991, Chapter 5.; Ted Honderich, *Punishment: The supposed justifications*, London 1969, Hutchinson & Co., Chapter 1; Brian Barry, *Theories of Justice*, Berkeley 1989, University of California Press; David Schmidtz, *Elements of Justice*, New York 2006, Columbia University Press; Eric Heinze, *The Concept of Injustice*, Routledge, 2013; Rawls, *supra* note 55; ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); THOMAS WINFRIED MENKO POGGE, *REALIZING RAWLS* (1989); AMARTYA KUMAR SEN, *THE IDEA OF JUSTICE* (2009); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

¹⁰⁶ Plato, *Republic* Book II, trans. Robin Waterfield Oxford University Press, 1984

¹⁰⁷ Aristotle, *Politics* p. 79, 81, 86, 134, 136, 151 this also related to his justification of unequal treatment of slaves in the society.

¹⁰⁸ Aristotle, *Nicomachean*, book V pp. 67-74, 76; 1129a-1132b, 1134a

¹⁰⁹ HANS Kelsen, *WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE : COLLECTED ESSAYS* (2000), p.24.

Kelsen recognizes the subjective interpersonal notion of justice and chooses to build his “pure theory” of law without reference to morals or justice of norms, based on moral values within this relations.¹¹⁰ He sees them as a matter of discussion in political philosophy and not the foundation of legal theory.

Hart explains that “the distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair’”.¹¹¹ He also recognizes that justice is traditionally thought of as maintaining or restoring a balance or proportion and treating like cases alike (and vice versa different things differently)¹¹². He places significant emphasis on equality as the foundational principle of justice and distinguishes a just law from a just application of a law¹¹³. From a procedural point of view he emphasizes principles of impartiality and objectivity as in Latin phrase 'audi alteram partem.'¹¹⁴ Additionally to the equal treatment of parties, he also observes that sometimes discrimination is required from a point of view of specific needs or specific capacities of parties (e.g., the legal capacity of children to make contracts). As with Kelsen, Hart discusses justice as a digression or side note explanation to his primary legal theory. His positions on justice and morality became even more obvious in the Hart-Fuller debate, where Hart argued for a separation of positive law and morality, while Fuller grounds positive law in the morality, indicating that the morality is the source of binding power of positive law.¹¹⁵

It is also necessary to mention utilitarian ideas, pioneered by Bentham and Mill, where justice is the total maximum sum of individual well-being/utility/happiness. Justice, according to them is not an intrinsic value, but the measured value that is expressed rationally in different situations.¹¹⁶

Looking at the said philosophers, the idea of equality and equal treatment was the main pillar in the discourse on justice. But from a normative legal point of view, it was only after the

¹¹⁰ HANS KELSEN, *PURE THEORY OF LAW* (2005), p. 59–68.

¹¹¹ HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* (2012), p. 158

¹¹² *Id.*, p.159.

¹¹³ *Id.* 160.

¹¹⁴ *Id.* 160.

¹¹⁵ H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. LAW REV.* 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. LAW REV.* 630 (1958).

¹¹⁶ JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* (1991).

emergence of the theory of John Rawls that the discussion about justice gained new grounds and fresh interest in modern legal and political theory.

3.2. Rawls' theory of justice

As an answer to the utilitarian concept of justice as a maximizing of benefits, and drawing from a Kantian moral philosophy, Rawls revitalized interest for the concept of justice in political theory in the second half of the 20th century. Rawls' paper "Justice as Fairness", which he later extended into a substantial book called "Theory of Justice", sparked discussions about the abstract concept of justice and its role in society.

3.2.1. Principles of justice

Rawls uses the idea of social contract¹¹⁷, already well known in philosophy, as the foundation for his arguments, and modifies it into his own thought experiment which he dubbed "original position"¹¹⁸. According to Rawls, principles of justice could be attained if people would rationally decide upon rules, by which they will be governed, from the original position under "the veil of ignorance"¹¹⁹. The veil of ignorance is a metaphorical explanation of inability of people in an original position to know which group of society they belong to or which natural characteristics or traits they possess. In the original position, people blinded by the veil of (self) ignorance, would according to Rawls, choose rationally rules and principles from the point of risk (as they do not know what would be their interest but, they would be willing to minimize the risk in case of ending in socially less advantaged group). He asserted this kind of reasoning as the "maximin" principle.

Governed by the rationale of the maximin principle, and deciding from the original position covered by the veil of ignorance, people would determine rules based on fairness. The fairness

¹¹⁷ JEAN-JACQUES ROUSSEAU & G. D. H. COLE, ON THE SOCIAL CONTRACT (2003).

¹¹⁸ JOHN RAWLS, A THEORY OF JUSTICE (1999).

¹¹⁹ *Id.* at 118. revised edition p. 118

from this original position was abstracted into two famous principles of justice, according to John Rawls:

- First principle: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
- Second principle: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.¹²⁰

Rawls also imposes lexical priority to the first principle over the second one.¹²¹ The priority clearly indicates his devotion to liberty of people, which stands in contrast with the egalitarian notion of equality as a starting point. However, he guarantees an equal right to the most extensive scheme of equal basic liberties. By basic liberties he understands political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.¹²² These principles are considered equal by Rawls.

Rawls second principle is a cornerstone of his philosophy. Being also called “the difference principle”, it is his most recognizable idea that the social and economic inequalities are to be distributed, so that worst off members of society are to benefit from such inequalities. The interpretation of this second principle could have various implications on societies' tax policies, social programs, property, etc.

We would also like to emphasize at this point that Rawls didn't include freedom of doing business or freedom to contract within basic liberties: “Of course, liberties not on the list, for example, the right to own certain kinds of property (e.g., means of production) and freedom of contract as understood by the doctrine of laissez-faire are not basic; and so they are not protected by the priority of the first principle”.¹²³ However, the fact that freedom (or right) of

¹²⁰ RAWLS, *supra* note 118

¹²¹ *Id.* p.220 “The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with the lesser liberty”.

¹²² *Id.* 53.

¹²³ *Id.* 54.

the contract is not under the scope of the first principle doesn't mean that specific aspects of the contract or private law that are grounded in public or constitutional law are to be completely disregarded as being irrelevant to Rawls principles.

3.2.2. Basic structure of society

Although his principles tend to be universal, as they were the result of the reasoning from an original position, Rawls recognizes that there are certain requirements that need to be met, in order to allow principles of justice. These requirements which he calls “background conditions” are needed for “basic structure of society” which is the set of major social institutions that need to cooperate with single scheme.¹²⁴ By institutions, he understands a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like.¹²⁵ It is understood that the basic structure of society is requirement and domain of application of his theory, but Rawls does not give a clear explanation of all the institutions of the basic structure of society. The basic structure is the primary subject of Rawlsian justice. And while he speaks about the constitution and constitutional law as parts of the basic structure of society, clarification is needed on exactly which legal institutions should be considered within this basic structure of society and therefore under the influence of principles of justice.

The scope of basic structure from the point of contracts has been debated.¹²⁶ A narrow interpretation of Rawls basic structure excludes most of the contract law, as private regulation of parties' rights and duties, from the scope of his theory and therefore his principles of justice. One of the reasons for this kind of interpretation is Rawls explanation and distinction from Lockean reasoning about justice as a local relational concept between individuals.¹²⁷ He negates this local justice concept and demands the basic structure as a prerequisite for the more universal abstract concept of justice. For him, justice is a social concept and not merely an aspect of the relationship between individual persons conducting private transactions.¹²⁸

¹²⁴ *Id.* 47.

¹²⁵ *Id.*

¹²⁶ Kevin A. Kordana & David Blankfein-Tabachnick, *Rawls and Contract Law*, ; Josse G. Klijnsma, *SMEs in European Contract Law: A Rawlsian Perspective*, SSRN ELECTRON. J. (2010); Josse Klijnsma, *Contract Law as Fairness*, 28 *RATIO JURIS* 68–88 (2015), <http://doi.wiley.com/10.1111/raju.12067> (last visited Oct 14, 2015).

¹²⁷ John Rawls, *The Basic Structure As Subject*, (1977). p.265-267,287.

¹²⁸ Kordana and Blankfein-Tabachnick, *supra* note 126.p. 603.

According to Kordana and Tabachnik claims of justice made by Rawls are not simply a matter of informed consensual transactions between persons, but instead must be defined, in some measure, in terms of whether or not certain conditions exist in the background to individual (or local) transactions.¹²⁹ They conclude: “the necessity of background conditions to social justice creates a demand for basic structure that establishes these conditions”¹³⁰

3.2.3.Procedural justice

To better explain his theory, Rawls introduces the notion of treating the question of distributive shares as a matter of pure procedural justice. Pure procedural justice is the idea of social system design so that the outcome of the process is always just as long as it is in a certain range.¹³¹ He further explained his pure procedural justice in contrast to perfect and imperfect procedural justice. The distinction between these three types of procedural justice is centered on the existence of independent criterion of fairness.

Perfect procedural justice guarantees the just outcome through existence and application of the independent criterion of fairness. Rawls illustrates perfect procedural justice with the example of division of cake:

“A number of men are to divide a cake: assuming that the fair division is an equal one, which procedure, if any, will give this outcome? Technicalities aside, the obvious solution is to have one man divide the cake and get the last piece, the others being allowed their pick before him. He will divide the cake equally since in this way he assures for himself the largest share possible. This example illustrates the two characteristic features of perfect procedural justice. First, there is an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And second, it is possible to devise a procedure that is sure to give the desired outcome.”¹³²

Therefore the criteria for perfect procedural justice could be determined in advance and if the procedure is properly applied leads to a fair outcome. In the given an example equal treatment

¹²⁹ *Id.*

¹³⁰ *Id.* 604.

¹³¹ RAWLS, *supra* 118.

¹³² *Id.*

or division by a cake cutter is insured by his incentive to cut as equal as possible to get the most of the cake.

Obviously perfect procedural justice is difficult to reach in a practical situation. We are quite more accustomed to imperfect procedural justice. Within imperfect procedural justice, we have an independent criterion of fairness, but we cannot guarantee that the process will lead to just outcomes.¹³³ We take an example of imperfect procedural justice in criminal trials. The criteria for fairness in criminal law in broader terms would be that, if guilty, it is fair to sentence a party to appropriate punishment. However, it is difficult to design legal rules that they always lead to correct results and even though a procedure is conducted by the law, an innocent man could be found guilty (while they, in fact, are innocent).

By contrast to imperfect procedural justice, pure procedural justice doesn't have an independent criterion of fairness, so the results of the process are fair by itself, provided that the procedure was followed properly.¹³⁴ This type of procedural justice is illustrated by gambling. Results and division made through gambling are fair if we had proper process of gambling (no cheating etc.) A distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out in order to have fair results.

Rawls requires setting up an administration of the just system of institutions, in order to apply pure procedural justice to the distribution of societal shares. The second part of the second principles of justice, so-called principle of fair opportunity is required in order to ensure the system of cooperation by pure procedural justice.

Rawlsian fairness as a foundation of procedural justice can be found in works of modern scholars like Julia Hörnle, who extracts specific building blocks for procedural fairness in dispute resolution.¹³⁵ Her definition of fairness in dispute resolution consists of three main principles: equal treatment, a rational approach to decision-making and effectiveness.¹³⁶ Effectiveness is specifically comprised of general access and mechanisms to counter-balance existing procedural inequalities between the parties (the "counterpoise"). The difference

¹³³ *Id.* 75.

¹³⁴ *Id.*

¹³⁵ JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION (2009).P. 16.

¹³⁶ *Id.* p.5.

principle, as in Rawls second principle, was the most influential for construing the counterpoise requirement between parties in the process as fairness.

Julia Hörnle also distinguishes a fourth type of procedural justice: quasi-pure procedural justice. It is one where the rules also defined the outcome as fair, but the rules themselves could be contentious since it's not statistically verifiable whether or not they lead to fair results.¹³⁷ The role of a quasi-pure procedural justice is to define the limits of discretion of decision-makers while deciding on fair outcomes if there are more fair outcomes possible.¹³⁸

Some authors place Rawlsian principles of fairness as an influence or as an additional dimension to the existing body of procedural rules that have been established, with the goal of ultimately creating more just institutions. Stefan Wrbka, argues that Rawlsian value-oriented justice should complement procedural justice to be pillars of, as he coined it, “access to justice 2.0”.¹³⁹

Having in mind all of the above, we distinguish two types of procedural justice. First, procedural justice in the sense of fair outcomes that are consequential to the procedure, with or without independent criterion (with or without of idea of just outcome); this is procedural justice observed from the point of view of outcomes. Second, (pure) procedural justice in the design of procedural rules: procedural justice as fairness. While giving an example of an independent criterion for fairness in criminal law procedure, Rawls did not explain how we as a society come to independent criterion in the first place. However, it is implied when Rawls talks about “the four-stage sequence” in the application of the two principles of justice that society gradually goes through in order to build basic structure.¹⁴⁰ In the first phase, a group of people in the original position, covered by the veil of ignorance, decides upon the first principles according to maximin logic; according to Rawls, they formulate the two principles of justice. In the second phase, the veil is partially lifted, to receive some information on circumstances, so the people could decide about the constitution.¹⁴¹ In the third phase, with the assumption that the principles of justice influenced the group to deliver a just constitution, the veil is lifted even more so that, with the additional information and a fair political procedure,

¹³⁷ JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION (2009).p.11.

¹³⁸ RAWLS, *supra* 118.

¹³⁹ WRBKA, *supra* 56.

¹⁴⁰ RAWLS, *supra* 118. p.171-176

¹⁴¹ *Id.* p.172.

the group can enact legislation in accordance with the two principles and the constitution. Finally, the fourth stage is the stage of application of rules by judges, administrators, and people. In the final stage, everyone has complete access to all the facts.¹⁴² These four stages illustrate the influence of fairness, particularly fairness of procedure on “background conditions” of the system. Of course, these stages are for illustrative purposes and not a proposal for actual legislative processes.¹⁴³ In assessing the fairness of positive legal framework, we are assessing virtual work on the third stage and its compliance with the established two principles of justice and just constitution and comparing it with positive legal norms that distribute rights and duties.

3.3. Critique of Rawls and alternate theories

3.3.1. Nozick's libertarian response

Shortly following the publication of Rawls theory of justice, his colleague from Harvard, Robert Nozick in his book “Anarchy, State, and Utopia” criticized the theory from a libertarian point of view.¹⁴⁴ Nozick is trying to defend the theory that even though the state has the monopoly on coercion, it should not be involved in the redistribution of income and wealth as this is not a legitimate use of state coercion. He criticized Rawls for emphasizing benefits to society while advocating as he called it “separateness of persons”. Contrary to that, Nozick prioritizes individual goods over common goods. According to him, there is no societal entity, but there are only different individual people in their own interests.¹⁴⁵

He proposes “the entitlement theory of justice” in holdings which consist of three main principles:

1. a person who acquires the holding in accordance with the principle of justice in acquisition is entitled to that holding
2. a person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to that holding, is entitled to the holding.

¹⁴² *Id.* p. 175.

¹⁴³ *Id.* p. 176.

¹⁴⁴ NOZICK, *supra* 105.

¹⁴⁵ *Id.* p.32-33

3. No one is entitled to a holding except by (repeated) applications of 1 and 2.¹⁴⁶ Nozick's libertarian response to Rawls theory illustrates the difference both from the philosophical point as well as the practical side. Arguing for states to restraint from private transactions as well as minimal involvement in public affairs has been accustomed to the *laissez-faire* and neoliberal economic models. As we will argue later in the thesis, these models are also demonstrable in a cloud economy, where terms of service set in click-through agreements, imposing conditions which are considered unfair by many legal scholars, even if libertarians like Nozick disagree.¹⁴⁷ Both Rawls and Nozick are committed to liberty as the foundation of their theories. However, Nozick is opposing any kind of intervention in individual liberty on the grounds of social or economic equality, since he perceives it as an illegitimate coercion over the entitled holder.

And even though he claims that the complete principle of distributive justice is simply put as "...a distribution is just if everyone is entitled to the holdings they possess under the distribution"¹⁴⁸, he doesn't give sufficient explanation what does he mean by principle of justice and acquisition and principle of justice in transfer. He, however, hints that his understanding of legitimate acquisition and transfer corresponds to legal institutions and regulation of property acquisition and transfer of ownership by accepted legal system. He further differentiates his ideas about justice from Rawls by advocating a non-patterned approach, one accustomed to libertarian views against the patterned idea of liberalism.¹⁴⁹

Both Rawls' patterned approach and Nozick's non-patterned approach are based upon contemplation of a single society and justice within it. We would argue that Nozick's principles

¹⁴⁶ *Id.* 151.

¹⁴⁷ Christopher R. Drahozal, *Unfair Arbitration Clauses*, 2001 UNIV. ILL. LAW REV. 695 (2001); Miles B. Farmer, *Mandatory and Fair - A Better System of Mandatory Arbitration*, 121 YALE LAW J. 2346–2394 (2011); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BRIGH. YOUNG UNIV. LAW REV. 1–63 (2013); Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SOUTHWEST. LAW REV. 187–228 (2012).

¹⁴⁸ NOZICK, *supra* note. 105

¹⁴⁹ Which he illustrates through famous Wilt Chamberlain example. Wilt Chamberlain is a biggest star in basketball in society, and if 1 million people are willing to freely give Chamberlain 25 cents each to watch him play basketball over the course of a season Chamberlain will have \$250,000, a much larger sum than ordinary people in the society. He calls this new distribution in society D2, which is different from pattern D1, as proposed by Rawls or some other patterned approach. According to Nozick only D2 is just. Because each member of society freely exchanges some of his D1 share with the basketball player and D1 was a just distribution (and D1 is presumably just, because it was distributed according to any just patterned principle of distribution). From that naturally follows that the D2 is a just distribution and it can hardly be deemed unjust. Nozick argues that, as the Wilt Chamberlain example shows, the state will have to continually interfere with people's ability to freely exchange their D1 shares, for any exchange of D1 shares explicitly involves breaching the original pattern. . See *Id.* 160

logically indicate (as well as the title of his book) that having discussed justice within a single state (or a single society) and proposing a laissez-faire doctrine (or just minimal intervention) as a model for what is fair, it would not be a big stretch to conclude that it would apply as a guiding principle to international matters as well: if conditions of the principles of justice in acquisition are met then justice lies in whatever the outcomes of the international contracts between parties may be.

3.3.2. Communitarian and global justice

So far we have only focused on two theories on distributive justice, where one stands in contrast to another. It is only fitting to mention some other theories and the briefly describe them for later reference and argumentation when discussing our positions towards access to justice.

Michael Walzer advocates a communitarian approach to justice which is dependent on goods, or rather sets of complex goods that could be identified as primary goods. He is also pointing to the necessity of defining primary goods in accordance to a specific society¹⁵⁰. All societies are not alike, and therefore their preferences are not the same. There is a spatial and temporal dimension to the goods that are identified as primary according to a certain society. He considers the theory of (complex) goods an essential prerequisite for justice. Inability to identify common goods would exclude the need for a society to regulate just distribution. He believes that justice is a moral standard associated with a particular society or nation, while he is reserved to the idea of an abstract universal notion of justice. We would argue that Walzers' communitarian approach is difficult to put in the practical term when it comes to regulating international private relationship, especially where parties could come from different cultural backgrounds and different expectations.

Another contemporary communitarian philosopher is Michael Sandel who is arguing that the benefits of a community outweigh individual liberties.¹⁵¹ According to Sandel, justice determines what is right according to the goods and values that are established within a community, and not individually. He especially criticizes Rawls for abstracting principles of justice while divorcing them from individual values by using the thought experiment of the veil

¹⁵⁰ WALZER, *supra* 105.

¹⁵¹ MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998).

of ignorance. Same as with Walzer, it would be difficult to establish global values, other than in some general terms, that could be practically applicable in the context of, for instance, private international relationships.

Amartya Sen proposes a capabilities approach where justice is evaluated through the prism of human capabilities and in connections with human rights.¹⁵² Sen proposes a comparable alternative to Rawls thought experiment of the veil of ignorance, but instead of insisting on not knowing his own position in society, he insists on impartiality of the one who decides. He calls them impartial spectators. It is safe to state here that the impartiality is a recurring theme and is essential for the notion of fairness or justice.

Thomas Pogge, while being a critic of John Rawls' theory of justice, extends his ideas and concepts even further to the international arena.¹⁵³ Even Rawls conceded that his ideas are based on a single society, which usually could be placed in a single nation or state, and any attempt to international justice would be done through the cooperation of states. Pogge rejects criticism of Rawls by the likes of Nozick and Sandel and reinforces Rawls' central ideas that the morality or justice must reflect upon our basic social institutions and that the justice of institutions is to be assessed by how well are its worst off participants. Pogge develops his own interpretation of Rawls's principles of justice, relating it to different fundamental rights, the ideal and the just organizations of institutions. From our point of view most importantly Pogge pushes for extending the Rawlsian criterion of justice to the international arena and attempts to identify justice as the main criterion for international institutional reforms.

3.4. Independent criterion of fairness

To be able to answer the primary research question of the thesis, we need to define appropriateness for dispute resolution in cloud services' context. We define appropriateness through the fair distribution of rights and duties having in mind the context. In the first step of painting the picture of what is appropriate, we are aiming for justice, as it should be the final outcome of any dispute resolution. Lacking the proper way to measure justice outcomes for possible disputes¹⁵⁴, we turn to procedural justice as a means to produce just final outcomes

¹⁵² SEN, *supra* 105

¹⁵³ POGGE, *supra* 105.

¹⁵⁴ See more in HÖRNLE, *supra* 33.

following a certain procedure. Rawls distinguishes perfect, imperfect and pure procedural justice, where independent criteria of fairness are known only in the first two types. Nonetheless, in cases where we do not know the independent criterion of fairness, he proposes the use of pure procedural justice, by going to the “original position” with “veil of ignorance” covering our eyes, and to reflect on fair solutions. Rawls assumes that people following the maximin principle (minimization of risks) would choose two overarching general principles of justice he formulated. The two principles of justice help us formulate an independent criterion of fairness relative to the context and issues we are facing.

Robert Nozick’s approach, where justice is a result of freedom and individual negotiation, is not particularly fair (in Rawls’ sense of fairness behind the veil of ignorance) especially having in mind potential lack of negotiation power, which could deprive the powerless of justice. If Nozick’s philosophy would allow for intervention in terms of power relations, rendering some situations unfair, we would still remain without the criterion of fairness or justice other than what is already available in the form of established rules through various regulations due to a current power setting of a libertarian society. Nozick’s defense of individualism doesn’t help in our search for a criterion of fairness, but in fact, leaves the markets to regulate themselves. In looking for the criterion for appropriateness for dispute resolution in cloud scenarios, the “veil of ignorance” and the “difference principle” are better tools when faced with ambiguities and complexities of regulating disputes and steering potential choices among appropriate means to settle the dispute.

Communitarian approaches require identification of common goods prior deliberation on justice. To identify common goods, we need to examine the context of our research: cloud service disputes. The cloud market is international in its nature, meaning cross-border transactions are quite usual, with the diversity of providers and users with unequal negotiation power and a variety of interests and cultures. If we observe global cloud “community”, it would be difficult to reduce the interest of the various stakeholders in a community of identifiable common goods, or even if identify them they would be loosely based concepts and the principle that are already part of the legal framework. If we focus on smaller niches, we would have to assess goods in specific smaller communities but then it could be inconsistent with other communities and would get a combination of communitarian and libertarian market regulation approach. Sen’s capabilities approach, with cross-cultural awareness, given the global market, makes it harder to develop criteria that are universally recognized, unless we reduce our consideration to a similar position like in Rawls starting point.

Pogge, on the other hand, accepts Rawls' arguments and extends them to the criterion for international institutions. This is the step that Rawls himself didn't propose, but remained in single society frame, leaving international justice to agreements between the states. Sympathetic to Pogge's arguments and searching for an independent criterion, we have to turn to existing sets of procedural rules defining general procedural justice principles under various terms: the right to a fair trial, due process, access to justice, etc. Since access to justice is a bit more general in relation to due process and the right to a fair trial, encompassing both of them and more, we're taking the access to justice as a common denominator through which we can get closer to the independent criterion of fairness having in mind Rawlsian principles.

Building on Rawls idea of fairness as a decision making the process from an original position behind a veil of ignorance, and its influence on background conditions of society, we need to observe access to justice from the Rawlsian point of view.

4. Access to justice as Rawlsian fairness

All of what has been written so far leads us to the question: what is the relationship between access to justice and fairness? What is an independent criterion or criteria of fairness when it comes to dispute resolution mechanisms? Simply put, the connection, and the focus of our interest is the fairness of the background conditions and institutions that are essential to access to justice; and its fair setting where the distribution of rights and duties is to the greatest benefit to the least advantaged.

While access to justice can be a matter of choice, due to party autonomy that allows parties to freely regulate and choose dispute resolution mechanism, under certain restrictions, we do not intend to propose intervention in the will of the parties expressed in the contracts. Rawls also excluded private orderings and contracts from the scope of his subject matter. He does not include freedom to contract within the scope of basic liberties. If we would compare the right to hold property to the contract law, he expressly states that even the right to hold property is not the basic liberty and therefore not the subject to the first principle of justice. However, the right to hold property entails social and economic matters and indirectly fall under the scope of the second principle-the difference principle. *Mutatis mutandis*, the same logic should apply

to contract law, and while the direct distribution of rights and duties by private parties should not be under the scope of the difference principle, the various institutions supporting, enabling or imposing provisions of contract law are to be considered under the second principle.¹⁵⁵ These institutions and rules form the background conditions of society and have to be in line with the just constitution as indicated by Rawls. They are the subject of the third stage - the legislative deliberation with the imperative to be in line with the principles of justice and the just constitution. Hence, substantive and procedural rules defining the position of the party, even if the party is free to dispose of with some of the default rights, are subject to the Rawls' principles of justice.

Since we are talking about dispute resolution, offered by dispute resolution mechanisms, which provide the essential social function of conflict resolution, either by a state or by a state approved private scheme, it falls under the constitutional level of deliberation in the second stage of Rawls' four stages, as it is constitutional category in law. The issues of equal access to justice, right to a fair trial and right to effective remedy, fall under the human rights specter of law and are usually guaranteed in the constitutions, thus any derogation or distribution is of significance to fair background condition as a subject matter of the second principle of justice. Human rights are universally applicable to natural persons and come closest to the logic of deciding behind the veil of ignorance on a global scale. Principles of civil law, often extracted from human rights, are also governing principles of an institution of law, essential for the rule of law in society. As such it clearly is the subject matter of principles of justice.

Even if we consider Rawls' restriction to the single state or nation as grounds for his ideas, in the context of international commerce, where parties contract under various legal frameworks to which the single state or state of the relevant nation conceded, it is still under the scope of Rawls' principles. We don't see how we can completely divorce regulating peoples or institutions of a state and disregarding the international element simply because the group of a single state did not participate solely in creating the extensive scheme of liberties and right under the principles of justice. The act of regulating the Constitution that allows the government in all its forms to interact and sign international conventions, is by itself by the people from the people, and hence obligatory to the people, and should be just. Finally, when it comes to a single state or a nation in Rawls teaching, we could argue that it could extend at least to a single market, as in EU internal market. The Union is a supranational organization

¹⁵⁵ Klijnsma, *supra* 126, Klijnsma, *supra* 126; Kordana and Blankfein-Tabachnick, *supra* 126.

that has attributes of a federal state in many aspects, especially regulatory which in turn could be influenced by Rawls philosophy.

Now that we have pointed that regulating the institutions of access to justice fall under the justice principles, we can reflect also on the idea of the similarity behind Rawls philosophy and logic behind the development of access to justice movement. The difference principle promotes the positions of the disadvantaged: "... social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage..." One of the reiterations of the same principle, especially in the context of multiple worse off parties, is explicitly reformulated to: "... are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged..."¹⁵⁶ Through advancement in access to justice over time and extension of its breadth, we can notice a similar thread of improving the position of a party or a group that is worse off. Even though this movement largely predates Rawls and his philosophy, it sheds light on principles of fairness underpinning the idea of access to justice. And while an intuitive notion of fairness based on equality was sufficient for the development of the ideas of access to justice, we believe that philosophical support is needed in justification of certain policies, especially of the third wave of access to justice. Even if we deal primarily with the procedural aspects of access to justice, they are also defined and limited with socio-economic positions of the individuals and require legislative intervention that improves their procedural position (i.e. consumers).

Both substantial and procedural aspects of fairness, have an influence on access to justice as more generalized notion that is intrinsic to the access to justice. We are treating access to (procedural) justice, primarily. We are also using (procedural) justice as fairness methodology to deliberate on what is just or fair. Therefore to assess the first term as the subject by the second term as methodology we are formulating access to justice as fairness.

¹⁵⁶ RAWLS, *supra* 118. p. 72.

4.1. Theoretical framework for access to justices as fairness

We selected the four indicators of key concepts of access to justice that encompass all or majority of traits in different methods of civil dispute resolution as proposed earlier (in section 2.2.2):

1. Access to a dispute resolution body
2. Fairness of the process
3. Efficiency of the process
4. Effectiveness of the outcomes

And while the specific principles that serve to these four goals (like judicial independence) are difficult to compare in an exact manner when it comes, for instance to the comparison between court proceedings and an arbitrage, they are sufficiently comparable, due to the characteristics of the two processes to be placed in opposition to each other and to draw conclusion which form of dispute resolution is superior in certain aspects (i.e., judicial independence guarantees are in general higher in judicial proceedings than in arbitrages due to the formal and procedural requirements). We will be guided by the broader classification that Neil Andrews devised.¹⁵⁷ In order to explore the context of the dispute, we need to know the characteristics of each possible method of dispute resolution. It will be the subject of the subsequent chapters to assess and evaluate each method relative to each other and put in a frame of the limitation imposed by various regulation or “background conditions”. As we finally get the picture of how the methods of dispute resolution stand relative to each other within specific context, it will be again the subject of reflective equilibrium and using the principles of justice, notably the difference principle, to establish what do we consider to be the fairest method, considering abovementioned goals, and how the background conditions could improve to obtain the goals reasonably to everyone’s advantage.

Now that we have established the main indicators in our conceptual framework, we need to operationalize those four aspects and to further elaborate them into more observable components.¹⁵⁸ We propose 9 variables which set the stage for further examination of the performance of different ADR mechanisms. These variables are parts of the key concepts or

¹⁵⁷ NEIL ANDREWS, PRINCIPLES OF CIVIL PROCEDURE (1994).

¹⁵⁸ The method of operationalization has been modeled by Percy Williams Bridgman ideas presented in *The Logic of Modern Physics* is a 1927.

indicators that elaborate on them and could be measured or observed in some aspects. While we do not intend to measure directly but to use indirect sources of data since a good number of empirical studies, have focused on some aspect of them and data on specific disputes are protected by confidentiality in many dispute resolution mechanisms. Selected variables would be availability of dispute resolution body, accessibility to dispute resolution body, independence and impartiality, equality of arms, rules on costs of dispute resolution, duration of processes, costs, success rate, and enforcement of outcome. Each variable will be observed and quantified (if possible). To break down on the variables, we introduce more quantifiable elements on each of them, and we will focus on them as primary input on variables. The operationalization of the key concepts will be through following questions:

1. Do jurisdictional rules or competence rules allow or make available use of a dispute resolution mechanism in regards to clouds dispute context?
2. Do travel costs, language, and need of professional help, impede the access to DR relative to the low value of the dispute.
3. Are there procedural guarantees in place for transparency and fairness in selection/appointment procedure of adjudicators/neutrals?
4. Are there procedural guarantees in place to ensure equality of arms in presenting the case?
5. Are the rules for the cost of dispute resolution prohibitive for small value or other disputes in cloud dispute context?
6. Could average time of proceedings before DR, measured by average time spent to resolve the issue, be described as fast relative to others forms of DR?
7. Are the average costs of the proceeding before DR, measured by average institution fees per case, high compared to others forms of DR?
8. Is the voluntary compliance necessary for the success of the dispute resolution?
9. How many legal actions are needed for the enforcement?

These are presented in the table:

Framework:	Key concepts /indicators	Variables	How different dispute resolution mechanisms compare in following operational definitions
Rawlsian fairness in access to justice Or Access to justice as fairness	Access	<ul style="list-style-type: none"> • Availability of dispute resolution body • Accessibility to dispute resolution body 	<ul style="list-style-type: none"> ➤ Jurisdiction/competence allow or make available dispute resolution entity? ➤ Do travel costs, language, professional help impede in access to the body?
	Procedural fairness	<ul style="list-style-type: none"> • Independence and impartiality • Equality of arms • Rules on costs of DR 	<ul style="list-style-type: none"> ➤ Are there guarantees for transparency and fairness in selection/appointment procedure? ➤ Are there guarantees that each party has the reasonable possibility to present its cause? ➤ Who bears the costs of proceedings and in what manner?
	Efficiency	<ul style="list-style-type: none"> • Duration of processes • Costs 	<ul style="list-style-type: none"> ➤ Average time needed for completion of process ➤ Average costs of the proceeding (institution fee)
	Effectiveness	<ul style="list-style-type: none"> • Success Rate • Enforcement of outcome 	<ul style="list-style-type: none"> ➤ Is the voluntary compliance with outcome necessary? ➤ How many steps needed for the enforcement?

Table 1. Conceptual framework for research

In order to bring down the abstract concepts to observable level we had to devise variables that are an essential part of the concepts and that are applicable to all or majority of observable dispute resolutions.¹⁵⁹ We did not want to put emphasis on a single concept, so we sought a balanced inquiry. Of course, many more variables and questions could have been proposed but limitations placed on our research in time and resources influenced drawing up an achievable scope. More than 9 could potentially be too much and with each additional, the potential workload increases and focus drifts. Since we had to place some limitation to the framework, we decided that 9 would be appropriate for the purposes of the thesis.

When it comes to the concept of access, we proposed availability that is focused on regulatory aspects of jurisdiction and competences of different entities. Jurisdiction could be influenced by mandatory regulation and contractual grounds, while competences also determine whether

¹⁵⁹ See more in Chapter 5 on different forms of dispute resolution and how they interact

a dispute resolution body is capable of handling a specific dispute, whether on consensual or mandatory grounds. Placing definition into the strict legal terminology of judicial system limits the aspects of ADR, so we approach it through the wider term of availability. Accessibility is focused on other obstacles, and since reoccurring issues in international disputes are travel costs, language, professional help, we chose to focus on them.

Looking at the procedural rules for different dispute resolution bodies, we get an impression of variety and possible feeling of comparing apples and oranges when it comes to certain forms of dispute resolution (i.e. mediation and court procedure). Therefore, we need a common denominator, a common baseline that applies to all the forms of dispute resolution. We draw inspiration from a regulatory instrument that set such common standards for various disputes resolution bodies without having to specify the details for each.¹⁶⁰ Since all those elements (and more) could be found in the judiciary, the common denominator was established. Rules on the cost of dispute resolution have to be differentiated from efficiency through costs, as these are procedural aspects dealing with issues for example: does losing party bear all the costs of waging disputes, including other party's attorney's fees. These rule could directly incentivize or dissuade potential disputants, hence they are appropriate in access to justice model.¹⁶¹

Different aspects of efficiency could be observed, but we had to consider our resources and availability of data in mostly confidentiality cloaked private dispute resolution mechanisms. Hence, we selected two most pertinent ones to give a solid comparable picture on different dispute resolution bodies. Most of those nine variables proposed could be researched from the point of efficiency as a thesis for itself. Thus, the framing of the model has to be limited to few relevant aspects with accessible data.

We observe the effectiveness of dispute resolution mechanisms by looking at their outcomes. The outcomes of dispute resolution mechanisms vary significantly due to the fact that the mechanisms by itself are different and sometimes intended or selected for different purposes. There are several methods to measure the effectiveness of the dispute resolution. All these methods require some form of extensive empirical research into the produced effects of the outcomes, satisfaction, and perception of the process and the outcome, perception of justice

¹⁶⁰ See more in Chapter 5 and 6 on ADR Directive.

¹⁶¹ CHRISTOPHER J. S. HODGES, STEFAN VOGENAUER & MAGDALENA. TULIBACKA, THE COSTS AND FUNDING OF CIVIL LITIGATION : A COMPARATIVE PERSPECTIVE (2010).

(procedural or substantive) reached through the process, etc.¹⁶² Given the variety of possible disputes, parties to the dispute (consumers, enterprises), international aspects of the dispute, complex international legal framework and potential technical aspects of the dispute, it would be hard to devise methodology that encompasses all of these facets and produce significant conclusions on the outcomes, other than general observations already established by previous research under different methodologies and interpretations. Because of the variety of dispute resolution mechanisms and respective regulations we chose to focus on two aspects of dispute resolution process which are essential for the effectiveness of all different dispute resolution mechanisms. These two aspects answer our questions from conceptual framework regarding effectiveness: is the voluntary compliance necessary for the success of the dispute resolution and how many legal actions are needed for the enforcement? The first addresses the issue of voluntary compliance and how success rate of the proceeding could depend on will of the opposing party. If after all the steps in the process, one party simply refuses to comply with recommendation or agreement, then no matter how accessible, efficient or fair the process is, the outcome is ineffective. Therefore is important to see what is the success rate based on voluntary compliance and how it could be improved. Having an enforcement mechanism available is an incentive for voluntary compliance, but the question is how many legal steps, especially in international adjudication are necessary to obtain enforcement of decision. If the enforcement is too costly or too complicated, it also renders the resolution ineffective, so we need to address that issue as well.

Once, the proper input is finalized, and we get the reading on the indicators of access to justice by different dispute resolution mechanisms, to answer our research questions we will turn to Rawls again for the final assessment of the fairness based on inputs of different indicators. We will assess the results by asking does dispute resolution allow for equality in access to the elements of the variables. This question would be in logic with Rawls first principle of equality of most extensive scheme of liberties, hence equal access to any of those indicators. The first principle of justice has priority according to Rawls. However, if the equality is not attained, and if there is inequality, is it set up to be in favor of worse off party (weaker party)? The wording of the second principle of justice is “reasonably expected to be to everyone’s advantage” which is also later reinterpreted by Rawls as to advantage to the worse off party.

¹⁶² Gramatikov, Barendrecht, and Verdonschot, *supra* note 77. Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO STATE J. DISPUT. RESOLUT. (2008). Jin Ho Verdonschot et al., *Measuring Access to Justice: The Quality of Outcomes*, SSRN ELECTRON. J. (2008); Gramatikov, Barendrecht, and Verdonschot, *supra* note.77

However, we would like also to point to the first version of “everyone’s advantage”, which should be interpreted as different from redistribution to exclusive advantage to worse off party and unnecessary disadvantage to better off party. If we could find a less disadvantaged position for better off party, and at the same time give an advantage to worse off party at a comparable level, it should be considered fair as it is “reasonably expected to be to everyone’s advantage”. Thus, we do not simply indulge worse off party without a certain sense of balance.

Now that we have established our conceptual framework for the assessment of fair access to justice, we need to further assess the research problem and elaborate on the perceived lack of access to justice.

Chapter 3 – Dispute Resolution in Cloud Service Contracts

1. Introduction

We have stepped into a service economy.¹⁶³ Service economy refers to the phase of economic development where economic growth has moved from production of goods onto provisioning of services.¹⁶⁴ Powered by new technologies, services are becoming delivered with minimal human involvement. The National Academy of Sciences explains the phenomenon with growth induced by the rapidly falling cost of procession power (also known as Moore's law¹⁶⁵) and

¹⁶³ Francisco J. Buera & Joseph P. Kaboski, 2012. "The Rise of the Service Economy," *American Economic Review*, American Economic Association, vol. 102(6), pages 2540-69, October

¹⁶⁴ *Id.*

¹⁶⁵ MOORE, *supra* note.18

significant corporate investments in information technology.¹⁶⁶ Some authors describe the IT-induced transformation of services as dramatic, pervasive, and far-reaching.¹⁶⁷ To build a service economy, that can leverage its full potential, leading to a dynamic knowledge economy, services should be provided on-demand, according to technical and economic conditions required by the consumers, and supported by a transparent and automated business process back-end.¹⁶⁸ Cloud services are the current model for providing on-demand, easy to access and affordable services. However, a services driven society or economy also facilitates the growth of disputes coming from the services it relies upon. Since cloud services are bringing us closer to a knowledge-based service economy, we also need to consider the aspect of dispute resolution within such environment. We propose access to justice and fairness as a measure of successful handling of the disputes in this rapidly changing economy.

We will start this chapter by defining cloud services and their characteristics. Even though we will begin from technology description and definition, we will move forward in the second part to the more appropriate definition for the services from the point of view of users. In the third part, we will discuss contracts as the legal foundation for cloud services. In the fourth part, we examine dispute resolution in cloud contracts and analyze data gathered on a significant number of cloud providers' terms of services. Finally, in the fifth section, we address the problem of adequacy of existing dispute resolution practices in relation to access to justice and fairness.

1.1. What is the cloud?

When it comes to information technology services (IT), it is always difficult to delineate certain technology and argue that it is an entirely new way of a delivering or providing a service. Most of the time the “new” is just a slight improvement of existing technology and business practices.

¹⁶⁶ Dale Weldeau Jorgenson and Charles W. Wessner, eds., *Enhancing Productivity Growth in the Information Age*, Washington, D.C.: National Academies Press, 2007.

¹⁶⁷ Brie et al., *The New Challenge to Economic Governance : The Digital Transformation of Services* .// in *Inno*, (2011).p.3

¹⁶⁸ Philipp Wieder, Joe M. Butler, Wolfgang Theilmann, Ramin Yahyapour eds. *Service Level Agreements for Cloud Computing* , Springer p.4.; Yasheng Pang et al. *Risk Assessment and Classification of Focusing SLA Requirement in Cloud Computing*, 7 243–256 (2013)

Trying to define innovation in IT would be a too arduous task and unnecessary for the purposes of this thesis. However, to answer the primary research question, we need to focus on a particular domain of interest. That domain is a delivery of a newer generation of services: cloud services and disputes that come out of it.

Cloud services could be simply described as information technology services based wholly or partially on cloud computing technology. It is a simple definition that emphasizes an end user's point of view, without regard to particular and distinguishable characteristics of cloud computing technology. Another would be: cloud service is any resource provided over the Internet¹⁶⁹. This would not be an appropriate starting point as we analyze different facets of misunderstanding and conflicts between users and providers at the end-point or final phase of the service, having in mind the technology and its characteristics as the defining point of the service. Similarly, the purely technological definition would not be appropriate as it focuses on processes rather on the results of those processes and it is more suitable for the defining technology itself. However, without understanding the basic elements of underlying technology, it would be difficult to assess the complexity of the legal problems surrounding it.

1.2. Cloud computing - the underlying technology

If we are to trust the marketing of numerous IT companies and industry expert's opinions, we are in the middle of the new evolution in the delivery of computing.¹⁷⁰ This new "thing" is called "cloud computing." However, what exactly is cloud computing? We should try to offer some clarity on the definition of cloud computing before we embark any deeper into the analysis of cloud computing services and potential disputes that can come out of them. Paradoxically, the definition has been the point of debate for quite some time, fueling the argument that the cloud is nothing more than a buzzword introduced by clever marketing.

"Cloud computing" in simplified terms could be understood as the storing, processing and use of data on remotely located computers accessed over the internet which would allow users

¹⁶⁹ Margaret Rouse, WHAT IS CLOUD SERVICES? - DEFINITION FROM WHATIS.COM (2011), <http://searchcloudprovider.techtarget.com/definition/cloud-services> (last visited Aug 18, 2014).

¹⁷⁰ See more at :<http://www.cloudscaling.com/blog/cloud-computing/the-evolution-of-it-towards-cloud-computing-vmworld/> (last accessed April 2014)

unlimited computing power on-demand without major prior investments.¹⁷¹ Christian Baun et al. define cloud computing as the use of virtualized computing and storage resources and modern Web technologies, which provides scalable, network-centric, abstracted IT infrastructures, platforms, and applications as on-demand services¹⁷². They also point that these services are billed on a usage basis.

Following three years work and lots of debates, US National Institute for Standardization and Technology (hereinafter: NIST) settled final, the 16th version of the definition of cloud computing. So-called NIST definition is a starting point for various research related to cloud computing:

“Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.”¹⁷³

The NIST document described cloud computing through five essential characteristics¹⁷⁴:

- On-demand self-service - allows automatic provisioning of computing without human interaction,
- Broad network access - capabilities are available over a networked infrastructure allowing thin (e.g. mobile devices) and thick clients easy access.
- Resource pooling - resources are pooled together to serve multiple consumers using a multi-tenant model; dynamic sharing of the resource while at the same time creating a sense of location independence. Examples include storage, processing, memory and network bandwidth
- Rapid elasticity- rapid and elastic provisioning of capabilities to quickly scale up or down as required, creating a sense of unlimited resources to consumers.
- Measured service - automatic control and optimization of resources coupled with metering capability allowing a pay-per-use model

¹⁷¹ Jonathan Cave & Svitlana Kobzar, *Regulating the Cloud*, p.14. EU COMMISSION. *THE FUTURE OF CLOUD COMPUTING OPPORTUNITIES FOR EUROPEAN CLOUD COMPUTING BEYOND 2010 - Expert Group Report*

¹⁷² CHRISTIAN BAUN, *CLOUD COMPUTING WEB-BASED DYNAMIC IT SERVICES* (2011) p.3.

¹⁷³ Peter Mell, Timothy Grance & Peter Mell, *THE NIST DEFINITION OF CLOUD COMPUTING, RECOMMENDATIONS OF THE NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY SPECIAL PUBLICATION 800-145*, p.2, <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

¹⁷⁴ *Id.* p.2

These computing services are delivered through three service models which we will discuss in next section. In the same document NIST also distinguished four deployment models¹⁷⁵:

- Private cloud – provision of cloud infrastructure for exclusive use by a single organization comprising multiple consumers, which cloud be owned, managed and operated by the organization, a third party, or some combination of them, and it may exist on or off premises.
- Community cloud - provision of cloud infrastructure for exclusive use by a specific community. It cloud be owned, managed, and operated by one or more of the organizations in the community, a third party, or some combination of them, and it may exist on or off premises.
- Public cloud – provision of cloud infrastructure for open use by the general public. It may be owned, managed, and operated by a variety of parties and it exists on the premises of the cloud provider.
- Hybrid cloud – where the cloud infrastructure is a composition of two or more distinct cloud infrastructures (private, community, or public) that remain unique entities but are bound together by standardized or proprietary technology that enables data and application portability.

Kuan Hon and Cristopher Millard gave another good definition describing cloud “as a way of delivering computing resources as a utility service via a network, typically the Internet, scalable up and down according to user requirements”.¹⁷⁶

Competing definitions of cloud computing in academia relate to approaches that are taken by different researchers. Some of them are more software oriented defining cloud computing as “software offerings where the application is executed in a web browser, via software code that is downloaded (as needed) from a remote server that also stores users’ files”¹⁷⁷. Other definitions are more focused on the outsourcing aspect of the cloud: “outsourcing’ computing functions traditionally controlled by a consumer – operating and maintaining hardware, installing and running software, storing data – to a third-party service via the Internet”¹⁷⁸.

¹⁷⁵ *Id.*

¹⁷⁶ Millard, *supra* note. 20 p.1.

¹⁷⁷ Christopher Soghoian, *Caught in the Cloud: Privacy, Encryption, and Government Back Doors in the Web 2.0 Era*, 8 J. TELECOMM. HIGH TECH. LAW (2010), p.364.

¹⁷⁸ N Ozer & C Conley, *Cloud Computing: Storm Warning for Privacy?*, ACLU NORTH. CALIF. 1 (2010).

2. Cloud services - definition

Even before the NIST definition, the International Data Corporation (IDC)¹⁷⁹ has made efforts to distinguish cloud computing from cloud services. According to IDC cloud computing is “an emerging IT development, deployment, and delivery model, enabling real-time delivery of products, services and solutions over the Internet”, while cloud services are “Consumer and Business products, services and solutions that are delivered and consumed in real-time over the Internet.”¹⁸⁰

NIST, subsequently, made a clear difference between characteristics of technology and the services that could be provided using it. The standardization body categorized various forms of services into three service models¹⁸¹:

- Infrastructure as a Service (IaaS). The capability provided to the consumer is to provision processing, storage, networks, and other fundamental computing resources where the consumer is able to deploy and run arbitrary software, which can include operating systems and applications at will stations. The consumer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, and deployed applications; and possibly limited control of select networking components (e.g., host firewalls)
- Platform-as-a-Service (PaaS) - The capability provided to the consumer is to deploy onto the cloud infrastructure consumer-created or acquired applications created using programming languages, libraries, services, and tools supported by the provider. The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, or storage, but has control over the deployed applications and possibly configuration settings for the application-hosting environment.
- Software-as-a-Service (SaaS) - The capability provided to the consumer is to use the provider’s applications running on a cloud infrastructure. The applications are accessible from various client devices through either a thin client interface, such as a web browser (e.g., web-based email), or

¹⁷⁹ See more at: <http://www.idc.com/> (last visited Aug 20, 2014)

¹⁸⁰ Gens, *supra* note. 17

¹⁸¹ Peter Mell, Grance, and Mell, *supra* note 16 .p.3

a program interface. The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, storage, or even individual application capabilities, with the possible exception of limited user-specific application configuration settings.

For the illustration of the models, Infrastructure-as-a-Service (from now on: IaaS) access to remote physical or virtual machines model of service could be compared to hardware in the sense of personal computer. In the same sense, Platform-as-a-Service (from now on: PaaS) would represent operating system on the personal computer since PaaS typically includes operating system programming language, execution environment, and database. Software-as-a-Service (from now on: SaaS) could be compared to application software and databases installed on the operating system.

However, these are not only as-a-service models out there. We could also mention desktop-as-a-service, data-as-a-service, backup-as-a-service, mobile backend-as-a-service, unified communication-as-a-service, monitoring-as-a-service. The desire to distinguish itself from the market caused “as-a-service” phenomenon where every niche on the market tries to represent itself as a special model of cloud service.¹⁸² With the constant rise of cloud market, many of the preexisting services are rebranding themselves into the as-a-service model¹⁸³, thus contributing to further confusion with the term. Some definitions even introduce humans-as-a-service¹⁸⁴ as a combination of human service (usually by crowdsourcing¹⁸⁵ certain tasks) and computing, forming an “everything-as-a-service” paradigm. Considering all above it is understandable that NIST limited the list of service models on three wide but distinct categories.

IDC in their early publication (with rather a skeptical attitude towards innovation of cloud computing technology) has given eight distinguishing attributes of cloud services: offsite service/provided by third-party provider, accessed via the internet, minimal/no it skills to “implement”, provisioning/self-service, fine-grained & usage-based pricing, browser (and

¹⁸² Mike Elgan, THE RISE OF VAGUENESS AS A SERVICE | COMPUTERWORLD MAY 10 (2014), <http://www.computerworld.com/article/2489252/mobile-apps/the-rise-of-vagueness-as-a-service.html> (last visited Aug 31, 2014).

¹⁸³ *Id.*

¹⁸⁴ BAUN, *supra* note 172, p 28..

¹⁸⁵ JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005)

successors) user interface, system interface - web services APIs and shared resources/common versions¹⁸⁶.

What makes cloud computing services complex compared to some other IT service models is the cloud supply chain. Virtualization or abstraction of service layers and possible combinations of layers of service providers in the stack allows additional flexibility to the providers, but from the end user's point of view complicates the service model. Consumers of SaaS, most commonly, do not know if their provider uses its own infrastructure or not, where are the servers and location of their data, who has access to it, what kind of physical security measures to protect their data are being taken, etc. The conditions and terms for processing and storing data could depend on several service providers in different jurisdictions. Having in mind the multi-tenancy characteristic of cloud computing where load balancing of servers is optimized by moving data from server to server, it is hard to have an exact answer to where the data is stored in some cases. The cloud supply chain is dependent on how many service providers are in the chain of IaaS, PaaS, and SaaS. For example, we could have Software-as-a-service, built upon Microsoft Azure platform¹⁸⁷, deployed on Amazon Web Services IaaS¹⁸⁸. However, most of the details of the underlying layers of the service remain unknown to the ordinary users.

Since we are approaching the subject mostly from the end-users point of view, we are interested in a definition oriented around consumers/users and their expectations. Simple but vague in the way of what is to be expected the definition of cloud service is given by Amazon Web Services: “Cloud computing by definition refers to the on-demand delivery of IT resources and applications via the Internet with pay-as-you-go pricing.”¹⁸⁹ This definition hints to the cloud as a utility but also illustrates the marketing aspect of the cloud services and the way they are represented.

Sometimes unfulfilled expectations of a cloud service user could lead to dissatisfaction of a client and if he feels wronged in some way the user might be seeking a remedy. First, by

¹⁸⁶ Gens, *supra* note 17.

¹⁸⁷ See more at: <https://azure.microsoft.com/en-us/> (last visited Aug 25, 2014)

¹⁸⁸ See more at: <http://aws.amazon.com/> (last visited Aug 25, 2014)

¹⁸⁹ See more at: http://aws.amazon.com/what-is-cloud-computing/?sc_icountry=en&sc_ichannel=ha&sc_idetail=ha_en_93&sc_icontent=ha_en_d_ed_93_1&sc_iplac e=ha_en_ed&sc_icampaign=ha_en_WhatIsCC&trk=/ (last visited Aug 25, 2014)

communicating the problem to the service provider informally and then, if the consumer has not achieved the satisfactory solution and if the consumer is willing to endure, a more formal dispute resolution becomes an option. Cloud services are contract based services, where customers usually sign in by accepting “click-through” agreements, comprised of long Terms of Service which most of the consumers tend not to read.¹⁹⁰ As we will see later many of terms in the cloud providers’ Service Agreement, tend to be in provider’s favor. Only in the moment of conflict escalation majority of consumers read thoroughly Terms of Service and reassess their legal position; they look to the terms and conditions trying to validate their understanding of the provider action that is contrary to contract or law.

2.1. Cloud services benefits and adoption

Cloud computing services advertise its advantages to achieve wider scale adoption. One of the main selling points is that the cloud technology allows access, mobility and flexibility to business and personal use, without requirements of additional infrastructure investments.¹⁹¹

The European Commission’s Expert Group identified several impacts of cloud computing technology and divided them into three general types: non-functional, economic and technological.¹⁹²

The general or non-functional aspect¹⁹³ that drives the adoption of cloud computing is explained in terms of:

- elasticity - ability to adjust resources to actual demands through horizontal and vertical scalability;
- reliability - operations without disruptions;
- the quality of service support - guaranteed in service-level agreements;
- agility and adaptability - ability to respond in real time according to demands;
- availability of services - providing continuous access without disruptions or changing of user experience.

¹⁹⁰ Ben-Shahar, Omri, *The Myth of the 'Opportunity to Read' in Contract Law* (July 18, 2008). U of Chicago Law & Economics, Olin Working Paper No. 415. <http://dx.doi.org/10.2139/ssrn.1162922>

¹⁹¹ Maximilian Robu, *CLOUD COMPUTING : THE NEXT BIG THING FOR SMALL AND MEDIUM BUSINESSES*, .

¹⁹² Jonathan Cave & Svitlana Kobzar, *Regulating the Cloud*, p.14. EU COMMISSION. *THE FUTURE OF CLOUD COMPUTING OPPORTUNITIES FOR EUROPEAN CLOUD COMPUTING BEYOND 2010 - Expert Group Report*

¹⁹³ *Id.* p. 13.

Economic aspects¹⁹⁴ that drive adoption of cloud computing are usually perceived in:

- Cost reduction- of IT infrastructure maintenance and acquisition costs; one of the biggest attractions of cloud computing; also ability to adapt to user's behavior that results in reducing excess capacities;
- Pay-per-use - ability to acquire services according to actual consumption, without the in-house infrastructure investment of state-of-the-art technology;
- Shorter time-to-market - cutting down the costs and delays associated with investments in IT infrastructure;
- Return on investment – return on IT outsourcing in cloud outweighs return on investment in an in-house infrastructure;
- Converting CAPEX to OPEX - Capital expenditure (CAPEX) is required to build up a local infrastructure but is unnecessary in case of outsourcing, where the company will spend only operational expenditure (OPEX);
- Green effects - energy efficiency; minimizing energy use and carbon prints;
- Hardware software and technology independence - computer services are purchased on per use basis, thus, businesses and consumers can reallocate their investments in other areas¹⁹⁵.

Technological aspects¹⁹⁶ of cloud computing adoption:

- Virtualization-essential technological characteristic allows infrastructure independence, flexibility and adaptability, location independence, and ease-of-use;
- Multi-tenancy- the same resource may be assigned to multiple users (potentially at the same time);
- security, privacy, and trust in dealing with data;
- Data management- data is flexibly distributed across multiple resources, but the system needs to be aware of data location;
- Enhancements to programming and APIs- scalability and capabilities under autonomic system management;
- Metered use- of consumption of resources necessary for billing purposes;
- Cloud tools- for development, adaptation, and usage.

¹⁹⁴ *Id.* p 14.

¹⁹⁵ *Id.* p. xvi

¹⁹⁶ Expert group. p.15

Having in mind all these aspects that influence adoption, as well as rising technological trends that are connected with the development of cloud computing, such as big data analytics¹⁹⁷ and Internet of things¹⁹⁸, most of the available forecasts predict a rise in adoption of cloud computing services.¹⁹⁹ According to IDC research from 2014, by the year 2016, there was an 11% shift of IT budget away from traditional in-house IT delivery, toward various versions of cloud computing as a new delivery model, and by 2017, 35% of new applications will use cloud-enabled, continuous delivery and DevOps life cycles for faster rollout of new features and business innovation.²⁰⁰ Recent IDC projection estimates the worldwide spending on public cloud services will reach \$122.5 billion in 2017, and it will reach \$203.4 billion by 2020.²⁰¹

Among other things, the adoption is also influenced by the ease of access to cloud services. All of the perceived or potential benefits of cloud services are usually advertised as easily accessible and available for users with a “click of a mouse.” Commoditization of cloud services for large-scale use requires standardized contracts, as individual negotiation for every cloud service would undermine the functioning and some of the fundamental characteristics of the cloud.

2.2. Pricing and free cloud

One of the more prominent features of the cloud services, which also has a direct effect on the legal position of the users is the pricing of the services with certain distinctions are being made between free and paid services. Advertised “free” services include in their Terms of Service most favorable terms for the provider, with the wide exclusion of any liability of provider.²⁰² Like in most tech industries, the source of fast growth and expansion could be correlated with

¹⁹⁷ Ibrahim Abaker Targio Hashem et al., *The rise of “Big Data” on cloud computing: Review and open research issues*, 47 INF. SYST. 98–115 (2014), <http://www.sciencedirect.com/science/article/pii/S0306437914001288>.

¹⁹⁸ EVANS, *supra* note. 22

¹⁹⁹ Roundup Of Cloud Computing Forecasts And Market Estimates, 2015 - Forbes, , <http://www.forbes.com/sites/louiscolombus/2015/01/24/roundup-of-cloud-computing-forecasts-and-market-estimates-2015/> (last visited Nov 21, 2015).

²⁰⁰ IDC, 2015-2017 FORECAST: CLOUD COMPUTING TO SKYROCKET, RULE IT DELIVERY - INNOVATIVE INTEGRATION, INC., <http://www.innovativeii.com/2015-2017-forecast-cloud-computing-skyrocket-rule-delivery/> (last visited Nov 21, 2015).

²⁰¹ IDC's Worldwide Semiannual Public Cloud Services Spending Guide available at:

<http://www.idc.com/getdoc.jsp?containerId=prUS42321417>

²⁰² Christopher Millard, *Cloud Computing Law*, (2013)

the effects of Moore's law, Kryder's law and several other laws describing a decrease in price through time per unit of production (or increase in the rate of production per time units). Moore's law²⁰³ is an observation that, over the history of computing hardware, the number of transistors on integrated circuits doubles approximately every 18 months. Therefore, the prices of the circuits (or the price of processors) constantly decrease. Kryder's law²⁰⁴, similarly, explains the decline in prices per storage unit. Hence, more and more memory is available to us for the same price, either buying bigger hard drives or getting bigger storage space online or in the "cloud." Butter's law²⁰⁵ illustrates that the amount of data coming out of an optical fiber is doubling every nine months. Nielsen's law²⁰⁶ claims that the bandwidth available to users increases by 50% annually. Similar laws describe other building blocks of Internet and digital economy. The consequences of this rate of production are that we have a highly competitive market of services, with low barriers to entry that constantly puts pressure to lower the cost of services or to offer more and more of free services.

Constant lowering of prices, as described above, allowed the development of business models around free services or free offers. Chris Anderson claims that this is a natural consequence of speed and growth of production in the digital economy, where resources are abundant (as opposed to the physical world) and where the speed of distribution is instant, and costs of distribution are minimal to nothing.²⁰⁷

Hoofnagle and Whittington, however, claim that "free" is mostly used as an enticement to get consumers to try a product without realizing its costs.²⁰⁸ They argue that conceiving the transactions as free can be detrimental to consumers and competition because there are often hidden charges in these exchanges in the form of providing personal information. According to them:

"The service provider may expect to earn revenues from the personal information collected about consumers who devote their attention to advertising and other services, such as games, from third parties. The more time the consumer spends using the service and revealing information, the more

²⁰³ MOORE, *supra* note. 18

²⁰⁴ Walter, *supra* note. 18

²⁰⁵ GAIL ROBINSON & GAIL ROBINSON, SPEEDING NET TRAFFIC WITH TINY MIRRORS (2000), <http://www.eetimes.com/story/OEG20000926S0065> (last visited Feb 6, 2014).

²⁰⁶ JAKOB NIELSEN & JAKOB NIELSEN, NIELSEN'S LAW OF INTERNET BANDWIDTH (1998), <http://www.useit.com/alertbox/980405.html> (last visited Feb 6, 2014).

²⁰⁷ CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE (2009).

²⁰⁸ Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, UCLA L. REV. (2014),.

the service can adjust the product to reveal more information about the consumer and tailor its advertising of products to that consumer's personal information".²⁰⁹

Hoofnagle and Whittington are also proposing consideration of free services from transaction cost economics' point of view, which hardly leaves them the qualification "free."²¹⁰

De la Iglesia and Gayo divide these online business models into the following categories: advertising, freemium, work exchange and mass collaboration.²¹¹ They explain that the advertising model is based on the building of an audience or better to say in internet terms, a community, to which advertisers will want to offer their products or services; in Freemium model (combination of words free and premium) premium users pay and subsidize the use of everybody; work exchange allows free services in return for some work by users; mass collaboration exists because the cost is nearly nothing.

Figure 1 - Table of Web 2.0 business models.

Model	Cost	Who pays	Why
Freemium	0	Premium users	Better features
Advertising	0	Advertisers	The attention of the community to its products or services.
Work exchange	0	Service provider or sponsor	Getting value from users
Mass Collaboration	0	Donators Volunteers	Altruism Self-promotion Interest

Source: Iglesia & Gayo (2009) p. 95 ²¹²

Some of the most prominent free web services consider personal information gathering essential for revenues. The value of personal information is also confirmed by market valuations of such companies and their proprietary networks. At the same time, researchers are trying to answer what is the value of personal data per individual user. The methods vary from

²⁰⁹ *Id.* p. 608-609

²¹⁰ *Id.*

²¹¹ JLM de la Iglesia & JEL Gayo, *Doing business by selling free services, WEB 2.0* (2009), http://link.springer.com/content/pdf/10.1007/978-0-387-85895-1_6.pdf. p. 89

²¹² *Id.*

measuring the value of privacy²¹³ to a willingness to pay if personal data could be bought from the social network²¹⁴. The Spiekermann study suggests that the more a user is using a social network, the more he/she is willing to pay for personal information.²¹⁵

Similarly, free “apps”²¹⁶ as an extension of a cloud service, are widely available on “app markets” for various smartphones and their platforms. Many of them, to work properly, demand internet connection (usually to display ads). In certain cases, we have interesting interaction between free and premium (sometimes paying) users in the new free web-based games. For example, players of free game *FarmVille*²¹⁷ can earn virtual currency by completing tasks or selling crops, but also, users can use real money to gain these currencies (Farm Coins and Farm Cash in *FarmVille* or Farm Bucks in *FarmVille 2*²¹⁸). However, is the legal treatment of users who earned virtual currency the same as treatment of users who purchased virtual currency with real money?

Having in mind previously mentioned research on the value of personal data²¹⁹ and the relationship between invested time/effort in using a service and value it represents for the user, we could also easily imagine situations where users get in disputes over free cloud services. Consider a user finding one day that he/she cannot access to his/her (one of the popular) free email account.²²⁰

How much time and effort invested in that service would be lost together with all established communication and contacts, because of an alleged violation of Terms of Service? Would one pay to have this situation resolved? If so, how much? Would one be willing to file a lawsuit in the court (usually Californian) specified within standardized Terms of Service? What would be the cost of such action? Alternatively, consider already numerous examples of Facebook locking accounts after reports of violation of Facebook Community Standards, especially over some controversial topics.²²¹ Certain artist creates and promotes provocative artwork that could

²¹³ Bernardo A. Huberman, Eytan Adar & Leslie R. Fine, *Valuating Privacy*, IEEE SECUR. PRIVACY, (2005).

²¹⁴ Sarah Spiekermann, Christine Bauer & Jana Korunovska, *On the Value of Information – What Facebook Users are Willing to Pay*, (2012).

²¹⁵ *Id.* p.4.

²¹⁶ Short of applications.

²¹⁷ See more at: <https://company.zynga.com/games/farmville>

²¹⁸ See more at: http://zynga.com/game/farmville-two?src=game_index

²¹⁹ Huberman, Adar, and Fine, *supra* note 213. Spiekermann, Bauer, and Korunovska, *supra* note 214.

²²⁰ Similar story described by Tienlon Ho, LIFE WITHOUT GOOGLE: WHEN MY ACCOUNT WAS SUSPENDED, I FELT LIKE I’D BEEN DUMPED.,

http://www.slate.com/articles/technology/future_tense/2013/04/life_without_google_when_my_account_was_suspended_i_felt_like_i_d_been_dumped.html (last visited Apr 21, 2014).

²²¹ Controversial N.J. artist banned by Facebook for nude photography, , http://www.nj.com/entertainment/arts/index.ssf/2015/11/graupepillard_joins_artists_banned_by_facebook

be deemed inappropriate by Facebook administrators. How about a dispute over wrongly assessed test or assignment on one of the free Massive Open Online Courses (MOOCs), provided by educational platforms like Coursera²²², which offer free education globally and where users are obtaining valuable certificates without paying for the course or enrollment. However, would one be able to have access to justice when all disputes are to be resolved before federal or state court in Santa Clara, California?

Before we discuss access to justice, we need to examine common traits of cloud service contracts to see if there are elements of unfair distribution in rights and obligation between cloud service parties.

3. Contracts for cloud services

A contract could be defined as an agreement giving rise to obligations that are enforced or recognized by law.²²³ While the definition of a contract is not universally accepted, most of the scholars agree on two fundamental requirements for the formation of a contract: an offer and acceptance.²²⁴ Like most commercial services, cloud computing services are based upon contracts that give rise to legal obligations for both parties: users, and providers. Even though the term contract is not necessarily mentioned, and quite often elements of contracts are scattered in several documents with different names, they all constitute legally binding obligations based on offer and acceptance. If we distinguish negotiable and non-negotiable contracts/agreements, cloud services, especially public cloud services, predominantly fall into the non-negotiable category. Bradshaw et al. found that only large companies and governments can negotiate more favorable terms, which is corresponding to the value of their contract indicating that for low-value contracts there is no possibility for negotiation.²²⁵

ook.html (last visited Jan 21, 2016). Facebook standards:
<https://www.facebook.com/communitystandards>.

²²² See more at: <https://www.coursera.org/>.

²²³ GUENTER H. TREITEL, THE LAW OF CONTRACT BY SIR GUENTER TREITEL (11th ed.). p. 155 ; GARNER, *supra* note 92. p. 365

²²⁴ Ewan Meckendrick Contract law p. 4, Neil Andrews contract law, p. 37

²²⁵ Bradshaw, Millard, and Walden, *supra* note 21.

Non-negotiable agreements are a useful tool in economies of scale, for which especially public cloud services strive. When it comes to cloud services, these contracts are being made online, usually in the form of click-wrap agreements, which are the type of contracts of adhesion.

3.1. Contracts of adhesion in cloud services

Contracts of adhesion, in the more general definition, are the contracts presented by sellers to consumers in a take-it-or-leave-it form and containing standard clauses.²²⁶ Standard clauses sometimes are written in the style that is hardly understandable to an average user, which some legal traditions labeled as boilerplate clauses in contracts.²²⁷ Legislators in the EU intervene by regulating certain aspects of contracts of adhesion, especially in the consumer domain. Traditional reasons for the legislative intervention in consumer contracts are that companies harbor larger market power over individual consumers, consumers lack the sophistication to deal with specifics of contracts and that contracts are too complex for the individual consumer.²²⁸ Looking at the cloud providers' Terms of Service and related documents all of the above characteristics of contracts of adhesion are easily recognizable.

For the purposes of this research, we have gone through 322 cloud services looking at the Terms of Service (ToS) and Privacy Policies (PP) that were available at the sites of cloud providers.²²⁹ While the main focus was on specific clauses relating to dispute resolution, we detected certain similarities in the forms of contracts and elements of their content. Regarding the type, contracts are being offered on "as is" basis, indicating that they, by their formation and standardized form for different users, are falling into the category of contracts of adhesion. Cloud service provider, as the party with a stronger bargaining/economic/market power drafts and offers the terms on take it or leave it the basis to the party with a weaker bargaining power. The majority of cloud users do not have negotiation power to alter previously set the terms by providers. With characteristics such as "broad network access", meaning that the parties could

²²⁶ ELENA D'AGOSTINO, 21 CONTRACTS OF ADHESION BETWEEN LAW AND ECONOMICS: RETHINKING THE UNCONSCIONABILITY DOCTRINE (2014).p.2.

²²⁷ EDITED BY GIUDITTA CORDERO-MOSS, BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW (Giuditta Cordero-Moss ed., 2011).

²²⁸ D'AGOSTINO, *supra* note 226.

²²⁹ details about the cloud services and their terms can be found in Appendix 1 one of the thesis

access service regardless of their physical location, and the “on demand” aspect illustrating promptness to cater real-time needs, it would not be very efficient to negotiate every individual contract or specific term. It is also a continuation of contracting practices for software licensing online and offline, with shrink-wrap agreements (offline) and click-wrap agreements.²³⁰

Very often the “as is” nature is clearly expressed in the Terms of Service:

“To the maximum extent permitted by law, the Service Is Available “As Is.” YOU EXPRESSLY UNDERSTAND AND AGREE THAT:

YOUR USE OF THE SERVICE AND THE PURCHASE AND USE OF ANY PRODUCTS ARE ALL AT YOUR SOLE RISK. THE SERVICE IS PROVIDED, AND PRODUCTS ARE SOLD ON AN “AS IS” AND “AS AVAILABLE” BASIS.”²³¹

“TO THE FULLEST EXTENT PERMITTED BY LAW, DROPBOX, AND ITS AFFILIATES, SUPPLIERS AND DISTRIBUTORS MAKE NO WARRANTIES, EITHER EXPRESS OR IMPLIED, ABOUT THE SERVICES. THE SERVICES ARE PROVIDED "AS IS." WE ALSO DISCLAIM ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. Some places don't allow the disclaimers in this paragraph, so they may not apply to you.”²³²

3.2. Terms of Service and cloud services’ policies

Looking at available Terms of Services of 322 cloud providers, certain regularities were easily detected. We have noticed that in general, we can place the majority of observed terms in one of the following categories: Terms of Service, Service Level Agreements, Acceptable Use Policies, Privacy (and/or Security) Policies. To the extent that providers deem necessary, we can find only one or several (possibly five or more if intellectual properties protection was significant enough to be mentioned in the separate document, i.e. IP policy declaring that you are the owner of your content²³³).

3.2.1. Terms of Service

Terms of Service (ToS) regulates the relationship between service provider and user. After indicating with whom users are stepping into a legally binding agreement, it usually specifies

²³⁰ Contracts of Adhesion Between Law and Economics - | Elena D’Agostino | Springer, .

²³¹ See more at: <https://evernote.com/legal/tos.php> accessed November 2015

²³² See more at: <https://www.dropbox.com/terms> (last accessed November 2015).

²³³ Evernote ToS at: <https://evernote.com/legal/tos.php> (last accessed November 2015).

providers prewritten terms in regards to its service. It specifies the main elements of a contract and lays out obligations of provider and user. Sometimes, ToS contain definitions and clarification of certain terms to avoid misinterpretation of the meaning. Occasionally, terms are quite specific on the intellectual property rights regarding users' data.²³⁴ If it is not a subject of separate policy documents, Terms of Service tend to profess providers' commitments to security, with different degrees of details.

For paid services, ToS typically contains commercial terms, i.e. details for payment of services. Certain services have special provisions for payment disputes, stating that if the provider overcharged for the service, there is a deadline for filing payment complaints. ToS also usually cover termination of the agreement, either by the will of a party or due to a breach. Certain agreements also allow for the suspension of the agreement, pending a decision on suspected violation or third party complaint.

In the majority of observed ToS, we found some form of limitation of liability and/or exclusion of warranties to the extent possible by applicable law. Such provisions are more common to the United States legal system and possibly not applicable to other jurisdictions (EU Unfair Terms Directive would render such clauses, not binding). Nevertheless, they indicate attitudes of cloud providers towards liability for certain issues. Similarly, the one-sidedness of Terms of Service is also illustrated in the provider's reservations for the unilateral changes of terms. Providers usually reserve the right to unilateral changes with a degree of differentiation in the notification procedure (from email notifications to publishing changes of ToS on sites) and allowing an opt-out for users. Some of the providers, especially storage providers, specify the details of data handling in the event of contract termination.

In addition to dispute resolution clauses that will be discussed later, providers, may place indemnification clauses which creates an obligation for the customer to indemnify, defend and hold harmless provider and its associates from and against any liability arising from a claim of a third-party.

They also usually specify governing law and jurisdiction in the case of a dispute. We discuss these aspects of ToS in section 4 in greater detail. Ordinarily, we also find a clause on severability indicating that in the event that competent court or tribunal finds some point Terms of Service unenforceable, the remaining clauses are to be enforced nonetheless,

²³⁴ See more at: <https://evernote.com/legal/tos.php> (last accessed November 2015).

For contractual disputes, (as opposed to non-contractual, e.g. in the case of damages) norms expressed in Terms of Service are of essential importance. Common disputes that can be observed in most paid services are those related to payments. Paid services, on a monthly basis or metered, are being billed automatically. Some services dealing with the higher volume of users prescribed specific steps for initiating disputes as well as shorter deadlines to contest payments:

IF YOU BELIEVE THAT YOUR CHARGES ARE INCORRECT, YOU MUST CONTACT JOYENT IN WRITING WITHIN 30 DAYS FROM THE DATE OF THE APPLICABLE INVOICE (“DISPUTE PERIOD”) TO CONTEST SUCH CHARGES TO BE ELIGIBLE TO RECEIVE AN ADJUSTMENT OR CREDIT. TO THE FULLEST EXTENT PERMITTED BY LAW, YOU HEREBY WAIVE ALL CLAIMS RELATING TO ANY AND ALL CHARGES NOT DISPUTED BY YOU DURING THE DISPUTE PERIOD (THIS DOES NOT AFFECT YOUR CREDIT CARD ISSUER RIGHTS).²³⁵

In many cases that ToS incorporate clauses that could be covered in acceptable use policies, privacy and security policies, intellectual property policy or service level agreements. If those policies are portrayed in separate documents, they are being referenced to in Terms of Service, and vice versa ToS are referenced in those policies as general terms of the provider.

3.2.2. Service level agreements

Service level agreements (SLA) as a part of cloud service contracts are more technical documents, more likely to be found in IaaS and PaaS cloud services than in software as service models. Their function is to specify the expected level of service between provider and user. Through SLAs provider commits to and guarantees a certain level and quality of service. SLA’s usually state that providers do not guarantee 100% of availability of service (service uptime). It details availability of the service usually in percentage of uptime (ref. the service will be available for 99.5% of time)

In some cases, SLA’s also includes Quality of service parameters (i.e. response time, throughput) but to enforce them, they need to be constantly monitored.²³⁶ Issues of monitoring are essential when it comes to disputes over SLA’s and quality of service. Some providers shift

²³⁵ Joyent ToS available at: <https://www.joyent.com/about/policies/terms-of-service> (last accessed November 2015); Also see Twilio ToS at: <https://www.twilio.com/legal/tos> (last accessed November 2015);

²³⁶ Pankesh Patel, Ajith Ranabahu & Amit Sheth, *Service Level Agreement in Cloud Computing*, p. 2.

the burden of proving SLA violations on the user.²³⁷ Providers tend to define the terms within SLA's carefully to avoid any confusion on the meaning of terms like the outage or the measurement period.

Other than the parameters of SLA, the agreement usually contains procedures in case of a failure to obtain prescribed levels of service. Following the specific procedure in case, provider does not meet specified service levels, the user usually becomes eligible for service credits as a form of compensation. Often compositions just restricted to services but also capped to the maximum possible level of service credits. Some providers offer service credit as a monetary-based credit that could be credited back to an eligible account.²³⁸

The existence of the specific procedures in cases where a user complains that provider does not meet SLAs' expectations indicates the likelihood of the occurrence of these disputes and the need to streamline procedures for a quick resolution.

3.2.3. Privacy Policies

A privacy policy is a legal document that contains a statement on the use and treatment of users' personal data.²³⁹ In our survey of dispute resolution clauses that will be detailed in the section 4, we found most of the Privacy Policies displayed on the provider's landing page of a site, although the other terms like "Privacy Statements",²⁴⁰ "Privacy Notice",²⁴¹ "Data Privacy"²⁴² or just simply "Privacy"²⁴³, are also used for the same document.

Usually, Privacy Policies give an explanation of what type of data providers collect and use, often expressing commitment to the privacy of users and safety of their data. The majority of providers in their Privacy Policies use the term "personally-identifiable information"²⁴⁴ or

²³⁷ Amazon EC2 ref. *Id.*

²³⁸ See: <http://www.iron.io/sla/> (last accessed November 2015);

²³⁹ Coming from European legal tradition we use the term "personal data" which is defined in article 2(a) of the directive 95/46/EC as..." Any information relating to identified or identifiable natural person (' data subject'); and identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity."

²⁴⁰ See more at: <https://www.microsoft.com/en-us/privacystatement/default.aspx>

²⁴¹ See more at: <http://www.amazon.com/gp/help/customer/display.html?nodeId=468496>

²⁴² See more at: <http://www.apptio.com/resources/trust/data-privacy>

²⁴³ See more at: <https://automattic.com/privacy/>

²⁴⁴ Facebook explanation: <https://www.facebook.com/privacy/explanation> :personally identifiable information is and information to be used to identify or contact a person ref (last accessed November 2015)

“personal information”, which is more in line with privacy laws of the United States, as opposed to “personal data” defined in EU Data Protection Directive 95/46/EC. If providers publicize personal information, they regularly give account to what information they make public with the consent of the user. However, this is not to be confused with the sharing of data with third parties, which is not always clearly explained in Privacy Policies and occasionally is a business strategy of providers that raises privacy concerns with users.²⁴⁵

Providers often provide an explanation that they collect data, both personal and non-personal, through various techniques. They can rely on voluntarily offered information given by users, but also, they could automatically collect metadata, such as type of device used by user, software used to access the service, geolocation, log data and other statistics on usage, etc. Additionally they provide information if they use tracking technologies, like cookies,²⁴⁶ which are usually justified with the intention to optimize the service for the user’s needs.

The difference in approach to privacy and data protection between the United States and the European Union allows different jurisdictions and applicable law issues. The differences in mandatory requirements cause additional burden for cloud providers that offer services globally, especially having in mind the nature of cloud services and the ease of data relocation between different locations and thus jurisdictions. Constantly evolving services, within a dynamic cloud market, occasionally challenges the purpose of use principle of the Data Protection Directive.²⁴⁷ Possible multi-stack in the chain of cloud service providers complicates the responsibility for processing²⁴⁸ and sometimes makes unclear how personal data is shared between different providers in the stack,²⁴⁹ or where the data is stored. In practice, it became difficult to guarantee and enforce users’ rights, as the right to access or the right to correction and erasure personal data.²⁵⁰ The European Union and its Data Protection Directive did not fully harmonize legal treatment under national data protection laws of different Member States, adding uncertainty, to an extent, into the single market. The scope of the thesis is limited and does not allow aspects of data protection and privacy regulations. For our purposes, it is

²⁴⁵ Lilian Edwards & Ian Brown, *Data Control and Social Networking: Irreconcilable Ideas?*, ,

²⁴⁶ See more at: <https://www.facebook.com/help/cookies/update>

²⁴⁷ Article 10 and 11 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

²⁴⁸ Article 10 a and 11 of the Directive 95/46/EC

²⁴⁹ Art 10 c and 11 c of the Directive 95/46/EC

²⁵⁰ Article 12 of the Directive 95/46/EC, also see Case C-362/14 the ECJ court Judgment of 6 October 2015. Maximilian Schrems v Data Protection Commissioner

sufficient to point to the debate on the issues of regulating data protection and privacy and to infer that uncertainty leads to disputes between users and providers. Recently, we are witnessing an increase in a number of legal battles, where users are claiming their rights before Data Protection Authorities and courts.²⁵¹ The ways users' claims are being handled vary between providers and between jurisdictions, placing users of the same services in unequal positions due to their circumstances.

3.2.4. Acceptable use policies

Acceptable use policy, (AUP), also called fair use policy, is a set of rules given by the provider which forbid certain uses of the cloud service. Cloud providers in their desire to be shielded from potential lawsuits, declare certain potential uses of their services incompatible with the company's philosophy and intention. AUPs are written in general terms, forbidding any use of the service in illegal, harmful or offensive purposes.²⁵² They often provide a non-exhaustive list of prohibited activities. Certain AUPs are explicit in actions that are not permitted, giving detailed descriptions of action or citing examples of such action.²⁵³ AUP's are also an integral part of security, as it prohibits security violations or network abuse.²⁵⁴ For that purpose, the rules have to be expressed in a clear and concise language that explains what constitutes security violation, network abuse or other infringement.

We consider AUPs as a general normative tool of providers, that does not necessarily have to be called acceptable use policy or exist within a single document. The rules on inappropriate use could be a part of Terms of Service, but also, they can be expressed in different documents: antispam policy, security policy or intellectual property policy (DMCA takedown policy).²⁵⁵

The interpretation of AUPs is crucial for the enforcement of the policy. Usually, AUPs are mentioned as a part or reference the Terms of Service. If AUPs do not have a specific clause on applicable law, governing law expressed in Terms of Service will be consulted in case of different interpretation of legal terms and standards (especially in internal complaint

²⁵¹Max Schrems high profile case, more at: <http://europe-v-facebook.org/EN/en.html>, ECJ Case C-131/12.. Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.

²⁵² See for example: <https://aws.amazon.com/aup/> (last accessed November 2015)

²⁵³ See for example: https://www.dropbox.com/terms#acceptable_use and <https://www.facebook.com/communitystandards> (last accessed December 2015)

²⁵⁴ See : No Security Violations part at: <https://aws.amazon.com/aup/> (last accessed November 2015)

²⁵⁵ See for example: <https://www.zoho.com/policy.html> and <https://www.facebook.com/legal/terms> (last accessed December 2015)

procedures). Occasionally acceptable use policies collide with different interpretations of freedom of expression or privacy laws in different jurisdictions.²⁵⁶

Very commonly AUPs prescribe complaint procedures, provided that in the case of infringement of an AUP a third party can report the user, citing the example of the alleged abuse.²⁵⁷ The report is then internally investigated, and in the event that provider finds the user in breach of the AUP, they deliberate on one of the steps possible and prescribed as a consequence in case of violation of policy. These range from formal warnings, suspension of an account, termination of an account, to additional billing or even bringing legal action for damages caused by the violation.

