

Universal Standards for the Concept of Fairness in Online Dispute Resolution in B2C E-Disputes

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ABSTRACT

The internet has created a global marketplace where consumers can purchase goods and services. Disputes regarding online purchases are known as electronic commerce disputes or “e-disputes.” The need for an appropriate means of resolving e-disputes has resulted in the development of Online Dispute Resolution (ODR), a mechanism for resolving these disputes through the internet. Currently, there is no universal agreement about the concept of procedural fairness in ODR systems, although this issue has been widely discussed in the field of Alternative Dispute Resolution (ADR). This Article aims to develop a set of standards, so e-commerce users have faith in the fairness of ODR systems.

This study adopted a new approach in the ODR field that is not mirrored by any similar research. This Article used a quantitative and qualitative approach for gathering data. The study was conducted over three phases: in the first phase, which was phenomenological qualitative data collection, face-to-face interviews with six ODR providers and experts were conducted. After analyzing interview data, identified themes guided the Researcher for the next phase. In the second phase of collecting quantitative data, online surveys were designed to investigate consumers’ experiences with online purchasing disputes. One hundred and eight responses were collected, and statistical descriptive analysis was utilized. In the third phase, an interpretation of the interview and survey data was conducted. Overall, this study identified several elements as standards in ODR systems for measuring procedural fairness: equal treatment, respect, neutrality, trustworthiness, consistency, and the ethicality rule. Finally, these results led to several implications for ODR provider and e-commerce companies.

I. INTRODUCTION

E-commerce is now pervasive. There are no boundaries of time and space in such an environment. The ease of creating relationships in online space has spawned a significant number of transactions and interactions between businesses and consumers (B2C). However, relationships are easily damaged, and this has generated online disputes. When online disputes arise, parties are generally at a distance from each other and lack face-to-face interaction. That dynamic suggests the need for a dispute resolution mechanism that differs from traditional systems, including courts and Alternative Dispute Resolution (ADR) provided by non-governmental organizations. An effective mechanism would rely upon digital communication and information processing. The need has been filled by well-established Online Dispute Resolution mechanisms known as ODR systems.¹ While there is as yet no generally accepted definition for ODR, ODR developed from the synergy between ADR and Information and Communication Technology (ICT) as a method of resolving disputes that were burgeoning online, and for which traditional means of dispute resolution were inefficient or unavailable.² Negotiation, mediation, and arbitration are the most commonly applied approaches within the different processes of ODR.³ The number of e-commerce disputes (“e-disputes”) is growing rapidly. Factors such as language barriers and cultural differences, delivery and payment problems, and fraud have led to e-disputes between consumers and businesses.⁴ ODR in comparison to ADR provides a more flexible, less formal process, with more procedures that are confidential and lead to fast settlements. Moreover, ODR is less costly than traditional methods, which leads to its use for low-value disputes and easy access to justice.⁵

¹ Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C.L. REV. 329, 330 (2016).

² Chitranjali Negi, *Information Technology, E-Justice & ODR* 1 (Aug. 23, 2015, rev. Sept. 2, 2015),

available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649508.

³ ARTHUR PEARLSTEIN ET AL., *THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 448 (Mohamed Abdel Wahab et al. eds., 2011).

⁴ Fahimeh Abedi & Sakina Shaik Ahmad Yusoff, *Consumer Dispute Resolution: The Way Forward*, 2 J. GLOBAL MGMT. 204, 213 (2011).

⁵ PABLO CORTÉS, *ONLINE DISPUTE RESOLUTION FOR CONSUMERS IN THE EUROPEAN UNION* 34 (2010).

In 2010, eBay/PayPal handled more than eighty million disputes in e-commerce between buyers and sellers, up from twenty million in 2008.⁶ Those statistics illustrate an increasing need for an effective dispute resolution system for online disputes. In the absence of recognized global practices, however, ODR systems appear to be complex, problematic, and unable to engender trust.⁷ Establishment of a well-designed and global ODR system would benefit disputants.⁸ In recent years ODR has become the most prominent and suitable mechanism for resolving online disputes. However, there are some issues related to ODR systems that need to be resolved to maximize the high level of ODR effectiveness and enhance consumer protection in e-commerce.

Justice or fairness is a necessary principle for ODR systems. All actors involved in ODR regulation can easily agree on the abstract need for fairness, while their interpretations and concepts of fairness differ widely. To provide procedural fairness in the adjudicative process, each party should be able to comment on the case of its disputant adversary, and an arbitrator should not have *ex parte* meetings with any party. Moreover, procedural fairness includes the right of parties to participate or withdraw from proceedings at any stage and take their case to the legal system or any out-of-court redress mechanism.⁹

Another issue is the importance of neutrality and its relationship with the notion of procedural fairness. In court processes, disputants should be able to explain their side of the case and the judge must assess their discussions in an unbiased manner. The same lack of bias is the reason for the significance of neutrality in ODR and ADR.¹⁰ Moreover, both the Organization for Economic Cooperation and Development (OECD) and European Commission (EC) recommendations underscore the importance of the principle of fairness for International Commercial Online Dispute Resolution (ICODR)

⁶ Vikki Rogers, *Managing Disputes in the Online Global Marketplace: Reviewing the Progress of UNCITRAL's Working Group III on ODR*, 19 DISP. RESOL. MAG. 20, 21 (2013).

⁷ Aura Esther Vilalta, *Legal Framework and Harmonization of ADR/ODR Methods*, 2 J.L. & CONFLICT RESOL. 103, 103–05 (2010).

⁸ Louis Del Duca et al., *Facilitating Expansion of Cross-Border E-Commerce—Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems—Work of the United Nations Commission on International Trade Law)*, 1 PENN. ST. J.L. & INT'L AFF. 59, 74 (2012).

⁹ GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* 119 (2004).

¹⁰ ARNO R. LODDER & JOHN ZELEZNIKOW, *ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY* 45 (2010).

proceedings, incorporating the notions of transparency and impartiality.¹¹ Most researchers in the ODR field have produced descriptive work. Although researchers have noted that there is a need to resolve current issues of ODR to increase the quality of ODR systems, their work focuses more on explaining what ODR is and its advantages and disadvantages, rather than how to define or measure issues of fairness.

II. DEFINITION OF FAIRNESS AND PROCEDURAL FAIRNESS

Harvard philosopher John Rawls, in his classic work *A Theory of Justice*, developed the concept of justice as fairness.¹² Usually the word justice is interchangeable with the word fairness.¹³ There are many different terms for and definitions of justice, depending on context. Some examples of justice are: distributive, procedural, organizational, corrective, substantive, restorative, social, interactional, communicative, communitarian, interpersonal, and transitional.¹⁴ Fairness extends to all forms of dispute resolution, whether or not the third party is facilitative, evaluative, or adjudicative, or whether or not there is no third party.¹⁵ Justice is a subjective concept, a tangible belief that individuals formulate as a perception or experience.¹⁶ Generally, justice or fairness is a universal concept embedded in individuals and, because of its subjective nature, what is fair or unfair is interpreted differently from one individual to another.¹⁷

Justice or fairness plays an important role in our daily lives. Ambrose argues that “[j]ustice matters”¹⁸ and Jeong emphasizes the key role of justice as a protection of rights.¹⁹ Generally, there are three reasons for individuals to be concerned about justice: first, justice has instrumental value; second, it has

¹¹ SOO HYE CHO, INTERNATIONAL COMMERCIAL ONLINE DISPUTE RESOLUTION: JUST PROCEDURE THROUGH THE INTERNET 63–64 (2011).

¹² JOHN RAWLS, *A THEORY OF JUSTICE* 111 (rev. ed. 1999).

¹³ Mary A. Konovsky, *Understanding Procedural Justice and its Impact on Business Organizations*, 26 J. MGMT. 489 (2000).

¹⁴ Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RES. 1, 28 (2008).

¹⁵ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 118.

¹⁶ E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 4 (1988).

¹⁷ See James Q. Wilson, *The Moral Sense*, 87 AM. POL. SCI. REV. 1, 6 (1993).

¹⁸ Maureen L. Ambrose, *Contemporary Justice Research: A New Look at Familiar Questions*, 89 ORG. BEHAV. & HUM. DECISION PROCESSES 803, 803 (2002).