Considering this short overview of four elements of cloud contract, we can assume that there is a big number of potential disputes which are contract based or stemming from different interpretations of the contracts, and related to specific provisions of the Terms of Service. From a substantive law point of view, there are a number of legal issues that are invoked in a cloud environment, which lack consensus on the solution and uniform way of handling. Every legal issue is additionally complicated when we consider the international element of cloud services and the easiness with which data transfers from one jurisdiction to another. Still, no matter what is the cause for dispute, parties have the option to resort to a dispute resolution process. As a starting point for determining jurisdiction, and in line with party autonomy principle in private law, we need to investigate the choice of dispute resolution venue and procedure, commonly embedded in the contracts of cloud services.

4. Dispute resolution in cloud contracts

Considering the fact that the multitude of legal aspects are usually covered in the Terms of Service and other potentially lengthy legal documents which are offered by providers strictly following “AS IS” formula, it is understandable that the majority of disputes are contract based and invoke interpretation and enforcement of the terms. It is usually a starting point in any deliberation on the dispute regarding cloud services. Even when the paragraphs of ToS are

²⁵⁶ A few examples on the Authentic name policy of Facebook and users issues with it in regard to freedom of expression, privacy and : <http://www.theguardian.com/commentisfree/2014/sep/29/facebooks-real-names-policy-is-legal-but-its-also-problematic-for-free-speech> and <http://www.wired.com/2015/06/facebook-real-name-policy-problems/> and <http://money.cnn.com/2015/12/16/technology/facebook-real-names/>

²⁵⁷ Examples of reporting at: <https://aws.amazon.com/forms/report-abuse> and <https://www.facebook.com/communitystandards#> and <https://www.zoho.com/ipr-complaints.html>

being discussed in the court of law to substantiate party's claim of unfair terms which should be null and void, the Terms of Service still have to be taken into account both as a starting and potentially crucial aspect of the dispute.

To assess the fairness in dispute resolution for cloud services we need to take Terms of Service and accompanying documents as a starting point. Terms of Services represent at least the cloud provider's interests. Cloud contracts are non-negotiable for the majority of clouds users, and if users decide to enter into legal relationships with a cloud provider, they are subjected to obligations and entitled to rights in accordance with the contract. In a sense, users choose if they want to become part of the distribution of rights and duties within the frame of the service. The offer of service, comprising such distribution, should be well within the bounds of the law, as a more general frame of rights and duties. Dispute resolutions between parties are within the reach of private regulation or distribution, but they are also essential to the rule of law, and in most legal systems constitutional safeguards are in place to guaranty access to justice or right to a fair trial. Under certain circumstances, parties can decide if they want to rely on states' dispute resolution mechanisms or to choose private dispute resolution mechanisms. They can also sometimes choose among different states i.e. which court of which state has jurisdiction.²⁵⁸ The validity of such choices where one party merely accepts nonnegotiable terms is debatable when it comes to certain categories, such as consumers.²⁵⁹ However, first, we need to establish if provider's choices of dispute resolution place cloud consumer as a weaker party in a worse off position. To have proper "feel" of providers preference of dispute resolution methods and jurisdictions we have analyzed a significant number of Terms of Service to come to reliable conclusions about their choices.

4.1. Terminology in dispute resolution clauses

Dispute resolution clauses are usually positioned near the end of the Terms of Service. Sometimes they are placed at the beginning of the text, but in those cases usually, clauses are short and succinct, specifying governing law and the court that has jurisdiction. Sometimes they are clearly titled and numbered within the ToS. The term for the group of clauses or a

²⁵⁸ See more about party autonomy in chapter 4

²⁵⁹ See more on unfair terms in chapter 4

section can vary, but we find most commonly terms like “Governing law”, “Choice of law”, “Governing law and jurisdiction”, “Dispute resolution” or just under “General” or “Other”.

Observing the significant number of terms of services and their dispute resolution clauses we noticed regularities and underlying structure that repeats itself to an extent, depending on providers’ style of drafting contractual causes and providers’ interests in determining specific jurisdictions.

In a certain number of cases, dispute resolution clauses start with the amicable suggestion that provider and users should resolve their differences informally by communication and good faith.²⁶⁰ However, this request sometimes comes with the proviso of obligatory notice of a dispute of the complaining party, demanding that prior to initiating any formal dispute resolution complaining party needs to communicate the issue in written form most commonly 30 days prior to taking any legal action the party is entitled to (we observed range from 5 to 60 days prior).²⁶¹ The requirement of notices for dispute is sometimes followed up with the new formal requirement for arbitration in case negotiation fails. These notices are more accustomed to terms of service that are opting for arbitration, as the procedure for initiating action before a court of law is well-established and prescribed by the applicable law.

The dispute resolution clauses vary in their length, content, and style. Rarely, terms of service do not contain dispute resolution section (we found 5 of 322 ToS without dispute resolution), or it is expressed in a single clause:

“This Agreement will be governed by the laws of the Commonwealth of Massachusetts without regard to its conflict of laws provisions.”²⁶²

As we will see later, the majority of terms of service of cloud providers prefer courts over arbitration, which also reflects on the structure of the clauses. Terms of service that are specifying applicable law and single jurisdiction of the courts of one state, tend to have shorter dispute resolution sections:

This Agreement shall be governed by the laws of the State of New York and the United States without regard to conflicts of laws provisions thereof and without regard to the United Nations Convention on the International Sale of Goods or the Uniform Computer Information Transactions

²⁶⁰ Cloud 9 ToS at: <https://c9.io/site/terms-of-service>

²⁶¹ For example DigitalOcean at: <https://www.digitalocean.com/legal/terms/>; Slack at: <http://slack.com>; Silkroad at: <http://www.silkroad.com/>; and SendGrid at: <https://sendgrid.com/tos> (last accessed November 2015)

²⁶² Aperia ToS at: <https://www.apperian.com/service-agreement/> (last accessed November 2015)

Act (UCITA). The exclusive jurisdiction and venue for actions related to the subject matter hereof shall be the New York state and United States federal courts located in New York, New York, and both parties irrevocably consent to such personal jurisdiction of such courts and waive all objections thereto.²⁶³

The terms of services that are specifying different applicable laws for different areas or countries provide more detail on the contracting parties (if they are in different countries), in what circumstance which terms are applicable, which platforms of dispute resolution are applicable and in accordance with which law.²⁶⁴ ToS that mandate binding arbitration are the longest in their contents, detailing among other: nature of the arbitration, procedure for initiating arbitration, applicable rules and where they can be found, number of potential arbitrators, location and language of the proceedings, for what kind of disputes arbitration does not apply and which court has jurisdiction in those cases, enforceability of arbitral awards, clauses about bearing costs of arbitration, possibility of initiating disputes before small claim court, etc.²⁶⁵ Dispute resolution clauses that introduce binding arbitration may declare certain types of disputes that will be dealt with exclusively by courts. These commonly include intellectual property rights disputes and equitable relief disputes. Looking at the example of ToS of SaaS “Judicata” we can see almost all of the elements mentioned above:

“12. ARBITRATION

INFORMAL NEGOTIATIONS. To expedite resolution and reduce the cost of any dispute, controversy or claim related to this Agreement (“Dispute”), you and Judicata agree to first attempt to negotiate any Dispute (except those Disputes expressly excluded below) informally for at least thirty (30) days before initiating any arbitration or court proceeding. Such informal negotiations will commence upon written notice. Your address for such notices is your billing address, with an email copy to the email address you have provided to Judicata. Judicata’s address for such notices is Judicata, Inc., 330 Townsend Street, Suite 240, San Francisco California, 94107; Attention: Legal.

BINDING ARBITRATION. If you and Judicata are unable to resolve a Dispute through informal negotiations, all claims arising from use of the Judicata Service (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party will be final and binding on the other. YOU UNDERSTAND THAT IF EITHER PARTY ELECTS TO ARBITRATE, NEITHER PARTY WILL HAVE THE RIGHT TO SUE IN COURT OR HAVE A JURY TRIAL. The arbitration will be commenced and conducted under the Commercial Arbitration Rules (the “AAA Rules”) of the American

²⁶³ For example CloudBees ToS at: <https://www.cloudbees.com/terms-service> (last accessed November 2015)

²⁶⁴ Facebook ToS at: <https://www.facebook.com/legal/terms>; (last accessed November 2015) , Evernote ToS at: <https://evernote.com/legal/tos.php> (last accessed November 2015)

²⁶⁵ examples of the most common structures and phrases of dispute resolution clauses are illustrated in Appendix 2 of the thesis

Arbitration Association (“AAA”) and, where appropriate, the AAA’s Supplementary Procedures for Consumer Related Disputes (“AAA Consumer Rules”), both of which are available at the AAA website. Your arbitration fees and your share of arbitrator compensation will be governed by the AAA Rules (and, where appropriate, limited by the AAA Consumer Rules). The arbitration may be conducted in person, through the submission of documents, by phone or online. The arbitrator will make a decision in writing, but need not provide a statement of reasons unless requested by a party. The arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Except as otherwise provided in this Agreement, you and Judicata may litigate in court to compel arbitration, stay proceeding pending arbitration, or to confirm, modify, vacate or enter judgment on the award entered by the arbitrator.

EXCEPTIONS TO ALTERNATIVE DISPUTE RESOLUTION. Each party retains the right to bring an individual action in small claims court or to seek injunctive or other equitable relief on an individual basis in a federal or state court in San Francisco County, California with respect to any dispute related to the actual or threatened infringement, misappropriation or violation of a party’s intellectual property or proprietary rights.

WAIVER OF RIGHT TO BE A PLAINTIFF OR CLASS MEMBER IN A PURPORTED CLASS ACTION OR REPRESENTATIVE PROCEEDING. You and Judicata agree that any arbitration will be limited to the Dispute between Judicata and you individually. **YOU ACKNOWLEDGE AND AGREE THAT YOU AND JUDICATA ARE EACH WAIVING THE RIGHT TO PARTICIPATE AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS ACTION OR REPRESENTATIVE PROCEEDING.** Further, unless both you and Judicata otherwise agree, the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this “Dispute Resolution” Section will be deemed null and void.

LOCATION OF ARBITRATION. Arbitration will take place in San Francisco County, California. You and Judicata agree that for any Dispute not subject to arbitration (other than claims proceeding in any small claims court), or where no election to arbitrate has been made, the California state and Federal courts located in San Francisco, California have exclusive jurisdiction, and you and Judicata agree to submit to the personal jurisdiction of such courts.”²⁶⁶

Another characteristic feature of dispute resolution clauses in observed cloud providers’ ToS was a usual waiver of trial by jury and even more commonly any participation in a class action or group action against a provider. Class actions are not universally recognized. Therefore, these clauses are only applicable to certain legal systems.²⁶⁷

Along the specifying applicable law, one of the more common features of the observed terms of services and their dispute resolution paragraphs is the exclusion of conflicts of law or choice of law rules of the selected applicable law. We found the explicit exclusion in 124 out of 322

²⁶⁶ Judicata -Terms and Conditions, at: <https://www.judicata.com/terms> (accessed January 21, 2016).

²⁶⁷ More about the topic in chapter 4

surveyed terms of service.²⁶⁸ Another very common declaration is that applicable law governs the agreements without regard to the United Nations Convention on the International Sale of Goods and sometimes the Uniform Computer Information Transactions Act (UCITA).²⁶⁹

Providers, especially those who insert binding arbitration in their ToS, are aware that in certain jurisdictions, such clauses could be declared null and void before a domestic court. However, if some of the terms have been declared void, it does not necessarily render the whole contract void of the effect.²⁷⁰ We found that providers regularly place a severability clause that assures application of the remaining parts of the contract in case certain clauses are found to be void in the court of law.²⁷¹

Few providers have a particular dispute resolution for specific purposes outside of its regular dispute resolution section in ToS. It sometimes includes payment disputes, disputes between the users, intellectual property disputes, etc. US-based providers usually state its compliance with DMCA requirements and offer the notice and takedown procedure in case of an infringement of intellectual property rights through the use of provider sites' and service.²⁷²

Even though we have a variety of length and content of clouds' ToS, we can extract certain common denominators, which are indicative of the position of the majority of providers towards the mechanisms of conflict resolution with its users. For this purpose, we have conducted the survey and focused on the essential elements found in observed terms of service.

4.2. Dispute resolution in Terms of Services survey

The dispute resolution clauses in the Terms of Service are usual but small part of cloud contracts. Since we are observing the narrow aspect of ToS, we decided to take a larger number of cloud contracts as a base for the survey and analysis.²⁷³ A greater number of surveyed Terms of Service offers more solid evidence to back the claim on the commonalities in the cloud market expressed through contract based transactions. We build on empirical data gathering and statistical analysis, with in-depth analysis of the clauses themselves and potential effects it

²⁶⁸ The full list of observed cloud services, with their Terms of Service Privacy Policies, and information extracted from the clauses, is contained in the appendix 1 of this thesis.

²⁶⁹ Ref UNCCsg I UNCITA. UNCITA exclusion was found in 15 ToS.

²⁷⁰ TREITEL., *supra* note 223.

²⁷¹ See for example Acronis: <http://www.acronis.com/en-eu/> or see Okta: <https://www.okta.com/terms/>

²⁷² See for example <http://www.sumtotalsystems.com/legal/> (last accessed November 2015)

²⁷³ as opposed to smaller number of providers' terms of service which would be analyzed in-depth for all the aspects of contract in relation to applicable laws and parties positions

will have on the parties' position. Here, we focus mostly on what is written in the Terms of Service and not the corrective measures in the positive law (i.e., in the case of unfair terms for consumers), which will be the subject of the next chapters.

For our survey, we have analyzed 322 of available Terms of Service and Privacy Policies from different cloud services. The cloud market, in the broadest sense, hosts a variety of services,²⁷⁴ which are difficult to represent properly through the observed sample. We chose to focus on the market shares of providers and their services, expressed through the popularity of a cloud service among users. Due to a limitation in time and resources for the thesis, and our willingness to observe a bigger number of providers we chose to rely on external assessments on the popularity of the services. We started with an assessment of "The Cloud Times": the portal writing about topics that are cloud market specific and targeted at clouds users and providers.²⁷⁵ The Cloud Times compiles annually a list of the best 100 cloud providers based on Cloud Times' algorithm that calculates social media performance of selected companies.²⁷⁶ This list of 2015 performance is enlarged with the cloud services from the "BVP Cloudscape" which lists 300 most promising cloud companies according to the BVP Cloud Index.²⁷⁷ "BVP Cloudscape" categorizes and groups cloud services along three axes of functional buyers, horizontal solutions, and industry-specific solutions.²⁷⁸ For our goals, we needed a significant number of representative cloud services from IaaS, PaaS, and SaaS markets. The methodology of these two lists are not relevant for the purpose of our survey, as we needed a list or a pool of cloud providers arranged by a parameter related to their popularity among cloud users, and results of their research are not relevant to our topic, so we will not elaborate their findings. Just to be on a safe side, we also added (the services that were already not on the list) Terms of Service and Privacy Policies of cloud services that were under observation of "Cloud legal project" carried out by Queen Mary University of London, School of Law.²⁷⁹ In the most recent survey, Dimitra Kamarinou et al. in 2015 published the paper "Privacy in the Clouds: an

²⁷⁴ See the part on the definition of cloud services at section 2 of this chapter.

²⁷⁵ the portal is available at: <http://cloudtimes.org/>; info about the contributors: <http://cloudtimes.org/about-us/> and <http://cloudtimes.org/guest-authors/> (last accessed November 2015)

²⁷⁶ The list contains in total 109 cloud service available at: <http://cloudtimes.org/top100/> (last accessed November 2015)

²⁷⁷ BVP Cloudscape of June 3, 2014 is available at: <https://www.bvp.com/blog/bvp-cloudscape-top-300-private-cloud-companies-0> (last accessed November 2015). "BVP" that's short of "Bessemmer Venture Partners", is a privately held company that holds a significant portfolio of technology startups. About BVP at: <https://www.bvp.com/about> and their BVP Cloud Index: <http://www.bvp.com/cloud-computing/comps>

²⁷⁸ <https://www.bvp.com/blog/bvp-cloudscape-top-300-private-cloud-companies-0> (last accessed November 2015). The company actually listed 295 cloud services but from marketing and convenience purposes they called the list the top 300.

²⁷⁹ Cloud Legal Project at: <http://www.cloudlegal.ccls.qmul.ac.uk/>

Empirical Study of the Terms of Service and Privacy Policies of 20 Cloud Service Providers”,²⁸⁰ which has focused on in-depth analysis of ToS of 20 providers. Selection of providers was made on numbers of cloud users based on available data.²⁸¹ We then cross-referenced these three lists: cloud times’ 109 cloud service in addition to 295 listed services on “BVP top 300 listing” and 20 cloud providers on Kamarinou et al. study based on a number of the users. A number of services overlapped on the three lists, which lowered the final number for the survey. Additionally, we decided to treat only cloud services that offered Terms of Services on their site or were readily available by simple search and to exclude those who lacked the documents. A number of services only have Privacy Policies displayed on their sites, and even those in most cases do not contain dispute resolution clauses. It does not mean that these services do not have Terms of Service, but merely that they are not accessible for consideration unless user contacts provider (with the question on ToS), demands a demo or signs-up in some other way (i.e. user registration prior to click-through agreements). We ultimately arrived at the list of 322 cloud services and analyzed their Terms of Service and Privacy Policies. The full table of all observed cloud services that illustrates the selection of dispute resolution methods of each provider is available as an Appendix A of the thesis. After initial analysis on commonalities and setting up the frame for observing ToS, we quantified the results of the survey, and we came to the following results which indicates several important aspects of choices in dispute resolution methods for cloud services. Table 1 illustrates preferences of cloud providers that are part of their terms of service.

²⁸⁰ Dimitra Kamarinou, Christopher Millard & W. Kuan Hon, *Privacy in the Clouds: An Empirical Study of the Terms of Service and Privacy Policies of 20 Cloud Service Providers*, (2015).

²⁸¹ *Id.* p. 1

Location of dis.res./choice of jurisdiction in the ToS of 322 cloud service	Jurisdictions in ToS	Exclusive choice of single jurisdiction of all the ToS that include that jurisdiction	Choice of courts as exclusive dis.res. method in the ToS	Small Claim Court (optional with Arbitration)	Arbitration AAA Rules	Arbitration JAMS Rules	Arbitration ICC, LCAI and other
United States	267	179	204	8	48	23	11
• California	169	148	117	5	25	19	7
• San Francisco County	71	56	42	3	11	14	5
• Santa Clara County	50	35	40	1	6	4	2
• New York	26	24	21		2		3
• Massachusetts	17	16	16		1		1
• Washington	12	12	10	1	2		
• Delaware	6	6	6				
United Kingdom (London mostly)	21	6	14		2		6
Germany	7	1	7				
Singapore	9	0	5		1		3
Israel	4	4	4				
Other (France, Netherlands, Hong Kong, Canada, Spain, Switzerland, Brazil, Norway, Austria, Australia, Ireland, Mexico)	69	12	48				8
Total 322 ToS	377	202	282	8	51	23	28

Table 1. Survey of the 322 cloud provider. See more in Appendix A

Five out of 322 analyzed terms of service and privacy policies did not have any dispute resolution clause or applicable law/governing law clause, either in ToS or PP. Nine providers contained dispute resolution provisions only in the privacy policies, which arguably refers only to the disputes related to privacy and data protection. Three providers have displayed terms of service on their site but no privacy policies as a separate or distinguished part of cloud contract.

In the survey, particularly in ToS, we focused on the four aspects of terms of service: location of the dispute resolution, exclusive choice of single jurisdiction for dispute resolution, exclusive choice of courts and mandatory or possible arbitration. These four aspects are the basis for follow-up analysis of the fairness in the choices in dispute resolution clauses of cloud providers.

4.2.1. Location for a dispute resolution

The first aspect illustrates preference of cloud providers for certain jurisdictions or specific locations (states, counties, areas, cities, etc.). We emphasize this, having in mind the global reach of cloud services (potentially global cloud market) and easiness of cross-border cloud transactions, where selected jurisdictions are of consequences to the effective protection of users' rights. We wanted to see how globally spread were most popular cloud services and how it relates to their choices of jurisdictions in case of dispute. As we see in Table 1, the United States are the most common choice for dispute resolution venue among the surveyed ToS, which is as expected as most of the cloud providers are incorporated in the United States. Of 322 cloud providers, 267 have included the United States as the location where dispute resolution will take place. However, even within the United States, we notice the concentration of the jurisdictions in certain states, most prominently California with 169 terms of service citing the state, counties or cities in California as the venue of the dispute resolution. The most preferred counties are the counties of San Francisco with 71 ToS and Santa Clara with 50 ToS, as these counties together with the wider area of the Northern California also hosts some of the most prominent cloud services based in so-called "Silicon Valley".

Even though the more than half of total number of surveyed terms of service opted for dispute resolution in California, we found cloud providers also concentrated in a few other jurisdictions in the United States, such as states of New York (26 ToS), Massachusetts (17 ToS), Washington (12 ToS) and Delaware (6 ToS).

Outside the United States, which is obviously preferred choice among surveyed cloud providers, we find a variety of different jurisdictions in different countries, in close connection with the place of their establishments or corporate seat. With 21 surveyed terms of service, the United Kingdom and their courts are entrusted with possible disputes, using only for outside the United States, mostly for EU and EMEA area.²⁸²

All the findings of our data gathering resemble the results from our initial survey in 2013 conducted on a smaller sample.

²⁸² EMEA stands for Europe, Middle East and Asia

<i>Cloud providers - total 40</i>	<i>Applicable law(in contract)</i>	<i>Jurisdiction (contract)</i>
21	US-California	California courts
8	US-Others	US courts
7	UK and Wales	UK and Wales
5	EU (without the UK)	Member state
1	Swiss, Canada	Swiss, Canadian
2	Brazil	Brazil
8	Mandatory Arbitration	AAA rules
4	Possible Arbitration	AAA (+ 1 other)

Table 2. Initial smaller sample survey from 2013 published in the paper:” Online Dispute Resolution and Cloud Computing Services.”²⁸³

Both surveys, display the similar concentration of choices in jurisdiction over dispute resolution, regardless of the selection of court or arbitration as an appropriate tribunal. Certain jurisdictions intend to provide resolution of disputes with users coming from a significant number of foreign jurisdictions, and the number of domestic users within these selected jurisdictions are significantly disproportionate to the number of the users that would consider these jurisdictions as foreign or at least not local. If we determined jurisdiction strictly by click-through terms of service of cloud providers, the majority of the cloud users would be exposed to a foreign jurisdiction in the case of a dispute. Since this puts consumers in a worse position, many legislators decided to intervene to balance positions of parties. Chapter 4 and 5 discusses fairness and legislative response to these terms.

²⁸³ D Martić, *Online Dispute Resolution for Cloud Computing Services*, Vol-1105 in CEUR-WS.ORG (2014), <http://ceur-ws.org/Vol-1105/paper2.pdf> (last visited Jan 30, 2014). We have examined contracts offered by 40 popular cloud providers (that offer more than 60 cloud services). Surveyed cloud services: Google Cloud(Drive, Docs, Gmail...),Apple iCloud, Evernote, Dropbox, Box, Amazon, Skydrive (Microsoft),Microsoft Azure, SoundCloud, Spotify, Mendeley, CloudON, Zoho, SAP, MicrosoftOffice365, Salesforce, GoogleAppEngine, Coursera, Fuzbox, GoGrid, Rackspace, Joyent, Enomaly, Appistry, Engineyard, ThinkGrid, Opsource, HP cloud, Lunacloud, Nephoscale, Adrive, Mozy/Decho, Softlayer, Symantec, PayPal, Intycascade, Flipboard, Netflix, EDX, Prezi,Trustmarque, Servicemesh

4.2.2. Exclusive choice of a single jurisdiction for dispute resolution

The terms of service that offer more than one jurisdiction, usually in the location of registered branch or office, are more accessible to the users seeking remedies than those cloud services that insist on a single jurisdiction in the case of a dispute. Having in mind a global reach of cloud service and potentially low price for the service (pay per use), some companies possibly could have opted for single jurisdiction as a strategy to dissuade dissatisfied users from filing a lawsuit or initiating a formal dispute.²⁸⁴ It is also a reasonable choice for companies looking to cut down on legal expenses. Whatever the case may be, exclusive jurisdictions of a certain state or a county are in the majority of observed terms, accounting for 202 of 322 ToS or 62.7% of terms of service that opted for a single jurisdiction. We note in the survey that 148 or 45.96% of all terms of services in case of a formal dispute cite California as the exclusive jurisdiction. Another evidence for a concentration of jurisdictions, with even greater emphasis on exclusiveness.

However, we can also notice that it is not the same case with the terms of services that opted exclusively for non-US jurisdictions. If we recall the fact that providers, the parties that dictate the terms, can opt for numerous jurisdictions, it is interesting to observe that non-US providers less frequently opt for exclusive jurisdiction of (presumably) their domestic legal systems. In the case of US-based providers, it is in 179 of 276 ToS, which accounts for 67% of providers opting for exclusive US jurisdiction. On the other hand, we see that only 23 exclusive jurisdictions in 110 ToS, which is 20.9% of non-US based providers (UK, Germany, Singapore, Israel and Other in table 1) which are selecting their domestic or preferred jurisdiction outside of the United States. In one example a provider is choosing arbitration in California according to American Arbitration Association Rules, but in case that the binding arbitration agreement is not applicable, Estonian courts in the city of Harju have exclusive jurisdiction.²⁸⁵ If the provider opted for arbitration as a primary dispute resolution method, naming the exclusive venue where arbitration will be held was considered the exclusive choice of jurisdiction. However, if provider opted for arbitration without specifying the location (even if he specify

²⁸⁴ Google initially had English courts in 2011 but they now refer to exclusively Santa Clara California. Millard, *supra* note 20., ANTOINE MASSON & MARY J. SHARIFF, LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE (Antoine Masson & Mary J. Shariff eds., 2010).

²⁸⁵ Pipedrive ToS at: <https://www.pipedrive.com/en/terms-of-service> ;

the rules), we did not consider it exclusive, as multiple jurisdictions are possible with the same rules of arbitration.

Without going further into the reasons behind the choices, we simply record the fact that the concentration among selection of jurisdictions is taking place in cloud service markets. The consequences of such choices on fairness and not the rationale of the dictating party is relevant from a third-party point of view.

4.2.3. Courts as exclusive method

The third and fourth aspect are to illustrate the preference in adjudicative methods for dispute resolution. We focus on adjudicative methods as they are ultimate means to resolve the disputes when consensual methods as mediation or negotiation that result in effective resolution of the dispute and parties choose to escalate a conflict.²⁸⁶ We wanted to see how many of cloud providers opted for courts as exclusive and somewhat traditional method of adjudicative dispute resolution as opposed to alternative dispute resolution methods as arbitration, with all the consequences that such choice carries for the parties, especially having in mind accessibility costs and time of such exclusive forum for service of a global reach. Selection of court as a method does not necessarily imply a single jurisdiction. It is possible, and occasionally we find terms of service that name different possible jurisdictions but are exclusive of specific court or courts within a particular jurisdiction are selected in case of dispute. We considered (albeit in a small number of instances) terms of service that specified applicable law without mentioning court as the venue where disputes are going to be handled, as equal to the terms of service that are quite specific to the selection of the tribunals, and we will add them together. The logic behind this inclusion is that all legal systems consider courts as primary dispute resolution mechanism, especially in commercial and consumer matters. Any derogation from this principle are specified in law and is considered as an exemption to the rule that allows for different methods of dispute resolution. We also find within different ToS, that providers sometimes choose courts in one jurisdiction, but for specific jurisdiction or users, they prefer arbitration (most commonly for the users who are United States' residents).²⁸⁷ Possible options

²⁸⁶ We discuss more about this in chapter 5.

²⁸⁷ See more at: <https://evernote.com/legal/tos.php> (last accessed November 2015)

for exclusive method or combination with ADR puts different users in different legal positions over the same services, and it has ramification on issues of access to justice.

Looking at our sample of terms of service we document the general preference for courts as an exclusive dispute resolution methods in 282 cases of 377 possible jurisdictions, which is 74.8%. This preference is distributed almost equally in all jurisdictions, where it is 76.4% (204 of 267) in the US and 70.9% (78 of 110) in non-US jurisdictions. These findings indicate that regardless of the possible benefits of alternative dispute resolution methods, courts remain to be the most significant dispute resolution bodies.

4.2.4. Arbitration in the ToS

For the same reasons as courts, the information on how many providers opted for arbitration is of importance, as well as under what circumstances they adhere to ADR. Circumstances expressed through the choice of arbitration rules make a significant difference from party's point of view. Therefore, it is essential to distinguish different kinds of arbitration rules and providers selection based on them. For illustration, we also grouped selection of arbitration in three categories: two most referenced rules of arbitration and one category for all others. We also included here, albeit in a small number of observed terms, whenever small claims court is specified as an alternative to binding arbitration.

Cloud providers can choose exclusive binding arbitration or to offer it as a possibility and as a complement to a choice of the court which doesn't make it binding for a user. They can choose to have arbitration in a single location or to allow multiple venues in case of a dispute for practical purposes. Even when the provider insists on binding arbitration, in the vast majority of terms of service provider specifies the court which will have jurisdiction in case arbitration agreement is found to be unenforceable. Providers sometimes specify alongside the binding arbitration agreement that a certain court will have jurisdiction over specific disputes (for example intellectual property disputes).

Arbitrations as an alternative dispute resolution methods have been more developed and used in common-law countries than in civil law communities. Hence, it is only natural that the majority of binding and nonbinding arbitration in dispute resolution clauses were placed in terms of service specifying US jurisdictions. Only 20 of 102 terms are proposing or imposing arbitration outside the United States. It is also a relatively small number in relation to a total number of jurisdictions observed (377). On the other hand, we found 82 possible or mandatory

arbitrations that could take place in various jurisdictions the United States. Unsurprisingly, most commonly in California and San Francisco County (29 in total).

In a small number of terms of services (8), and all of them indicating jurisdiction of United States, cloud providers offered the possibility to wage a dispute before Small Claims Court, in addition to the binding arbitration agreement. Although such legal action could be possible in certain jurisdictions even without explicit clause in terms of service, we only enumerated where it was expressed clearly to illustrate that in certain cases where provider chooses binding arbitration they still leave an option to users who may find it more practical or fair, as opposed to those ToS that insist on arbitration exclusively.

The arbitration rules that were specified most often (51 times) are rules of American Arbitration Association (AAA), usually including the AAA's Supplementary Procedures for Consumer-Related Disputes. The rules of American Arbitration Association are discussed further in Chapter 5. In some cases, the provider does not indicate the specific venue where arbitration will take place but only specifies the rules. In these cases, the location of the dispute could be appropriated to users or could be subject to a post-dispute agreement. Another notable choice in 23 ToS is JAMS arbitrations, formerly known as Judicial Arbitration and Mediation Services, Inc., which is a United States-based organization providing ADR services, including mediation and arbitration. Both, AAA rules and JAMS rules face criticism on fairness when they are imposed on consumers through click-through pre-dispute agreements. We will discuss this in Chapter 5.

In some cases, providers with a more international presence in the markets offer arbitration by International Chamber of Commerce rules or LCAI rules. However, these are more appropriate for business-to-business commercial disputes as opposed to the consumer related disputes.

Of all surveyed jurisdictions in terms of services, arbitration is a possibility in only 27% of cases. We can claim then that providers are not that eager to offer users additional and supposedly more flexible venues for dispute resolution even for low-value disputes (contractual disputes over low-cost services) where it is perceived to be the most practical.

4.3. Dispute resolution in Privacy Policies

Privacy policies are usually separated from the terms of service and represented in a different document although they are both integral part of cloud contracts. Privacy policies often

reference terms of service as an applicable general document that regulates the relationship between parties. That being said, it is not uncommon to see that privacy policies provide different procedures in certain situations, due to the regulatory requirements or the providers' attitudes towards privacy and data protection. Cloud providers determine their privacy policies in congruence with their business processes and interests. In the cases where the providers extend cloud offers to other jurisdictions, facilitating cross-border exports and imports of data, it is expected to see the appropriation of privacy policies to the exposure of peremptory norms of different jurisdictions where compliance is required.

Dispute resolution clauses are not a necessary element of privacy policies. In case that the privacy policies do not reference specific dispute resolution, the mechanisms established in terms of services are applicable unless there is a mandatory administrative or judicial body that has exclusive jurisdiction based on relevant and enforceable law. In the case of cloud services, one of the most prominent pieces of legislation that have a significant influence on the industry is the EU Data Protection Directive 95/46 (EU DPD).²⁸⁸ The Directive 95/46 establishes the jurisdiction of supervising authorities in article 28 and, notwithstanding supervisory authorities, the jurisdiction of the Member States' courts in Article 22 to provide a judicial remedy for any breach of the rights guaranteed by the applicable national law. Since data protection has the human rights perspective and the public law perspective regulators did not allow parties' autonomy in the contractual relations to exclude the jurisdiction of these public bodies. However, within the Safe Harbor regulatory and Privacy Shield framework, which are intended to facilitate cross-border data transport while guaranteeing standards set in data protection directive, it is possible to designate dispute resolution form of choice in case of data protection related disputes.

Cloud providers, especially those based outside the EU Member States, relied heavily on the Safe Harbor agreement (between EU Commission and the United States as it is most often the case), to facilitate legal transport of data from the EU. Accordingly, they profess their adherence to the Safe Harbor agreement's "adequacy" standards and additionally designate dispute resolution applicable in the case of a relevant dispute. In our survey, we found that out of 322 cloud providers 185 have adhered to Safe Harbor program that they advertise on their sites and within their privacy policies. In some cases, PPs do not provide information on the

²⁸⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

dispute resolution program for Safe Harbor, but information is publicly available at the <https://safeharbor.export.gov/list.aspx>.

Most of the 185 providers that opted for safe harbor designated specific dispute resolution providers for data protection disputes.²⁸⁹ Eighty-two of those have signed up with TRUSTe, the trustmarks company that offers privacy and data protection certification and an accompanying online dispute resolution program.²⁹⁰ Another 25 privacy policies list “BBB EU Safe Harbor Dispute Resolution Program” which is in dispute resolution program offered by Better Business Bureau based in the United States.²⁹¹ The American Arbitration Association (AAA) features in 15 PP as dispute resolution provider, 9 of which specifies International Center for Dispute Resolution of AAA (ICDR of AAA) as their choice, while the others name AAA without additional details. The Judicial Arbitration Mediation Service’s (JAMS) program for Safe Harbor is also listed in 14 privacy policies. We also have 2 cases of the Direct Marketing Association named as dispute resolution provider.

Cloud providers that haven’t opted for one of the above-mentioned dispute settlement schemes have selected the EU Data Protection Authorities (DPAs) and Swiss Federal Data Protection and Information Commissioner (FDPIC) as the institutions that are (already) entrusted with complaint handling.²⁹²

Safe Harbor is not the only reason to specify dispute resolution scheme for privacy issues. To obtain the trust of the users, many providers accept third-party private certification schemes regarding privacy and data protection. Almost all of them having some form monitoring program that also includes a dispute resolution mechanism in case of user complaints.²⁹³ TRUSTEe is most preferred third-party certification among observed cloud providers which also offers a cloud-specific certification program.²⁹⁴ We have not found this certification displayed in cloud websites but rather the general TRUSTEe certification. However, most of the TRUSTEe programs include dispute resolution program for complaint handling.

²⁸⁹ Table in Appendix 1, last column indicates dispute resolution in privacy policies or of observed cloud providers.

²⁹⁰ See more at: <https://www.truste.com/> (last accessed December 2015)

²⁹¹ See more at: <https://www.bbb.org/council/eusafeharbor/bbb-eu-safe-harbor-dispute-resolution-program> (last accessed December 2015)

²⁹² For example see Microsoft information at <http://safeharbor.export.gov/list.aspx>

²⁹³ Paolo Balboni, TRUSTMARKS IN E-COMMERCE - THE VALUE OF WEB SEALS AND THE LIABILITY OF THEIR PROVIDERS SPRINGER (2009).

²⁹⁴ About TRUSTEe cloud certification program see more at: <https://www.truste.com/window.php?url=https://download.truste.com/TVarsTf=9KDUTVJ8-531> a

Most of these programs offer nonappearance spaced dispute resolution in the form of online dispute resolution through an online platform or written based arbitration or mediation. The intention is to facilitate quicker, cheaper and more accessible dispute resolution.²⁹⁵ The cost of these programs, however, are not so obvious and are dependent on the type and duration of the disputes.

4.3.1. Privacy Shield as a new framework

At the time of conducting our survey, after some deliberation, in October 2015 the European Court of Justice declared invalid the EU Commission's US Safe Harbour Decision that allowed transfer of personal data to U.S. under an adequate level of protection of the data.²⁹⁶ The overturn of Safe Harbour brought uncertainty for cloud providers and governments sought new solutions to allow legal transfer of personal data outside of the EU. Following the reasoning of the Court's decision, the European Commission and the U.S. Government initiated negotiations about a new framework, and they reached a new agreement in February 2016.²⁹⁷ The European Commission finally adopted the decision on Privacy Shield framework on 12 July 2016, and it went into effect the same day, while the President of the U.S. signed an Executive Order entitled "Enhancing Public Safety" which states that U.S. privacy protections will not be extended beyond US citizens or residents.²⁹⁸

In Chapter 7 we discuss in greater details the changes Privacy Shield framework brought to dispute resolution. However, due to changes to Privacy Policies of a certain number of cloud providers we have conducted a new survey of the policies and compared with the previous findings. In Appendix A you will find a single table with updated input including changes Privacy Shield (PS) caused. Up to April 14, 2017, out of 322 observed cloud services' PP, 112 has introduced Privacy Shield terms based on self-certified process. For dispute resolution that entails designating independent dispute resolution entity or DPA to handle cases for potential claims against infringement of Privacy Shield Principles. We can notice a hesitant or slower process of adopting PS, where out of 187 providers previously enlisted Safe Harbour

²⁹⁵ See JAMS at: <http://www.jamsadr.com/>

²⁹⁶ Case C-362/14, Judgment of the Court (Grand Chamber) of 6 October 2015. Maximilian Schrems v Data Protection Commissioner. Request for a preliminary ruling from the High Court (Ireland) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0362>

²⁹⁷ See more on press release available at: http://ec.europa.eu/justice/data-protection/international-transfers/eu-us-privacy-shield/index_en.htm

²⁹⁸ See more at http://ec.europa.eu/justice/data-protection/international-transfers/eu-us-privacy-shield/index_en.htm

arrangements, 83 did not yet adopt the Privacy Shield. On the other hand of the remaining , 12 providers that were not under Safe Harbour are now Privacy Shield certified. Although informative, these numbers do not indicate serious change of attitude of provider towards privacy policies. They rather seem to adapt to new requirements for the sake of compliance. However, the new requirements have brought some changes that could have direct effects on access to justice, or access to recourse (as formulated in the framework). Not all mechanisms under new framework have become operational and we did not find any relevant report on disputes until the date of writing this.²⁹⁹ The adequacy of Privacy Shield may also be subject of Court's assessment in following years.³⁰⁰ We discuss in greater details Privacy Framework and its implication in Chapter 7.

4.4. Dispute resolution in SLA's and AUPs

Service-Level Agreements and Acceptable Use Policies rarely contain dispute resolution clauses. If they are represented in different documents, they reference the general terms of service and hence, dispute resolution designated within them.

One of the characteristics of the SLAs, as technical documents specifying expected quality of service, are the clauses prescribing remediation in case the set uptime of service has not been reached (, or some other technical aspects of the service have failed). Service-level agreements are usually limited in remedies since the procedures are only focused on the issues of quality of service (and its lack of) and capped in the possible remediation by maximum credit that could be awarded in case of established breach of SLAs targets.³⁰¹ However, if remediation and service credits awarded are not satisfactory, the complaining party can initiate a formal dispute resolution process in accordance with the general Terms of Service and the applicable law.

One of the issues for remediability is the quantification or the measurement of the availability or uptime. Depending on how the measurement is expressed, which parameters were taken into account and what circumstances are counted (i.e. if regular maintenance is counted as

²⁹⁹ See certain info on Privacy Shield practice where IAPP writer Sam Pfeifle reports that there are no reports of complaints yet. Available at <https://iapp.org/news/a/how-privacy-shield-doing-well-no-ones-complaining/>

³⁰⁰ See more news reports at: <https://iapp.org/news/a/libe-committee-declares-privacy-shield-inadequate-by-narrow-margin/> and <https://iapp.org/news/a/why-the-privacy-shield-may-survive-for-now-2/> and <https://iapp.org/news/a/the-trump-effect-on-privacy-shield-theres-a-great-deal-thats-unknown/>

³⁰¹ See for example <http://www.iron.io/sla/>

downtime) and depending on the interpretation of the same, the guarantees of provider (of a high percentage of uptime) are ineffective.³⁰² Lack of standards in the market leaves a large margin of possible interpretations, especially in the cross-border service scenarios. However, the cloud industry and its potential standardization could push for alternative dispute resolution models appropriate for SLA disputes. At the time, we have not recorded mentioning of adjudicative ADR in the SLAs.

Acceptable use policies, in addition to prohibiting certain behaviors and providing norms for users, could also specify complaints procedure in case of breach of policies. Wordpress (cloud hosting service) invites third parties to report a blog that is hosted on their servers if they contain abusive content.³⁰³ These procedures are usually focused on solving conflicts between users or to prevent users from infringing third parties' rights. DMCA notice and takedown procedure falls in this category.³⁰⁴ Any breach or abuse of prescribed standards of behavior or "community standards" coupled with a complaint procedure could be also considered dispute resolution in a broader sense.³⁰⁵ However, these complaint handling practices are not appropriate for the disputes of the users with providers themselves, because of the impartiality (being a judge in own case) and fairness issues.

5. Access to justice and fairness in cloud contracts

In this chapter so far we focused only on what we observed in the cloud service contracts and what are the perceived positions of the parties based on these prewritten service agreements. We will discuss in the next chapter the legal framework for dispute resolution, and how sometimes applicable and binding law overrides dispute resolution terms which it finds unfair or unsuitable for certain categories. Just looking at contracts *prima facie* allow us to draw some conclusions on the fairness of access to justice mechanism within cloud domain.

³⁰² European Commission, *Standards terms and performance criteria in service level agreements for cloud computing services*, Luxembourg, Publications Office of the European Union 2015, A study prepared for the European Commission DG Communications Networks, Content & Technology by: Hans Graux and Jos Dumortier of time.lex CVBA and Patricia Ypma, Jasmine Simpson, Peter McNally, and Marc de Vries of Spark Ltd, p. 30

³⁰³ See more at: <https://en.support.wordpress.com/report-blogs/>

³⁰⁴ See for example copyright dispute policy in Sumologic's ToS at: <https://www.sumologic.com/terms-conditions/>

³⁰⁵ Facebook community standards at: <https://www.facebook.com/communitystandards>

Based on the results of the survey and considering ToS drafting regularities, we can conclude that the cloud providers are better off compared to users, primarily due to the fact that they are dictating the terms of cloud contracts. This conclusion stems from expected effects of imposed provider's choices in terms of service. If we go back to the theoretical framework set up in Chapter 2, where we proposed the four key concepts to assess fairness based on party's expectation prior to the dispute, we can see clearly the points where usual terms service agreements can lead to unequal parties' position. Our framework for assessment echoes Neil Andrews' principles of civil procedure³⁰⁶, and they comprise the:

1. Access to a dispute resolution body,
2. Fairness of the process,
3. Efficiency of the process
4. Effectiveness of the outcomes

We considered the first criterion as essential for the access to justice and the right to fair trial. Without effective access, discussions on the remaining criteria are rather meaningless. Cappelletti et al. also emphasize the access to dispute resolution as a starting point of access to justice.³⁰⁷ Access to dispute resolution, and in the previous sense the access to justice, are largely determined by the dispute resolution clauses in the cloud service agreements. If we consider only cloud contracts, we can see a concentration of access points in a limited number of jurisdictions, according to providers' preferences. The survey was conducted on the number of popular cloud services, whose popularity stretches far beyond national borders. As a global service, facilitating cross-border transactions, the majority of users, both businesses, and consumers are engaging in a legal relationship with the foreign elements.

Clouds service providers dictate the terms of the relationship and usually, when it comes to dispute resolution, impose favorable terms on their behalf. Such terms include the preferred location of the dispute resolution, usually the city/county/state where the provider is based and preferred choice of courts or ADR as binding dispute resolution method. Both of those choices regulate the users' ability to initiate formal dispute resolution process. Selection of exclusive jurisdiction and exclusive dispute resolution body (either arbitration or court proceeding) diminishes accessibility for the users who are not domiciled in the selected jurisdiction. Very few providers have selected the user's location as the venue for dispute. Some cloud businesses

³⁰⁶ ANDREWS, *supra* note. 72

³⁰⁷ CAPPELLETTI, *supra* note. 37 p. 2

accept the user's location under binding arbitration scheme for dispute resolution.³⁰⁸ A number of providers, especially those that opt for arbitration under the American Arbitration Association rules, offer a possibility of nonappearance, submission or telephone based dispute resolution.³⁰⁹ This is certainly a step in the direction of providing more access to dispute resolutions. However, this should not be an exclusive option, as it would hinder fundamental rights in a case that a party demands to a fair hearing before an independent tribunal.³¹⁰ Mandatory nonappearance dispute resolution would stand against the second criterion of procedural fairness. Therefore, to safeguard basic tenets of procedural fairness, enshrined in the right to a fair trial, easily accessible non-appearance dispute resolution should be viewed as an additional tool and not replacement.³¹¹

While some providers offer flexibility in the selection of dispute resolution methods or provide several jurisdictions where the user can turn to the most appropriate one, the question of fairness of imposing the terms without negotiation is still lingering. Going back to the Rawlsian reasoning behind the "veil of ignorance", it is unlikely that the choice of the group of individuals, unaware of its position, would correspond to the choices of a smaller group or minority that are placed in preferable position compared to the majority. Such reasoning would be contrary to "maximin" logic, which would mandate minimization of risk for the majority.³¹²

The issue of accessibility is effectively the issue of barriers (physical, linguistic and cultural) which then translates into issues of practicality and costs of initiating and waging a dispute in a distant venue. This criterion stands separated from the efficiency of the process, meaning the costs and speed of process itself without taking into account the costs of accessing the dispute resolution. The criterion of efficiency should be considered under the presumption that there is overall equal access to the dispute settlement body. Efficiency is focused on the expenditure of resources (costs, time) of selected processes.³¹³ Since we are dealing with expectations and fairness of choices made based on these expectations, we can observe the efficiency criterion

³⁰⁸ See for example Netflix ToS at: <https://help.netflix.com/legal/termsfuse?locale=en-GB>;

³⁰⁹ See for example Snapchat ToS at: <https://www.snapchat.com/terms> or Doximity ToS at: <https://www.doximity.com/physicians/privacy>

³¹⁰ The right to a fair hearing before the independent tribunal of law is recognized in many legal systems as the integral part of right to fair trial of Art 6.of the European Convention of Human Rights. The European Court of Human Rights has developed extensive jurisprudence on the right to a fair hearing.

³¹¹ More about it in chapter 4

³¹² See chapter 2, p.

³¹³ More about it in chapter 4, Council of Europe's body- The European Commission for the Efficiency of Justice (CEPEJ) has developed evaluation schemes that could be considered for the criterion of efficiency. See more at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp

by comparing the typical characteristics and costs of the processes. This would mean that ordinarily arbitration will be considered more efficient than court proceedings; certain arbitration rules could be regarded as more efficient than others based on the deadlines and required costs of arbitration; certain jurisdictions could be regarded as more efficient than others considering the average length of a proceeding and the average costs of a procedure. For example, we consider waging trial of the comparable value of dispute, to be on average more costly in the US common-law system than in one of the EU Member State's civil law system.³¹⁴ Therefore, imposing the jurisdiction and method with higher average costs for waging a dispute (and/longer time expenditure) would be unfair (and inaccessible) to users who are unable or unwilling to sustain these costs, especially considering the possibility of a more efficient dispute resolution. Again, maximin logic would offer different outcomes.

If courts are expensive, then we could turn to alternative dispute resolution. ToS that opted for arbitration would thus offer a more fair method. However, even though ADRs are thought to be cheaper, accessible and efficient dispute resolution method, they did not show satisfactory results in the Safe Harbor framework, and we are yet to see the effects of Privacy Shield. In an appearance before the LIBE committee on inquiry about "Electronic mass surveillance of EU citizens", Chris Connolly noted that: "Many of the selected dispute resolution providers are inaccessible to ordinary consumers."³¹⁵ He explained that an arbitrator with the AAA charges between \$120 and \$1,200 per hour (with a four-hour minimum charge) and JAMS costs \$350 to \$800 per hour (plus a \$1,000 filing fee for international disputes), which renders these two popular dispute resolution services too expensive for ordinary consumers.³¹⁶ Comparing the fees for arbitration with the value of cloud service (not including free services) illustrates the potential barrier for consumers in access to justice even with readily available dispute resolution providers. Also, several weaknesses were detected, which led to the conclusion that dispute resolution providers who have been self-selected by members are completely inappropriate to deal with a dispute relating to national security.³¹⁷

Procedural fairness of selected disputes resolutions in the cloud terms of services is also assessed on the basis of expectation. The expectation of procedural fairness in arbitration is

³¹⁴ David L. McKnight and Paul J. Hinton, *NERA Economic Consulting International Comparisons of Litigation Costs* U.S. Chamber Institute for Legal Reform, June 2013.

³¹⁵ Chris Connolly, *EU/US Safe Harbor – Effectiveness of the Framework in relation to National Security Surveillance* Galexia 2013. p.5.

³¹⁶ *Id.*

³¹⁷ *Id.* p.7.

lower compared to court proceedings, as the processes are less formal and with less stringent rules.³¹⁸ Even in ToS arbitration is sometimes explained as less formal dispute resolution, with procedures that are simpler and more limited than rules applicable in court, and that review is also limited.³¹⁹ It is considerably more complicated to compare procedural fairness between courts proceeding in different jurisdictions or to give value judgment on the fairness of various arbitration rules. Therefore, we propose the rebuttable presumption that the procedural fairness of the different dispute resolution bodies of the same type is equal. The practice called “forum shopping” indicates that procedural fairness of every system is not the same (even though it mostly concerns substantial law).³²⁰ It is difficult, though, to prove that a party has intentionally selected a forum for strategic purposes and not for convenience sake. In the survey, we came along ToS, that resembles forum shopping, but we do not have sufficient evidence to claim knowledge of the provider’s intent.³²¹ Still, we are basing our assessment on expectations, and expectations of procedural fairness are also supported by various regulatory safeguards of fairness, such as principles of impartiality of judges and judicial independence, that are enshrined in constitutions and civil codes. Therefore, if any of the legal safeguards exist in the applicable law, we presume equal procedural fairness towards parties within the same type of dispute resolution.

The effectiveness of the outcomes of the dispute resolution over cloud services is widely dependent on existing legal framework. Both national and international legal instrument set the frame in which dispute resolution bodies provide access to justice. The law establishes the functioning of the courts and the enforcement of judicial decisions. Issues may come up in the enforcement of the foreign court decisions, which depending on the legal system lowers the effectiveness of foreign tribunals. For those terms of service that opted for arbitration, international enforcement is usually based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" from 1953. On the other hand, if applicable law does not allow for ADRs/jurisdiction stipulated in cloud contract than dispute resolution set in the ToS is

³¹⁸ Even though the basics of the process and guarantees of fairness are covered in the various national Arbitration regulations. US based arbitration providers are in compliance with The Federal Arbitration Act (Pub.L. 68–401, 43 Stat. 883, enacted February 12, 1925, codified at 9 U.S.C. § 1 et seq.)

³¹⁹ For example Cloud 9’s ToS at: <https://c9.io/site/terms-of-service>

³²⁰ Azar, Deborah. *On selecting jurisdiction in Internet defamation cases*. Common Law Review (Prague, Czech Republic); Bell, Avi. *Libel Tourism: International Forum Shopping for Defamation Claims*. Jerusalem Center for Public Affairs. ISBN 978-965-218-070-4.

³²¹ Pipedrive ToS at: <https://www.pipedrive.com/en/terms-of-service>

ineffective. The finality and effectiveness of dispute resolutions set in the ToS need to be assessed by examining the positive law, which we will address in the following chapter.

To conclude when we combine our criteria with the findings from our survey of ToS and PP we come to following conclusions based on parties's expectations:

- Access to dispute resolution is biased towards providers because of the tendency of exclusivity and concentration of dispute resolution in jurisdictions and selection of institutions more suitable to providers;
- There is a presumption of procedural fairness in the same types of dispute resolution methods; arbitration provides less procedural fairness guarantees than court proceedings, which places users in a worse position when providers select the rules; “forum shopping” is an indicator of the unfair position of the weaker party/user.
- Most selected dispute resolution providers within observed ToS seem to be too costly/inefficient in relation to reasonable value of disputes estimated with cloud subscriptions
- the effectiveness of the dispute resolution specified in ToS depends on regulatory interventions and limitations of party’s autonomy

Regulatory interventions and legal framework for dispute resolution over cloud services will be examined in the next chapter.

Chapter 4 – Jurisdiction over Cloud Service Disputes

1. Introduction

The Internet poses certain challenges to legislation. The trans-jurisdictional character of the Internet has become the focal point of many modern legal issues and is of vital importance when we speak about online services. Legal applications based on geographical locations are of little help in cases of services where the location of the processing of data is difficult to determine, or the venue itself is irrelevant for the execution of the service. The emergence and growth of online business-to-consumer commerce have compelled the rethinking of not only the traditional conception of consumers, which is that they are weak parties in transactions, but also the conception of international transactions in general. Because of the general ambiguity of legal structures to deal with electronic commerce, it has been proven to be particularly challenging to justify mechanisms for dispute resolution in such cases. We have seen in the previous chapter that in the majority of cases cloud service providers impose dispute resolution

body (public or private) that will have the authority to handle disputes if a case occurs. The validity of these choices, however, needs to be examined in comparison with imperative legal norms of national and international regulations of jurisdictions in private law disputes.

The last decade and a half we have seen the beginnings of cyberspace litigation and growth of various internet connected disputes.³²² Though other forms of resolution should be developed to complement litigation, litigation remains the guarantor of final justice. Access to a judge in the course of the ADR, for example, may be helpful to solve an unexpected problem and facilitate a smooth and fruitful process. It is paramount in the first place to provide a complete structure for litigation in light of which other mechanisms will be successfully devised. It is vital to establish a waterproof framework for jurisdiction in litigation, to also set the boundaries to the negotiating in the “shadows of the law.”³²³ There are three issues at hand that should be discussed from the private international laws field: adjudicative jurisdiction, choice of law, and enforcement. Though separate and unique, these are also interdependent and often involve similar considerations. For the purposes of this thesis, we will mostly focus on the rules for determining the jurisdiction, as this would be a starting point of a formal dispute resolution, but we will also address other issues as they are relevant for the questions of access to justice and fairness in disputes resolution. When litigation is called upon, the decision regarding which court shall have the jurisdiction to make a judgment is the first significant issue encountered. If the wrong court makes a ruling, procedural injustice could be cited as a reason for refusing enforcement.

In the previous chapter we have established the general context of cloud service disputes, where we have a provider, ordinarily based in one jurisdiction offering service to international customers, imposing the terms and conditions, usually on a pay-per-use basis or subscription basis which could be perceived as a low-value transaction. The business models³²⁴ of cloud companies that scale up the service to fit the global market and service a significant number of low or non-directly-paying customers did not compel regulators to reassess significantly existing framework for international commerce.³²⁵ The extent to which the international legal framework supports enforcement of rights of all parties to such transactions remains to be the

³²² YUN ZHAO, *DISPUTE RESOLUTION IN ELECTRONIC COMMERCE* (2005).

³²³ RH Mnookin & L Kornhauser, *Bargaining in the shadow of the law: The case of divorce*, LAW J. (1979). Jacob, *supra* note 5.

³²⁴ Iglesia and Gayo, *supra* note 211.

³²⁵ Speaking in general terms of e-commerce and not in specific field like in data protection regulation etc.

question that occupies legal scholars.³²⁶ To establish if the rules governing disputes resolution, mostly those determining jurisdictions, allow access to justice to the users of such services, we need to assess the private international legal framework given the context of cloud services. Nominally guaranteed access to court and rights to redress, in general, seem ineffective or inappropriate if the costs and obstacles which a user has to overcome are hugely disproportionate to the costs of service.³²⁷ We could group these costs as the costs dependent on the location of dispute resolution and costs dependent on the type of procedure.

The first group of costs are linked to the physical location of the dispute resolution body, which induces costs of access (traveling related costs, costs related to language barriers), and it is a significant factor when potential party ponders on initiating formal dispute procedure. Especially if we consider disputes where parties need to travel internationally to seek redress. Similarly, procedural rules of the institution have effects on accessibility, procedural fairness, efficiency and effectiveness of dispute resolution. Different types of procedures and its particular characteristics, from less formal mediation and arbitration to more formal judicial processes, also vary in costs which additionally burden the parties. For that reason, it is essential first to determine who has the authority to resolve the disputes as it directly relates to the expenses dependent on location and the costs dependent on the procedure. Given that, access to justice is directly correlated to the rules on determining the jurisdiction of dispute resolution authority.

1.1. Adjudicative jurisdiction in private international law

Adjudicative jurisdiction is explained as a state's authority to subject persons or things to the process of its courts or administrative tribunals.³²⁸ The process involves one's selecting one court out of many before bringing a case to court and courts using discretionary power to decide

³²⁶ See for example Giuditta Cordero-Moss, GIUDITTA CORDERO-MOSS-BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW_ COMMON LAW CONTRACT MODELS AND COMMERCIAL TRANSACTIONS SUBJECT TO CIVILIAN GOVERNING LAWS –CAMBRIDGE ; Christopher Kuner, Data Protection Law and International Jurisdiction on the Internet, 1–26 (2009); Toshiyuki Kono & P Jurcys, International Jurisdiction over Copyright Infringements in the Cloud, AVAILABLE SSRN 2181671 1–20 (2012); ANTÔNIO AUGUSTO CANÇADO TRINDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE, TOM 18;TOM 937 (2011).

³²⁷ CAPPELLETTI, *supra* note.37

³²⁸ See Restatement (3rd) of Foreign Relations 402 (1986).

whether they can handle the case before taking it. It is sometimes considered to be the gateway to the success of litigation.

Even though the World Wide Web is not a physical entity, the existing legal precedent for adjudicative jurisdiction is defined and limited by a complex system of borders on the local, state, national, and international level.³²⁹ Adjudicative jurisdiction has traditionally been built upon territorial connections, with courts being vested with power over acts within their administrative territory. In traditional international commerce, territorial connections are identifiable because the players and action were easily detectable in the visible world. This is hardly the case for electronic commerce that happens in virtual space and whose actors could be indifferent to geographic location.³³⁰ People's location is becoming less and less relevant to the activities and transactions in the electronic commerce of today.

The framework for the objective allocation of adjudicative jurisdiction has never existed.³³¹ Considering the new face of commerce, some lawyers have called for a new jurisdictional system to accommodate electronic commerce.³³² As territorial connecting factors have not been satisfying in the light of electronic commerce, the notion of pushing for a new connecting factor(s) emerged.³³³ However, this idea has not received much support. In principle, electronic commerce still belongs to the known world of traditional international trade. International commercial interests and incentives have not changed entirely due to new technologies. Although electronic commerce can accomplish entire transactions online, many Internet-based businesses also used additional, traditional communication means. While systems of communication always change, the prudent policy of technological neutrality in regulation suggests a careful approach to the development of specific laws.³³⁴ Based on traditional legal theory, online commerce does not necessitate a separate system of law to deal with the problems given rise to by the Internet.³³⁵

³²⁹ C.N. Davis, Personal Jurisdiction in Online Expression Cases: Rejecting Minimum Contacts in Favor of Affirmative Acts, 14 *International Review of Law, Computer & Technology*, 44 (2000).

³³⁰ ZHAO, *supra* note 322.

³³¹ V. Heiskanen, Dispute Resolution in International Electronic Commerce, 16 (3) *Journal of International Arbitration*, 36 (1999).

³³² D. Johnson, D. Post, Law and Borders—The Rise of Law in Cyberspace, 48 *Stanford Law Review*, 1357, 1367 (1996).

³³³ *Id.*

³³⁴ Koops et al., *supra* note 2.

³³⁵ Ethan Katsh wrote in *Cybertime, Cyberspace and Cyberlaw*, *Journal of Online Law* (1995), article 1, paragraph 36,; "...when the law changes with every new event, then there is no law." See also L. Fuller, *The Morality of Law* (1964).

Jurisdiction has historically depended upon control held over a certain person or object. Late in the 19th century, for example, an American citizen or company was only subject to the jurisdiction of the courts that presided over fora in which the citizen or business had a physical presence.³³⁶ However, principles concerning jurisdiction must always be developed to meet new demands. With the rapid increase of international trade in the second part of 20th century, in large part, a reaction to developments in communication, new principles developed.

Today, with ever-accessible communication and cloud-based businesses, it is hard to determine the relevant location of specific action, actor or data and to establish a relevant connection between transactions and the forum states. The challenge for judiciary and academia is to establish such connections in a resounding manner.

We distinguish in rem and personal jurisdiction. An *in rem* jurisdiction revolves around the exercise of control over property found within the forum state.³³⁷ In rem jurisdiction is based on the location of the certain property. Thus, it is important to tackle the difficult tasks of first determining what should be regarded as property in electronic commerce and then locating that property. In the physical world, goods or real estate would easily be identified, but in electronic domain things become dubious. However, as participants in e-commerce are not always known in consumer transactions, it is impossible or takes efforts to ascertain the location of the relevant property if it exists.³³⁸ If we consider layers of different cloud service providers on which cloud services are sometimes offered, it further complicates the question of property rights over tangible (servers- IaaS) and intangible (intellectual) property (virtual machines and software– PaaS, SaaS).

There are ways to resolve these issues. For example, in the case of domain disputes, the address of domain can serve as property, and the location of the related server can be regarded as the relevant environment for in rem jurisdiction.³³⁹ Under the Anticybersquatting Consumer Protection Act, in rem jurisdiction may exist in disputes regarding forfeiture and cancellation of domain names or in cases that involve transferring a name to its rightful owner.³⁴⁰ From time to time domain name registrants misrepresent themselves or are using names in bad faith. However, it is now only theoretically possible to sue a domain name itself (in rem) rather than

³³⁶ See *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877).

³³⁷ T R Lee, *In rem jurisdiction in cyberspace*, 75 WASHINGT. LAW REV. 97–145 (2000).

³³⁸ ZHAO, *supra* note 322. p. 94

³³⁹ *Id.*

³⁴⁰ *Id.*

suing a person or corporation (in personam jurisdiction), and the reality is that *in rem* proceedings are adjusted under the International Shoe standard.³⁴¹

As opposed to *in rem*, personal jurisdiction or so-called *in personam* jurisdiction refers to the power of a court or similar tribunal over an individual or property.³⁴² As plaintiffs choose a court in which to file a lawsuit, the personal jurisdiction doctrine acts as a constitutional standard that limits a court's power by protecting an individual's interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.³⁴³

In cases where the defendant is frequently outside the jurisdiction of the state where the damage occurred, the applicability of personal jurisdiction becomes especially important. Two types of personal jurisdiction are recognized: general and specific jurisdiction.

1.1.1. General Jurisdiction

General jurisdiction is based on continuous and systematic or substantial connections between the person and the court.³⁴⁴ When general jurisdiction is asserted over a defendant, the court has jurisdiction in any lawsuit, even one which has no relation to the forum state. Generally, if an office is established carrying out business in a forum state, general jurisdiction can be inferred, but the quality and quantity of the business' commercial interactions with residents shall determine whether it qualifies as continuous and systematic, subjecting the participants in electronic commerce to the state's general jurisdiction.³⁴⁵

³⁴¹ *Id.*

³⁴² Perritt, H. Jr., Note on Personal Jurisdiction, , See more at: <<http://mantle.sbs.umass.edu/vmag/PJ2.HTM>>

³⁴³ *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). *International Shoe Co.* (defendant), a Delaware Corporation headquartered in Missouri, has places of business in several states, but not the State of Washington, where the corporation manufactures and distributes its products. But 12 agents were employed in Washington to display merchandise and accept orders. A suit was brought against the corporation in a Washington court. The court ruled that defendant's business activities in Washington rendered it amenable to suit in that state. United States Court of Appeals, See more at: <https://www.ca10.uscourts.gov/opinions/00/00-1185.pdf> (accessed March 22, 2016). *Id.*

³⁴⁴ *Id.* Zhao supra note 322. See further J.W. Glannon, *Civil Procedure Examples and Explanation* 5 (2nd Ed. 1992); see also *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984).

³⁴⁵ T.P. Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-commerce (Part II)*, *Journal of Internet Law*, See more at: <http://www.gcwf.com/articles/journal/jil_dec98_2.html>

Considering the nature of cloud services, the assertion of general jurisdiction is not popular.³⁴⁶ There are not many cases, and more importantly, no general jurisdiction has thus far been asserted purely based on contacts through the Internet in the case of electronic commerce.

1.1.2. Specific Jurisdiction

Specific jurisdiction is based on the relationship of a specific action and the forum state.³⁴⁷ Once business occurs in the certain area, such jurisdiction is easy to determine, as each state possesses exclusive jurisdiction within its territory. However, as interstate business and travel increased during the Industrial Revolution, territorialism proved insufficient for asserting jurisdiction.³⁴⁸ Thus, the court extended jurisdiction for persons outside the certain territory, as in the United States' case *International Shoe v. Washington* which laid the foundation for the modern theory of personal jurisdiction in the US.³⁴⁹ To assert specific jurisdiction, long-arm statute³⁵⁰, and due process requirement conditions, which heighten scrutiny of assertions of judicial jurisdiction over foreign entities, must be met.³⁵¹ The long-arm statute concerns are going out-of-state and bringing a nonresident defendant into the state to defend a lawsuit.³⁵² For that reason, the court must determine whether the forum state's long-arm statute applies to the defendants.

The theoretical overview of jurisdiction so far has been addressed from US legal tradition and theory. Most popular Cloud services, as we have seen in Chapter 3, have registered seat or at least have a steady connection with the United States, which gives jurisdictional grounds to the

³⁴⁶ As the developing standard for general jurisdiction is very high, it will likely only be applicable to large corporations that carry on significant, continuous business in a visible manner. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–416, n. 9 (1984). Charles W. (Rocky) Rhodes, CLARIFYING GENERAL JURISDICTION.

³⁴⁷ ZHAO, *supra* note 322.

³⁴⁸ *Id.*

³⁴⁹ 326 U.S. 310 (1945).

³⁵⁰ Long-arm statutes are state legislative acts which provide for personal jurisdiction, via substituted service of process, over persons or corporations which are non-residents of the state, and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes. See GARNER, *supra* note 92.

³⁵¹ See further G.B. Born, Reflections on Judicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1, 33 (1987).

³⁵² Glannon, *supra* note 344, at 26. See for example, N.Y.C.P.L.R., section 302 (a): New York Long-arm Statute; Calif. Code Civ. Pro., section 410.10: California Longarm Statute; Conn. Gen. Stat. Ann., section 33–411 (c) (West 1997): Connecticut Long-arm Statute; Mass. Gen. Laws Ann., ch. 223A, 3 (West 1985): Massachusetts Long-arm Statute; Mo. Ann. Stat., 506.500 (West 1986): Missouri Long-arm Statute; Ohio Rev. Code Ann., 2307.382 (A) (Anderson 1995): Ohio Long-arm Statute.

US courts. However, the nature of the service and its characteristics allows access to users from different countries which entails consideration of private international rules of those countries that could have imperative or exclusive jurisdictional grounds in certain scenarios.

1.2. Jurisdiction in the age of cloud computing

The shift to cloud computing, like any other major technological upheaval, has not been—and will not be—entirely free of legal obstacles. Providers and users have rapidly adopted cloud computing models which are a transition spurred on by the efficiencies noted in the previous chapter.³⁵³ These benefits have not come without a price, however. Extensive legal disputes have already arisen out of cloud-based interactions in substantive areas ranging from personal privacy to copyright infringement, antitrust, and a myriad more. Before these issues can be adequately adjudicated, however, courts must address the fundamental question dealt with by this chapter: jurisdiction. Jurisdiction and choice of law although seem separated, in the matters of online services, as we are aware that they tend to become tangled issues. However, for the scope of our research we are mainly interested in jurisdictional rules.

Besides the issues of inequality of bargaining power which compromises party autonomy in cloud contracts, we also have the general issues of e-commerce in relation to private international law. The private international law relies on connections, and while it is difficult to determine the connection of the consumer or SMEs with cloud service under certain location, it is much easier to establish a connection with provider's location, usually a place of residence of the provider of service. Consequently, we could again end up with inequality but this time in relation to the most connections of service has with the system of rules or applicable law.³⁵⁴ We also have issues of declining jurisdiction, that are more accustomed to common law tradition under the doctrine of *forum non convenience*. Additionally, many countries reserve the right to use public policy and overriding mandatory rules of the forum to protect the fundamental social, economic and political order of the forum or a friendly third country from being violated by the application of foreign law.³⁵⁵

³⁵³ See chapter 3

³⁵⁴ ZHENG SOPHIA TANG, ELECTRONIC CONSUMER CONTRACTS IN THE CONFLICT OF LAWS HART PUBLISHING-STUDIES IN PRIVATE INTERNATIONAL LAW (2015).

³⁵⁵ *Id.* p.11.

The courts of a forum where the case has been presented will first check to see if there is a specific choice of court agreement in line with the principles of party autonomy and freedom of contract. As it was demonstrated in the previous chapter, the majority of observed cloud services' Terms of Service have a dispute resolution clause which designates selected court or arbitration in case of a dispute. In most jurisdictions, the court will examine *ex officio* the validity of such clauses for establishing the jurisdiction of the court in the dispute at hand. To establish jurisdiction, the clauses need to be in compliance with applicable law, national and relevant international rules on the prorogation of jurisdiction. Therefore, we will start to give an overview of the selected national rules on jurisdiction and the requirements needed for it. National regulations treat differently parties' choice of court agreements, so we need to assess default national and international rules in case there is no such choice of court agreements or that they have been declared null and void.

2. National regulation of jurisdiction for online disputes

The question of ascertaining jurisdiction in online cross-border disputes is also the question of governance. Initial intriguing ideas that online interactions lie outside of the scope of the traditional law, due to virtual nature of cyberspace and ease of cross-border communication, and that they require Internet specific regulation³⁵⁶ were soon abandoned with the growth of e-commerce, which spurred states' interest. A more somber approach mandated, whenever possible, the use of already established technology neutral norms to regulate interactions occurring on the Internet.³⁵⁷ Online is wherever possible equated with off-line transactions represented in a catchy policy one-liner: "What hold off-line, holds online".³⁵⁸ In the case of online services, the states apply their existing regulation of international services, developed over the years of international trade, with occasional appropriation or expansion of existing rules to the particularities of Internet dealings. In common-law countries, new precedents occurred, where civil law countries, sometimes more slowly, adapted the regulatory framework by amending the existing legislation. In procedural law, the rules on asserting court jurisdiction were particularly under stress in online scenarios. The questions of states' regulating

³⁵⁶ Wu, Timothy S. "Cyberspace Sovereignty--The Internet and the International System." Harv. JL & Tech. 10 (1996): 647.

³⁵⁷ JACK L. GOLDSMITH & TIM. WU, WHO CONTROLS THE INTERNET? : ILLUSIONS OF A BORDERLESS WORLD (2006).Koops et al., *supra* note 2.

³⁵⁸ *Id.*

jurisdictions independently are still being debated with opposing argument that more harmonized approach of international regulation of jurisdiction would be more suitable.³⁵⁹ In certain cases, as we will see on a European level, it led to significant steps to allowing access to justice in cross-border dispute scenarios. The case may very be that it is easier to harmonize regulation of jurisdiction on the regional level than on a global, but lack of international regulation effectively leaves parties to international online disputes to fall back to national private international law or conflicts of laws rules of relevant states. Without going too much into specific detail, we will give a brief overview of selected national rules on asserting jurisdiction in online-related disputes.

2.1. Jurisdiction rules in the US applicable to online disputes

Given the current concentration of the most popular cloud services companies within certain jurisdictions in the United States, especially within the State of California, we should start by giving the brief general overview of the rules on which United States courts base their jurisdiction in the disputes before them. Without going into specific particularities of many different state regulations in the United States, we aim to provide general brushstrokes of the rules applicable to the majority of the cases.

Facing the cases regarding the activities on the internet, a significant number of legal precedents was built upon the rules and principles of common-law tradition which have been largely upheld by US courts. The common-law tradition in regard to asserting jurisdiction, both in the US and in the UK, could be described as discretion-based.³⁶⁰ It differs from civil-law rule-based approach as it gives courts the possibility to decide on jurisdiction issues, on a case by case basis, with a level of discretion but abiding by the principles of fairness and justice in their decisions. The discretion has also led to the notion of denying jurisdiction if deemed unappropriated by the court, which is commonly known as *forum non conveniens*.³⁶¹

³⁵⁹ See more in following sections of this Chapter

³⁶⁰ TANG, *supra* note. P 354.

³⁶¹ See more on Peter S. Gillies, *Forum Non Conveniens in the Context of International Commercial Arbitration*, SSRN ELECTRON. J. (2008); Christopher A. Whytock, *THE EVOLVING FORUM SHOPPING SYSTEM* (2011); Edwin Peel, *FORUM SHOPPING IN THE EUROPEAN JUDICIAL AREA - INTRODUCTORY REPORT*; Ronald A. Brand, *CHALLENGES TO FORUM NON CONVENIENS* (2013).

Differing from European rule-based approach, US courts built precedents in early phases of development of e-commerce. The cases which dealt with online transaction established tests for obtaining jurisdictional grounds aware of potential consequences in ascertaining jurisdictions in cases over websites located outside the United States. The applied traditional test of minimum contacts established in *International shoe* jurisdiction demanded that: a) the nonresident defendant must perform some act or consummate some transaction with the forum; (b) the claim must be one which arises out of or results from the defendant's activities related to the forum; (c) exercise of jurisdiction must be reasonable.³⁶²

Rules of general jurisdictions would require substantial, continuous and systematic contact between the defendant and the forum which is a rigorous demand and high threshold that is not reliant on mere online contacts but the significant presence in the forum.³⁶³ Evolving online services also meant dealing with considerably more complicated questions in asserting jurisdiction. If a cloud service provider has a strong connection to the certain forum in the United States, that would equate to the significant physical commercial presence, general jurisdiction could be invoked.³⁶⁴ Regular contacts through the website or conducting the transaction online, would not be sufficient for general jurisdiction grounds, nor would use of servers be enough.³⁶⁵ The nature and functionality of the servers are not significant enough for establishing a significant presence in the forum. The possibility of server load balancing, hardware virtualization and rapid data migration between storages fortifies the argument that servers are the weak link to be considered under general jurisdiction.

If general jurisdiction is inadequate in most of the case regarding disputes with cloud service providers, we turn to specific jurisdiction rules that emphasize forum related activities of defendants rather than permanent connections. Precedents building jurisprudence on specific jurisdiction offered us several tests for asserting jurisdiction over Internet-related disputes.³⁶⁶

One of the most cited cases, *Zippo Manufacturing Co v Zippo Dot Com*, established the “sliding-scale” test.³⁶⁷ After citing the requirements for exercising specific personal jurisdiction

³⁶² *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

³⁶³ *Perkins v Benguet Consolidated Mining Co* 342 US 437 (1952) ; *Helicopteros Nacionales de Colombia SA* 466 US 408, 414 – 6 (1984) ; *Millennium Enterprises v Millennium Music* 33 F Supp 2d 907, 909 (D Or, 1999).

³⁶⁴ *Shrader v Biddinger*, 633 F.3d 1235, 1241 – 2, 1243 (CA10 (Okla), 2011) .

³⁶⁵ TANG, *supra* note. 354 Tang p. 85.see also Rhodes, *supra* note 346 .

³⁶⁶ Some of the earlier cases argued for “sustained contact test” that the constant accessibility of the internet by the large population of a given state is a “sustained contact” especially compared to television or radio but this logic of passive advertising was criticized and replaced by more appropriate tests. See more in *Inset System v Instruction Set* 937 F Supp 161 (D Conn, 1996) .

³⁶⁷ *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997)

over a non-resident, the presiding court concluded that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”³⁶⁸ The court devises “the scale” according to the websites’ activities:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.³⁶⁹

The innovative aspect of the *Zippo*’s scale inspired many subsequent cases, however, it gradually loses its significance with the progressive development of online services. Considering cloud computing services and their characteristics as described in Chapter 3, hardly any cloud service could be described as passive in the sense of *Zippo* case. Almost all cloud services could be put in the end of the specter to those that “involve the knowing and repeated transmission of computer files over the Internet” or at least to the “interactive websites” where users have a strong level of interactivity. It should be noted that although it provides interesting tool *Zippo* case does not replace traditional personal jurisdiction determination rules.

In *Calder* case, actress Shirley Jones brought an action in a California court against the National Enquirer’s Iain Calder and John South for an allegedly libelous article they wrote and edited in Florida.³⁷⁰ The article was published in the National Enquirer and distributed throughout California and the United States. In deciding to uphold California’s personal jurisdiction over Calder and South, the Supreme Court concluded that “the fact that the actions causing the effects in California were performed outside the State [should] not prevent the State from asserting jurisdiction over a cause of action arising out of those effects.”³⁷¹ Although some scholars view Calder’s “effects test” favorably and encourage its use when determining

³⁶⁸ *Zippo*, 925 F. Supp. at 1124

³⁶⁹ *Id.*

³⁷⁰ *Calder v Jones* 465 US 783 (1984).

³⁷¹ *Id.*

personal jurisdiction in Internet cases,³⁷² more believe the standard should be modified.³⁷³ Many authors offer a variety of solutions to perceived problems with the test. For example, one author claims Calder's "express aiming" or "purposefully directed" requirement "prevents the exercise of personal jurisdiction in cases where Internet-based activities represent the modern functional equivalent of actual physical presence in a forum."³⁷⁴

The "subjective availment" test permits the court to exert specific jurisdiction over a non-resident defendant if the defendant has deliberately targeted the forum in question. Unlike the "sliding-scale" test, which is also based on the purpose of the defendant, the "subjective targeting" test focuses more on the subjective purpose of the business instead of the objective purpose shown by the website. The approach of the court in *Winfield Collection v McCauley*³⁷⁵ has been followed by a number of subsequent cases concerning auction sales through an intermediate virtual market.³⁷⁶ This test is helpful for cases where an e-business does not have a website of its own but engages in business activities through the website of a third party-cloud service provider. It is not appropriate to determine in every case the business's purpose by examining the nature and quality of the website, which is managed and run by the cloud service. However, the real subjective position is hard to prove, and the inner intention of the parties usually has to be indicated by its external appearance. The factors considered are prior negotiations and potential future consequences, along with the terms of the contract and the parties' actual course of dealing. It has also been noticed from the existent case law that the test standard for the "subjective availment" is high since the seller could be deemed to have not purposefully availed himself to the jurisdiction of the more active buyer's residence (who actively sought seller).³⁷⁷

The US courts rely most on "subjective or purposeful availment" test when asserting jurisdiction over non-residents, which is arguably the very likely scenario given the global

³⁷² See for example 4 Anderson Bailey, Purposefully Directed: Foreign Judgments and the Calder Effects Test for Specific Jurisdiction, 62 N.Y.U. ANN. SURV. AM. L. 671, 689 (2007)

³⁷³ Teresa J. Cassidy, Civil Procedure-Effects of the "Effects Test": Problems of Personal Jurisdiction and the Internet; *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008), 9 WYO. L. REV. 575, 597 (2009); Andrew F. Halaby, Making Sense of "Express Aiming" After *Schwarzenegger v. Fred Martin Motor Co.*, 37 ARIZ. ST. L.J. 625, 625 (2005); Matthew L. Perdoni, Revising the Analysis of Personal Jurisdiction to Accommodate Internet- Based Personal Contacts, 14 U. D.C. L. REV. 159, 187-88 (2011);

³⁷⁴ Matthew L. Perdoni, Revising the Analysis of Personal Jurisdiction to Accommodate Internet-Based Personal Contacts, 14 U. D.C. L. REV. 159, 187 (2011).

³⁷⁵ *Winfield Collection v McCauley* 105 F Supp 2d 746, 750 (ED Mich, 2000) .

³⁷⁶ *Metcalf v Lawson* 802 A 2d 1221 (NH 2002); *Karstetter v Voss* 184 S W 3d 396 (Tex Ct App, 2006) ; *United Cutlery Co v NFZ* (n 59); *Boschetto v Hansing* WL 1980383 (ND Cal, 2006) affd 539 F Supp 3d 1011 (CA(9) Cal, 2008);

³⁷⁷ TANG, *supra* note. 354 p. 93.

market cloud company could service. However, the effectiveness of this test is arguable since it can hardly be applied to assess whether a consumer purposefully avails himself to the company's residence where a business aims to sue a consumer.³⁷⁸ Although it is presumable that the general principles can guarantee a fair and reasonable result, these tests can hardly provide a certain and predicted result to protect the consumer as the weaker party as they were not devised with consumer specific mindset, which is also different approach from the EU consumer protective legislation.

2.2. Jurisdiction for online disputes in the United Kingdom

As an EU member state, United Kingdom had to harmonize civil law provisions and accordingly set the rules on asserting jurisdiction in accordance with Brussels Convention and subsequent Brussels I Regulation which will be discussed further in the chapter. In English common law, an English court has jurisdiction in claims *in personam* where the defendant is present in England, where the defendant submits to the jurisdiction, or where the court could exercise its power to give permission for the process to be served on the defendant out of the jurisdiction under the Civil Procedure Rules.³⁷⁹ The grounds for the English court to serve out of the jurisdiction in respect of contracts are indicated in the Practice Direction B to Part 6 of the Civil Procedure Rules and a claim form may be served out of the jurisdiction with the permission of the court if: (1) the contract was made within the jurisdiction; (2) the contract was made by or through an agent trading or residing in the jurisdiction; (3) the contract is governed by English law; (4) there is a choice of forum agreement choosing this jurisdiction; or (5) the breach of contract was committed within the jurisdiction.³⁸⁰ The English legal system remains traditional and hesitant to innovation specific to new technologies and availability of Internet services when it comes to the civil procedure rules up to the recent developments and reforms, which we will mention later.

As it is seen in our survey a number of terms of service indicates to the English courts as the dispute resolution body to handle disputes between parties, and if such agreement exists and it's in line with the Civil Procedure Rules, the courts do uphold such clauses. However there is

³⁷⁸ *Id.*

³⁷⁹ The Civil Procedure Rules 6.37 of the UK.

³⁸⁰ *Id.* para 3.1(6) (a-d) and para 3.1(7), para 3.1(8)

a question of suitability of these agreements for consumer contracts, especially in the contracts of adhesion where consumers do not negotiate.