¹⁹ HO-WON JEONG, *CONFLICT MANAGEMENT AND RESOLUTION: AN INTRODUCTION* 132 (2010).

relational properties;²⁰ and third, individuals see justice as a moral virtue that guides ethical conduct and has human worth.²¹ Justice researchers often define justice or fairness as a part of the dispute resolution process, but their definitions vary. For example, Smith and Martinez define justice “in a general sense” as conveying “a sense of fairness, rightfulness and validity, or, more narrowly, an outcome pursuant to the authority or administration of law.”²² According to Bingham, there are different types of justice: distributive, procedural, substantive, organizational, restorative, corrective, social, interactional, communicative, communitarian, interpersonal, and transitional.²³ Based on social norms, Maxwell believes there are two kinds of justice: distributive fairness and procedural fairness.²⁴ Distributive justice refers to the perceived fairness of one’s outcomes, which has its roots in equity theory.²⁵ Procedural fairness refers to the fairness of the processes used in making decisions,²⁶ which takes into account the interests of all parties involved.²⁷ Interactional justice is defined by sociologists as the degree to which people affected by decisions are treated with dignity and respect²⁸ and is concerned with the fairness of interpersonal interactions or communication.²⁹ Other types of justice include distributive justice, egalitarian justice, and several other terms that are defined in Table 1 below.

TABLE 1

²⁰ LIND & TYLER, *supra* note 16, at 193.

²¹ Robert Folger, *Fairness as a Moral Virtue*, in *MANAGERIAL ETHICS: MORAL MANAGEMENT OF PEOPLE AND PROCESSES* 16, 19 (Marshall Schminke ed., 1998).

²² Stephanie Smith & Janet Martinez, *Analytic Framework for Dispute Systems Design*, 14 *HARV. NEGOT. L. REV.* 123, 128–29 (2009).

²³ Bingham, *supra* note 14, at 28.

²⁴ SARAH MAXWELL, *THE PRICE IS WRONG: UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING* 74 (2007).

²⁵ J. Stacy Adams, *Inequity in Social Exchange*, 2 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 267, 269 (1965).

²⁶ Robert Folger & Jerald Greenberg, *Procedural Justice: An Interpretive Analysis of Personnel Systems*, 3 *RES. PERSONNEL & HUM. RESOURCES MGMT.* 141, 143 (1985).

²⁷ Joel Brockner & Batia M. Wiesenfeld, *An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures*, 120 *PSYCHOL. BULL.* 189, 189 (1996).

²⁸ JOHN R. SCHERMERHORN ET AL., *ORGANIZATIONAL BEHAVIOR* 110 (8th ed. 2003).

²⁹ Robert Bies & Joseph S. Moag, *Interactional Justice: Communication Criteria of Fairness*, 1 *RES. ON NEGOT. ORGS.* 43, 44 (1986).

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| Name | Source | Definition |
|----------------------------|----------------------------------|--|
| Distributive Justice | Posner citing Aristotle | The state distributes money, honors, and things of value |
| Distributive Justice | Thibaut and Walker | Equity theory: an allocation is equitable justice when outcomes are proportional to the contributions of group members |
| Egalitarian Justice | Rawls and Posner citing Ackerman | Distributive justice to allow for compensating undeserved inequalities of birth (affirmative action) |
| Justice as Fairness | Rawls | Inequality justified by improving the situation of the least advantaged person in an ordinal ranking |
| Justice as Fairness | Thibaut and Walker | Equality- or needs-based allocation |
| Social Science | Posner | Purely public non-compensatory remedy that views harm as a social and not individual entitlement |
| Macrojustice | Lipsky et al. | Pattern of outcomes from the DSD |
| Restitutionary Justice | Posner | Strict liability; justice as restitution for harm that one causes, regardless of wrong; a form of distributive justice |
| Perfect Procedural Justice | Rawls | Procedure designed to render perfect distributive justice (e.g., person who cuts the cake must take the last piece) |
| Pure Procedural Justice | Rawls | Distributing goods based on random procedure, as in odds, dice, and gambling |

Source: Adapted from Bingham³⁰

Procedural fairness is more significant than distributive fairness for several reasons: 1) the process gives more information about the character of the authority compared to the outcome; 2) these character judgments are helpful as a heuristic for judging future events; and 3) fairness of the outcome

³⁰ Bingham, *supra* note 14, at 28–32.

is hard to measure.³¹ Several authors have argued that while distributive justice and procedural justice have independent influence on fairness perception or evaluation, procedural fairness is more likely to affect overall fairness judgments.³²

A study by Lind and colleagues—examining perceptions of outcomes and perceptions of procedural justice in adjudicative processes, and comparing the effects of procedural justice and distributive justice—concluded that the verdict does not affect perceptions of procedural justice.³³ Even if the verdict was considered unfair by the parties, the process was viewed as procedurally just when the parties were allowed to have control of the process. However, procedural fairness does not change the perception about the outcome and distributive justice.³⁴

Three theories have been developed regarding the importance of procedural justice for individuals. The first theory suggests that individuals regard a fair process as a way of gaining a fair outcome.³⁵ The second theory argues that social status is important to individuals, including concerns about their status in society, and the level of procedural justice afforded to them offers important cues about this status.³⁶ The third theory argues that procedural justice judgments are important because they convey information relevant to uncertainty reduction.³⁷

As discussed earlier, the first study about procedural justice conducted by Thibaut and Walker indicated that procedural justice had its origins in the legal field.³⁸ When people bring their case into the legal system, they are more concerned about the fairness of the process, which is separate from their interest or expectation in achieving a result. Therefore, parties feel more comfortable and consent to attend—a disposition that is achieved by fair

³¹ Kees van den Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034, 1035–36 (1997).

³² JERALD GREENBERG, *ADVANCES IN ORGANIZATIONAL JUSTICE* 73 (2002).

³³ E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643, 652 (1980).

³⁴ *Id.*

³⁵ John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 559 (1978).

³⁶ Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 140 (1992).

³⁷ E. Allan Lind, *Fairness Judgments as Cognitions*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 416, 427 (Michael Ross & Dale T. Miller eds., 2002).

³⁸ JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 12 (1975).

procedure.³⁹ However, the legal system is not the only field on which procedural justice has an effect. For example, procedural justice has an impact on assessments of decisionmaking in other fields such as managerial and political setting.⁴⁰

A. *Fairness in Alternative Dispute Resolution*

Alternative dispute resolution (ADR) is not a new mechanism. According to Tyler, there are four criteria for measuring procedural justice: neutrality, interpersonal respect, voice/participation, and trustworthiness.⁴¹ Leventhal's theory of procedural justice judgments focuses on six criteria: voice, consistency, accuracy rule, bias suppression, correctability, and ethicality rule.⁴² Furthermore, Hancock and d'Estree have discussed that these rules are related to ADR and its non-adversarial nature.⁴³ These procedural fairness rules are described below:

- **Respect Rule:** This rule requires participants to be polite, behaving with respect and dignity, and respecting one another's rights, which will all increase feelings of fairness.⁴⁴
- **Voice/Representativeness Rule:** As mentioned by Thibaut and Walker, voice is the most tested criteria among justice rules that determines the degree to which procedure provides an opportunity for individuals to express and communicate their evidence, arguments and views.⁴⁵ Generally, voice has two parts: first, process control, which means individuals have the opportunity to present their evidence or views of their situation (position); and second, decision control, which means the individual participates in the act of making

³⁹ Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008).

⁴⁰ *Id.* at 477.

⁴¹ Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 887 (1997).

⁴² Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE THEORY 33 (1980).

⁴³ Landon Hancock & Tamra P. d'Estrée, *Culture and Procedural Justice in Transitioning Societies*, 18 PEACE AND CONFLICT STUD. 116, 131 (2011).

⁴⁴ E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 958 (1990).

⁴⁵ THIBAUT & WALKER, *supra* note 38, at 9.

the decision.⁴⁶ The other variation of the voice concept is termed the representativeness rule.⁴⁷

- **Consistency Rule:** This criterion for procedural fairness, according to Leventhal, has implications across person and time. Consistency across person means that individuals should feel they have been treated equally and have the same rights during the procedure. Consistency across time means that each time the procedure follows the same rules.⁴⁸ The importance of consistency rules has been emphasized by other scholars. Based on heuristic theory, the information provided for people before the procedure highly influences procedural fairness in expectations about the procedure.⁴⁹ Therefore, it is the individual's expectations that influence procedural fairness, not what they receive⁵⁰ or what they experience in the process.⁵¹ Moreover, Greenberg's findings indicated that consistency is more important than voice.⁵²
- **Neutrality Rule:** The neutrality rule requires the decisionmaker and the process to be neutral in order to safeguard and protect participants.⁵³
- **Bias Suppression Rule:** There are two sources of bias related to procedural fairness: first, the procedure would be unfair if the decisionmaker has a vested interest in the outcome; second, if the decisionmaker has made his or her decision based on doctrinaire grounds, the decisionmaker is so influenced by his or her prior beliefs that all points of view do not receive adequate and equal consideration.⁵⁴

⁴⁶ *Id.* at 12.