Common law jurisdiction is based on discretion. It means the court may not take jurisdiction simply because a jurisdiction basis is met. The court will exercise discretion to consider whether or not taking jurisdiction is “appropriate” or could achieve the ends of justice.³⁸¹

The justice test which puts forward *forum convenience* doctrine in English law was set in *Connelly v RTZ*, in which Lord Goff of Chieveley stated that:

The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available,³⁸²

Yet it is sometimes difficult to establish if the plaintiff is filing suit in English court because of its advantages or because of requirements of justice. On the other hand, the consumer might wish to claim that due to his weak financial power or other reasons, requiring him to have litigation abroad denies his access to justice which breaches Article 6 of the European Convention on Human Rights (ECHR).³⁸³ However, the effect of Article 6 of the ECHR in English jurisdiction is marginal and controversial, and the English courts usually refuse to use Article 6 of the ECHR as a new ground outside the current justice consideration test.³⁸⁴

2.3. Civil law rule based jurisdiction in Germany

Just as UK, Germany as an EU member state is obligated by the relevant provisions of the European Union, which in itself is a large body of legal rules and procedures. Germany and its legal system, however, will serve to better illustrate the civil law culture and rule-based jurisdictional grounds. The German legal system is difficult to navigate but representative to the extent of many continental legal systems. The German Code of Civil Procedure (ZPO) is

³⁸¹ P Rogerson, Collier's Conflict of Laws, 4th edn (Cambridge, Cambridge University Press, 2013) 165. *Spiliada Maritime Co v Cansulex Ltd* [1987] AC 460, 480; CPR, r 6.37(3).

³⁸² *Connelly v RTZ* [1998] AC 854. 873

³⁸³ The ECHR has been implemented in the UK under the Human Rights Act 1998. The European Court of Human Rights (ECtHR) has made its decision in several cases that denial of access to justice constitutes a breach of Art 6 of the ECHR. eg *Osman v United Kingdom* (2000) 29 EHRR 245.

³⁸⁴ *Id.* Tang p.111.

the relevant statute in all matters regarding civil procedure. Jurisdictional questions are regulated in paragraph 12ff ZPO, whereas the most important provision for Internet jurisdiction is para. 32 ZPO.³⁸⁵ The statutes do not offer a provision directly regulating international jurisdiction, but the courts have always used para. 32 ZPO by analogy to determine questions of international jurisdiction. According to the paragraph 32 of ZPO, a German court is competent to hear a case about claims arising out of unlawful if the unlawful act has been committed in its district.

In Germany, the choice of court rules and relevant private international law rules are part of the Introductory Act to the German Civil Code which prescribes legal rules applicable to international disputes.³⁸⁶ However, there are not many multijurisdictional Internet-related cases that could observe and draw concrete conclusions on German approach to jurisdiction. One case had a significant impact, though. The *New York Times Decision* case of the federal Supreme Court influenced a new standard in the interpretation of paragraph 32 in the context of jurisdiction in personality rights infringements.³⁸⁷ In this case, German courts asserted the jurisdiction even though the article was published in New York. The District Court argued that mere accessibility of a website is insufficient to establish jurisdiction in Germany and the article should be intended to be accessed in the place in question. The federal Supreme Court rejected that opinion and argued that the mere accessibility of websites is sufficient to establish a place of commission of the unlawful act.³⁸⁸

In the following section will speak more about European rules on jurisdictions required by European Regulation which is directly applicable to all EU Member States, including Germany and the United Kingdom.

3. International regulation of jurisdiction

We discussed cloud computing characteristics which allow cloud-based services to be offered globally or at least provide services in different jurisdictions. We have seen in Chapter 3 the majority of the cloud contracts contain a choice of jurisdiction in the case of disputes. Whether

³⁸⁵ MünchKommZPO/Patzina, para. 32 Rn. 1, BeckOKZPO/Toussaint, para. 32 Rn 1, MusielakZPO/Heinrich, para. 32 Rn.2.

³⁸⁶ of the Introductory Act to the German Civil Code Article 40 Rn.72

³⁸⁷ BGH Urteil vom 2.3.2010 – VI 23/09 = BGH GRUR 2010, 461.

³⁸⁸ *Id.*

the selected jurisdiction will apply to specific case depends on compliance with applicable norms. Thus, when it comes to cloud services disputes, we also have to consider international regulation, private international law instruments which regulate jurisdiction and conflict of laws in civil disputes. At this point, we will provide an overview of the most relevant international instruments with a certain inclination towards European regulation and its applicability to cloud disputes.

3.1. The EU regulation of jurisdiction

The EU regulation of jurisdiction and choice of law was gradually developed over time following the progression and enlargement of the European Union. European countries took the initial step with signing Brussels Convention.

3.1.1. The Brussels Convention and the Lugano Convention

At the time European Economic Community was composed of six Member States, the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention), which had been signed in 1968 and entered into effect in 1973, aimed at regulating jurisdiction as well as recognition and enforcement within the Community. The Convention was drafted and signed on the grounds of the Art. 220 of the Treaty establishing European Economic Community (EEC), which also meant that every new member joining EEC, would have to adhere to the Brussels Convention. However, Brussels convention at the very beginning did not focus on consumers or consumers' protection per se.³⁸⁹ Initially, it provided grounds for jurisdiction in cases of contracts for the sale of goods by installment and loans. The scope of protection to consumers was extended by the Court of Justice ruling in *Bertrand v Ott*, Where it was clarified that the Convention was to be applied to consumers which were to be protected because of their "weakness in comparison with sellers".³⁹⁰ The Bertrand ruling reasoning and protection of consumers influenced 1978's amendment to the Convention with the accession of UK, Ireland, and Denmark to the European Communities. Nevertheless, the Convention was regarded highly fruitful and valuable and served as a basis for the Lugano Convention with similar or identical provisions that are taken out of the older

³⁸⁹ *Id.* p.6.

³⁹⁰ Case 150/77 *Bertrand v Ott* [1978] ECR 1431 , para 21.

Brussels Convention that withstood the test of time. The Lugano Convention, which came into effect in 1988 and was effective with the Member States of European Free Trade Association (EFTA), meaning that the rules of the Brussels Convention have been extended to the members of EFTA.³⁹¹ The significant difference was that the European Court of Justice had jurisdiction over the Brussels convention and not over the Lugano Convention.

The Brussels Convention was a double convention. It dealt both with the liberalization of recognition of judgments and jurisdictional distribution among Members States' courts. The broad scope of the Brussels Convention limited national judiciaries in deciding cases with an international element. The Brussels Convention had been replaced with Brussels I Regulation (44/2001) but remained in effect due to the specific relationship between the EU and Denmark (which placed reserves on Brussels I Regulation).

The Brussels Convention while confirming the principles of party autonomy also introduced significant safeguards for consumers, furthering academic and legislative efforts in securing the access to justice in situations of unequal bargaining and economic power.

In the Art 14 the Brussels Convention clearly sets the terms in favor of consumer protection giving consumers the freedom to choose a more favorable forum to bring its proceedings:

“A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.”

The Brussels Convention development was clearly in line with “second wave” of access to justice movement where the diffuse and fragmented interest of group like consumers were given more favorable treatment as a “weaker party”.³⁹²

³⁹¹ EFTA comprises Norway, Island, Switzerland and Lichtenstein

³⁹² As discussed in Chapter 2, see also CAPPELLETTI, *supra* note.37

3.1.2. The Brussels I Regulation

Brussels I Regulation (44/2001) is a continuation of Brussels Convention.³⁹³ It is also a double regulation of jurisdiction as well as recognition and enforcement, and in most parts, it is verbatim of the Convention's terms. Although Denmark initially excluded itself from the Regulation, which meant that the Brussels Convention was still applicable in relevant cases, with the latest European Commission efforts to amend the Regulation, appropriately named the "Brussels I Regulation recast"³⁹⁴, Denmark fully adhered to the Regulation which now is applicable to all 28 Member States of the EU.³⁹⁵

The Brussels I Regulation recast (the recast) is the latest regulation that took an additional step towards unburdened circulation and recognition of court decisions in the EU. It addressed some of the issues European courts faced, extended the scope of its application in particular areas and abolished perceived barriers for the enforcement of the decisions. Although it's a significant expansion introduced by a new regulation (replacing Council Regulation (EC) No 44/2001), having the same scope of application, it kept colloquial name Brussels I Regulation, which we will use here respectively making specific reference to the recast and original Brussels I Regulation where the significant change has taken place.

The Brussels I Regulation (the Regulation) set broad jurisdiction grounds for civil and commercial matters whatever the nature of the court or tribunal, but is explicit in Art 1. that it will not be applied in cases of the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, social security and arbitration.³⁹⁶ It sets the rules for general jurisdiction for persons domiciled in a Member State which shall, whatever their nationality, be sued in the courts of that Member State.³⁹⁷ This rule is in line with the doctrine

³⁹³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R0044> (last visited March 20, 2016).

³⁹⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ EU 2012, L 351/1. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:EN> (accessed April 01, 2016).

³⁹⁵ See more at https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

³⁹⁶ Art 1 of Council Regulation (EC) No 44/2001 and Art 1 of Regulation (EU) No 1215/2012

³⁹⁷ Art 2 (1) of Council Regulation (EC) No 44/2001 and Art 4 of Regulation (EU) No 1215/2012

actor sequitur forum rei - a general principle that defendant should be sued in the place of his domicile.

After setting general jurisdiction *in personam*, Brussels I Regulation introduces a good deal of grounds for the special jurisdiction where persons domiciled in a Member State may be sued in the courts of another Member State. For contractual disputes, is possible to be sued in another's Member state in the courts for the place of performance of the obligation in question.³⁹⁸ The place of performance of the obligation in the case of the sale of goods, shall be the place in a Member State where the goods were delivered or should have been delivered, and in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.³⁹⁹ While services are not excluded from the scope of the recast, they are problematic as they are excluded from Rome I Regulation, which deals with applicable law. It is important also to mention that the courts for the place where the branch, agency or other establishment is situated will have jurisdiction with regards to a dispute arising out of the operations of a branch, agency or other establishment.⁴⁰⁰

The Regulation also specifies jurisdictional rules matters relating to tort, delict or quasi-delict, civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, civil claim for the recovery, based on ownership, of a cultural object, operations of a branch, dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in certain cases of arrest.⁴⁰¹ Article 8 allows jurisdiction of another Member state in some cases of multiple defendants, proceedings of the third party which also involves defendant, counter-claims and certain contract disputes connected to the immovable property.⁴⁰² The last one is not to be confused with proceedings which have as their object rights *in rem* in immovable property for which Member States are granted exclusive jurisdiction where the property is situated.⁴⁰³

³⁹⁸ Art 7 of Regulation (EU) No 1215/2012

³⁹⁹ Art 7 (b) of Regulation (EU) No 1215/2012

⁴⁰⁰ *Id.* Art 7 (4)

⁴⁰¹ Art 7 (2-7) of Regulation (EU) No 1215/2012

⁴⁰² *Id.* Art 8

⁴⁰³ Section 6.

The Brussels I Regulation pay particular attention to setting special jurisdiction in matters of insurance, consumer contracts, and contracts of employment. The consumer is defined as a person who can be regarded as being outside his trade or profession. When a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or another establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.⁴⁰⁴ The jurisdiction over consumer contracts has been expanded with the Brussels I Regulation recast. Similarly to the Brussels Convention, Article 16 of previous (original) Brussels I Regulation indicated that a consumer might bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.⁴⁰⁵ Seemingly, the wording of this article does not include third country parties (outside of the EU), without branch, agency or another establishment in one of the Member States. Brussels I Regulation recast has expanded its scope:

“A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.”⁴⁰⁶

Of course, even under the old Regulation, which granted branch and agency some treatment as the domiciled party of a Member State, it was possible to subject third countries’ parties to special jurisdiction terms for consumer contracts. To add to that, even under previous Regulation the Member States, including for example Belgium, Denmark, France, Hungary, Italy, Luxembourg, the Netherlands, and Spain, already allowed consumers to sue professionals from third states at home in accordance with their national rules of jurisdiction.⁴⁰⁷ However, the formulation of the recast Regulation places EU domiciled consumer in a stronger “weak” position in cross-border consumer contracts. To be clear, it applies only to consumers that have domicile in a Member state of the EU.⁴⁰⁸ On the other hand, all the above-mentioned regulations and conventions, allow consumers to be sued only in the court of the consumer’s domicile.

⁴⁰⁴ *Id.* Art 17

⁴⁰⁵ Art 16 of Council Regulation (EC) No 44/2001

⁴⁰⁶ Art 18 (1) of Regulation (EU) No 1215/2012

⁴⁰⁷ Giesela Ruhl, *The Consumer’s Jurisdictional Privilege: On (Missing) Legislative and (Misguided) Judicial Action*, (2015), p.4.

⁴⁰⁸ Art 17. of Regulation (EU) No 1215/2012

Brussels I Regulation protects consumers by allowing them a choice between the court of consumer domicile and the court where business is domiciled. However, not all businesses that enter into legal relationships with consumers are under the scope of this regulation. Art 17 (c) is limiting jurisdiction over consumer contracts where:

... the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State and the contract falls within the scope of such activities.

While it's casting a wide net since it's applicable to all contracts other than contracts for the sale of goods on instalment credit terms (in Art 17 (a)) and contracts for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods (in Art 17 (b)), it is at the same time limiting contracts with alternative conditions that leaves the room to different interpretations. The business has to pursue either commercial or professional activities in the consumer's domicile, or it has to direct commercial or professional activities to the consumer's domicile or the states including the consumer's domicile.

The Regulation confirms the autonomy of the parties to a contract but places a significant restraint on mentioned insurance, consumer or employment contracts, where only limited autonomy to determine the courts having jurisdiction is allowed and subjected to the exclusive grounds of jurisdiction laid down in the Regulation. We will speak more about party autonomy in the following section.

Article 25(2) of the Brussels I Regulation is the only instance that explicitly acknowledges agreements made via electronic means, stating that "any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing."⁴⁰⁹ It implies that a contract stored in a computer as a secured word document (i.e. a read-only document or document with entry password), or concluded by email or a click-wrap agreement falls within the scope of Article 23(2) of the Brussels I Regulation.⁴¹⁰

⁴⁰⁹ Art 25(2) of Regulation (EU) No 1215/2012 and Art 23(2) of Council Regulation (EC) No 44/2001

⁴¹⁰ Faye Fangfei Wang, *Obstacles and solutions to internet jurisdiction a comparative analysis of the EU and US laws*, 3 J. INT. COMMERCIAL LAW TECHNOL. 233–241 (2008). p.233.

3.1.3. Cloud services under Brussels I Regulation

If we consider cloud services in a business-to-business type of relationship, then Brussels I Regulation is following the lines of the traditional doctrine of *actor sequitur forum rei*, where the court of defendant's domicile has jurisdiction. However, the scope of Brussels I Regulation is limited to parties who are domiciled in the EU Member States, and if cloud service based outside of the European Union does not have branch, agency or other establishment, it falls out of the Regulation's regime of the EU-wide recognition and enforcement. Such scenarios default back to private international rules of individual states. Brussels I Regulation reinforces party autonomy except in certain cases where it limits jurisdiction (i.e. exclusive jurisdiction regarding mobile property), and if choice of courts agreements fulfills the form of validity of being a written form, which includes electronic durable record, it is considered as such clause represents valid consent of the parties to a certain jurisdiction. Hence, a significant number of cloud services that have a branch in one of the Member States of the EU have a valid choice of court agreement indicating jurisdiction of that state's court in the case of a dispute. The Regulation does not offer any protection for small and medium enterprises.

For cloud services, conditions set out in Article 17 (c) regarding consumer contracts should be of special interests. Depending on the interpretation of these terms, the cloud services fall or do not fall under the scope of the Brussels I regulation when it comes to consumer contracts.

The first alternative of pursuing commercial activities in the consumer's domicile sounds more applicable to traditional forms of customer relations and business management of off-line service providers. To pursue commercial activity could be interpreted narrowly, in the sense of performing transactions meaning providing paid services, or broadly, encompassing all activities engaging consumers even though these services are perceived to be free for consumers. It is debatable if the commercial activity is oriented to users of, for example, social network service that is free but profits of selling user-related data to third parties, or the commercial activities is oriented to the third parties as customers of accumulated data. Zhang Sophia Tang makes the argument that if we focus on the latter alternative of "directing activities" as more appropriate to the e-commerce, we should then interpret "pursuing activity" narrowly.⁴¹¹ It is still unclear does pursuing mean physical presence in the domicile, or should we look into plans and intentions of business. Also, it is worth to note that the pursuing should be done in the Member States of the consumer's domicile as opposed to directing such activities

⁴¹¹ TANG, *supra* note 354. p. 44.

which can be done in one or more Member States. This observation goes in line with the argument of a narrow interpretation of pursuing. Arguably, it is possible that this because of ambiguous intentions of online services where it is hard to establish that they are pursuing specific consumers of a specific member state, the legislators set alternative in the form of “directing” commercial activities to the consumer domicile of one or more Member States.

There are a number of ways that “directing activity” could be interpreted in the context of cloud services. Mere accessibility of a service could not be interpreted as directing activity or sending an offer of the service. The Council and the Commission confirmed that the mere fact that an internet site is accessible is not sufficient for Article 15 (Art 17 of the recast) to be applicable.⁴¹² Users being able to access service does not mean that the service has been directed its activity to the same users. Some discussions have been around separating active (interactive) and passive websites, but problem even if we could make such a distinction remains the same.⁴¹³

One of the ideas that sprung about was to mark profitability as a pointer of directing activity, meaning if a service makes a profit out of the jurisdiction it should be considered reasonable to fall under that jurisdiction.⁴¹⁴ We do not find this approach particularly appropriate to cloud services when we consider alternative monetization of the services, especially free services that collect and resell aggregate user data to third parties. Since the service is not making a profit directly from the users of the service, they would be effectively deprived of protective rules regarding jurisdiction.

Another approach proposes that the service itself indicates the connection with certain country or jurisdiction.⁴¹⁵ The connection could be made for example based on domain names of websites and language of communication, or some under indicator that would undoubtedly establish a connection with a certain jurisdiction or a country. However, relying just on them, said indicators would not be enough. We couldn't solely rely on providers' appearance of a connection, as it is too easy to manipulate the connecting factors. Providers are sometimes choosing domain names irrelevant to the country and providing a single international language of service does not mean the exclusion of all other users whose native language is not corresponding to the language of a service.

⁴¹² The Council and the Commission, ' Joint Statement on Articles 15 and 73' (' Joint Statement ') ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf, accessed on 16 November 2008.

⁴¹³ CHRIS REED, INTERNET LAW: TEXT AND MATERIALS LAW IN CONTEXT (2004). TANG, *supra* note 354.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* p.49.

In traditional commerce and private international law, the location of performance would be a much more reliable connection. Needless to say, the location of activity of cloud service is quite dubious sometimes. While it is possible, and sometimes not without effort, to identify servers used to deliver cloud services, the activity of the servers could be dispersed due to resource pooling and rapid elasticity of cloud computing. Especially in scenarios involving public cloud, the location of the data which is being migrated between several servers for load balancing purposes is hard to pinpoint or the location could include several servers in several different jurisdictions for a given service over short periods of time. In certain cases, location and jurisdiction of servers are being specified in terms and conditions. Certain cloud users insist on keeping the data within a specified jurisdiction due to regulatory requirements, or they could simply prefer and have trust in particular legal systems. Such cases could justify performance or activity as a connector to jurisdiction, but then again it would be superfluous since it is already user's choice of jurisdiction, and jurisdictional grounds would be firmly established by party autonomy. Dan Jerker B. Svantesson suggests that in general if the performance takes place online, the place of performance is not appropriate as a connecting factor.⁴¹⁶ The thought especially resonates with cloud services. Unless the location of the activity where data is stored and processed is not specified, the location of performance in the traditional sense of private international law and Brussels I Regulation should not be primary connection to the jurisdiction in the case of a dispute.

One more widely used approach in finding an appropriate connection with jurisdiction is ring-fencing. The ring-fencing is based on the idea that the business should clarify and limit its commercial activities to desired locations. It would be sufficient to clarify the activities directed at certain jurisdictions and the consumer protective provisions of Brussels I Regulation could be avoided if business desires to do so.⁴¹⁷ In a way, it is a declaration of business' intent. One way to ring fence is a written statement preferably in terms and conditions. However, the statement doesn't completely alleviate the responsibility from providers. In fact, certain cloud providers are stating in their terms of service exclusivity of their service to certain countries and jurisdictions while on the other hand, the service itself remains accessible to everyone under the same conditions as for consumers from the specified jurisdiction.⁴¹⁸ Another way to ring fence is via geo-localization technologies, which block access from certain locations based

⁴¹⁶ Dan Jerker B. Svantesson, PRIVATE INTERNATIONAL LAW AND THE INTERNET (2007).p. 268.

⁴¹⁷ TANG, *supra* note 354.

⁴¹⁸ See for example Toutapp ToS at: <https://toutapp.com/terms> Cloud 9 ToS at: [https://c9.io/; Terms of Service \(ToS\)](https://c9.io/; Terms of Service (ToS))

on IP addresses and allow service providers control which limits exposure to undesired jurisdictions, and thus direct activity to the desired. The third way of ring-fencing would be to require potential users to disclose their personal information and then based on received information to proceed or restrict service. This method relies on data provided by the user, which can be manipulated or misleading as well. Restricting the service to users coming from certain geographic areas would potentially incentivize users to provide false data. Not one single method has proven to be effective by itself in practice, and scholars like Tang are advising hybrid approach: ring-fencing by looking into several aspects of the business, country-specific indicators and where possible activity.⁴¹⁹

As we have seen and established in the survey in Chapter 3, the majority of cloud contracts contain dispute resolution clauses with a choice of court or choice of arbitration agreements. The validity of this clauses regarding consumer contracts will be also assessed through the lens of Unfair Terms Directive in Chapter 5.

3.1.4. European Small Claims Procedure

Speaking of cloud service disputes as most commonly low-value disputes with cross-border elements, we are looking into appropriateness and applicability of different regulatory instruments looking from the context of cloud services. The regulation establishing the European Small Claims Procedure (ESCP) ostensibly represent such an instrument.⁴²⁰ It was intended to be the pan-European solution for lower value disputes with exclusively cross-border elements and significantly lower formality of processes. To a certain extent, this regulation was a consequence of EU guaranteed a free movement of persons, goods, and services which resulted in increased cross-border cases. European Small Claim Procedure together with European Enforcement Order⁴²¹ and European Order for Payment⁴²² were proposals for cooperation in civil matters with cross-border implications to ensure proper functioning of the internal market.

⁴¹⁹ *Id.* p.55.

⁴²⁰ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure

⁴²¹ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

⁴²² Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

ESCP is envisioned to be the exclusively cross-border procedure for claims under €2000, for all civil and commercial matters with a wide range of possible disputes. The limits of €2000 claim is a result of a compromise between countries of higher and lower standards of living in the European Union with the upcoming lifting the threshold to €5000 in July 2017. Another element *sine qua non* -cross-border disputes is defined as the case “...in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized”⁴²³ There’s always possibility the dispute will not be cross-border until the enforcement phase, but in that case the European Order or Payment (EOP) would be helpful.⁴²⁴ If EOP is not applicable, the rules of enforcements of judgments under of Brussels I regulation will be applicable.

Certain states have placed reserves on the regulation: Denmark is excluded; in Ireland it is applicable only to certain consumer cases; Spain allows process without legal representation under €900 and above it is obligatory. The procedure does not require mandatory legal representation⁴²⁵ and the rules for oral hearings have been relaxed in the sense that where they’re needed, they could be handled through video conferencing.⁴²⁶ Form for commencing the claim has been standardized, and needed assistance could be provided for filing it.⁴²⁷ The form itself (called Form A) instructs applicants on the rules of Brussels I Regulation, as applicable. ESCP is governed by the procedural law of the Member States in which procedure is conducted.⁴²⁸ Article 5 provides rules for the conduct of the procedure:

1. The European Small Claims Procedure shall be a written procedure. The court or tribunal shall hold an oral hearing if it considers this to be necessary or if a party so requests. The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings. The reasons for refusal shall be given in writing. The refusal may not be contested separately.

...

3. The defendant shall submit his response within 30 days of service of the claim form and answer form, by filling in Part II of standard answer Form C, accompanied, where appropriate, by any relevant supporting

⁴²³ *Id.* Art 3.

⁴²⁴ PABLO CORTÉS, ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION (2010). p.100.

⁴²⁵ Art 10 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure

⁴²⁶ *Id.* Art 8

⁴²⁷ *Id.* Art 4

⁴²⁸ *Id.* Art 19

documents, and returning it to the court or tribunal, or in any other appropriate way not using the answer form.

4. Within 14 days of receipt of the response from the defendant, the court or tribunal shall dispatch a copy thereof, together with any relevant supporting documents to the claimant.

...

According to article 16 unsuccessful party bears the cost of the proceedings, however the court will not award the costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim. The appeal on the decision is possible but dependent on the procedural laws of the Member State whose court heard the matter. At the moment there hasn't been a complete study on the usefulness of the ESCP however its positive influence on harmonization of procedural rules are already visible (for example single Form A). Use of new technologies will probably be necessary in order to keep the system efficient and effective.⁴²⁹

Looking at the European Small Claims Procedure, we notice a significant improvement in solving low-value cross-border cases within the space of European internal market. It has certain limitations: at the moment is not fully online, claimants occasionally need assistance, limited to defendants who are residents of the EU. Having in mind Brussels I Regulation, particularly the possibility to treat a branch, an agency or other establishment as a resident of the Member State and the expansion of consumer protection scope to non-European defendants, it certainly stands possible to use of European small claim procedure for the cases of cloud service disputes. To argue which dispute resolution is more appropriate for cloud disputes we will compare the characteristics of ESCP (especially IT supported procedure) and private dispute resolutions in the following chapters.

3.1.5. Jurisdiction and EU data protection regulation

So far, we have been dealing with the context of disputes between cloud service providers and users primarily as the transactional relationship between two parties covered by contracts (terms of service). However, when we speak about cloud services, we must not neglect an array of mandatory public law provisions guaranteeing fundamental human rights of consumers (given that consumers as natural persons are entitled to such guarantees) and their interaction with norms of private international law. The right to privacy is a fundamental human right

⁴²⁹ Cortes, Pablo 2010. *Online Dispute Resolution for Consumers in the European Union (Routledge Research in Information Technology and E-Commerce Law)*. Routledge.

enshrined in the Article 8 the European Convention on Human Rights and the Article 7 of the EU Charter of Fundamental Rights. For the purposes of the cloud service dispute context we will focus mainly on data protection aspects in the privacy of cloud consumers (although the right to privacy encompasses more than just data protection, and data protection covers more than just privacy) and its jurisdictional aspect. Directive 95/46/EC also called Data Protection Directive (DPD) has set jurisdictional grounds that could be invoked in a wide array of disputes between different actors as disputants. It establishes grounds for data subjects as defined in Art. 2 of DPD⁴³⁰ to initiate civil litigation against data controller and processors, but also allows jurisdiction in administrative litigation against decisions of Data Protection Authorities.

The EU Member States fostering civil law tradition distinguish public law from private law provisions, while common law countries do not insist on such differences. Consequently, civil law Member States differentiate between remedies in civil procedures and remedies in administrative procedures. Article 22 of the Data Protection Directive is recognizing such a distinction by allowing judicial recourse without prejudice to any administrative remedy.⁴³¹ With the administrative remedies, the actions are being taken before administrative bodies, such as national data protection authorities, although these are not subject of this thesis and will not be further discussed, but they are important to have in mind and to have a clear distinction between administrative or judicial procedures.⁴³² Recent high profile case *Google vs. Spain* implicated jurisdiction which was the dispute involving administrative remedies because Spanish DPA was presumably acting in the exercise of the public authority.⁴³³

Our interests primarily lie in cloud computing disputes between users and providers, as data subjects, controllers and processors respectively, and not in administrative procedure before Data Protection Authority (DPA) or remedies against DPA's decisions. In fact, judicial process and the administrative process could be parallel and independent to each other, without rules

⁴³⁰ According to the Art 2. DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, data subject is an identifiable person is one who can be identified , directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

⁴³¹ Article 22 DPD states:” Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.”

⁴³² See more in Maja Brkan, *Data Protection and European Private International Law*, SSRN ELECTRON. J. (2015).

⁴³³ CJEU case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014)

of *lis alibi pendens*, which would mandate the staying of the proceedings. However, question remains, when and how these disputes invoke rules on jurisdiction as regulated by Brussels I and what is their relationship with Data Protection Directive and recently adopted General Data Protection Regulation which will come into force in May 2018.⁴³⁴

Firstly we need to clarify if does Brussels I Regulation apply at all to the disputes regarding data protection. As we have clarified before Regulation 1215/2012, strictly covers civil and commercial matters, which implies that and administrative matter does not fall under Brussels I Recast. This was confirmed by multiple rulings of the Court of Justice of the European Union.⁴³⁵

How and if we apply Brussels I Regulation depends on who are the parties to the dispute. If a party is a data subject, defined by Art 8 of DPD, as “identified or identifiable natural person”, depending on the type of dispute and facts, he/she could call upon jurisdiction rules of Recast as a consumer or a trader. Data subject could for example sue for breach of contract, non-performance, damages, seek an injunction, be involved in collective action if it is available, etc. We are focused on contractual disputes only, therefore we narrow the scope when we discuss the interplay between DPD and Brussels I Regulation. On the other hand, data protection regulations as public laws surpass any contractual exclusions of mandatory requirements and data protection standards and hence are not subject to free negotiation between parties.⁴³⁶ Maja Brkan invites for reconsideration of DP rules for the special jurisdictional forum, which would counter-balance the negotiation imbalance and protect data subject as a weaker party to negotiation.⁴³⁷

If data subject is at the same time a consumer then protective rules of Brussels I Regulation will be applicable, and data subject could choose between the court of his domicile and the court in place of the business’ establishment. Of course requirements of a professional who has directed its activities to the Member State of consumer domicile applies as confirmed by the case law of CJEU.⁴³⁸

⁴³⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

⁴³⁵ See for example Sonntag [1993] ECR I-1963, paragraph 20; Case C-292/05, Lechouritou and Others [2007] ECR I-1519, para 31; Case C-420/07, Apostolides [2009] ECR I-3571, para 43; Case C-154/11, Mahamdia, [2012] ECR I- [2012] ECR I-0000, para 34. More on it Maja Brkan *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.* p.18

⁴³⁸ See CJEU Case C-585/08, Pammer and Hotel Alpenhof, [2010] ECR I-12527, para 93

As we will see in the next chapter when we discuss Unfair Terms Directive, contractual clauses that subject consumers to exclusive jurisdictions could be considered non-binding if they were not negotiated and they cause a significant imbalance in parties rights and obligations to the detriment of the consumer.⁴³⁹

The data subject could use cloud services for both private and professional use, which in turn excludes consumer protection jurisdiction unless it was evidently marginal professional use and had a negligible role in relation to the contract.⁴⁴⁰

If professional use are part of data subject use of cloud, the general rule of Brussels I Regulation will apply, and the court of defendant's domicile will have the jurisdiction, but again this will be applied only if the defendant has a domicile in the EU. If cloud user/data subject wants to file a suit against, for example, US based cloud provider, he cannot do it under the Brussels Regulation but should consult his national private international law rules. If we remember the surveyed cloud contracts, a significant number of cloud providers are not established in the EU, and which makes access to courts more difficult or practically inaccessible at all.

3.2. Choice of court agreements - the Hague Convention

We focus primarily on consumers as a weaker party to the contractual disputes. However, we must not forget that even a professional could be a weaker party when placed in negotiation position against an economically more powerful party. Therefore we could argue the extension (limited or full) of the fair legal framework in consumer disputes with cloud providers to the microenterprises as weakest in negotiation power among the small and medium businesses. Although they are ordinarily not able to influence a lot of changes in predispute agreements, they are considered commercial side and as such treated and entitled to same rights and obligation as every other business. Notable exceptions could be found in specific sectorial regulation where additional protection has been put in place.⁴⁴¹ We have seen in Chapter 3 the same provider favorable terms for businesses as well as consumers. Therefore a brief overview

⁴³⁹ Directive 93/13 on unfair terms in consumer contracts

⁴⁴⁰ See CJEU Case C-464/01, Gruber, [2005] ECR I-439, para 39.

⁴⁴¹ Financial Ombudsman Service insight briefing: micro-enterprises and financial services a review of complaints, (2015).

of relevant international instrument that regulates the choice of court in the agreements are in order.

The issue of choice of court agreement is one, but important, an aspect in the regime of jurisdiction. Currently at the international level, a multilateral treaty – the Hague Convention on Choice of Court Agreements 2005 (hereafter called “Choice of Court Convention”) – governs this issue. The Choice of Court Convention is part of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (hereafter called “the Draft Jurisdiction Convention”).⁴⁴² The Draft Jurisdiction Convention was considered to be an ambitious project. It was comprehensive but too controversial; thus, after years of debate, the Hague Conference proposed that the Draft Jurisdiction Convention be scaled down to address the only choice of court agreements between businesses, leaving many of the broader jurisdictional and enforcement provisions out of the discussion.⁴⁴³ On 30 June 2005, all of the Member States approved it as the Hague Convention on Choice of Court Agreements.⁴⁴⁴

The Choice of Court Convention has parallel functional similar to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (“New York Convention”). The difference lies in the characteristic forum or the nature of a choice of court agreement and an arbitration agreement. When parties choose a public forum, they will usually include a choice of court agreement. When parties prefer a private forum, an arbitration agreement may be concluded. The Choice of Court Convention is a more modern and up-to-date international instrument than the New York Convention in the sense that the Choice of Court Convention recognizes the validity of an electronic choice of court agreement.

The Choice of Court Convention lays down uniform rules for the enforcement of international choice of court clauses. Aiming to “promote international trade and investment through enhanced judicial cooperation,” the Convention applies solely to “international cases of exclusive choice of court agreements concluded in civil or commercial matters”.⁴⁴⁵ That is, it applies only to business-to-business (B2B) transactions. It excludes application to consumer

⁴⁴² Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=78> (last access April 1, 2016)

⁴⁴³ Dogauchi and Hartley, the Hague conference on private international law, preliminary draft convention on exclusive choice of court agreements draft 6 . (2004)

⁴⁴⁴ Hague Convention on Choice of Court Agreements. Private International Law - Civil Procedure - Hague , available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (accessed March 22, 2016).

⁴⁴⁵ Art 1 (1) of Hague Convention on Choice of Court Agreements of 30 June 2005. Hague. available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (accessed March 22, 2016)

agreements. However, it does not indicate whether it also excludes a wide range of small and micro businesses or nonprofit organizations. Article 2(2) further excludes its application to the carriage of passengers and goods, claims for personal injury brought by or on behalf of national persons and other matters. Moreover, Article 10 makes clear that a ruling on a matter excluded under Article 2(2) shall not be recognized and enforced under this Convention.

The general scope of the Choice of Court Convention outlined in Article 1 reflects its applicability to the digital age, as the “international” feature of the Convention strongly supports global cross-border electronic transactions. In addition, recognition and application of choice of court clauses concluded electronically can also be found in another two articles of the Choice of Court Convention. As Article 3(c) expressly states, an exclusive choice of court agreement must be concluded or documented “in writing; or by any other means of communication, which renders information accessible so as to be usable for subsequent reference”. The wording of this provision was inspired by Article 6(1) of the UNCITRAL Model Law on Electronic Commerce from 1996. The terminology “by any other means of communication” should be deemed to include any electronic means, although this article could be made clearer by providing that “any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’” as was stated in original Brussels I Regulation.⁴⁴⁶ The consideration of electronic communications is also implied in Article 13 of the Choice of Court Convention. For example, Article 13(1)(b) provides that “the party seeking recognition or applying for enforcement shall produce the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence”. The wording “or other evidence of its existence” was included mainly for agreements concluded electronically.

While Hague Convention was drafted having in mind international commerce between big and medium companies, in excluding consumers and offering no protection the weaker parties as small and micro businesses from its scope makes the convention less relevant from the point of view of high-volume low-value cloud service transactions.

3.2.1. Exclusive choice of court agreements

The definition of “exclusive choice of court agreements” in the Choice of Court Convention, laid down in Article 3, provides that:

⁴⁴⁶ Article 23(2) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”), OJ L 012, 16.01.2001, p. 1, available at europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf

a) Exclusive choice of court means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

This article provides that the Choice of Court Convention only apply to the choice of court agreements in favor of the Contracting States, which can apply to both past and future disputes. It contains five requirements: first, the agreement between two or more parties must exist; second, the form requirement must be satisfied; third, the agreement must designate courts of one state or one or more specific courts in one state excluding all other courts; fourth, the designated court or courts must be in a Contracting State; and finally, the designated courts must be connected to a particular legal relationship.⁴⁴⁷

The validity of the choice of court agreement is to be determined by the law of the state of designated courts, which is problematic having in mind that it can be strategically used and abused by an economically stronger party. Such party, most probable provider, could use its repeat experience to identify most favorable the applicable law to impose on the weaker party in terms of service. As we will see in the following section, legislators have made significant efforts to counterbalance this inequality in a bargaining position.

⁴⁴⁷ Hartley and Dogauchi, Explanatory Report on Convention of 30 June 2005 on Choice of Court Agreements, p.38 , available at: <https://assets.hcch.net/upload/exp137e.pdf>

What we have discussed in this chapter relates to the question of the international legal framework relevant to dispute resolution over cloud services. For the access to justice and our framework, the issue of jurisdiction is of special importance. Rules that regulated court's jurisdiction in international dispute can have a significant influence whether the conflict will be formally disputed or not. In our theoretical framework jurisdiction is the primary feature of availability of dispute resolution body, in the sense of having a right to initiate the formal process. On the other hand, jurisdiction inadvertently has the effect on accessibility. Even on national effect rules governing jurisdiction determine a specific court competent to deal with the issue that, unless placed in ideal physical position between the parties, favor one party to a certain extent. This disadvantage can be that much significant when it comes to international disputes and especially low-value disputes. The physical traits of courts become obstacles in a way to access to justice. These obstacles were one of the leading reasons for the introduction of alternative dispute resolutions whose flexibility in accessibility and procedure could amend some of the issues. We will see in following chapters how the courts also fare in comparison with other dispute resolution bodies when it comes to procedural fairness, efficiency, and effectiveness.

Now that we have seen general rules on establishing court jurisdiction in international disputes that are applicable to cloud services, we need to examine the rules and effects of regulations that circumvent the access to courts, either mandatory or voluntary by the parties. We will discuss now the international legal framework of alternative dispute resolution with a strong emphasis on the regulations within the EU.

Chapter 5 - Alternative Dispute Resolution for Cloud Disputes

1. Introduction

In this chapter, we introduce alternative dispute resolution with the aim of depicting possible ways to solve conflicts in cloud service markets. We have seen in the survey that the significant number of cloud terms of services indicates some form of an alternative dispute resolution (from now on ADR) as a preferred and/or exclusive method for solving disputes with their customers. Looking at our data, we could say that ADR's are still the exception rather than the general choice for most cloud providers mechanisms. Still, it is important to address substantial aspects of ADRs and compare them to the courts in the established framework to draw conclusions on the suitability of the different dispute resolution mechanisms for cloud service disputes.

Within the mentioned variety, however, we will not treat equally all forms as this would not fit in the framework of our research which mostly focuses on adjudicative methods of alternative dispute resolution. Some forms of alternative dispute resolution that can also be described as bargaining methods could be better observed as complementary methods rather than competitive to the mechanisms like arbitration and litigation, therefore are not suitable for baseline comparison of the framework. However, they play a major role in dispute system design, and we need to address them for their function and their relationship with primary subjects of our research. We will give an overview and distinction between most common bargaining mechanisms (negotiation, mediation) and adjudicative mechanisms (arbitration, mock trial, and early neutral evaluation). In the following section, we will introduce ADRs and their more essential forms. The third part of the chapter goes into relevant regulation that shapes ADRs pertinent for our context. In the fourth part, we explore how alternative dispute resolution and specifically arbitration have been applied to consumer disputes and what is their place in access to justice. We will also present the data gathered on ADR providers who are offering dispute resolution to the consumer in the EU through the official site of the EU. All of the above will allow us to draw an inference to the possible use of available ADRs on the cloud service dispute.

2. Definition and types of ADR

Alternative Dispute Resolution is a general name of the group (latin *genus proximum*) encompassing various out-of-court dispute resolution mechanisms. Being a general catch-all notion, the specific mark of ADRs or its *diferentia specifica* is an avoidance of formal/judicial resolution of conflicts. While a broad concept, the lax definition allows all out-of-court mechanisms to be regarded as ADR, regardless of enormous differences in procedure, form, function, and outcomes.

Although used for a long time, the phrase “alternative dispute resolution” itself is not entirely backed by the academia. In last two decades, we are witnessing the push for changing the use of term “alternative” to “appropriate” dispute resolution, while acronym remains the same. The reason for such a change would lie in disassociating with the notion of ADRs as an alternative to the judicial system, but rather to see them as complementary and added value mechanism (

‘alternative to what?’ they ask) since they became very common and in some categories more likely to be used than formal trials.⁴⁴⁸

In Chapter 2 we have previously mentioned the development of alternative dispute resolution within the context of “third wave” of access to justice movement. The story of the alternative dispute resolution goes much further in the history. The origins of different forms of ADR can be traced back to the ancient Greece, but the emergence of *lex mercatoria* in the medieval Europe has catalyzed its growth.⁴⁴⁹ “Merchant law” or *lex mercatoria* grew from customary rules established by traveling merchants looking to avoid jurisdictions and laws of local courts in their trade routes.⁴⁵⁰ From the mechanism of dispute resolution for traveling merchants, it branched further to solving diplomatic conflicts, and it found use in political and social unrests as well.⁴⁵¹ Commercial ADRs have grown in recognition over time and became part of the Permanent Court of Arbitration.⁴⁵² Permanent Court of Arbitration, arose from the Hague conference in 1898, predates the International Court of Justice (and also shares the same address), which indicates the historical importance of ADR mechanisms in the domain of international law. In the US, the American Arbitration Association established in 1926, beside commercial ADR, provided labour-management dispute resolution.⁴⁵³ However, a significant rise of ADR and more common use will be seen only in second half of the 20th century.

A spurt of ADRs in its variety came about in 1970’s under the influence of theories in the fields of sociology, political science, and psychology of previous decades,⁴⁵⁴ which encouraged alternative forms of dispute resolution within the judicial system (court-annexed ADRs) or outside of judiciary.⁴⁵⁵ Theories of integrative and problem-solving negotiation, as in works of Fisher and Ury,⁴⁵⁶ will lead to the development of the practice of mediation, and then later to more hybrid forms mediation-arbitration, arbitration-mediation, summary jury, and

⁴⁴⁸ Jeffrey Scott Wolfe, *Across the Ripple of Time: the Future of Alternative (or, is it “appropriate?”) Dispute Resolution*, 36 TULSA LAW J. 785–812 (2001). Carrie Menkel-Meadow, ALTERNATIVE AND APPROPRIATE DISPUTE RESOLUTION IN CONTEXT FORMAL, INFORMAL, AND SEMIFORMAL LEGAL PROCESSES (2015).

⁴⁴⁹ BARRETT AND BARRETT, *supra* note 4.

⁴⁵⁰ Nikitas Hatzimihail, *Genealogies of Lex Mercatoria*, SSRN ELECTRON. J. (2013); Francesco Galgano, *The New Lex Mercatoria*, 2 ANNU. SURV. INT. COMP. LAW (2010), <http://digitalcommons.law.ggu.edu/annlsurvey/vol2/iss1/7> (last visited Jan 23, 2017); Alec Sweet, *The New Lex Mercatoria and Transnational Governance*, FAC. SCHOLARSH. SER. (2006), http://digitalcommons.law.yale.edu/fss_papers/92 (last visited Jan 23, 2017).

⁴⁵¹ BARRETT AND BARRETT, *supra* note 4.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ Such as works of Lewis Coser, Kurt Lewin and Morton Deutsch.

⁴⁵⁵ Menkel-Meadow, *supra* note 448.

⁴⁵⁶ ROGER FISCHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES NEGOTIATING AN AGREEMENT WITHOUT GIVING IN (1981).

minitrials.⁴⁵⁷ With the globalization and free market expansion, ADRs have become a significant tool in international trade primarily seen as private and an efficient means to an end. The long tradition of ADR has encompassed a variety of methods, and we will provide in following section overview of the most distinct forms and their characteristics.

We would like to point out here that we are observing alternative dispute resolution methods as competitive and comparative methods to formal trials in order to provide a value judgment on which method is preferable given a certain context. We have modalities of the alternative dispute resolution methods as court-adjacent or court-annexed methods, where they supplement existing structures to reduce existing backlog of cases, the decrease inflow of new cases, especially small claims, and in general to improve the efficiency and satisfaction of parties appearing before the court. In this complementary form, ADRs become part of the process before judicial instance depending on jurisdiction. Hence, we choose to group and place these the dispute resolution methods (usually mediation) under the category of courts (to which they are adjacent). Similarly, the same methods that could be complementary or annex to another form of adjudicative methods-arbitration which will be considered under the same category (the form can also distinguish itself in the titles like med-arb or neg-med-arb).

It is difficult to observe and get concrete data on how many of actual conflicts turn to disputes that again undergo all the steps in the available resolution process. Parties usually weigh different agreements are being criticized aspects and expected outcomes before engaging in the process. Stipanovitch suggests that court trial is and always was an exceptional event with very limited aims.⁴⁵⁸ Marc Galanter quips that for the vast majority of users of the court system, the name of the game is “liti-gotiation”—a process of negotiation, adjustment, and accommodation that is carried on against the backdrop of the series of events leading up to trial and, in very rare cases, beyond.⁴⁵⁹ Statistically, no matter what the number of trials, the fact is that the vast majority of matters never reach the courtroom—having been negotiated or resolved in some other fashion short of trial, or even the onset of litigation.⁴⁶⁰ It would be beyond the scope of

⁴⁵⁷ Menkel-Meadow, *supra* note 448. Calvin Morrill, *Institutional Change Through Interstitial Emergence : The Growth of Alternative Dispute Resolution in American Law , 1965-1995* * Calvin Morrill Department of Sociology University of Arizona Tucson , Arizona 85721 USA, ALTERNATIVES 1965–1995 (1998). Carrie Menkel-Meadow, INTRODUCTION, FOUNDATIONS OF DISPUTE RESOLUTION: VOL. I OF COMPLEX DISPUTE RESOLUTION (2012).

⁴⁵⁸ Thomas J Stipanowich, *ADR and the “Vanishing Trial” : The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIR. LEG. STUD. 843–912 (2004). p.847

⁴⁵⁹ Marc Galanter, *Reading the landscape of Dispute: What we know and dont know about our alledgedly contentious and litigious society,* 4 UCLA LAW REV. 1–60 (1983).

⁴⁶⁰ Stipanowich, *supra* note 458.

our research to go into every possibility and modality of previous steps. Therefore we will restrict our focus only to the final phases of the dispute path when other methods did not bear fruits. Adjudicative methods and expected outcomes of the same, in fact, shape the bargaining methods. Hence the availability of “justice” is essential to the negotiating positions. If the certain adjudicative method is preferable and available, it could also influence the choices of parties in previous negotiating stages. If no alternatives are available, the dearth of choice shapes the positions as well. Hornle points that although useful, bargaining methods of ADR (negotiation and mediation) are not comparable to adjudicative forms and serve more as a filter of cases to these forms of adjudication in the broader sense (by which she means state courts and arbitration).⁴⁶¹ Nevertheless, those methods serve the function of dispute resolution and avoidance, so we will briefly describe two most important bargaining methods negotiation and mediation and then arbitration as a relevant adjudicative method.

2.1. Negotiation

Negotiation is not usually perceived as a manifest method of a dispute resolution among the general public. It is rather seen as a common, everyday activity and part of communication in life and business. In academia, negotiation is a broad notion and shared the field of studies between different disciplines, but we focus mostly on dispute resolution and legal aspects of negotiation. Black’s law dictionary define negotiation as a consensual bargaining process in which the parties attempt to agree on a disputed or potentially disputed matter that usually involves complete autonomy for the parties involved, without the intervention of third parties.⁴⁶² Barron’s Law dictionary explains negotiation as a method of dispute resolution where either the parties themselves or the representatives of each party attempt to settle conflict without resort to the courts.⁴⁶³

Traditionally negotiation has been viewed through a strategy of positional bargaining where parties, having in mind their positions compromise and make concessions until they reach an agreement. Ordinarily, parties entering negotiations adopt positions, but frequently become committed and sometimes entrenched to them. The strategy of positional bargaining has been

⁴⁶¹ JULIA HORNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION OPTIONS (2009). p.47

⁴⁶² GARNER, *supra* note 92. p.1136.

⁴⁶³ STEVEN H. GIFIS, BARRON’S LAW DICTIONARY (7th ed.). p. 366

criticized that frames negotiation as an adversarial, zero-sum exercise.⁴⁶⁴ Such strategy of positional bargaining (also sometimes called distribution negotiation) implies that one party will gain at the expense of the other resulting in “win-lose” outcome. In their seminal work, “Getting to Yes,” Fischer, Ury, and Patton propose alternative approach/strategy which they called the principled negotiation.⁴⁶⁵ In the principled negotiation, parties do not focus on positions but underlying interests. By focusing on interests, parties are prodded to look at different aspects, various positions and innovative solutions that could satisfy those interests.⁴⁶⁶ Fisher, Ury, and Patton propose several principles as guidelines for handling negotiation:⁴⁶⁷

- Separate the People from the Problem
- Focus on Interests, Not Positions
- Invent Options for Mutual Gain
- Use Objective Criteria

The principled negotiation (also called integrative, merit-based, or interest-based negotiation) approaches conflict as though the parties have a shared problem for which resolution they need to collaborate. It encourages taking opponent’s point of view of a problem to devise creative solution having in mind opponents interests. Both approaches assume negotiation in good faith. The parties that participate in negotiation without the desire to resolve the conflicts, for whatever purpose, are negotiating in bad faith.⁴⁶⁸

The positional bargaining and its potential win-lose outcome are inherent to the adversarial adjudicative systems with the difference that it is third party or adjudicator who decides on the final outcome. The parties, unable to compromise themselves through negotiation, rely on third-party to take a decision on the strength of the argument of their positions. On the other hand, collaborative approach of interest-based negotiation (principled negotiation) attempts to give objective perspective to the parties with the help of several strategies proposed by Ury and Fischer. Most prominent of those are defining BATNA (Best Alternative to Negotiated Agreement), WATNA (Worst Alternative to Negotiated Agreement). Analysis and differentiation between those two in turn help parties identify the ZOPA (Zone of Possible Agreement). Negotiation characterizes a strong control of the parties on the outcomes of negotiation and flexibility style and form of communication. It could range from highly formal

⁴⁶⁴ Bruce Patton, *Building relationships and the bottom line: The circle of value approach to negotiation*, HARVARD BUS. ONLINE (2004).

⁴⁶⁵ FISCHER, URY, AND PATTON, *supra* note 456.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. LAW REV. 1401 (1958).

written exchange to verbal exchanges during a short meeting. From its diversity of possible ways to negotiate, it is rather straightforward to indicate that negotiation in general as a form of ADR is the most direct, efficient and effective dispute resolution method. However, the effectiveness and the efficiency, and hence success of negotiation depends on the willingness of the parties to agree.

The final agreement is to be found within the boundaries of the zone of possible agreements (ZOPA). Even with the concepts and strategies suggested by Ury and Fischer, sometimes participants are not able to reach agreement on their own (due to possible lack of sharing of information, lack of creativity or poor analysis of the situation and interests) and they are in need of assistance of a third party. The professional third parties willing to participate in dispute negotiation but not to adjudicate are mediators and conciliators. Conciliation is a process where parties reach an amicable agreement with the help conciliator. However, the parties themselves are more active in the resolution of the dispute.⁴⁶⁹ The role of a conciliator is similar to the one of mediator; the difference lies in the primary role of conciliator to restore or repair broken relationship either personal or in business. The mediator is oriented more towards resolving the dispute at hand with a greater emphasis on neutrality towards parties.⁴⁷⁰

2.2. Mediation

Mediation is defined as a method of settling disputes outside of a court setting by the involvement of a neutral third party known as a mediator to act as a link between the parties.⁴⁷¹ Mediation is especially useful in situations where parties are not able or to take steps necessary to reach an agreement by themselves, but there is still a possibility of the agreement which would satisfy parties to an extent (even maybe not meeting their entire expectations). Mediators serve as a neutral link and facilitator in communication, unattached to the parties or issues, and potential guide to a resolution when parties hit an impasse in their positions. Mediation is usually structured as an interactive and dynamic process designed to help parties advance in solving their issues. However, being party-centred it is a voluntary process (except in some mediations where the participation is mandatory by law to a degree) as it depends on party's willingness to participate and give inputs. Mediators use a host of techniques, mostly to open

⁴⁶⁹ GIFIS, *supra* note. 463 p.104.

⁴⁷⁰ David N. Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. LAW SUPPL. (1977).

⁴⁷¹ GIFIS, *supra* note. 463 p. 340.

and improve dialogue, and to guide the dialogue to the common ground and the away from entrenching in the positions excluding compromise. Some of the benefits of mediation recognized by academia and practitioners are:

- Costs - although mediators charge fees they are considerably smaller compared to lawyer's fees in other forms of dispute resolution such as arbitration and litigation⁴⁷²
- Time - mediation is perceived to be faster in handling cases compared to adjudicative forms because of its flexibility and party-oriented process as opposed to more formal processes.⁴⁷³
- Confidentiality - is a hallmark of mediation. Mediators and parties are only privy to the process. It is ethical and legal obligation of a mediator to keep confidential what he/she learned in the process. In many cases mediators do not take notes or if they do they destroy them by the end.⁴⁷⁴
- Control - parties are in control of the process, and they can stop at will, most of the time. The control builds trust between the parties and allows for more mutually agreeable and enforceable solutions.⁴⁷⁵

We already mentioned few domains where mediation (as a form of ADR) established itself as particularly useful: international relations, commercial disputes, financial disputes, workplace and labor disputes... One domain where it has gained much support in recent decades is family disputes. The sensitivity in cases involving children (custody in cases of separation) and also in emotionally charged disputes between spouses (divorce, prenuptial agreements, alimony, etc.), emphasizes the importance of confidentiality and professionalism of mediators. Family mediation (which can be stated for mediation in general) is oriented towards prevention of escalation and conflict aversion. The principles and strategies of Ury, Fischer, and Patton, serve well in organizing and structuring the process with underlying interests of the parties in the minds of mediators.

In comparison with formalized authoritative court proceedings, mediation offers flexible, self-determined approach in which all aspects of the conflict may be considered.⁴⁷⁶ We recognize

⁴⁷² KLAUS J. HOPT & FELIX STEFFEK, *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* (2013). p.99.

⁴⁷³ *Id.*

⁴⁷⁴ Edward Brunet, *REEVALUATING COMPLEX MEDIATION GENERALIZATIONS* (2011).

⁴⁷⁵ HOPT AND STEFFEK, *supra* note 472.

⁴⁷⁶ FELIX STEFFEK, *MEDIATION IN THE EUROPEAN UNION: AN INTRODUCTION* (2012), <https://e-justice.europa.eu/fileDownload.do?id=b3e6a432-440d-4105-b9d5-29a8be95408f>.

three different types of mediation in relation to court proceedings: private mediation (independently of court), court-annexed mediation (initiated by the court but without involvement), and judicial mediation (judges or court officials involved but not necessarily leading the process). The latter two forms of mediation are viable choices for dispute resolution, but as mentioned at the beginning of the chapter we need to assess mediation as a competitive form to judicial proceedings, thus we will mostly comment on the private mediation.

Felix Steffek and Klaus Hopt in collaboration with significant number of researchers in the field distilled from the variety of definitions of mediation the four essential elements (or core definition): (1) dispute resolution procedure, (2) voluntary nature, (3) systematic promotion of communication between the parties and (4) resolution for which the parties bear responsibility and where there is no decision-making power on the part of the intermediary.⁴⁷⁷ They also cite important elements (although not part of the core definition) of neutrality and confidentiality, but also make a remark that in some jurisdiction instead of neutrality reference is made to independence or impartiality, and in some confidentiality is not expressly stated.⁴⁷⁸

Clear delineation between the methods of negotiation and mediation is difficult to do, largely because the actors share the same skill-sets in communication and common goals. The most significant difference is the role of the third party. But also not every dispute is suitable for mediation. Suitability of the conflict for mediation could be determined by assessing factors as nature of the conflict, possibility of a consensual solution, reasonable and desired success/outcome, methods already tried to solve the conflict, probable costs of different procedures to solve the conflict, probable duration of different procedures to solve the conflict including the consideration of a failure of the procedure tried, importance of an on-going relationship with the conflict party/parties, importance of control over the conflict solution, extent to which communication problems have contributed to the conflict, desire to solve further problems in connection with the conflict.⁴⁷⁹ Suitability to resolve disputes when there is a substantial power imbalance between the parties is certainly of importance in our context and will be addressed later.

The structure of mediation is dependent on the type of mediation, and most regulations allow flexible approach where parties and mediators can devise their steps in the process. We can

⁴⁷⁷ HOPT AND STEFFEK, *supra* note 472.p.13.

⁴⁷⁸ *Id.*

⁴⁷⁹ STEFFEK, *supra* note 476.

mark some general points in the already flexible structure. The beginning of mediation depends on the type; if it is private mediation it commences on the will of one party based on agreed clause to mediate; if it is court-annexed or judicial mediation, it starts with court's recommendation or imperative legal norm to attempt mediation before judicial proceedings. This phase is followed by appointment or selection of a mediator. The procedure of mediation varies depending on the style of mediator but in general should have several phases: opening phase - gathering information and in affirming commitment to mediate; exploratory phase - parties and mediator investigate positions and underlying interests of the parties; negotiation phase - mediator and parties trying to come up with solution; concluding phase - settlement in case of success or termination of mediation.⁴⁸⁰

Mediation is different from arbitration in one essential aspect: adjudicatory or decision-making power of the third party in concluding phase. The success/effectiveness of mediation largely depends on the will of the parties, and in cases where this voluntary element is lacking, sometimes the only solution is the legally binding decision of an independent party.

2.3. Arbitration

Arbitration is out-of-court dispute resolution mechanism where parties agree to bring disputes before one or several arbitrators (third parties) who will decide on the issue. Depending on the relevant regulation and agreement of the parties it could be binding on the nonbinding decision (which would be the more advisory role of arbitrator or expert consultation). As with other dispute resolution methods, it comes in many forms and versions. We are primarily interested in private arbitration as opposed to court-annexed or court-ordered arbitration; we want to focus our attention on contractual arbitration only. Of course, arbitration can be used in the vast variety of possible disputes, where it is not strictly forbidden by the law to arbitrate the conflicts (arbitrability), but we are concerned with arbitration that could come out as a consequence of a possible breach of terms of service in cloud service contracts. We have seen in Chapter 3 that a pertinent number of cloud providers based in the US relies on some form of arbitration to resolve issues with its customers.

⁴⁸⁰ Different phases and modules could be found in different legal cultures and jurisdictions. See more in HOPT AND STEFFEK, *supra* note 472; STEFFEK, *supra* note 25.

Historically, called by different names, arbitration existed and followed the development of the society in general.⁴⁸¹ It existed before state-run courts have been established to settle disputes and once judicial systems were in place, it has continued its practice in parallel, growing on specific needs and specializing in them. In modern times where the shape of arbitration as an out-of-court method has been fully accepted, it was bundled with others in the same notion of alternative dispute resolution.

As with other dispute resolution mechanism, it shares certain common characteristics, and it is hard to determine what is typical characteristic for all arbitration processes. However, having in mind that the parties select it (sometimes design) and in some form usually regulated by state and/or private institution, we can comment on the most common structure in the majority of processes. The first question that arises is if the potential dispute could be a subject to arbitration. The arbitrability of the dispute depends on applicable law and could be regulated differently in a different jurisdiction.⁴⁸² Arbitration is perceived as suitable for handling private conflicts that do not concern third parties or infringe their rights.⁴⁸³ Whatever matter society considers to be of a greater public importance could be excluded as a subject matter of arbitration. For example, matters pertaining to family law, status or criminal law are generally excluded. Also in many jurisdictions state intervenes or restricts arbitration in order to protect weaker parties, e.g. consumers. However, when it comes to consumers, we are witnessing a significant difference between the approaches the United States and the EU. The applicable law determines the arbitrability of the subject matter.

Another important element in the condition for arbitration is the existence of arbitration agreement. These agreements come in many shapes, but ordinarily, they are in written form and usually part of the main contract in the shape of the arbitration clause. Arbitration clauses can be more or less detailed, ranging from simple statement that arbitration will be method for resolution of disputes the more detailed clause or even whole contract with specific elements providing the applicable law, place of arbitration, procedure for selection or arbitrators, subject matter of disputes, limitations, waivers, severability of the rest of the contract in case of the clause being declared void and null, etc. Observing terms of service cloud providers, allowed us to see all of these variations and some of this clauses are showcased in Annex B.

⁴⁸¹ BARRETT AND BARRETT, *supra* note 4.

⁴⁸² A REDFERN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2004).

⁴⁸³ T VARADY, JOHN J.. BARCELÓ & AT VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION (2003).

We can also divide arbitration agreements into so-called pre-dispute agreements and post-dispute agreements. Pre-dispute arbitration agreements are usually the part of the general contractor in our case terms of service which is predefined and offered to customers as a contract of adhesion. Pre-dispute agreements are typically criticized on the grounds of lack of choice for customers, lack of consent and inability to negotiate on the elements of the agreement.⁴⁸⁴ We will address the issue of fairness in pre-dispute agreements when we get to the EU Unfair Terms Directive. Post-dispute agreements, on the other hand, are not perceived as problematic; usually, they are the result of negotiation and consent on appropriate dispute resolution methods which underlines interest of both parties to delegate the issue to such a venue.

If there is a valid arbitration agreement for the dispute that occurs between the parties, assuming that conflict is arbitrable, one of the parties can initiate arbitration before an arbitral institution and its arbitrators. Depending on the agreement, which could indicate rules for selection of arbitrators and their number, adjudicators are appointed. We could have one or more arbitrators in the panel which is convened and also sometimes called arbitration tribunal or arbitral tribunal. Pertinent rules determine the selection of the chairman (if there is a chairman) how to proceed with processing the claim. The parties in principle are free to determine the number of arbitrators and their composition. There certain differences in depending on the type of arbitration.

We can differentiate arbitral tribunals in two types of proceedings: *ad hoc* arbitration where parties appoint adjudicators without the involvement of the institution, and institutional arbitration where institutions themselves supervise and/or restrict potential appointees in compliance with their institutional rules.⁴⁸⁵ In case there is a disagreement on appointees, parties can rely on procedural law and courts of the place of the arbitration to resolve any differences over the appointments when it comes to *ad hoc* arbitration, or they rely on rules of the institution if they have chosen specific institutional arbitration. *Ad hoc* arbitrations usually have one to three appointed adjudicator for a specific case, and their role as arbitrators ends with the finality of the case. Institutional arbitrations, especially those dealing with large

⁴⁸⁴ See more about it in chapter 3. Also see EDITED BY GIUDITTA CORDERO-MOSS, *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW* (Giuditta Cordero-Moss ed., 2011); Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law*, SSRN ELECTRON. J. (2008); RON SCRUGGS, THOMAS TRAPPLER & DON PHILPOTT, *CONTRACTING FOR CLOUD SERVICES* (2011); WK Hon, Christopher Millard & Ian Walden, *Negotiating Cloud Contracts: Looking at Clouds From Both Sides Now*, STAN. TECH. L. ... 79–129 (2012); Compulsory Arbitration Agreements in Domestic and International Consumer Contracts, KING.

⁴⁸⁵ VARADY, BARCELÓ, AND MEHREN, *supra* note 483.

commercial cases with an international element, have long-established practices and many times have specialized panels which increase the trust in the institutions. Better-known global arbitrational institutions are International Chamber of Commerce (ICC) in Paris,⁴⁸⁶ the American Arbitration Association⁴⁸⁷ (and its International Centre for Dispute Resolution - ICDR for international arbitration), the London Court of International Arbitration,⁴⁸⁸ the Arbitration Institute of the Stockholm Chamber of Commerce⁴⁸⁹, the Singapore International Arbitration Center⁴⁹⁰, etc. The International Centre for Settlement of Investment Disputes (or ICSID) is the best-known arbitration institution created by the Washington Convention in 1965 to settle disputes between states and foreign investors.

Ad hoc arbitrations allow more party autonomy in determining procedural rules that guide the process.⁴⁹¹ Institutional arbitration has pre-determined rules of procedure with more or less possibility of customizing those rules for the purposes of a specific case.⁴⁹² The procedural laws which apply in the seat of the arbitration in combination with the agreed *ad hoc* or institutional rules determine procedural rights and duties of the parties and the tribunal.

Most national laws regulating arbitration guarantee minimum procedural justice in the sense of duty of the tribunal to be impartial towards parties and to allow both sides to be heard equally.⁴⁹³ However, when it comes to appealing the decision of the tribunal, it depends on the institution and applicable law. Most countries grant the supervisory role to the courts, allowing parties to appeal on the grounds of arbitrability, breach of norms of public order, fraud or some other significant breaches of the applicable law.⁴⁹⁴

The final result of arbitration is an adjudicatory decision on the merits called arbitral award or arbitration award. The award is analogous in effect to court judgments in commercial matters. In case a losing party does not comply with the arbitral award and voluntarily pays, the award has to be enforced through a court in the jurisdiction where other party resides or has assets. When it comes to international commercial arbitration, the most important international tool is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958,

⁴⁸⁶See more at: <http://www.iccwbo.org>

⁴⁸⁷ See more at: <https://www.adr.org>

⁴⁸⁸ See more at: <http://www.lcia.org/>

⁴⁸⁹ See more at: <http://www.sccinstitute.com/>

⁴⁹⁰ See more at: <http://www.siac.org.sg/index.php>

⁴⁹¹ Giuditta Cordero-Moss, *Limits on Party Autonomy in International Commercial Arbitration*, 4 PENN STATE J. LAW INT. AFF. (2015).

⁴⁹² *Id.* CR Drahozal, *Party Autonomy and Interim Measures In International Commercial Arbitration*, (2011),

⁴⁹³ VARADY, BARCELÓ, AND MEHREN, *supra* note 483.

⁴⁹⁴ *Id.*

also known as the New York Convention. Signed by 156 countries, it allows international arbitration awards to be enforceable in most of the countries in the world. It emphasizes the significance of international cooperation and regulation for the success of arbitration and alternative dispute resolution mechanisms in general.

2.4. Online dispute resolution

To say that an online dispute resolution is a form of alternative dispute resolution is oversimplification and debatable statement.⁴⁹⁵ We chose to put the term here for clarification and reference in following discussions. We do not have universally acceptable and uncontested definition of online dispute resolution (hereinafter: ODR), but then again we can operate with several different definitions depending on an approach that is being taken. This is precisely because ODR as a field is a meeting point between several different disciplines, ranging from technical fields of computer science like software engineering, artificial intelligence and legal knowledge systems to legal and social studies of conflict resolution, dispute avoidance, and management.

Defining ODR usually means focusing on a specific aspect. If we focus on out-of-court dispute resolution, then we can say that ODR is a part of the larger field of ADR, or more commonly to see it as an extension of ADR. Then again, if we focus on the “online” part, we define ODR through the use of online technologies and focus on the application of such technology in dispute resolution regardless whether it’s strictly out-of-court, court-annexed or an integral part of the judicial system. ODR has become a common term that includes any use of information communication technologies in dispute resolution. Katsh and Rifkin coined the term “fourth party” for the technology that facilitates the dispute resolution.⁴⁹⁶ The term has, even more, standing with the developments in artificial intelligence which enables software to play a significant role in dispute resolution.⁴⁹⁷

Recently adopted UNCITRAL’s Technical Notes offer a definition of ODR in section 5 as, a “mechanism for resolving disputes through the use of electronic communications and other

⁴⁹⁵ Carrie Menkel-Meadow, *Is ODR ADR? REFLECTIONS OF AN ADR FOUNDER FROM 15TH ODR CONFERENCE, THE HAGUE, THE NETHERLANDS, 22-23 MAY 2016* (2017).

⁴⁹⁶ Katsh, Katsh, and Rifkin, *supra* note 3.

⁴⁹⁷ ARNO R. LODDER & J. ZELENKOW, *ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY* (2010).

information and communication technology.”⁴⁹⁸ This definition emphasizes role of technology and is neutral towards out-of-court aspect. Nevertheless, ODR has not gotten that far from ADR, and its forms are still largely comparable with traditional offline ADR.

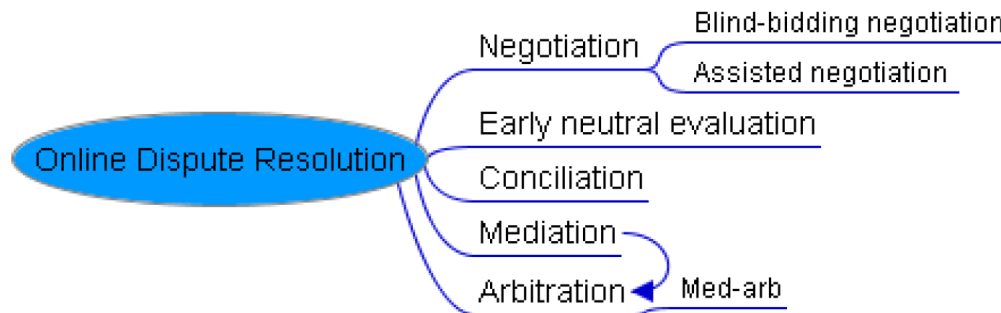


Figure 1. ODR basic typology by Marta Poblet⁴⁹⁹

Among the ODR methods that are considered authentic, blind-bidding and some form of automated or assisted negotiation are usually mentioned. Blind-bidding is a form of settlement through an auction, where party bids for appropriate amounts for settlement, either precisely or more usually in a certain range, while at the same time unaware of the same bid from opposing party.⁵⁰⁰ When both parties blindly overlap in their offers or come to a certain close range, the software declares the issue settled. This mechanism is especially useful when there is a need for quick monetary settlements.

Assisted negotiation is the method where technology guides the parties in certain phases of their negotiation.⁵⁰¹ The “assistant” could streamline the negotiation and guide the conversation to specific points which are presumably in service of a potential settlement. Currently, many online platforms that offer a form of dispute resolution or complaint handling incorporate some form of assisted negotiation as well.

⁴⁹⁸ UNCITRAL’s Working Group III A/CN.9/WG.III/WP.140 - Online dispute resolution for cross-border electronic commerce transactions: Draft outcome document reflecting elements and principles of an ODR process

⁴⁹⁹ Marta Poblet, *Introduction: Bringing a New Vision to Online Dispute Resolution*, EXPAND. HORIZONS ODR PROC. 5TH INT. WORK. ONLINE DISPUT. RESOLUT. (ODR WORK. CONJUNCTION WITH 21ST INT. CONF. LEG. KNOWL. INF. SYST. (JURIX 2008) (2008), <http://ceur-ws.org/Vol-430/Paper1.pdf> (last visited Apr 15, 2017).

⁵⁰⁰ THOMAS SCHULTZ ET AL., *ONLINE DISPUTE RESOLUTION: THE STATE OF THE ART AND THE ISSUES* UNIVERSITY OF GENEVA (2001).

⁵⁰¹ Jeanne M Brett, *STICKS AND STONES : LANGUAGE , FACE , AND ONLINE DISPUTE RESOLUTION* University of Melbourne, 50 85–99 (2007).

Since its early days in mid-nineties, ODR has become a vibrant scholarly field with many prominent scholars researching the role of new technologies on the principles and practices of alternative dispute resolution.⁵⁰² We will discuss more on the role and development of ODR in Chapter 7.

3. International regulation of alternative dispute resolutions

We have briefly presented three main methods in alternative dispute resolution domain and touched upon ODR. In order to assess whether they would be a useful tool in solving disputes in cloud service market, we need to examine legal framework that supports ADR methods and how it deals with disputes with a cross-border element. The negotiation is not regulated as a method of dispute resolution, but rather it is subsumed under the regulation of contract law since the potential outcome of negotiation could be legally binding agreement. All the issues fall under the domain of contracts and applicable law to the contracts which have to be consulted. Although we will not go into issues of contracts and their enforcement, negotiation will be discussed when it is necessary for relation to mediation and arbitration. They could be observed more as stones we need to step on to reach the same goal. Sometimes a stone can be skipped, and sometimes it is more prudent to tread on each step carefully, so we do not fall. Negotiation is the first stepping stone. It is the most informal way, and many terms of services instruct users to contact cloud providers directly before initiating any formal complaint. Sometimes it is a legal requirement and condition to following formal procedure. Being most informal as a dispute resolution, it does not (and probably should not) require regulatory intervention on party autonomy which is protected by contract law. Hence, we will be discussing mostly regulation of mediation and arbitration, which occasional referencing negotiation as appropriate.

⁵⁰² Katsh, *supra* note 3. GABRIELLE. KAUFMANN-KOHLER & THOMAS (LAWYER) SCHULTZ, ONLINE DISPUTE RESOLUTION : CHALLENGES FOR CONTEMPORARY JUSTICE (2004).

3.1. EU Regulation of ADR

The approach of legislators can vary depending on how they perceive ADR's role in relation to access to justice. The EU stance has oscillated over time from a light touch, skeptical of ADRs as an alternative to litigation, to considering significant support to out-of-court binding resolutions, and back again. In the "Consumer Access to Justice Green Paper" from 1993, the EU Commission took cautious approach considering useful roles of mediators and ombudsman but suspected the guarantees of independence of arbitrators.⁵⁰³ According to the Green Paper adjudicatory role is best vested in the judiciary of the rule-of-law states.⁵⁰⁴ In ADR Communication from 1998, Commission suggests principles that could indicate the Commission's support to the involvement of the third parties, similar to the likes of binding consumer arbitration.⁵⁰⁵ But later in 2001, the ADR recommendation supports consensual resolution of consumer disputes.⁵⁰⁶ At the time E-Commerce Directive in its Article 17 arranges that the Member States shall ensure in the event of disagreement between an information society service provider and the recipient of the service, that their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.⁵⁰⁷ Shortly after, Green Paper on alternative dispute resolution in civil and commercial law (2002 ADR Green Paper) proposes pan-EU ADR mechanism.⁵⁰⁸ After adopting European Code of Conduct for Mediators in 2004, the Commission pushed for the EU Mediation Directive.

⁵⁰³ Commission Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market. p.57.

⁵⁰⁴ *Id.*

⁵⁰⁵ Communication from the Commission of 30 March 1998 on the out-of-court settlement of consumer disputes [COM(1998) 198 final - not published in the Official Journal].

Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [Official Journal L 115 of 17.4.1998]. WRBKA, *supra* note.56 p. 86.

⁵⁰⁶ Commission recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, 4 April 2001, OJ 2001 No. L109/56 (2001 ADR Recommendation).

⁵⁰⁷ Article 17 of the 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 (Directive on electronic commerce)

⁵⁰⁸ Green paper on alternative dispute resolution in civil and commercial law, 19 April 2002, COM (2002) 196 final.

3.1.1. EU Mediation Directive

The Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (from hereon: Mediation Directive) provides a framework for cross-border mediation. The Mediation Directive dates from 21 May 2008, has been implemented in the European Member States' law (except Denmark) from 20 May 2011.

The extent and the precise nature of the Articles of the Mediation Directive reflected the different regulatory approaches of the Member States and the fact that mediation as a dispute resolution mechanism was still in the process of development.⁵⁰⁹ Some Articles contain concrete and hard rules for the Member States to transpose into their national laws, such as Art. 6 on the enforceability of settlement agreements developed in mediation or Art. 7 on confidentiality.⁵¹⁰

Other Articles are formulated rather softly and express rather a desire than clear rules to implement, such as Art. 4 on ensuring the quality of mediation and Art. 5 on the relationship between court proceedings and mediation.⁵¹¹ Then again, some issues are not directly dealt with by the regulatory part of the Directive at all, for example, the liability of mediators.

3.1.1.1. Scope

The application of the Mediation Directive is narrow in several aspects. It starts with the definition of mediation which could be interpreted restrictively to some forms of mediation. The Art. 3(a) determines the scope:

“Mediation means a structured process, however, named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.”

Art. 3(b) includes judicial mediation:

“It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.”

⁵⁰⁹ STEFFEK, *supra* note 476.

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

The Directive only applies to civil and commercial matters and excludes rights and obligations which are not at the parties' disposal under the relevant applicable law.⁵¹² More relevant for our context, the Directive only applies to cross-border disputes as defined in Art. 2: a dispute in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Article 5 an invitation by a court to use mediation or attend an information session is made to the parties. While it only applies to cross-border disputes, the Directive does not restrict the Member States to enact laws that cover cross-border as well as purely national mediations, and a single set of rules for national and international mediations would be desirable, as it would foster the understanding and practice of mediation and avoids arbitrarily different regulation.⁵¹³

3.1.1.2. Courts and mediation

The relationship between court proceedings and mediation is dealt with in Art. 5 of the Mediation Directive where it allows courts to invite the parties to use mediation in order to settle the dispute or to attend an information session on the use of mediation. The Directive gives priority to party autonomy and the principle of voluntariness. However, the Directive expressly does not intervene in the Member States willingness to make mediation compulsory if desired, or from developing other incentives to use mediation and imposing sanctions for not using mediation. In any case, such measures could not prevent the parties from exercising their right of access to the judicial protection.

3.1.1.3. Enforcement of mediation settlements

According to the research, agreements resulting from mediation have a higher chance of performance compared with court decisions.⁵¹⁴ Mediation agreements to settle the dispute are

⁵¹² Art. 1(2) of the Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters

⁵¹³ *Id. Id.*

⁵¹⁴ Smith, *supra* note 470; Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is: The Problem in Court-Oriented Mediation*, 15 GEORG. MASON LAW REV. (2007); Brunet, *supra* note 474.

based on party autonomy instead of an authoritative third party ruling which indicates that parties only agree if they want the solution, hence the higher satisfaction. Mediation settlements are rather considerate and are prone to taking into account financial difficulties of the parties.⁵¹⁵ Nonetheless, the parties desire to create an enforceable agreement. This might be the case if the obligations agreed on are far in the future or if the parties have specific financial or emotional security needs.⁵¹⁶ According to Art. 6 Mediation Directive the Member States must ensure that a written agreement resulting from mediation can be made enforceable with the consent of the parties. However, the Directive necessitates that the content of the agreements are not to be contrary to the law and to be enforceable under the applicable law of the Member State where the request is made.⁵¹⁷ It gives some option to the Member States on the selection of the competent institution (court or other competent authority) and appropriate form (decision, judgment or another authentic instrument, but the general rules on cross-border and national enforcement apply. Therefore, if a mediation agreement leads to a settlement in a court, it will be enforceable under the national law and Art. 59 of Brussels I (Regulation 1215/2012) and if a settlement is fixed as an authentic instrument, it is enforceable under the national rules for such instruments and respectively Art. 58 Brussels I Recast.

3.1.1.4. Confidentiality

The willingness of the parties to disclose information which then forms the basis for a proposal favorable to all involved in the conflict is key to the success of mediation.⁵¹⁸ The discussion between the mediator and single party in privacy is used as an opportunity to convey sensitive information which the mediator may use to develop solution scenarios.⁵¹⁹ Confidentiality rules, either mandatory by law or merely contractual, intend to ensure the trust of the parties and to avoid reluctance to disclose information out of fear that the information might be used against them in subsequent court or arbitration proceedings.⁵²⁰ According to Art. 7(1) Mediation Directive the Member States must ensure preservation of confidentiality by the mediators or the parties involved and to guarantee that persons involved in the administration of the process (legal counsel, experts, translators, etc.) will not be compelled to give evidence in judicial

⁵¹⁵ STEFFEK, *supra* note 476.

⁵¹⁶ *Id.*

⁵¹⁷ Art. 6 of Mediation Directive

⁵¹⁸ *Id. Id.*

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

proceedings or arbitration regarding information arising out of or in connection with mediation. If the parties agree otherwise, it will not apply (also where public policy so requires or where disclosure is necessary in order to implement or enforce the mediation settlement). Nonetheless, the Member States are allowed to enact stricter measures to protect the confidentiality of mediation.⁵²¹

The Mediation Directive rectified a number of issues that perplexed mediation as a cross-border dispute resolution, and we highlighted few, but its effect on the use of mediation or ADR in general in commercial and consumer disputes was modest and necessitated additional legislation. The key (and also general) the problem is that it relies on the willingness of the parties and if a single party refuses to cooperate the effort becomes ineffective, and without proper incentives parties within legal systems that have not been accustomed to using mediation did not respond to it with massive success.⁵²² This is of particular importance when there is a significant negotiation power discrepancy, and the Directive does not offer any solutions for those cases. Another issue is the Directive does not require Member States to introduce mediations schemes where did not exist, therefore parties from the certain Member States would not enjoy the same privilege of equal access to mediation in case of need even if there is a sufficient willingness to participate from both sides.

3.1.2. EU ADR Directive

While the Mediation Directive focused on a single form of dispute resolution, after some deliberation, the EU Commission attempted to harmonize alternative dispute resolution methods for consumer protection in all Member States by establishing certain standards and requirements without prejudice to Directive 2008/52/EC. In 2013 European Parliament voted in favor of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR).

3.1.2.1. Scope

The purpose of the EU ADR Directive is clearly stated in the first article: achievement of a high level of consumer protection ensuring that consumers can, on a voluntary basis, submit

⁵²¹ Art. 7(2) of Mediation Directive

⁵²² CHRISTOPHER. HODGES, IRIS. BENÖHR & NAOMI. CREUTZFELDT-BANDA, CONSUMER ADR IN EUROPE. (2012).

complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures.⁵²³ The Directive is without prejudice to national legislations making participation in ADR procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.⁵²⁴

The scope of application, defined in Article 2, are procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.⁵²⁵

The Directive's scope excludes a number of possible disputes related to work relationship with trader, procedures before consumer complaint-handling systems operated by the trader, non-economic services of general interest, disputes between traders, direct negotiation between the consumer and the trader, attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute, procedures initiated by a trader against a consumer, health services, public providers of further or higher education.⁵²⁶

3.1.2.1. Access to ADR and procedures

The ADR Directive places obligation on Member States to facilitate consumers' access to ADR bodies and imposes requirements for ADR providers: to maintain an up-to-date website which provides the parties with easy access to information concerning the ADR procedure, and which enables consumers to submit a complaint and the requisite supporting documents online; to give information on an durable medium (paper) and to enable consumers to submit the complaints off-line; enable the exchange of information between the parties via electronic means or, if applicable, by post; accept both domestic and cross-border disputes, including disputes covered by ODR Regulation (see further in 3.1.2.3.).⁵²⁷

⁵²³ Art 1 of DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

⁵²⁴ Art 1 of Directive on consumer ADR

⁵²⁵ Art 2 (1) of Directive on consumer ADR

⁵²⁶ Art 2 (2) of Directive on consumer ADR

⁵²⁷ Art 5 of Directive on consumer ADR

Directive leaves to the Member States to permit or forbid to ADR bodies to introduce procedure rules to refuse to deal with disputes in the cases where : (a) the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader; (b) the dispute is frivolous or vexatious; (c) the dispute is being or has previously been considered by another ADR entity or by a court; (d) the value of the claim falls below or above a pre-specified monetary threshold; (e) the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which shall not be set at less than one year from the date upon which the consumer submitted the complaint to the trader; (f) dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity.⁵²⁸ In paragraph 4 of Art 5, it is stated that if an ADR entity is unable to consider a complaint that has been submitted to it, a Member State shall not be required to ensure that the consumer can submit his complaint to another ADR entity.