⁴⁷ Leventhal, *supra* note 42, at 30.

⁴⁸ *Id.* at 25.

⁴⁹ E. ALLAN LIND, THE FAIRNESS HEURISTIC: RATIONALITY AND "RELATIONALITY" IN PROCEDURAL EVALUATIONS (1992) (paper presented at the Fourth International Conference of the Society for the Advancement of Socio-Economics, Irvine, CA).

⁵⁰ Jerald Greenberg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 J. APPLIED PSYCHOL. 340, 341 (1986).

⁵¹ Kees van den Bos et al., *The Consistency Rule and the Voice Effect: The Influence of Expectations on Procedural Fairness Judgements and Performance*, 26 EUR. J. SOC. PSYCHOL. 411, 425 (1996).

⁵² Greenberg, *supra* note 50, at 341.

⁵³ Leventhal, *supra* note 42, at 26.

⁵⁴ *Id.* at 26.

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- **Accuracy Rule:** The accuracy rule focuses on the appropriateness and accuracy of the information that the decisionmaker uses during the decisionmaking process.⁵⁵
- **Correctability Rule:** This rule requires the procedure to include some provision for correcting bad decisions or outcomes.⁵⁶
- **Ethicality Rule:** This rule requires the procedure to conform to standards of ethics and morality and to assure that age, gender, nationality, and other extraneous factors have no bearing on the decision that is made.⁵⁷

Therefore, it is important to consider which elements and rules contribute to the procedural fairness of justice systems. The significance of procedural fairness from the psychological literature is that individuals will follow the rules because they believe in the legitimacy of the authority that promulgated them, and, by experiencing procedural fairness, they believe that authorities act legitimately.⁵⁸ Individuals regard the process of decisionmaking as procedurally just because they regard the decisionmaker as trustworthy, neutral, respectful, and courteous; they have an opportunity for voice, and they view a decision made under those circumstances as reasonable.⁵⁹ Studies show that disputants care about the fairness of the procedure in each process, and therefore prefer to use ADR processes as they feel they have received fair treatment.⁶⁰ Therefore, Procedural justice is an important factor for people when choosing dispute resolution mechanisms.

B. *Fairness in Online Dispute Resolution*

Clear principles should be established in ODR services that determine the structure of the dispute resolution mechanism. Normally, this will shape the parties' expectations and their strategies for dispute resolution.⁶¹ According to Ramsay, parties should resolve their dispute based on fair and

⁵⁵ *Id.* at 27.

⁵⁶ *Id.* at 29.

⁵⁷ *Id.* at 33.

⁵⁸ Margaret Levi et al., *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs*, 53 AM. BEHAV. SCI. 354, 360 (2009).

⁵⁹ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 150 (2006).

⁶⁰ Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 10 (2011).

⁶¹ ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 33 (2001).

justified social norms or through agreed norms that could be more generous than laws and rules.⁶² While there are various measures of effectiveness, parties would not use a system if they perceived it as unfair.⁶³ It is easier to measure the fairness of the process separate from the outcome. As an initial matter, this study aims to discover the main factors for maximizing procedural fairness. Individuals feel more comfortable and prepared to engage in processes that they perceive as procedural.⁶⁴

A measurement of procedural fairness is necessary to understand whether parties are at risk of an unfair decision via a particular procedural mechanism,⁶⁵ such as ODR systems. Considering procedural fairness in each of the ODR methods—arbitration, mediation, and direct negotiation between parties—will enhance fairness of an ODR system. Since arbitration has a similar structure to litigation, the same factors that disputants use to evaluate procedural justice in judicial proceedings could also be used for evaluating procedural fairness in arbitration. Therefore, the four elements of neutrality, voice, courtesy, and respect are key factors to determine whether disputants have experienced procedural justice in an arbitration process. Negotiation is an informal process that allows parties to bargain with each other to reach an agreement. While there is no particular procedural form in negotiation, parties still evaluate the fairness of the process according to how it comports with rule of law values.⁶⁶ When parties undertake mediation, they have more control over the process compared to arbitration, and this increases their satisfaction. If one of the parties, based on their prior experience or assumption about the mediation process, enters mediation, they might be dissatisfied because this mediation process contravenes their antecedent assumptions about procedural fairness.⁶⁷

In any dispute resolution mechanism, neutrality is a significant value and it is related to the notion of fairness. In a court process, disputants should be able to explain their side of the case, and the judge must assess the evidence and arguments in an unbiased manner. This lack of bias is the reason for the

⁶² Iain D.C. Ramsay, *Consumer Redress Mechanisms for Poor-Quality and Defective Products*, U. TORONTO L.J. 117, 148–49 (1981).