3.1.2.2. Principles

Articles 6 to 10 of the Directive on consumer ADR establishing guarantee principles which should harmonize practices alternative dispute resolution on the single market. These principles are expertise, independence, impartiality, transparency, effectiveness, fairness, liberty, and legality.

Expertise, independence, impartiality rules established in the article 6, guarantee that the parties will possess necessary knowledge skills in general and standing law and that they are independent of parties and appointed for sufficient duration to their positions. Their remuneration should not be dependent on the outcome of the case. Along with giving general requirements of expertise, independence, impartiality, in breach of Article 6, the Member States shall ensure that there is a procedure in place to remedy the issues. Since the ADR directive is trying to harmonize existing practice in the Member States, the EU Commission needed to ensure impartiality and independence of long-established sectorial ADR bodies and their remuneration schemes. Paragraph 4 states:

“Where the natural persons in charge of ADR are employed or remunerated exclusively by a professional organization or a business association of which the trader is a member,

⁵²⁸ Art 5 (4) of Directive on consumer ADR

Member States shall ensure that, in addition to the general requirements set out in paragraphs 1 and 5, they have a separate and dedicated budget at their disposal which is sufficient to fulfil their tasks.

This paragraph shall not apply where the natural persons concerned form part of a collegial body composed of an equal number of representatives of the professional organisation or business association by which they are employed or remunerated and of consumer organisations.”

The question of financing of ADR bodies has been the focus of academia with specific emphasis in the researcher on the potential bias of ADR entities could have to traders hoping a significant number of cases to them.⁵²⁹

Transparency principle ensures availability of the most relevant information (contact address, the language in use, fees, nature of the procedure, competences of ADR bodies, average duration, grounds for refusal, etc.), either on the website of the ADR entities or durable medium per request.⁵³⁰

Under the principle of effectiveness, Member States are required to ensure easy online and off-line access to ADR bodies, access to the procedure without necessary legal representation, that the ADR procedure is free of charge or available at a nominal fee for consumers, and that requirement of the quick notification of the complaint.⁵³¹

In the Art. 7, the outcome of the ADR procedure, but not the enforcement, is to be available in a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file. However, In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days’ time period. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute.⁵³²

The principle of procedural fairness is represented in the Article 9 of the Directive. Member States guarantee the right of the parties to express their point of view (lat. *audiatur et altera*

⁵²⁹ LISA B. BINGHAM & LISA BLOMGREN AMSLER (FORMERLY BINGHAM), 29 ON REPEAT PLAYERS, ADHESIVE CONTRACTS, AND THE USE OF STATISTICS IN JUDICIAL REVIEW OF EMPLOYMENT ARBITRATION AWARDS MCGEORGE LAW REVIEW (1997); Menkel-Meadow, *supra* note 448; Carrie Menkel-Meadow, DO THE HAVES COME OUT AHEAD IN ALTERNATIVE JUDICIAL SYSTEMS? REPEAT PLAYERS IN ADR (1999); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RIGHTS EMPLOY. POLICY J. (1997).

⁵³⁰ Art 7 of Directive on consumer ADR

⁵³¹ Art 8 of Directive on consumer ADR

⁵³² Art 8 of Directive on consumer ADR

pars).⁵³³ The parties should also be informed of the outcome of the procedure in written form. In ADR procedures with solution proposal as an outcome the parties have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure, but in case national rules allow mandatory participation this will be applicable only to consumers.⁵³⁴

The liberty principle in Art.10, in a similar fashion to Unfair Terms Directive, confirms that Member States shall guarantee that an agreement between a consumer and an on an ADR procedure is not binding on the consumer if it was concluded before the dispute happened and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.⁵³⁵ The legality principle expressed in Art 11. ensures that rules of ADR Directive and Mediation Directive in the case of conflict of law do not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of his residence.⁵³⁶

3.1.2.3. Relationship with EU ODR Regulation

The Directive on consumer ADR and the EU ODR Regulation have been introduced at the same time as a package intended to improve consumer protection and redress. The EU ODR Regulation introduced single pan-European online dispute resolution portal, where consumers can file complaints in a simplified manner.⁵³⁷ The EU ODR website provides free case management tool for ADR providers that lack technical expertise or practice in handling cases online. We will discuss more phenomena of ODR and the regulation in the following chapter. Here we would like to point the complementary role of the two regulations. While ADR Directive was intended to harmonize and to bring the same level of standards existing ADR entities and to ensure that the Member States provide alternative dispute resolution in the first place, the EU ODR Regulation was meant to provide single entry point for consumer

⁵³³ Art 9 of Directive on consumer ADR

⁵³⁴ Art 9 (2) of Directive on consumer ADR

⁵³⁵ Art 10 of Directive on consumer ADR

⁵³⁶ Art 11 of Directive on consumer ADR

⁵³⁷ COMMISSION IMPLEMENTING REGULATION (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes

complaints on a single market, both domestic and international, which can link existing network of ADRs in all Member States (that fulfill requirements of the ADR Directive). The Recital 18 of the Regulation clarifies intent to make single entry point which should allow consumers and traders to submit complaints by filling in an electronic complaint form available in all the official languages of the institutions of the Union and to attach relevant documents and it should transmit complaints to an ADR entity competent to deal with the dispute concerned.⁵³⁸

The two pieces of legislation are interconnected. The EU Regulation on Consumer ODR relies on the definitions in the Art 4 of Directive on consumer ADR, which indicates the intent of unambiguous interpretation between two acts in the ADR practice. The ODR website is meant to provide relevant data on ADR entities, which has been indicated as a requirement in the ADR Directive, but also to provide statistical data on the use of ADR by consumers on the European level, having in mind the entry point of a dispute - EU ODR platform. On the other hand, ODR regulation has a bit wider scope since it allows disputes of traders against consumers (under certain conditions), and at the same time, narrower scope since it only applies to cases related to online sales and services' contractual disputes.

Both, the Directive and the Regulation do not provide a lot of assistance when it comes to enforcement, indicating that when it comes to enforcement of arbitral awards (when one party does not comply) we need to revert to New York's convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958) or the Mediation Directive when it comes to outcomes of mediation and cross-referencing applicable Brussels I Regulation rules.

In general, both regulations rely on a willingness to participate by the parties based on post-dispute agreements, which by itself can render accessible pan-European single-entry point and available infrastructure (ADR network) ineffective considering the potential number of cases omitted on the facts that one party does not agree to the procedure.

⁵³⁸ Recital 18. of 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 or ODR Regulation)

3.1.3. EU ODR Regulation

While the online dispute resolution in is the full title of the Regulation No 524/2013, we cannot find a definition of ODR itself. ODR as a domain is a bit more difficult to define, and it is still debated the issue in academia.⁵³⁹ What we can infer from the stated purposed of the Regulation in Art 1, is that under ODR falls out-of-court resolution of disputes between consumers and traders online. If that it all, only a method of out-of-court than the discussion would be over soon. However, as we will see in Chapter 6, the use of technology allowed new and innovative forms of ODR that evolve of the traditional concept of ADR. Also, trends and demand for ODR in the courts show that maybe lines between ODR and e-courts will be blurred.⁵⁴⁰

Nevertheless, the purpose of Regulation is through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market, and in particular of its digital dimension by providing a European ODR platform ('ODR platform') facilitating the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online.⁵⁴¹ We can notice here the focus on the EU and the improving the functioning of internal market which is also explained in Recital 4 where it states that the uneven availability, quality, and awareness of simple, efficient, fast and low-cost means of resolving disputes arising from the sale of goods or provision of services across the Union constitutes a barrier within the internal market which undermines consumers' and traders' confidence in shopping and selling across borders.⁵⁴²

The scope of the regulation is similar to the ADR Directive. In fact, it invokes the intervention of an ADR entity listed in accordance with Article 20(2) of Directive 2013/11/EU. However, it is focused only on contractual disputes that arise out of online sales and services.⁵⁴³ To be able to deal with the e-commerce disputes and to impede the fragmentation of the internal market EU establishes a platform that will be a single pan-EU entry point for potential disputants.

The ODR platform has been built to provide following functions in accordance with Art 5 of Regulation: (a) to provide an electronic complaint form which can be filled in by the

⁵³⁹ Menkel-Meadow, *supra* note 529.

⁵⁴⁰ See Hiil TREND REPORT IV ODR and the Courts: The promise of 100% access to justice? Online Dispute Resolution 2016

⁵⁴¹ Art 1 of Regulation on consumer ODR

⁵⁴² Recital (4) of Regulation on consumer ODR

⁵⁴³ Art 2 of Regulation on consumer ODR

complainant party; (b) to inform the respondent party about the complaint; (c) to identify the competent ADR entity or entities and transmit the complaint to the ADR entity, which the parties have agreed to use; (d) to offer an electronic case management tool free of charge, which enables the parties and the ADR entity to conduct the dispute resolution procedure online through the ODR platform; (e) to provide the parties and ADR entity with the translation of information which is necessary for the resolution of the dispute and is exchanged through the ODR platform; (f) to provide an electronic form by means of which ADR entities shall transmit the information; (g) to provide a feedback system which allows the parties to express their views on the functioning of the ODR platform and on the ADR entity which has handled their dispute; (h) to make publicly available the following: (i) general information on ADR as a means of out-of-court dispute resolution; (ii) information on ADR entities listed in accordance with ADR Directive which are competent to deal with specified disputes; (iii) an online guide about how to submit complaints through the ODR platform; (iv) information, including contact details, on ODR contact points designated by the Member States; (v) statistical data on the outcome of the disputes which were transmitted to ADR entities through the ODR platform.

Another important aspect is unifying and streamlining the complaint procedure with user-friendly and easily accessible the complaint form on EU ODR site. Certain information are conditional, and if the complaint form has not been fully completed, the complainant party shall be informed that the complaint cannot be processed further unless the missing information is provided.⁵⁴⁴

Upon receipt of a fully completed complaint form, the ODR platform shall, in an easily understandable way and without delay, transmit to the respondent party:⁵⁴⁵

- a) information that the parties have to agree on an ADR entity in order for the complaint to be transmitted to it, and that, if no agreement is reached by the parties or no competent ADR entity is identified, the complaint will not be processed further;
- b) information about the ADR entity or entities which are competent to deal with the complaint, if any are referred to in the electronic complaint form or are identified by the ODR platform on the basis of the information provided in that form;
- c) in the event that the respondent party is a trader, an invitation to state within 10 calendar days:

⁵⁴⁴ Art 9 of Regulation on consumer ODR

⁵⁴⁵ *id*

- Whether the trader commits to, or is obliged to use, a specific ADR entity to resolve disputes with consumers, and
- Unless the trader is obliged to use a specific ADR entity, whether the trader is willing to use any ADR entity or entities from those referred to in point (b)

If the parties fail to agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint will not be processed further, and complainant party will receive information on other means of redress.⁵⁴⁶

An ADR entity which accepted to handle the dispute has to conclude the ADR procedure within the deadline set in ADR Directive (90 days), and it will not require the physical presence of the parties or their representatives unless its procedural rules provide for that possibility and the parties agree.⁵⁴⁷ On the other hand, ADR entity is not required to conduct the ADR procedure through the ODR platform even though case management tool is available freely.

Finally, it is important to notice that according to article 14, traders established within the EU engaging in online sales or service contracts, and online marketplaces established within the Union shall provide on their websites an electronic link to the ODR platform.⁵⁴⁸ This is a potential problematic requirement. On one hand e-commerce business has a mandatory requirement to place a visible link to ODR site, or to communicate it in the offer through an email, or in where applicable in the general terms and conditions of online sales and service contracts. On the other hand, the participation in the ADR procedure is not mandatory unless under some sector-specific or national regulation. This could be a possible source of confusion for the consumers looking for redress and coming across the link on the site or in general terms of service, just to find out later, that the trader is not willing at all to be involved in the process. Potentially it could undermine the trust in the EU ODR site. As it is the mandatory link is no more than an advertisement of sorts.

3.1.4. Unfair Terms Directive

The application of the Directive on unfair terms in consumer contracts is quite broader than the regulation of dispute resolution, and its primarily deals with rights and duties of consumers in

⁵⁴⁶ Art 9 (8) of Regulation on consumer ODR

⁵⁴⁷ Art 10 of Regulation on consumer ODR

⁵⁴⁸ Art 14 of Regulation on consumer ODR

contracts where there is a significant imbalance in the rights and obligations between consumers on the one hand and sellers or suppliers on the other hand.⁵⁴⁹ It directly goes to the subject matter of consumer protection in the EU. We want to emphasize the connection and treatment of consumers and the protection they receive when it comes to the selection of dispute resolution methods and entities.

To be considered fair, contract terms need to be written in an intelligible language and in “good faith.” Possible ambiguities in interpretation will be interpreted in favour of consumers.⁵⁵⁰ Unfair term has been defined in Art. 3, where it states that contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

It expands on that definition with a clarification:

“A term shall always be regarded as not individually negotiated where it has been drafted in advance, and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.”⁵⁵¹

The Directive obliges the Member States to set up regulation where the unfair terms, as defined in Art 3, will not be binding for consumers while allowing for possible co

This article covers a vast majority of today’s online contracting by click-through agreements which appear as predefined terms of service. As it is seen in Chapter 3, the majority of cloud providers offer contracts of adhesion for the services where they already predefined terms and conditions. Even if all terms have not been predefined and there is room for negotiation with cloud consumer, dispute resolution clauses are usually not negotiable. Still, many providers are aware of mentioned mandatory consumer protection norms and are declaring severability of the rest of the contract in case of dispute resolution clauses was found to be null or void.

⁵⁴⁹ COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Directive on Unfair Contract Terms)

⁵⁵⁰ Art 5 of Directive on Unfair Contract Terms

⁵⁵¹ Article 3 (2) of COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Finally, in the Annex of the Directive, we can find a non-exhaustive list of the terms which may be regarded as unfair. In this exemplary list of unfair terms, we find terms which require from consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract exclusive arbitration.⁵⁵²

A significant number of cloud providers' terms regarding arbitration, surveyed in Chapter 3 most likely would be considered unfair in contracting with EU domiciled consumers. The significant imbalance would be clear if we would compare average fees that ADRs charge in the EU and of those predetermined in terms of service.⁵⁵³ Fees' differences are even higher if we take into account costs of possible professional representation. Certainly, if the process in front of imposed ADR would deprive EU domiciled consumers of the rights guaranteed, in accordance with consumer protection laws in the EU, the terms would not be considered binding in the courts of the EU Member States.⁵⁵⁴ If we couple all that with potential costs of travel and language barriers if they exist (accessibility) compared with preferred jurisdiction/ADR of the provider (which suits them most) than the significant imbalance is obvious for the reasons of practicality alone. Given the value of the dispute, if predefined terms would be enforced it in effect would have a detrimental effect to access to justice.

3.2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

When we speak of international regulation of alternative dispute resolutions rarely can we start the discussion without invoking the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, adopted by the diplomatic conference of United Nations in 1958. It is a cornerstone of a modern international commercial arbitration primarily because it allows international arbitration to serve its function render the decisions enforceable. Being a voluntary ADR, without the simplified enforcements mechanism which allows for binding decisions to be implemented in jurisdictions of signatory states, commercial arbitration be ineffective, if not pointless.

⁵⁵² Annex to the COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

⁵⁵³ More on this in following section

⁵⁵⁴ Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, LOYOLA UNIV. CHICAGO INT. LAW REV.

Being drafted and adopted in 1958, some of the languages reflected the agreement technologies of the time. The most consequential aspect is a requirement of written arbitration agreement where it is clarified that it also include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.⁵⁵⁵ The application of the Art II is dubious when it comes to the arbitration agreement that has been concluded by means electronic communication or stored in ICT mediums.

The main significance of the Convention undoubtedly is in relaxation of the rules for enforcement of arbitral awards. Under the Convention, an arbitration award issued in any other state can generally be freely enforced in any other contracting state, only subject to certain, limited grounds for objection defined in Art V:

- a party to the arbitration agreement was, under the law applicable to him, under some incapacity, or the arbitration agreement was not valid under its governing law;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);
- the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the "lex loci arbitri");
- the award has not yet become binding upon the parties or has been set aside or suspended by a competent authority, either in the country where the arbitration took place or pursuant to the law of the arbitration agreement;
- the subject matter of the award was not capable of resolution by arbitration; or
- Enforcement would be contrary to "public policy".

In addition to some countries apply for possible reservations to the convention where they restrict arbitration awards only to awards issued in a Convention member state or only enforce arbitration awards that are related to commercial transactions, or they allow enforcement of awards from the non-contracting state but require reciprocity treatment. Following work of the

⁵⁵⁵ Art II of Convention on the Recognition and Enforcement of Foreign Arbitral Awards

United Nations on harmonization and unification international commercial arbitration closely followed the language and the rules set in New York Convention.

3.3. UNCITRAL Model Laws

Shortly after the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the United Nations General Assembly established in the December 1966 permanent commission that will carry out its work in annual sessions switching between two locations: Vienna and New York City. The commission was called The United Nations Commission on International Trade Law (UNCITRAL). The mission, among others, was to promote the harmonization and unification of international trade law by ...”preparing or promoting the adoption of new international conventions, model laws, and uniform laws ...”⁵⁵⁶ In addition to annual sessions, UNCITRAL is organized in intergovernmental working groups that are in charge of dealing with specific topics. Their work can also be supported by nongovernmental organizations and states were not members of UNCITRAL who are were willing to contribute but do not have voting rights.⁵⁵⁷

The outcomes of the Commission’s work are usually not binding (except for Conventions which are brought before UN General Assembly for a vote), and it is up to states to accept them and implement them into their national legislations. The work of UNCITRAL is oriented to promoting participation and building consensus to be able to propose model laws to be acceptable and implemented by the signatories. Nonetheless, in practice, the spirit of consensus is not easy to reach especially when we have long-established commercial practices based on different legal systems, whose interests are taking care by representative governments in the work of the Commission.

Without going into details of the work of the Commission, having in mind its significant influence on national legislations, including the EU Member States, we want to give a brief overview of selected model laws related to ADRs.

⁵⁵⁶ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW., THE UNCITRAL GUIDE : BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. (2007).

⁵⁵⁷ *Id.*

3.3.1. UNCITRAL Model Law on International conciliation

UNCITRAL adopted, the Model Law on International Commercial Conciliation on 24 June 2002. The Model Law provides uniform rules in respect of the conciliation process, with the primary goal to encourage the use of conciliation and ensure greater predictability and certainty in its use. Given the nature of UNCITRAL and slow adoption of Member States, until 2017 the legislations based on or influenced by the Model Law have been adopted in 16 States in a total of 28 jurisdictions.⁵⁵⁸

The use of the term conciliation, as opposed to somewhat more specific term mediation, has been clarified in the first article: ““conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute. (Art 1)”⁵⁵⁹.

The conciliation is international only if parties have their places of business in different States (a) or if the place of the State in which the parties have their places of business is different from either the State where substantial part of obligation is performed or the State with which the subject matter of the dispute is most closely connected (b).⁵⁶⁰

With the purpose of clarifying and avoiding uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators (Art. 5), commencement and termination of conciliation (Art. 4 and Art. 11), conduct of the conciliation (Art. 6), communication between the conciliator and other parties (Art. 7), confidentiality (Art. 9), admissibility of evidence in other proceedings (Art. 11) as well as some post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements (Art. 14).

Being adopted in a relatively small number of the States, the Model Law on International Commercial Conciliation has not been as influential, especially having in mind binding nature and effect of EU Mediation Directive, which covered the EU Member States’ national

⁵⁵⁸ Information on adopted national legislation available at:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html

⁵⁵⁹ the article 1(3) of the UNCITRAL Model Law on International Commercial Conciliation (2002)

⁵⁶⁰ the article 1(5) of the UNCITRAL Model Law on International Commercial Conciliation (2002)

legislation. Then again, the principles and solutions in the Model Law have been parts of many legislation prior to its formal adoption. It serves a more significant function in the Member States that lacked regulatory frame for conciliation and mediation. However, the principles and proposal remain relevant, and UNCITRAL Working Group II has continued its work on proposing an instrument on enforcement of international commercial settlement agreements resulted from conciliation.⁵⁶¹ This work is direct continuation whose relevance will be more apparent in the near future.

3.3.2. *UNCITRAL Model Law on International Commercial Arbitration*

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission, but got amended in 2006 to be in line with evolving practice in international trade and technological developments.⁵⁶² The intended goal was harmonization and unification of international commercial arbitration to further the trust in international trade. According to UNCITRAL Secretariat explanatory note, the form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws.⁵⁶³ The agreement on Model law reflects a worldwide consensus on the basic principles and significant issues of international arbitration practice, regardless of few countries that implemented the model with some reservations (US, China) and few countries that did not model its national laws in the image of it (France, Italy, Portugal, Sweden etc.).

When we observe its global reach, it is clear that Model Law constituted a strong basis for the intended harmonization and improvement of national laws since it covers (and therefore influenced) all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award.⁵⁶⁴

⁵⁶¹ Current work of United Nations Commission on International Trade Law Working Group II available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

⁵⁶² The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article 2 of New York Convention of 1958, which did not include electronic communication and agreements or signatures as part of the written agreement.

⁵⁶³ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf p. 23

⁵⁶⁴ *Id.*

The model law applies to the international commercial arbitration but gives wide interpretation to “commercial” and it is “international” if parties have their places of business in different States (a) or place of arbitration or substantial part of the obligation is outside of the State where parties have business (b) or if they agree that subject matter is international (c).⁵⁶⁵

The Model Law also proposes norms on extent of court intervention (art.5), arbitration agreement(art. 7-9), composition of arbitral tribunal (art. 10-15), competence of arbitral tribunal to rule on its jurisdiction(art. 16), interim measures and preliminary orders (art. 17), conduct of arbitral proceedings (art. 18-27), making of award and termination of proceedings(art. 28-33), recourse against award (art. 34).

The “original” Model Law from 1985 follows the New York Convention in requiring the written form of the arbitration agreement, but with the amendments of 2006 it recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing.”

If parties fail to reach agreement on a number of arbitrators, they will be three by default.⁵⁶⁶

When there are three arbitrators, each party will appoint one, and they will appoint third, but in the case of arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority.⁵⁶⁷

When it comes to procedural guarantees Article 18 safeguards the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. Hearings and written proceeding are subject to parties’ agreements, but Article 24 (1) mandates that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It is also interesting to note that the arbitral proceedings may be continued in the absence of a party, provided that due notice has been given, which is also applicable to the failure of the respondent to communicate its statement of defense.⁵⁶⁸

The enforcement relies on the New York Convention with proposed inclusion arbitral awards based on arbitration agreements in forms equivalent to traditional writing. In addition to that, United Nations Commission on International Trade Law Working Group II is working on an

⁵⁶⁵ Art 1 of the Model Law on International Commercial Arbitration as amended in 2006. In the footnote to article 1 (1) calls for “a wide interpretation” and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, “whether contractual or not”.

⁵⁶⁶ Article 10 of the Model Law on International Commercial Arbitration as amended in 2006

⁵⁶⁷ Article 10 (3)

⁵⁶⁸ Article 25 of the Model Law on International Commercial Arbitration as amended in 2006.

instrument on enforcement of international commercial settlement agreements in connection with conciliation and arbitration.⁵⁶⁹

4. Alternative Dispute Resolution and Access to Justice

Describing the development of access to justice as a movement, Mauro Cappelletti elaborated on the “third wave” of a broader conception of access to justice, where he clarifies that “this approach recognizes the need to relate and that the civil process to the type of dispute.”⁵⁷⁰ Although disputes have collective as well as individual repercussions, the parties who tend to be involved in certain kinds of disputes should be taken into consideration.⁵⁷¹ In other words, the context of the dispute has to be considered when we ponder on appropriate dispute resolution mechanisms. Without an appropriate understanding of the context, the parties and the neutral could end up taking inappropriate steps towards the solution.⁵⁷² From the regulatory perspective, the context and the protection of the underlying interest of the parties in regulating dispute resolution, also known as normative individualism, does not mean that individuals should be deprived of the assumptions of their positions and disadvantages.⁵⁷³ In fact, the “second wave” of access to justice recognized diffused interests of the parties, where individually they wouldn’t be able to properly protect them considering the power of these disadvantaged parties. Among others, this is the case with consumers and regulation in regard to consumer protection. In the developments during the last several decades, after being recognized as a group that needed protection that brought about the substantial body of law, policy makers and the regulators also considered what would be appropriate dispute resolution mechanisms that could provide the most effective consumer protection. In the following section, we will discuss dispute resolution for consumers and their characteristics and outcomes based on prior empirical researchers, and we will also analyze recent data gathered on about dispute resolutions for consumers in the EU. This will give an essential picture of the usefulness of ADRs for consumer access to justice.

⁵⁶⁹ Current work of United Nations Commission on International Trade Law Working Group II available at: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

⁵⁷⁰ CAPPELLETTI, *supra* note.37 p.52.

⁵⁷¹ *Id.*

⁵⁷² MICHAEL L. MOFFITT, ROBERT C. BORDONE & PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL., THE HANDBOOK OF DISPUTE RESOLUTION (2005).

⁵⁷³ Steffek, *supra* note 25.

While primarily we are talking here about consumers, but we shouldn't neglect another group of parties that could be lacking proper access to justice in the context of cloud disputes- the micro enterprises. For the purposes of the thesis, we defined micro enterprises as enterprises that employ up to 10 employees. Micro enterprises represent a substantial number of cloud costumers, but without significant clout, they are usually not given's ability to negotiate the terms of service.⁵⁷⁴ Given that a significant number of micro enterprises have a limited budget, compared to larger size companies, they are placed in a comparable situation when it comes to dispute resolution options and when they have to do a cost-benefit analysis of potential formal escalation of the international commercial dispute. Mentioned UNCITRAL Model Laws or relevant national regulations on dispute resolutions do not provide specific treatment of micro enterprises in the relations to their economic positions. Consumers, on the other hand, are placed in considerable better position in a certain number of protections of their weaker positions are in place. For instance, Brussels I Regulation permits consumers to sue in the court of their domicile. Immaculada Barral argues that EU's excessively narrow definition of the concept of "consumer" in the context of new ecommerce is not useful in the context of "clickwrap" agreements and other new contracting types.⁵⁷⁵ Barral claims that the concept of "consumer" should be inclusive to all parties that are weaker because they are not experts and are unequipped to deal with these agreements.⁵⁷⁶ Considering their similar economic positions in the relations to large and medium-sized companies, but significant difference in legal protection, we can assume that lack of access to justice for consumers in our context can be implied for micro enterprises as well. Therefore we will primarily focus on consumers' access to justice and alternative dispute resolutions.

4.1. Consumers and Alternative Dispute Resolution

Consumers in the cloud market are an imprecise term. Cloud service providers sometimes used interchangeably the terms users and consumers.⁵⁷⁷ As cloud service providers potentially offer their services globally and that the consumer can be interpreted differently in different

⁵⁷⁴ Hon, Millard, and Walden, *supra* note 21. See more in Chapter 3.

⁵⁷⁵ Immaculada Barral, *Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet*, 27 Penn St. Int'l L. Rev. 609 (2009).

⁵⁷⁶ *Id.*

⁵⁷⁷ SCRUGGS, TRAPPLER, AND PHILPOTT, *supra* note 484. C. N. Höfer & G. Karagiannis, *Cloud computing services: Taxonomy and comparison*, 2 J. INTERNET SERV. APPL. 81–94 (2011).

jurisdictions, we will stick with the legal consumer definition that is used in ADR Directive. In the article 4 it is stated that “consumer” means any natural person who, in commercial practice is acting for purposes which are outside his trade, business, craft or profession; “trader” is defined as any natural persons, or any legal person, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession.⁵⁷⁸

When we spoke about EU regulation of ADR, we mentioned the gradual development of policies towards consumer alternative dispute resolution, where the attitudes of policymakers were shifting between “soft” ADR as consumer’s voluntary complement to existing judicial system and ADR as an out-of-court dispute resolutions that could replace court in certain disputes. Eventually, policymakers decided to rely on a voluntary approach, which is evident from the scope of ADR Directive but also to set standards and harmonize existing national legislations on ADR.⁵⁷⁹ The effects of voluntary aspects of consumer alternative dispute resolution will be assessed in the years to come, we can compare at least initial results with alternative approaches that can be found in the other legal systems, most notably in the United States.

It is also important to remember that we can observe different dispute resolution methods in relation to each other. In the field of dispute system design there is a general recommendation that the design should be focused on prevention as a basic level, then if the conflict is escalated it should be dealt with on a negotiation level, followed up with mediation in case it is needed, and finally if everything else fails adjudicative methods of litigation or arbitration should be at the top.⁵⁸⁰ The lower levels serve as a filter, and only a small number of more complicated cases end up in the upper levels. The following figure by Ilse Hakvoort illustrates the relationship:⁵⁸¹

⁵⁷⁸ Art 4 of DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

⁵⁷⁹ Directive on consumer ADR

⁵⁸⁰ Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARVARD NEGOT. LAW REV. (2009),; Louis F. Del Duca, Colin Rule & Vikki Rogers, *DESIGNING A GLOBAL CONSUMER ONLINE DISPUTE RESOLUTION (ODR) SYSTEM FOR CROSS-BORDER SMALL VALUE - HIGH VOLUME CLAIMS - OAS DEVELOPMENTS* (2010); Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARVARD NEGOT. LAW REV. (2009),; Sheila Purcell, *Dispute System Design: A Comparative Study of India, Israel, and California*, SSRN ELECTRON. J. (2013),; Orna Rabinovich-einy & Ethan Katsh, *Lessons from Online Dispute Resolution for Dispute Systems Design*, 51–71.

⁵⁸¹ Ilse Hakvoort, *The conflict pyramid: a holistic approach to structuring conflict resolution in schools*, 7 J. PEACE EDUC. 157–169 (2010).

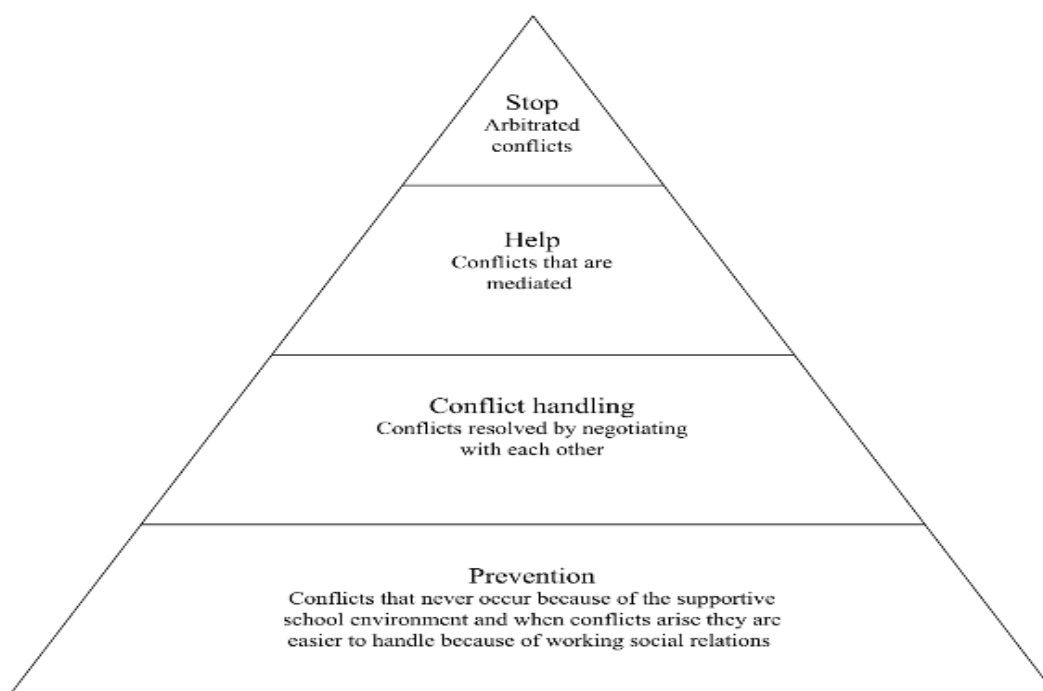


Figure 1. The conflict pyramid.

Arbitration and litigation stand at the top of the conflict pyramid, and they serve as a final dispute resolution methods when voluntary and bargaining methods do not produce the desired outcome. Hence, their availability or accessibility, as well as binding effect play an essential role in access to justice. We have discussed access to justice from the aspect of access to courts and jurisdiction in the previous chapter, and now we will observe arbitration and its consequence for consumers.

4.2.Consumer Arbitration in the US

Consumer decision in the United States is specifically interesting from the aspect of access to justice and fairness due to the ongoing debate over the use of pre-dispute arbitration clauses. On the one side of the debate, we have proponents of arbitration, claiming it's a business-friendly and consumer-friendly dispute resolution method as it is cheaper and faster, which in turn incentivizes parties to abstain from courts.⁵⁸² Critics on the other side are pointing to the

⁵⁸² Thomas J. Stripanowich, *American Justice at a Crossroads: Remarks of Thomas J. Stripanowich*, 11 PEPPERDINE DISPUT. RESOLUT. LAW J. (2010). Arbitration/Litigation Interface: The European Debate, NORTHWEST. J. INT. LAW BUS.

numerous issues of consumer arbitration: repeat player effect that causes bias, unintelligible clauses, waiver of class actions, etc.⁵⁸³

While the post-dispute arbitration clauses are generally not considered to be problematic since they are an expression of the free will and consent of the parties, they are not being debated or questioned. Pre-dispute arbitration clauses are being criticized and considered unfair since they are being imposed by the party who dictates the terms of the contract, i.e. the business, and generally they are in favor of that party when it comes to certain aspects of arbitration.⁵⁸⁴ We have already discussed imposed arbitration terms in cloud contracts and how they would probably be considered not binding by the law in the EU Member States, but in the United States their fairness is not being questioned only on the grounds of imposing the terms that cause significant imbalance, but rather on impeding access to the courts.

The United States historically had been liberal towards arbitration, whether they enforce arbitration agreements which were valid under Federal Arbitration Act (FAA) from 1925.⁵⁸⁵ On the criticism that arbitration agreements were forcing unaware consumers to arbitration, proponents respond that there is a possibility to declare these terms unconscionable if conditions are met, and hence would not be enforced.⁵⁸⁶ Unconscionability was invoked in many states courts that considered dubious clauses like class action waiver detrimental to consumers, until the seminal decision of United States Supreme Court in the case of *AT&T Mobility v. Concepcion* which interpreted that FAA pre-empted state laws that prohibit contracts from disallowing class actions.⁵⁸⁷ Consequently, significant number of companies changed their terms of the service to include a waiver of class actions and impose consumer

⁵⁸³ Stripanowich, *supra* note 458 .Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap Sophisticated Parties Too*, 2010 J. DISPUT. RESOLUT. (2010); Thomas J. Stipanowich, *An Arbitration Fairness Index: A Rating System for Consumer and Employment Arbitration Programs*, 19 DISPUT. RESOLUT. MAG. (2012); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary*, 21 J. CORP. LAW (1995); Bingham, *supra* note 529 ; Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses*, 25 OHIO STATE J. DISPUT. RESOLUT. (2010).

⁵⁸⁴ *Id.*; Christopher R. Drahozal, *Arbitration Clauses in Franchise Agreements: Common (and Uncommon) Terms*, 22 FRANCH. LAW J. (2002),.

⁵⁸⁵ Rob Gordon, *Binding Pre-Dispute Agreements: Arbitration's Gordian Knot*, 43 ARIZ. STATE LAW J. 263–287 (2011).

⁵⁸⁶ Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 NEW YORK UNIV. LAW REV. 1420–1490 (2008).J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VANDERBILT LAW REV. 1735–1770 (2006).David Horton, *Unconscionability Wars*, 106 NORTHWEST. UNIV. LAW REV. 387–408 (2012),.Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO LAW REV. 609–628 (2009).

⁵⁸⁷ Bruhl, *supra* note 586.

arbitration.⁵⁸⁸ As it was obvious from conducted survey on cloud terms of service, many clauses forward dispute resolution to American Arbitration Association (AAA) or JAMS, two of the most prominent American institutional arbitrations. However, some reports indicate that actual consumer arbitration is minuscule compared to the rest of the workloads.⁵⁸⁹ In the Consumer Financial Protection Bureau's study of arbitration, 1,241 cases were filed before the AAA from 2010 to 2012 concerning credit cards, checking accounts and payday loans, which is quite low number considering the number of credit card holders and users of financial services.⁵⁹⁰ Even more interesting for low-value claims is the statistic that out of 326 AAA cases where a debt was not disputed, but some other reason of complaint was filed, only 23 times consumers pursued claims for \$1,000 or less in arbitration.⁵⁹¹ In the highly publicized series of the New York Times on the issue of arbitration, journalists reported that from gathered data from 2010 to 2014, there were only 505 arbitration cases where a consumer brought a dispute for no more than \$2,500.⁵⁹²

We have also seen attempts to presents arbitration clauses as consumer friendly by apparently allowing the consumer choice to opt out, go for small claims, or to choose the non-appearance arbitration.⁵⁹³ In our survey, some providers offered to pay all arbitration costs up to a certain amount, but some scholars describe these as incentives and an elaborate way to bypass the unconscionability test.⁵⁹⁴

⁵⁸⁸ Todd Seaman, *Drowning in the Wake of Concepcion: How to Protect Small Claims Plaintiffs Bound by Mandatory Arbitration Agreements*, 73 OHIO STATE LAW J. FURTHERMORE (2012),; Christopher R. Drahozal, *FAA Preemption after Concepcion*, 35 BERKELEY J. EMPLOY. LABOR LAW (2014); Charles Gibbs, *Consumer Class Actions after AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 UNIV. ILL. LAW REV. 1345–1381 (2012).

⁵⁸⁹ Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SOUTHWEST. LAW REV. 87–129 (2012), http://www.swlaw.edu/pdfs/lr/42_1sternlight.pdf (last visited Feb 8, 2017); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 LAW CONTEMP. PROBL. (2004).

⁵⁹⁰ CONSUMER FINANCIAL PROTECTION BUREAU, *ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE* (2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (last visited Feb 8, 2017).

⁵⁹¹ *Id.*

⁵⁹² JESSICA SILVER-GREENBERG & ROBERT GEBELOFF, *ARBITRATION EVERYWHERE, STACKING THE DECK OF JUSTICE* (2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?hp&action=click&pgtype=Homepage&module=a-lede-package-region®ion=top-news&WT.nav=top-news&_r=0.

⁵⁹³ RAMONA L. LAMPLEY, *IS ARBITRATION UNDER ATTACK?: EXPLORING THE RECENT JUDICIAL SKEPTICISM OF THE CLASS ARBITRATION WAIVER AND INNOVATIVE SOLUTIONS TO THE UNSETTLED LEGAL LANDSCAPE* (2008), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ramona_lampley.

⁵⁹⁴ David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA LAW REV. 605–667 (2010), <http://www.uclalawreview.org/pdf/57-3-1.pdf> (last visited Feb 8, 2017). Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. LAW REV. 373–430 397 (2005), <http://www.michiganlawreview.org/assets/pdfs/104/3/Gilles.pdf>.

4.2.1. Empirical research on the use of ADR

Characterizing dispute resolution methods could be done in different ways. Usually, legal scholars use the descriptive method to describe dispute resolution processes, based on their interpretation of regulations and possible effects that it will have on the parties. The growth of legal empirical research in last decades gave us another data-based insight, which will be useful in terms of discussing efficiency but also in relation to how actual values of the dispute compare to the volume. Gathering data on various alternative dispute resolution methods in different jurisdictions is a too strenuous task for single thesis, so we have to rely on empirical research available in literature with specific focus on low-cost disputes that can be found in mediation and arbitration. Some of the elements we are observing our availability (accessibility) in voluntary procedures, the number of cases, duration of processes, average costs, satisfaction with the outcomes.

4.2.1.1. Mediation

Any generalizations based on gathered data available from different legal cultures are difficult and subject to different interpretations. The data should serve as pieces of the mosaic that are put together considering a specific context or to answer a specific query. In the field of mediation, substantial research has been done in 2013 on principles and regulation in comparative perspectives under the editorial guide by Klaus J. Hopt and Felix Steffek.⁵⁹⁵ Their extensive research has been backed by empirical data gathered from the most important jurisdictions around the world. A statistical comparison of practices in different jurisdictions gives an uneven picture of mediation in different legal cultures.⁵⁹⁶

4.2.1.1.1. Acceptance

When it comes to taking out disputes to mediation legal cultures of Japan and China are much more prone to use of mediation, with the numbers of acceptance are quite high.⁵⁹⁷ On the other side of the spectrum acceptance, the countries like Bulgaria, Poland, Russia, Switzerland and

⁵⁹⁵ HOPT AND STEFFEK, *supra* note 472.

⁵⁹⁶ *Id.* p.94

⁵⁹⁷ *Id.* p. 996

in some areas in France, showed very slow acceptance of mediation in proportion to adjudicatory proceedings.⁵⁹⁸ However, a significant number of countries seems to be in a transition phase, or in the exploratory phase, moving from court-oriented dispute resolutions to alternative options.⁵⁹⁹ Although this is a slow-moving trend that is measured in decades, the trend is still strong, and there are no reports of opposite direction.⁶⁰⁰ The number of mediated cases depends on the domain where mediators are employed, and the developments and the needs of the specific markets.⁶⁰¹

4.2.1.1.2. Duration

The assessment of comparable durations in mediation is related to the legal framework and organizational infrastructures as well as commitments of the parties involved. Steffek and Hopt distinguish two types of data related to duration: the time spent from the decision to use mediation until the end of the procedure, and the number and duration of individual mediation sessions.⁶⁰² Studies in mediation from the Netherlands provides insights in both aspects, where relevant associations gave reports on the longer observed time-frames. One study for the periods between 1998 and 2005, found the average duration 2.5 months (10 weeks).⁶⁰³ Another study for the period between 2005 and 2008 found the similar average of 69 days (2.5 months) with an average of 4.7 contact hours with mediator and 3.5 meetings.⁶⁰⁴ The third study for the period from 1993 to 2002 report is an average of 3.5 months (14 weeks)⁶⁰⁵ Swiss mediation Association reported similar time frames for 2008 with the terms of all procedures were concluded within 3 months, and only a few percentages took more than 6 months.⁶⁰⁶ In the United States, mediation before Citizen Dispute Settlement Centers for smallest cases typically do not last longer than two hours.⁶⁰⁷

One of the Dutch studies also observed duration of court-annexed mediation and concluded that it ended up in bit longer averaged duration of 3 months and average direct contact of seven hours.⁶⁰⁸ In 2006 report for Montréal, Canada, the duration of court-annexed mediation was

⁵⁹⁸ *Id.* p. 95

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

⁶⁰² *Id.* p.97

⁶⁰³ *Id.* Report in ACB study

⁶⁰⁴ *Id.* Mediation Monitor Study 2005-2008

⁶⁰⁵ *Id.* SGOA Study

⁶⁰⁶ *Id.* Ch 24, p. 1236

⁶⁰⁷ *Id.* Ch 25, p. 1263

⁶⁰⁸ *Id.* Mediation Monitor Study 2005-2008

average seven months due to structural/judicial issues.⁶⁰⁹ Steffek and Hopt observed that regulations which prescribe deadlines for mediation are rare, except in cases like Florida (deadline of 45 days).⁶¹⁰

4.2.1.1.3. Costs

Hourly rates demanded by mediators certainly vary depending on the living standards of the countries of their practice. The Italian Ministry of Justice reported for the period of 2011 to 2012, and average mediation fee in the range of 1000, which is based on the average value of all cases mediated in that period (€118,299).⁶¹¹

The Netherlands' mediation Associations report the fees from €80-€300, with an average of €140 for the year 2010.⁶¹² In the Dutch study, mentioned before, commercial mediations in the period between a 1988 and 2005, in average charged €2.925 per party.⁶¹³ English mediators in 2012 charged our daily fees of 1517 pounds (and 4279 pounds for an experienced mediator).⁶¹⁴ Switzerland reported 169 CHF as an average hourly mediator rate in 2008.⁶¹⁵ We can notice obvious correlation between living standards in certain developed countries and hourly rates of mediators. Steffek and Hopt concluded that mediation in generally falls lower in the costs and duration compared to litigation as an alternative.⁶¹⁶ However, they also note that attractiveness of mediation in regards to costs and time spent considerably varies due to a significant difference in litigation costs and time in different countries.⁶¹⁷

In one study on cross-border disputes in the European Union from 2010, results displayed that on average going to mediation before going to court, saves time and costs compared to going directly to the court first.⁶¹⁸

⁶⁰⁹ *Id.* p.98

⁶¹⁰ *Id.* Ch 25, p. 1263

⁶¹¹ *Id.* Ch 12, p. 690

⁶¹² *Id.* Ch 13, p. 758

⁶¹³ *Id.* Report in ACB study

⁶¹⁴ *Id.* Ch 6, p.442

⁶¹⁵ *Id.* Ch 24, p. 1237

⁶¹⁶ *Id.* p.100

⁶¹⁷ *Id.* p.101

⁶¹⁸ THE COST OF NON ADR – SURVEYING AND SHOWING THE ACTUAL COSTS OF INTRA-COMMUNITY COMMERCIAL LITIGATION | ADR INTERNATIONAL, , <http://www.adrcenterinternational.com/the-cost-of-non-adr-surveying-and-showing-the-actual-costs-of-intra-community-commercial-litigation/> (last visited Feb 8, 2017).

4.2.1.1.4. Success rates

If we define conclusion of settlements or similar agreements between the parties as a successful termination, the high success rates of mediation were reported around the globe. Here are illustrative numbers gathered by Steffek and Hopt (multiple percentages are for different mediation schemes):⁶¹⁹

- Success rates of mediation in general: China 95%; France 80%; Hungary 87%, 66 and 67%; Italy 48% and 76%; Netherlands 65% and 87%; Portugal 48%, 35%, 50 to 70% and 70%; Japan 60%; Russia 80%; Spain 70.5%; Switzerland 70.4%;
- the success rate of private mediation: France 75% ;Italy 80%; Netherlands 76%;
- success rate of court-annexed mediation: Bulgaria 76% and 70%; England 69%, 80%, 62% and 50%; Netherlands 59%, 78%, 60% and 45%; New Zealand 90%; Portugal 25%; Spain 77%;
- success rate of judicial mediation: Canada 80%; Germany 69%, 80% and 80%; Norway 70- 80%;
- the success rate of mandatory mediation: Canada 80%; England 48%; France 50%; New Zealand 73%;

High success numbers or effectiveness of mediation cannot be disregarded when we discuss the role of mediation either as an alternative or the part of the judicial system. Although these numbers portrayed the use of mediation in general and in specific domains, the potential for the use of mediation in low-value cross-border disputes and consumer disputes are evident. Now let's take a look at consumer arbitration as an adjudicative form of alternative dispute resolution for consumers.

4.2.1.2. Studies on consumer arbitration in the US

Considering the history of consumer protection in the United States,⁶²⁰ and the role of arbitration in it, especially in the recent years after the *Concepcion* decision,⁶²¹ it is not difficult to understand why the most extensive research on consumer arbitration having conducted in

⁶¹⁹ HOPT AND STEFFEK, *supra* note 472. p. 103-104

⁶²⁰ Consumer protection through legal precedents as opposed to legislative approach of the EU. Nancy A. Welsh & David B. Lipsky, *Moving the Ball Forward in Consumer and Employment Dispute Resolution: What Can Planning, Talking, Listening and Breaking Bread Together Accomplish*, 19 DISPUT. RESOLUT. MAG. (2012).

⁶²¹ US Supreme Court, *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011)

the United States. Most of the researches have been conducted with specific inquiries and aims. Lisa Bingham has devoted a series of articles on empirical research of employment arbitration and repeat-player effects that produce biases in favor of big parties.⁶²² Ernst&Young conducted research in consumer arbitration in the sector of financial services and reported that consumers are not losing a disproportionate amount of cases compared to litigation.⁶²³ Californian Dispute Resolution Institution even came to a different conclusion that the success of consumers and employees were higher in arbitration citing the pending outcome of 215 from 303 cases (71%).⁶²⁴

Recently, the focus of the research is on the role of arbitration in consumer protection, and specifically on the consequences of consumer arbitration with regards to waivers of class actions. Three relevant studies give insight into the applicability of arbitration to small-value consumer disputes:

1. The Searle Civil Justice Institute in the so-called Searle Report reviewed 301 cases before American Arbitration Association in 2007.⁶²⁵ From that number 240 were consumer complaints, and in 128 of these (53%), consumers were successful.⁶²⁶ The average duration of 240 cases was around seven months, but in cases that consumers forfeited the hearings and allowed decision based on documents along average time would be reduced to four months.⁶²⁷
2. The Consumer Financial Protection Bureau's arbitration study (CFPB Study) reviewed 1,847 matters involving financial services companies between January 1, 2010, and December 31, 2012.⁶²⁸ Of that number consumers brought 1,234 of cases, businesses initiated 438, and 175 were coded as joint filings, and CFPB confirmed that 246 cases

⁶²² Bingham, *supra* note.162 Bingham, *supra* note 529 ; Lisa B. Bingham, *Why Suppose - Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISPUT. RESOLUT. (2002);; Lisa Blomgren Amsler (formerly Bingham), *DESIGNING JUSTICE: LEGAL INSTITUTIONS AND OTHER SYSTEMS FOR MANAGING CONFLICT* (2009); Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW CONTEMP. PROBL. 221–51 (2004), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1322&context=lcp> (last visited Feb 8, 2017).

⁶²³ Ernst & Young, *Outcomes Of Arbitration: An Empirical Study Of Consumer Lending Cases 2* (2005)

⁶²⁴ Cal. Disp. Resol. Inst., *Consumer And Employment Arbitration In California 5* (2004)

⁶²⁵ SEARLE CIVIL JUSTICE INSTITUTE, *CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION* (2009), http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_010205&RevisionSelectionMethod=LatestReleased (last visited Feb 8, 2017).

⁶²⁶ *Id.*

⁶²⁷ *Id.*

⁶²⁸ JASON SCOTT JOHNSTON & TODD ZYWICKI, *THE CONSUMER FINANCIAL PROTECTION BUREAU'S ARBITRATION STUDY: A SUMMARY AND CRITIQUE* (2015), <http://mercatus.org/sites/default/files/Johnston-CFPB-Arbitration.pdf> (last visited Feb 8, 2017).

settled (23%), 362 may have settled (34%), and 111 were probably withdrawn (11%).⁶²⁹ Combining debt related complaints and others, CFPB concluded the consumers won only 32 out of 158 times (20%). The average duration of the documents-only precedents were about six months, and where telephonic hearings took place, it was about five months.⁶³⁰ The arbitrators' fees averaged about \$206, with a paid median of \$125, but CFPB also noted sometimes costs were reimbursed.⁶³¹ AAA required consumers to pay additional administrative fees in 54 of 326 awarded matters (17%) when it came to attempting to collect a debt.⁶³²

3. David Horton and Andrea Cann Chandrasekher conducted their empirical research in 2015 on a sample of 4,839 arbitrations.⁶³³ From that total number 1,446 disputes were withdrawn (30%), 1,407 ended up with the award (29%), 1,825 settled (38%), 150 terminated on administrative grounds (3%), and 11 were dismissed on the merits (less than 1%).⁶³⁴ At the time of the study consumer's fees have been capped \$125 for causes of action seeking \$10,000 and \$375 for those between \$10,001 and \$75,000.⁶³⁵ In their sample of 1,407, 491 received an award of \$1 or more (35%).⁶³⁶ The average duration of an awarded case was 243 days and median time of total cases was about 6.86 months (or 206 days).⁶³⁷

⁶²⁹ *Id.*

⁶³⁰ *Id.*

⁶³¹ *Id.*

⁶³² *Id.*

⁶³³ David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEORGETOWN LAW J. (2015).

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ *Id.*

⁶³⁷ *Id.*

After the abovementioned studies, there were some changes in AAA’s Costs of Arbitration (including AAA Administrative Fees) which is illustrated in the following table.⁶³⁸

Party	Desk Arbitration	In-Person or Telephonic Hearing – Single Arbitrator	In-Person or Telephonic Hearing – Three Or More Arbitrators
Consumer	Filing Fee—\$200 (nonrefundable)	Filing Fee—\$200 (nonrefundable)	Filing Fee—\$200 (nonrefundable)
Business	Filing Fee—\$1,700 Arbitrator Compensation—\$750 per case	Filing Fee—\$1,700 Hearing Fee—\$500 Arbitrator Compensation—\$1,500 per hearing day	Filing Fee—\$2,200 Hearing Fee—\$500 Arbitrator Compensation—\$1,500 per hearing day per arbitrator

Table No 1: AAA’s Costs of Arbitration in the January 2017.

Similarly, JAMS fees for consumer arbitration are a lump sum of \$250, while business’ fee varies.⁶³⁹

The scholars have been praising consumer arbitration compared to litigation when it comes to costs and duration, but also critical to the use of pre-dispute arbitration agreements and waivers from class actions, which they claim are detrimental to consumers.⁶⁴⁰ The most recent research show that even perceived advantages in costs to litigation, are not to be taken as certain.⁶⁴¹ Also, the same research indicates the outcomes of consumer rotations have shifted to repeat player’s favor after *the Concepcion* decision.⁶⁴² At the time being, the EU legislators and national laws of Member States have decidedly forbidden practices of pre-dispute arbitration agreements that could have detrimental effects to consumers.⁶⁴³ Still, with the gathered data and empirical research, we have valuable insights into the practicability of consumer arbitration when it comes to low-value disputes.

⁶³⁸ Costs of Arbitration amended and effective on January 1, 2016 available at:

<https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2026862>

⁶³⁹ “With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees.” See more at: <https://www.jamsadr.com/consumer-minimum-standards/>

⁶⁴⁰ See Drahozal and Ware, 588; Christopher R. Drahozal, *Is Arbitration Lawless*, 40 LOYOLA LOS ANGEL. LAW REV. (2006); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 INDIANA LAW J. (2004); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 NORTH CAROLINA J. INT. LAW COMMER. REGUL. (2002); Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HAST. BUS. LAW J. (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO STATE J. DISPUT. RESOLUT. (2010); Drahozal, *supra* note 584; Christopher R. Drahozal, *Busting Arbitration Myths*, 56 UNIV. KANSAS LAW REV. (2007); Christopher R. Drahozal, *Arbitration Costs and Form Accessibility: Empirical Evidence*, 41 UNIV. MICHIGAN J. LAW REFORM (2007).

⁶⁴¹ Horton and Chandrasekher, *supra* note 633.

⁶⁴² *Id.*

⁶⁴³ Schmitz, *supra* note 554.

4.2.1.3. Consumer Alternative Dispute Resolution in the EU

In the period following the Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes⁶⁴⁴ of 1998, and the Commission Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR,⁶⁴⁵ of 2001, the EU Commission have undertaken several studies to assess the consumer access to redress, coverage of ADR schemes in the Single market and level of compliance with ADR bodies with the recommendations.

Prior to the proposal of ADR directive, the Commission considered reports of relevant institutions on access to justice and consumer protection in cross-border low-value cases in the European Union Member States, concluding that the judicial courts are not practical or cost-efficient for consumers or businesses.⁶⁴⁶ The conclusion came about as a result of several reports and researchers ordered by the Commission to address the level of access to redress for consumers in cross-border cases.

Study conducted by European Commission for Efficiency of Justice (CEPEJ) showed significant increase in average length of proceedings in civil cases on European level from 2004 to 2008 and that the duration of court proceedings vary in different jurisdictions (to reach the decision in the first instance in average it needed 928 days in Italy, 925 days in Portugal and 408 days in Bulgaria, etc.).⁶⁴⁷

At the same time research on consumer perception for cross-border trade showed that only 2% of consumers who had a problem brought their complaint to the court in 2010,⁶⁴⁸ and 25% of

⁶⁴⁴ Commission Recommendation (EC) 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, [1998] OJ L 115.

⁶⁴⁵ Commission Recommendation (EC) 2001/310 on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L 109,

⁶⁴⁶ COMMISSION STAFF WORKING PAPER IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR) Brussels, 2011 SEC(2011)

⁶⁴⁷ European judicial systems Edition 2010 (data 2008): Efficiency and quality of justice, European Commission for the Efficiency of Justice (CEPEJ), p.159
<https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=164098&SecMode=1&DocId=1653000&Usage=2>

⁶⁴⁸ Flash Eurobarometer 299 on "consumer attitudes towards cross-border trade and consumer protection", The Gallup Organisation 2010, http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf

consumers would not go to court for less than €1000.⁶⁴⁹ Another study reports that nearly half of EU consumers (48%) will not go to court for damages under 200 Euro, and 8% would never go to court, regardless of the monetary value of their claim.⁶⁵⁰ Additional research on traders' perception showed that 54% of businesses would prefer to solve disputes through ADR rather than court.⁶⁵¹

The progress in development ADR schemes that could address those issues has been steady from the Commission's Recommendation in 1998, where by 2009 more than 750 consumer ADR schemes existed in the EU.⁶⁵² The schemes and practices in the ADR domain were highly diverse being established either by industry or in cooperation between the public sector, industry, and consumer organizations or directly by public authorities.⁶⁵³ According to the "Study on the use of Alternative Dispute Resolution in the European Union" by CIVIC Consulting (CIVIC ADR study) their funding may be private (e.g. by industry), public or a combination of both and in most Member States, the geographical coverage of ADR can be national rather than decentralised at regional or local level.⁶⁵⁴

CIVIC reports on the functioning of sector-specific and multi-sectoral ADR schemes in the Member States but the vast majority of ADR procedures are based on the willingness of the parties to engage in the process.⁶⁵⁵ For as much as 64% of ADR schemes the adherence by the industry is not mandatory, and when participation to the ADR procedure is voluntary, the possibility for consumers to solve disputes depends on the willingness of the business to engage in ADR.⁶⁵⁶ Types and forms of ADR procedures and decisions vary, and they may be taken collegially (e.g. by boards) or by individuals (e.g. by a mediator or ombudsman) but then the

⁶⁴⁹ Eurobarometer 342 on consumer empowerment, 2011, TNS opinion and social, p.192

http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_sum_en.pdf

⁶⁵⁰ European Commission (2011). Consultation paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union, para. 1; CSES 2009, p. 10.

⁶⁵¹ Flash Eurobarometer 300 on "retailer attitudes towards cross-border trade and consumer protection", The Gallup Organisation 2010, p.79 -hereafter EB 300. , p. 220.

⁶⁵² Final Report, *Study on the use of Alternative Dispute Resolution in the European Union Final Report Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium Framework Contract Lot 2 – DG SANCO*, (2009).

at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf.164 to 324 and EU database of ADR schemes

⁶⁵³ *id*

⁶⁵⁴ *id*, COMMISSION STAFF WORKING PAPER IMPACT ASSESSMENT Accompanying the proposal for Directive on consumer ADR and Regulation on consumer ODR. p. 16.

⁶⁵⁵ *Id*. Final Report, *Study on the use of Alternative Dispute Resolution in the European Union Final Report Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium Framework Contract Lot 2 – DG SANCO*, (2009)

⁶⁵⁶ *Id*.

nature of their decisions also may vary considerably (e.g. non-binding recommendations, decisions binding on the trader or on both parties, agreement of the parties).⁶⁵⁷

Study on “Cross-Border Alternative Dispute Resolution in the European Union” by DG FOR INTERNAL POLICIES, found that the main problems with cross-border ADR overlap with problems at the national level, but they are aggravated by specifics of cross-border situations, such as language barriers and the physical absence of the consumer from the trader’s country.⁶⁵⁸ In addition, ADR schemes, as a rule, do not accept complaints against traders in the other Member States, mainly due to a lack of ADR schemes’ jurisdiction, knowledge of applicable law, and/or enforceability of final decisions.⁶⁵⁹

However, all this research illustrates the state of ADR before Directive on consumer ADR and ODR Regulation. EU ODR platform has been fully operational since January 2016, and all ADR providers that are willing to comply with the requirements can be registered on the site, which in turn serves as a portal that forwards online complaint it receives.⁶⁶⁰ The part of the process that goes through ODR site is universal, with a click and fill an online form that is then forwarded to the trader, with a proposal for ADR provider.⁶⁶¹ If trader accepts the parties and the complaint are forwarded to ADR provider.

Not to belittle the significance of all consumer complaints, but for our research, we are mostly interested in cross-border consumer cloud service disputes. For that purposes, we have conducted our own survey of dispute resolution bodies whose information are listed on ODR platform in order to examine characteristics of ADR bodies that would handle cloud service disputes.

⁶⁵⁷ *Id.*

⁶⁵⁸ Directorate General et al., *Cross-Border Alternative Dispute Resolution in the European Union*, June 2011.

⁶⁵⁹ *Id.*

⁶⁶⁰ See Ch 6.

⁶⁶¹ EU ODR platform available at:

<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>

4.2.1.4. Survey on dispute resolution entities in the EU

There are two types of data relevant to our research on the EU ODR site. The statistic on a number of complaints and more importantly for our research the data on available ADR bodies with characteristics required by ADR Directive.

At the time of writing this thesis, the EU ODR platform has been functioning for a year, and just recently it published the first batch of data with basic information on a number of complaints per country, the percentage of domestic vs. cross-border cases and top ten most complained about sectors.⁶⁶² Although such dirt of data is not the source out of which we could draw concrete and precise conclusions, it is still a starting point considering the year of functioning of the platform and the time spent from the enactment of the new regulations. In the Art 21. of the ODR Regulation, it is stated that the Commission shall report to the European Parliament and the Council on the functioning of the ODR platform on a yearly basis and for the first time one year after the ODR platform has become operational.⁶⁶³ While the final report is in the making, the data published on the site is straightforward:

- the total number of complaints is 26,283 which is represented in the following illustration with the numbers of complaints per country of both trader and consumer.

⁶⁶² Data available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.statistics.show>

⁶⁶³ Art 21. Of ODR Regulation

Number of complaints by country

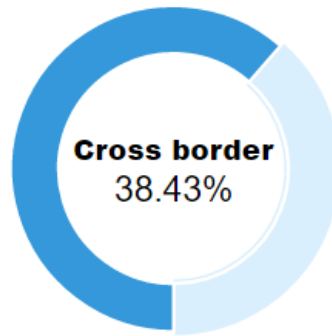
#	Country of trader																											TOTAL					
	DE	FR	IT	ES	PT	GR	DK	NL	BE	PL	CZ	SK	SI	HU	RO	BG	HR	SE	NO	FI	RU	UK	IE	LU	MT	CY	EE		LV	LT			
DE	75	3	1	-	-	285	-	-	5	1	10	31	-	-	8	5	-	4	-	-	4	-	-	17	-	2	-	-	2	-	-	451	
FR	5	229	4	1	-	98	2	2	21	-	75	95	2	-	11	41	-	14	-	-	5	-	-	133	-	5	1	1	5	-	1	751	
IT	5	3	108	1	-	24	-	-	5	4	5	58	4	-	31	10	-	9	-	-	-	1	1	8	-	8	-	28	1	-	1	307	
ES	-	2	-	8	-	11	-	-	2	-	1	8	8	-	5	1	-	4	-	-	-	-	1	4	-	-	1	1	-	-	53		
PT	4	-	-	1	45	21	3	-	-	-	-	11	-	-	11	8	-	3	-	-	4	-	-	8	-	3	-	-	-	-	4	124	
GR	91	20	4	9	16	5820	32	8	78	4	133	431	6	2	41	55	-	57	-	2	48	4	9	188	-	23	3	7	19	3	14	6905	
DK	1	1	4	1	-	32	81	3	8	-	6	26	1	-	7	4	-	4	-	-	1	-	-	9	-	1	-	-	1	-	-	169	
NL	-	1	-	1	-	14	1	47	9	2	4	25	-	-	4	4	-	4	-	2	-	7	3	4	-	1	-	-	4	-	-	137	
BE	6	22	-	3	2	314	7	5	1783	8	133	333	5	1	37	91	-	44	-	2	35	-	3	58	-	8	5	3	18	2	1	2927	
PL	2	-	-	2	-	29	3	5	2	19	6	14	-	-	2	3	-	1	-	-	-	-	1	5	-	1	-	-	5	-	-	100	
CZ	13	73	3	4	2	288	6	-	82	4	1105	245	4	-	14	75	-	44	-	2	19	-	8	48	-	8	20	1	5	-	6	2081	
SK	52	21	8	9	9	184	43	3	101	2	108	5397	12	1	154	177	-	42	-	2	28	3	41	84	-	4	9	3	28	1	3	6503	
SI	1	4	5	-	2	32	-	-	8	1	14	77	99	-	2	10	-	7	-	1	2	1	1	7	-	-	2	-	1	1	276		
HU	2	1	-	-	1	13	-	-	8	-	2	17	-	58	7	-	-	1	-	1	1	-	-	3	-	-	-	-	-	-	-	115	
RO	2	2	-	7	4	27	1	-	3	-	3	25	2	-	242	10	-	5	-	-	2	1	-	5	-	3	-	118	-	-	10	472	
BG	4	1	-	1	-	20	1	-	12	-	5	159	3	-	-	129	-	5	-	-	-	1	-	-	9	-	2	2	1	1	-	-	356
HR	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
SE	8	8	1	12	2	147	2	-	48	2	32	107	2	-	52	88	-	773	-	1	20	-	5	29	-	3	4	1	-	3	1	1327	
NO	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
FI	1	-	-	2	1	13	-	-	5	-	2	18	-	-	22	-	-	2	-	-	171	2	-	8	-	4	-	-	-	-	-	249	
RU	3	1	-	-	-	15	-	-	5	-	2	3	1	-	2	-	-	2	-	-	3	-	1	-	-	-	1	-	-	-	-	39	
UK	-	-	-	1	-	13	2	8	1	-	1	31	-	-	12	3	-	2	-	4	1	22	1	1	-	1	-	-	1	-	1	104	
IE	-	-	-	-	-	5	-	-	-	-	-	28	-	-	5	1	-	-	-	-	1	-	4	2	-	-	-	-	-	-	-	46	
LU	5	8	-	1	-	88	2	-	12	1	11	50	2	-	13	17	-	3	-	-	1	-	2	307	-	3	3	-	2	-	-	509	
MT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	0
CY	5	2	1	18	-	71	1	-	7	-	3	58	-	-	38	10	-	5	-	-	4	-	-	7	-	421	-	2	3	-	1	653	
EE	4	1	-	4	4	57	1	1	130	-	83	81	2	-	8	20	-	13	-	-	4	-	1	14	-	1	298	2	-	-	1	710	
LV	4	1	3	2	1	33	1	-	3	-	7	90	4	-	100	2	-	3	-	-	4	-	4	7	-	3	-	233	-	2	2	509	
LT	10	-	-	1	-	37	17	2	8	-	6	35	1	-	23	15	-	2	-	-	-	-	3	16	-	-	-	26	1	-	203		
EE	-	-	-	-	-	20	-	-	3	-	2	8	2	1	5	1	-	1	-	-	-	-	-	8	-	1	-	1	-	7	1	61	
LT	3	-	3	2	12	17	1	-	9	-	3	15	-	-	2	3	-	-	-	-	-	1	1	1	-	4	1	-	-	-	24	102	
TOTAL	304	404	141	89	101	7514	187	80	2352	48	1742	7472	158	63	854	763	0	1054	0	188	189	39	88	944	0	504	348	402	119	20	72	26239	

Illustration No1: Number of complaints by country on January 31, 2017

- out the total number, 61.58% are national and 38.42% are cross-border (which can be translated to 17,766 domestic and 11,083 cross-border complaints)
- top ten most complained about sectors are:
 - Clothing (including tailor-made goods) and footwear – 5.64% (3012)
 - Airlines – 4.06% (2170)
 - Information and communication technology (ICT) goods - 3.95% (2113)
 - Mobile telephone services – 2.73% (1457)
 - Electronic goods (non-ICT/recreational) – 2.57% (1371)
 - Furnishings - 1.99% (1064)
 - Leisure goods (sports equipment, musical instruments, etc) - 1.87% (1000)
 - Spares and accessories for vehicles and other means of personal transport – 1.41% (754)

- Internet services – 1.31% (698)
- Large domestic household appliances (including vacuum cleaners and microwaves) – 1.04% (556)

Percentage of national and cross-border complaints



Top 10 most complained about sectors

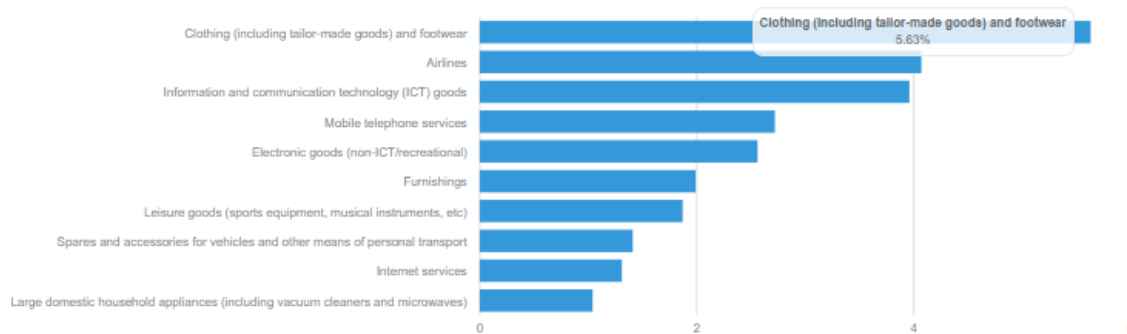


Illustration No 2: Percentage of national and cross-border complaints and top 10 most complained about sectors

The total number of 26,283 complaints speaks volumes. However, if we consider that it is a total number of complaints gathered through the platform for the entire Single market, including all consumer sectors and previously functioning ADR providers (whose reputation could be well established), then the numbers are not that impressive. ODR Regulation requires of all traders established in the EU who are selling goods and services online to place a link on a visible place in their respective site and to inform consumers about possible ADR scheme of choice.⁶⁶⁴ The numbers are representative only on complaints received through the site (although there is no explanation) but considering the rising trend of use of ADR in the EU (for

⁶⁶⁴ Art 14 of ODR Regulation

21 large ADR schemes in the EU for 2007 - 297,147, for 2008 - 372,136, and for 2009-408,599)⁶⁶⁵ those numbers are not showing wide acceptance of the EU level.

For cloud services, it is likely that the number of complaints is low, although we cannot tell exact number or that there were valid complaints at all. We believe (although without confirmation, hence with reserve) that cloud services probably do not fall under any of the categories that are listed in top 10 most complained about. Internet services that are listed in top 10 are listed in information on ADR providers under the general category of “Postal services and electronic communications”. Therefore it is probably the case of disputes with a local provider of Internet services (ISP). Still, we cannot exclude the inclusion of cloud services or that ISP does not offer cloud services in the bundle. If they do include them the total number of these complaints is again very low – 698. Similarly, ICT goods probably do not include ICT services, since ICT goods are usually defined differently,⁶⁶⁶ but we make that statement with reservation too. Another problem we observed is the distinction between cross-border and domestic dispute in regard to top 10 complained sectors. We do not know how many if any at all foreign ISPs have been complained about. Or if cross-border mobile telephone service included some form of cloud service as well. To draw any conclusion on available data would be rightfully critiqued. It only remains to make a general observation on low numbers of complaints, even if we do not know how many of those complaints have been turned into mediated or arbitrated dispute. All this information speaks more on the functioning of ODR site and its usefulness, and not on the usefulness of individual ADR schemes.

The other data set of interest is the data on available ADR providers. The ADR providers who are capable and willing of integrating into ODR platform and fulfill the requirement of ADR Directive and are listed on the site.⁶⁶⁷

In the following table No2, we had extracted data from the information on the site and displayed information on relevant aspects for ADR providers in regards to consumer cloud service disputes. The total number of ADR enlisted is 258. It is about a third of the figure of 750 in the CIVIC report of 2009 (which did not distinguish consumer from commercial ADRs).

⁶⁶⁵ *Id.* June 2011. p. 27

⁶⁶⁶ See for example OECD’s ICT sector – Service industries (ISIC Rev. 4) Presentation available at: https://www.itu.int/ITU-D/ict/events/geneva08/Session3_Spiezia_classifications.pdf

⁶⁶⁷ List of available ADRs per country at : <https://webgate.ec.europa.eu/odr/main/?event=main.adr.show>

ALTERNATIVE DISPUTE RESOLUTION ENTITIES FOR CONSUMERS AVAILABLE THROUGH EU ODR PLATFORM			TOTAL No.258
The entity is competent for disputes initiated by	C2B	258	
	B2C	15	
	Both (C2B and B2C)	15	
Conduct of the procedure			
Conduct of the procedure	in writing	256	
	orally	126	
	in writing, orally	124	
The physical presence of the parties and/or of their representative			
The physical presence of the parties and/or of their representative	Not required	173	
	Required	85	
Fees			
Fees	No fees have to be paid by the consumer	199	
	Fees have to be paid by the consumer	59	Variable 23
			Fixed 36
	Fees have to be paid by the trader	111	Variable 58
Fixed 53			
No fees have to be paid by the trader	147		
Outcome of the procedure			
Outcome of the procedure	This entity might reach more than one type of outcome. It might be binding upon agreement by one or both parties, or non-binding	14	
	It might be binding on consumers and traders , or non-binding	8	
	Binding upon agreement	39	
	The procedure is non-binding.	174	
	Binding on consumers	24	
	Binding on consumers and traders	24	
	Binding on traders	23	
	Binding on traders or non-binding	3	
The entity is competent for disputes in the following sectors			
The entity is competent for disputes in the following sectors	Internet services	57	
	Electricity	44	
	Other communication services	39	
	Other (includes both goods and services)	45	
Average length of the procedure			
Average length of the procedure		30	
	From 1 to and including 30 days (1 month)	83	
	From 31 to and including 60 days (2 months)	123	
	From 61 to and including 90 days (3 months)	22	
	More than 90 days		

Table No2: alternative dispute resolution entities for consumers available through EU ODR platform

Since all those providers are listed on EU ODR site, the data illustrates that not all of mechanisms could be rightfully called online capable or online functional (very few reported

previously to be fully online⁶⁶⁸), especially those 85 that require physical presence. Only selected few ADRs are competent of dispute of traders against consumers, which is a matter of national law. Two ADR conduct procedures only orally.

The requirements for regulated and appropriate fees for consumers are evident since in 199 ADR procedures consumers don't have to pay and in 59 cases they pay symbolic or low amounts (usually less than AAA or JAMS fees). Traders are required to pay more often with different fees variation, but especially when it comes to fixed amounts again, it is considerably more favorable in comparison with the American counterparts.⁶⁶⁹

Only 24 ADR scheme provide binding outcomes for consumers (and respectively traders), which indicate arbitration or some form of out-of-court adjudication. Even those schemes are based on the willingness of the consumer to initiate the proceeding (not entirely comparable to pre-dispute agreements in ToS). Such outcome is different from those that are binding on consumer upon agreement, which indicates agreement on a binding settlement. However, evidently dominant forms are the ADRs which result in non-binding outcomes (174).

Like fees, the average length is influenced by the Directive requirement of up to 90 days (with possible exception). Few exceed the limit, and a significant number (102) produce resolution up to 60 days. These number confirms the presumption of fast resolution. And it is not the adjudicatory forms that require extra time to handle disputes even though methods like mediation are less riddled with the formal or procedural requirement. At the next table, it is shown that out of 24 of binding arbitrations only 1 requires more than 90 days.

		Binding on trades	Binding on consumers and trades	Binding upon agreement	Electricity	Internet services	Other (includes both goods and services)	Other communication services
Country	Austria	-	-	-	1	3	1	1
	Bulgaria	-	-	1	2	1	-	2
	Belgium	-	1	-	1	2	2	1
	Cyprus	-	1	-	1	1	-	1
	Czech Republic	-	3	-	1	1	2	1
	Denmark	-	-	-	1	2	1	1
	Finland	-	-	-	1	1	1	1
	Estonia	-	-	-	1	1	-	1
	France	-	-	-	2	2	2	1
	Germany	3	-	8	-	2	2	2
	Greece	-	-	-	2	2	2	2
Hungary	1	-	-	-	-	-	-	

⁶⁶⁸ Directorate General, *Cross-Border Alternative Dispute Resolution in the European Union*, June 2011.

⁶⁶⁹ See AAA and JAMS fees in previous section 4.2.1.3. Consumer Alternative Dispute Resolution in the EU

	Ireland	-	-	-	8	1	-	-							
	Italy	-	2	-	-	14	4	4							
	Latvia	2	-	1	1	1	2	1							
	Lithuania	-	4	-	2	1	1	1							
	Luxembourg	-	-	-	1	1	1	1							
	Malta	-	-	2	1	-	-	-							
	Netherlands	-	3	-	1	1	1	1							
	Portugal	1	2	10	10	9	10	9							
	Slovakia	-	-	5	2	2	2	2							
	Slovenia	-	3	-	3	3	3	3							
	Sweden	2	-	-	1	1	1	1							
	United Kingdom	14	5	12	1	5	7	2							
The entity is competent for disputes initiated by	C2B	23	24	39	44	57	45	39							
	B2C	0	4	2	1	4	3	2							
	Both (C2B and B2C)	0	4	2	1	4	3	2							
Conduct of the procedure	in writing	22	24	39	43	56	44	39							
	orally	23	17	28	33	31	31	25							
	in writing, orally possible	12	17	28	32	30	30	25							
The physical presence of the parties and/or of their representative	Not required	13	15	26	22	31	27	23							
	Required	10	9	13	22	26	18	16							
Fees	No fees have to be paid by trader	8	9	17	28	29	21	24							
	No fees have to be paid by consumer	21	14	29	33	39	34	30							
	No fees have to be paid by consumer and trader	7	8	16	27	27	20	22							
	No fees have to be paid by consumer but have to be paid by trader	14	13(F) 1(V)	6	3(F) 10(V)	13	6	1(F) 5(V)	12	3(F) 9(V)	14	6(F) 8(V)	8	1(F) 7(V)	
	Fees have to be paid by consumer but not by trader	1	1(F) 0(V)	1	0(F) 1(V)	1	1(F) 0(V)	1	1(F) 0(V)	2	1(F) 1(V)	1	1(F) 0(V)	2	1(F) 1(V)
	Fees have to be paid by consumer and by trader	1	0(F) 1(V) 0(F & V)	9	3(F) 4(V) 2(F & V)	9	4(F) 4(V) 1(F&V)	10	2(F) 8(V) 0(F & V)	16	2(F) 13(V) 1(F&V)	10	1(F) 9(V) 0(F & V)	7	1(F) 6(V) 0(F & V)
	Fees have to be paid by the consumer	2		10	10	11	18	11	9						
	Fees have to be paid by the trader	15		15	22	16	28	24	15						
	Average length of the procedure	From 1 to and including 30 days (1 month)	6	6	10	8	10	7	6						
From 31 to and including 60 days (2 months)		4	4	12	11	17	12	12							
From 61 to and including 90 days (3 months)		12	13	14	25	29	26	21							
More than 90 days		1	1	3	0	1	0	0							

(F) – Fixed fee; (V) – Variable fee; (F&V) – Fixed and Variable fee.

Table No 3: Data on selected ADR's competences, procedure conduct, physical requirements, fees and duration

In the table No3, we have cross-referenced data for selected categories to illustrate data on ADRs with binding outcomes, and ADRs who deal with four categories of dispute under which cloud disputes can be placed (internet service, other communication services, other goods and services) and one category for utility service disputes to display relevant info on ADRs because cloud service are occasionally compared with utilities, and NIST report indicated that US federal agencies would want cloud provider to operate more like utility services.⁶⁷⁰ Of those displayed, notable are 3 out of 10 binding arbitrations in Portugal for disputes in electricity.

There are 15 out of 24 binding arbitrations (for both) where physical presence is not required, which indicate proper online or written correspondence arbitration. Physical presence required in the disputes with providers of internet services (26), other communication services (16), other services (18) or electricity (22) would most likely render inappropriate ADR scheme for cloud service disputes, even if they were categorized in these sectors.

Looking at ADR providers data, we can conclude that in the variety of available options for consumer disputes, not all disputants' needs for appropriate ADR provider will be met. It is uncertain but probable that many of the listed schemes (few are certainly capable, for example, Italian Risolvi Online⁶⁷¹, or Verein Internet Ombudsmann⁶⁷²) would be not able and willing to deal with dispute that could fit our context even if we would categorize cloud service under internet services, especially if the technical expertise is required and not much room for negotiation left. The primary reason we are leaning towards adjudicatory forms, as explained in the dispute resolution pyramid,⁶⁷³ is if we lack adjudicatory form then voluntary bargaining methods will not be as effective. Looking at the data there are not many adjudicatory methods available through EU ODR site, not all of them have binding outcomes to one or both parties, not all of them are possible without the physical presence of the parties, not all of them are capable of conduction correspondence or online procedure. In addition, those that are capable and functioning are probably oriented to domestic consumers due to language barriers (for example Portuguese Coimbra District Arbitration Centre for Consumer Disputes).⁶⁷⁴ It is

⁶⁷⁰ <http://www.networkcomputing.com/cloud-infrastructure/treating-cloud-utility/2013935982> NIST report available at: <https://www.nist.gov/news-events/news/2014/10/nists-cloud-computing-roadmap-details-research-requirements-and-action>

⁶⁷¹ RisolviOnline.com - Camera Arbitrale di Milano, available at: risolvionline@mi.camcom.it

⁶⁷² Verein Internet Ombudsmann - nur für im Internet abgeschlossene Verträge, Association «médiateur sur l'internet» - seulement pour les contrats conclus sur l'internet at: <http://www.ombudsmann.at>

⁶⁷³ Hakvoort, *supra* note 581.

⁶⁷⁴ Directorate General, *Cross-Border Alternative Dispute Resolution in the European Union*, June 2011 ; Centro de Arbitragem de Conflitos de Consumo do Distrito de Coimbra available at: <http://www.centrodearbitragemdecoimbra.com>

possible that some or all of the mentioned issues influenced a small number of disputes reported for cross-border transactions.

Now that we have a clearer picture of the state of alternative dispute resolution mechanisms that are applicable to online disputes, we can assess if the current international legal framework of both traditional judicial systems and alternative dispute bodies allow for appropriate balance between access, fairness, efficiency and effectiveness of dispute resolution over cloud services.

Chapter 6 - Access to Justice in Cloud Service Disputes

1. Introduction

Everything that we have been dealing with so far has led us to this point where we need to compare and assess the level of fairness in access to justice over cloud service disputes. We are going to make the comparison based on our conceptual framework established in Chapter 2. From the beginning, we have to emphasize that this is not a comparison between equal entities, but between entities with different characteristics. In some aspects, they are used as compatible in a dispute system design for specific purposes. In Chapter 2 we have defined our framework through a set of shared characteristics for all the entities. The comparison will also be made based on reasonable expectations of the effects of the international legal framework on the dispute within our context.

To assess the mechanism for dispute resolution, it is necessary to put it into the context of the parties, disputed matter, and the general circumstances. In our context of cloud service disputes, we often have a provider of a service based in one jurisdiction, and consumer (or microenterprise) domiciled in another jurisdiction; service provider has most likely imposed terms of service on consumer during an online sign up for the service; the dispute is contractual (related to the cloud contract) involving a computing service with possibly technical aspect; provider has bigger or total control over the service; a dispute about the service that is presumably in the range between 0 (free) and 200 EUR (more likely 100 or less); the travel cost to the jurisdiction alone would probably outweigh the worth of the paid service (not necessarily the value for the party);

We have described the regulatory framework for cross-border dispute resolution in chapters 4 and 5 and explored existing empirical research and currently available data on ADR schemes in the EU and the United States. To answer the main research question whether the current dispute resolution mechanisms provide adequate means to resolve disputes within our context, we need to compare different dispute resolution mechanism relative to that context. We address the following sub-question:

- To what extent the dispute resolution mechanisms under current international legal framework are adequate for cloud service disputes to ensure access to justice and fairness?