⁶³ Donna Maria Blancero et al., *Just Tell Me! Making Alternative Dispute Resolution Systems Fair*, 49 INDUS. REL. 524, 525 (2010).

⁶⁴ Ofir Turel & Yufei Yuan, *Online Dispute Resolution Services: Justice, Concepts and Challenges*, in HANDBOOK OF GROUP DECISION AND NEGOTIATION 425, 429 (D. Marc Kilgour & Colin Eden eds., 2010).

⁶⁵ Byron Crowe II, *Financial Services ADR: What the United States Could Learn from South Africa*, 47 CORNELL INT'L L.J. 145, 147 (2014).

⁶⁶ Hollander-Blumoff & Tyler, *supra* note 60, at 17.

⁶⁷ *Id.* at 16.

importance of neutrality in ODR and ADR.⁶⁸ Therefore, there is a need for equal treatment of all parties in an online mediation process as well as in online arbitration.⁶⁹ In mediation, the mediator should provide an equal opportunity for both parties to present their case and understand the opposite party's arguments. In addition, the mediator should assist both parties in a neutral manner. Therefore, it is necessary to provide consumers with equitable treatment and equal access to all documents, evidences, and remedies without regard to social and economic status. It is necessary to create policy for ODR providers that aims for equitable treatment, while preparing efficient and transparent avenues to gain enforceable remedies.⁷⁰ ODR systems, decisionmakers and neutrals should be separate from the disputing parties, and if there is any conflict of interest this needs to be made transparent.⁷¹

One of Kohler and Schultz's ODR principles is trustworthiness within the discretion of the neutral, and it depends on integrity and authenticity, which are appreciated taking all circumstances into account.⁷² According to Rabinovich-Einy, one of the concerns for ODR users is fairness and consistency of outcomes in any ODR approach.⁷³ Procedural fairness helps parties, especially the weaker party, to make an informed choice before a solution is achieved. There are three conditions for providing procedural fairness: (1) parties should have an equal opportunity to be heard; (2) the proceedings should not be delayed without a reasonable cause; and (3) the decisionmaker should be impartial and independent.⁷⁴ ODR might transfer power from a party comfortable with face-to-face communication to one that is comfortable with technology, or from a party that is articulate to one that

⁶⁸ LODDER & ZELEZNIKOW, *supra* note 10, at 45.

⁶⁹ JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION 137–39 (2009) (discussing the importance of equal treatment in the mediation and arbitration processes).

⁷⁰ Amy J. Schmitz, *Building Trust in Ecommerce through Online Dispute Resolution*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 307, 328 (John A. Rothchild ed., 2016).

⁷¹ Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT'L. J. ONLINE DISP. RESOL. 12, 27 (2016).

⁷² KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 190.

⁷³ Orna Rabinovich-Einy, *Reflecting on ODR: The Israeli Example* (Jan. 2008) (conference paper presented at the 5th International Workshop on Online Dispute Resolution, in conjunction with the 21st International Conference on Legal Knowledge and Information Systems (JURIX 2008), Firenze, Italy), https://www.researchgate.net/publication/221172969_Reflecting_on_ODR_The_Israeli_Example.