When we put the context against the dispute resolution schemes that are available under the current international legal framework, we are checking if the said legal framework arranges the appropriate or fair distribution between parties in relation to key concepts: access, fairness, efficiency, and effectiveness. According to Rawls inequalities are to be arranged to benefit worse off (weaker) party. Ideally both sides would be equally beneficial in the access to justice that is nominally guaranteed, but in reality, a number of factors weaken the position of one party. We are going to comment on inequalities by looking at different variables within our core concepts, with the guidelines of operational definitions proposed in Chapter 2 and presented in the following table:

Framework:	Key concepts /indicators	Variables	How different dispute resolution mechanisms compare in following operational definitions
Rawlsian fairness in access to justice Or Access to justice as fairness	Access	<ul style="list-style-type: none"> • Availability of dispute resolution body • Accessibility to dispute resolution body 	<ul style="list-style-type: none"> ➤ Jurisdiction/competence allow or make available dispute resolution entity? ➤ Do travel costs, language, professional help impede in access to the body?
	Procedural fairness	<ul style="list-style-type: none"> • Independence and impartiality • Equality of arms • Rules on costs of DR 	<ul style="list-style-type: none"> ➤ Are there guarantees for transparency and fairness in selection/appointment procedure? ➤ Are there guarantees that each party has the reasonable possibility to present its case? ➤ Who bears the costs of proceedings and in what manner?
	Efficiency	<ul style="list-style-type: none"> • Duration of processes • Costs 	<ul style="list-style-type: none"> ➤ Average time needed for completion of process ➤ Average costs of the proceeding
	Effectiveness	<ul style="list-style-type: none"> • Success Rate • Enforcement of outcome 	<ul style="list-style-type: none"> ➤ Is the voluntary compliance with outcome necessary? ➤ How many steps needed for the enforcement?

Key variables we need to explore based on following operationalized questions:

1. Do jurisdictional rules or competence rules allow or make available use of a dispute resolution mechanism in regards to clouds dispute context?
2. Do travel costs, language, and need of professional help, impede the access to DR relative to the low value of the dispute.
3. Are there procedural guarantees in place for transparency and fairness in selection/appointment procedure of adjudicators/neutrals?
4. Are there procedural guarantees in place to ensure equality of arms in presenting the case?

5. How the cost of dispute resolutions are attributed and is it adequate in cloud dispute context?
6. Could average time of proceedings before DR be described as fast relative to others forms of DR?
7. Are the average costs of the proceeding before DR, measured by average institution fees per case, high compared to others forms of DR?
8. Is the voluntary compliance necessary for the success of the dispute resolution?
9. How many legal actions are needed for the enforcement?

For the comparison, it is only appropriate that the starting point is the courts in a judicial system, as they are essential elements of the organization of societies and they are a basic pillar of access to justice. We will divide this Chapter according to variables and then discuss different dispute resolution mechanisms in relation to courts and each other. We start with a most important element of access to justice, the access.

2. Access

Access is the most important element of access to justice. Without access, the remaining concepts do not matter. Thus, we place emphasis on access when we discuss access to justice. We have divided access into two separate variables: availability of dispute resolution (which includes both jurisdictional rules, the possibility of voluntary alternatives and available competences of those entities) and accessibility which translates into overcoming different barriers. The first variable is closely connected to regulation and rights, while the second is connected to physical effects of regulatory frame and need for assistance. We start with the first one that has direct regulatory implications:

- Do jurisdictional rules or competence rules allow or make available use of a dispute resolution mechanism in regards to clouds dispute context?

2.1. Access to courts in cloud disputes

Availability of the courts to solve the dispute are to be observed through the rules of jurisdiction. We have discussed jurisdiction rules for cross-border cloud services in Chapter 4

where we analyzed possible jurisdictional issues that could impede or make difficult access to justice. However, access to the court is also the basic human right of every natural person on the planet. It is the essential element of the rights to a fair trial. As such, it is enshrined and guaranteed by the most important conventions on human rights. The Universal Declaration of Human Rights (UDHR) in its art 10 proclaims that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal; in article 8 it provides for the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law. The Universal declarations framing certainly influenced a great deal of international and national provisions, dealing with equal rights to a fair trial. At the European level, access to justice guarantees fall under the article 6 (the right to a fair trial) and the article 13 (the right to an effective remedy) of the European Convention on Human Rights (ECHR), and in the article 47 (both right to a fair trial and right to an effective remedy) of the Charter of Fundamental Rights of the European Union. Entitlement of the access to court does not automatically mean effective or practical. This is where European Court of Human Rights played an important role in interpreting the article 6. In the decision *Bellet v. France*, the Court has confirmed that the right of access to a court must be “practical and effective” where individuals must “have a clear, practical opportunity to challenge an act that is an interference with his rights.”⁶⁷⁵ Practical and effective nature of the right may be impeded by the prohibitive costs of the proceedings,⁶⁷⁶ or the issues relating to time limits,⁶⁷⁷ or by the existence of some procedural limitations.⁶⁷⁸

The right of access to the courts is not an absolute right and can be subjected to limitations. The limitations must not restrict or reduce the access to the individual in such a way or to such an extent that the very essence of the right is impaired.⁶⁷⁹

While it is rare for civil law countries, common-law countries’ courts have the option of declining jurisdiction by invoking the doctrine *forum non conveniens*. However, jurisprudence and interpretation of the doctrine vary between common-law countries. In Australia, a court

⁶⁷⁵ CASE OF BELLET v. FRANCE (Application no. 23805/94) of December 4 1994. Par. 38 and par 36.

⁶⁷⁶ CASE OF KREUZ v. POLAND (Application no. 28249/95) 38-45; CASE OF PODBIELSKI AND PPU POLPURE v. POLAND (Application no. 39199/98) pra. 65-66

⁶⁷⁷ CASE OF MELNYK v. UKRAINE (Application no. 23436/03) par. 26

⁶⁷⁸ CASE OF PÉREZ DE RADA CAVANILLES v. SPAIN (116/1997/900/1112) par 49; CASE OF MIRAGALL ESCOLANO AND OTHERS v. SPAIN (Applications nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98) par 39

⁶⁷⁹ Council of Europe/European Court of Human Rights, 2013 - Guide on Article 6 of the Convention – Right to a fair trial (civil limb) p. 14

could decline jurisdiction if the court is a clearly inappropriate forum, while in most common-law countries, relative to the claim, jurisdiction can be denied if there is another more appropriate forum.⁶⁸⁰ However, in both interpretations of *forum non conveniens*, the courts indicate that there is another appropriate court. If that another court would also decline jurisdiction, then we could say that proper lack of access to court has been established.⁶⁸¹

Another common reason for declining jurisdiction for both common-law and civil-law countries is the doctrine *lis alibi pendens* which means that another court has initiated a proceeding in the same matter between same parties and for that reason access to the court is declined. However, in this case, it is evident that the party already has access to some other court (though maybe not most appropriate for the party). Hence we do not consider it reason for limiting access to courts.

There is a difference between the right of access to court and availability of dispute resolution mechanism based on the dispute agreement. The right of access as a part of the right to fair trial is a constitutional right in most countries, and it is also guaranteed by international conventions, which means that in a worst-case scenario, even if met with obstacles of procedural nature, a party should not be deprived of access to a court. More commonly, the rules on asserting jurisdiction which regulates access to courts in connection to the subject matter of disputes and the parties, determine which court a party has access. To answer the initial question in relation to courts: do jurisdictional rules allow or make available use of a dispute resolution mechanism in regards to clouds dispute context - the answer is yes, the applicable rules guarantee the access.

This guarantee is a significant difference compared to other forms of dispute resolution which rely on the agreement (either pre-dispute or post-dispute) to be able to initiate the dispute. As we will see in section 1.2.2., the power relation between parties influence the outcomes of the agreements and thus influence the availability of ADR or even restrict access to court under certain circumstances. Still, the access to courts remains a residual guarantee and the backbone of the rule of law.

The right of access is guaranteed, but the access to the court which is inappropriate for one party due to various factors, are a separate issue and result of jurisdictional rules. Chapter 4 is

⁶⁸⁰Dan Jerker B. Svantesson, *supra* note 416. p.8.

⁶⁸¹ Although in those cases also probably the court of higher instance would decide on which court has more connection to the dispute and which is more appropriate. It would delay justice for sure.

devoted to jurisdictional rules that are relevant for cloud service disputes, and we have seen under which conditions we apply Brussels I Regulation or national laws for consumers, or the influence of Hague Convention on the choice of court agreement for commercial disputes. Still, in some form right, of access is guaranteed (even though by same laws could be ineffective) in most of the jurisdictions, and given enough resources it is attainable. The same cannot be said for alternative dispute resolution, nor that it exists the right to access ADR. In some specific sectors regulations mandate the use of ADR but do not exclude consumers' access to courts in the EU entirely, or we mostly have recommendations in regulatory or policy documents to use ADR in appropriate settings. The cloud context would seemingly be an appropriate setting for ADR due to its global availability, and ADR's flexibility should be a strong asset that would drive the use of it. Currently, as presented in our survey in Chapter 3, this is not the case, since it is not represented in the majority of cloud contracts. Let us see what factors could have influenced such outcome.

2.2. Availability of alternative dispute resolution body

As we have seen in Chapter 3, jurisdictional rules, given the circumstances of the disputes, especially when it comes to cross-border transactions, tend to favor either plaintiff (complainant) or defendants. The rules that give authority to specific dispute resolution body to handle disputes, while relying on intrinsically fair principles, at the outcome could have results were the jurisdiction (or the competence which is a better term for ADRs) diminishes the possibility of initiating the dispute resolution process. For alternative dispute resolutions, we underline the distinction between binding adjudicatory schemes (arbitration) and voluntary (consensual) bargaining schemes (negotiation, mediation/conciliation).

Here we have two questions that need to be answered in the beginning phase of the process.

1. Do jurisdictional (competence) rules allow the dispute to be handled in designated ADR entity?
2. If they allow but are made not mandatory, are the parties going to accept the authority of the ADR body and commit to it?

Jurisdictional rules, in general, allow the dispute to be handled by an ADR entity if the submission is based on the agreement between the parties, conditional to unrestricted consent and certain regulatory requirements. However, to avail itself of the procedural guarantees and

principles established in regulations, the parties and subject matter of the dispute have to fall within the scope of the pertinent regulations.

When it comes to the EU, if the circumstances of the dispute do not fall within the scope of the ADR Directive and the ODR Regulation, the residual national and international regulations still apply (if covered by their scope). Since the ADR Directive harmonizes procedural guarantees, principles and practices of ADRs in the EU, and ODR Regulation provides single entry points, we have chosen to focus on them as they are applicable to the whole Single market and set in favor of consumers as weaker parties. Indeed, they were our main reference point for the discussion on access to justice for consumers on the EU level. Therefore for the availability of the ADRs that are held to the standards of these regulations (which are also relevant for other key concepts/indicators) we need to examine if our context fits into their scope of application.

2.2.1. Restrictive scope of EU regulations

The scope of EU regulations is restrictive in several aspects relative to the cloud service dispute context.

2.2.1.1. Disputants

Both the scopes of ADR Directive and ODR Regulation are equally restrictive about the disputant parties. They are both only applicable to a dispute between a consumer resident in the European Union and a trader established in the Union.⁶⁸² This is very restrictive considering the global availability of cloud services and how many consumers that are domiciled in the EU are able to use the services which are established outside of the EU (presumably in the US). The same goes in the other direction, many consumers domiciled outside of the EU would not be able formally to avail themselves of access to the ADR entities that comply with the regulation by invoking it, even if the business established in the EU are willing to. According to Art 4 of the ADR Directive a trader is established: (a) if the trader is a natural person, where he has his place of business, or (b) if the trader is a company or other legal person or association of natural or legal persons, where it has its statutory seat, central administration or place of business, including a branch, agency or any other establishment.⁶⁸³ Of course, if the (out of scope) trader is willing to accept out-of-court entity to settle the dispute and consumer

⁶⁸² Art 2 of ADR Directive, Art 2 of ODR Regulation

⁶⁸³ Art 4 of ADR Directive, also it is referenced to in Art 4 (2) of ODR Regulation

(nonresident) is willing as well, then it would not be that strenuous to find available ADR body in the EU and probably even among those enlisted on ODR site. Only, in that case, it would not have to comply with requirements and principles set in ADR and ODR regulations. That means the guarantees are not in place and hence the international legal framework is not appropriate for the disputants that fall outside of the scope. Consequently, the potentially high number of disputes that are within our context (mostly for traders established outside of EU) would be left out of high standards and principles of the framework.

2.2.1.2. Out-of-court entities

The ADR Directive is not applicable to procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader, (unless national law of Member States allows it); and procedures before consumer complaint-handling systems operated by the trader.⁶⁸⁴ That leaves out any in-house complaint systems even if it would be subjected to independent supervision or audit, or if it provides substantive guarantees for its independence or impartiality. Also, it leaves out numerous complaint handling systems that describe themselves as ODR.⁶⁸⁵ It is up to the Member States to allow for the application of the Directive in the first case but it is not mandatory for all states and does not set the standard, so it cannot be taken as allowed or set. A Member State could just as easily enact higher standards for all requirements and principles under its national law.

This does not, in turn, exclude trustmark schemes since they are not being remunerated exclusively by a single trader. They are financed by the system of annual fees and membership from the adhering members/traders, or if they are financed based on the procedure initiated they are still not reliant on the trader as single source of income but they are being financed under general adherence to their respective programs, which also includes remuneration for compliance checks etc. Still, we have not yet observed that Trustmark schemes like TRUSTe are enlisted on the ODR site, even if they provide fully online dispute resolution.

In addition, the scope of ADR Directive does not include attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute.⁶⁸⁶ It is not clear if it

⁶⁸⁴ Art 4 (a) and (b) of ADR Directive

⁶⁸⁵ More on it in the later in chapter 7

⁶⁸⁶ Art 4 (f) of ADR Directive

includes any attempt before judicial proceedings where a judge advises parties to adhere to mediation or assisted negotiation, or it is strictly restrictive to judicial role in mediation and negotiation. If we go strictly by the wording of the article, then all court-annexed ADR are out of scope. This paragraph excludes a number of national initiatives to expedite the proceedings before civil courts and small claim courts by introducing online and off-line annexed ADR schemes, which run independently or under the supervision of court staff.⁶⁸⁷

2.2.1.3. Subject matter

Both ADR Directive and ODR Regulation are clear that the subject matter of the respective regulation are disputes that concern contractual obligations stemming from sales or service contracts.⁶⁸⁸ However, ODR Regulation diverges in one important aspect: “...disputes concerning contractual obligations stemming from online sales or service...” ODR Regulation is primarily oriented to online sales and services, which includes cloud services as a subcategory of online services. However, looking at the text of the EU ODR and ADR regulations we get an impression that the legislator had primarily focused on buyer-seller disputes of products on the internal market and chose to neglect the quite common free online service which are mostly cloud based.

2.2.1.3.1. Free services

Nominally, the legislator addresses services, however, the idea that EU has not been fully considering redress for free online services is best illustrated in the definition of a service. If we look at the definition of a service contract for ADR Directive (ODR Regulation also refers to it for the definition) it clearly says in Art 4:

“Service contract means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof.”⁶⁸⁹

Click-through sign-up for free service are usually a form of a service contract. This definition excludes the use of EU ODR platform for disputes over contracts for free services, where

⁶⁸⁷ See Hiil TREND REPORT IV ODR and the Courts: The promise of 100% access to justice? Online Dispute Resolution 2016

⁶⁸⁸ Art 2 of ADR Directive and Art 2 of ODR Regulation

⁶⁸⁹ Art 4 of DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

economic gains are not coming from consumers paying for the service, but from other possible income models as described in Chapter 3. On the EU ODR site, while submitting a complaint, it is required to fill one of the fields by entering the amount spent on good or service. The requirement is set in Annex to the ODR Regulation, where it is specified what kind of information is to be provided when submitting a complaint. Under (9) it is required to enter information on the price of the good or service purchased.⁶⁹⁰ It is obviously considered relevant to have information on the amount of money that was spent for the good or service, as it is relevant for the complaint handling (communication to trader), type of dispute and choice of ADR provider among others, but also for the parties' consideration whether it is worthwhile to settle dispute in proposed manner (if not mandatory). However defining a service contract by counter payment, excludes many of the online services from the scope.

We could also question the possible interpretation of this definition on free trial periods of the services; a free trial is not as committing to payment or undertaking to pay for a service, as the commitment to payment is conditional and pending approval upon trial period. In the highly competitive markets for certain internet services, a free trial period is highly expectable. On the other hand, liability limitations are common and justifiable in the probation periods for the service, since the main goal of the trial period is to test the quality to establish whether quality standards satisfy the user. If users' requirements and standards on providers' contractual obligations are not met, the outcome should be the cancellation of the main service contract. However, there are possible situations leading to disputes, where users that canceled the service upon trial period are being charged as though the service contract has been concluded. The issues of unjustified enrichment and whether such scenario constitutes service contract or if it is a contractual dispute in the first place would possibly have to be interpreted beforehand in the court or another tribunal.

Similarly, to keep the customer loyalty, service providers are often providing other free services that may not be directly connected to the one that has been paid. Such subsidized service is usually based on separate click-through contract, which according to ADR Directive is not a service contract. Additionally, we also have situations where the cloud service is free, but certain extensions or add-ins are to be paid if desired. If users run into an unrelated issue with a basic service provider, while they only paid for this third-party add-in software, it is uncertain if it falls under the scope since the basic service is intermediary for the paid service, but the

⁶⁹⁰ Annex to the Regulation on consumer ODR

paid one is not directly disputed. If the cloud provider limits liability or guarantees for any third party application and if they are not being paid to (at least directly) by users are they under the scope of the Directive? Again, strictly looking at the wording of the scope of regulations, those situations would be excluded from the scope.

Time could also be an issue since we could have services that were used to be paid, but then became free services, or if a user of paid premium version of service, switches to free version. Should it be considered a new contract because the important element has changed (price and terms for payment) or a continuation of previous by the annex to the contract since all other elements have remained the same? When users switch back to free or basic version, usually it has to be specific step indicating the intention for the transition. Otherwise, service is being charged as in a previous period (automatically billing as in the prior period of monthly or yearly subscriptions for premium users).⁶⁹¹ For this step, users need to find the appropriate option on the site and undergo new click-through giving of consent, which indicates a new agreement. Whether it should be considered an entirely new contract for free service or annex to the existing contract, it should have legal effects from the date of giving a renewed consent for it. Therefore, it would be most likely considered a free service for the purposes of the Directive if the dispute arises after the date of switching to a basic account. However, if the dispute would be for overcharging or charging the previously canceled paid service then it could still be considered a paid consumer service (for the previous period), and it would fall under the scope of the regulations.

Needless to say, the wording of the Directive excludes the use of most popular cloud-based social network sites from its scope. Social network sites, like Facebook, have a significant number of complaints involving compliance with acceptable use policies and terms of service.⁶⁹² Even though Facebook algorithms are used for detection of AUP violations, they employ a significant number of people to check or verify the work of algorithm based on complaints.⁶⁹³ Access to the free services like Facebook has become valuable to many users, arguably more valuable than the price they are (not) paying for it, and if given option, some of the blocked users from Facebook, would probably contest such decision in the external and

⁶⁹¹ See for example ToS of Spotify at: <https://www.spotify.com/int/legal/end-user-agreement/> and Dropbox at: <https://www.dropbox.com/privacy#terms>

⁶⁹² See for example <http://www.theverge.com/2014/9/2/6083647/facebook-s-report-abuse-button-has-become-a-tool-of-global-oppression> and <https://www.change.org/p/facebook-encourage-facebook-to-review-their-report-abuse-process> and <https://www.rt.com/uk/359144-facebook-lawsuit-nude-photo/>

⁶⁹³ See <https://mic.com/articles/153072/facebook-harassment-abuse-algorithm#.XB2tC3B1j>

appropriate forum. Certain social network sites or cloud services could be excluded from the scope due to their nature, regardless of the price (or lack thereof). LinkedIn, for example, is advertised as a social network for building professional networks of its users. Thus it would be hardly considered as consumer service that is outside of natural person's trade, business, craft or profession as defined in Art 4 of ADR Directive.

Many products (other than cloud services) come bundled with additional free online service that otherwise would have to be paid for. It could come in the form of free subscription for a cloud service that comes with a smartphone that has been bought, a toy that has interactive web game based on it, or software (a platform) that is bundled with basic free third party applications. To add to complexity many home appliances that are being marketed under the term of "internet of things" are enabled to connect to third party applications, and many of those are free as well. The market for smartphones alone is significant enough and relies on many free web-based services that in turn proliferates use of free services, and many of those are used for interaction with other internet enabled products. Free services have become a vital part of the cloud market, and without further explanations, we do not know the reason for excluding them from the scope of the ADR Directive and ODR Regulation. We could speculate that the Commission did not consider the disputes over free services relevant since their value has not been expressed through price (which could also complicate determination of the value of the claim) and consumers of those services are less committed without payments. Hence the redress for them is less relevant. Maybe, it was intended to avoid large volumes of frivolous claims stemming from irrational demands from users of free services. Maybe it was sought to avoid the complexity of some issues, like the ones we mention above, and to stick with simple low-value cases that could be handled more easily by ADR providers. Then again most of these arguments are sidestepped if we consider that there are no thresholds for the paid service to allow redress, and there is no significant difference between free service and service that has been paid for in lowest, symbolic amounts (for example 1 EUR or 0.1 EUR to confirm the validity of credit card in some service).⁶⁹⁴ In the free services, the value of service is not expressed through the price paid for the service and access to redress should not be conditioned to it either. If a consumer has attached significant value to the service, especially with the prolonged use of it (for example consider the use of popular free e-mail client), he should be able to have access to external redress if he considers being wronged by the provider (most

⁶⁹⁴ See for example Paypal.com ToS

commonly blocked access by provider). However, said redress is not covered by the scope of consumer regulations on ADR and ODR in the EU.

2.2.2. Effectiveness of post-dispute agreements on ADR

If the dispute at hand falls under the scope of ADR Directive and ODR Regulation, that does not mean certain availability of the ADRs. The use of alternative dispute resolutions in most cases is not compulsory. In certain cases, the use of ADR is required by pertinent regulation or conditional to adherence to the specific sectoral scheme. In the EU, there is a certain variety when it comes to mandatory ADR. Adherence to the ADR scheme by traders could be required by law (e.g. concerning consumer protection in specific sectors) to offer or guarantee the availability of ADR, but it is not made mandatory for the consumer whose right to access to courts is also guaranteed. Such ADR schemes are set up and overseen by public authorities.⁶⁹⁵ We also have mandatory ADR schemes set up by professional or trade association and who make adherence to ADR a condition for membership.⁶⁹⁶ However, the majority of ADR schemes, in general, are on a voluntary basis. CIVIC study reported in the questionnaire on adherence by the industry to ADR schemes that out of 164 members of various industries, 19% declare mandatory participation.⁶⁹⁷ It indicates that the majority of traders either decides on a case by case basis whether they are going to participate in the ADR procedure or it could be adopted trader's policy, and they are willing to accept it even if it is not a mandatory procedure. In any case, the decision entails some form of deliberation on the part of the trader if it is in its interests to take part in the procedure. Pre-dispute agreements on mandatory arbitration are frowned upon from the standpoint of fairness in the EU, and probably would not be considered binding on consumers; nevertheless, that does not mean that it would be binding for traders if they would choose to submit themselves to ADR scheme. Therefore we could have trader's policy on the use of ADR either in the form of pre-dispute agreements or post-dispute agreement either for binding or non-binding outcomes of ADR, and we also have the case-by-case decision of trader to participate in available ADR in post-dispute scenarios.

⁶⁹⁵ For example in consumer financial services sector, see for example Financial Ombudsman Service in the UK: <http://www.financial-ombudsman.org.uk/> but also Commission de Surveillance du Secteur Financier in Luxembourg, Pensions Ombudsman in Ireland, and the Federal Financial Supervisory Authority in Germany.

⁶⁹⁶ See for example Banking Ombudsman in Poland, Commission Paritaire de Médiation de la Vente Directe in France and the Netherlands Foundation for Consumer Complaints Boards.

⁶⁹⁷ Report, *supra* note. 655 p. 35.

While the pre-dispute agreement is already determining the availability of the ADR to the consumer for potential redress purposes, the post-dispute agreement allows traders to assess the legal standing in a given case, assess the possible options, effects and outcomes of proposed ADR methods and compare it with alternatives. The parties are in effect negotiating on the acceptance of an ADR scheme which is either suggested by the one of the party or by the ODR platform (based on the input of claimant). No matter if they take a positional or principled approach to negotiation, the power relationship between the parties plays an important role. The power imbalance is one of the main critique points of the work of Fisher and Ury, where the theory assumes rough equality in power between the parties.⁶⁹⁸ Fisher addressed issues of power imbalance, and proposed strategies which point to establishing a strong BATNA, but even those strategies recognize the overpowering effect of the stronger party.⁶⁹⁹

In our context, there is an obvious power imbalance, observable in imposed terms of service and non-negotiable terms. If negotiation relied solely on the power of the parties in their relationship and party autonomy, the outcomes would prevail in favor of providers, which we can testify by observing the typical “as is” terms of services.⁷⁰⁰ Without regulatory intervention, the weaker party-consumer would not be able to consider significant alternatives to negotiated agreements or BATNA’s. The regulatory intervention potentially creates incentives to reassess negotiation position. Given that EU consumer regulation would allow consumers to choose the court of their domicile, which could be inconvenient for providers, they would have to consider the effects of such choice on their positions. Such incentive is viable only if the consumer would be willing to pursue redress before the court. As we have seen in the previous chapter, a significant percentage of consumers (48%) would not be willing to go to court for the damages under 200 Euros.⁷⁰¹ Cloud services for consumer mostly fit into price range from free to 200 Euros. The cost of disputes, as we will demonstrate soon, differs from state to state, but could be even more expensive when there is a cross-border element to the dispute. These factors influence negotiation positions and BATNA’s, and if legislative intervention does not provide additional incentive for providers to adhere voluntarily to ADR scheme, the weaker parties will

⁶⁹⁸ W McCarthy, *The role of power and principle in getting to yes*, NEGOT. J. (1985).Katja Funken, *THE PROS AND CONS OF GETTING TO YES Shortcomings and Limitations of Principled Bargaining in Negotiation and Mediation*,

⁶⁹⁹ ROGER FISHER, *Negotiating Power*, 27 AM. BEHAV. SCI. 149–166 (1983).

⁷⁰⁰ See survey on ToS in chapter 3

⁷⁰¹ European Commission (2011). Consultation paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union, para. 1; CSES 2009, p. 10

be facing inferior negotiation position that leads to lack of redress and hence lack of access to justice.

Amy Schmitz claims that although some companies use pre-dispute arbitration to escape liability and sidestep legal regulation, “insistence on post-dispute arbitration agreements is impractical because parties rarely agree to arbitrate after relationships have soured.”⁷⁰²

The ODR Regulation, with proclaimed intention to provide low cost and speedy dispute resolution, is nonetheless reliant on the willingness of parties to participate. In article 9 it is clearly stated that, after exchanging communications, if parties fail to agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint shall not be processed further.⁷⁰³ The only obligation of the cloud provider established in the EU is to provide a link to the ODR platform. There could be a perplexing issue of consistency here since there is no obligation of the provider, which in a way advertises its acceptance and support for EU ODR platform by placing a link to it that it will follow through and respond to invite by ODR platform. In other words, the web service could advertise its willingness to resolve disputes through ODR mechanisms, but when it comes to it, the business will make case-by-case decision to be or not be the part of the ODR process. This is a general problem of EU ODR Regulation - lack of proper mechanism to ensure the acceptance of the processes.⁷⁰⁴ In highly competitive markets where different services providers offer similar services, those who are willing to participate in ODR and go a step further and offer such option for consumers in pre-dispute agreement, are exposed to a multitude of potential claims compared to those who abstain.

We have to remind that ADR Directive and ODR regulation are primarily intended to be consumer protection tools that only apply to disputes between consumers and traders who are residents of the European Union. Paid and free consumer web services are also most commonly cloud computing services, where its biggest providers are residents of the United States. It is common that Software-as-a-service (SaaS) model is based on PaaS or IaaS of a different provider (possibly based outside EU). The functioning of SaaS is sometimes dependent on SLAs of its provider. Interdependence of layers of service could be exemplified through disruptions that influence other services. For instance, disruption of services of IaaS (like

⁷⁰² Schmitz, *supra* note 554. p. 101.

⁷⁰³ Art 9 (8) of ODR Regulation

⁷⁰⁴ Dusko Martić, *Redress for free internet services under the scope of the EU and UNCITRAL’s ODR regulations*, 1 REV. DEMOCR. DIGIT. E GOV. ELETRÔNICO 360–376 (2014).

Amazon Web Services) could potentially lead to disruption of a European SaaS. Consumers of SaaS being in a contractual relationship with only European provider could seek redress for this disruption. This would put SaaS provider in a difficult situation to be part of the dispute resolution process where it, in fact, is not responsible for the lack of the service.⁷⁰⁵ So unless there are an adequate redress and remuneration from its own provider, SaaS would not easily accept beforehand to be part of the process where the majority of its users could seek redress and it is understandable why would provider hesitate to submit to an adjudicatory form of dispute resolution on a permanent basis, rather on per case basis, or if at all.

It is possible that the EU's ODR platform could be appropriate for EU-based cloud providers, competing with more renowned US-based providers, by offering more redress options and building trust with users through ODR.⁷⁰⁶ Looking at the survey in Chapter 3, cloud service companies are not devoted at the moment to cross-border ODR mechanisms outside of their established practices. If interested cloud service based outside of EU would probably consider the use of ODR mechanisms independently of EU ODR Regulation.

2.3. Accessibility of dispute resolution bodies

Another important aspect of access to justice is the accessibility of dispute resolution bodies from the point of view of travel costs, language, and need of professional help. Looking at the different dispute resolution bodies, we need to answer respectively if travel costs, language, and need of professional help, impede the access to DR relative to the low value of the dispute in our context? It is also important to remark that not all forms of dispute resolution are equally physically available. The number of courts, arbitrations, or even arbitrators and mediators are limited and differ from country to country. The number of courts in the country should serve a purpose of allowing a maximum number of people access to the court. In the 2016 CEPEJ study on European judicial systems, the average number of first instance courts was 2 per 100 000 inhabitants of all of the observed countries members of Council of Europe (median 1,4; minimum 0,1; maximum 13,2) and the average number was 21 judges per 100.000 inhabitants.⁷⁰⁷ It is obviously not comparable to the significantly lower number of total 750

⁷⁰⁵ *Id.*

⁷⁰⁶ For more on building trust through ODR see Noam Ebner, *ODR and Interpersonal Trust*, 203–236 (2012).

⁷⁰⁷ European judicial systems Efficiency and quality of justice CEPEJ STUDIES No. 23, 2016 (data from 2014) p.90 and p. 167. The number includes all types of first instant courts and judges

ADR bodies in the EU out of which 258 are registered with the ODR platform, nor should it be an interchangeable category.⁷⁰⁸ Still, it is illustrative of their capacities in case of a higher volume of dispute inflow.

2.3.1. Travel costs

We have already pointed to the aspects of potential cloud service disputes that given their cross-border nature, it is quite likely that the travel costs to the jurisdiction of the party would outweigh the price paid for the disputed service. This does not mean that the value of the dispute for the complaining party is determined only in relation to the price, but it is indicative of impracticability of waging disputes in these scenarios. If we consider just traveling costs between different states and then recall the study that consumers would not go to a court for the damages less of €200, then we can say that for low-value cloud service disputes, cross-border travel could play an important role in pursuing access to justice.

Having this in mind we need to consider how the traveling costs are distributed among the parties. Are they equally distributed (Rawlsian first principle) or in case they are not, are they distributed, so that weaker party is benefiting of such distribution (second principle)? We can observe the travel costs as direct effects of the rules of jurisdiction and availability of dispute resolution bodies.

If the dispute resolution is pursued before the court, the distribution of travel costs will be determined by rules of jurisdiction. The party is physically located further away from the court that has jurisdiction, will most likely (but not necessarily) have higher travel expenses connected to the litigation, especially if presence is required or party needs to give oral statements before the court. If the procedure requires only written statements and does not require the physical presence of the parties, or it is rather an exception than the rule, as in many procedures before small claim courts, it also has the effect on the costs.

The forum of the dispute and the type of the court is determined by private international law rules of jurisdiction which we have talked about in Chapter 4. The accepted principle is that defendant should be sued in the place of his domicile- *actor sequitur forum rei*. This doctrine puts complaining parties in the cross-border disputes in the less favorable position of having to travel to the defendant's domicile. However, as we have seen, there are exceptions to the rules.

⁷⁰⁸ See Chapter 5

In the case of prorogation, where parties agree to the jurisdiction of courts under specific legal conditions and designate courts that will have jurisdiction regardless of parties' domicile. In the majority of the cases of cloud service disputes, this is the case of designating provider's jurisdiction in terms of services. Having more negotiating power cloud providers impose more favorable forum to them. On the other hand, consumer protection rules incorporated into Brussels I regulation, offer protection to consumers as the weaker parties in giving them a choice of jurisdiction between the Court of defendant's domicile and the court of consumer's domicile. The consumer would have to be domiciled in one of the Member States of the EU for Brussels I to apply. Assumed selection of consumer's local court is, of course, more favorable to the consumer. The special jurisdiction for consumers is limited to natural persons and transactions outside of their trade or profession. Cloud users that are also natural persons must abstain from the professional use of cloud service in order to benefit from consumer protection rules on jurisdiction.⁷⁰⁹ When we mention other than natural persons that use cloud service professionally, we think of small and medium enterprises that are also disadvantaged by the established rules of private international law in the case of cross-border cloud disputes, as they are not entitled to different treatment from big enterprises.

To counteract traveling costs and other disadvantages of having cross-border disputes, the EU has introduced the Regulation on European small claims procedure, which is intended to be the pan-European solution for lower value disputes with exclusively cross-border elements and significantly lower formality of processes.⁷¹⁰ Nevertheless, it is still a court procedure that is governed by the Brussels I regulation in determining of the jurisdiction. Lower procedural formality allows for avoidance of unnecessary travel and could be equally favorable to both parties. The advantages of European small claims procedure for cross-border cases still have to be confirmed in practice, and then to be compared to alternative forms of dispute resolution. To develop the full potential of European small claims procedure, the courts would have to rely more on information technologies to facilitate faster, cheaper and accessible procedures.⁷¹¹

Alternative dispute resolutions encompass a variety of methods which have effects in lowering travel costs that could be incurred by parties in litigation. Bargaining methods of ADR are much less formal and more flexible than adjudicatory forms and largely depend on

⁷⁰⁹ See more in Chapter 4

⁷¹⁰ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure

⁷¹¹ CORTÉS, *supra* note 424.

communication. If the communication can be facilitated without travel costs, it would be equally beneficial desired effect for both parties. If travel costs are necessary, they depend on the format of ADR, and fairly arranged by parties themselves or mediator.

Arbitration in the traditional sense requires establishing the seat of the arbitration tribunal. The most renowned institutional arbitrations are usually seated in commercial capitals, and if the dispute is brought before them, depending on the level of formality in arbitration, travel costs for the parties could be even higher than in litigation. Arbitration also allows flexibility where parties can agree on ad hoc tribunals with the seat in the mutually agreed location. The arrangement and possible costs dependent on parties 'agreement, which again could be an issue there is a major power imbalance. Costs can be avoided with procedurally less stringent (correspondence only) arbitrations that don't require physical presence. This type of arbitration without physical appearance could sit well with cloud service disputes since the evidence could be submitted in an electronic medium and oral depositions would probably be exceptional. In such circumstances, it would seem even more appropriate to conduct the whole proceedings online, and thus to avoid travel costs altogether.

If we consider characteristics of the parties, where both disputants have equal or similar access to the Internet, then ODR allows most equal accessibility with lowest costs of travel and communication compared to other forms of dispute resolution. The digital divide should not be an issue since users are already using digital services. Thus presumption of availability and competence in using internet services would be sufficient for accessing online arbitration or other forms of ODR.⁷¹² Both parties have already presumed access to the Internet. Accordingly, the travel costs in use of ODR would be irrelevant for the process. Online formal dispute resolution comes closest to the ideal equality in access. If on the other hand the choice between different forms of dispute resolution had to be made, having in mind Rawlsian fairness and its propensity for weaker party, the travel costs or lack thereof in online methods of dispute resolution are to the greatest benefit of worse off party. It cannot be considered in isolation but in conjunction with other concepts. However, the perceived barrier of costs in traveling plays an important role in assessment and decision to pursue a formal dispute resolution.

⁷¹² M WARSCHAUER, TECHNOLOGY AND SOCIAL INCLUSION: RETHINKING THE DIGITAL DIVIDE (2004); P NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE (2001).

2.3.2. Language and professional need

We observe language from the point of view of accessibility of dispute resolution body, and not as a procedural guarantee based on the right to a fair trial. Linguistic rights that cover rights to an interpreter during trials are a separate issue connected to procedural fairness. However, from the point of accessibility through initiating disputes, do courts and ADRs accept complaints in different languages other than the official language of the institution?

Usually, when submitting a lawsuit in the court, it has to be in one of the official languages recognized by the state. For parties that do not speak the official language, professional assistance in the form of lawyers and interpreters are available. Employing a professional assistance increases overall costs and discourages low-value claims from being submitted in the first place.

European small claims procedure Regulation introduces standardized form for submitting the claim and provides assistance in filling it if needed.⁷¹³ However, the claim must be submitted in the language of the court, as must the response, any counterclaim, the description of supporting documents, essential documents.⁷¹⁴

Similarly, most of ADR bodies registered on the EU ODR platform, give information on the languages in which they perform the procedures. This information is required by ODR Regulation, and it is mandatory to be submitted to the parties in initial communication/negotiation phase on appropriate dispute resolution body for the disputes. In that sense ADR procedures have the same limitations as the court procedures where official languages is a potential limiting factor or barrier in case of disputes with cross-border elements and parties speak different languages. It is also one of the main reasons why currently European ADR schemes are oriented primarily towards disputes within their Member States.

Nevertheless, the EU ODR platform allows submitting a complaint in all official languages of the European Union, by standardizing the fields in the form on the site in all languages, allowing the party to select the language it uses, and also based on the language it seeks and

⁷¹³ Art 4 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure

⁷¹⁴ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure

proposes appropriate ADRs.⁷¹⁵ It also provides information and assistance in all the official languages of the EU.

For the low-value consumer cases, professional assistance in the form of attorney is usually not required in the courts of the Member States. It has also been confirmed with European small claim procedure Regulation that professional assistance is not required and the judges could provide help and assistance to the disputant.⁷¹⁶ European small claim procedure Regulation also gives judges discretionary power to refuse unnecessary procedural requests by the parties in they are unnecessary for the fair proceedings.⁷¹⁷ We have a presumption of judges' expertise required to assess the legal situation, and if needed the judge can provide some assistance to the party who did not commission attorney.

ADR Directive and ODR Regulation, do not require professional assistance of the third parties, although it is intrinsic to some form of ADR, like the natural role of the mediator would be to consider the interest of the parties and to find an appropriate solution from a neutral standpoint. Still, the role of mediators should not be compared with the requirement of professional assistance in adjudicative forms of dispute resolution. ADR Directive and ODR Regulation confirm that legal representation is not required in submitting a complaint or for proceeding with a dispute, but without depriving parties of the right to representation.⁷¹⁸ The possibility of having a dispute resolution without necessary legal representation was one of the *raison d'être* for the ADR and ODR consumer regulations.

Considering our context of cloud services, if the parties do not have the necessary legal knowledge, the assistance of the judge or ADR third party is welcome, with the assumption that the legal expertise of the judge surpasses required standards for ADR neutrals. In any case, at least for consumer disputes, legal representation or lack thereof is not a barrier to initiate or proceed with the dispute. ODR platform could be seen as additional assistance in proposing ADR entities based on their proclaimed expertise although the platform itself does not provide any professional assistance other than facilitating language variety.

⁷¹⁵ Art 5 and Art 9 of ODR Regulation

⁷¹⁶ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure

⁷¹⁷ See Chapter 4

⁷¹⁸ Art 7 (b) of ADR Directive: "the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor, but the procedure shall not deprive the parties of their right to independent advice or to be represented or assisted by a third party at any stage of the procedure;"

2.4. Access for the less advantaged

Commonly, cloud service providers impose terms of service in their favor, which consequently can turn the users of service to be a less advantaged party of arrangement. From all the possible ways users could be treated unfairly, we are interested only in the aspect of dispute resolution and how fairly the parties can access justice. While the most competent and fair dispute resolution bodies could be available elsewhere in comparable cases, the only thing that matters from users' point of view in specific dispute is whether they have access to a suitable conflict resolution that matters to the dispute at hand. Therefore we focused on two variables of access: availability and accessibility. We observed whether different dispute resolution bodies are sufficient from the point of these two variables by answering two guiding questions:

- Do jurisdictional rules or competence rules allow or make available use of a dispute resolution mechanism in regards to clouds dispute context?
- Do travel costs, language, and need of professional help, impede the access to DR relative to the low value of the dispute.

Availability of the courts is guaranteed by international human rights conventions as the right to access the court, but the availability of ADRs depends on contractual/consensual nature of the mechanisms. The EU regulatory framework provides specific boundaries that shape and sometimes restrict the availability of ADRs. Looking strictly at adjudicatory dispute resolution bodies in comparison, we find that human right guarantees of access to court outweigh the availability of ADRs that are usually on contractual grounds. Even though the EU ADR and ODR framework are set to provide consumers a suitable forum for low-value disputes, the fact that availability mostly relies on traders good will, do not provide a sufficiently adequate tool that users could expect to use in case of need. Current numbers of available arbitrations that are in compliance with ODR Regulation are smaller in comparison with already established practices for consumer arbitration/adjudication in some of the EU Member States. Therefore, the pillars of availability remain on courts within the networks of national judicial systems and adjudicative ADRs have an advantage over adjudicative ODR mechanisms. If we factor in non-adjudicatory methods, the result remains the same since the non-adjudicatory mechanisms like mediation and conciliation also depend on post-dispute agreement. Traditional ADRs have a

slight advantage due to previously established practices in the Members States and availability through European Consumer Center Network (ECC-NET), but this could change during time through higher recognition of ODR.⁷¹⁹

As opposed to availability based on rights of the parties to bring the dispute to the forum, the accessibility is a matter of the barriers to the access to a potential dispute resolution. Online dispute resolution mechanisms achieve almost ideal equality with overcoming travel costs for the parties. This would suit perfectly to Rawlsian first principle of justice, and hence have a strong advantage over other mechanisms. Traditional arbitration, due to limited numbers of institutions which are mostly focused on significant commercial areas is less benefiting to the worse off parties than courts. Non-adjudicatory methods have an additional advantage over adjudicatory due to their flexibility.

Looking at the both elements of access in our conceptual framework of access to justice as fairness, we can notice the interplay between them and influence of access to other key concepts. Without access to the courts or availability of alternative dispute solutions remaining key concepts are not engaged at all. The right of access to the courts is an essential human right. However, although guaranteed right, jurisdictional rules of private international law affect the accessibility to the public bodies whose access they guarantee. The effect they produce could turn out to be barriers, like disproportionate travel costs to one side that render dispute resolution impractical. Assuming access to dispute resolution body, either mandatory or on a voluntary basis, we can proceed with assessing other key concepts before analyzing them from a fairness point of view.

3. Procedural fairness

If we look at the procedural rules for different dispute resolution bodies, we get an impression of variety and possible feeling of comparing apples and oranges when it comes to certain forms of dispute resolution (i.e. mediation and court procedure). Therefore, we need a common denominator, a common baseline that applies to all the forms of dispute resolution. The ADR Directive serves this purpose since its goal is to harmonize and set common standards for ADR entities, whether they are registered on the ODR platform or not. At that juncture of standards

⁷¹⁹ More on ECC-NET available at: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm

for ADR, we can establish if and to what extent procedural guarantees and principles of judicial processes satisfy those standards, or in what ways they surpassed them. It is well-known that judicial proceedings are well regulated by national procedural laws, and they are expected to have higher procedural standards compared to ADRs rules. Rules and procedures could also serve different functions, and while they guard basic human rights of plaintiffs in judicial proceedings, they could be purposely devised to allow flexibility and informality in ADR as alternatives to very same rules of judicial proceedings. The high formality of judicial proceedings and its consequences motivate potential disputants to seek alternatives. The question remains if such alternatives provide basic procedural fairness to be considered a form of access to justice.

We will focus on three aspects of procedural fairness that are common for all dispute resolution bodies which involve a third party. They do not cover negotiation, as it is inter-party dispute resolution without the involvement of third parties. Negotiation in cloud disputes is the least formal form of dispute resolution and generally does not require procedure (although it is possible to have structured negotiation with rules). Without strict structure and procedure, the issues of procedural fairness are not problematic, especially if there is a similar level of negotiation power. If negotiation is based on voluntary participation, and if it does not yield a satisfying result, parties can escalate the dispute to another form. In the case of power inequality in negotiation, the law could be invoked on the outcomes of unfair negotiation under certain conditions, but regulations do not interfere in the negotiation procedures in the disputes relevant for our context. Therefore, we focus on the regulated aspects of ADR which we will observe through following three questions:

1. Are there procedural guarantees in place for transparency and fairness in selection/appointment procedure of adjudicators/neutrals?
2. Are there procedural guarantees in place to ensure equality of arms in presenting the case?
3. How the cost of dispute resolutions are attributed and is it adequate in cloud dispute context?

3.1. Transparency and fairness in appointment

To guarantee procedural fairness in the appointment of entities and persons that deal with disputes, two aspects need to be examined: professional- the expertise of the adjudicator/neutral, and ethical- impartiality and independence of the adjudicator/neutral.

3.1.1. Expertise of third parties

In judicial systems, the expertise of judges in general aspects of law and judicial procedures are verified through several stages of their professional life. Beginning with the initial training in the law and obtaining the law degree, usually to become a judge, the candidates would have to undergo additional professional training and accumulate years of experience in practice before being appointed to the position of a judge. The process of appointment of judges to a permanent position (tenure) differs from state to state, and the conditions vary. In many cases, the selection and appointment of judges are regulated by a constitution, in order to guarantee separation of powers and impartiality and independence from other branches of government.⁷²⁰ The appointment process itself is of paramount importance for the democracy and is being held to the high standards of scrutiny in regards to professional expertise in matters of law.⁷²¹

The expertise of third parties or neutrals in alternative dispute resolution depends on the needs of the specific case and agreement of the parties that specific person with required expertise handles the dispute. The third party, whether it is a mediator, conciliator or arbitrator, or combination of all those, does not necessarily have to be expert in law. Their expertise could be a relevant or subject matter of the dispute (in the case of arbitrators) or in managing conflict (mediators, conciliators). Moreover, even though their position depends on the agreement of the parties, and they could be selected from a variety of possible neutrals, if they are handling disputes as a chosen profession, then it is expected to have a certain expertise relevant to their practice.

Article 6 of the ADR Directive guarantees a level of expertise of persons in charge of ADR and requires that they “possess the necessary knowledge and skills in the field of alternative or

⁷²⁰ MICHAL BOBEK, SELECTING EUROPE’S JUDGES : A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS.

⁷²¹ *Id.*

judicial resolution of consumer disputes, as well as a general understanding of the law.”⁷²² Given that ADR directive covers many forms of consumer dispute resolution, the requirement of the necessary knowledge and skills could vary significantly in relation to the subject matter of the disputes and ADR methods. Necessary knowledge and skill of a mediator are not the same as those of an arbitrator. It does require a general understanding law, but this is an unspecified requirement. It would have been more specific if it had required an understanding of consumer law. On the other hand, it leaves room for lawyers, attorneys, former judges and other legal professionals that have expertise or knowledge of judicial resolutions. Still, the criteria for the expertise of the third parties is unspecified and significantly lower compared to expertise criteria of judges in any national judicial system.

It is interesting to the point that article 6 makes reference only to the expertise of the natural person in charge of ADR. If we consider the use of innovative forms of ODR, where the third party as a natural person could be replaced by software in assisting or proposing solutions or even adjudicating issues, we could question the adequacy of this requirement. Potential software that has capabilities comparable to required skills and knowledge of natural persons (if not exceeding them) would not *stricto sensu* have to be subjected to any requirement of expertise. If we assume that the requirement of expertise would be then referred to a natural person operating such system, then the ODR system could not operate completely autonomously without the oversight of natural persons with the required expertise. In that case, we could say that natural person could be a limiting factor for the development and use of ODR and artificial intelligence solutions if it is to be always linked to the expertise of a natural person in charge. The article 6 requirement is for a natural person in charge of ADR which indicates that the ODR systems would be considered only a tool in the hands of designated natural person. As we will see later in a discussion, this solution could affect the role of technology in ODR as a “fourth party.”⁷²³ This requirement could be mitigated by broader interpretation of required necessary knowledge and skills of persons in charge, so that technical person could suffice, or if it would be sufficient that there is a natural person in charge to handle issues that ODR “tool” could not handle by itself. Otherwise, the expertise is only required of natural persons, and not of legal entities operating the software. A legal entity has the right to use ODR system without implicating natural persons in the ADR process since there is no strict definition

⁷²² Article 6 of ADR Directive

⁷²³ Arno R. Lodder, *The Third Party and Beyond. An analysis of the different parties, in particular The Fifth, involved in online dispute resolution*, 15 INF. COMMUN. TECHNOL. LAW 143–155 (2006).

that would imply otherwise.⁷²⁴ This would legally bypass requirements of expertise of ODR system or ADR entity, but it becomes even more problematic when we discuss requirement of impartiality and independence.

3.1.2. Impartiality and independence

Requirements of impartiality and independence are regulated together with expertise in article 6 of ADR Directive. Again, the Directive requires the Member States to ensure that the natural persons in charge of ADR are independent and impartial.⁷²⁵ Independence and impartiality are additionally specified with requirements that natural persons in charge of ADR are: (1) appointed for a term of office of sufficient duration to ensure the independence of their actions, and are not liable to be relieved from their duties without just cause; (2) are not subject to any instructions from either party or their representatives; (3) are remunerated in a way that is not linked to the outcome of the procedure.⁷²⁶ These requirements are comparable to the tenure of judges in judicial systems that guarantee their positions and security from being relieved without just cause, their financial stability, and independence from parties and government.⁷²⁷

Additionally, the Directive requires from natural persons to disclose without delay to the ADR and any circumstance that may or may be seen to, affect their independence and impartiality or give rise to a conflict of interest with either party to the dispute they are asked to resolve.⁷²⁸ ADR entities must have procedures in place to replace natural persons in charge that would disclose such circumstances.⁷²⁹ In the case of relevant disclosure, a person is replaced with another natural person in charge of dispute resolution process, ADR entity proposes another entity competent to deal with the dispute or the procedure continues with the consent of the parties.⁷³⁰

⁷²⁴ Art 4 of ADR Directive defines: 'ADR entity' means any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2) and 'ADR procedure' means a procedure, as referred to in Article 2, which complies with the requirements set out in this Directive and is carried out by an ADR entity;

⁷²⁵ Art 6 of ADR Directive

⁷²⁶ Art 6 of ADR Directive par. 1. (b), (c), (d)

⁷²⁷ William Howard Taft, *The Selection and Tenure of Judges*, (1913). BOBEK, *supra* note 720.

⁷²⁸ Art 6 of ADR Directive par. 1 (e)

⁷²⁹ Art 6 par. 2

⁷³⁰ Art 6 par. 2 (a)(b)(c)

As with other requirements in regards to expertise, impartiality, and independence, the Directive makes reference only to natural persons as the ones in charge of handling the dispute resolution process. It is an assumption that negates current technical capabilities of certain ODR systems, which are expected to become even more sophisticated with the development of artificial intelligence, natural language processing, and legal expert systems.⁷³¹ Again, as with expertise, ADR entities that are legal entities, according to the Directive do not have any specific requirement or obligation to put natural persons in charge of ADR, which means they could use ODR systems as replacement of natural persons to handle ADR processes. In case the ADR entity is a legal entity (as opposed to natural persons that act as ADR entity alone) chooses to employ an ODR system, there would not be necessarily a natural person in charge of ADR and hence requirements of impartiality, independence and expertise are inexistent. This opens the door for possible misuse and fraud in case proper oversight is not conducted. It leaves out accountability and ethical constraints from persons in charge of setting up autonomous of ODR systems.

Nevertheless, we are talking about the European Union Directive, and it depends on how the Member States are going to implement this norm into their national legislations. If they transcribe it verbatim, they will leave a loophole for ADR legal entities as well.

No matter if the mentioned lacuna will actually become abused in practice, it shows that with minimal requirements of professional ethical standards it is possible to find ways of misuse. National legal systems place significantly more effort in securing impartiality and independence of judges, as this represents the backbone of democratic deliberation under the separation of branches of government. Also, impartiality and independence of judges are the foundations of the right to a fair trial, and as such it has been subject to significant interpretation and clarification of European Court of Human Rights. The independence is referred to in relation to other parties and in relation to other powers (Parliament and executive).⁷³² ECHR has established following criteria on assessing independence.⁷³³

⁷³¹ Davide Carneiro et al., *Online dispute resolution: An artificial intelligence perspective*, 41 ARTIF. INTELL. REV. (2014). John Zeleznikow, *Developing an Online Dispute Resolution Environment : Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 1–52. AR Lodder & John Zeleznikow, *Artificial Intelligence and Online Dispute Resolution*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 73–94 (2012), http://www.mediate.com/pdf/lodder_zeleznikow.pdf (last visited Nov 26, 2013). LODDER AND ZELEZNIKOW, *supra* note 731.

⁷³² CASE OF BEAUMARTIN v. FRANCE (Application no. 15287/89) JUDGMENT STRASBOURG 24 November 1994 and CASE OF SRAMEK v. AUSTRIA (Application no. 8790/79) 22 October 1984

⁷³³ CASE OF LANGBORGER v. SWEDEN (Application no. 11179/84) 22 June 1989; CASE OF KLEYN AND OTHERS v. THE NETHERLANDS 6 May 2003

- the manner of appointment of its members and
- the duration of their term of office;
- the existence of guarantees against outside pressures;
- Whether the body presents an appearance of independence.

We recognize the similarity of the criteria with requirements of ADR Directive, with the distinction of long-established jurisprudence on the issues of independence that is mandatory for all the states signatories to European Convention on Human Rights, which leaves less space for interpretation. Similarly, ECHR established criteria for assessing impartiality: (1) a subjective test, on personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a case; (2) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.⁷³⁴

Looking at the criteria developed by the European Court of human rights, especially the manner of appointment of its members, we emphasize the significance of transparency in appointments of persons in charge of dispute resolution. Even though it ADR Directive promotes transparency by requiring specific information to be available on the sites of ADR providers, it is not held to such high standards of criteria as we can witness in judicial systems based on the jurisprudence of ECHR or national courts and national legislations. The appointments of judges are not on a voluntary basis. It is a differently regulated procedure in national systems, but usually in accordance with “natural” judge principle were cases are being distributed randomly.⁷³⁵ Contrariwise, cases are not being distributed randomly to natural persons within ADR entities (unless it is part of the appointment procedure where it ADR entity appoints a one or more arbitrators randomly) nor the selection of ADR entities is randomly rendered, but usually it is controlled by the parties, and it is based on their agreement. Different institutions or ADR entities have different rules for appointing third parties. Established institutional arbitrations usually have detailed procedures for appointment of arbitrators and the role of institutions in their appointments and selection. There are also principles and best practices for the appointment of arbitrators proposed in UNICTRAL Model laws and UNCITRAL

⁷³⁴ CASE OF MICALLEF v. MALTA (Application no. 17056/06) 15 October 2009 See more on it in Echr & Cedh, *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial*, .

⁷³⁵ BOBEK, *supra* note 720.

arbitration and conciliation rules. They serve as a guide if an agreement between the parties is not easy to reach.

3.2. Equality of arms

The equality of arms principle is an essential principle of the general concept of fairness within the right to a fair trial. It is a fundamental principle for adversarial adjudicative proceedings. Equality of arms underpins the equal opportunities of the parties in proceedings by assuring procedural equality of the parties to present their cases.⁷³⁶ As a part of the right to a fair trial, it is enshrined in the most important international conventions dealing with basic human rights. Our focus for comparison is mostly in Europe and the European Convention on Human Rights, which in its article 6 guarantee equality of arms among the states signatories of the Convention. By the wording of the Convention in the said article everyone is entitled to a fair hearing by the tribunal. The requirement of fair hearing establishes the general principle of fairness for criminal, civil proceedings. Signatory States do have more room for interpretation of requirements of fairness in civil proceedings than for criminal proceedings.⁷³⁷ Equality of arms as an element of fairness has been defined by the European Court of Human Rights in the sense of maintaining a fair balance between the parties.⁷³⁸ Fair balance entails affording a reasonable opportunity to present case and evidence under the condition that it does not place a party at the substantial disadvantage in relation to another party.⁷³⁹ The Court takes the position principle is a general formulation and does not require strict equality between the opposing sides, but in its jurisprudence gives examples of failures to protect equality of arms. For our context, an important example of such breach of equality of arms would be in cases where a party that enjoyed significant advantages in control or access to relevant information swayed considerable influence over the court's rulings.⁷⁴⁰

The ADR Directive in Article 9 provides similar requirements to the principle of equality of arms, with the proviso of the applicability to other methods as well and not just to the adversarial adjudicatory proceedings. It is framed in a way that the parties “have the possibility,

⁷³⁶ Shajeda Akther, Dr Rohaida & Binti Nordin, *EQUALITY OF ARMS : A FUNDAMENTAL PRINCIPLE OF FAIR TRIAL GUARANTEE DEVELOPED BY INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS*, .

⁷³⁷ Echr and Cedh, *supra* note. 734 p. 34.

⁷³⁸ CASE OF FELDBRUGGE v. THE NETHERLANDS (Application no. 8562/79) of 29 May 1986

⁷³⁹ CASE OF DOMBO BEHEER B.V. v. THE NETHERLANDS (Application no. 14448/88) of 27 October 1993

⁷⁴⁰ CASE OF YVON v. FRANCE (Application no. 44962/98) 24 April 2003 par 37

within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them.”⁷⁴¹

The possibility to comment on presented arguments, evidence, documents is not exactly guaranteed equality of arms as interpreted by ECHR since it does not deal with the important aspect of disadvantages of another party. Therefore, as long as the substantially disadvantaged party is enabled to comment on other parties and expert submissions, the fairness requirements will be satisfied. The article 9 does not give any additional authority or guideline to ADR entity for handling the issues of fairness between the parties. This could have a detrimental effect on the fairness of the process, especially when there is a significant imbalance of power between the parties where one is overly dominant and has access to all information and evidence, and the other party does not have full access to needed evidence. If rules of ADR procedure would allow so, ADR entity or person in charge of ADR could be entitled to more investigatory powers or to reverse a burden of proof where appropriate, but this would have to be based on an agreement between the parties on the rules of ADR. Given our previous discussion on the effectiveness of post-dispute agreements where dominant party decides on acceptance of ADR on a case-by-case basis, it would be hard to expect that the third party would be given significant investigatory authority. In situations like these, regulatory intervention on behalf of a weaker party would be required to guarantee fairness. Legislators of the Member States could further elaborate on the requirement of fairness and establish higher standards.

3.3. Distribution of costs

The rules on distribution of costs are relevant from the point of view of access to justice. In the first “wave” of access to justice, the equality before the court was guaranteed, but the costs of litigation were prohibitive to the poor.⁷⁴² We could say that rules on distribution of costs were not adequate for all categories of the population to allow access to justice. Looking at our context and the international framework we are interested to see how the cost of dispute resolutions are attributed among parties and is it adequate in cloud dispute context?

⁷⁴¹ Article 9 of ADR Directive

⁷⁴² CAPPELLETTI, *supra* note.37

All countries impose fees on the parties who initiate the proceedings and sometimes even on defendants in certain stages of the trial.⁷⁴³ The amount of imposed fees is regulated by statutes and depend on the type of courts, type of case or other factors. Hodges reports that the majority of countries use a tariff system, either basing the fee on a specified fixed percentage of the claim value or on the basis of a detailed tariff that specifies certain bands of fees or percentages for cases of differing values.⁷⁴⁴ Two approaches are distinguished with the court fees: one that requires upfront payments and another that requires payments during specific steps of the process. “A large initial fee may obviously deter access to the courts, but again that depends on the size of the fee relative to the resources of users.”⁷⁴⁵

Other important aspects of the distribution of costs are costs-shifting rules. Most jurisdictions have rules of costs shifting where the majority of countries adhere to the general costs shifting rule where loser pays.⁷⁴⁶ Exceptions are countries like the United States and Lithuania and in the EU where the rule is that each party bears its own cost.⁷⁴⁷ For our context of low-value disputes, it is important to mention rules on costs in the EU Small Claim Procedure. Recital 29 of the Regulation on European Small Claim Procedure states:

The costs of the proceedings should be determined in accordance with national law. Having regard to the objectives of simplicity and cost-effectiveness, the court or tribunal should order that an unsuccessful party be obliged to pay only the costs of the proceedings, including for example any costs resulting from the fact that the other party was represented by a lawyer or another legal professional, or any costs arising from the service or translation of documents, which are proportionate to the value of the claim or which were necessarily incurred.⁷⁴⁸

However, the success of the dispute is not always clear-cut win or lose scenario. Almost every jurisdiction has rules of costs shifting and costs of distribution based on the partial success of the claim or counterclaim which usually leads to proportionate amounts of bearing costs relative to the success of the claim of each party.⁷⁴⁹ If we compare these principles and national rules on cost attribution and costs shifting with the rules on fees in the ADR directive, we can notice a strong inclination to consumer protection in the ADR processes. In Art 8 of the ADR

⁷⁴³ HODGES, VOGENAUER, AND TULIBACKA, *supra* note 161. p.13.

⁷⁴⁴ *Id.*

⁷⁴⁵ *Id.* p.14.

⁷⁴⁶ *Id.* p.17.

⁷⁴⁷ *Id.*

⁷⁴⁸ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.

⁷⁴⁹ *Id.* p.18.

Directive, it is proclaimed that the procedure is free of charge or available at a nominal fee for consumers.⁷⁵⁰ We have seen in our survey in Chapter 5 that the significant number of the ADR providers, in fact, provides ADR mechanism free of charge for consumers or for a nominal fee. Still, it is important to the point that even those nominal fees are sometimes comparable if not exceeding significantly more than potential costs of cloud services relevant for our context. This distinction would be even more drastic compared to court fees, even under the smallest fees regulated by small claim procedures in the Member States of the EU.

If we consider ODR platform as part of ADR process, which also incurs certain costs of functioning, it is pertinent to stress that the service that platform provides is free of charge for both parties and not just consumers. It even offers free case management tool for online dispute resolution. The lack of fees for ODR platform is an additional incentive for the use of the tool in handling disputes. The rules for distribution of costs only paint part of the picture. In the following section, we will approximate the difference in actual costs for disputes before courts and ADRs.

With all above mentioned aspects in mind, we come to the conclusion that procedural fairness, as observed through these three aspects, would expectedly a strong side for traditional litigation. In fact, procedural guarantees are sometimes so stringent that could become a hindrance on dispute resolution, with possible effects on duration which is necessary for every procedural requirement to take place equally for both sides. Equality before the law and guarantees of due process are well established constitutional principles in any rule of law society. Hence, looking strictly from procedural guarantees, when it comes to independence and impartiality, and equality of arms, judicially system provide most to the weaker party to the dispute. However, treating sides equally means that usually losing party bears the cost in accordance with law and its cost-shifting rules. Here, we see one aspect where ADR Directive and ODR Regulation are in a position to benefit more to the weaker party-consumer by mostly getting rid of charges for consumers or capping them to a nominal level. Still, the overall assessment and expectations of procedural fairness give courts significant advantage.

⁷⁵⁰ Art 8 (c) of ADR Directive

4. Efficiency

Efficiency is a broad economic term for a measure of the extent to which input is well used for an intended task or function (output).⁷⁵¹ One aspect of efficiency is a measurement of productive efficiency where no additional output can be obtained without increasing the amount of inputs, and production proceeds at the lowest possible average total cost.⁷⁵² Here, we are mostly interested in a simplification of efficiency indicators and comparison between different entities with those indicators. We are focusing mostly on time indicators of average time spent and costs, as defined in following questions:

1. Could average time of proceedings before DR be described as faster relative to others forms of DR?
2. Are the average costs of the proceeding before ADR measured by average institution fees per case, lower compared to others forms of DR?

4.1. Average time comparison

In Chapter 5 we have seen some of the research related to the average duration of ADRs, especially consumer arbitration the United States, where the average time spent according to several studies range between two and four months.⁷⁵³ Of course, these are general consumer arbitration studies without the specific context of the dispute, and they do not provide specific information for types of disputes that are in our focus. They serve as a general illustration of the time efficiency of ADR process. For our assessment of international framework for cloud service disputes, it is essential to focus on European legal framework embodied in the ADR Directive and ODR Regulation.

In article 8 of ADR Directive is it is required that the outcome of the ADR procedure be made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file, with the possible extension in case of highly complex disputes.⁷⁵⁴ ADR entities listed on ODR platform are required to provide information on average length of dispute resolution proceedings.⁷⁵⁵ In case they are not connected to ODR

⁷⁵¹ P. A. (PHILIP A.) BLACK ET AL., ECONOMICS : PRINCIPLES AND PRACTICE (2000).

⁷⁵² *Id.*

⁷⁵³ See Chapter 5 Section 4.2.1.1.2

⁷⁵⁴ Article 8 (e) of ADR Directive

⁷⁵⁵ Article 9 par. 5 (d) of ODR Regulation

platform but comply with ADR Directive, they are still required to provide information on average length of dispute resolution proceedings on the website of the ADR entity and to provide this information to interested parties.⁷⁵⁶ We have conducted the survey based on available information from the ADR entities listed on ODR platform, of both general and specific sector ADRs (for internet services) and found that they comply with these requirements. Of all 258 ADR entities, 30 of them (11.62%) finalize outcome within 30 days, 83 (32.2%) within 60 days and 123 (47.7%) within 3 months.⁷⁵⁷ Only 22 (8.5%) surpass required three months.⁷⁵⁸ Out of 57 ADR entities that capable of dealing with disputes over Internet services (although the meaning and capacity of this qualification we have already questions in the previous chapter) number show that 10 do it in up to a month, 17 up to two months and 29 up to three months, with only 1 reported for average duration more than 90 days.⁷⁵⁹ If other specified conditions are met, and one of the listed ADR entities is selected for handling disputes between cloud providers and users, the numbers on the average length of the procedure show similarity with consumer arbitration in the United States.

If we compare this data with the data available on the average duration of civil and commercial cases before the courts in the EU, we cannot negate certain advantages in ADR timeframes. Although we do not have specific data on duration of cases that are relevant to our research (as this is hard to obtain) we can draw general but relevant conclusions on general average times of different countries in the EU. Following table presents CEPEJ monitoring of the time of civil and commercial litigious cases between 2010 and 2014 for EU Countries with following average, median, minimum and maximum days at the EU level for available data on the years 2010, 2012 and 2014 respectively:

⁷⁵⁶ Article 7 of ADR Directive

⁷⁵⁷ See more in section 4.2.1.4. Survey on Dispute Resolution Entities in the EU p.187.

⁷⁵⁸ *id*

⁷⁵⁹ *Id.* p. 189.

Country	2010.	2012.	2014.
Austria	129	135	130
Belgium	NA	NA	NA
Bulgaria	NA	NA	NA
Croatia	462	457	380
Cyprus	513	NA	NA
Czech Republic	128	174	163
Denmark	182	165	177
Estonia	215	167	125
Finland	259	325	289
France	279	311	348
Germany	184	183	192
Greece	190	469	330
Hungary	160	97	144
Latvia	315	241	225
Lithuania	55	88	97
Luxemburg	200	73	103
Malta	849	685	536
Ireland	NA	NA	NA
Italy	493	590	532
Netherlands	NA	NA	132
Poland	180	195	203
Portugal	417	369	NA
Romania	217	193	146
Slovakia	364	437	524
Slovenia	315	318	228
Spain	289	264	318
Sweden	187	179	157
United Kingdom	NA	NA	NA
Average	266	243	243
Median	195	188	177
Minimum	13	40	33
Maximum	849	685	603

Table No 4: Evolution of the Disposition Time of civil and commercial litigious cases between 2010 and 2014 for EU Countries according to CEPEJ study 2016 (2014 data)⁷⁶⁰

This table presents average time frames for all cases including small value litigation for which we do not have specific data. European Small Claims Procedure Regulation proclaimed the goal of increasing the speed of proceedings, but without imposing specific time limitations.⁷⁶¹ However, there is a deadline of 30 days within which the court has to provide judgment based on written submissions when all other procedural conditions have been met (which also have guaranteed procedural deadlines), or in case court is not able to deliver a final judgment, take

⁷⁶⁰ Source: European judicial systems, Efficiency and quality of justice, CEPEJ Studies No.23, Edition 2016 (2014 data).

⁷⁶¹ REGULATION (EC) No 861/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 establishing a European Small Claims Procedure par. (23)

further details and evidence or summon parties to an oral hearing within 30 days of the summons.⁷⁶²

Small Claims Court procedure as harmonized by European regulation could be comparable in the time necessary for handling disputes with ADR entities if all actions and submissions by the parties and the court are taken without significant delays within procedural deadlines. That being said it would be still expected that ADR entities, given their lower formalism in proceedings and higher flexibility in communication, would still be able to deliver faster outcomes in comparable cases. In cloud service disputes communication would be presumably even faster, given that both parties are apt for online communication and would potentially prefer this way to offline.

4.2. Average costs comparison

We have talked about the rules on the attribution of costs. To paint a proper picture of factors that influence party's decision to initiate disputes we should also assess average costs between courts and ADRs. The costs of ADR differs significantly relative to the type of case, by the claim, a number of third parties, institutional fees (especially renowned commercial institutions), etc. We have seen in Chapter 5 fees for consumers in the US arbitration schemes (200 \$ for initiating disputes regardless of value under AAA). For our context of low-value claims in cross-border cloud service disputes, the EU's ADR Directive and ODR Regulation are most relevant. ADR Directive set the standards on cost with an obvious inclination to consumer protection as the weaker parties in cross-border disputes. The article 8 of ADR Directive requires that the ADR procedure is free of charge or available at a nominal fee for consumers.

In our survey on ADR entities listed on ODR platform, we found that 199 of 258 ADR entities that require fees to be paid the consumer, and of 59 of those require 36 have fixed nominal fees for consumers. Of 57 ADR entities dealing with internet service disputes, 39 do not require fees to be paid by the consumer.⁷⁶³ Traders are also exempt from fees in 147 of the total number of ADR and in 29 of 57 for internet service disputes.⁷⁶⁴ This shows the intent of regulator to

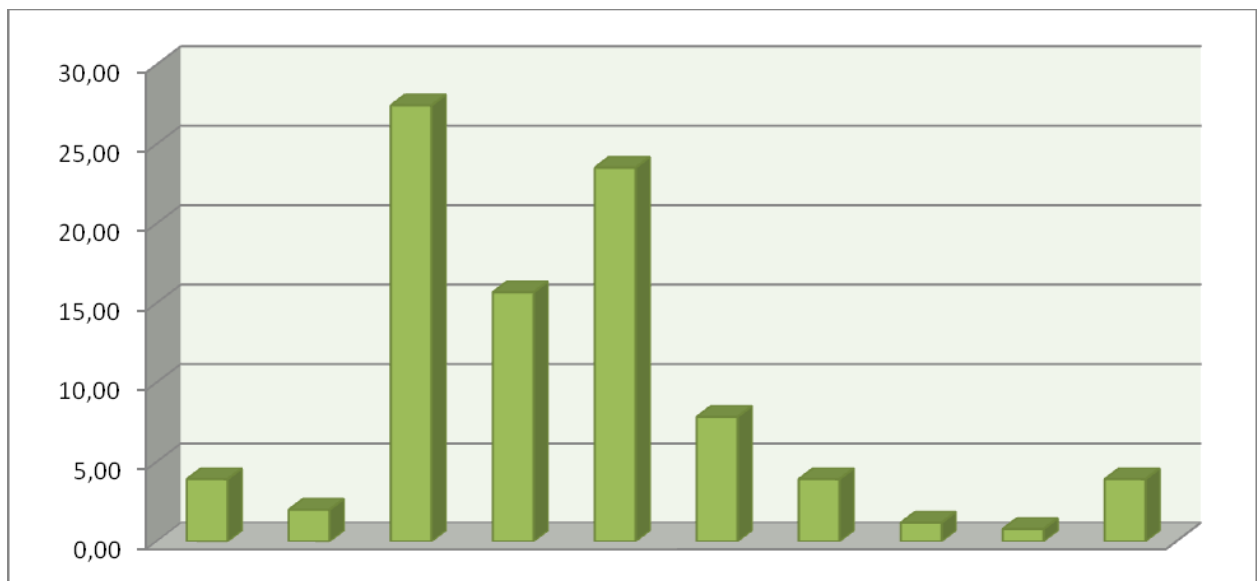
⁷⁶² *Id.* Article 7

⁷⁶³ See more in section 4.2.1.4. Survey on Dispute Resolution Entities in the EU p.187.

⁷⁶⁴ *Id.*

incentivize voluntary adherence to ADR schemes by lowering or exempting from fees traders as well. The time will show if the fee incentive is sufficient to attract a larger volume with the cross-border law by the dispute cases. At the moment based on available data displayed in Chapter 5, the significant attraction has not been demonstrated. The logic “if you build it they will come” might not be entirely sufficient when there are other interests at play.⁷⁶⁵

Looking at our context, again we need to differentiate between general costs of all civil disputes and costs of small claims procedures. For cloud service disputes in most cases, small claim procedures are more relevant if all conditions are met for that to be applied. In cases where small claims courts that assume jurisdiction, general civil courts will impose appropriate fees according to their rules. The following graph shows results of the questionnaire on the amounts of proceeding fees in Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union. The study includes small claim procedures, and obviously, fees in the range of 20-249 Euros are most prevalent.

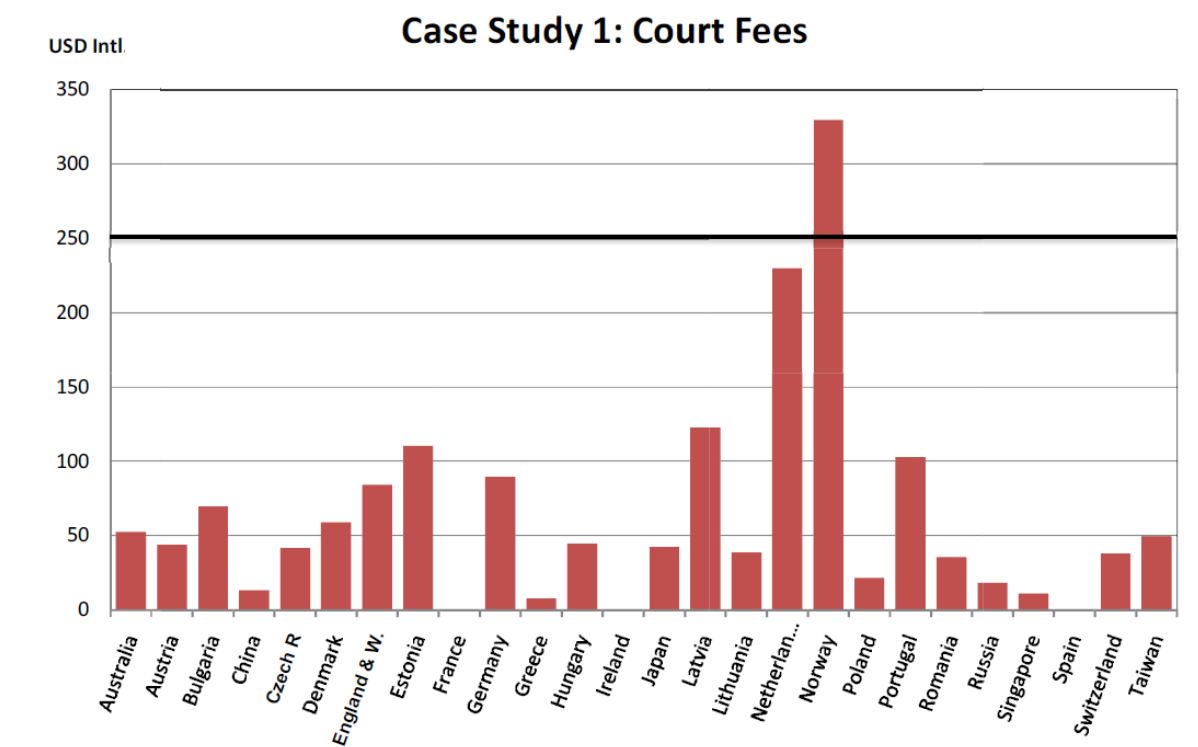


Amount in EUR | Free | 1-19 | 20-49 | 50-99 | 100-249 | 250-349 | 350-499 | 500-749 | 750-999 | +1000
 Graph 1- Amount of proceeding fees in Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union Source: public questionnaire⁷⁶⁶

⁷⁶⁵ Reference “if you build it they will come” is made to the line in movie “Field of Dreams”

⁷⁶⁶ Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, final report, 2007.

The importance of small claims should be emphasized once more, as new Regulation promised disputes with proportionate costs under harmonized procedure.⁷⁶⁷ The research of Christopher Hodges and others have conducted on civil costs, in a scenario where repayment was sought by a consumer of €200 price paid for a product not delivered, showed that total costs in small claim dispute, whoever bears the final costs are not proportionate to the sum in dispute in a significant number of countries.⁷⁶⁸



Graph 2- a Case study of Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka et al. on court fees on small claim case where repayment was sought by a consumer of €200 price paid for a product not delivered.⁷⁶⁹

With time, possibly the costs of small claims procedures will become proportionate to the value of the claims. However revoking that in our context the price of the disputed cloud service could be significantly lower than exemplified €200, it is hard to imagine that costs of the procedure, which include several procedural and administration steps, will be entirely

⁷⁶⁷ Recital 7 of REGULATION (EC) No 861/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 establishing a European Small Claims Procedure states: ... It should be necessary to have regard to the principles of simplicity, speed and proportionality when setting the costs of dealing with a claim under the European Small Claims Procedure. It is appropriate that details of the costs to be charged be made public, and that the means of setting any such costs be transparent.

⁷⁶⁸ HODGES, VOGENAUER, AND TULIBACKA, *supra* note 161. p.53.

⁷⁶⁹ *Id.* p.34.

proportionate to the value or claim of cloud service disputes. The smaller or somewhat proportional costs to the value of the dispute will always play an important role in deciding to escalate the conflict. In confirming the importance of the costs relative to party's decision on initiating a proceeding in low-value claims. Hodges notes:

In low-value claims, costs are frequently both high and disproportionate to the amount in dispute. This can be so irrespective of whether or not costs are controlled by a tariff. In other words, all court-based dispute resolution systems have an inherent level of costs that produces a threshold of cost proportionality: below the threshold, cases may not be worth pursuing and may either be dropped or pursued through alternative means.⁷⁷⁰

By way of conclusion, we can say that empirical research and comparisons of average durations and costs of different dispute resolution bodies indicate that ADRs would have the expected advantage over judicial systems for the disputes related to cloud services. We can couple this with regulatory requirements in favor of efficiency that also makes ADRs favorable. However, it is evident that ODR with online communication platforms and the possibility of asynchronous handling of disputes would have an additional advantage over traditional offline ADRs. The practicality of the technology directly translates into efficiency, which makes ODR most appropriate for the online disputants, and hence weaker party to the dispute as well.

5. Effectiveness

Effectiveness is often defined as the ability to be successful and produce the intended results.⁷⁷¹ Hence, we observe the effectiveness of dispute resolution mechanisms by looking at their outcomes. The outcomes of dispute resolution mechanisms vary significantly due to the fact that the mechanisms by itself are different and sometimes intended or selected for different purposes.

There are several methods to measure the effectiveness of the dispute resolution. All these methods require some form of extensive empirical research into the produced effects of the outcomes, satisfaction, and perception of the process and the outcome, perception of justice

⁷⁷⁰ *Id.* p.72.

⁷⁷¹ effectiveness Meaning in the Cambridge English Dictionary, , <http://dictionary.cambridge.org/dictionary/english/effectiveness> (last visited Jan 27, 2017).

(procedural or substantive) reached through the process, etc.⁷⁷² Researching specific or several aspects the outcomes based on empirical data constitutes thesis by itself with proper methodology and far exceeds resources for our research.⁷⁷³ Given the variety of possible disputes, parties to the dispute (consumers, enterprises), international aspects of the dispute, complex international legal framework and potential technical aspects of the dispute, it would be hard to devise methodology that encompasses all of these facets and produce significant conclusions on the outcomes, other than general observations already established by previous research under different methodologies and interpretations.

Because of the variety of dispute resolution mechanisms and respective regulations we chose to focus on two aspects of dispute resolution process which are essential for the effectiveness of all different dispute resolution mechanisms. These two aspects answer our questions from conceptual framework regarding effectiveness:

- Is the voluntary compliance necessary for the success of the dispute resolution?
- How many legal actions are needed for the enforcement?

5.1. Voluntary compliance

The question of voluntary compliance is to a large extent comparable with the issues of acceptance of dispute resolution methods in the sense that it relies on parties' assessment of its interests to comply and act on it. In most cases, parties comply with the outcome of the process. The reason for that lies in the expectancy that in the case of non-compliance, mechanisms that ensure enforcement will be applied, often adding additional expenses to the party. However, those mechanisms are not always available.

On the one hand, we have dispute resolution schemes with binding outcomes. Those range from judicial processes, binding arbitration, the binding decision of neutral third party following conciliation, binding settlements stemming either from mediation or negotiation. The defining factor for all of them is a lack of reliance on the voluntary compliance and the external assistance available if necessary for enforcement. In case a party refuses to comply with the binding outcome, pertinent regulations are in place to guaranty the enforcement of the outcome.

⁷⁷² Gramatikov, Barendrecht, and Verdonschot, *supra* note 162. Bingham et al., *supra* note 529. Verdonschot et al., *supra* note 162; Gramatikov, Barendrecht, and Verdonschot, *supra* note 77.

⁷⁷³ *Id.*

In most cases, enforcement is vested in the power of states to use force or other means necessary for the compliance with the binding outcome. This also refers to alternative dispute resolution mechanisms and their enforcement which by and large depend on state assistance in enforcement in case of non-compliance. For cross-border disputes, the New York Convention is of paramount importance for the recognition of arbitral awards. The binding settlements usually include a clause that the agreement is enforceable in a court of law. Having external state mechanism guaranteeing the outcome renders the binding decisions and court rulings effective by themselves. Voluntary compliance is a more pertinent issue with non-binding dispute resolution mechanisms, where effectiveness relies on the good faith of parties. Reaching an agreement that is to the greatest extent satisfactory for both parties is one way to ensure the likelihood of voluntary compliance. Pleading to the underlying interests of the parties is essential for conducting dispute resolution and its effectiveness.

When it comes to non-binding dispute resolution, the enforcement depends on the will of parties. If the participation was voluntary, not required by any regulation, the likelihood of successful outcome is great considering that the outcome should be agreed by the parties. The parties who are willing to agree to a non-binding settlement, are less likely to refuse compliance after the agreement.⁷⁷⁴ Of course, it is possible that a party changes its mind, but the overall success rate of mediation testify the likelihood of voluntary follow-through compliance. The main question here brings us back to the previously discussed issues when it comes to cloud service disputes. Will the party agree to participate in the first place?

In Chapter 5 we have discussed general success rates of mediation that included both voluntary and mandatory mediation. Steffek and Hopt reported on prevailing success rate when it comes to mediation if we define conclusion of settlements or similar agreements between the parties as a successful termination (France 80%; Hungary 87%, 66 and 67%; Italy 48% and 76%; Netherlands 65% and 87%; Portugal 48%, 35%, 50 to 70% and 70%; Japan 60%; Russia 80%; Spain 70.5%; Switzerland 70.4%).⁷⁷⁵ The numbers do not show 100% success rate, but even with judicial proceedings, 100% of enforcement rate is difficult to accomplish for various reasons (death, lack of means, legal obstacles, etc.). These numbers show the success rate of initiated mediation under already developed mechanisms for certain types of disputes that are deemed appropriate for mediation. We do not have access to data on the success rate of initiated mediation where there is a big negotiation power discrepancy and hence can not draw specific

⁷⁷⁴ ANDREWS, *supra* note 72.

⁷⁷⁵ HOPT AND STEFFEK, *supra* note 472.

conclusion relative to our context based on these general findings. We can only turn to circumstantial indicators that are reasonably argumentative and relevant for generalized comparison between binding and non-binding dispute resolution mechanism within our context.

For cloud service disputes as we mentioned many times, the bigger issue and main indicator are acceptance on non-binding dispute resolution mechanisms. The data published on EU ODR platform, unfortunately, do not paint an optimistic picture when it comes to acceptance or submission of complaints regarding cloud disputes. The survey we have conducted on cloud providers terms of service did not show any inclination towards non-binding mediation through the EU ODR platform or otherwise. Therefore, we can only conclude the lack of effectiveness in voluntary schemes would not be caused by a lack of willingness to comply with the previously mediated non-binding settlement, but due to lack of acceptance of such mechanisms in the first place. This then goes back to the issues of the power relationship between parties and their interest to participate. Luckily, there are mechanisms that do not rely on the will of the party to secure the successful outcome of the dispute resolution process.

5.2. Enforcement

Voluntary compliance with binding or nonbinding decision is always the easiest way to ensure a successful outcome of the dispute resolution process. We see that there are issues with voluntary compliance, but for the rule of law to exist, there must be an enforcement mechanism in place when a party refuses to comply with the binding decision. This is a traditional role of courts. In the case a court decision is not complied with by a party in a specified timeframe, the opposing party can submit a motion for judicial enforcement. In some countries, the enforcement is also vested in private entities with public authority, but their activities are also highly regulated and controlled by public bodies. For our context, we are mainly interested in the enforcement of decisions with a foreign element. Those can be from the point of claimant either domestic court decision that needs to be enforced in another country since plaintiff does not have any property in claimant's jurisdiction, or foreign judgment that needs to be enforced against a party in his domicile by a local court.

If within our context Brussels I Regulation is applicable, the recent changes to the Regulation (recast) has abolished exequatur procedure that was regulating recognition and enforcement of

Member State judgments. Until the changes exequatur procedure slowed enforcement by requiring the judgment of other Member State to be verified in local court, although in a limited fashion. With the recast, Brussels I Regulation in its article 53 requires only to present the enforcing court a copy of the judgment and a standard certificate delivered by the court which rendered the judgment. The new rule removes a significant barrier for enforcement of foreign judgments in the EU and hence allows higher access to justice. However, this is only to be applied if Brussels I is applicable and we have seen that in regards to our context that is not always the case. Even if Brussels I is invoked for consumer cases allowing the jurisdiction of the court where the consumer has a domicile, recent changes that broadened the scope to out of EU entities as well do not address the issues of enforcement over those entities. In case cloud provider does not have a domicile or property in the EU territory, national rules of private international law for recognition of foreign judgment apply. The rules can differ between different jurisdiction, and some jurisdictions do not recognize judgments from certain countries at all. Nonetheless, the rules for recognition usually involve a verification by the local enforcing court, which means additional procedure and potentially additional costs and delay. These can also be abolished by bilateral state agreements. These have not been sufficient for the global economy since the issues of enforcement in cross-border cases has motivated international trade to turn to alternative dispute resolutions.

When it comes to ADR, the main significance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, undoubtedly is in the relaxation of the rules for enforcement of arbitral awards. Under the Convention, an arbitration award issued in any other state can generally be freely enforced in any other contracting state, only subject to certain, limited grounds for objection defined in Art 5. The number of signatories to Convention is high enough to make the Convention nonpareil instrument in international commercial arbitration. However, as we have discussed in the previous chapter, there are some issues, especially with the applicability of NY Convention to an agreement made online and online arbitration awards enforceability. The Convention is due for an update and until the wide acceptance of proposed changes in accompanying regulations is achieved, ODR and more specifically online arbitration could be handicapped by the lack of recognition under NY Convention.

To conclude, observing effectiveness from these two aspects of enforcement, indicate that mandatory or binding dispute resolution has a clear advantage over non-binding. Even if the rates of non-compliance are not high, still they are high enough to make bargaining methods

ineffective if there are no residual binding mechanisms that would incentivize voluntary compliance. On the other hand, among binding adjudicatory measures, ODR field has still to work out some wrinkles to be able to smoothly enforce decisions. Traditional arbitration has a significant tool in NY Convention applicable both in and outside of the EU. With the removal of exequatur in Brussels recast, enforcement of foreign judgments has been liberalized. The enforcement in countries outside of the EU remains within national law requirements which could be very diverse. Hence, traditional offline arbitration could be considered most internationally enforceable and effective mechanism.

6. Access to justice and fairness for cloud services under international legal framework

What we have discussed so far are the building blocks to answer the question: to what extent the dispute resolution mechanisms under current international legal framework are adequate for cloud service disputes to ensure access to justice and fairness? To answer this, we need to know which dispute resolution mechanism under current international legal framework is the most adequate for cloud service disputes and does it ensure access to justice and fairness.

When we put the context against the dispute resolution schemes that are available under the current international legal framework, we are checking if the legal frameworks arrange the appropriate or fair distribution between parties in relation to key concepts: accessibility, fairness, efficiency, and effectiveness. According to Rawls inequalities are to be arranged to benefit worse off party. Ideally both sides would be equally beneficial in the access to justice that is nominally guaranteed, but in reality, a number of factors influence worsening of the position of a party.

We are going to make a distinction in the comparison between adjudicatory and non-adjudicatory methods. We are addressing adjudicatory dispute resolution mechanisms first, as they are the backbone of dispute resolution systems. Having in mind the dispute resolution pyramid scheme design, where for proper efficiency and effectiveness, as well as incentives for the parties, we need to position adjudicative dispute resolution on the top of the pyramid, meaning that we cannot rely solely on non-adjudicatory mechanisms. This is especially relevant in situations of vast imbalance in negotiation power. Therefore, looking from our

theoretical framework, we first compare the most relevant forms of adjudicatory dispute resolution mechanisms, under four key concepts, which translate to nine comparable variables. We have concluded each section with the comparison but to see it more clearly we can represent it in the following tables:

Framework	Adjudicatory Dispute Resolution (DR) Mechanisms		Courts	Alternative DR Arbitration (in compliance with ADR Directive, not online)	Online DR Arbitration (in compliance with ODR Regulation)	The most benefiting to the worse off party in cloud service dispute
Access to justice as fairness in cross-border low-value cloud service dispute	Accessibility	Availability of dispute resolution body	High	Medium	Low	Court
		Accessibility to dispute resolution body	Medium	Low	High	
	Procedural Fairness	Independence and impartiality	High	Medium	Low	Court
		Equality of arms	High	Medium	Low	
		Rules on costs of DR	Low	Medium	High	
	Efficiency	Duration of processes	Low	Medium	High	ODR
		Costs	Low	Medium	High	
	Effectiveness	Success Rate	High	Medium	Low	Court and ADR
		Enforcement of outcome	Medium	High	Low	

Table No 5. Comparison between dispute resolution mechanisms within the framework of access to justice as fairness. Values: low, medium, and high relative to the benefit of worse off party.

Looking at the table, we get clear impression that courts remain to be the mechanism of dispute resolution that is most benefiting to the worse off party in cloud service dispute. The availability of the courts is guaranteed, and so are the higher procedural standards. Currently, the involuntary enforcement relies heavily on courts. What it lacks in efficiency it compensates in consistency and remains the backbone of the rule of law. However, this also portrays inadequacy of alternative dispute resolution (both ADR and ODR) to fill the spot, and in scenarios where they could supposedly be more useful, they do not achieve its purpose. Would the situation be different if we would introduce non-adjudicatory mechanisms? Maybe the variety in the approach could be the difference? However, according to the pyramid as

explained in Chapter 5, with all the variety non-adjudicatory methods are effective only in cooperation with residual adjudicatory methods. In the following table we introduce the non-adjudicatory forms and observe them in conjunction with adjudicatory:

Framework	Dispute Resolution (DR) Mechanisms		Courts	Adjudicatory Alternative DR Arbitration (in compliance with ADR Directive, not online)	Non-adjudicatory Alternative DR Mediation/Conciliation (in compliance with ADR Directive, not online)	Non-adjudicatory Online DR Mediation/Conciliation (in compliance with ODR Regulation)	Adjudicatory Online DR Arbitration (in compliance with ODR Regulation)	The most benefiting to the worse off party in cloud service dispute
Access to justice as fairness in cross-border low-value cloud service dispute	Accessibility	Availability of dispute resolution body	Highest	High	Medium	Low	Lowest	Court and online mediation
		Accessibility to dispute resolution body	Low	Lowest	Medium	Highest	High	
	Procedural Fairness	Independence and impartiality	Highest	High	Medium	Low	Lowest	Court
		Equality of arms	Highest	High	Low	Lowest	Medium	
		Rules on costs of DR	Lowest	Low	High	Highest	Medium	
	Efficiency	Duration of processes	Lowest	Low	Medium	Highest	High	ODR (online mediation)
		Costs	Lowest	Low	Medium	Highest	High	
	Effectiveness	Success Rate	Highest	High	Low	Lowest	Medium	Court and arbitration
		Enforcement of outcome	High	Highest	Medium	Low	Lowest	

Table 6. Comparison between dispute resolution mechanisms within the framework of access to justice as fairness that includes non-adjudicatory forms of dispute resolution. Values: lowest, low, medium, high, and highest relative to the benefit of worse off party.

We get similar results of comparison with somewhat adjusted approaches dependent on the acceptance of the non-adjudicatory method. Obviously, if they would be accepted, methods like online mediation would be an additional tool and could complement still dominant court system. This is also in line with the reform of certain judicial systems which plans to rely more on online mechanisms to filter the cases and quickly resolve smaller claims through several non-adjudicatory methods.⁷⁷⁶

⁷⁷⁶ See LORD JUSTICE BRIGGS, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT (2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (last visited Apr 15, 2017).

Finally, to answer the question to what extent the dispute resolution mechanisms under current international legal framework are adequate for cloud service disputes to ensure access to justice and fairness, we must simply state that it depends on circumstances. It depends to what extent providers as the more dominant parties are willing to participate in voluntary, contractual dispute resolution mechanisms.

When it comes to cloud providers who are unwilling to participate - to the extent mandatory primarily adjudicatory mechanisms are in place. That would be courts and traditional litigation. We have discussed in Chapter 4 the international legal framework for litigation, and together with the data presented in Chapter 5 and Chapter 6, we can say that the framework is not adequate. It does not allow access to justice and access to redress in the disputes that originate out of cloud services. Precisely, because of perceived deficiency of the courts, the EU has introduced ADR Directive and ODR Regulation as additional tools for tackling the issues of cross-border consumer disputes.

On the other hand, if providers are willing to participate, then we could have additional mechanisms like online mediation or online adjudication of sorts that would be useful and more adequate tools, but it would still be a limited mechanism and eventually reliant on traditional courts. Either as an incentive for dealing in the “shadows of the law” or as enforcement. From what we have observed as we have seen in Chapter 3 and Chapter 5, cloud providers are mostly not interested in participating in mentioned alternatives, or they are uninformed and yet to reassess their position if they find it compelling in some way. In the following chapter, we will look into possible legal measures that could adjust existing regulatory framework to be adequate for cloud service disputes.

Chapter 7 - Online Dispute Resolution for Cloud Service Disputes

1. Introduction

We have seen in Chapter 6 to what extent current international legal framework is adequate for cloud service disputes. In this chapter, we will explore what needs to be done to improve the existing framework. Certainly, there are a number of ways to improve and adjust any of the forms of dispute resolution to suit cloud service disputes or any other type of disputes if the proper amount of focus and resources are allocated to handling the issues. Ideally, courts as an integral part of the judicial system should be perfectly suited to handle all disputes allowing full access to justice, in all its aspects. Just as any branch of government, the judiciary cannot reach its ideal form, and it operates within constraints and limitations. Access to justice for all will remain to be the goal of dispute system design. Presently, we need to focus on those issues where we identified insufficient access to justice in specific circumstances. For our research that is the context of cloud service disputes. Since cloud service disputes could be by and large described as low-value cross-border disputes, naturally we focus on optimizing regulations dealing with low-value cross-border disputes. EU ODR and ADR regulations are exactly intended to deal with this kind of cases in the EU. In Chapter 6 we have compared the likely

outcomes of the EU regulatory framework on the cloud service disputes to see if it achieves or improves access to justice for cloud disputants. The comparison with traditional systems has shown that not only that it does not warrant the access to justice, but that in many cases it is comparably a lot behind courts. The judicial system, of course, remains the backbone of the right to a fair trial and hence access to justice. The legislative efforts to improve the system with adding additional tools for remedy remain ineffective because of the small number of perceived points that could be addressed in future legislations.

A regulatory framework for low-value cross-border disputes already exists. The easiest and most prudent way to handle what we described as problematic from the point of our cloud service context, is to address the ADR Directive and ODR Regulation respectively, to enhance their effectiveness with a number of pertinent tweaks. We have already identified the points where ODR in particular underachieves. Naturally, this will be our roadmap in proposing steps to ameliorate the framework and to ensure the adequacy of ODR for cloud services. We have illustrated the lack of actual definition of ODR in Chapter 5 and touched upon its evolving relationship with new technologies. We will continue to address ODR tools having in mind developing technologies while at the same time have technology neutrality regulatory mindset. We take the stand, however, that the regulation should not prevent greater possible role of technology and that if fact should create proper boundaries for it to fulfill its potential and usefulness for its users.

Many lessons can be drawn from the established ODR practices. ODR has been developing for two decades, and its history offers significant insights for the dispute resolution design. ICANN's Uniform Domain-Name Dispute-Resolution Policy (UDRP procedure) is interesting as a single set of rules for adjudicatory ODR that is globally applicable and effective.

Before we address the specific issues in the regulations and propose the alternatives, we will briefly observe the proposal for a global international framework that did not achieve its purpose because of the hurdles of international consensus. It is still interesting for comparison and as a guideline for the design of dispute system on a global or a regional level. The approach the UNCITRAL has taken was different as it did not seek to grow from existing ADR practices, but to create a framework for ODR which stands by its rules and clarifies the missing procedural issues on a global scale. We observe both the UNCITRAL'S ODR work and UDRP through the perspective of our framework and draw conclusions from it. It

reinforces our arguments for necessary changes to existing European regulatory framework to achieve its purpose of having effective dispute resolution tool for low-value consumer disputes.

Another important framework that has to be addressed is recently introduced, Privacy Shield. Cloud services deal with data and in many ways, especially consumer-oriented services in the Single market, have to comply with EU data protection regulations. European Commission and U.S. Department of Commerce have negotiated the agreement setting up Privacy Shield framework that covers the transfer of personal data from the EU to the US. Privacy Shield guarantees redress through independent dispute resolution and binding arbitration for cases dealing with personal data.⁷⁷⁷

We contrast UNCITRALs technical notes, Privacy Shield framework and UDRP rules with our theoretical framework and existing ODR Regulation to gain insights to answer the research question: what is the most appropriate legal framework for dispute resolution between cloud providers and users that provide access to justice and fairness?

First, we need to give a brief overview of the history and development of ODR and why is it considered suitable for e-commerce.

2. Development of Online Dispute Resolution

In Chapter 5 we gave a short overview and definition of ODR as a reference point for the follow-up discussion on EU ODR Regulation. However, the story of online dispute resolution and its development is worth taking a look in itself to illustrate the potential and opportunity ODR represents. The growth of ODR coincided with the general use and popularity of Internet and especially with the occurrence of blooming e-commerce opportunities in the 90s.⁷⁷⁸

As we said in Chapter 5, most commonly in defining ODR technologies are used as a discernible factor in comparison to alternative dispute resolution. Online dispute resolution, is according to this school of thought, the extension of existing practices of ADR by use of technology, more specifically online communication tools. However, this approach

⁷⁷⁷ Section 2.3. - Redress mechanisms, complaint handling and enforcement of COMMISSION IMPLEMENTING DECISION (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield

⁷⁷⁸ Katsh, *supra* note 3.

unintentionally dismisses the potential of technology to redefine the field itself. The use of technology especially the innovative aspect of technology could give birth to previously and unimagined forms of dispute resolution.

ODR as a field of dispute resolution has been developing for over 20 years now, with more than a 150 projects. ODR has been developing through several stages that Conley Tyler has proposed as she documented ODR practices and ODR platforms. In two different reports (in 2003, 2004 but also confirmed the same phases in following reports) she described the different stages of development of ODR since the early nineties:⁷⁷⁹

- i. the “hobbyist” period of the first half of the 1990s, lead on an individual basis, often without any institutional support; individual pioneers and enthusiasts were experimenting with technologies in the field of dispute resolution;
- ii. the “experimental” phase (1996–1998) mostly consisting of projects developed by US academic institutions (i.e. the “Virtual Magistrate” of the Villanova University and the Online Ombuds Office (OOO) at the University of Massachusetts) and funded by the like of Hewlett Foundation and institutions such as United Nations;
- iii. The “entrepreneurial” phase (1999–2001) where a significant number of start-ups enter the ODR market. In early 2001, commercial sites offering ODR services had reached its peak in the US (i.e. SquareTrade, Cybersettle, SmartSettle, etc.) while experimental initiatives were launched in Europe (ECODIR, Médiateur du Net, etc.). However, with the burst of the dot-com bubble in 2001 many of the then raising ODR providers that were hopeful startups ceased their commercial activities;
- iv. The current “institutional” phase (2001- until today). The new wave of the public support a range of official bodies including courts and other dispute resolution providers. EU has enacted its ODR Regulation which created pan-EU ODR platform. UNCITRAL has worked on their proposal for an international legal

⁷⁷⁹ Melissa Conley Tyler, *Seventy-six and Counting: An Analysis of ODR Sites*, in Proceedings of the UNECE Second Forum on Online Dispute Resolution, 8 (Ethan Katsh & Daewon Choi, eds., Center for Information Technology and Dispute Resolution, University of Massachusetts, 2003). www.odr.info/unece2003/pdf/Tyler.pdf and Mellissa Conley Tyler, “115 and Counting: The State of ODR 200”, in M. Conley Tyler, E. Katsh & D. Choi. (eds.), Proceedings of the Third Annual Forum on Online Dispute Resolution, Melbourne, Australia, 5-6 July 2004. Available at <www.odr.info/unforum2004/ConleyTyler.htm>.

framework for ODR. Several judicial reforms proclaimed interest for ODR and its applicability.⁷⁸⁰

Most of the initiatives to develop online dispute resolution have been in the private sector, where knowledgeable entrepreneurs try to seize the opportunity by addressing the demand for dispute resolution over right in different cases that originated online. Among the majority of unsuccessful pilots and projects, few have stood out with the success that is representative of ODR's potential: SquareTrade, Cybersettle, SmartSettle, Ebay, PayPal, ICANN's UDRP, chargeback procedures. Here we are mostly interested in observing the legal framework that allows such private initiatives to thrive, although some of them even thrived despite existing regulations.

We could also observe the development of ODR through the progress of technology it uses and the development of the "fourth party". Marta Poblet et al. describes early development as ODR 1.0 technology that although different boils down to three features: (i) proprietary software licenses, (ii) stable platforms, (iii) PC-based.⁷⁸¹ Online communication was the crux of the early ODR providers, with little additional functionalities with few notable exceptions (SmartSettle). However, with the development of the notion of "Web 2.0" and "Semantic web", new ODR initiatives have followed.⁷⁸² Lodder and Zeleznikow developed a substantial model for dialogue tools and negotiation support system that lays the foundation for growth and development of artificial intelligence in ODR.⁷⁸³ ODR could also use technology to enhance some aspects of dispute resolution, for example, detection of emotions.⁷⁸⁴ On the other hand, Barendrecht leads the notion that the best use of technology for ODR is to allow access to justice to underprivileged in search of microjustice.⁷⁸⁵ With the development of new

⁷⁸⁰ BRIGGS, *supra* note 776.

⁷⁸¹ Marta Poblet & Pompeu Casanovas, *Mediation, ODR, and the web 2.0: a case for relational justice*, in *AI APPROACHES TO THE COMPLEXITY OF LEGAL SYSTEMS. COMPLEX SYSTEMS, THE SEMANTIC WEB, ONTOLOGIES, ARGUMENTATION, AND DIALOGUE* 205–216 (2010). p.2

⁷⁸² Ronald Leenes, *Introduction: Online Dispute Resolution and Data Protection*, 21 *INT. REV. LAW, COMPUT. TECHNOL.* 79–80 (2007)., Jaap Van Den Herik, Daniel V. Dimov & Jaap Van den Herik, *Towards Crowdsourced Online Dispute Resolution*, *J. INT. COMM. LAW TECHNOL.* (2012).

⁷⁸³ Arno R. Lodder & John Zelznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 *HARVARD NEGOT. LAW REV.* (2005).LODDER AND ZELEZNIKOW, 731.Gerard A.W. Vreeswijk & Arno R. Lodder, *GearBi: Towards an online arbitration environment based on the design principles simplicity, awareness, orientation, and timeliness*, 13 *ARTIF. INTELL. LAW* 297–321 (2006).

⁷⁸⁴ Marta Poblet & Pompeu Casanovas, *Emotions in ODR*, 21 *INT. REV. LAW, COMPUT. TECHNOL.* 145–156 (2007).

⁷⁸⁵ Maurits Barendrecht et al., *Towards Basic Justice Care for Everyone: Challenges and Promising Approaches*, *SSRN ELECTRON. J.* (2012).Maurits Barendrecht, *In Search of Microjustice: Five Basic Elements of a Dispute System*, *SSRN ELECTRON. J.* (2009); Maurits Barendrecht & Patricia van Nispen, *Microjustice*, *SSRN ELECTRON. J.* (2008).Jobien Monster, RB Porter & Maurits Barendrecht, *Dispute Resolution Practices of Legal Aid*

technologies, we see ODR slow but steady acceptance and adaptation.⁷⁸⁶ From proprietary PC-based stable platform software, we are now witnessing a migration to cloud-based ODR.⁷⁸⁷

Development of negotiation systems and other advancements are allowing ODR to integrate into companies' customer service and complaint handling departments, which blurs the line between ODR and complaint management, as well as in-house and independent ODR.⁷⁸⁸ eBay, using ODR on its platform for solving C2C disputes, has reportedly managed to deal with an enormous inflow of complaints and disputes.⁷⁸⁹ On the other hand, facing the high-volume of disputes over online services (like social networks) prompted ODR scholars to put additional emphasis on prevention of conflict.⁷⁹⁰

The scope of our research is limited to legal frameworks, so we will not go deeper into various ODR initiatives. We do however need to address one success story of the self-regulatory regime using online communication for its administrative procedure - ICANN's UDRP.

2.1. ICANN's UDRP

The Internet Corporation for Assigned Names and Numbers (hereinafter: ICANN) is a non-profit organization that coordinates the maintenance and procedures of several databases related to the namespaces of the Internet, known as Domain Name System (DNS), manages generic top-level domains (TLDs), and the operation of root name servers.⁷⁹¹ From its establishment, ICANN ran across issues with registered domain names and trademarks. Trademark owners would complain that someone registered a trademark protected domain without the owner's approval. The "first come, first served" policy that ICANN used in the registration of domains, led to a number of registrants who abused their right by registering a name that is a well-established trademark, in order to reserve or "cybersquat" and negotiate with the trademark owner to sell the rights to the domain name. ICANN commissioned World

Organizations in Developing Countries, (2011).Maurits Barendrecht & Jin Ho Verdonchot, *Objective Criteria: Facilitating Dispute Resolution by Information About Going Rates of Justice*, SSRN ELECTRON. J. (2008).

⁷⁸⁶ MARTA POBLET, MOBILE TECHNOLOGIES FOR CONFLICT MANAGEMENT (Marta Poblet ed., 2011).

⁷⁸⁷ See Modria cloud-based model at <http://modria.com/> and Youstice at <https://www.youstice.com/en/>

⁷⁸⁸ See for example Cognicor solution for airline industry complaints at: <http://www.cognicor.com/>

⁷⁸⁹ C Rule & C Nagarajan, *Leveraging the Wisdom of the Crowds: the Ebay Community Court and the Future of online Dispute Resolution*, ACRESOLUTION 2 4 (2010).

⁷⁹⁰ Katsh, Ethan, and Orna Rabinovich-Einy. *Digital Justice: Technology and the Internet of Disputes*. Oxford University Press, 2017.

⁷⁹¹ See more at <https://www.icann.org/>

Intellectual Property Organization (WIPO) to help set up a response to common complaints. Following WIPO recommendation to establish a mandatory administrative procedure, which allows neutral venue in the context of often international disputes, ICANN adopted the Uniform Domain-Name Dispute-Resolution Policy (UDRP)⁷⁹² After ten years ICANN adopted another proposal of WIPO on eUDRP Rules, to transition into electronic-only submission of complaints and annexes.⁷⁹³

Selected providers of resolution in accordance with UDRP are: World Intellectual Property Organisation (WIPO)⁷⁹⁴, The Asian Domain Name Dispute Resolution Centre (ADNDRC)⁷⁹⁵, National Arbitration Forum (NAF)⁷⁹⁶, Czech Arbitration Court, Arbitration Center for Internet Disputes⁷⁹⁷ and the Arab Center for Dispute Resolution (ACDR)⁷⁹⁸

The UDRP has not been exactly equated with arbitration, although it resembles it in many aspects. It is usually described as administrative adjudicatory procedures with self-enforcement mechanism. Committing to UDRP does not exclude judicial redress in the same matter in most jurisdictions. The UDRP rules, according to its article 18, require notification in case any legal proceeding has been initiated prior to or during an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, and the acting Panel shall have the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision.⁷⁹⁹

The success of the UDRP procedure can be attributed to several aspects. One reason lies in the authority of the ICANN as an international nonprofit with semi-public authorities vested with overseeing a significant administrative work of international importance. Although criticism of the lack of transparency and legitimacy can be heard when ICANN's work is brought to discussion, the organization has contributed to the development of the Internet and position itself as a pillar of its structure.⁸⁰⁰ However, we would argue the success is inherent to the

⁷⁹² The Management of Internet Names and Addresses: Intellectual Property Issues Final Report of the WIPO Internet Domain Name Process <http://wipo2.wipo.int> April 30, 1999

⁷⁹³ See more on eUDRP at <http://www.wipo.int/amc/en/domains/rules/eudrp/>

⁷⁹⁴ See more at: <http://www.wipo.int/amc/en/domains/>;

⁷⁹⁵ See more at: <https://www.adndrc.org/mten/index.php>

⁷⁹⁶ See more at: <http://www.adrforum.com/domains>

⁷⁹⁷ See more at: <http://www.adr.eu/index.php>

⁷⁹⁸ See more at: <http://acdr.aipmas.org/default.aspx?lang=en>

⁷⁹⁹ Article 18 (a) of The Rules for Uniform Domain Name Dispute Resolution Policy - Effect of Court Proceedings, see more on <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en/#8>

⁸⁰⁰ Pablo Cortes, AN ANALYSIS OF THE UDRP EXPERIENCE: IS IT TIME FOR REFORM? (2007). Annemarie Bridy, NOTICE AND TAKEDOWN IN THE DOMAIN NAME SYSTEM: ICANN'S AMBIVALENT DRIFT INTO ONLINE CONTENT REGULATION (2017).

design of UDRP: limited reasons for complaints, straightforward procedure and self-enforcement.

2.1.1. The procedure

The Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") have been amended a few times but in general kept their core traits of written based, and now exclusively electronically mediated procedure. The grounds for the complaint have been limited to issues where:

1. the domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
2. the registrant (domain-name holder) has no rights or legitimate interests in respect of the domain name that is the subject of the complaint; and
3. The domain name has been registered and being used in bad faith.⁸⁰¹

The registrar of a domain name, although not part of the process, must comply with requests for information by the dispute resolution provider in charge of the procedure, and ultimately to enforce the decision.

After submission of complaint and response (if submitted), a Panel will be appointed of one or three members/adjudicator. Usually, the cases are handled by a single arbitrator appointed by approved dispute resolution provider, but in cases, parties express such plea, both parties can appoint one, and the third one will be appointed by dispute resolution body.⁸⁰² A panelist has to be impartial and independent and shall have, before accepting the appointment, disclosed to the dispute resolution provider any circumstances giving rise to justifiable doubt as to the panelist's impartiality or independence.⁸⁰³ The decision of a single panelist or the panel must be delivered within 14 days after its appointment.⁸⁰⁴ Upon communication from the panel, the concerned registrar notifies within 3 days the date of enforcement of the decision.⁸⁰⁵

⁸⁰¹ Article 3 (b) (ix) of the Rules for Uniform Domain Name Dispute Resolution Policy

⁸⁰² *Id.* Article 6.

⁸⁰³ *Id.* Article 7.

⁸⁰⁴ *Id.* Article 15.

⁸⁰⁵ *Id.* Article 16,

Complainants pay to the dispute resolution provider an initial fixed fee, in accordance with their supplement rules.⁸⁰⁶ If the fees have not been payed within ten days of receiving the complaint, the complaint shall be deemed withdrawn and the administrative proceeding terminated.⁸⁰⁷

Interestingly, from the point of equality of arms and fairness, although the claimant has to prove the merits of its claim, UDRP recognized in some cases that complainant does not have access to relevant information to back their claim and reversed the burden of proof.⁸⁰⁸

The legal framework of the UDRP procedure is of contractual nature. Registrants commit during application for domain name that he will not “infringe upon or otherwise violate the rights of any third party”.⁸⁰⁹ Registrants also commit to procedure conducted before one of the administrative-dispute-resolution service providers (UDRP).⁸¹⁰

ICANN’s Policy and Rules have not been based on international agreement, but as an overseeing semi-public organization vested with powers to directly assign domains and thus enforce relevant decisions with international elements. It is interesting to display similarities and contrasts to already discussed international regulations. The disputes that we are dealing with are outside of the scope of UDRP. However, from the point of our theoretical framework, we can notice possible similarities with some proposals for an international frameworks (like UNCITRAL’s work on ODR). Certain scholars have pointed to the possible appropriateness of the UDRP for handling a larger scope of e-commerce disputes.⁸¹¹ Limited competences of UDRP panels and a single applicable set of binding rules have simplified the procedure and allowed greater efficiency. If we consider the dispute within the competencies of the UDRP, the availability and accessibility have been on a very high level. With the introduction of mandatory electronic submission and communications, the access and efficiency are expectedly close to the highest possible levels. Although many procedural guarantees are in place, certain criticisms have been heard, especially of structural bias in favor of

⁸⁰⁶ *Id.* Article 19

⁸⁰⁷ *Id.*

⁸⁰⁸ See UDRP Policy para 4(a); Also see cases: Sormac BV v Domains by Proxy, Inc. and James McCrory D2007-1338 denied; Playboy Enterprises International, Inc. v Joao Melancia D2006-1106 transfer.

⁸⁰⁹ Article 3 of Uniform Domain Name Dispute Resolution Policy

⁸¹⁰ *Id.* Article 4.

⁸¹¹ Jacques de Werra, ADR IN CYBERSPACE: THE NEED TO ADOPT GLOBAL ALTERNATIVE DISPUTE RESOLUTION MECHANISMS FOR ADDRESSING THE CHALLENGES OF MASSIVE ONLINE MICRO-JUSTICE (2016). Jacques de Werra, *Can Alternative Dispute Resolution Mechanisms Become the Default Method for Solving International Intellectual Property Disputes?*, SSRN ELECTRON. J. (2012). Andrew F. Christie, ONLINE DISPUTE RESOLUTION – THE PHENOMENON OF THE UDRP (2014).

complainants.⁸¹² The expertise of panelists is not in question, but independence and impartiality guarantees need to be reinforced, which has been the subject to amendments and changes to UDRP. The rule on the distribution of cost point to the claimant's responsibility to advance the fees in order to be heard. We don't see this as fair from the perspective of the economically weaker party, but it is understandable considering that most of the claimants are trademark owners with certain economic strength. Efficiency has been regulated and guaranteed by the UDRP. The self-enforcement mechanism is probably the most noteworthy element, where the circumstances and the design of the ICANN allowed enforcement of panels' decisions through registrars, regardless of respondent's willingness to comply. The enforcement could be overturned by judicial decision, but within the autonomous legal system that the UDRP has become, self-enforcement has become a hallmark of ICANN's effectiveness. The UDRP has given a strong argument for ODR in international dispute resolution domain and inspired work on an international legal framework for cross-border e-commerce disputes. The effectiveness of the UDRP seems desirable from a standpoint of dispute resolution system design, and fully online adjudicatory model is something to strive for in the cloud service dispute resolution.

3. International legal framework for Online Dispute Resolution

Given the established assumption in the academia of the usefulness or appropriateness of ODR for conflicts arising out of e-commerce, before we make a stand on the most appropriate framework for cloud services dispute resolution, we need to take a look at existing legal frameworks and see how they fare with our theoretical framework for access to justice and fairness in dispute resolution. We have discussed and analyzed EU ODR Regulation in Chapter 5 and 6, so we will focus here on UNCITRAL's work and new regulatory framework Privacy Shield.

3.1. Online Dispute Resolution and the United Nations Commission on International Trade Law

⁸¹² Cortes, *supra* note 799; Bridy, *supra* note 799. David A. Simon, AN EMPIRICAL ANALYSIS OF FAIR USE DECISIONS UNDER THE UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY (2011).

3.1.1. Negotiation on UNCITRAL's International framework

At its forty-third session (New York, 2010), the United Nations Commission on International Trade Law (UNCITRAL) agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions.⁸¹³ In the following sessions, UNCITRAL specified the mandate of Working Group (called Working Group III) by instructing the parties involved to work on low-value, high-volume cross-border electronic transactions, including B2B and B2C transactions, having in mind its impact on consumer protection.⁸¹⁴

UNCITRAL's ambition was to provide a framework for an international online dispute resolution by developing the Procedural Rules for ODR primarily, but also additional supplementing documents: Guidelines for Neutrals, Minimum Standards for ODR Providers Supplementary Rules for ODR Providers, Substantive Legal Principles for Resolving Disputes and Cross-border Enforcement Mechanisms.⁸¹⁵ However, the ambition and successful outcome of the initiative was sidelined and eventually diluted by the fundamental disagreement in approaches to ADR/ODR between UNCITRAL Member States on the nature of the final stage of the ODR process.

One side, a group of states, led by the United States, pushed for binding arbitration as the final stage of the process.⁸¹⁶ The other side, which includes the EU Member States, Canada, and Japan, disagreed and proposed non-binding instrument as a final stage based on original dispute agreement.⁸¹⁷ The fundamental difference lies in acceptance of pre-dispute agreements, whereas we discussed in Chapter 5, the EU considers pre-dispute arbitration clauses for consumers to be non-binding and in contravention of the Unfair Terms Directive. The US, on the other hand, has developed consumer arbitration practice based on pre-dispute arbitration agreements. Since the expected bulk of low-value, high-volume cross-border electronic transactions will be consumer disputes and consumer protection impact was considered

⁸¹³ See A/CN.9/868 - Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session (New York, 29 February-4 March 2016)

⁸¹⁴ See more on

http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html

⁸¹⁵ See A/CN.9/WG.III/WP.112 - Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules Preamble 2, Par 3. Also see Hörnle, *supra* note 135.

⁸¹⁶ See A/CN.9/827 - Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session (Vienna, 20-24 October 2014)

⁸¹⁷ *Id*

essential for Working Group deliberation, the difference in approaches led to a lack of consensus on a number of related issues.⁸¹⁸

The rift in approaches led to the development of two tracks in the draft proposals for Procedural Rules for ODR. The stages of ODR according to proposals would coincide when it comes to negotiation through ODR platform as a beginning stage, followed by facilitated settlement stage. As the final stage of ODR (in cases where the agreement has not been reached in the previous step) track I proposed binding arbitration and track II non-binding recommendation.⁸¹⁹ The important issues would be in identifying whether Track I or Track II would be applicable about the specific consumer in high-volume transactions. Consumer arbitrations with clear post-dispute consumer consent are not deemed problematic, and based on it we have seen attempts to bring closer two approaches with the “second click proposal”, wherein the third stage the consumer would be asked to choose (but only under track II) between a recommendation as a default option and arbitration (if parties agree).⁸²⁰

However, at the UNCITRAL’s forty-eighth session (in Vienna, 29 June-16 July 2015), it was agreed that any future text should build upon the progress achieved up to that point and the Commission instructed the Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process.⁸²¹ The non-binding descriptive document was called Technical Notes on Online Dispute Resolution.

3.1.2. UNCITRAL’s Technical Notes

The Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law that has been adopted by the General Assembly on December 13, 2016, cannot be considered a framework for ODR. They do however reflect the work of UNCITRAL and the attempt of creating a consensus for an international regulatory framework

⁸¹⁸ *Id* par 132.

⁸¹⁹ See A/CN.9/827 - Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session (Vienna, 20-24 October 2014)

⁸²⁰ See A/CN.9/833 - Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session (New York, 9-13 February 2015)

⁸²¹ See A/CN.9/WG.III/WP.137 - Online dispute resolution for cross-border electronic commerce transactions: Notes on a non-binding descriptive document reflecting elements and principles of an ODR process par 1.

for ODR in e-commerce. Technical notes are relevant in several aspects: they set a number of common principles and proposals for rules that could be a foundation for future legal instruments regulating ODR on regional or international level; they illustrate differences and issues in approaches to ODR from different legal backgrounds; they confirm public trust in ODR and its usefulness even without unison conceptual approach.

Technical Notes are divided into eleven sections: (1) introduction, purpose of the technical notes, (2) principles, (3) stages of an ODR process, (4) scope of ODR process (5) ODR definitions, roles and responsibilities, and communications, (6) commencement of ODR proceedings, (7) negotiation, (8) facilitated settlement, (9) appointment, powers and functions of the neutral, (10) language, (11) governance.

In the introductory section, Working Group III reaffirms that ODR is one of the mechanisms which can assist the parties in resolving the disputes coming out of online cross-border transactions in a simple, fast, and flexible manner, without the need for a physical presence at a meeting or hearing.⁸²² The proclaimed purpose of the Technical Notes is to “foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings” by reflecting approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability, and transparency.⁸²³

The Technical Notes are a non-binding descriptive document that is not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding, nor does it promote any practice of ODR as best practice.⁸²⁴ The Technical Notes are however intended for use mainly in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.⁸²⁵ This is also confirmed in the section dealing with the scope of the ODR process. Additionally, it is specified that ODR process, as proposed under Technical Notes, may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.⁸²⁶

⁸²² Par 1 of A/CN.9/WG.III/WP.140 - Online dispute resolution for cross-border electronic commerce transactions: Draft outcome document reflecting elements and principles of an ODR process

⁸²³ *Id*

⁸²⁴ *Id.* par 6.

⁸²⁵ *Id.* par 5.

⁸²⁶ *Id.* par. 22.

The Technical Notes offer a definition of ODR in section 5 as, a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology.”⁸²⁷ The Notes then going further and distinguished ODR from ADR (especially ad hoc ADR) through technology where they confirm that ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications (such a system is referred to as an “ODR platform”).⁸²⁸

The principles that underpin any ODR process include fairness, transparency, due process, and accountability, but those principles are not exhaustive or entirely explained. They are rather exemplified with statements of desirability to disclose any relationship between the ODR administrator and a particular vendor (transparency) or usefulness to adopt policies dealing with identifying and handling conflicts of interest and code of ethics for neutrals (independence, under due process), or policies governing selection and training of neutrals (expertise, under due process).⁸²⁹ The accountability principle proposes an internal oversight/quality assurance process which may help the ODR administrator to ensure that neutrals’ decisions conform to the standards it has set for itself.⁸³⁰ Even though the principle of party autonomy is not explicitly mentioned in the proposed principles, it is recommended that the ODR process should be based on the explicit and informed consent of the parties.⁸³¹ However, the consent recommendation does not go into details nor does it clarify in any way whether and how it applies to pre-dispute and post-dispute agreement scenarios.

The Technical Notes propose three-stage process including negotiation; facilitated settlement; and a third (final) stage without specifying what the third stage would be. They leave to ODR administrator to direct parties to a third stage in accordance with applicable ODR rules. This is a result of the lack of consensus on the nature of the final stage of ODR proceedings. The ODR process commences by claimant submission of a notice of claim through the ODR platform to the ODR administrator. After the ODR administrator informs the respondent on the claim, gives them the opportunity to respond and informs claimant about it, with their consent, the first stage of a technology-enabled negotiation begins. If the settlement through negotiation is not reached, the process may move to a second, “facilitated settlement” stage, where the

⁸²⁷ *Id.* par 24.

⁸²⁸ *Id.* par 26.

⁸²⁹ *Id.* par 7-15.

⁸³⁰ *Id.* par. 16.

⁸³¹ *Id.* par. 17.

ODR administrator appoints a neutral.⁸³² If that stage also does not yield result in the form of settlement of the dispute, the process may move to the final, third stage which may be, although not specifically mentioned, binding arbitration in case of parties post-dispute consent or based on pre-dispute agreements in cases where applicable, or non-binding recommendation or evaluation of the dispute.⁸³³

One of the significant differences with EU ODR Regulation is when it comes to the rules for the appointment of neutrals. According to the Technical Notes, for reasons of efficiency and costs reduction, it is preferable that the ODR administrator appoints a neutral only when a neutral is required for the dispute resolution process in accordance with any applicable ODR rules.⁸³⁴ Dealing with a low-value dispute, the Notes specifically recommend that there should be only one neutral per dispute appointed at any time for reasons of cost efficiency.⁸³⁵ The following powers of neutral are enlisted as desirable:

- a) Subject to any applicable ODR rules the neutral be enabled to conduct the ODR proceedings in such a manner as he or she considers appropriate;
- b) The neutral be required to avoid unnecessary delay or expense in the conduct of the proceedings;
- c) The neutral be required to provide a fair and efficient process for resolving disputes;
- d) The neutral be required to remain independent, impartial and treat both parties equally throughout the proceedings;
- e) The neutral be required to conduct proceedings based on such communications as are before the neutral during the proceedings;
- f) The neutral be enabled to allow the parties to provide additional information in relation to the proceedings; and
- g) The neutral be enabled to extend any deadlines set out in any applicable ODR rules for a reasonable time.⁸³⁶

The Technical Notes, in accordance with their name also contain a number of recommendation relating to the technical aspects of communication through the ODR platform (retaining communication on the platform, having a electronic address per party etc.), which information

⁸³² *Id.* par. 19,20.

⁸³³ *Id.* par. 21.

⁸³⁴ *Id.* par 45.

⁸³⁵ *Id.* par 47 (e)

⁸³⁶ *Id.* par 48

should be communicated by parties (especially for commencement of ODR process), desired requirement from neutrals (declaration of impartiality and disclosure of any relevant facts that could give rise to doubts), proposal for streamlined appointment and challenge procedures, language preferences, etc.⁸³⁷

The Technical Notes also profess a desire for ODR proceedings to be subject to the same due process standards that apply to that process in an offline context, in particular, independence, neutrality, and impartiality, and that guidelines or minimum requirements for the conduct of ODR platforms and administrators should be in place.⁸³⁸

3.1.3. Access to justice and UNCITRAL's Technical Notes

Even though the Technical Notes are a descriptive document with the general recommendation, and without any formal legal status, we still can discuss some of its recommendation from the point of view of our context.

Cloud services are usually cross-border and in general, could fall under the low-value high-volume category, hence the recommended scope for ODR processes cover cloud service disputes both from consumer-to-business and business-to-business aspect. In that sense, if the result of UNCITRAL's work had been a legal framework for cross-border dispute resolution, the broader scope would have solved many issues pertaining to the distinction between consumer and professional use of a cloud service. As we have discussed in Chapter 6, EU ODR Regulation could have problems related to discerning service with mixed professional use and private/consumer use outside of the profession. Including B2B and B2C in the scope solves the issue although applicable law questions remain.

When it comes to access, we have distinguished accessibility and availability of dispute resolution mechanisms. The Technical Notes are very clear on the principle of party autonomy in paragraph 17 where they confirm The ODR process should be based on the explicit and informed consent of the parties. That means we only have contractual grounds for initiation of ODR process. Explicit and informed consent requirement is not entirely clear on the issues of pre-dispute agreements. The US law considers the pre-dispute agreement on arbitration by

⁸³⁷ *Id.* par 32-43.

⁸³⁸ *Id.* par 51-52.

click-through terms of service as an agreement based on explicit and informed consent.⁸³⁹ According to the EU Unfair Terms Directive, such agreements are not binding; they do not allow freedom to its users not to consent and hence do not prevent consumers from access to court. In our context, we have unequal negotiation power from the beginning, and both parties are expected to behave in their best interest. Therefore the issue of a contractual basis for ODR process can be considered troublesome from the fairness perspective if pre-dispute agreements are enforceable, or from the effectiveness of post-dispute agreements if pre-dispute agreements are non-binding. We have discussed both aspects in previous chapters. Even if we consider them entirely legal, the fairness aspect of pre-disputed agreements, from the Rawlsian perspective is not acceptable in our framework. The worse off party ends up in worse off position when it comes to availability of dispute resolution and access to redress. Relying on post-dispute agreements, on the other hand, is ineffective and does not fulfill the potential of the mechanism, as evidenced by the modest numbers aggregated by EU ODR platform in a large market and for supposedly high volume transactions. Therefore we could assume that the result for the contractually based framework for the availability of ODR, under UNCITRAL Technical Notes influence would yield little result within our context. Accessibility, as the other side of the coin of access to dispute resolution, would be optimal as was the case in our comparison in Chapter 6, where instant access by both parties reaches almost ideal equality. Such equality has priority over unequal distribution benefiting worse off party, as we have discussed in Chapter 6.

The procedural fairness is not in any way guaranteed simply by the nature of the non-binding character of the Technical Notes. We have seen consensus professed on the principles of fairness, due process, transparency, and accountability. Some of those principles are elaborated with vague recommendations. It is of course not to be expected of the Technical Notes to go deep on the principles, though it could be stated that for some principles we have seen more consensus on how to approach selected issues during the UNCITRAL's Working Group discussions. For instance, the fairness principle is scattered through several recommendations for fair treatment. The neutral should be required to "provide a fair and efficient process" or to "independent, impartial and treat both parties equally throughout the proceedings." In the draft procedural rules, we have seen undisputed articles that substantiate fairness requirements, especially in regards to equality of arms:

⁸³⁹ See more in Chapter 5

“Each party shall have the burden of proving the facts relied on to support its claim or defense. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.”⁸⁴⁰

However, without finalized consensus and for probable reasons of appropriateness for the Technical Notes, a number of formulations that could have support from all the Working Group members have been omitted from the final text. Much of these principles are reaffirmed where the Technical Notes discuss the powers of neutral. We see the inclination to fairness, but without a significant guarantee, this remains ineffective.

The efficiency is also professed without specific formulations. It is desired that in various stages the actions are taken within a reasonable time for parties, and from neutrals, it is required to avoid unnecessary delay or expense in the conduct of the proceedings. ODR, in general, is offered as a more cost-effective alternative to traditional approaches, the latter of which in some cases may be overly complex, costly and time-consuming in light of the nature and value of the dispute.⁸⁴¹ The notes do not specify any time limitations or cost requirements. The one significant aspect is explicit consensus within Working Group that a single neutral should be appointed to handle disputes for efficiency purposes. This, of course, can be opposed to certain aspects of fairness, but the logic of appropriating a low-value dispute to minimum necessary handlers is obvious. Even though arbitration is not explicitly discussed in Technical Notes, due to lack of consensus on nature of final stage, this requirement of single neutral translates to a single neutral/adjudicator in the final stage/arbitration.

Finally, when it comes to effectiveness, and more specifically to enforcement issues, the Technical Notes do not mention enforcement. The enforcement has been discussed in Working Group with special emphasis on private enforcement mechanism through payment intermediary, but given that none of the expected outcomes of the initial Working Group goals have been achieved, it is not surprising that enforcement issues have been neglected at the end.

⁸⁴²

With our theoretical model in mind and considering the context of cloud services disputes, we can conclude that the Technical Notes and the work of UNCITRAL on ODR have not provided

⁸⁴⁰ Draft Article 7 of A/CN.9/WG.III/WP.133 - Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

⁸⁴¹ See more in A/CN.9/WG.III/WP.140 - Online dispute resolution for cross-border electronic commerce transactions: Draft outcome document reflecting elements and principles of an ODR process

⁸⁴² See more in A/CN.9/WG.III/WP.124 - Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms

desired outcomes. The non-binding descriptive nature of the Notes is insufficient to serve anything other than to pinpoint international consensus on certain issues in regulating dispute resolution for low-value high-volume disputes. We have seen some promising aspects in the discussion of the Working Group, but without concrete results at the end, we can say that currently, the EU has the most significant international (or regional) framework for ODR with a concrete single EU ODR platform. Therefore we will focus on the existing international ODR instrument, with the intention to make it more suitable for cloud service disputes. Before that, we will also briefly review the Privacy Shield-legal framework for data transfers between US and EU, which offers dispute resolution for data protection related cases. Though at the time of writing this text, the dispute resolution mechanism is not functional yet, we can comment based on the requirements for dispute resolution bodies within the framework.

3.2. Privacy Shield Framework

3.2.1. Background

After some deliberation, in October 2015 the European Court of Justice declared invalid the EU Commission's US Safe Harbour Decision that allowed transfer of personal data to the U.S. under an adequate level of protection of the data.⁸⁴³ The Decision was brought under an agreement with U.S. on the framework of the International Safe Harbour Privacy Principles in line with requirements of Article 25(2) of Directive 95/46/EC. However, since the Court overturned the Decision, we will not discuss Safe Harbour other than in accordance with our findings during the survey in Chapter 3.⁸⁴⁴ Following the Court's decision, the European Commission and the U.S. Government initiated negotiations about a new framework, and they reached a new agreement in February 2016.⁸⁴⁵

The Privacy Shield framework, like Safe Harbour before it, contains a number of substantive norms that are outside of the scope of our research. However, the redress mechanism within the Privacy Shield framework is connected and dependent on the adequacy of the framework

⁸⁴³ Case C-362/14, Judgment of the Court (Grand Chamber) of 6 October 2015. Maximilian Schrems v Data Protection Commissioner. Request for a preliminary ruling from the High Court (Ireland) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0362>

⁸⁴⁴ See Commissioner Jourová's remarks on Safe Harbour EU Court of Justice judgment before the Committee on Civil Liberties, Justice and Home Affairs (LIBE)", 26 October 2015

⁸⁴⁵ See more on press release available at: http://ec.europa.eu/justice/data-protection/international-transfers/eu-us-privacy-shield/index_en.htm

to serve its purpose within the larger EU Data Protection framework. The Article 29 Data Protection Working Party in its subsequent Opinion stated that the Privacy Shield offers major improvements compared to the Safe Harbour decisions, but that three major points of concern remain, which relate to deletion of data, a collection of massive amounts of data, and clarification of the new Ombudsperson mechanism.⁸⁴⁶ Related to the redress mechanism the Article 29 Data Protection Working Party also expressed some concerns that the effective exercise of the data subject's right might be undermined which we will address below.⁸⁴⁷ The European Data Protection Supervisor published an opinion in which, besides the other issues, he found minor concerns regarding the complexity of the redress system and proposed bigger role of Ombudsperson.⁸⁴⁸

The European Commission adopted the decision on Privacy Shield framework on 12 July 2016, and it went into effect the same day, while the President of the U.S. signed an Executive Order entitled "Enhancing Public Safety" which states that U.S. privacy protections will not be extended beyond US citizens or residents.⁸⁴⁹

3.2.2. Dispute Resolution under Privacy Shield

Within the EU-U.S. Privacy Shield principles, under the "Recourse, Enforcement and Liability Principle", participating organizations must provide recourse for individuals who are affected by non-compliance of other principles of the framework and offer the possibility for EU data subjects to submit complaints regarding non-compliance by U.S. self-certified companies and to have these complaints resolved, if necessary by an adjudicatory decision, providing an effective remedy.⁸⁵⁰

The data subject can complain directly or through the Department of Commerce following referral by a DPA, and the organization must provide a response to the EU data subject within

⁸⁴⁶ Chapter 5 of Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision, the Article 29 Data Protection Working Party available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238_en.pdf

⁸⁴⁷ *Id.* p. 26.

⁸⁴⁸ European Data Protection Supervisor, Privacy Shield: more robust and sustainable solution needed, 30 May 2016 available at: https://edps.europa.eu/sites/edp/files/publication/16-05-30_privacy_shield_en.pdf p.12

⁸⁴⁹ See more at http://ec.europa.eu/justice/data-protection/international-transfers/eu-us-privacy-shield/index_en.htm

⁸⁵⁰ See 2.1. Privacy Principles (26) in Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176)

a period of 45 days, which must include an assessment of the merits of the complaint and information as to how the organization will rectify the problem.⁸⁵¹ If not satisfied, data subject can approach other recourses.

Organizations are required to undergo self-certification, which also provides with independent recourse mechanism by which individuals can file complaints and initiate disputes free of charge.⁸⁵² Self-certification requirements are somewhat more stringent than under the previous Safe Harbour framework. Self-certified organizations may choose independent recourse mechanisms in either the European Union or in the United States, which includes a choice between the EU DPAs or independent Alternative Dispute Resolution (ADR) established either in the US or EU (except for human resources data disputes).⁸⁵³ Selected ADRs must include effective enforcement mechanisms in accordance with the requirements. Independent dispute resolution bodies should be readily available and free of charge to individuals. Organizations are obliged to remedy any problems of non-compliance, and they are also subject to the investigatory and enforcement powers of the FTC, or any other U.S. authorized statutory body.⁸⁵⁴

Independent dispute resolution bodies must inform on the Privacy Shield Principles' dispute resolution with the description on how the complaint is to be filed, the timeframe and description of potential remedies and also to provide information on aggregate statistics regarding their dispute resolution services.⁸⁵⁵ Private sector dispute resolution bodies and self-regulatory bodies must notify failures of Privacy Shield organizations to comply with their rulings to the governmental body with applicable jurisdiction or to the courts, where applicable.⁸⁵⁶

In cases where their complaints have not been resolved by any of the dispute resolution mechanisms, as a “last resort” individuals may invoke binding arbitration under the Privacy Shield Panel.⁸⁵⁷ Before addressing the Privacy Shield Panel data subjects must:

- (1) raise the claimed violation directly with the organization and afford the organization an opportunity to resolve the issue within the timeframe set;

⁸⁵¹ *Id.* par. 44

⁸⁵² *Id.* see 2.3. Redress mechanisms, complaint handling and enforcement

⁸⁵³ *Id.* (40)

⁸⁵⁴ *Id.*

⁸⁵⁵ *id*

⁸⁵⁶ *id*

⁸⁵⁷ *Id.* (42)

- (2) make use of the independent recourse mechanism under the Principles, which is at no cost to the individual;
- (3) Raise the issue through their Data Protection Authority to the Department of Commerce (DoC) and afford an opportunity to DoC to resolve the issue within set timeframe.⁸⁵⁸

The Privacy Shield Panel (consisting of one or three arbitrators, as agreed by the parties) provides limited remedies since it has the authority to impose individual-specific, non-monetary equitable relief (such as access, correction, deletion, or return of the individual's data in question) necessary to remedy the violation of the Principles only with respect to the individual.⁸⁵⁹ The binding decision of the Panel could be subject to judicial review and enforcement under the U.S. Federal Arbitration Act.⁸⁶⁰ The Arbitration Panel will be selected by the parties from the list of at least 20 arbitrators chosen by European Commission and U.S. Department of Commerce, based on their independence, integrity, and expertise, with the condition that they are admitted to law practice in the U.S. and are also experts in U.S. privacy law, with additional expertise in EU data protection law.

At the time of writing the Department of Commerce and the European Commission are yet to agree to adopt an existing, well-established set of U.S. arbitral procedures (such as AAA or JAMS) to govern proceedings before the Privacy Shield Panel, in accordance with Annex II, with certain pre-set specifications among which are: "... 5. The location of the arbitration will be the United States, and the individual may choose video or telephone participation, which will be provided at no cost to the individual. In-person participation will not be required; 6. The language of the arbitration will be English unless otherwise agreed by the parties...; 9. Arbitrations should be completed within 90 days of the delivery of the Notice..."⁸⁶¹

The arbitrator should take reasonable steps to minimize the costs or fees of the arbitrations, and the Department of Commerce will establish a fund where Privacy Shield organization will be required to pay an annual contribution, which will cover the arbitral cost, including arbitrator fees.⁸⁶²

⁸⁵⁸ Annex II of Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.207.01.0001.01.ENG&toc=OJ:L:2016:207:FULL#ntr52-L_2016207EN.01000101-E0052

⁸⁵⁹ *id*

⁸⁶⁰ *Id*

⁸⁶¹ *Id.*

⁸⁶² *id*

3.2.3. Access to justice and Privacy Shield

Although online dispute resolution has not been specifically mentioned in the Privacy Shield framework, it follows logically that the dispute resolution for the cases related to non-compliance with the Principles will only be effective if it is conducted partially or entirely through online communication tools. Other forms of dispute resolution that excludes online communication tools entirely (even though possible) seem improbable from practical reasons, cost efficiency, and short deadlines. The participating organization that transfer personal data outside of the EU and guarantee recourse to data subject domiciled in the EU, undergo self-certification which introduces independent dispute resolution bodies (either ADR or private sector developed privacy programs) that provide recourse to affected Data Subjects irrespective of their location. The only way to design a dispute resolution process that could efficiently cover communication with a possible variety of potentially affected data subjects is to rely heavily on online communication tools, commonly through the specific platform of certification body or ADR. One of the very well established privacy shield certification programs, TRUSTe, facilitate consumers' privacy complaints through an online submission mechanism, where it guides complainant on in addressing a specific type of complaint, but also requires a functional e-mail address to proceed with the complaint.⁸⁶³ This might hint to possible Digital Divide issues where data subjects who would lack competences in online communication would be discriminated, but it is reasonable not to expect a lot of these issues relative to Privacy Shield Principles. We can assume use of online communication tools for the majority of disputes regarding issues of compliance with Privacy Shield Principles individual cases and proceed with assessing the framework within our contexts of cloud service disputes.

Our theoretical framework considers access as the significant point of access to justice and fairness and within it availability and accessibility of dispute resolution bodies. Given that the transfer of personal data outside the EU to the United States is conditional to guarantees of adequate level of protection in line with Directive 95/46/EC, and that the Privacy Shield framework is intended to facilitate legal transfer for a large number of US-based organizations, and many of those are cloud services providers, we consider this framework significant for access to justice for individuals in cases relative to data protection and privacy. Availability of

⁸⁶³ See TRUSTe dispute resolution on-site form at: <https://feedback-form.truste.com/watchdog/request>

the dispute resolution bodies is guaranteed within the framework, which allows several recourses for potential redress and additional binding arbitration mechanism in case previous bodies failed. The Framework and Annex II cite “readily available independent mechanism.”⁸⁶⁴The data subjects can sometimes choose between private certification mechanism and its dispute resolution scheme, ADR based in the US or EU, or European Data Protection Authorities to facilitate resolution. With the availability guaranteed, the question of accessibility remains. As mentioned above, the only way to achieve efficient (speedy procedure at no cost for data subjects) and effective dispute resolution procedure is to rely on online communication tools. Therefore, we speak of online dispute resolution in the broader sense of technology-mediated dispute resolution, and since digital divide should not be an issue within our contexts, online dispute resolution allows the greatest level of accessibility that comes closest to the ideal of equality. Even if available dispute resolution is not satisfactory in the prior stages, data subject can eventually invoke binding arbitration through Privacy Shield Panel that does not require in-person procedure and allows for video or telephone communication. Thus, legal guarantees of availability with online accessibility provides nominally strong access to dispute resolution bodies for cloud service related disputes.

When it comes to procedural fairness, Privacy Shield framework does not provide guidelines for specific dispute resolution bodies on the dispute resolution procedures. It requires from independent bodies an annual report providing aggregate statistics regarding services reports that could indirectly hint on their independence since significant irregularities could be potentially noticed. Procedures before DPAs are regulated with administrative procedure norms of different national laws, and high level of procedural fairness is to be expected in DPAs handling of the procedure. When the complaint is brought before a DPA, the informal panel of DPAs established at Union level delivers advice after both parties have had a reasonable opportunity to comment and to provide any evidence they wish.⁸⁶⁵ Independent dispute resolution bodies and DPAs are vested with the investigation of complaints allowing them more authority to act as they see fit than in mere adversarial procedure.⁸⁶⁶ The organization is obliged to comply. The Privacy Shield does, however, condition approval for

⁸⁶⁴ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) par.39.

⁸⁶⁵ *Id.* par. 48.

⁸⁶⁶ *Id.*

appointment in arbitrators' pool for Privacy Shield Panel, with independence, integrity, as well as experience in U.S. privacy and Union data protection law.

The distribution of cost is obviously set in favor of data subjects as the less powerful party. It is required that dispute resolution procedure is at no costs for the individuals. These include costs of the procedure only (fees for DR body) and no other expenses, such as legal representation. It is unclear who bears the costs of translation if it is necessary. Travel costs are minimized with the use of online technologies for communication. For the Privacy Shield Panel, it is required to set up a fund where Privacy Shield participating organizations will pay an annual contribution, which will cover the arbitral cost, including arbitrator fees. It is expressly stated that attorney's fees are not covered by these provisions.⁸⁶⁷ The arbitration will be in English unless both parties agree otherwise, which in practice translates that it will be almost always since U.S. law is applicable and arbitrators will be selected among lawyers with US law practice experience. Nevertheless, these norms solidify the position of data subject as an economically weaker party to wage a dispute resolution process.

Since the Privacy Shield has been introduced recently (relative to the writing of this text) we have not seen any reports on dispute resolution under the framework, and we have yet to see the general reports on the framework, we have to rely on the text of the framework to assess the efficiency.⁸⁶⁸ It is required from the organizations and dispute resolution body to act promptly on received complaint. The organizations have to respond within 45 days to the complaints addressing the issues of the individual. As a general rule, the DPAs' advice will be delivered by the panel within 60 days after receiving a complaint. If an organization fails to comply with a device within 25 days, the DPA panel will give the notice to submit the matter to the FTC or to conclude a serious breach of commitment. If DPAs refer the complaint to the Department of Commerce, the procedure is established where relevant contact point will liaise directly with the respective DPA on compliance issues and in particular update it on the status of complaints within a period of not more than 90 days following referral.⁸⁶⁹ Arbitrations under

⁸⁶⁷ Annex II to the Commission Implementing Decision (EU) 2016 under H. Costs

⁸⁶⁸ See for example The International Association of Privacy Professionals blog update: How's Privacy Shield doing? Well, no one's complaining <https://iapp.org/news/a/how-privacy-shield-doing-well-no-ones-complaining/> last accessed on March 2017.

⁸⁶⁹ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) par 52.

Privacy Shield Panel should also be completed within 90 days of the delivery of the Notice to the organization at issue unless otherwise agreed to by the parties.⁸⁷⁰

Finally, the effectiveness of the Privacy Shield dispute resolution framework is related to its enforcement mechanisms. In the theoretical framework through which we observe dispute resolution mechanism, we ask the question: is the voluntary compliance necessary for the success of the dispute resolution? The short answer is no. The decisions of dispute resolution bodies following mostly investigatory procedure are by nature adjudicatory and not dependent on parties' agreement. If the organization chose to self-certify and condition itself to Privacy Shield Principles, it also accepted to introduce an obligatory recourse mechanism with the threat of removal from the list of certified Privacy Shield organizations in case of non-compliance, backed by enforcement action of Department of Commerce, the FTC or a competent court.⁸⁷¹ Removal from the certified list would indicate non-compliance with Privacy Shield Principles and that any future transfer of personal data of EU data subject would be illegal. Ensuring compliance with the Principles should represent sufficient incentive in most cases. Additionally, in case the data subject escalates the dispute to binding arbitration by the Privacy Shield Panel enforcement of the arbitral decisions pursuant to U.S. law under the Federal Arbitration Act.⁸⁷²

How many legal actions are needed to enforce the decision of independent dispute resolution body or advice of DPA, depends on the organization's resistance to comply with the decision of different competent bodies. In most cases, additional actions are not required from individuals. Steps related to removal of the certified organization from the list is not connected with any cost to the individual. For the estimated small number of cases of involuntary enforcement of the arbitral decision by the Privacy Shield Panel, possible legal actions before the competent court would be necessary for enforcement under FAA.

The Article 29 Data Protection Working Party (WP29) acknowledges different layers of possible redress but express concerns that most, if not all, of the recourse mechanisms, foresee a procedure in the U.S., thus complicating monitoring of the procedure by the EU DPAs.⁸⁷³ The WP29 criticizes framework for not allowing to bring claims for damages in the European Union

⁸⁷⁰ Annex II to the Commission Implementing Decision (EU) 2016 under G. Arbitration Procedures(9)

⁸⁷¹ Commission Implementing Decision (EU) 2016/1250 par. 47-52.

⁸⁷² Annex II to the Commission Implementing Decision (EU) 2016 under E. Review and Enforcement

⁸⁷³Article 29 Data Protection Working Party Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision Adopted on 13 April 2016 p. 26.

as well as being “granted the right to lodge a claim before a competent EU national court.”⁸⁷⁴ They also stress concern that, though arbitration is available, having to cover the costs of attorneys may prevent EU individuals from initiating arbitration proceedings.⁸⁷⁵

Privacy related disputes also fall under our context of the cloud service disputes, which encompasses a larger scope of possible conflicts. Although we do not focus specifically on data protection disputes the contractual disputes over cloud services, self-certification for Privacy Shield and previous Safe Harbour framework introduces the provision of said framework into Privacy Policies and hence contracts with individuals as cloud users. Recent changes introduced in Privacy Shield were the result of perceived deficiencies and lack of access to redress under Safe Harbour. The value of the claims in data protection and privacy disputes are difficult to determine but in most cases could be characterized as low-value or small claims (small claims under The European Small Claims procedure is for claims of up to €2000, but the threshold will be increased to €5000 from July 2017) which is especially relevant in cross-border access to justice context. With Privacy Shield framework in mind, we will discuss in the next section possible recommendations to make a more adequate existing legal framework for low value online cross-border contractual disputes to the cloud service disputes scenarios.

4. Dispute resolution framework for cloud service disputes

Everything that we have discussed so far led us, in one way or another, to more substantial conclusions on what has to be changed in order to have more appropriate dispute resolution framework for cloud service disputes. We have seen the development of online dispute resolution that coincided with the growth of e-commerce and has grown out of demand or even necessity for handling conflicts in the new e-commerce environment. We have seen that private ODR schemes, like the ones of eBay and PayPal, have achieved enormous success but also play an important part in maintaining the trust in a general service that these companies provide. The participation to these ODR mechanisms is mandatory and part of the terms of service that users have to accept if they want to avail themselves of those online services. It was interesting to the point that these companies, as champions of ODR mechanisms for private online out-of-

⁸⁷⁴ See Article 29 Data Protection Working Party letter to Vice-President Redding, 10 April 2014

⁸⁷⁵ Article 29 Data Protection Working Party Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision Adopted on 13 April 2016 p.28.

court dispute settlements systems, do not readily accept ODR for disputes they are having with their own consumers.

We have seen a functioning global ODR mechanism in ICANN's UDRP, where the system grew out of necessity to deal with specific issues of intellectual property rights' infringements. A single set of rules to deal with the limited number of issues and mandatory nature of the adjudicatory dispute resolution, coupled with effective enforcement mechanism made UDRP a success story of online arbitration.

UNCITRAL's effort in devising a global international legal framework for online dispute resolution to deal with low-value high-volume cross-border disputes has not been successful and resulted in non-binding descriptive documents or recommendation for ODR. Although it is understandably difficult to reach a consensus of many different legal cultures, we have seen in the work of Working Party III significant efforts and uncontested proposals that could serve as an inspiration for future frameworks of dispute resolutions. Principles of fairness, transparency, due process, and accountability within several stages of dispute resolution process seems to be a general recommendation for ODR. Among other things, in proposals for binding arbitration as a final phase of dispute resolution, we have noted the proposal for appointment of a single arbitrator by ODR administrator for the efficiency reasons.

Dispute resolution under Privacy Shield framework offers several available mechanisms to file a complaint about infringement of principles set in the framework. As a last resort, if the dispute has not been settled in previous stages, the Framework introduced binding arbitration under single set procedural rules. This residual mechanism serves both as an additional instrument for data subjects and as an incentive for organizations to solve the issue through other means, increasing chances for access to justice.

To answer the research question of the chapter on what is the most appropriate legal framework for dispute resolution between cloud providers and users that provides access to justice and fairness, we take into account all of the above and the results of analysis from Chapter 6. We should point here that there is an unsatisfactory way to correctly answer this research question and it goes as follows: any legal framework that achieves optimal or ideal results in the categories that we have observed would be suitable. So any dispute resolution that comes closest to its ideal forms would be the most suitable one. However, we have seen in the previous chapter that none of the available methods comes close to ideal when it comes to cloud service disputes. In fact, traditional litigation still would be the appropriate method in current

circumstances (unless there is a providers' good will) and we have seen that it does not provide access to justice in practice. Hence it is not adequate. Precisely because court system harbors inefficiency and other inadequacies that alternative forms of dispute resolution came to be. But then again neither alternative dispute resolutions (including online) do not achieve its goal in cloud service disputes. Specialized framework for the out-of-court handling of disputes coming out of e-commerce does not achieve its purpose.

We can recall here that our primary research question of the thesis asks: (if it is not adequate) what legal measures can be taken to improve access to justice and fairness in this domain? Therefore, if we are looking to improve access to justice and fairness by legal or regulatory intervention, we get additional perspective on our question for the chapter. Thus we have a clearer query of the most appropriate legal framework for dispute resolution between cloud providers and users that we can improve with legal measures to become the most adequate. Although efficiency as a category, could be influenced by legal requirements, it does not depend on it nor does it guarantee the result. Hence with legal measures, we can improve access (availability), procedural fairness and effectiveness.

In our analysis in Chapter 6, we found that ODR mechanisms are most accessible (within category access) and most efficient. Therefore, with regulatory intervention in ODR's availability and effectiveness, and amending some issues in procedural fairness, it would position ODR as the most adequate dispute resolution mechanism for cloud service disputes. We could look into ways to optimize court to become more efficient, but that would require greater regulatory intervention with many implications to national laws and more importantly it would require greater technical improvements of judicial systems. At the moment the UK is reforming its judiciary by including online dispute resolution as the integral part for certain types of disputes.⁸⁷⁶ The current proposal imagines three phases, first- evaluative and preventive phase, second - conciliatory phase with case management tools, and final third – adjudicatory with online adjudication by judges. Similarly with pyramid of conflict resolution Brigg's proposal aims to handle most of the low-value cases in first phases. It indeed sounds as potentially good model for cloud service disputes before judiciary, however it is important to stress that it is part of the strategy for reform of national judiciary which is still being debated and it is primarily orientated on a single state with aims of reducing backlogs of cases and

⁸⁷⁶ See LORD JUSTICE BRIGGS, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT (2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (last visited Apr 15, 2017).

increase in judicial efficiency. While it could be commendable reform it is hardly a solution for cross-border disputes unless similar reforms have been successful in all or majority of the Members States. Until then, even with the most optimized national judicial system, we will have unequal access to justice for different cloud users, which is hardly in line with ideals of the Single market. As opposed to courts, already functioning infrastructure of ODR platform could be appropriated more easily and allow ODR market players to fulfill its role. Thus, if we want to make as little adjustments to existing regulatory framework as possible, then we should look to specialized regulations for our domain – legal framework for ODR. It comes back to the intuitive argument from the early days of the field that ODR is most suitable for conflicts that originate online.⁸⁷⁷

Now we shall address what actual legal measures could be taken to improve the international regulatory framework for online dispute resolution - EU ODR Regulation and ADR Directive respectively – that could be applicable to cloud service disputes in its entirety (as opposed to Privacy Shield).

4.1. Proposals for the dispute resolution for cloud services in the EU

The European Union has enacted regulations to deal with out-of-court dispute resolution for cross-border online sales of products and services. Since cloud services fall under this category the logical way to handle what we described as problematic from the point of our cloud service context, is to address the ADR Directive and ODR Regulation respectively, to enhance their overall effectiveness with a number of pertinent tweaks. These are specialized regulatory instruments, and it is easier and more practical to address them, than for example to enhance general aspects of the judicial system. European Small Claims procedure is an example of such enhancement, but at the moment desired efficiency or reliance on information technology in small claims procedure have not been achieved. On the other hand, single EU ODR platform has been activated and designed in a user-friendly manner with mandatory links to it on traders' sites.

To get an answer on what is the most appropriate legal framework for dispute resolution between cloud providers and users that provide access to justice and fairness, we start from the

⁸⁷⁷ Katsh, *supra* note 3 .

conclusions of Chapter 6. Observing the current legal framework available for contractual disputes in the EU, we found out that for cloud services within our context judicial system and courts remain to be most adequate dispute resolution mechanism in case of a dispute between cloud users and providers. ADR and ODR regulations, although intended to address the issues of solving disputes coming out of e-commerce, have not yet proven to be effective, and by our analyses are more appropriate for issues of selling goods online within Single market than for cloud service. However, due to various reasons explained in Chapter 4, 5 and 6, even the option of the court as the dispute resolution method would most likely lead to abstention from the dispute resolution unless certain thresholds in the value of the claim had been surpassed. It is particularly the case if the only option is a foreign court, where additional costs and barriers are involved rendering dispute resolution impractical. In a situation where a party has a legitimate claim and will to pursue, having an option to initiate and wage a dispute, but for one reason or another finds obstacles to available redress that result in not having a conflict resolved, indicates a lack of access to justice. Building from our previous conclusions and through the lens of our theoretical framework we address potential proposals or guidelines for the legal framework for ODR/ADR.

4.1.1. Access in the proposed ODR framework

To address the access to justice issues, Mauro Cappelletti focused on access.⁸⁷⁸ In our theoretical framework, we focused on four concepts, observed through nine indicators, where access remained key concepts on which other depended. Without access, the remaining concept does not matter. We have observed access through availability and accessibility of dispute resolution.

Accessibility of ODR, where barriers are low or non-existent, is close to ideal equality for parties and thus score highly in fairness, compared to traditional offline forms of dispute resolution. Single ODR platform equalizes not only parties to the disputes, but also access to various consumers in different Member States where there could be a significant difference in access to justice in general.

⁸⁷⁸ CAPPELLETTI, *supra* note 37.

By way of our definition, availability depends on jurisdiction or competences of dispute resolution bodies. Herein lies currently the most pertinent problem of existing regulatory framework for ODR. There are no mechanisms to ensure the availability of the dispute resolution party. Firstly, we have not observed that consumer cloud services have complied with the requirement to post a link to EU ODR site.⁸⁷⁹ Secondly, in most cases the participation to the process is voluntary, and there are no mechanisms to ensure participation of traders (except in cases where there is sectorial obligation to participate). Cloud providers usually impose on its user's non-negotiable terms of service, which indicate that they are not prone to renegotiation of pre-set terms, and even if they were, they would decide to participate in each case from a post-dispute perspective. Hence, the decision to participate would be based on expected successful outcome. The effectiveness of post-dispute agreements in a situation with significant power disparity is dubious at least. So it would require a solid incentive to make cloud providers to participate or to make the participation obligatory. The latter seems sounder since market incentives to participate have not been effective or relevant so far. The requirement to place a link already exist, and in a way, it is a half-way measure that confuses consumers, as there is no guarantee of participation.

From the perspective of benefiting the worse off party, and in our context that would be consumers, the participation to the ODR procedure should be made obligatory for service providers. This however, does not inevitably lead to the mandatory binding outcome of the proceedings. Rawlsian distribution of inequalities does not necessarily indicate distribution to the benefit of the worse off party exclusively on the expense of better off party (win-lose scenario, zero sum). If available, a distribution where worse off party would benefit and better off party would benefit more than in the previous scenario; it would be more in accordance with Rawlsian fairness. Would it be fair to force cloud providers to participate in ADR procedure even for disputes of lowest value or over free services? It represents significant intervention at the expense of principle of party autonomy. Imposing non-negotiable arbitration that causes significant imbalance is considered unfair for consumers. Therefore, we would argue that if it is possible to achieve the same or similar outcome with a measure of lesser disadvantage to one party, it would be more suitable.

We propose that mandatory online arbitration under the auspices of ODR platform would be an option for the consumer in case a provider/trader refuses participation in ODR/ADR

⁸⁷⁹ See survey in chapter 3.

procedure, as offered by ODR platform in the initial phase of complaint handling. It would serve as “residual mechanism” that would incentivize the trader (cloud provider) to participate in already available ODR procedures. For this residual binding online arbitration, we would propose that it becomes an integral part of ODR platform, with a single set of procedural rules (model by UNCITRAL arbitration, UNCITRAL Technical Notes, AAA consumer arbitration rules, or any other appropriate or appropriated rules for arbitration of low-value disputes). Residual online arbitration would not be free for consumers, and they would have to pay the fees of arbitration in accordance with cost-shifting rules for losing party (with the possible exception of other party’s legal representation fees). That would discourage frivolous and fraudulent claims. The cloud provider could challenge the fraudulent claim by inviting the claimant to initiate online arbitration for which he could end up paying. The cheapest option for both parties would be to participate in one of ADR schemes offered by ODR platform, and if provider/trader accept participation, online arbitration would be off the table for the consumer to choose.

Mandatory online arbitration option already exists in some frameworks that we have touched upon, like ICANN’s UDRP and in Privacy Shield framework. Privacy Shield would especially be relevant, since the designers of the Privacy Shield, have decided to address the lack of access to redress with providing several options for redress, and arbitration as a “last resort” under a single set of procedural rules. Pablo Cortes, Cristopher Hodges at al. propose ensuring the effective provision of consumer ADR by making the requirement of consumer ADR mandatory in a number of sectors where there is a high demand for ADR and to set up an effective residual forum to ensure full coverage.⁸⁸⁰ Cortes ponders whether the online tribunal or the online court would be a better residual instrument but nevertheless, argues for any of those instruments as improvement over existing framework.⁸⁸¹ We believe that EU ODR platform with a single set of procedural rules would be the most appropriate venue for binding arbitration in case trader/provider refuses to participate in offered ADR procedure.

Another important aspect is the ADR procedure under current Regulation if the provider accepts the participation. Any form of dispute resolution would be appropriate with a successful outcome. We have seen, that according to various empirical research, high rates of successful outcomes when it comes to bargaining dispute resolution methods. However, from the incentives point of view, the fact that there is a percentage of unsuccessful outcomes that

⁸⁸⁰ See Conclusion in PABLO. CORTÉS, THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE RESOLUTION (2016).

⁸⁸¹ *id*

does not lead to some form of settlement, could mean that providers could “fake” participation without consequences. Therefore as an incentive, and also a form of enforcement, we propose that unsuccessful outcomes due to “bad faith” would be published on neutral’s discretion, with a description of the issue and neutral’s recommendation as well as party’s refusal to comply with the recommendation in given timeframe. This published information would be available on ODR site as a transparency report on individual unsuccessful cases but also as a reputation damaging information in cases of provider’s unjustified refusal to comply. Indirectly, this would resemble EU trustmark scheme. For a provider of cloud service, within our low-value dispute context with high-volume of transactions and large consumer base, it would require resources to participate even in the non-binding procedure (to avoid potential binding arbitration), and in addition, it would be waste of such resource if reputation damaging information on consumer complaint gets published in case of disregard of neutrals recommendations/advice/proposal. It would serve as another incentive for a “good faith” in an attempt to solve the conflict.

In our analysis in Chapter 6, we found that scope of ADR Directive and ODR Regulation are restrictive in several ways. Without repeating, we would propose that those issues get attention in future amendments. It would be desirable to expand the scope on the traders/providers who are not established in the EU, but who orientate its activities to the EU market. Similar interpretations have been established in national jurisprudence, and with recent Brussels I Recast amendments.⁸⁸² Of course, it is possible that current scope was designed to provide additional tools for traders established in the EU and thus grow additional trust in cross-border transactions within EU. However, we are observing the framework from an individual access to justice point of view, and with normative individualism in mind, we approach the legislative proposals without thinking of overall economic effects for society.

Free services are excluded from the scope of current ADR Directive and ODR Regulation. The regulatory framework for disputes over cloud services, or in general for online service, would have to redefine the definition of service contract in a manner that the element of payment is not essential. We have a constant growth of free services in the cloud market and many indications that such trend will continue and expand. Leaving free services outside of the scope, could leave the door open for many arguments over what exactly was paid for and does a service fall under the scope or not. We have discussed the issues of free service at greater length

⁸⁸² See more in Chapter 4.

in Chapter 6, and we propose regulators to redefine the definition of service contracts which include services that are profited of in different manners and not directly through user's payment. Accountability of providers should not be conditioned with users' payments.

4.1.2. Procedural fairness in the proposed ODR framework

Procedural fairness in dispute resolution in our theoretical framework has been observed from 3 aspects that are a common factor for all various dispute resolution methods. We have commented if procedural guarantees are in place for transparency and fairness in selection/appointment procedure of adjudicators/neutrals; procedural guarantee in place to ensure equality of arms in presenting the case; procedural rules for cost distribution. We have noted in Chapter 6 that in general there are procedural guarantees for all these aspects, although with significantly lesser standards for ADR and ODR, than in traditional judicial systems. This was to be expected since procedural fairness of courts is guaranteed by numerous procedural laws, constitutions, international conventions, etc. On the other front, the minimal standard for different ADRs has been put in place with the goal to harmonize the ADR practice across the EU. The less stringent procedural requirements are part of the appeal of ADR and ODR, and they serve their purpose allowing higher flexibility than within traditional litigation.

Nevertheless, we found some points of criticism in current legislations. Within procedural guarantees of independence, impartiality and expertise, set in Article 6 of ADR Directive rests a specific lacuna. ODR Regulation reference ADR Directive and its requirement for ADR entities. ADR entities could be both natural and legal persons. However, guarantees of independence, impartiality, and expertise are directed only to natural persons, without requirements for legal persons. ADR entity that is a legal person could employ ODR technology without a natural person in charge of ADR to legally bypass the requirements. Even more so could be expected with further development of capabilities of ODR technology. Although we are talking about Directive that has to be implemented into national laws, small amendments to existing provisions could rectify the issue. For example, where appropriate in the text it should be stated that requirement should be extended to ADR administrator, whether natural or legal person.

For residual binding online arbitration, we would propose a selection of arbitrators from a large pool of experts open at EU level (recall to the Rawlsian notion of equally open offices to all).

If parties cannot reach agreement on one or three arbitrators, ODR platform would appoint a random arbitrator with necessary expertise and requirements. This approach has recommended by UNCITRAL's Technical Notes for low-value high-volume disputes.

Equality of arms is covered by Article 9 of ADR Directive, It does not guarantee any balancing authority in cases of significant imbalance of power between the parties where one is overly dominant and has access to all information and evidence, and the other party does not have full access to needed evidence. We have seen that in Privacy Shield framework dispute resolution bodies are vested with essentially investigatory competences. While this would not be entirely appropriate for contractual dispute in general and it depends on type of dispute resolution, within our proposal we would accept formulation for authority of the third party in residual binding arbitration as displayed in one of the draft proposals for UNCITRAL's WG III: "The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require."⁸⁸³ For all other ADR procedures, neutral discretion to assess that the provider has not complied with its recommendations could suffice in providing authority to the neutrals for conducting various forms of dispute resolution where one party has all information and evidence, and the other party does not have full access to needed evidence.

The way costs are attributed under current regulations it is adequate for consumers in cloud dispute context. We would, however, propose equalization in case of binding arbitration. In accordance with cost-shifting rules for losing party applicable to most civil law systems, the fees of arbitration will be covered by the party who failed (with the possible exception of other party's legal representation fees). That would discourage frivolous and fraudulent claims. This rule would also motivate parties to use the existing network of ADRs as already in function. Principles of efficiency and neutral authority to guide the process to be most efficient as proposed by UNCITRAL's Technical Notes would be welcomed here as well.

4.1.3. Efficiency in the proposed ODR framework

Efficiency is the aspect where ADR and ODR regulations have already established appropriate limitations, and we have seen in our survey in Chapter 5 that disputes handled through EU ODR platform have been handled more efficiently compared with average costs and duration

⁸⁸³ Draft Article 7 of A/CN.9/WG.III/WP.133 - Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

of procedure in traditional offline dispute resolution mechanisms. We would recommend, as in the previous section on the appointment of arbitrators, that ODR platform takes a more significant role in the appointment of arbitrators. At least in residual binding arbitration. Hörnle distinguishes the referral function from transfer function of the current ODR platform.⁸⁸⁴ The referral function imitates search engine for ADR/ODR providers and the transfer function is evident from receiving and transferring the complaint/case to chosen ADR/ODR provider.⁸⁸⁵ We propose for the efficiency of the residual phase that the functions of the platform are enhanced by allowing ODR platform as a “fifth party” the function to randomly select arbitrator (from list of qualified neutrals) in line with recommendations from Technical Notes and to transfer the case through an online arbitration tool adjacent to existing platform. With residual binding arbitration as an incentive for negotiation, the EU ODR platform could even provide a single negotiation tool that could structure and filter negotiation phase before escalating to another phase, thus improving the overall efficiency.

By allowing enlisting a greater number of potential arbitrators for residual arbitration, the competition and market itself could potentially reduce the costs of arbitration fee, especially having in mind the freely available online arbitration tool at their disposal. Of course, the criteria for selection would be predefined by the ODR platform and random selection would be the case only among equally qualified (maybe even equally cheap) arbitrators.

4.1.4. Effectiveness in the proposed ODR framework

Effectiveness in our model is largely connected to the issues of enforcement of decisions and settlements. We would argue that voluntary compliance should not be necessary for the dispute resolution, or rather that there are small incentives to push voluntary compliance. We proposed that unsuccessful outcomes due to “bad faith” of one party should be published on neutral’s discretion, with a description of the issue and neutral’s recommendation as well as party’s refusal to comply with the recommendation in given timeframe. This published information would be available on ODR site as a transparency report on individual unsuccessful cases but also as a reputation damaging information in cases of provider’s unjustified refusal to comply. It could be described and indirect enforcement, but would not require any additional step from

⁸⁸⁴ J Hörnle, *Encouraging Online Dispute Resolution in the EU and Beyond-Keeping Costs Low or Standards High?*, QUEEN MARY SCH. LAW LEG. STUD. RES. (2012) p.18.

⁸⁸⁵ *Id.*

opposing party. In a way, it would be immediate enforcement, and some satisfaction for complaining party to have a neutral recommendation publicly proclaimed in his favor. The trader/provider can choose to ignore the negative review, but if we recall that consumer was free to choose from the beginning how he is going to pursue the dispute, and one opted out of traditional litigation than one should accept the consequence of his actions. To some degree at least he/she had access to some justice or redress. Being a dispute of low-value that would be an appropriate risk when deciding to make dispute formal or not to pursue at all. Here we are only proposing an addition to non-binding mechanisms, while there is a significant number of ADR operating that issues binding decision on traders, consumers or both, as we showed in Chapter 5.

On the other hand, for our proposal of residual binding arbitration, it would be desirable to have a straightforward legal grounds for enforcement of arbitral decision coming out of online arbitration (and thus solve the issue with NY Convention). Arbitral decision coming out of online arbitration under auspices of EU ODR platform should be directly enforceable with at least same or even quicker procedure when compared to enforcement of foreign arbitral awards under NY Convention.

We have discussed in this chapter proposals for improving the existing legal framework for disputes coming out of cloud services. We argue that a small number of changes to the ADR Directive and ODR Regulation could make the most appropriate legal framework for dispute resolution between cloud providers and users that provide access to justice and fairness? There a significant number of way legislation could be appropriated and with no certainty can we say that one way is the ultimate solution. However, starting from the Rawlsian perspective of improving the position of the worse off party, and applying this logic to minor redistribution of rights and obligation under existing framework, that would achieve the desired outcome, we consider above-discussed changes sufficient. Additional requirements could overburden one side and achieve opposite effect. We should also remind that ODR and ADR regulations are but a tool for reaching a goal of access to justice and that more “heavy” instruments exist. The question of appropriateness is then a matter of decision based on specific circumstances.

Chapter 8 – Conclusion

In today's fast-paced ultra-connected world, living without technology seems impossible. Technology surrounds us, and we are immersed in the technology in our professional and social lives. One of the dominant ways we interact with each other today is through the Internet. The Internet has become a platform for the exchange of ideas and communication, but also a catalyst for social changes, in particular through an increase in productivity which leads to transformation of whole industries. We are now able to be productive irrespective of our geographical location or day of the time. With the constant exchange of knowledge and services online we are ushering a new industrial revolution. One of the technologies industries are increasingly relying on to become more efficient and productive are cloud services.

Cloud services are based on cloud computing technology, which by itself is characterized by on-demand self-service, broad network access, resource pooling, rapid elasticity and measured service. Cloud computing essentially provides infrastructure, platform or specific software as an on-demand, pay-as-you-use, always accessible service over the Internet. With the effects of Moore's law, Kryder's law and several other laws describing a decrease in price through time per unit of production, we could expect a constant growth of cheaply and readily available

services that will cost users nothing to very little. This is evident also from the number of free cloud services (e-mail clients, photo-editors, streaming services, etc.) or free apps in the markets. To use free or low-cost service, we usually click-through terms of service on the website or accept terms and conditions for the app, which are essentially contracts of adhesion.

These contracts are usually predetermined, non-negotiable and usually in one way or another in favor of its provider. The specific aspect that we are interested in are dispute resolution clauses, which are usually predetermined in the way that sets provider's local jurisdiction as a forum in a case dispute arises. In order to determine the exact state of the issue, we have conducted the survey on a significant number of cloud providers' terms of service, which confirmed assumptions of predetermined jurisdiction in favor of the provider which could be inaccessible or difficult to access by the majority of users of the service. Cloud services are usually globally available and not restricted to a specific jurisdiction. From our survey, we established that the United States are the most common choice for dispute resolution venue among the surveyed ToS, which was expected as most of the cloud providers are incorporated in the United States. Of 322 common cloud providers, 267 have included the United States as the location where dispute resolution will take place. However, even within the United States, we notice the concentration of the jurisdictions in certain states, most prominently California with 169 terms of service citing the state, counties or cities in California as the venue of the dispute resolution. The most preferred counties are the counties of San Francisco and Santa Clara, as these counties together with the wider area of the Northern California also hosts some of the most prominent cloud services based in so-called "Silicon Valley." Analyzing the effects of such dispute resolution clauses on cloud users' access to justice, which we defined in our theoretical framework in Chapter 2, we concluded that it deprives access to justice to users of low-value cross-border services. If predefined contractual terms do not allow appropriate access to justice, that does not mean there are no other more adequate means for the user to find redress.

Our research has been focused on answering the following question: do the current dispute resolution mechanisms provide adequate means to resolve cross-border low-value disputes between cloud providers and users, and if not, what legal measures can be taken to improve access to justice and fairness in this domain?

We have developed the theoretical framework of access to justice as fairness, by applying the Rawlsian approach to fairness, which he used to formulate 2 principles of justice. The second

principle of justice, demands distribution of inequalities to the benefit of the worse off party. This philosophy was unintendedly promoted through several waves of access to justice movement. We have identified 4 key concepts out of principles of civil law dispute procedures and operationalized them through 9 observable aspects which were later used for assessment and comparison of different dispute resolution mechanisms, always having in mind context of cloud service disputes.

In Chapter 4 we have explored jurisdictional aspects of potential cloud services disputes. We find that the EU domiciled users, with Brussels I (recast) Regulation have a significant tool for bringing the dispute to their local courts. However, as we saw in Chapter 5, even if the court option is available, disputants are not willing to engage in litigation if certain thresholds of disputed value have not been crossed. Cloud service disputes, usually fall below such threshold. In Chapter 5 we have analyzed the international legal framework for ADRs and ODR. The framework for ADR and ODR in the EU has been enacted in order to address the issues of lack of redress for cross-border consumers. We have gathered data from different sources to have stronger insights into the adequacy of existent ADRs for cloud service disputes and also we have gathered data from the EU ODR platform. Looking at the available data, we do not see that many cases over cloud services, either because the cloud providers are not interested or uninformed, or ODRs and ADR are not competent to handle those disputes. In Chapter 6, we compare the analysis of available data and perceived characteristics of previously analyzed dispute resolution mechanisms to draw conclusions on the most appropriate dispute resolution for cloud services given the current international legal framework. With critical analysis of the ADR Directive and ODR Regulation, we have identified several inadequate provisions, which restrict the use of the EU ODR platform for the cloud services disputes, although they are intended to deal with disputes originating in online transactions. Exclusion of the free services from the scope of regulations as well as inappropriate safeguards for independence, impartiality, and expertise are some of the points criticized in Chapter 6. However, one of the biggest obstacles to the success of ODR platform is the voluntary nature of procedures, which in the cloud context of imbalance in negotiation power, seems highly ineffective. Certainly, with ADR Directive and ODR Regulation, the EU has increased the range of availability and accessibility of dispute resolution with almost guaranteed efficiency.

To answer the question to what extent the dispute resolution mechanisms under current international legal framework are adequate for cloud service disputes to ensure access to justice and fairness, we must simply state that it depends on circumstances. It depends to what extent

providers as the more dominant parties are willing to participate in voluntary, contractual dispute resolution mechanisms.

When it comes to cloud providers who are unwilling to participate - to the extent mandatory primarily adjudicatory mechanisms are in place. That would be courts and traditional litigation. The international legal framework for litigation is not adequate for low-value disputes such as those over cloud service. This conclusion is additionally confirmed by the data presented in Chapter 5 and Chapter 6. The international legal framework, including the framework for ADR, does not provide adequate access to justice and access to redress in the disputes that originate out of cloud services. Precisely, because of the perceived deficiencies of the courts, the EU has introduced the ADR Directive and ODR Regulation as additional tools for tackling the issues of cross-border consumer disputes.

On the other hand, if providers are willing to participate, then we could have additional mechanisms like online mediation or online adjudication of sorts that would be useful and more adequate tools, but they would still be limited mechanisms and eventually reliant on traditional courts. Either as an incentive for dealing in the “shadows of the law” or as an enforcement tool. From what we have observed in Chapter 3 and Chapter 5, cloud providers are mostly not interested in participating in mentioned alternatives, or they are uninformed and yet to reassess their position if they find it compelling in some way.

Given what we have concluded so far, we have discussed in the final chapter proposals for improving the existing legal framework for disputes coming out of cloud services. We argued that a small number of changes to the ADR Directive and ODR Regulation could turn ODR into the most appropriate dispute resolution mechanism under said legal frameworks for dispute resolution between cloud providers and users that provide access to justice and fairness. Small number of changes relative to required reforms of national judicial systems if we wanted to rely solely on courts. The suitability of these legal frameworks in turn means suitability of ODR/ADR as the most appropriate dispute resolution mechanisms.

There are significant number of ways legislation could be appropriated and with no certainty can we say that one way is the ultimate solution. However, starting from the Rawlsian perspective of improving the position of the worse off party, and applying this logic to minor redistribution of rights and obligation under existing framework, that would achieve the desired outcome, we consider following changes optimal:

- A single ODR platform access to justice through the upgraded version of already existent pan-European portal for ODR.
- The participation to the ODR procedure should be made obligatory for service providers. This, however, does not inevitably lead to the mandatory binding outcome of the procedure, since they could refuse to comply with the recommendation of a neutral.
- In the case of non-compliance with the neutral's recommendation, the recommendation with the facts of the case (where applicable) should be published, and thus additional incentive of avoidance of negative reputation would be in place.
- Any form of dispute resolution agreed by the parties would be appropriate. If the provider accepts or proposes ADR that has been approved and enlisted on ODR platform, consumer's refusal would end the procedure, and the consumer is left with a choice of other available dispute resolution mechanisms, e.g. courts.
- It would be desirable to expand the scope on the traders/providers who are not established in the EU, but who orientate their activities to the EU market.
- We propose that mandatory online arbitration under the auspices of ODR platform would be an option for the consumer in case a provider/trader refuses participation in ADR procedure, as offered by the ODR platform in the initial phase of complaint handling. It would serve as "residual mechanism" that would incentivize the trader (cloud provider) to participate in already available ODR procedures.
- The regulatory framework for disputes over cloud services, or in general for online service, would have to redefine the definition of service contract in a manner that the element of payment is not essential.
- More explicit procedural guarantees for independence and impartiality of ODR software as a "fourth party" is needed.
- For residual binding online arbitration, we would propose a selection of arbitrators from a large pool of experts open at the EU level. If parties cannot reach agreement on one or three arbitrators, the ODR platform would appoint a random arbitrator with necessary expertise and requirements.
- We propose cost-shifting rules for the losing party as applicable in most of civil law systems; the fees of residual arbitration will be covered by the party who failed.
- Arbitral decision coming out of online arbitration under auspices of EU ODR platform should be directly enforceable in the Members States and in accordance with NY

Convention. Non-compliance with neutral's recommendation in regular ODR would be published on ODR platform.

These proposals are meant to serve as guidelines in achieving more adequate or fair framework for dispute resolution. Additional requirements could overburden one side and achieve opposite effect. We should also remind that ODR and ADR regulations are but a tool for reaching a goal of access to justice and that more "heavy" instruments exist. The question of appropriateness is always to be considered under specific circumstances and with the development of new technologies, those circumstances will likely lead to the point where future disputants will not remember how to handle disputes without the use of technology.

Appendix A

*Overview of dispute resolution methods and jurisdictions in Terms of Service and Privacy Policies of 322 cloud services*⁸⁸⁶

Cloud Services	Choice of adjudicative dispute resolution in Terms of Service	Location of dispute res./choice of jurisdiction in Terms of Service	Choice of dispute resolution in Privacy Policies
1. <i>1010Data</i> ⁸⁸⁷	Court	New York	SH/PS, TRUSTe
2. <i>10gen</i> ⁸⁸⁸	Court	New York	AAA/ PS
3. <i>37 signals.com(Basecamp)</i> ⁸⁸⁹			SH/PS, BBB EU
4. <i>42Floors</i> ⁸⁹⁰		US	
5. <i>Abiquo</i> ⁸⁹¹	Court	UK	
6. <i>Acquia</i> ⁸⁹²	Court	Middlesex County, Massachusetts	SH/PS
7. <i>Acronis</i> ⁸⁹³	Court	Massachusetts	SH/ no PS

⁸⁸⁶ In the footnotes last access date refers to Terms of Service. All Policies have been access again and updated up to date of April 15, 2017 due to changes and introduction of Privacy Shield framework. SH stands for Safe Harbour and PS stands for Privacy Shield certification. Additional independent dispute resolution bodies where noted when they are designated in Privacy Policy.

⁸⁸⁷ Service description available at: <https://www.1010data.com/> ; Terms of Service (ToS) at: <http://www.gooddata.com/terms-of-use> ; Privacy Policy at: <http://www.gooddata.com/privacy-policy> (last accessed November,2015)

⁸⁸⁸ Service description available at: <https://www.mongodb.com/>;; Terms of Service (ToS) at: <https://www.mongodb.com/legal/terms-of-use>; Privacy Policy at: <https://www.mongodb.com/legal/privacy-policy>; (last accessed November,2015)

⁸⁸⁹ Service description available at: <https://basecamp.com/> ; Terms of Service (ToS) at: <https://basecamp.com/terms> ; Privacy Policy at: <https://basecamp.com/privacy> (last accessed November,2015)

⁸⁹⁰ Service description available at: <https://42floors.com/>; Terms of Service (ToS) at: https://42floors.com/terms_of_service ; Privacy Policy at: https://42floors.com/privacy_policy (last accessed November,2015)

⁸⁹¹ Service description available at: <http://www.abiquo.com/>; Terms of Service (ToS) at: [anycloud.abiquo.com/tos](http://www.abiquo.com/tos) ; Privacy Policies (PP) at: <http://www.abiquo.com/privacy-policy/> (last accessed November,2015)

⁸⁹² Service description available at: <https://www.acquia.com/> ; Terms of Service (ToS) at: <https://www.acquia.com/about-us/legal/terms-of-use> ; Privacy Policy at: <https://www.acquia.com/about-us/legal/privacy-policy> ; (last accessed November,2015)

⁸⁹³ Service description available at: <http://www.acronis.com/en-eu/> ; Terms of Service (ToS) at: <http://www.acronis.com/en-eu/legal.html> ; Privacy Policy at: <http://www.acronis.com/en-eu/company/privacy.html> ; (last accessed November,2015)

8. <i>Actifio</i> ⁸⁹⁴	Court	Massachusetts	
9. <i>Akamai</i> ⁸⁹⁵		Massachusetts	SH/PS
10. <i>Alfresco</i> ⁸⁹⁶	Court	England(law)	
11. <i>Amazon Web Services</i> ⁸⁹⁷	Court for over 7500\$	King county, Washington	SH/PS, BBB EU
12. <i>American Well</i> ⁸⁹⁸	Court	in Boston, Massachusetts	
13. <i>Anaplan</i> ⁸⁹⁹	Court	California	SH/ no PS, TRUSTe
14. <i>Anaqua</i> ⁹⁰⁰			SH/ no PS, AAA
15. <i>Aperian</i> ⁹⁰¹	Court	law of Massachusetts	SH/ no PS
16. <i>Apigee</i> ⁹⁰²	Court	Santa Clara, County, California	SH/ no PS, BBB EU
17. <i>AppDynamics</i> ⁹⁰³	Court	San Francisco, California	SH/ no PS, AAA

⁸⁹⁴ Service description available at: <http://www.actifio.com/#cloud-service-provider> ; Terms of Service (ToS) at: <http://www.actifio.com/terms-of-use/> ; Privacy Policy at: <http://www.actifio.com/privacy-policy/> ; (last accessed November,2015)

⁸⁹⁵Service description available at: <https://www.akamai.com/>; Terms of Service (ToS) at: <https://www.akamai.com/us/en/privacy-policies/portal-terms.jsp> ; Privacy Policy at: <https://www.akamai.com/us/en/privacy-policies/privacy-statement.jsp> (last accessed November,2015)

⁸⁹⁶ Service description available at: <https://www.alfresco.com/> ; Terms of Service (ToS) at: <https://www.alfresco.com/terms-use> Privacy Policy at: <https://www.alfresco.com/privacy> (last accessed November,2015)

⁸⁹⁷Service description available at: <http://aws.amazon.com/>; Terms of Service (ToS) at: <http://aws.amazon.com/agreement/>; Privacy Policy at: https://aws.amazon.com/privacy/?nc1=f_pr(last accessed November,2015)

⁸⁹⁸ Service description available at: <https://www.americanwell.com/>; Terms of Service (ToS) at: <https://www.americanwell.com/terms-of-use/> ; Privacy Policy at: <https://www.americanwell.com/privacy-policy/> ; (last accessed November,2015)

⁸⁹⁹ Service description available at: www.anaplan.com; Terms of Service (ToS) at: <https://www.anaplan.com/terms-of-use/> ; Privacy Policy at: <https://www.anaplan.com/privacy-policy/> ; (last accessed November,2015)

⁹⁰⁰ Service description available at: <http://www.anaqua.com/> ; Terms of Service (ToS) at: <http://www.anaqua.com/legal/terms-and-conditions> ; Privacy Policy at: <http://www.anaqua.com/legal/privacy-policy> (last accessed November,2015)

⁹⁰¹ Service description available at: <https://www.apperian.com/> ; Terms of Service (ToS) at: <https://www.apperian.com/service-agreement/> ; Privacy Policy at: <https://www.apperian.com/apperian-privacy-policy/> ; (last accessed November,2015)

⁹⁰² Service description available at: <http://apigee.com/about/> ; Terms of Service (ToS) at: <http://apigee.com/about/terms>; Privacy Policy at: <http://apigee.com/about/privacy> (last accessed November,2015)

⁹⁰³ Service description available at: <http://www.appdynamics.com/>; Terms of Service (ToS) at: <http://www.appdynamics.com/terms-of-use/>; Privacy Policy at: <http://www.appdynamics.com/privacy-policy/>(last accessed November,2015)

18. <i>Appistry</i> ⁹⁰⁴		Missouri law	SH/ no PS, AAA
19. <i>Apple</i> ⁹⁰⁵	Court	Santa Clara County, California	TRUSTe, SH/ no PS, Apple privacy officer or EU DPA
20. <i>Apprenda</i> ⁹⁰⁶	Court	Rensselaer County, New York	
21. <i>Aprenda</i> ⁹⁰⁷	Court	Rensselaer County, New York	
22. <i>Apptio</i> ⁹⁰⁸		laws of Washington	SH/ PS, TRUSTe
23. <i>Aria</i> ⁹⁰⁹			SH/ PS, TRUSTe
24. <i>ARM</i> ⁹¹⁰			
25. <i>Aryaka</i> ⁹¹¹	Court	Santa Clara County, California	
26. <i>Asana</i> ⁹¹²	Arbitration, AAA	San Francisco San Francisco,	SH/ PS, BBB EU

⁹⁰⁴ Service description available at: <http://www.appistry.com/>; Terms of Service (ToS) at: <http://www.appistry.com/terms-and-conditions/>; Privacy Policy at: [http://www.appistry.com/safe-harbor-privacy-policy/\(last accessed November,2015\)](http://www.appistry.com/safe-harbor-privacy-policy/(last%20accessed%20November,2015))

⁹⁰⁵ Service description available at: www.apple.com; Terms of Service (ToS) at: <http://www.apple.com/legal/internet-services/terms/site.html>; Privacy Policy at: <http://www.apple.com/privacy/privacy-policy/>; (last accessed November,2015)

⁹⁰⁶ Service description available at: <https://apprenda.com/>; Terms of Service (ToS) at: <https://apprenda.com/express-license-terms/>; Privacy Policy at: <https://apprenda.com/privacy-policy/>; (last accessed November,2015)

⁹⁰⁷ Service description available at: <https://apprenda.com/>; Terms of Service (ToS) at: <https://apprenda.com/express-license-terms/>; Privacy Policy at: <https://apprenda.com/privacy-policy/>; (last accessed November,2015)

⁹⁰⁸ Service description available at: www.apptio.com; Terms of Service (ToS) at: <https://tbmcouncil.jiveon.com/terms-and-conditions!input.jspa?displayOnly=true> and <http://tbmcouncil.org/termsfuse.html>; Privacy Policy at: <http://www.apptio.com/resources/trust/data-privacy>; (last accessed November,2015)

⁹⁰⁹ Service description available at: www.ariasystems.com; Terms of Service (ToS) at: <https://www.ariasystems.com/legal>; Privacy Policy at: <https://www.ariasystems.com/privacy-policy>; (last accessed November,2015)

⁹¹⁰ Service description available at: <http://www.arm.com/>; Terms of Service (ToS) at: <http://www.arm.com/about/terms-conditions.php>; Privacy Policy at: <http://www.arm.com/about/privacy.php>; (last accessed November,2015)

⁹¹¹ Service description available at: <http://www.aryaka.com/>; Terms of Service (ToS) at: <http://www.aryaka.com/terms-and-conditions/>; Privacy Policy at: <http://www.aryaka.com/privacy-policy/>; (last accessed November,2015)

⁹¹² Service description available at: <https://asana.com/>; Terms of Service (ToS) at: <https://asana.com/terms#terms-of-service>; Privacy Policy at: <https://asana.com/terms#privacy-policy> (last accessed November,2015)

27. <i>AT&T</i> ⁹¹³	Small claim court Arbitration BBB Court	California AAA rules for Data service, Online Texas for site	TRUSTe
28. <i>Atlassian</i> ⁹¹⁴	Arbitration, ICC Court	Sydney, Amsterdam ,San Francisco San Francisco, California,	SH/PS, TRUSTe
29. <i>Automattic – Wordpress</i> ⁹¹⁵	Arbitration, JAMS Courts Court	San Francisco County, California Washington	
30. <i>Avalara</i> ⁹¹⁶			
31. <i>Avature</i> ⁹¹⁷			SH/PS
32. <i>BambooHR</i> ⁹¹⁸	Court	Utah	SH/PS, TRUSTe
33. <i>Barracuda Networks</i> ⁹¹⁹	Court	Santa Clara County, California	
34. <i>BetterLesson</i> ⁹²⁰	Courts	Boston, Massachusetts	

⁹¹³Service description available at: <https://www.att.com/>; Terms of Service (ToS) at: <http://www.att.com/legal/terms.sessionBasedWirelessDataServicesAgreement.list.html>; Privacy Policy at: <http://www.att.com/gen/privacy-policy?pid=2506> (last accessed November,2015)

⁹¹⁴ Service description available at: <https://www.atlassian.com> ; Terms of Service (ToS) at: <https://www.atlassian.com/end-user-agreement> ; Privacy Policy at: <https://www.atlassian.com/legal/privacy-policy> (last accessed November,2015)

⁹¹⁵ Service description available at: <https://automattic.com/> ; Terms of Service (ToS) at: <https://en.wordpress.com/tos/> ; Privacy Policy at: <https://automattic.com/privacy/> ; (last accessed November,2015)

⁹¹⁶ Service description available at: www.avalara.com; Terms of Service (ToS) at: <http://www.avalara.com/terms-of-use/> ; Privacy Policy at: <http://www.avalara.com/privacy-policy/> ; (last accessed November,2015)

⁹¹⁷ Service description available at: <http://www.avature.net/> ; Terms of Service (ToS) at: <http://www.avature.net/en/terms-of-use/> ; Privacy Policy at: <http://www.avature.net/en/privacy-policy/> ; (last accessed November,2015)

⁹¹⁸ Service description available at: <http://www.bamboohr.com/> ; Terms of Service (ToS) at: <http://www.bamboohr.com/terms.php> ; Privacy Policy at: <http://www.bamboohr.com/privacy.php>; (last accessed November,2015)

⁹¹⁹Service description available at: www.barracudanetworks.com; Terms of Service (ToS) at: <https://www.barracuda.com/legal/terms>; Privacy Policy at: <https://www.barracuda.com/legal/privacy>; (last accessed November,2015)

⁹²⁰ Service description available at: betterlesson.com ; Terms of Service (ToS) at: http://betterlesson.com/public/terms_of_service?from=cc_footer ; Privacy Policy at: http://betterlesson.com/public/privacy_policy?from=cc_footer ; (last accessed November,2015)

35. <i>Bigcommerce</i> ⁹²¹	Court	Travis County, Texas	PS
36. <i>Bill.com</i> ⁹²²	Court	the Northern District of California	TRUSTe
37. <i>Bime - Zendesk</i> ⁹²³	Court	French (law)	
38. <i>Birst</i> ⁹²⁴	Arbitration, AAA	Santa Clara, California	SH/ PS, TRUSTe
39. <i>BlueJeans</i> ⁹²⁵	Arbitration, JAMS Court	San Jose, California Santa Clara, California	SH/ PS, TRUSTe
40. <i>Bluelock</i> ⁹²⁶	Court	Marion County, Indiana	SH/ PS, BBB EU
41. <i>Bluenose</i> ⁹²⁷	Arbitration, JAMS	San Francisco County, California	
42. <i>Boundary</i> ⁹²⁸	Court	US- Houston; Austria- Vienna; Germany- Frankfurt ab Main; Belgium, Denmark, Finland, England, Netherlands, Norway, Sweden- English Courts; Portugal- Lisbon; Spain – Madrid;	EU DPA

⁹²¹ Service description available at: <https://www.bigcommerce.com/> ; Terms of Service (ToS) at: <https://www.bigcommerce.com/terms/> ; Privacy Policy at: <https://www.bigcommerce.com/privacy/> (last accessed November,2015)

⁹²² Service description available at: www.bill.com; Terms of Service (ToS) at: <https://app.bill.com/TermsOfService>; Privacy Policy at: <http://www.bill.com/privacy> ; (last accessed November,2015)

⁹²³ Service description available at: <https://www.bimeanalytics.com/>; Terms of Service (ToS) and Privacy Policy at: <https://www.bimeanalytics.com/terms-of-use.html> (last accessed November,2015)

⁹²⁴ Service description available at: <https://www.birst.com/> ; Terms of Service (ToS) at: <https://www.birst.com/website/commercial-terms/powered-by-birst-cloudappliance-customer-agreement/> ; Privacy Policy at: <https://www.birst.com/website/privacy-policy/> (last accessed November,2015)

⁹²⁵ Service description available at: <http://bluejeans.com/> ; Terms of Service (ToS) at: <http://bluejeans.com/terms-of-service> ; Privacy Policy at: <http://bluejeans.com/privacy-policy> ; (last accessed November,2015)

⁹²⁶Service description available at: <http://www.bluelock.com/> Terms of Service (ToS) at: http://www.bluelock.com/uploads/2012/09/Bluelock_MSA_v120901.pdf; Privacy Policy at: <http://www.bluelock.com/legal/privacy-policy/> (last accessed November,2015)

⁹²⁷ Service description available at: <http://www.bluenose.com/> ; Terms of Service (ToS) at: <http://www.bluenose.com/legal/> ; Privacy Policy at: <https://getsatisfaction.com/corp/privacy-policy/> (last accessed November,2015)

⁹²⁸ <https://boundary.com/>; Terms of Service (ToS) at: <http://www.bmc.com/legal/terms-of-use.html>; Privacy Policy at: <http://media.cms.bmc.com/documents/External+Privacy+Binding+Coporate+Rules+Policy+-+Aug+04.pdf> ; (last accessed November,2015)

		Switzerland- Zurich; France- Nanterre	
43. <i>Box</i> ⁹²⁹	Court	In US - Santa Clara County, California; In UK- CourtEngland and Wales	SH/ PS, TRUSTe
44. <i>Bright Edge</i> ⁹³⁰	Court	San Francisco, San Mateo or Santa Clara County, California	
45. <i>Brightbytes</i> ⁹³¹	Courts	San Francisco, California	
46. <i>Buuteeq (bookingSuite- Priceline)</i> ⁹³²	Court	Amsterdam	
47. <i>CA Technologies</i> ⁹³³	Court	Suffolk County, New York	BCR, SH/ PS, EU DPAs
48. <i>Carecloud</i> ⁹³⁴	Court	State of Florida, Miami-Dade County	TRUSTe
49. <i>Chargify</i> ⁹³⁵	Court	Boston	SH/ PS, BBB EU
50. <i>Chartbeat</i> ⁹³⁶	Court	New York	SH/ PS, BBB EU

⁹²⁹ Service description available at: [www.box.com; Terms of Service \(ToS\) at: https://www.box.com/legal/terms-of-service/](http://www.box.com/terms-of-service/); Privacy Policy at: <https://www.box.com/legal/privacypolicy/>; (last accessed November,2015)

⁹³⁰ Service description available at: <http://www.brightedge.com/>; Terms of Service (ToS) at: <http://www.brightedge.com/legal>; Privacy Policy at: <http://www.brightedge.com/privacy>; (last accessed November,2015)

⁹³¹ Service description available at: brightbytes.net; Terms of Service (ToS) at: <http://brightbytes.net/terms/>; Privacy Policy at: <http://brightbytes.net/privacy-policy/>; (last accessed November,2015)

⁹³² Service description available at: <http://suite.booking.com/>; Terms of Service (ToS) at: <http://suite.booking.com/terms-of-service/>; Privacy Policy at: <http://suite.booking.com/privacy-policy/> (last accessed November,2015)

⁹³³ Service description available at: <http://www.ca.com/us/default.aspx>; Terms of Service (ToS) at: <http://www.ca.com/us/legal/terms-for-cadotcom.aspx>; Privacy Policy at: <http://www.ca.com/us/privacy.aspx?intcmp=footernav>; (last accessed November,2015)

⁹³⁴ Service description available at: <http://www.carecloud.com/>; Terms of Service (ToS) at: <https://community.carecloud.com/terms-and-conditions>; Privacy Policy at: <http://www.carecloud.com/privacy-policy/>; (last accessed November,2015)

⁹³⁵ Service description available at: www.chargify.com; Terms of Service (ToS) at: <https://www.chargify.com/terms-conditions/>; Privacy Policy at: <https://www.chargify.com/privacy-policy/>; (last accessed November,2015)

⁹³⁶ Service description available at: <https://chartbeat.com/>; Terms of Service (ToS) at: <https://chartbeat.com/terms/>; Privacy Policy at: <https://chartbeat.com/privacy/> (last accessed November,2015)

51. <i>Circleci</i> ⁹³⁷	Arbitration, JAMS	San Francisco, California	
52. <i>Cirruspath</i> ⁹³⁸	Courts	In US- State California; In Canada-Province of Ontario; EMEA-English Court(for Italy only, Italian law); Japan – Tokyo; Australia- New South Wales; All other- California	SH/ PS,
53. <i>Cisco Systems</i> ⁹³⁹			SH/ PS, TRUSTe
54. <i>Citrix Systems</i> ⁹⁴⁰	Court	Florida	PS
55. <i>Clarizen</i> ⁹⁴¹	Court	California	SH/ no PS, JAMS
56. <i>Clarizen</i> ⁹⁴²	Court	California	SH/ no PS, JAMS
57. <i>Clearcare</i> ⁹⁴³	Court	San Francisco, California	
58. <i>Clearslide</i> ⁹⁴⁴	Court	San Francisco County, California	SH/ PS, TRUSTe

⁹³⁷ Service description available at: <https://circleci.com/> ; Terms of Service (ToS) at: <https://discuss.circleci.com/tos> ; Privacy Policy at: <https://circleci.com/privacy> ; (last accessed November,2015)

⁹³⁸ Service description available at: <http://www.cirruspath.com/> ; Terms of Service (ToS) at: <https://www.cirrusinsight.com/terms> ; Privacy Policy at: <https://www.cirrusinsight.com/privacy> (last accessed November,2015)

⁹³⁹ Service description available at: <http://www.cisco.com/>; Terms of Service (ToS) at: http://www.cisco.com/web/siteassets/legal/terms_condition . and <https://www.webex.com/terms-of-service.html> ; Privacy Policy at: http://www.cisco.com/web/siteassets/legal/privacy_full.html; (last accessed November,2015)

⁹⁴⁰ Service description available at: <http://www.citrix.com/>; Terms of Service (ToS) at: <https://www.citrix.com/about/legal/legal-notice.html>; Privacy Policy at: <https://www.citrix.com/about/legal/privacy.html#safe>; (last accessed November,2015)

⁹⁴¹ Service description available at: <http://www.clarizen.com/> ; Terms of Service (ToS) at: https://app2.clarizen.com/clarizen/pages/service/terms_conditions.htm Privacy Policy at: <http://www.clarizen.com/privacy-policy.html> (last accessed November,2015)

⁹⁴² Service description available at: <http://www.clarizen.com/> ; Terms of Service (ToS) at: https://app2.clarizen.com/Clarizen/Pages/Service/Terms_Conditions.htm ; Privacy Policy at: <http://www.clarizen.com/privacy-policy.html> (last accessed November,2015)

⁹⁴³ Service description available at: <http://clearcareonline.com/>; Terms of Service (ToS) at: <http://clearcareonline.com/master-subscription-agreement/> ; Privacy Policy at: <http://clearcareonline.com/privacy-statement/> ; (last accessed November,2015)

⁹⁴⁴ Service description available at: <https://www.clearslide.com/> ; Terms of Service (ToS) at: <https://www.clearslide.com/legal/terms> ; Privacy Policy at: <https://www.clearslide.com/legal/privacy> (last accessed November,2015)

59. <i>Clever</i> ⁹⁴⁵	Courts	Santa Clara, California	
60. <i>Clicktale</i> ⁹⁴⁶	Court	Tel Aviv, Israel	
61. <i>Clio</i> ⁹⁴⁷	Court	England, Wales and Ireland	TRUSTe
62. <i>Cloud9 Analytics</i> ⁹⁴⁸	Arbitration, AAA Court	Santa Clara County, California	
63. <i>CloudBees</i> ⁹⁴⁹	Court	New York	
64. <i>Cloudera</i> ⁹⁵⁰	Court	San Francisco, California	SH/ PS, TRUSTe
65. <i>Cloudera</i> ⁹⁵¹	Court	San Francisco, California	SH/ no PS, TRUSTe
66. <i>Cloudflare</i> ⁹⁵²	Arbitration, AAA Court	San Francisco, California	SH/ PS, TRUSTe
67. <i>Clou dius. (now scylladb)</i> ⁹⁵³	Court	Tel-Aviv	
68. <i>Cloudlock</i> ⁹⁵⁴	Court	Massachusetts (law)	SH/ no PS, TRUSTe
69. <i>CloudPassage</i> ⁹⁵⁵	Arbitration, JAMS	San Francisco, California	

⁹⁴⁵ Service description available at: clever.com; Terms of Service (ToS) at: <https://clever.com/about/terms> ; Privacy Policy at: <https://clever.com/about/privacy-policy> ; (last accessed November,2015)

⁹⁴⁶ Service description available at: <https://www.clicktale.com/> ; Terms of Service (ToS) at: <https://www.clicktale.com/terms-use> ; Privacy Policy at: <https://www.clicktale.com/privacy-policy> ; (last accessed November,2015)

⁹⁴⁷ Service description available at: <https://www.goclio.com/> ; Terms of Service (ToS) at: <https://www.goclio.com/tos/> ; Privacy Policy at: <https://www.goclio.com/privacy/> (last accessed November,2015)

⁹⁴⁸ Service description available at: <https://c9.io/>; Terms of Service (ToS) at: <https://c9.io/site/terms-of-service> <https://c9.io/site/privacy-policy>; (last accessed November,2015)

⁹⁴⁹ Service description available at: <https://www.cloudbees.com/> ; Terms of Service (ToS) at: <https://www.cloudbees.com/terms-service> ; Privacy Policy at: <https://www.cloudbees.com/privacy-policy> ; (last accessed November,2015)

⁹⁵⁰ Service description available at: [cloudera.com](http://www.cloudera.com); Terms of Service (ToS) at: <http://www.cloudera.com/content/www/en-us/legal/terms-and-conditions.html> ; Privacy Policy at: <http://www.cloudera.com/content/www/en-us/legal/privacy-policy.html> ; (last accessed November,2015)

⁹⁵¹ Service description available at: <http://www.cloudera.com/>; Terms of Service (ToS) at: <http://www.cloudera.com/content/www/en-us/legal/terms-and-conditions.html> ; Privacy Policy at: <https://www.cloudpassage.com/privacy-policy>; (last accessed November,2015)

⁹⁵² Service description available at: www.cloudflare.com ; Terms of Service (ToS) at: <https://www.cloudflare.com/terms> ; Privacy Policy at: <https://www.cloudflare.com/security-policy> ; (last accessed November,2015)

⁹⁵³ Service description available at: <http://www.clou dius-systems.com> and <http://www.scylladb.com/> ; Terms of Service (ToS) at: <http://www.scylladb.com/opensource/cla/> ; (last accessed November,2015)

⁹⁵⁴ Service description available at: www.cloudlock.com ; Terms of Service (ToS) at: <https://www.cloudlock.com/tos/> ; Privacy Policy at: <https://www.cloudlock.com/privacy-policy/> ; (last accessed November,2015)

⁹⁵⁵ Service description available at: <https://www.cloudpassage.com/>; Terms of Service (ToS) at: <https://www.cloudpassage.com/terms-of-use> ; Privacy Policy at: <https://www.cloudpassage.com/privacy-policy>; (last accessed November,2015)

70. <i>CloudShare</i> ⁹⁵⁶	Court	Israel	
71. <i>Connectandsell</i> ⁹⁵⁷	Arbitration, AAA and if not JAMS	San Francisco, California	
72. <i>Content Raven</i> ⁹⁵⁸	Court	Massachusetts	
73. <i>Cornerstone-Evolv</i> ⁹⁵⁹	Court	California (law)	SH/ PS
74. <i>Couchbase</i> ⁹⁶⁰	Court	California (law)	
75. <i>Coupa</i> ⁹⁶¹	Arbitration, JAMS	San Francisco, California	SH/ no PS, DPAs
76. <i>Coursera</i> ⁹⁶²	Arbitration		SH/ PS, ICDR of AAA
77. <i>Crittercism</i> ⁹⁶³	Court	Santa Clara, California	SH/ no PS
78. <i>CrowdFlower</i> ⁹⁶⁴	Arbitration, AAA	San Francisco, California	SH/ no PS, TRUSTe
79. <i>Curalate</i> ⁹⁶⁵	Court	Philadelphia, Pennsylvania	

⁹⁵⁶ Service description available at: www.cloudshare.com; Terms of Service (ToS) at: <http://www.cloudshare.com/node/21> ; Privacy Policy at: <http://www.cloudshare.com/node/20>; (last accessed November,2015)

⁹⁵⁷ Service description available at: <http://connectandsell.com/> ; Terms of Service (ToS) at: <http://www.connectandsell.com/docs/CONNECTANDSELL-ONLINE-AGREEMENT.pdf> (last accessed November,2015)

⁹⁵⁸ Service description available at: <http://www.contentraven.com/> ; Terms of Service (ToS) and Privacy Policy at: <http://www.contentraven.com/terms-conditions/> ; (last accessed November,2015)

⁹⁵⁹ Service description available at: <http://www.cornerstoneondemand.com/evolv>; Terms of Service (ToS) and Privacy Policy at: <https://www.cornerstoneondemand.com/privacy-policy> ; (last accessed November,2015)

⁹⁶⁰ Service description available at: <http://www.couchbase.com/>; Terms of Service (ToS) at: <http://www.couchbase.com/terms-of-service>; Privacy Policy at: <http://www.couchbase.com/privacy-policy>; (last accessed November,2015)

⁹⁶¹ Service description available at: www.coupa.com; Terms of Service (ToS) at: https://supplier.couphost.com/terms_of_use ; Privacy Policy at: <http://www.coupa.com/privacy-policy/> ; (last accessed November,2015)

⁹⁶² Service description available at: www.coursera.org ; Terms of Service (ToS) at: <https://www.coursera.org/about/terms> ; Privacy Policy at: <https://www.coursera.org/about/privacy> ; (last accessed November,2015)

⁹⁶³ Service description available at: <http://www.crittercism.com/> ; Terms of Service (ToS) at: <http://www.crittercism.com/service-terms-and-conditions/> ; Privacy Policy at: <http://www.crittercism.com/privacy-policy/> ; (last accessed November,2015)

⁹⁶⁴ Service description available at: <http://www.crowdfunder.com/> ; Terms of Service (ToS) at: <http://www.crowdfunder.com/terms-and-conditions> ; Privacy Policy at: <http://www.crowdfunder.com/privacy> ; (last accessed November,2015)

⁹⁶⁵ Service description available at: <http://www.curalate.com/> ; Terms of Service (ToS) at: <http://www.curalate.com/tos/> ; Privacy Policy at: <http://www.curalate.com/privacy-policy/> ; (last accessed November,2015)

80. <i>Datameer</i> ⁹⁶⁶	Arbitration, AAA	California	SH/ no PS,
81. <i>Defense.net (F5.com)</i> ⁹⁶⁷	Court	State of Washington, United States.	SH/ no PS, JAMS
82. <i>Dell</i> ⁹⁶⁸	Arbitration-consumers, AAA, JAMS Mediation--commercial Court-commercial Court	Travis or Williamson County, Texas	SH/ no PS, TRUSTe
83. <i>Delphix</i> ⁹⁶⁹	Court	Northern District of California	
84. <i>Deskaway</i> ⁹⁷⁰			
85. <i>Digital Ocean</i> ⁹⁷¹	Arbitration, AAA	in the city where subscriber is being billed, NY law	SH/ PS
86. <i>DocuSign</i> ⁹⁷²	Court	State of Washington(law)	SH/ no PS, TRUSTe
87. <i>Docutap</i> ⁹⁷³	Court	Sioux Falls, South Dakota	
88. <i>Dotcloud</i> ⁹⁷⁴	Court	Berlin	

⁹⁶⁶ Service description available at: <http://www.datameer.com/>; Terms of Service (ToS) at: <http://www.datameer.com/datameer-azure-evaluation-agreement/>; Privacy Policy at: <http://www.datameer.com/privacy-policy/> (last accessed November,2015)

⁹⁶⁷ Service description available at: <https://f5.com/>; Terms of Service (ToS) at: <https://f5.com/about-us/policies/terms-of-use>; Privacy Policy at: <http://www.f5.com/pdf/customer-support/f5-safe-harbor-policy.pdf>; (last accessed November,2015)

⁹⁶⁸ Service description available at: <http://www.dell.com/>; Terms of Service (ToS) at: <http://www.dell.com/learn/us/en/uscop1/terms>; Privacy Policy at: <http://www.dell.com/learn/us/en/uscop1/policies-privacy>; (last accessed November,2015)

⁹⁶⁹ Service description available at: <http://www.delphix.com/>; Terms of Service (ToS) at: <http://www.delphix.com/wp-content/uploads/2014/03/Delphix-Product-License-Agreement.pdf>; Privacy Policy at: <http://www.delphix.com/p/privacy-policy/>; (last accessed November,2015)

⁹⁷⁰ Service description available at: <http://www.deskaway.com/>; Terms of Service (ToS) at: <http://www.deskaway.com/terms/>; Privacy Policy at: <http://www.deskaway.com/privacy/> (last accessed November,2015)

⁹⁷¹ Service description available at: <https://www.digitalocean.com/>; Terms of Service (ToS) at: <https://www.digitalocean.com/legal/terms/>; Privacy Policy at: <https://www.digitalocean.com/legal/privacy/>; (last accessed November,2015)

⁹⁷² Service description available at: www.docusign.com; Terms of Service (ToS) at: <https://www.docusign.com/company/terms-of-use>; Privacy Policy at: <https://www.docusign.com/company/privacy-policy> (last accessed November,2015)

⁹⁷³ Service description available at: <http://docutap.com/>; Terms of Service (ToS) at: https://docutap.com/assets/uploads/content-files/DocuTAPCustomerPortalTerms_2013-05-06.pdf; Privacy Policy at: <http://docutap.com/privacy/>; (last accessed November,2015)

⁹⁷⁴ Service description available at: <https://www.dotcloud.com/>; Terms of Service (ToS) at: <https://www.cloudcontrol.com/terms> and <https://www.dotcloud.com/terms>; Privacy Policy at: <https://www.dotcloud.com/privacy-policy/>; (last accessed November,2015)

89. <i>DotCloud</i> ⁹⁷⁵	Court	Santa Clara, California-US Berlin for EU; Santa Clara County, California for US	
90. <i>Doximity</i> ⁹⁷⁶	Court Arbitration, AAA (optional for less than 10000\$)	Santa Clara County, California Non-appearance arbitration	
91. <i>Dreambox</i> ⁹⁷⁷	Arbitration, AAA	King county, Washington	
92. <i>Dropbox</i> ⁹⁷⁸	Arbitration, AAA-US Court Small claims court	San Francisco, California	SH/ PS, JAMS
93. <i>Dynamic Yield</i> ⁹⁷⁹	Court	Israel (law)	PS
94. <i>Edmodo</i> ⁹⁸⁰	Arbitration, JAMS	San Francisco, California	SH/ PS, BBB EU
95. <i>Egnyte</i> ⁹⁸¹	Court	Santa Clara County, California	SH/ PS, TRUSTe
96. <i>Ello</i> ⁹⁸²	Arbitration, AAA	Burlington, Vermont	

⁹⁷⁵ Service description available at: <https://www.dotcloud.com/>; Terms of Service (ToS) at: <https://www.dotcloud.com/terms>; Privacy Policy at: <https://www.dotcloud.com/privacy-policy>; (last accessed November,2015)

⁹⁷⁶ Service description available at: www.doximity.com ; Terms of Service (ToS) and Privacy Policy at: <https://www.doximity.com/physicians/privacy>; (last accessed November,2015)

⁹⁷⁷ Service description available at: www.dreambox.com; Terms of Service (ToS) at: <http://www.dreambox.com/terms> ; Privacy Policy at: <http://www.dreambox.com/privacy> ; (last accessed November,2015)

⁹⁷⁸ Service description available at: www.dropbox.com; Terms of Service (ToS) at: <https://www.dropbox.com/terms> ; Privacy Policy at: <https://www.dropbox.com/terms#privacy> ; (last accessed November,2015)

⁹⁷⁹ Service description available at: <https://www.dynamicyield.com/> ; Terms of Service (ToS) at: <https://www.dynamicyield.com/tos/> ; Privacy Policy at: <https://www.dynamicyield.com/privacy-policy/> ; (last accessed November,2015)

⁹⁸⁰Service description available at: www.edmodo.com; Terms of Service (ToS) at: <https://www.edmodo.com/corporate/terms-of-service> ; Privacy Policy at: <https://www.edmodo.com/privacy#policy> ; (last accessed November,2015)

⁹⁸¹ Service description available at: <https://www.egnyte.com/>; Terms of Service (ToS) at: https://www.egnyte.com/corp/terms_of_service.html; Privacy Policy at: https://www.egnyte.com/corp/privacy_policy.html; (last accessed November,2015)

⁹⁸² Service description available at: <https://ello.co/wtf/about/what-is-ello/>; Terms of Service (ToS) at: <http://ello.co/wtf/policies/terms-of-use/> ; Privacy Policy at: <http://ello.co/wtf/policies/privacy-policy/> ; (last accessed November,2015)

97. <i>EMC</i> ⁹⁸³	Court	Middlesex County, Massachusetts	SH/ no PS, DPAs TRUSTe
98. <i>Engine Yard</i> ⁹⁸⁴	Arbitration, JAMS	San Francisco, California	SH/ no PS, ICDR of AAA
99. <i>Enshighten</i> ⁹⁸⁵	Arbitration, AAA		SH/ no PS
100. <i>Entelo</i> ⁹⁸⁶	Court	San Francisco, California	
101. <i>Erply</i> ⁹⁸⁷	Arbitration, AAA	New York	
102. <i>Eucalyptus Systems</i> ⁹⁸⁸	Court	Santa Clara County, California	SH/ no PS, BBB TRUSTe Apec
103. <i>Evernote</i> ⁹⁸⁹	Arbitration, AAA Courts	San Mateo County, California; Brazil; Switzerland	SH/ no PS, DPAs
104. <i>Expensify</i> ⁹⁹⁰	Court	the Northern District of California	SH/ PS, TRUSTe
105. <i>Facebook</i> ⁹⁹¹	Courts	Northern District, California or	SH/ PS, TRUSTe

⁹⁸³ Service description available at: <http://www.emc.com>; Terms of Service (ToS) at: <http://www.emc.com/legal/legal-information.htm> Privacy Policy at: <http://www.emc.com/legal/emc-corporation-privacy-statement.htm#3>; (last accessed November,2015)

⁹⁸⁴ Service description available at: www.engineyard.com; Terms of Service (ToS) at: <https://www.engineyard.com/policies/tos> ; Privacy Policy at: <https://www.engineyard.com/policies/privacy/>; (last accessed November,2015)

⁹⁸⁵ Service description available at: <https://www.ensighten.com/> ; Terms of Service (ToS) at: <https://www.ensighten.com/terms/> ; Privacy Policy at: <https://www.ensighten.com/privacy-policy/> ; (last accessed November,2015)

⁹⁸⁶ Service description available at: <https://www.entelo.com/>; Terms of Service (ToS) at: <https://www.entelo.com/terms-of-use/>; Privacy Policy at: <https://www.entelo.com/privacy/> ; (last accessed November,2015)

⁹⁸⁷ Service description available at: <https://erply.com/> ; Terms of Service (ToS) at: <https://erply.com/terms-of-service/> ; Privacy Policy at: <https://erply.com/privacy-policy/> (last accessed November,2015)

⁹⁸⁸ Service description available at: <http://www8.hp.com/us/en/cloud/helion-eucalyptus-overview.html>; Terms of Service (ToS) at: <http://www8.hp.com/us/en/hpe/legal/terms-of-use.html> ; Privacy Policy at: <http://www8.hp.com/us/en/hpe/privacy/privacy.html>; (last accessed November,2015)

⁹⁸⁹ Service description available at: <https://evernote.com/>; Terms of Service (ToS) at: <https://evernote.com/legal/tos.php>; Privacy Policy at: <https://evernote.com/legal/privacy.php>; (last accessed November,2015)

⁹⁹⁰ Service description available at: www.expensify.com ; Terms of Service (ToS) at: <https://www.expensify.com/terms> ; Privacy Policy at: <https://www.expensify.com/privacy> ; (last accessed November,2015)

⁹⁹¹ Service description available at: <https://www.facebook.com/>; Terms of Service (ToS) at: <https://www.facebook.com/legal/terms>; Privacy Policy at: <https://www.facebook.com/privacy/explanation>; (last accessed November,2015)

106. *FinancialForce.com*⁹⁹²

	San Mateo County	
Arbitration, JAMS, Court of International Arbitration Rules	San Francisco, California -US London –rest of the world	SH, JAMS
Arbitration, JAMS Courts	San Francisco, California San Francisco, California	
Courts	England	
Courts	New York	
Arbitration, AAA, Court	San Francisco, California	SH/ no PS, DMA
Arbitration	Ontario, Canada	TRUSTe
Courts	Santa Clara, California	SH/ no PS, DPAs
Arbitration, JAMS Court	Santa Clara Santa Clara or Northern District, California	SH/ PS, BBB EU

107. *Fivestars*⁹⁹³

108. *Flexiant*⁹⁹⁴

109. *FluidInfo*⁹⁹⁵

110. *Flurry*⁹⁹⁶

111. *Freshbooks*⁹⁹⁷

112. *Fusion IO (San Disk)*⁹⁹⁸

113. *Gainsight*⁹⁹⁹

⁹⁹² Service description available at: www.financialforce.com ; Terms of Service (ToS) at:<http://www.financialforce.com/company/cloud-erp/legal/platformtermsofuse-other/> and <http://www.financialforce.com/company/cloud-erp/legal/msa/> ; Privacy Policy at: <http://www.financialforce.com/company/cloud-erp/legal/> ; (last accessed November,2015)

⁹⁹³ Service description available at: <http://www.fivestars.com/> ; Terms of Service (ToS) at: <http://www.fivestars.com/terms/> ; Privacy Policy at: <http://www.fivestars.com/privacy/> ; (last accessed November,2015)

⁹⁹⁴ Service description available at: <https://www.flexiant.com/>; Terms of Service (ToS) at: <https://www.flexiant.com/terms-of-use/>; Privacy Policy at: <https://www.flexiant.com/privacy/> ; (last accessed November,2015)

⁹⁹⁵ Service description available at: <http://fluidinfo.com/>; Terms of Service (ToS) at: <http://fluidinfo.com/terms/> ; Privacy Policy at: (last accessed November,2015)

⁹⁹⁶ Service description available at: <http://www.flurry.com> ; Terms of Service (ToS) at: <http://www.flurry.com/legal-privacy/terms-service/flurry-analytics-terms-service>; Privacy Policy at: <https://policies.yahoo.com/us/en/yahoo/privacy/index.htm> (last accessed November,2015)

⁹⁹⁷ Service description available at: www.freshbooks.com; Terms of Service (ToS) at: <http://www.freshbooks.com/policies/terms-of-service> ; Privacy Policy at: <http://www.freshbooks.com/policies/privacy> ; (last accessed November,2015)

⁹⁹⁸ Service description available at: <http://www.fusionio.com>; Terms of Service (ToS) at: <https://www.sandisk.com/about/legal/terms> ; Privacy Policy at: <https://www.sandisk.com/about/legal/privacy> ; (last accessed November,2015)

⁹⁹⁹ Service description available at: <http://www.gainsight.com/> ; Terms of Service (ToS) at: <http://www.gainsight.com/terms-service/> ; Privacy Policy at: <http://www.gainsight.com/privacy-policy/> (last accessed November,2015)

114. <i>Get Satisfaction</i> ¹⁰⁰⁰	Arbitration, AAA	San Francisco County, California	SH, TRUSTe
115. <i>GigaSpaces</i> ¹⁰⁰¹	Courts	New York	
116. <i>Gigya</i> ¹⁰⁰²	Court	Santa Clara County, California	SH/ PS
117. <i>GinzaMetrics</i> ¹⁰⁰³			SH/ no PS, AAA
118. <i>GoGrid</i> ¹⁰⁰⁴	Courts	San Francisco, California	SH/ no PS, BBB EU
119. <i>GoodData</i> ¹⁰⁰⁵	Court	San Francisco, California	SH/ PS, TRUSTe
120. <i>Google</i> ¹⁰⁰⁶	Courts	Santa Clara County, California	SH/PS, DPAs For HR JAMS
121. <i>Greenhouse</i> ¹⁰⁰⁷	Court	New York	SH/ no PS
122. <i>Ground Rounds</i> ¹⁰⁰⁸	Court	Santa Clara County, California	
123. <i>Gusto, (formerly Zenpayroll)</i> ¹⁰⁰⁹	Arbitration, AAA	San Francisco, California	

¹⁰⁰⁰ Service description available at: <https://getsatisfaction.com/corp/> ; Terms of Service (ToS) at: <https://getsatisfaction.com/corp/terms-of-service/> ; Privacy Policy at:

<https://getsatisfaction.com/corp/privacy-policy/> (last accessed November,2015)

¹⁰⁰¹ Service description available at: <http://www.gigaspace.com/>; Terms of Service (ToS) at: <http://www.gigaspace.com/gigaspace-xap-software-license-agreement-premium-edition-and-or-caching-edition> ; Privacy Policy at: <http://www.gigaspace.com/privacy> ; (last accessed November,2015)

¹⁰⁰² Service description available at: <http://www.gigya.com/> ; Terms of Service (ToS) at: <http://www.gigya.com/terms-of-service/> ; Privacy Policy at: <http://www.gigya.com/privacy-policy/>; (last accessed November,2015)

¹⁰⁰³ Service description available at: <http://www.ginzametrics.com/> ; Terms of Service (ToS) at: <http://www.ginzametrics.com/terms-of-use/> ; Privacy Policy at: <http://www.ginzametrics.com/privacy-policy/> ; (last accessed November,2015)

¹⁰⁰⁴ Service description available at: www.datapipe.com; Terms of Service (ToS) at: <https://www.datapipe.com/gogrid/legal/>; Privacy Policy at: https://www.datapipe.com/gogrid/legal/eu_safe_harbor_policy/; (last accessed November,2015)

¹⁰⁰⁵ Service description available at: <http://www.gooddata.com/> ; Terms of Service (ToS) at: <http://www.gooddata.com/terms-of-use> ; Privacy Policy at: <http://www.gooddata.com/privacy-policy> (last accessed November,2015)

¹⁰⁰⁶ Service description available at: www.google.com; Terms of Service (ToS) at: <https://www.google.com/intl/en/policies/terms/>; Privacy Policy at: <https://www.google.com/intl/en/policies/privacy/>; (last accessed November,2015)

¹⁰⁰⁷ Service description available at: <http://www.greenhouse.io/> ; Terms of Service (ToS) and Privacy Policy at: <http://www.greenhouse.io/privacy-policy> ; (last accessed November,2015)

¹⁰⁰⁸ Service description available at: <https://www.grandrounds.com/> ; Terms of Service (ToS) at: <https://www.grandrounds.com/terms> ; Privacy Policy at: <https://www.grandrounds.com/privacy> ; (last accessed November,2015)

¹⁰⁰⁹ Service description available at: gusto.com; Terms of Service (ToS) at: <https://gusto.com/terms> ; Privacy Policy at: <https://gusto.com/privacy> ; (last accessed November,2015)

124. <i>Hc1.com</i> ¹⁰¹⁰	Court	Southern District of Indiana,	PS
125. <i>Hearsaysocial</i> ¹⁰¹¹	Court	California- US England- UK Hong Kong - HK	SH/ PS
126. <i>Heroku</i> ¹⁰¹²	Courts	Santa Clara, California	SH/ PS, TRUSTe
127. <i>Hewlett-Packard</i> ¹⁰¹³	Courts	Santa Clara County, California	SH/ no PS, BBB TRUSTe Apec
128. <i>Hightail</i> ¹⁰¹⁴	Arbitration, AAA Court	Northern District of California	SH/ PS, TRUSTe
129. <i>HireVue</i> ¹⁰¹⁵	Arbitration, AAA	New York	SH/ no PS
130. <i>Hoopla</i> ¹⁰¹⁶	Arbitration, JAMS Courts	San Jose, California Northern District, California	SH/PS, BBB EU
131. <i>Hootsuite</i> ¹⁰¹⁷	Court	British Columbia, Canada	SH/ no PS

¹⁰¹⁰ Service description available at: www.hc1.com; Terms of Service (ToS) at: <https://www.hc1.com/legal/terms-use/>; Privacy Policy at: <https://www.hc1.com/legal/privacy-policy/>; (last accessed November,2015)

¹⁰¹¹ Service description available at: <http://hearsaysocial.com/>; Terms of Service (ToS) at: <http://hearsaysocial.com/assets/2013/05/Hearsay-EULA-US-FINAL-2015.pdf> and http://hearsaysocial.com/assets/2013/05/Hearsay-EULA-UK-2015_FINAL.pdf; Privacy Policy at: <http://hearsaysocial.com/privacy-policy/> (last accessed November,2015)

¹⁰¹² Service description available at: <https://www.heroku.com/>; Terms of Service (ToS) at: <https://www.heroku.com/policy/tos>; Privacy Policy at: <https://www.heroku.com/policy/privacy>; (last accessed November,2015)

¹⁰¹³ Service description available at: <http://www8.hp.com/us/en/cloud/helion-eucalyptus-overview.html> Terms of Service (ToS) at: <http://www8.hp.com/us/en/hpe/legal/terms-of-use.html>; ; Privacy Policy at: <http://www8.hp.com/us/en/hpe/privacy/privacy.html>; (last accessed November,2015)

¹⁰¹⁴ Service description available at: <https://www.hightail.com>; Terms of Service (ToS) at: <https://www.hightail.com/aboutus/legal/terms-of-service#dispute>; Privacy Policy at: <https://www.hightail.com/aboutus/legal/privacy> (last accessed November,2015)

¹⁰¹⁵ Service description available at: <https://www.hirevue.com/>; Terms of Service (ToS) at: <http://www.hirevue.com/service-agreement/>; Privacy Policy at: <http://hirevue.com/terms>; (last accessed November,2015)

¹⁰¹⁶ Service description available at: <https://www.hoopla.net/>; Terms of Service (ToS) at: <https://www.hoopla.net/terms-of-use>; Privacy Policy at: <https://www.hoopla.net/privacy-policy> (last accessed November,2015)

¹⁰¹⁷ Service description available at: <https://hootsuite.com/>; Terms of Service (ToS) at: <https://hootsuite.com/legal/terms>; Privacy Policy at: <https://hootsuite.com/legal/privacy> (last accessed November,2015)

132. HortonWorks ¹⁰¹⁸	Court	Westchester County, New York	
133. Host analytics ¹⁰¹⁹	Court	San Mateo County, California	SH/ PS, BBB EU
134. HubiC ¹⁰²⁰	Commercial Court	Lille, France	
135. Hubspot ¹⁰²¹	Court	Massachusetts - US Dublin - EU New south Wales, Australia - Other	SH/PS, TRUSTe
136. Huddle ¹⁰²²	Court	English (law)	SH/ no PS,AAA
137. IBM ¹⁰²³			SH/ PS, TRUSTe TRUSTe Apec
138. Infusionsoft ¹⁰²⁴	arbitration AAA		SH/ PS, Verasafe dis. res.
139. InisdeView ¹⁰²⁵	Court	San Francisco County, California	SH/ no PS, TRUSTe

¹⁰¹⁸ Service description available at: <http://hortonworks.com/> ; Terms of Service (ToS) at: <http://hortonworks.com/agreements/terms-of-service/> ; Privacy Policy at: <http://hortonworks.com/agreements/privacy-policy/> ; (last accessed November,2015)

¹⁰¹⁹ Service description available at: www.hostanalytics.com ; Terms of Service (ToS) at: <http://www.hostanalytics.com/terms-of-use> ; Privacy Policy at: <http://www.hostanalytics.com/privacy-policy> ; (last accessed November,2015)

¹⁰²⁰ Service description available at: <https://hubic.com/en/> Terms of Service (ToS) and Privacy Policy at: https://hubic.com/en/contracts/Contrat_hubiC_2014.pdf (last accessed November,2015)

¹⁰²¹ Service description available at: <http://www.hubspot.com/> ; Terms of Service (ToS) at: <http://legal.hubspot.com/terms-of-service> and <http://www.hubspot.com/legal-stuff> ; Privacy Policy at: <http://www.hubspot.com/privacy-policy> ; (last accessed November,2015)

¹⁰²² Service description available at: <https://www.huddle.com/> ; Terms of Service (ToS) at: <https://www.huddle.com/terms-of-use/> ; Privacy Policy at: <https://www.huddle.com/safe-harbor/> (last accessed November,2015)

¹⁰²³ Service description available at: <http://www.ibm.com/cloud-computing/?lnk=bucl>; Terms of Service (ToS) and Privacy Policy at: <http://www.ibm.com/privacy/us/en/?lnk=flg-priv-usen?lnk=flg> ; (last accessed November,2015)

¹⁰²⁴ Service description available at: <http://www.infusionsoft.com/> ; Terms of Service (ToS) at: <http://www.infusionsoft.com/legal/terms-of-use> ; Privacy Policy at: <http://www.infusionsoft.com/legal/privacy-policy> and <https://www.verasafe.com/dispute-submission> ; (last accessed November,2015)

¹⁰²⁵ Service description available at: <http://www.insideview.com/> ; Terms of Service (ToS) at: <http://www.insideview.com/terms-use/> ; Privacy Policy at: <http://www.insideview.com/privacy-policy/> (last accessed November,2015)

140. <i>Insidersales.com</i> ¹⁰²⁶	Court	Utah	SH/PS, TRUSTe
141. <i>Insightly</i> ¹⁰²⁷	Court	California	SH/ PS, TRUSTe
142. <i>InsightSquared</i> ¹⁰²⁸	Court	Massachusetts (law)	SH/ PS, TRUSTe
143. <i>Instagram</i> ¹⁰²⁹	Arbitration, AAA JAMS Small claim court Court	Santa Clara, California	
144. <i>Instructure</i> ¹⁰³⁰	Courts	Salt Lake County, Utah	SH/ no PS, TRUSTe
145. <i>Intact</i> ¹⁰³¹	Arbitration, JAMS	Santa Clara, California	SH/ PS, TRUSTe
146. <i>Intel</i> ¹⁰³²	Courts	Delaware	SH/ no PS, DPAs
147. <i>Intercom</i> ¹⁰³³	Arbitration, JAMS	San Francisco, California	SH/ PS, TRUSTe
148. <i>Iron.io</i> ¹⁰³⁴	Court	San Francisco, California	SH/ noPS, ICDR of AAA

¹⁰²⁶ Service description available at: <http://uk.insidesales.com/> ; Terms of Service (ToS) at: <http://uk.insidesales.com/terms.php> ; Privacy Policy at: http://uk.insidesales.com/privacy_policy.php (last accessed November,2015)

¹⁰²⁷ Service description available at: <https://www.insightly.com> ; Terms of Service (ToS) at: <https://www.insightly.com/terms-of-service/> ; Privacy Policy at: <https://www.insightly.com/privacy-policy/> (last accessed November,2015)

¹⁰²⁸ Service description available at: <http://www.insightsquared.com/> ; Terms of Service (ToS) at: <http://www.insightsquared.com/docs/tandc/> ; Privacy Policy at: <http://www.insightsquared.com/docs/privacypolicy/> (last accessed November,2015)

¹⁰²⁹ Service description available at: <https://www.instagram.com> ; Terms of Service (ToS) at: <https://www.instagram.com/about/legal/terms/> ; Privacy Policy at: <https://www.instagram.com/about/legal/privacy/> ; (last accessed November,2015)

¹⁰³⁰ Service description available at: www.instructure.com; Terms of Service (ToS) at: <https://www.instructure.com/policies/terms-of-use> ; Privacy Policy at: <https://www.instructure.com/policies/privacy> ; (last accessed November,2015)

¹⁰³¹ Service description available at: us.intacct.com; Terms of Service (ToS) at: <http://us.intacct.com/endusertermsandconditions/termsofservice.pdf> ; Privacy Policy at: https://us.intacct.com/privacy_policy_website ; (last accessed November,2015)

¹⁰³² Service description available at: <https://www-ssl.intel.com/content/www/us/en/cloud-computing/intel-cloud-based-solutions.html>; Terms of Service (ToS) and Privacy Policy at: <https://www-ssl.intel.com/content/www/us/en/legal/terms-of-use.html>; (last accessed November,2015)

¹⁰³³ Service description available at: <https://www.intercom.io/> ; Terms of Service (ToS) at: <http://docs.intercom.io/terms> ; Privacy Policy at: <http://docs.intercom.io/privacy> (last accessed November,2015)

¹⁰³⁴ Service description available at: www.iron.io ; Terms of Service (ToS) at: <http://www.iron.io/terms/> ; Privacy Policy at: <http://www.iron.io/privacy/> ; (last accessed November,2015)

149. Jazz (formerly Resumator) ¹⁰³⁵	Court	Pittsburgh, Pennsylvania	SH/ PS, BBB EU
150. Jobscience ¹⁰³⁶	Court	San Francisco County, California	SH/ no PS, DPAs
151. Jobvite ¹⁰³⁷	Court	San Francisco, California	SH/ PS, TRUSTe
152. Jotta ¹⁰³⁸	Courts	Oslo, Norway	
153. Joyent ¹⁰³⁹	Courts	San Francisco, California	SH/ no PS, DPAs
154. Judicata ¹⁰⁴⁰	Arbitration, AAA Small claims court	San Francisco, California	
155. Juniper ¹⁰⁴¹	Courts	California	SH/ no PS, BBB EU
156. Kaavo ¹⁰⁴²	Courts	Delaware	
157. Kapost ¹⁰⁴³	Court	Denver County	
158. Keynote Systems ¹⁰⁴⁴	Courts	Santa Clara, California	SH/ no PS, DPAs
159. Kissmetrics ¹⁰⁴⁵	Court	San Francisco, California	SH/ PS, DMA

¹⁰³⁵ Service description available at: <https://jazz.co/> ; Terms of Service (ToS) at: <https://jazz.co/terms-of-service/> ; Privacy Policy at: <https://jazz.co/privacy-policy/> ; (last accessed November,2015)

¹⁰³⁶ Service description available at: <http://www.jobscience.com/> ; Terms of Service (ToS) at: <http://www.jobscience.com/terms> ; Privacy Policy at: <http://www.jobscience.com/privacy> ; (last accessed November,2015)

¹⁰³⁷ Service description available at: <http://www.jobvite.com/> ; Terms of Service (ToS) at: <http://www.jobvite.com/terms-and-conditions/> ; Privacy Policy at: <http://www.jobvite.com/privacy-policy/> ; (last accessed November,2015)

¹⁰³⁸ Service description available at: <https://www.jottacloud.com/>; Terms of Service (ToS) at: <https://www.jottacloud.com/terms-and-conditions/> ; Privacy Policy at: <https://www.jottacloud.com/privacy/> ; (last accessed November,2015)

¹⁰³⁹ Service description available at: www.joyent.com; Terms of Service (ToS) at: <https://www.joyent.com/about/policies/terms-of-service>; Privacy Policy at: <https://www.joyent.com/about/policies/privacy-policy>; (last accessed November,2015)

¹⁰⁴⁰ Service description available at: www.judicata.com ; Terms of Service (ToS) at: <https://www.judicata.com/terms> ; Privacy Policy at: <https://www.styleseat.com/privacy> (last accessed November,2015)

¹⁰⁴¹ Service description available at: <http://www.juniper.net/us/en/>; Terms of Service (ToS) at: <http://www.juniper.net/us/en/legal-notice/> ; Privacy Policy at: <http://www.juniper.net/us/en/privacy-policy/>; (last accessed November,2015)

¹⁰⁴² Service description available at: <http://www.kaavo.com/>; Terms of Service (ToS) at: <http://www.kaavo.com/terms>; Privacy Policy at : <http://www.kaavo.com/privacy> (last accessed November,2015)

¹⁰⁴³ Service description available at: <http://kapost.com/> ; Terms of Service (ToS) at: <http://kapost.com/mtm-terms-of-use/> ; Privacy Policy at : <http://kapost.com/privacy-policy/> (last accessed November,2015)

¹⁰⁴⁴ Service description available at: <http://www.keynote.com/>; Terms of Service (ToS) at: <http://www.keynote.com/legal/terms>; Privacy Policy at: <http://www.keynote.com/legal/privacy> ;(last accessed November,2015)

¹⁰⁴⁵ Service description available at: <https://kissmetrics.com/> ; Terms of Service (ToS) at: <https://kissmetrics.com/terms> ; Privacy Policy at: <https://kissmetrics.com/privacy> and

160. <i>Knewton</i> ¹⁰⁴⁶	Courts	New York	SH/ no PS, BBB EU
161. <i>Kyriba</i> ¹⁰⁴⁷	Court	San Diego County, California.	SH/ no PS, JAMS
162. <i>Layered Technologies</i> ¹⁰⁴⁸	Courts	San Francisco, California	SH/ no PS, BBB EU
163. <i>Lever</i> ¹⁰⁴⁹	Arbitration, AAA	San Francisco, California	SH/ no PS, PIPEDA
164. <i>Linkedin</i> ¹⁰⁵⁰	Courts	Santa Clara, California	SH/ no PS, TRUSTe and Irish DP Commission
165. <i>Linode.com</i> ¹⁰⁵¹	Court	New Jersey	SH/ no PS, BBB EU
166. <i>Lithium technologies</i> ¹⁰⁵²	Arbitration, ICC Court	San Francisco, California, New York, Honolulu, London, Geneva, Singapore, Hong Kong, or Sao Paulo US	SH/ no PS, TRUSTe
167. <i>Livedrive</i> ¹⁰⁵³	Courts	London, UK	

<http://thedma.org/resources/compliance-resources/safe-harbor-program-guide/dma-safe-harbor-program-guide-for-european-and-swiss-consumers/> (last accessed November,2015)

¹⁰⁴⁶ Service description available at: [www.knewton.com; Terms of Service \(ToS\) at: https://www.knewton.com/resources/terms/](http://www.knewton.com/terms-of-service); Privacy Policy at: <https://www.knewton.com/resources/privacy-policy/>; (last accessed November,2015)

¹⁰⁴⁷ Service description available at: [www.kyriba.com; Terms of Service \(ToS\) at: http://www.kyriba.com/sites/default/files/content/online_cloud_services_agreement_-_version_2014_03_01_-_us_corp_0.pdf](http://www.kyriba.com/terms-of-service); Privacy Policy at: <http://www.kyriba.com/company/safe-harbor-privacy-policy>; (last accessed November,2015)

¹⁰⁴⁸ Service description available at: https://www.datapipe.com/layered_tech/; Privacy Policy at: https://www.datapipe.com/gogrid/legal/eu_safe_harbor_policy/; (last accessed November,2015)

¹⁰⁴⁹ Service description available at: <http://www.lever.co/>; Terms of Service (ToS) at: <http://www.lever.co/terms-of-service>; Privacy Policy at: <http://www.lever.co/privacy-policy>; (last accessed November,2015)

¹⁰⁵⁰ Service description available at: <https://www.linkedin.com>; Terms of Service (ToS) at: https://www.linkedin.com/legal/user-agreement?trk=hb_ft_userag; Privacy Policy at: https://www.linkedin.com/legal/privacy-policy?trk=hb_ft_priv; (last accessed November,2015)

¹⁰⁵¹ Service description available at: www.linode.com; Terms of Service (ToS) at: <https://www.linode.com/tos>; Privacy Policy at: <https://www.linode.com/privacy>; (last accessed November,2015)

¹⁰⁵² Service description available at: <http://www.lithium.com/>; Terms of Service (ToS) at: <http://www.lithium.com/master-services-agreement>; Privacy Policy at: <http://www.lithium.com/privacy> (last accessed November,2015)

¹⁰⁵³ Service description available at: <https://www.livedrive.com>; Terms of Service (ToS) at: <https://www.livedrive.com/terms-of-use>; Privacy Policy at: <https://www.livedrive.com/privacy-policy>; (last accessed November,2015)

168. <i>LiveOps</i> ¹⁰⁵⁴	Court	Santa Clara County, California	SH/ no PS, TRUSTe
169. <i>LiveOps</i> ¹⁰⁵⁵	Courts	Santa Clara County, California	SH/ no PS, TRUSTe
170. <i>Localytics</i> ¹⁰⁵⁶	Arbitration, AAA	Boston, Massachusetts	SH/ no PS, TRUSTe
171. <i>Loggly</i> ¹⁰⁵⁷	Court	San Francisco, California	
172. <i>LogicWorks</i> ¹⁰⁵⁸	Courts	New York County	
173. <i>LongJump</i> ¹⁰⁵⁹	Courts	Darmstadt, Germany	
174. <i>Lookout</i> ¹⁰⁶⁰	Court	San Francisco, California	SH/PS, JAMS for non-HR, DPAs and FDPIC for HR
175. <i>LiquidPlanner</i> ¹⁰⁶¹	Court	King County, Washington	
176. <i>Mailchimp</i> ¹⁰⁶²	Court (not for account dispute)	Fulton County, Georgia	SH/ PS, TRUSTe

¹⁰⁵⁴ Service description available at: <http://www.liveops.com/> ; Terms of Service (ToS) at: <http://www.liveops.com/terms-of-service> ; Privacy Policy at: <http://www.liveops.com/privacy-policy> (last accessed November,2015)

¹⁰⁵⁵ Service description available at: <http://www.liveops.com/>; Terms of Service (ToS) at: <http://www.liveops.com/terms-of-service>; Privacy Policy at: <http://www.liveops.com/privacy-policy>; (last accessed November,2015)

¹⁰⁵⁶ Service description available at: <http://www.localytics.com/welcome/> ; Terms of Service (ToS) at: <http://www.localytics.com/terms-of-service/>; Privacy Policy at: <http://www.localytics.com/privacy-policy/> (last accessed November,2015)

¹⁰⁵⁷ Service description available at: www.loggly.com ; Terms of Service (ToS) at: <https://www.loggly.com/terms/> ; Privacy Policy at: <https://www.loggly.com/privacy/> ; (last accessed November,2015)

¹⁰⁵⁸ Service description available at: <http://www.logicworks.net/>; Terms of Service (ToS) at: <http://www.logicworks.net/legal/cloud-services-agreement>; (last accessed November,2015)

¹⁰⁵⁹Service description available at: <http://www.softwareag.com/special/longjump/index.html>; Terms of Service (ToS) at: <http://techcommunity.softwareag.com/ecosystem/communities/public/contents/common/terms/>; Privacy Policy at: <http://www.softwareag.com/corporate/privacy.asp>; (last accessed November,2015)

¹⁰⁶⁰ Service description available at: <https://www.lookout.com/> ; Terms of Service (ToS) at: <https://www.lookout.com/legal/terms> ; Privacy Policy at: <https://www.lookout.com/legal/privacy> ; (last accessed November,2015)

¹⁰⁶¹ Service description available at: <http://www.liquidplanner.com/> ; Terms of Service (ToS) at: <http://www.liquidplanner.com/terms/> ; Privacy Policy at: <http://www.liquidplanner.com/privacy/> (last accessed November,2015)

¹⁰⁶² Service description available at: <http://mailchimp.com/> ; Terms of Service (ToS) at: <http://mailchimp.com/legal/terms/> ; Privacy Policy at: <http://mailchimp.com/legal/privacy/> ; (last accessed November,2015)

177. <i>Main street hub</i> ¹⁰⁶³	Court	Travis county, Texas	
178. <i>Marketo</i> ¹⁰⁶⁴	Courts	California	SH/ PS, ICDR of AAA
179. <i>MarkLogic</i> ¹⁰⁶⁵	Court	San Mateo or Northern District, California	
180. <i>Masteryconnect</i> ¹⁰⁶⁶	Courts	Utah	
181. <i>McAfee</i> ¹⁰⁶⁷	Courts	US-New York; Canada; Italy; France; Spain; German; Austria; Switzerland; England; Sweden; Finland; Netherlands; South Africa; Denmark; Dubai; Belgium; Poland; Ireland; Australia; Singapore;	SH/ no PS, JAMS, JAMS international Mediation For HR EU DPAs
182. <i>Medallia</i> ¹⁰⁶⁸	Court	San Mateo County, California	SH/ no PS, TRUSTe
183. <i>MedeAnalytics</i> ¹⁰⁶⁹	Court	Alameda County, California	SH/ no PS, TRUSTe

¹⁰⁶³ Service description available at: <http://www.mainstreethub.com/> ; Terms of Service (ToS) at: <http://www.mainstreethub.com/terms-of-service/> ; Privacy Policy at: <http://www.mainstreethub.com/privacy-policy/> ; (last accessed November,2015)

¹⁰⁶⁴ Service description available at: <http://www.marketo.com/>; Terms of Service (ToS) at: <http://www.marketo.com/trust/legal/>; Privacy Policy at: <http://www.marketo.com/trust/safe-harbor/>; (last accessed November,2015)

¹⁰⁶⁵ Service description available at: www.marklogic.com ; Terms of Service (ToS) at: <http://www.marklogic.com/terms-of-use/> ; Privacy Policy at: <http://www.marklogic.com/privacy-policy/> ; (last accessed November,2015)

¹⁰⁶⁶ Service description available at: www.masteryconnect.com; Terms of Service (ToS) and Privacy Policy at: <https://app.masteryconnect.com/terms> ; (last accessed November,2015)

¹⁰⁶⁷ Service description available at: <http://www.mcafee.com/us/products/security-as-a-service/index.aspx>; Terms of Service (ToS) at: <http://www.mcafee.com/us/resources/legal/online-service-terms-na.pdf>; Privacy Policy at: <http://www.mcafee.com/common/privacy/english/docs/mcafee-privacypolicy.pdf> (last accessed November,2015)

¹⁰⁶⁸ Service description available at: <http://www.medallia.com/> ; Terms of Service (ToS) at: <http://www.medallia.com/terms-of-use/> ; Privacy Policy at: <http://www.medallia.com/privacy/> (last accessed November,2015)

¹⁰⁶⁹ Service description available at: <http://medeanalytics.com/> ; Terms of Service (ToS) at: <http://medeanalytics.com/terms> ; Privacy Policy at: <http://medeanalytics.com/privacy-policy> ; (last accessed November,2015)

184. <i>Mezeo (Zimbra)</i> ¹⁰⁷⁰	Courts	Dallas County, Texas	SH/ PS, JAMS
185. <i>Microsoft</i> ¹⁰⁷¹	Arbitration, AAA Small Claims court	King County, Washington	SH/PS
186. <i>Mindbody</i> ¹⁰⁷²	Arbitration, AAA	San Luis Obispo, California	SH/ PS, TRUSTe
187. <i>Mirantis</i> ¹⁰⁷³	Court	Santa Clara, or North District, California	
188. <i>Mixpanel</i> ¹⁰⁷⁴	Court	San Francisco, California	SH/ PS, BBB EU
189. <i>MobileIron</i> ¹⁰⁷⁵	Court Arbitration, LCIA Arbitration, ICC Arbitration, AAA	Santa Clara, California – US London (NY law) – EMEA Singapore – Asia, AU, New Zealand New York – Americas	SH/ PS, JAMS
190. <i>Modernizing medicine</i> ¹⁰⁷⁶	Court	Palm Beach County, US	
191. <i>Mojave Networks</i> ¹⁰⁷⁷	Court	Santa Clara, California	

¹⁰⁷⁰ Service description available at: <https://www.zimbra.com/>; Terms of Service (ToS) at: <https://files.zimbra.com/website/docs/Zimbra-Professional-Services-Terms-and-Conditions.pdf>; Privacy Policy at: <https://www.zimbra.com/legal/privacy> (last accessed November,2015)

¹⁰⁷¹ Service description available at: www.microsoft.com; Terms of Service (ToS) at: <https://www.microsoft.com/en-us/legal/arbitration/demand.aspx>; Privacy Policy at: <https://www.microsoft.com/en-us/privacystatement/default.aspx>; (last accessed November,2015)

¹⁰⁷² Service description available at: <https://www.mindbodyonline.com/>; Terms of Service (ToS) at: <https://www.mindbodyonline.com/terms-of-service>; Privacy Policy at: <https://www.mindbodyonline.com/privacy-policy> (last accessed November,2015)

¹⁰⁷³ Service description available at: www.mirantis.com; Terms of Service (ToS) at: <https://software.mirantis.com/blank/terms-and-conditions/> and https://www.mirantis.com/wp-content/uploads/2015/08/Master-Subscription-Agreement_Online_August-2015.pdf; Privacy Policy at: <https://www.mirantis.com/company/privacy-policy/>; (last accessed November,2015)

¹⁰⁷⁴ Service description available at: <https://mixpanel.com/>; Terms of Service (ToS) at: <https://mixpanel.com/terms/>; Privacy Policy at: <https://mixpanel.com/privacy/> (last accessed November,2015)

¹⁰⁷⁵ Service description available at: <https://www.mobileiron.com/en>; Terms of Service (ToS) at: <https://www.mobileiron.com/en/legal>; Privacy Policy at: <https://www.mobileiron.com/en/privacy-policy> and <https://www.mobileiron.com/en/legal/safe-harbor-privacy-policy>; (last accessed November,2015)

¹⁰⁷⁶ Service description available at: <https://www.modmed.com/>; Terms of Service (ToS) at: <https://www.modmed.com/terms-of-service/>; Privacy Policy at: <https://www.modmed.com/privacy-policy/>; (last accessed November,2015)

¹⁰⁷⁷ Service description available at: <https://www.mojave.net/>; Terms of Service (ToS) at: <https://www.mojave.net/terms>; Privacy Policy at: <https://www.mojave.net/privacy>; (last accessed November,2015)

192. Moxie softwar ¹⁰⁷⁸	Court	Santa Clara County, California	SH/ no Ps, AAA
193. Moz ¹⁰⁷⁹	Court	Seattle, Washington	
194. Mulesoft ¹⁰⁸⁰	Court	San Francisco, California	SH/ no PS, TRUSTe
195. Nasuni ¹⁰⁸¹	Courts	Massachusetts	
196. Navicure ¹⁰⁸²	Court	Gwinnett County, Georgia, or in the U.S. District Court located in Atlanta, Georgia, North Carolina.	
197. Ncino ¹⁰⁸³	Court	Users 'residence	
198. Netflix ¹⁰⁸⁴	Arbitration, AAA Small claim court	Brazil (law) Delaware (law)	
199. NetSuite ¹⁰⁸⁵	Arbitration ICC JAMS Courts	San Francisco San Mateo, California	SH/ PS, DPAs
200. New Relic ¹⁰⁸⁶	Courts	California	SH/ PS, TRUSTe

¹⁰⁷⁸ Service description available at: <https://www.gomoxie.com/> ; Terms of Service (ToS) at: <https://www.gomoxie.com/about/legal/> ; Privacy Policy at: <https://www.gomoxie.com/about/privacy/> (last accessed November,2015)

¹⁰⁷⁹ Service description available at: <https://moz.com/> ; Terms of Service (ToS) and Privacy Policy at: <https://moz.com/terms-privacy> ; (last accessed November,2015)

¹⁰⁸⁰ Service description available at: www.mulesoft.com ; Terms of Service (ToS) at: <https://www.mulesoft.com/content/terms-service> ; Privacy Policy at: <https://www.mulesoft.com/privacy-policy> ; (last accessed November,2015)

¹⁰⁸¹ Service description available at: <http://www.nasuni.com/>; Terms of Service (ToS) at: http://www.nasuni.com/legal/#terms_of_service; Privacy Policy at: http://www.nasuni.com/legal/#privacy_policy; (last accessed November,2015)

¹⁰⁸² Service description available at: <http://www.navicure.com/> ; Terms of Service (ToS) at: <http://www.billingbetter.com/terms.htm> ; Privacy Policy at: <http://www.navicure.com/privacy.htm>; (last accessed November,2015)

¹⁰⁸³ Service description available at: <https://www.ncino.com/> ; Terms of Service (ToS) at: https://www.ncino.com/terms_and_conditions ; Privacy Policy at: <https://www.ncino.com/privacy> (last accessed November,2015)

¹⁰⁸⁴ Service description available at: <https://www.netflix.com/>; Terms of Service (ToS) at: <https://help.netflix.com/legal/termsfuse?locale=en-GB> ; Privacy Policy at: <https://help.netflix.com/legal/privacy?locale=en-GB> ; (last accessed November,2015)

¹⁰⁸⁵ Service description available at: <http://www.netsuite.com/portal/home.shtml>; Terms of Service (ToS) at: <http://www.netsuite.com/portal/pdf/termservice-suitecloud.pdf> ; Privacy Policy at: <http://www.netsuite.com/portal/privacy.shtml>; (last accessed November,2015)

¹⁰⁸⁶ Service description available at: <http://newrelic.com/>; Terms of Service (ToS) at: <http://newrelic.com/terms>; Privacy Policy at: <http://newrelic.com/privacy>; (last accessed November,2015)

201. <i>Newrelic</i> ¹⁰⁸⁷	Court	California (law)	SH/ PS, TRUSTe
202. <i>Newvoicemedia</i> ¹⁰⁸⁸	Arbitration, Center for Effective Dispute Resolution (ADR)	England	
203. <i>Nicira</i> ¹⁰⁸⁹	Courts	Santa Clara County, California	SH/ no PS, DPAs
204. <i>Nimble</i> ¹⁰⁹⁰	Arbitration, AAA	California	SH/ PS, TRUSTe
205. <i>Nimbula</i> ¹⁰⁹¹	Courts	Santa Clara or San Francisco, California	SH/ PS, TRUSTe
206. <i>Nitrous</i> ¹⁰⁹²	Court	Santa Clara, California	
207. <i>Okta</i> ¹⁰⁹³	Court	San Francisco, California	SH/ no Ps, DPAs
208. <i>Onelogin</i> ¹⁰⁹⁴	Court	San Francisco, California	SH/ PS, TRUSTe
209. <i>Onlyoffice</i> ¹⁰⁹⁵			

¹⁰⁸⁷ Service description available at: www.newrelic.com ; Terms of Service (ToS) at: <http://newrelic.com/terms> ; Privacy Policy at: <http://newrelic.com/privacy> ; (last accessed November,2015)

¹⁰⁸⁸ Service description available at: <http://www.newvoicemedia.com/> ; Terms of Service (ToS) at: <http://www.newvoicemedia.com/legal> and <https://assets.digitalmarketplace.service.gov.uk/documents/92795/5205306132922368-terms-and-conditions.pdf> ; Privacy Policy at: <http://www.newvoicemedia.com/privacy-policy> (last accessed November,2015)

¹⁰⁸⁹ Service description available at: <https://www.vmware.com/products/nsx/>; Terms of Service (ToS) at: <https://www.vmware.com/help/legal.html#sthash.34MW6cix.dpuf> ; Privacy Policy at: <https://www.vmware.com/help/privacy.html>; (last accessed November,2015)

¹⁰⁹⁰ Service description available at: <http://www.nimble.com> ; Terms of Service (ToS) at: <http://www.nimble.com/company/terms-of-service/> ; Privacy Policy at: <http://www.nimble.com/company/privacy/> (last accessed November,2015)

¹⁰⁹¹ Service description available at: <http://www.oracle.com/us/corporate/acquisitions/nimbula/index.html>; Terms of Service (ToS) at: <http://www.oracle.com/us/legal/terms/index.html>; Privacy Policy at: <http://www.oracle.com/us/legal/privacy/services-privacy-policy/index.html>; (last accessed November,2015)

¹⁰⁹² Service description available at: <https://www.nitrous.io/> ; Terms of Service (ToS) at: <https://community.nitrous.io/docs/terms-of-use> ; Privacy Policy at: <https://community.nitrous.io/docs/privacy-policy> ; (last accessed November,2015)

¹⁰⁹³ Service description available at: www.okta.com ; Terms of Service (ToS) at: <https://www.okta.com/terms/> ; Privacy Policy at: <https://www.okta.com/privacy-policy> ; (last accessed November,2015)

¹⁰⁹⁴ Service description available at: <https://www.onelogin.com/> ; Terms of Service (ToS) at: <https://www.onelogin.com/terms> ; Privacy Policy at: <https://www.onelogin.com/privacy> ; (last accessed November,2015)

¹⁰⁹⁵ Service description available at: <https://www.onlyoffice.com/> ; Terms of Service (ToS) at: <https://www.onlyoffice.com/legalterms.aspx> ; Privacy Policy at: <https://www.onlyoffice.com/privacy.aspx> (last accessed November,2015)

210. <i>OpenStack</i> ¹⁰⁹⁶	Arbitration, AAA Court	US Australia-New South Wales Europe- UK Honk Kong	
211. <i>OpSource</i> ¹⁰⁹⁷	Arbitration, AAA		SH/ no PS,DPAs
212. <i>Optimizely</i> ¹⁰⁹⁸	Court	Santa Clara County, California	SH/ PS, TRUSTe
213. <i>Oracle</i> ¹⁰⁹⁹	Courts	Santa Clara or San Francisco, California	SH/ PS TRUSTe
214. <i>Oracle cloud</i> ¹¹⁰⁰	Court	San Francisco or Santa Clara County, California	SH/ PS, TRUSTe
215. <i>Pagerduty</i> ¹¹⁰¹	Court	San Francisco, California	SH/ no PS
216. <i>Panda Security</i> ¹¹⁰²	Courts	Bilbao, Spain	
217. <i>Pantheon</i> ¹¹⁰³	Court	Delaware	SH/ PS

¹⁰⁹⁶ Service description available at: [http://www.openstack.org/; Terms of Service \(ToS\) and Privacy Policy at: http://c744563d32d0468a7cf1-2fe04d8054667ffada6c4002813eccf0.r76.cf1.rackcdn.com/downloads/pdfs/RACKSPACE-%2342301-v4-Master Form Cloud Terms of Service JLF 27 October 2015 - uploaded.pdf; \(last accessed November,2015\)](http://www.openstack.org/; Terms of Service (ToS) and Privacy Policy at: http://c744563d32d0468a7cf1-2fe04d8054667ffada6c4002813eccf0.r76.cf1.rackcdn.com/downloads/pdfs/RACKSPACE-%2342301-v4-Master Form Cloud Terms of Service JLF 27 October 2015 - uploaded.pdf; (last accessed November,2015))

¹⁰⁹⁷ Service description available at: <http://www.opsources.net/> and <http://cloud.dimensiondata.com/saas-solutions/>; Terms of Service (ToS) at: <http://cloud.dimensiondata.com/saas-solutions/about/legal/legacy/opsources-cloud-terms> ; Privacy Policy at: [http://cloud.dimensiondata.com/saas-solutions/about/legal/privacy-policy; \(last accessed November,2015\)](http://cloud.dimensiondata.com/saas-solutions/about/legal/privacy-policy; (last accessed November,2015))

¹⁰⁹⁸ Service description available at: <https://www.optimizely.com/> ; Terms of Service (ToS) at: <https://www.optimizely.com/terms/> ; Privacy Policy at: <https://www.optimizely.com/privacy/> ; (last accessed November,2015)

¹⁰⁹⁹ Service description available at: [http://www.oracle.com/index.html; Terms of Service \(ToS\) at: http://www.oracle.com/us/legal/terms/index.html; Privacy Policy at: http://www.oracle.com/us/legal/privacy/services-privacy-policy/index.html; \(last accessed November,2015\)](http://www.oracle.com/index.html; Terms of Service (ToS) at: http://www.oracle.com/us/legal/terms/index.html; Privacy Policy at: http://www.oracle.com/us/legal/privacy/services-privacy-policy/index.html; (last accessed November,2015))

¹¹⁰⁰ Service description available at: <http://www.oracle.com/> ; Terms of Service (ToS) at: <http://www.oracle.com/us/legal/terms/index.html> ; Privacy Policy at: [http://www.oracle.com/us/legal/privacy/marketing-cloud-data-cloud-privacy-policy/index.html \(last accessed November,2015\)](http://www.oracle.com/us/legal/privacy/marketing-cloud-data-cloud-privacy-policy/index.html (last accessed November,2015))

¹¹⁰¹ Service description available at: <https://www.pagerduty.com/home-c/> ; Terms of Service (ToS) at: <https://www.pagerduty.com/tac/> ; Privacy Policy at: <https://www.pagerduty.com/privacy-policy/> ; (last accessed November,2015)

¹¹⁰² Service description available at: [http://www.pandasecurity.com/; Terms of Service \(ToS\) and Privacy Policy at at: http://www.pandasecurity.com/serbia/homeusers/media/legal-notice/#e10; \(last accessed November,2015\)](http://www.pandasecurity.com/; Terms of Service (ToS) and Privacy Policy at at: http://www.pandasecurity.com/serbia/homeusers/media/legal-notice/#e10; (last accessed November,2015))

¹¹⁰³ Service description available at: <https://pantheon.io/> ; Terms of Service (ToS) at: <https://pantheon.io/pantheon-terms-service>; Privacy Policy at: <https://pantheon.io/privacy> ; (last accessed November,2015)

218. <i>Panzura</i> ¹¹⁰⁴	Courts	Northern District, California	
219. <i>Parklet</i> ¹¹⁰⁵	Court	California	SH/ no PS
220. <i>Pentaho</i> ¹¹⁰⁶	Arbitration, AAA or JAMS Court	Orange County, California	SH/ PS, DPA and FDPIC
221. <i>Peplematter</i> ¹¹⁰⁷	Arbitration, AAA Court	Charlstone, South Carolina	
222. <i>Ping Identity</i> ¹¹⁰⁸	Courts	Colorado	SH/ no PS, DPAs
223. <i>Pipedrive</i> ¹¹⁰⁹	Arbitration, AAA Court	Santa Clara, California- US Harju court in Estonia- Other	
224. <i>Pivotlink- Smartfocus</i> ¹¹¹⁰	Court	English Courts	SH/ PS,
225. <i>Plex systems</i> ¹¹¹¹	Court	Oakland County, Michigan	PS
226. <i>Pointclickcare</i> ¹¹¹²	Court	Province of Ontario	

¹¹⁰⁴ Service description available at: <http://panzura.com/> ; Terms of Service (ToS) at: <http://panzura.com/termsandconditions/> and <https://www.pingidentity.com/en/legal/community.html>; Privacy Policy at: <https://www.pingidentity.com/en/legal/privacy.html>; (last accessed November,2015)

¹¹⁰⁵ Service description available at: <https://www.parklet.co/> ; Terms of Service (ToS) at: <https://www.parklet.co/terms> ; Privacy Policy at: <https://www.parklet.co/privacy> ; (last accessed November,2015)

¹¹⁰⁶ Service description available at: <http://www.pentaho.com/> ; Terms of Service (ToS) at: <http://community.pentaho.com/terms/> ; Privacy Policy at: <http://www.pentaho.com/privacy> (last accessed November,2015)

¹¹⁰⁷ Service description available at: <https://www.peplematter.com/> ; Terms of Service (ToS) at: <https://www.peplematter.com/sites/default/files/PeopleMatter-Appendix-D-Terms-and-Condititions-v1.pdf> ; Privacy Policy at: <https://www.peplematter.com/privacy> ; (last accessed November,2015)

¹¹⁰⁸ Service description available at: <https://www.pingidentity.com/en.html>; Terms of Service (ToS) at: <https://www.pingidentity.com/en/legal/pingid-terms-of-service.html>; Privacy Policy at: <https://www.pingidentity.com/en/legal/privacy.html>; (last accessed November,2015)

¹¹⁰⁹ Service description available at: <https://www.pipedrive.com/> ; Terms of Service (ToS) at: <https://www.pipedrive.com/en/terms-of-service> ; Privacy Policy at: <https://www.pipedrive.com/en/privacy> (last accessed November,2015)

¹¹¹⁰ Service description available at: <http://www.smartfocus.com/>; Terms of Service (ToS) at: <http://www.smartfocus.com/terms-of-use> ; Privacy Policy at: <http://www.smartfocus.com/privacy-and-cookies-policy> (last accessed November,2015)

¹¹¹¹ Service description available at: <http://www.plex.com> ; Terms of Service (ToS) at: <http://www.plex.com/utility/terms-and-conditions.html>; Privacy Policy at: <http://www.plex.com/utility/privacy-policy.html> (last accessed November,2015)

¹¹¹² Service description available at: <http://www.pointclickcare.com/> ; Terms of Service (ToS) at: <http://www.pointclickcare.com/terms-of-use/> http://wyqcr1hvyue2u5arp2hemjqt.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/PointClickCare_Terms_of_Use-US_v2014-1-1.pdf ; Privacy Policy at: <http://www.pointclickcare.com/website-privacy-policy/> ; (last accessed November,2015)

227. <i>Practice Fusion</i> ¹¹¹³	Court	San Francisco, California	
228. <i>Preact</i> ¹¹¹⁴	Court	San Francisco County, California	
229. <i>Procore</i> ¹¹¹⁵	Court	Santa Barbara County, California	
230. <i>Propeller Health</i> ¹¹¹⁶	Court	State of Wisconsin	PS
231. <i>Propertybase</i> ¹¹¹⁷	Court	Munich, Germany – EMEA Berkeley California- US and other	
232. <i>Puppet Labs</i> ¹¹¹⁸	Court	Multnomah County, Oregon	SH/ no PS,
233. <i>Qualys</i> ¹¹¹⁹	Court	Santa Clara, California	SH/ PS, TRUSTe
234. <i>Rackspace</i> ¹¹²⁰	Arbitration, AAA Court	US; Australia-New South Wales Europe- UK Hong Kong- HK	PS

¹¹¹³ Service description available at: <http://www.practicefusion.com/> ; Terms of Service (ToS) at: <http://www.practicefusion.com/pages/terms-of-use.html> ; Privacy Policy at: <http://www.practicefusion.com/pages/privacy-policy.html>; (last accessed November,2015)

¹¹¹⁴ Service description available at: <http://www.preact.com/> ; Terms of Service (ToS) at: <http://www.preact.com/company/terms.html> Privacy Policy at: <http://www.preact.com/company/privacy.html> (last accessed November,2015)

¹¹¹⁵ Service description available at: <https://www.procore.com/> ; Terms of Service (ToS) at: <https://www.procore.com/fine-print/terms.php> ; Privacy Policy at: <https://www.procore.com/fine-print/privacy-policy.php> (last accessed November,2015)

¹¹¹⁶ Service description available at: <http://propellerhealth.com/> ; Terms of Service (ToS) at: <https://my.propellerhealth.com/terms-of-service> ; Privacy Policy at: <http://propellerhealth.com/privacy/> ; (last accessed November,2015)

¹¹¹⁷ Service description available at: <https://www.propertybase.com> ; Terms of Service (ToS) at: https://www.propertybase.com/images/uploads/general-assets/Propertybase_MSA_2014-02-10.pdf ; Privacy Policy at: <https://www.propertybase.com/images/uploads/general-assets/Propertybase-Privacy-Policy-2012-09-10.pdf> (last accessed November,2015)

¹¹¹⁸ Service description available at: <https://puppetlabs.com/>; Terms of Service (ToS) at: <https://puppetlabs.com/terms>; Privacy Policy at: <https://puppetlabs.com/privacy>; (last accessed November,2015)

¹¹¹⁹ Service description available at: <https://www.qualys.com/>; Terms of Service (ToS) at: <https://www.qualys.com/forms/freescan/service-agreement.html> ; Privacy Policy at: <https://www.qualys.com/company/privacy/>; (last accessed November,2015)

¹¹²⁰ Service description available at: www.rackspace.com; Terms of Service (ToS) at: <http://www.rackspace.com/information/legal/cloud/tos>; Privacy Policy at: <http://www.rackspace.com/information/legal/privacystatement/>; (last accessed November,2015)

235. <i>RainStor</i> ¹¹²¹	Courts	South District of New York	SH/ no PS, ICDR of AAA
236. <i>Rapid 7</i> ¹¹²²	Court	Boston, Massachusetts	SH/ PS, TRUSTE
237. <i>Ravello</i> ¹¹²³	Court	San Francisco, California	SH/ no PS, DPAs
238. <i>Recurly</i> ¹¹²⁴	Court	San Francisco County, California	SH/ PS, DPAs
239. <i>Red Hat</i> ¹¹²⁵	Courts	New York	SH/ PS, DPAs
240. <i>Redbooth</i> ¹¹²⁶			
241. <i>Replicon</i> ¹¹²⁷	Arbitration, AAA Court	Calgary, Alberta, Canada	
242. <i>RightScale</i> ¹¹²⁸	Arbitration, AAA Court	California	SH/ no PS
243. <i>Rocket Lawyer</i> ¹¹²⁹	Court Arbitration, JAMS	England – UK San Francisco, California	

¹¹²¹ Service description available at: <http://rainstor.com/>; Terms of Service (ToS) and Privacy Policy at: file:///C:/Users/user/Desktop/Teradata_Privacy_Policy_23OCT2015%20FINAL.pdf; (last accessed November,2015) Teradata acquired RainStor in December 2014. Teradata dropped the RainStor product from its portfolio in January 2016 and it is no longer developed or marketed

¹¹²² Service description available at: <http://www.rapid7.com/>; Terms of Service (ToS) at: <http://www.rapid7.com/legal.jsp>; Privacy Policy at: <http://www.rapid7.com/privacy.jsp>; (last accessed November,2015)

¹¹²³ Service description available at: <https://www.ravellosystems.com/>; Terms of Service (ToS) at: <https://www.ravellosystems.com/ravello-terms-of-service>; Privacy Policy at: <https://www.ravellosystems.com/ravello-privacy-policy>; (last accessed November,2015)

¹¹²⁴ Service description available at: recurly.com; Terms of Service (ToS) at: <https://recurly.com/legal/terms>; Privacy Policy at: <https://recurly.com/legal/privacy>; (last accessed November,2015)

¹¹²⁵ Service description available at: <http://www.redhat.com/en>; Terms of Service (ToS) at: <http://www.redhat.com/en/about/terms-use>; Privacy Policy at: <http://www.redhat.com/en/about/privacy-policy>; (last accessed November,2015)

¹¹²⁶ Service description available at: <https://redbooth.com/>; Terms of Service (ToS) at: <https://redbooth.com/more-info/terms-and-fair-use>; Privacy Policy at: <https://redbooth.com/more-info/security-privacy> (last accessed November,2015)

¹¹²⁷ Service description available at: www.replicon.com; Terms of Service (ToS) at: <http://www.replicon.com/license-agreement>; Privacy Policy at: <http://www.replicon.com/privacy-policy>; (last accessed November,2015)

¹¹²⁸ Service description available at: <http://www.rightscale.com/>; Terms of Service (ToS) at: <http://www.rightscale.com/legal/terms-of-service> and <http://www.rightscale.com/legal/msa>; Privacy Policy at: <http://www.rightscale.com/legal/privacy-policy>; (last accessed November,2015)

¹¹²⁹ Service description available at: <https://www.rocketlawyer.com/> and <https://www.rocketlawyer.co.uk/>; Terms of Service (ToS) at: <https://www.rocketlawyer.com/terms-and-conditions.r>; Privacy Policy at: <https://www.rocketlawyer.com/privacy.r> (last accessed November,2015)

244. Saasu ¹¹³⁰	Court	New south wales, Australia	
245. SafeNet ¹¹³¹	Arbitration, ICC	London- EMEA Baltimore, Maryland- US Hong Kong - APAC	
246. Sailthru ¹¹³²			SH/ PS, TRUSTe Spam complaints
247. Salesforce.com ¹¹³³	Courts	San Francisco , California - US Toronto, Ontario- Canada England Courts- Eu, Middle East, Africa- Tokyo - Japan Singapore -Asia	SH/ PS, TRUSTe
248. SAP ¹¹³⁴	Courts	Germany, San Francisco, California- US	
249. Sauce labs ¹¹³⁵	Court	San Francisco, California	SH/ no PS
250. Scalextrem ¹¹³⁶	Court	Florida (law)	SH/ PS, TRUSTe
251. SendGrid ¹¹³⁷	Arbitration, ICC	Colorado law	SH/ no PS, Direct

¹¹³⁰ Service description available at: www.saasu.com ; Terms of Service (ToS) at: <https://www.saasu.com/terms>; Privacy Policy at: <https://www.saasu.com/privacy> ; (last accessed November,2015)

¹¹³¹ Service description available at: <http://www.safenet-inc.com/>; Terms of Service (ToS) at: http://www.safenet-inc.com/About_SafeNet/Terms_Conditions_of_Sale_-_EMEA/#sthash.YCun0ruZ.dpuf; Privacy Policy at: <http://www.safenet-inc.com/privacy-statement/>; (last accessed November,2015)

¹¹³² Service description available at: <http://www.sailthru.com/> ; Terms of Service (ToS) at: <http://www.sailthru.com/legal/> ; Privacy Policy at: <http://www.sailthru.com/legal/#privacy> ; (last accessed November,2015)

¹¹³³ Service description available at: <http://www.salesforce.com/>; Terms of Service (ToS) at: <http://www.salesforce.com/company/legal/agreements.jsp> and http://www.sfdcstatic.com/assets/pdf/misc/salesforce_MSA.pdf; Privacy Policy at: <http://www.salesforce.com/company/privacy/>; (last accessed November,2015)

¹¹³⁴ Service description available at: <http://go.sap.com/index.html>; Terms of Service (ToS) at: <http://www.sap.com/corporate-en/about/legal/terms-of-use.html>; Privacy Policy at: <http://www.sap.com/about/legal/privacy.html>; (last accessed November,2015)

¹¹³⁵ Service description available at: <https://saucelabs.com/> ; Terms of Service (ToS) at: <https://saucelabs.com/tos> ; Privacy Policy at: <https://saucelabs.com/privacy> ; (last accessed November,2015)

¹¹³⁶ Service description available at: <http://www.scalextreme.com/> <https://www.citrix.com/solutions/cloud-services/overview.html> ; Terms of Service (ToS) at: <https://www.citrix.com/about/legal/legal-notice.html> ; Privacy Policy at <https://www.citrix.com/about/legal/privacy.html#safe> ; (last accessed November,2015)

¹¹³⁷ Service description available at: sendgrid.com ; Terms of Service (ToS) at: <https://sendgrid.com/tos>; Privacy Policy at: <https://sendgrid.com/privacy> ; (last accessed November,2015)

		Marketing Association Elected for dispute resolution for SH
252. <i>Sendthisfile</i> ¹¹³⁸	Court	Sedgwick County, Kansas, USA SH/ PS, BBB EU
253. <i>Servicemax</i> ¹¹³⁹	Court	Alameda County, California SH/ no PS
254. <i>Shopify</i> ¹¹⁴⁰	Court	Province of Ontario SH/ PS. ICDR of AAA
255. <i>Silkroad</i> ¹¹⁴¹	Court	Cook County, Illinois SH/ PS
256. <i>Silversky (BEA systems)</i> ¹¹⁴²	Court	UK SH/ PS
257. <i>Simply Measured</i> ¹¹⁴³	Court	King County, Washington
258. <i>Skytap</i> ¹¹⁴⁴	Courts Arbitration, non-formal employee arbitrators	King County, Washington SH/ PS, JAMS
259. <i>Slack.com</i> ¹¹⁴⁵	Arbitration,	JAMS SH/ PS, JAMS

¹¹³⁸ Service description available at: <https://www.sendthisfile.com/index.jsp>; Terms of Service (ToS) at: <https://www.sendthisfile.com/policy/terms-of-use.jsp>; Privacy Policy at: <https://www.sendthisfile.com/policy/privacy-policy.jsp> (last accessed November,2015)

¹¹³⁹ Service description available at: <http://servicemax.com/>; Terms of Service (ToS) at: <http://sf.servicemax.com/pdfs/msa.pdf>; Privacy Policy at: <http://servicemax.com/privacy> (last accessed November,2015)

¹¹⁴⁰ Service description available at: <https://www.shopify.com/>; Terms of Service (ToS) at: <https://www.shopify.com/legal/terms>; Privacy Policy at: <https://www.shopify.com/legal/privacy> (last accessed November,2015)

¹¹⁴¹ Service description available at: <http://www.silkroad.com/>; Terms of Service (ToS) at: <http://www.silkroad.com/documents/2015/02/saas-terms-conditions.pdf>; Privacy Policy at: <http://www.silkroad.com/privacy/>; (last accessed November,2015)

¹¹⁴² Service description available at: <http://www.baesystems.com/en/cybersecurity/home>; Terms of Service (ToS) at: <http://www.baesystems.com/en/cybersecurity/terms-and-conditions>; Privacy Policy at: <http://www.baesystems.com/en/cybersecurity/privacy>; (last accessed November,2015)

¹¹⁴³ Service description available at: <http://simplymeasured.com/>; Terms of Service (ToS) at: <http://simplymeasured.com/subscription-agreement/>; Privacy Policy at: <http://simplymeasured.com/privacy/>; (last accessed November,2015)

¹¹⁴⁴ Service description available at: <https://www.skytap.com/>; Terms of Service (ToS) at: <https://www.skytap.com/?p=12930>; Privacy Policy at: <https://www.skytap.com/legal/privacy-policy/>; (last accessed November,2015)

¹¹⁴⁵ Service description available at: <https://slack.com/>; Terms of Service (ToS) at: <https://slack.com/terms-of-service>; Privacy Policy at: <https://slack.com/privacy-policy> (last accessed November,2015)

260. <i>SmartRecruiters</i> ¹¹⁴⁶	Court	Delaware	
261. <i>Snapchat</i> ¹¹⁴⁷	Arbitration, AAA or other, Small claim court	Non-appearance by the choice of initiating party and selection of the manner	PS
	Court	Central District of California	
262. <i>Snaplogic</i> ¹¹⁴⁸	Court	California (law)	PS, TRUSTe
263. <i>SOASTA</i> ¹¹⁴⁹	Courts	San Francisco County and Northern District California	
264. <i>Socrata</i> ¹¹⁵⁰	Court	King County, Washington	
265. <i>Spatialkey</i> ¹¹⁵¹	Arbitration, AAA Court	Boston	
266. <i>Spiceworks</i> ¹¹⁵²	Court	Travis County	
267. <i>SpiderOak</i> ¹¹⁵³	Arbitration, AAA Court	Kansas City, Missouri, USA and Chicago, Cook County, Illinois	SH/ no PS, BBB EU

¹¹⁴⁶ Service description available at: <https://www.smartrecruiters.com/> ; Terms of Service (ToS) at: <https://www.smartrecruiters.com/terms-and-conditions/> ; Privacy Policy at: <https://www.smartrecruiters.com/privacy-policy/> ; (last accessed November,2015)

¹¹⁴⁷ Service description available at: [https://www.snapchat.com Terms of Service \(ToS\) at: https://www.snapchat.com/terms](https://www.snapchat.com/Terms%20of%20Service%20(ToS)%20at%3A%3Ahttps%3A%2F%2Fwww.snapchat.com/terms) ; Privacy Policy at: <https://www.snapchat.com/privacy> ; (last accessed November,2015)

¹¹⁴⁸ Service description available at: www.snaplogic.com Terms of Service (ToS) at: <http://www.snaplogic.com/footer/terms-of-use> ; Privacy Policy at: <http://www.snaplogic.com/footer/privacy-policy> ; (last accessed November,2015)

¹¹⁴⁹ Service description available at: <http://www.soasta.com/>; Terms of Service (ToS) at: <http://www.soasta.com/wp-content/uploads/2015/04/soasta-contract.pdf> ; Privacy Policy at: <http://www.soasta.com/privacy-policy/>; (last accessed November,2015)

¹¹⁵⁰ Service description available at: <https://www.socrata.com/> ; Terms of Service (ToS) at: <https://www.socrata.com/terms-of-service/> ; Privacy Policy at: <https://www.socrata.com/privacy/> (last accessed November,2015)

¹¹⁵¹ Service description available at: <http://www.spatialkey.com/> ; Terms of Service (ToS) at: <http://www.spatialkey.com/terms/websiteterms.cfm> ; Privacy Policy at: <http://www.spatialkey.com/terms/privacypolicy.cfm> (last accessed November,2015)

¹¹⁵² Service description available at: <http://www.spiceworks.com/> ; Terms of Service (ToS) at: <http://www.spiceworks.com/terms-and-privacy/#terms> ; Privacy Policy at: <http://www.spiceworks.com/terms-and-privacy/> ; (last accessed November,2015)

¹¹⁵³ Service description available at: <https://spideroak.com/> Terms of Service (ToS) at <https://spideroak.com/policy/terms-of-use> and <https://spideroak.com/policy/service-agreement> ; Privacy Policy at: https://spideroak.com/privacy_policy ; (last accessed November,2015)

268. <i>Spreadfast</i> ¹¹⁵⁴	Arbitration, AAA Court(if opt- out of arb.)	Austin, Texas court	SH/ PS
269. <i>Sprinkl</i> ¹¹⁵⁵	Court	Borough of Manhattan, New York	FDPIC
270. <i>Steelwedge</i> ¹¹⁵⁶	Court	Northern District, California	SH/ PS
271. <i>Stripe</i> ¹¹⁵⁷	Court	San Francisco, California – US Singapore State of Victoria- Australia Province of British Columbia, and to venue within Vancouver, - Canada ciudad de México-Mexico	SH/ no PS, JAMS For employees DPAs
272. <i>Styleseat</i> ¹¹⁵⁸	Chargeback Arbitration, LCIA	Dublin	
273. <i>SugarCRM</i> ¹¹⁵⁹	Court	San Francisco, California	
274. <i>SugarSync</i> ¹¹⁶⁰	Arbitration, AAA	California California	SH/ PS, SH/ no PS, TRUSTe

¹¹⁵⁴ Service description available at: <https://www.spredfast.com/> ; Terms of Service (ToS) at: <https://www.spredfast.com/terms> ; Privacy Policy at: <https://www.spredfast.com/privacy> ; (last accessed November,2015)

¹¹⁵⁵ Service description available at: <https://www.sprinkl.com/> ; Terms of Service (ToS) at: [https://developers.sprinkl.com/API Terms of Use](https://developers.sprinkl.com/API_Terms_of_Use) ; Privacy Policy at: <https://www.sprinkl.com/privacy/> ; (last accessed November,2015)

¹¹⁵⁶ Service description available at: <http://www.steelwedge.com/> ; Terms of Service (ToS) at: <http://www.steelwedge.com/terms> ; Privacy Policy at: <http://www.steelwedge.com/privacy> (last accessed November,2015)

¹¹⁵⁷ Service description available at: <https://stripe.com/> ; Terms of Service (ToS) at: <https://stripe.com/terms> , <https://stripe.com/help/disputes-overview> , <https://stripe.com/help/dispute-types> ; Privacy Policy at: <https://stripe.com/privacy> ; (last accessed November,2015)

¹¹⁵⁸ Service description available at: <https://www.styleseat.com/> ; Terms of Service (ToS) at: <https://www.styleseat.com/tos> ; Privacy Policy at: <https://www.styleseat.com/privacy> (last accessed November,2015)

¹¹⁵⁹ Service description available at: <https://www.sugarcrm.com/> ; Terms of Service (ToS) at: <https://www.sugarcrm.com/sugarcrm-terms-of-use> ; Privacy Policy at: <https://www.sugarcrm.com/sugarcrm-inc-privacy-policy> (last accessed November,2015)

¹¹⁶⁰ Service description available at: <https://www.sugarsync.com/> ; Terms of Service (ToS) at: <https://www.sugarsync.com/terms.html> ; Privacy Policy at: <https://www.sugarsync.com/privacy.html> (last accessed November,2015)

	Small claim court		
275. <i>SumAll</i> ¹¹⁶¹	Court	New York	TRUSTe
276. <i>Sumologic</i> ¹¹⁶²	Arbitration, JAMS		SH/ PS, TRUSTe
277. <i>Sumtotal</i> ¹¹⁶³	Court	Santa Clara, California, or other in California	SH/ no PS, Australian, Singapore,
278. <i>Symantec</i> ¹¹⁶⁴	Arbitration, AAA Courts	California - US England and Wales for EMEA, Singapore for Asia	TRUSTe. SH/ no PS, DPAs
279. <i>ThinkingPhones</i> ¹¹⁶⁵	Court	Massachusetts	
280. <i>Tigertext</i> ¹¹⁶⁶	Court	Los Angeles County, California	
281. <i>Totango</i> ¹¹⁶⁷	Court	San Francisco, California	SH/ PS, TRUSTe
282. <i>Toutapp</i> ¹¹⁶⁸	Court	Santa Clara, California	
283. <i>Trend Micro</i> ¹¹⁶⁹	Courts	California-US, England and Wales- UK	

¹¹⁶¹ Service description available at: <https://sumall.com/>; Terms of Service (ToS) at: <https://sumall.com/terms>; Privacy Policy at: <https://sumall.com/privacy> (last accessed November,2015)

¹¹⁶² Service description available at: www.sumologic.com; Terms of Service (ToS) at: <https://www.sumologic.com/terms-conditions/>; Privacy Policy at: <https://www.sumologic.com/privacy-statement/>; (last accessed November,2015)

¹¹⁶³ Service description available at: <http://www.sumtotalsystems.com/>; Terms of Service (ToS) at: <http://www.sumtotalsystems.com/legal/>; Privacy Policy at: <http://www.sumtotalsystems.com/privacy/>; (last accessed November,2015)

¹¹⁶⁴ Service description available at: <https://www.symantec.com/index.jsp>; Terms of Service (ToS) at: <https://www.symantec.com/about/profile/policies/legal.jsp>; Privacy Policy at: <http://www.symantec.com/privacy/>; (last accessed November,2015)

¹¹⁶⁵ Service description available at: <https://thinkingphones.com/>; Terms of Service (ToS) at: <https://thinkingphones.com/legal/>; Privacy Policy at: <https://thinkingphones.com/privacy/>; (last accessed November,2015)

¹¹⁶⁶ Service description available at: <http://www.tigertext.com/>; Terms of Service (ToS) at: <http://www.tigertext.com/terms-use/>; Privacy Policy at: <http://www.tigertext.com/privacy-policy/>; (last accessed November,2015)

¹¹⁶⁷ Service description available at: <http://www.totango.com/>; Terms of Service (ToS) at: <http://www.totango.com/terms-of-use/>; Privacy Policy at: <http://www.totango.com/privacy-policy/> (last accessed November,2015)

¹¹⁶⁸ Service description available at: <http://www1.toutapp.com/>; Terms of Service (ToS) at: <https://toutapp.com/terms>; Privacy Policy at: <https://toutapp.com/privacy> (last accessed November,2015)

¹¹⁶⁹ Service description available at: <http://www.trendmicro.co.uk/>; Terms of Service (ToS) at: <http://www.trendmicro.co.uk/about/legal-policies/legal-notice/index.html>; Privacy Policy at: <http://www.trendmicro.co.uk/about/legal-policies/privacy/index.html>; (last accessed November,2015)

		Germany- Germany, Austria and Switzerland, France- Fr, Italy-IT, Ireland-EMEA New South Wales, Australia Asia Pacific Hong Kong- HK, India-India, Singapore- Indonesia, Malaysia, Philippines, Singapore, Thailand
284. <i>Tuenti</i> ¹¹⁷⁰	Court	Madrid, Spain
285. <i>Twilio</i> ¹¹⁷¹	Arbitration, AAA	San Francisco County, California
286. <i>Udacity</i> ¹¹⁷²	Courts	San Mateo County, California
287. <i>Udemy</i> ¹¹⁷³	Courts	San Francisco, California
288. <i>Unbounce</i> ¹¹⁷⁴		
289. <i>Upsight</i> ¹¹⁷⁵	Arbitration, Court	In parties residence, if not then San Francisco

¹¹⁷⁰ Service description available at: <http://corporate.tuenti.com/en> ; Terms of Service (ToS) at: <http://corporate.tuenti.com/en/legal> ; Privacy Policy at: <http://corporate.tuenti.com/en/privacy> ; (last accessed November,2015)

¹¹⁷¹ Service description available at: www.twilio.com ; Terms of Service (ToS) at: <https://www.twilio.com/legal/tos> ; Privacy Policy at: <https://www.twilio.com/legal/privacy> ; (last accessed November,2015)

¹¹⁷² Service description available at: www.udacity.com; Terms of Service (ToS) at: <https://www.udacity.com/legal/tos> ; Privacy Policy at: <https://www.udacity.com/legal/privacy> ; (last accessed November,2015)

¹¹⁷³ Service description available at: www.udemy.com; Terms of Service (ToS) at: <https://www.udemy.com/terms/> ; Privacy Policy at: <https://www.udemy.com/terms/privacy/> ; (last accessed November,2015)

¹¹⁷⁴ Service description available at: <http://unbounce.com/> ; ; Terms of Service (ToS) at: <http://unbounce.com/terms-of-service/> ; Privacy Policy at: <http://unbounce.com/privacy/> ; (last accessed November,2015)

¹¹⁷⁵ Service description available at: <http://www.upsight.com/> ; Terms of Service (ToS) at: <http://www.upsight.com/pricing/terms-of-service/> ; Privacy Policy at: <http://www.upsight.com/pricing/privacy-policy/> (last accessed November,2015)

290. <i>Userve</i> ¹¹⁷⁶	Court	San Francisco, County	SH/ PS, BBB EU
291. <i>Veeva</i> ¹¹⁷⁷	Court	California	SH/ PS, TRUSTe
292. <i>Vembu Technologies</i> ¹¹⁷⁸	Courts	US	SH/ PS, ICDR/AAA Safe Harbor Program
293. <i>Veracode</i> ¹¹⁷⁹			
294. <i>Verificient</i> ¹¹⁸⁰	Courts	Delaware	
295. <i>Verizon</i> ¹¹⁸¹	Courts	New York	SH/ no PS, AAA TRUSTe,
296. <i>VictorOps</i> ¹¹⁸²	Court	Denver County and the federal Court in the City of Denver, USA	
297. <i>View the space</i> ¹¹⁸³	Court	Manhattan, New York	PS

¹¹⁷⁶ Service description available at: <https://www.uservice.com/>; Terms of Service (ToS) at: <https://www.uservice.com/tos/>; Privacy Policy at: <https://www.uservice.com/privacy/> (last accessed November,2015)

¹¹⁷⁷ Service description available at: <https://www.veeva.com/>; Terms of Service (ToS) at: <https://www.veeva.com/terms/>; Privacy Policy at: <https://www.veeva.com/privacy-policy/> (last accessed November,2015)

¹¹⁷⁸ Service description available at: <https://www.vembu.com/>; Terms of Service (ToS) at: <https://www.vembu.com/terms-service/> and <https://storegridcloud.vembu.com/tos.php>; Privacy Policy at: <https://www.vembu.com/privacy-policy/>; (last accessed November,2015)

¹¹⁷⁹ Service description available at: www.veracode.com; Terms of Service (ToS) and Privacy Policy at: <http://www.veracode.com/privacy-and-legal-policies/>; (last accessed November,2015)

¹¹⁸⁰ Service description available at: www.verificient.com; Terms of Service (ToS) at: <http://www.verificient.com/terms-of-service>; Privacy Policy at: <http://www.verificient.com/privacy-policy>; (last accessed November,2015)

¹¹⁸¹ Service description available at: <http://www.verizonenterprise.com/solutions/cloud/>; Terms of Service (ToS) at: <http://www.verizonenterprise.com/terms/us/products/cloud/verizon-cloud-services-agreement-and-schedules-112614-for-review-locked.pdf> and https://business.verizon.com/MyBusinessAccount/one.portal?nfpb=true&pageLabel=gb_policy&page_id=Internet_buisness_tos and <http://www.verizonenterprise.com/terms/emea/nl/voorwaarden/#20> and http://www.verizonenterprise.com/support/codesofpractice/complaints-disputes_uk.pdf and http://www.verizonenterprise.com/resources/customer/spain-international-master-services-agreement_en_es.pdf; Privacy Policy at: <http://www.verizon.com/about/privacy/>; (last accessed November,2015)

¹¹⁸² Service description available at: <https://victorops.com/>; Terms of Service (ToS) at: <https://victorops.com/terms-of-service/>; Privacy Policy at: <https://victorops.com/privacy-policy/>; (last accessed November,2015)

¹¹⁸³ Service description available at: <https://www.vts.com/>; Terms of Service (ToS) at: <https://www.vts.com/terms/>; PRIVACY POLICY at: <https://www.vts.com/privacy> (last accessed November,2015)

298. <i>VMware</i> ¹¹⁸⁴	Courts	Santa Clara County, California	Courts
299. <i>Watchdox</i> ¹¹⁸⁵	Court	San Francisco, California	SH/ no PS, TRUSTe
300. <i>Wave</i> ¹¹⁸⁶	Court	Province of Ontario,	TRUSTe
301. <i>Webroot</i> ¹¹⁸⁷	Courts	Denver and Boulder Counties in Colorado, USA.	SH/ no PS, TRUSTe
302. <i>Websense</i> ¹¹⁸⁸	Courts	San Diego, California - USA England and Wales- UK Dublin – Ireland	PS
303. <i>WhatsApp</i> ¹¹⁸⁹	Court	Santa Clara County, California	
304. <i>Whitehat Security</i> ¹¹⁹⁰	Court	Santa Clara, California	SH/ no PS, ICDR/AAA U.S.-EU Safe Harbor program
305. <i>Workable</i> ¹¹⁹¹	Court	English Courts	

¹¹⁸⁴ Service description available at: <http://www.vmware.com/> ; Terms of Service (ToS) and Privacy Policy at: <https://www.vmware.com/help/legal.html#sthash.34MW6cjd.dpuf> ; (last accessed November,2015)

¹¹⁸⁵ Service description available at: <https://www.watchdox.com/us/>; Terms of Service (ToS) at: <https://www.watchdox.com/en/terms-and-conditions/>; Privacy Policy at: <https://www.watchdox.com/en/privacy-policy/> (last accessed November,2015)

¹¹⁸⁶ Service description available at: www.waveapps.com ; Terms of Service (ToS) at: <https://my.waveapps.com/terms/> ; Privacy Policy at: <https://my.waveapps.com/privacy/> ; (last accessed November,2015)

¹¹⁸⁷ Service description available at: <http://www.webroot.com/us/en/>; Terms of Service (ToS) at: <http://www.webroot.com/us/en/company/about/legal/>; Privacy Policy at: <http://www.webroot.com/us/en/company/about/privacy/>; (last accessed November,2015)

¹¹⁸⁸ Service description available at: <http://www.websense.com/content/home.aspx>; Terms of Service (ToS) at: <http://www.websense.com/content/legal.aspx> and <http://www.websense.com/content/product-end-user-terms-and-conditions.aspx> and <http://www.websense.com/content/reseller-terms-and-conditions.aspx> ; Privacy Policy at: <http://www.websense.com/content/privacy-policy.aspx>; (last accessed November,2015)

¹¹⁸⁹ Service description available at: <https://www.whatsapp.com>; Terms of Service (ToS) at: <https://www.whatsapp.com/legal/#TOS> ; Privacy Policy at: <https://www.whatsapp.com/legal/#Privacy> ; (last accessed November,2015)

¹¹⁹⁰ Service description available at: <https://www.whitehatsec.com/> ; Terms of Service (ToS) at: <https://www.whitehatsec.com/terms/25Nov2013/index.html> ; Privacy Policy at: <https://www.whitehatsec.com/safeharbor.html> ; (last accessed November,2015)

¹¹⁹¹ Service description available at: <https://www.workable.com/> ; Terms of Service (ToS) at: <https://www.workable.com/terms> Privacy Policy at: <https://www.workable.com/privacy> ; (last accessed November,2015)

306. <i>Workday</i> ¹¹⁹²	Courts	Alameda, California	SH/ PS, TRUSTe, DPAs APEC TRUSTe
307. <i>Wrike</i> ¹¹⁹³	Court	California	SH/ PS, BBB EU
308. <i>Xactly</i> ¹¹⁹⁴	Court	Texas	SH/ no PS, TRUSTe
309. <i>XING</i> ¹¹⁹⁵		German Law	
310. <i>Yesware</i> ¹¹⁹⁶	Court If less than 10000 Arbitration	Massachusetts Boston	SH/ no PS, BBB EU
311. <i>Yodle</i> ¹¹⁹⁷	Court BBB	New York (law)	New York court
312. <i>Zapier</i> ¹¹⁹⁸	Court	Wilmington, Delaware.	SH/ PS, TRUSTe,
313. <i>Zendesk</i> ¹¹⁹⁹	Courts	San Francisco, California, Singapore	SH/ PS, TRUSTe
314. <i>Zenefits</i> ¹²⁰⁰	Arbitration, JAMS Court	San Francisco, California	

¹¹⁹² Service description available at: <http://www.workday.com/>; Terms of Service (ToS) at: <http://www.workday.com/company/legal.php>; Privacy Policy at: <http://www.workday.com/company/privacy.php>; (last accessed November,2015)

¹¹⁹³ Service description available at: <https://www.wrike.com> ; Terms of Service (ToS) at: <https://www.wrike.com/terms/> ; Privacy Policy at: <https://www.wrike.com/privacy/> (last accessed November,2015)

¹¹⁹⁴ Service description available at: <https://www.xactlycorp.com/> ; Terms of Service (ToS) at: http://www.xactly.net/terms_and_conditions/ ; Privacy Policy at: <https://www.xactlycorp.com/privacy-policy/> (last accessed November,2015)

¹¹⁹⁵ Service description available at: <https://www.xing.com/> Terms of Service (ToS) at: <https://www.xing.com/terms> ; Privacy Policy at: <https://www.xing.com/privacy> ; (last accessed November,2015)

¹¹⁹⁶ Service description available at: <http://www.yesware.com/> ; Terms of Service (ToS) at: <http://www.yesware.com/terms> ; Privacy Policy at: <http://www.yesware.com/privacy> (last accessed November,2015)

¹¹⁹⁷ Service description available at: <http://www.yodle.com/> ; Terms of Service (ToS) at: <http://www.yodle.com/legal/terms/general-terms> ; Privacy Policy at: <http://www.yodle.com/legal/policies/privacy-policy> ; (last accessed November,2015)

¹¹⁹⁸ Service description available at: <https://zapier.com/> ; Terms of Service (ToS) at: <https://zapier.com/terms/> ; Privacy Policy at: <https://zapier.com/privacy/> ; (last accessed November,2015)

¹¹⁹⁹ Service description available at: <https://www.zendesk.com/> ; Terms of Service (ToS) at: <https://www.zendesk.com/company/terms/>; Privacy Policy at: <https://www.zendesk.com/company/privacy/>; (last accessed November,2015)

¹²⁰⁰ Service description available at: <https://www.zenefits.com/> ; Terms of Service (ToS) at: <https://www.zenefits.com/tos/> Privacy Policy at: <https://www.zenefits.com/privacy/> ; (last accessed November,2015)

315. Zerto ¹²⁰¹	Court	Tel Aviv-Yafo , Israel	SH/ no PS
316. Zetta ¹²⁰²	Courts	Santa Clara County, California	
317. Zeus Technology ¹²⁰³	Courts Arbitration, ICC	Santa Clara County, California- US Geneva- Non US	SH/ no PS, DPAs
318. Zimory ¹²⁰⁴	Courts	Berlin- Charlottenburg	
319. ZipRecruiter ¹²⁰⁵	Arbitration, AAA Online Courtsfor IPR and privacy	California	SH/ PS, TRUSTe
320. Zoho ¹²⁰⁶	Arbitration, AAA IPR complaints	California Online Zoho mediation	SH/ no PS, TRUSTe
321. Zuberance ¹²⁰⁷	Court	San Mateo, California	SH/ no PS
322. Zuora ¹²⁰⁸	Courts	Santa Clara, California	SH/ PS, TRUSTe

¹²⁰¹ Service description available at: <http://www.zerto.com/>; Terms of Service (ToS) at: <http://www.zerto.com/terms-of-use/>; Privacy Policy at: <http://www.zerto.com/privacy-policy/>; (last accessed November,2015)

¹²⁰² Service description available at: <http://www.zetta.net/>; Terms of Service (ToS) and Privacy Policy at: <http://www.zetta.net/legal.php>; (last accessed November,2015)

¹²⁰³ Service description available at: <http://www.brocade.com/en.html>; Terms of Service (ToS) at: <http://www.brocade.com/en/legal/purchase.html>; Privacy Policy at: <http://www.brocade.com/en/legal/privacy-policy.html>; (last accessed November,2015)

¹²⁰⁴ Service description available at: <http://www.zimory.com/>; Terms of Service (ToS) at: <http://www.zimory.com/en/meta/legal-info.html> and <http://forum.zimory.com/index.php?id=17>; Privacy Policy at: <http://www.zimory.com/en/meta/privacy-policy.html>; (last accessed November,2015)

¹²⁰⁵ Service description available at: <https://www.ziprecruiter.com/>; Terms of Service (ToS) at: <https://www.ziprecruiter.com/terms>; Privacy Policy at: <https://www.ziprecruiter.com/privacy>; (last accessed November,2015)

¹²⁰⁶ Service description available at: www.zoho.com; Terms of Service (ToS) at: <https://www.zoho.com/terms.html> and <https://www.zoho.com/ipr-complaints.html>; Privacy Policy at: <https://www.zoho.com/privacy.html> (last accessed November,2015)

¹²⁰⁷ Service description available at: <http://www.zuberance.com/>; Terms of Service (ToS) at: <http://www.zuberance.com/terms/>; Privacy Policy at: <http://www.zuberance.com/privacy/>; (last accessed November,2015)

¹²⁰⁸ Service description available at: <http://www.zuora.com/>; Terms of Service (ToS) at: <https://www.zuora.com/terms-conditions/>; Privacy Policy at: <https://www.zuora.com/privacy-statement/>; (last accessed November,2015)

Appendix B

Examples of most common dispute resolution clauses

Informal dispute resolution

Examples of Cloudflare and Lookout

Available at: www.cloudflare.com and <https://www.lookout.com/>

ToS at: <https://www.cloudflare.com/terms> and <https://www.lookout.com/legal/terms>

Cloudflare:

In the case of any disputes under this Agreement, the parties shall first attempt in good faith to resolve their dispute informally, or by means of commercial mediation, without the necessity of a formal proceeding.

Lookout:

Please Contact Us First: Our goal is for you to be happy and satisfied. If you have a dispute with Lookout, you agree to contact us and attempt to resolve the dispute with us, informally.

Exclusive jurisdiction of providers domicile court

Examples of Zapier and Preact

Available at: <https://zapier.com/> and <http://www.preact.com/>

ToS at: <https://zapier.com/terms/> and <http://www.preact.com/company/terms.html>

Zapier:

These Terms of Service will be governed by and construed in accordance with the laws of the State of Delaware, without reference to its conflict of laws principles. All disputes arising out of or relating to these Terms of Service will be submitted to the exclusive jurisdiction of a court of competent jurisdiction located in Wilmington, Delaware, and each party irrevocably consents to such personal jurisdiction and waives all objections to this venue.

Preact:

19. Governing Law.

These Terms and each Order Form shall be governed by the laws of the State of California, without reference to its conflict of laws rules. The exclusive jurisdiction and venue for all disputes hereunder shall be the state and federal courts located in San Francisco County, California, and each party hereby irrevocably consents to the jurisdiction of such courts. Application of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transaction Act are excluded from these Terms. All proceedings shall be conducted in English. Notwithstanding the foregoing, Preact reserves the right to seek injunctive relief against you to enforce these Terms in any venue and court of competent jurisdiction.

**Multiple jurisdictions in ToS
(exclusive court jurisdiction in case of dispute)**

Example of Box

Available at: <https://www.box.com>

ToS at: <https://www.box.com/legal/termsofservice/> and <https://www.box.com/legal/termsofservice/GB/>

For US residents:

17. CONTRACTING PARTY; GOVERNING LAW; LOCATION FOR RESOLVING DISPUTES

You are contracting with Box, Inc. with an address at 4440 El Camino Real Los Altos, CA 94022 USA. The laws of the State of California, U.S.A. govern the interpretation of these Terms and apply to claims for breach of these Terms, regardless of conflict of laws principles. The parties specifically exclude from application to these Terms the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transactions Act. All other claims, including claims regarding consumer protection laws, unfair competition laws, and in tort, will, only to the extent required by applicable law, be subject to the laws of your state of residence in the United States, or, if you live outside the United States, the laws of the country in which you reside. You and we irrevocably consent to the exclusive jurisdiction and venue of the state or federal courts for Santa Clara County, California, USA, for all disputes arising out of or relating to these Terms. Box may assign this contract to another entity at any time with or without notice to you.

For All others

16. GOVERNING LAW; LOCATION FOR RESOLVING DISPUTES

The laws of England and Wales shall govern the interpretation of these Terms and apply to claims for breach of these Terms. The parties specifically exclude from application to these Terms the United Nations Convention on Contracts for the International Sale of Goods. The Contract and any disputes or claims (whether contractual or non-contractual) arising out of or in connection with it, its subject matter or formation will be subject to and construed in accordance with the law of England and Wales and you and we irrevocably consent to the exclusive jurisdiction of the courts of England and Wales. Notwithstanding the foregoing and save where consumer law prohibits such actions, Box may bring proceedings in the courts of any other state which have jurisdiction for reasons other than the parties' choice, for the purpose of seeking: (i) an injunction, order or other non-monetary relief (or its equivalent in such other state); and/or (ii) any relief or remedy which, if it (or its equivalent) were granted by the courts of England and Wales would not be enforceable in such other state. Nothing in this clause is intended to prevent any consumer that is a Customer from relying on the consumer law applicable in the jurisdiction in which the Customer resides.

Multiple Jurisdictions in ToS
(arbitration and selected jurisdiction if arbitration is not applicable)

Example of Evernote

Available at: <https://evernote.com>
ToS at: <https://evernote.com/legal/tos.php?var=c>

Let us Know About Your Complaint.

We want to know if you have a problem so we encourage you to contact our Customer Support team if you have any concerns with respect to the operation of the Service or any Evernote Software, as we want to ensure that you have an excellent experience.

Initiating a Formal Claim.

If you conclude that we have not satisfied your concern and that you must pursue legal action, you agree that your claim must be resolved by the processes set forth in these Terms. Evernote provides the Service to you on the condition that you accept the dispute resolution provisions described below, so if you initiate any claim against Evernote in any other manner, you shall be in violation of these Terms and you agree that Evernote shall be entitled to have such action dismissed or otherwise terminated and you agree to reimburse Evernote for its reasonable costs incurred in defending against such improperly initiated claim. You agree that prior to initiating any formal proceedings against Evernote, you will send us a notice to our attorneys at legal notice AT Evernote DOT com and state that you are providing a “Notice of Dispute.” Upon receipt of a Notice of Dispute, you and we shall attempt to resolve the dispute through informal negotiation within sixty (60) days from the date the Notice of Dispute is sent. If the dispute remains unresolved, either you or we may initiate formal proceedings according to these Terms.

Except where our dispute is being resolved pursuant to an arbitration (as provided below), if you are a resident of the United States or Canada, you agree that any claim or dispute you may have against Evernote must be resolved exclusively by a state or federal court located in San Mateo County, California. You agree to submit to the exclusive personal jurisdiction of the courts located within San Mateo County, California (and, for the avoidance of doubt, to exclude the jurisdiction of any other court) for the purpose of litigating all such claims or disputes.

Except where our dispute is being resolved pursuant to an arbitration (as provided below), if you reside in Brasil, you agree that any claim or dispute you may have against Evernote must be resolved exclusively by the courts in São Paulo-SP, Brasil. You agree to submit to the exclusive personal jurisdiction of the courts located within São Paulo-SP, Brasil (and, for the avoidance of doubt, to exclude the jurisdiction of any other court) for the purpose of litigating all such claims or disputes.

Except where our dispute is being resolved pursuant to an arbitration (as provided below), if you are not a resident of the United States, Canada, or Brasil, you agree that any claim or dispute you may have against Evernote must be resolved exclusively by the courts in Zurich, Switzerland. You agree to submit to the exclusive personal jurisdiction of the courts located within Zurich, Switzerland (and, for the avoidance of doubt, to exclude the jurisdiction of any other court) for the purpose of litigating all such claims or disputes.

Alternative Dispute Resolution Process.

Unless you are subject to the Arbitration Agreement set out below, and subject to any applicable laws, if a claim arises between you and Evernote where the total value of such claim is less than US\$10,000, the party initiating the claim may elect to have the dispute resolved pursuant to a binding arbitration process that does not require attendance in person. This "Alternative Dispute Resolution Process" shall be initiated by either party sending notice to the other, in which event you and Evernote agree to use our reasonable efforts to agree within thirty (30) days upon an individual or service to manage the Alternative Dispute Resolution Process (the "Arbitration Manager") according to the following requirements: (i) neither party shall be required to attend any proceeding in person, (ii) the proceeding will be conducted via written submissions, telephone or online communications or as otherwise agreed upon, (iii) the fees for the Arbitration Manager will be borne equally by the parties or be submitted to the Arbitration Manager to determine as part of the dispute and (iv) the judgment rendered by the Arbitration Manager may be entered in any court of competent jurisdiction for enforcement.

Arbitration Agreement.

If you reside in the United States or are otherwise subject to the US Federal Arbitration Act, you and Evernote agree that any and all disputes or claims that have arisen or may arise between us - except any dispute relating to the enforcement or validity of your, our or either of our licensors' intellectual property rights - shall be resolved exclusively through final and binding arbitration, rather than in court, except that you may assert claims in small claims court, if your claims qualify. The Federal Arbitration Act governs the interpretation and enforcement of this Arbitration Agreement. (Note that if you were an Evernote Service user prior to December 4, 2012 and formally elected to opt out of the Arbitration Agreement pursuant to the procedures set out in our Terms of Service that were effective as of December 4, 2012, you are not subject to this Arbitration Agreement.)

Our arbitration proceedings would be conducted by the American Arbitration Association ("AAA") under its rules and procedures applicable at that time, including the AAA's Supplementary Procedures for Consumer-Related Disputes (to the extent applicable), as modified by our Arbitration Agreement. You may review those rules and procedures, and obtain a form for initiating arbitration proceedings at the AAA's website. The arbitration shall be held in the county in which you reside or at another mutually agreed location. If the value of the relief sought is US\$10,000 or less, either of us may elect to have the arbitration conducted by telephone or based solely on written submissions, which election shall be binding on us subject to the arbitrator's discretion to require an in-person hearing. Attendance at an in-person hearing may be made by telephone by you and/or us, unless the arbitrator requires otherwise.

The arbitrator will decide the substance of all claims in accordance with the laws of the State of California, including recognized principles of equity, and will honor all claims of privilege recognized by law. The arbitrator shall not be bound by rulings in prior arbitrations involving different Evernote users, but is bound by rulings in prior arbitrations involving the same user to the extent required by applicable law. The arbitrator's award shall be final and binding and judgment on the award rendered by the arbitrator may be entered in any court possessing jurisdiction over the parties, except for a limited right of appeal under the Federal Arbitration Act.

The AAA rules will govern the payment of all filing, administration and arbitrator fees, unless our Arbitration Agreement expressly provides otherwise. If the amount of any claim in an arbitration is US\$10,000 or less, Evernote will pay all filing, administration and arbitrator fees associated with the arbitration, so long as (i) you make a written request for such payment of fees and submit it to the AAA with your Demand for Arbitration and (ii) your claim is not determined by the arbitrator to be frivolous. In such case, we will make arrangements to pay all necessary fees directly to the AAA. If the amount of the claim exceeds US\$10,000 and you are able to demonstrate that the costs of arbitration will be prohibitive as compared to the costs of litigation, Evernote will pay as much of the filing, administration and arbitrator fees as the arbitrator deems necessary to prevent the arbitration from being cost-prohibitive. If the arbitrator determines the claim(s) you assert in the arbitration are frivolous, you agree to reimburse Evernote for all fees associated with the arbitration paid by Evernote on your behalf, which you otherwise would be obligated to pay under the AAA's rules.

YOU AND EVERNOTE AGREE, AS PART OF THE ARBITRATION AGREEMENT, THAT EACH OF US MAY BRING CLAIMS AGAINST THE OTHER ONLY ON AN INDIVIDUAL BASIS AND NOT AS PART OF ANY PURPORTED CLASS OR REPRESENTATIVE ACTION OR PROCEEDING. WE REFER TO THIS AS THE “PROHIBITION OF CLASS AND REPRESENTATIVE ACTIONS.” UNLESS BOTH YOU AND WE AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE OR JOIN YOUR OR OUR CLAIM WITH ANOTHER PERSON'S OR PARTY'S CLAIMS, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A CONSOLIDATED, REPRESENTATIVE OR CLASS PROCEEDING. THE ARBITRATOR MAY ONLY AWARD RELIEF (INCLUDING MONETARY, INJUNCTIVE, AND DECLARATORY RELIEF) IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF NECESSITATED BY THAT PARTY'S INDIVIDUAL CLAIM(S). ANY RELIEF AWARDED CANNOT AFFECT OTHER EVERNOTE USERS.

Except with respect to the Prohibition of Class and Representative Actions, if a court decides that any part of this Arbitration Agreement is invalid or unenforceable, the other parts of this Arbitration Agreement shall continue to apply. If a court decides that the Prohibition of Class and Representative Actions is invalid or unenforceable, then this entire Arbitration Agreement shall be null and void. The remainder of these Terms and this Section (What Do I Do if I think I Have A Claim Against Evernote?) will continue to apply.

Claims Are Time-Barred.

You agree that regardless of any statute or law to the contrary or the applicable dispute resolution process, any claim or cause of action you may have arising out of or related to use of the Service or otherwise under these must be filed within one (1) year after such claim or cause of action arose or you hereby agree to be forever barred from bringing such claim.

AAA arbitration

Example of Cloud 9

Available at : <https://c9.io/> and ToS at: <https://c9.io/site/terms-of-service>

14. User Disputes. Your interactions with other Users found on or through the Service are solely between you and such other Users. If there is a dispute between you and any third party (including, without limitation, any User), Cloud9 IDE, inc is under no obligation to become involved; however, we reserve the right, but have no obligation, to monitor disputes between you and other Users.

15.1 Governing Law. To the fullest extent permitted by law, and except as explicitly provided otherwise, these Terms and any disputes arising out of or relating to it will be governed by the laws of the state of California, in accordance with the Federal Arbitration Act, without giving effect to any principles that provide for the application of the law of any other jurisdiction. The United Nations Convention on Contracts for the International Sale of Goods does not apply to these Terms. The laws of the jurisdiction where you are located may be different from California law. You shall always comply with all international and domestic laws, ordinances, regulations, and statutes that are applicable to your purchase and use of the Service hereunder.

15.2 Arbitration. If you and we have a disagreement related to the Service or the validity of these Terms, we'll try to resolve it by talking with each other. If we can't resolve it that way, we both agree to use confidential binding arbitration, not lawsuits (except for small claims court cases) to resolve the dispute. We agree that any controversy or claim between us will be settled by one neutral arbitrator before the American Arbitration Association (“AAA”). There's no judge or jury in arbitration, arbitration procedures are simpler and more limited than rules applicable in court, and review is limited. But you are entitled to a hearing and the arbitrator's decisions are as enforceable as any court order.

(a) Arbitration shall be subject to the Federal Arbitration Act and not any state arbitration law. As modified by these terms of conditions of use, the arbitration will be governed by the AAA's Commercial

Arbitration Rules and, if the arbitrator deems them applicable, the Supplementary Procedures for Consumer Related Disputes (collectively “Rules and Procedures”). We further agree that: (i) the arbitration shall be held at a location determined by AAA pursuant to the Rules and Procedures (provided that such location is reasonably convenient for you), or at such other location as may be mutually agreed upon by you and us; (ii) any claims brought by you or us must be brought in our individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding; (iii) the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding; (iv) in the event that you are able to demonstrate that the costs of arbitration will be prohibitive as compared to costs of litigation, we will pay as much of your filing and hearing fees in connection with the arbitration as the arbitrator deems necessary to prevent the arbitration from being cost-prohibitive as compared to the cost of litigation; (v) we also reserve the right in our sole and exclusive discretion to assume responsibility for all of the costs of the arbitration; (vi) the arbitrator shall honor claims of privilege and privacy recognized at law; and (g) a decision by the arbitrator (including any finding of fact and/or conclusion of law) against either you or us shall be confidential unless otherwise required to be disclosed by law or by any administrative body.

(b) With the exception of subparts (ii) and (iii) in the paragraph above (prohibiting arbitration on a class or collective basis), if any part of this arbitration provision is deemed to be invalid, unenforceable or illegal, or otherwise conflicts with the Rules and Procedures, then the balance of this arbitration provision shall remain in effect and shall be construed in accordance with its terms as if the invalid, unenforceable, illegal or conflicting provision were not contained in these terms of conditions of use. If, however, either subpart (ii) or (iii) is found to be invalid, unenforceable or illegal, then the entirety of this arbitration provision shall be null and void, and neither you or we shall be entitled to arbitration, and the provision below titled “Forum and Jurisdiction” will apply.

(c) For more information on AAA, its Rules and Procedures, and how to file an arbitration claim, you may call AAA at 800-778-7879, write the AAA at 1633 Broadway, 10th Floor, New York, New York 10019, or visit the AAA website at <http://www.adr.org>.

15.3 Forum and Jurisdiction: You and Cloud9 IDE, inc agree that (i) claims for infringement or misappropriation of the other party’s patent, copyright, trademark, or trade secret (including injunctive remedies or an equivalent type of urgent legal relief for asserted violation or threatened violation of intellectual property rights), (ii) claims for interim equitable relief in court in order to maintain the status quo pending the arbitrator’s ruling, and (iii) if this subparts (ii) and (iii) in Section 15.2(a) are held unenforceable or any claims, demands, or disputes are initiated, filed, or proceed in court rather than in arbitration for whatever reason, such claims, demands, or disputes shall be exclusively resolved by an appropriate federal or state court located in the County of San Mateo, California. You and Cloud9 IDE, inc agree to submit to the personal jurisdiction of the courts located in the County of San Mateo, California for such purpose.

JAMS arbitration

Example of Wordpress - Automattic

Available at: <https://automattic.com> and <https://wordpress.com>; ToS at: <https://en.wordpress.com/tos/>

This Agreement constitutes the entire agreement between Automattic and you concerning the subject matter hereof, and they may only be modified by a written amendment signed by an authorized executive of Automattic, or by the posting by Automattic of a revised version. Except to the extent applicable law, if any, provides otherwise, this Agreement, any access to or use of our Services will be governed by the laws of the state of California, U.S.A., excluding its conflict of law provisions, and the proper venue for any disputes arising out of or relating to any of the same will be the state and federal courts located in San Francisco County, California. Except for claims for injunctive or equitable relief or claims regarding intellectual property rights (which may be brought in any competent court without the posting of a bond),

any dispute arising under this Agreement shall be finally settled in accordance with the Comprehensive Arbitration Rules of the Judicial Arbitration and Mediation Service, Inc. (“JAMS”) by three arbitrators appointed in accordance with such Rules. The arbitration shall take place in San Francisco, California, in the English language and the arbitral decision may be enforced in any court. The prevailing party in any action or proceeding to enforce this Agreement shall be entitled to costs and attorneys’ fees. If any part of this Agreement is held invalid or unenforceable, that part will be construed to reflect the parties’ original intent, and the remaining portions will remain in full force and effect. A waiver by either party of any term or condition of this Agreement or any breach thereof, in any one instance, will not waive such term or condition or any subsequent breach thereof. You may assign your rights under this Agreement to any party that consents to, and agrees to be bound by, its terms and conditions; Automattic may assign its rights under this Agreement without condition. This Agreement will be binding upon and will inure to the benefit of the parties, their successors and permitted assigns.

Safe Harbor compliance and dispute resolution

Examples of Chargify and Cloudera

Available at: <https://www.chargify.com> and <http://www.cloudera.com/>

Privacy Policy at: <https://www.chargify.com/privacy-policy/> and <http://www.cloudera.com/legal/privacy-policy.html>

Chargify:

Safe Harbor Chargify is committed to adhering to the Safe Harbor privacy principles and the 15 FAQs that make up the U.S.-EU Safe Harbor Framework. Chargify conducts itself in compliance with the U.S.-EU Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries. Chargify has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view Chargify’s certification, please visit www.export.gov/safeharbor/.

Chargify has committed to refer unresolved privacy complaints under the U.S.-EU Safe Harbor Privacy Principles to an independent dispute resolution mechanism, the BBB EU SAFE HARBOR, operated by the Council of Better Business Bureaus. If you do not receive timely acknowledgment of your complaint, or if your complaint is not satisfactorily addressed by Chargify, please visit the BBB EU SAFE HARBOR web site at www.bbb.org/us/safe-harbor-complaints for more information and to file a complaint.

Cloudera:

Cloudera has been awarded TRUSTe's Privacy Seal signifying that this privacy policy and practices have been reviewed by TRUSTe for compliance with TRUSTe’s Program Requirements and the TRUSTed Cloud Program Requirements including transparency, accountability and choice regarding the collection and use of your personal information. TRUSTe's mission, as an independent third party, is to accelerate online trust among consumers and organizations globally through its leading privacy trustmark and innovative trust solutions. If you have questions or complaints regarding our privacy policy or practices, please contact us at info@cloudera.com. If you are not satisfied with our response you can contact TRUSTe here.

The TRUSTe program covers our collection, use and disclosure of information we collect through our website, www.cloudera.com, our Platform and does not cover information that may be collected through downloadable software or through our mobile applications. The use of information collected through our service shall be limited to the purpose of providing the service for which the Client has engaged Cloudera.

Cloudera complies with the U.S. – E.U. Safe Harbor framework and the U.S. - Swiss Safe Harbor framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal data from European Union member countries and Switzerland. Cloudera has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view Cloudera’s certification, please visit <http://www.export.gov/safeharbor/>.

DMCA and Copyright infringement policies

Examples of Sumologic and Sumtotal Systems

Availbale at: <https://www.sumologic.com> and <http://www.sumtotalsystems.com>

ToS at: <https://www.sumologic.com/terms-conditions/> and <http://www.sumtotalsystems.com/legal/infringement.html>

Sumologic:

COPYRIGHT DISPUTE POLICY. Company has adopted the following general policy toward copyright infringement in accordance with the Digital Millennium Copyright Act or DMCA (posted at www.lcweb.loc.gov/copyright/legislation/dmca.pdf). The address of Company’s Designated Agent to Receive Notification of Claimed Infringement (“Designated Agent”) is listed at the end of this Section. It is Company’s policy to (1) block access to or remove material that it believes in good faith to be copyrighted material that has been illegally copied and distributed by any of our advertisers, affiliates, content providers, members or users; and (2) remove and discontinue service to repeat offenders.

Sumtotal Systems:

Notice and Procedure for Making Claims of Copyright Infringement

If you believe that your work has been copied in a way that constitutes copyright infringement, please provide the SumTotal Systems copyright agent with the written information specified below.

NOTE: THE FOLLOWING INFORMATION IS PROVIDED EXCLUSIVELY FOR NOTIFYING THE SERVICE PROVIDER REFERENCED BELOW THAT YOUR COPYRIGHTED MATERIAL MAY HAVE BEEN INFRINGED. ALL OTHER INQUIRIES, SUCH AS REQUESTS FOR TECHNICAL ASSISTANCE, REPORTS OF EMAIL ABUSE, AND PIRACY REPORTS, WILL NOT RECEIVE A RESPONSE THROUGH THIS PROCESS.

Written notification must be submitted to the following Designated Agent:

Service Provider(s): SumTotal Systems, LLC; Click2learn, Inc.; Docent, Inc.

Name of Agent Designated to Receive Notification of Claimed Infringement: General Counsel

Full Address of Designated Agent to Which Notification Should be Sent:

SumTotal Systems, LLC
2850 NW 43rd Street
Suite #150, Gainesville
FL 32606 USA

Telephone Number of Designated Agent: +1 352 264 2800

Facsimile Number of Designated Agent: +1 352 374 2257

Email Address of Designated Agent: copyright@sumtotalsystems.com

To be effective, the Notification must include the following:

1. A physical or electronic signature of a person authorized to act on behalf of the owner of the copyright interest that is alleged to have been infringed;
2. A description of the copyrighted works that you claim have been infringed and identification of the material in such work(s) that you claim to be infringing, or if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site;
3. A description of where the material that you claim is infringing is located on the SumTotal Systems site and identification of the material that is to be removed or access to which is to be disabled;
4. Information reasonably sufficient to permit the service provider to contact you, such as your physical address, telephone number, and email address;
5. A statement by you that you have a good faith belief that the use of the material identified in your Notice in the manner complained of is not authorized by the copyright owner, its agent, or the law.
6. A statement by you that the information in your Notice is accurate and, under penalty of perjury, that you are the copyright owner or authorized to act on behalf of the copyright owner; and
7. A statement requesting that SumTotal Systems take a specific act with respect to the alleged infringement (e.g. removal, access restricted or disabled).

Appendix C

Consumer ADR providers in EU data as provider on 31st January 2017

		Binding on trades	Binding on consumers and trades	Binding upon agreement	Electricity	Internet services	Other (includes both goods and services)	Other communication services
Country	Austria	-	-	-	1	3	1	1
	Bulgaria	-	-	1	2	1	-	2
	Belgium	-	1	-	1	2	2	1
	Cyprus	-	1	-	1	1	-	1
	Czech Republic	-	3	-	1	1	2	1
	Denmark	-	-	-	1	2	1	1
	Finland	-	-	-	1	1	1	1
	Estonia	-	-	-	1	1	-	1
	France	-	-	-	2	2	2	1
	Germany	3	-	8	-	2	2	2
	Greece	-	-	-	2	2	2	2
	Hungary	1	-	-	-	-	-	-
	Ireland	-	-	-	8	1	-	-
	Italy	-	2	-	-	14	4	4
	Latvia	2	-	1	1	1	2	1
	Lithuania	-	4	-	2	1	1	1
	Luxembourg	-	-	-	1	1	1	1
	Malta	-	-	2	1	-	-	-
	Netherlands	-	3	-	1	1	1	1
	Portugal	1	2	10	10	9	10	9
	Slovakia	-	-	5	2	2	2	2
Slovenia	-	3	-	3	3	3	3	
Sweden	2	-	-	1	1	1	1	
United Kingdom	14	5	12	1	5	7	2	
The entity is competent for disputes initiated by	C2B	23	24	39	44	57	45	39
	B2C	0	4	2	1	4	3	2
	Both (C2B and B2C)	0	4	2	1	4	3	2
	in writing	22	24	39	43	56	44	39
	orally	23	17	28	33	31	31	25

Conduct of the procedure	in writing, orally	12	17	28	32	30	30	25						
The physical presence of the parties and/or of their representative	Not required	13	15	26	22	31	27	23						
	Required	10	9	13	22	26	18	16						
Fees	No fees have to be paid by trader	8	9	17	28	29	21	24						
	No fees have to be paid by consumer	21	14	29	33	39	34	30						
	No fees have to be paid by consumer and trader	7	8	16	27	27	20	22						
	No fees have to be paid by consumer but have to be paid by trader	1 4	13(F) 1(V)	6 3(V)	3(F) 10(V)	1 3	6 5(V)	1 2	3(F) 9(V)	14 8	6(F) 8(V)	1 7(V)		
	Fees have to be paid by consumer but not by trader	1	1(F) 0(V)	1 1(V)	1(F) 0(V)	1	1(F) 0(V)	2	1(F) 1(V)	1	1(F) 0(V)	2	1(F) 1(V)	
	Fees have to be paid by consumer and by trader	1	0(F) 1(V) 0(F & V)	9 4(V) 2(F & V)	3(F) 4(V) 1(F & V)	9	4(F) 4(V) 1(F & V)	1 0	2(F) 8(V) 0(F & V)	1 6	2(F) 13(V) 1(F & V)	10 7	1(F) 9(V) 0(F & V)	1(F) 6(V) 0(F & V)
	Fees have to be paid by the consumer	2	10	10	11	18	11	9						
	Fees have to be paid by the trader	15	15	22	16	28	24	15						
	Average length of the procedure	From 1 to and including 30 days (1 month)	6	6	10	8	10	7	6					
	From 31 to and including	4	3	12	11	17	12	12						

	60 days (2 months)							
	From 61 to and including 90 days (3 months)	12	13	14	25	29	26	21
	More than 90 days	1	1	3	0	1	0	0

Table B.		Bindi ng on trade s	Binding on consum ers and trades	Binding upon agreem ent	Electri city	Intern et service s	Other (includes both goods and services)	Other comm unicati on service s
The entity is competent for disputes initiated by	C2B	23	24	39	44	57	45	39
	B2C	0	4	2	1	4	3	2
	Both (C2B and B2C)	0	4	2	1	4	3	2
Conduct of the procedure	in writing	22	24	39	43	56	44	39
	orally	23	17	28	33	31	31	25
	in writing, orally	12	17	28	32	30	30	25
The physical presence of the parties and/or of their representa tive	Not required	13	15	26	22	31	27	23
	Required	10	9	13	22	26	18	16
Fees	No fees have to be paid by trader	8	9	17	28	29	21	24
	No fees have to be paid by consumer	21	14	29	33	39	34	30
	No fees have to be paid by consumer and trader	7	8	16	27	27	20	22

	No fees have to be paid by consumer but have to be paid by trader	14	6	13	6	12	14	8
	Fees have to be paid by consumer but not by trader	1	1	1	1	2	1	2
	Fees have to be paid by consumer and by trader	1	9	9	10	16	10	7
	Fees have to be paid by the consumer	2	10	10	11	18	11	9
	Fees have to be paid by the trader	15	15	22	16	28	24	15
Average length of the procedure	From 1 to and including 30 days (1 month)	6	6	10	8	10	7	6
	From 31 to and including 60 days (2 months)	4	3	12	11	17	12	12
	From 61 to and including 90 days (3 months)	12	13	14	25	29	26	21
	More than 90 days	1	1	3	0	1	0	0

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