⁷⁴ Kristina Stern, *Procedural Fairness – Its Scope and Practical Application*, 56 AUSTL. INST. ADMIN. L. 2, 8–12 (2008) (paper originally presented at an AGS Government Law Group Seminar in October 2007).

writes well. Turel and Yuan developed a principle-based dispute resolution in which only data and claims are submitted to the system.⁷⁵ This system minimizes any differences that exist between parties using technology and eliminates power imbalances, thus promoting fairness. Moreover, Cho recognizes some standards for procedural fairness in International Competition for Online Dispute Resolution (ICODR), including:

- The parties shall have equal and reasonable opportunity to present their case, their view, and all relevant documents;
- The rights of the parties shall be protected under international public policy;
- The proceeding shall be affordable and accessible;
- The proceeding shall not be delayed beyond reasonable expectation;
- The parties shall give legitimate notice sufficient to prepare their response;
- Evidence and case-related documents;
- The parties shall be provided communication and documents in proceedings; and
- The parties' autonomy shall be respected.⁷⁶

Therefore, in view of the importance of procedural fairness in ODR systems, regulators should regulate minimum fairness principles with respect to allowing flexibility and honoring choice. Moreover, parties should have the opportunity to select any type of ODR method based on the type of dispute. The processes could be started by online negotiation, followed by online mediation, and potentially ending with a binding evaluative process if the disputants cannot resolve their dispute prior to that point.⁷⁷ This would allow consumers to have more control over the process and their own solutions.⁷⁸

III. METHODOLOGY

This Article focuses on the issues of fairness to increase the effectiveness of ODR systems and to develop better online consumer protection. The main question in this Article is, "*What is the definition and measurement for concept of Fairness in ODR systems?*" The subsidiary question branching from this main question is, "*What is Fairness in ODR and*

⁷⁵ Turel & Yuan, *supra* note 64, at 429.

⁷⁶ CHO, *supra* note 11, at 64.

⁷⁷ See Schmitz, *supra* note 70, at 329.

⁷⁸ *Id.*

how can it be measured? How is it different from the relevant notions in traditional ADR?”

An exploratory sequential mixed methods study was best suited to answer the research questions. This method included three phases:

- 1) **The Qualitative Phase (Phenomenological Research):** Data was collected from face-to-face interviews with six ODR providers who were asked about their lived experiences and perceptions of fairness in ODR;
- 2) **The Quantitative Phase:** The aim of this phase was to further explain the qualitative results. Thus, an online survey was designed based on the qualitative findings. Data was collected from 108 consumers who had experienced problems when shopping for goods and service; and
- 3) **Interpretation of Qualitative and Quantitative Findings:** In this phase, both qualitative and quantitative results were interpreted and compared with previous studies, and final findings to answer the research question of this Article were drawn.

A. *Qualitative Data Collection*

The first phase of data collection, which uses a qualitative phenomenological method, is presented. The phenomenological study through semi-structured interviews with ODR providers was conducted to explore how each provider defines, measures, and applies procedural fairness in their ODR systems. As it was difficult for the Researcher to travel to different countries and interview ODR providers, it was decided to select individuals for interview purposefully (purposive sampling) from the potential participants in an annual ODR Conference. This helped the Researcher to gain a detailed perspective of ODR providers and to better understand the problem and the research question. The sample size was six participants for interview, as this is a phenomenological qualitative design, and the number of interviewees is adequate. Typically, in phenomenology studies, the number of individuals range from three to ten.⁷⁹ Interviews were conducted in June 2015 at an international conference about ODR systems in New York City (USA) with participation of ODR providers, experts, and academics.⁸⁰

⁷⁹ JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES 189 (3d ed. 2011).

⁸⁰ See *ODR 2015 Agenda*, PACE L. SCH. (last visited Feb. 11, 2017), <http://law.pace.edu/odr-2015-agenda>.

To analyze the interview data, this research used the Stevick-Colaizzi-Keen seven-step method of data analysis.⁸¹ All seven steps were conducted manually by the Researcher. The Researcher extracted and identified forty-two meanings and codes from the significant statements of the six interview transcripts. These codes are shown in the following Table 2.

TABLE 2

| Number | Primary Codes |
|---------------|---|
| 1 | Offline experience for online neutrals |
| 2 | ODR ethics maintains ADR ethics |
| 3 | Regular testing of neutrals |
| 4 | Feedback system for neutral's performance |
| 5 | Neutral specific skills |
| 6 | Quality of neutrals affects dispute resolution services |
| 7 | In-depth neutral selection process |
| 8 | Significance of neutral selection guidelines |
| 9 | Consistency of ODR outcomes builds trust |
| 10 | Flexibility of ODR outcomes |
| 11 | Regularly re-evaluating neutral's performance |
| 12 | Guideline for ODR procedure |
| 13 | ODR ethical standards create trustable process |
| 14 | Parties propose their own solutions |
| 15 | ADR guidelines for ODR |
| 16 | Reducing unequal power |
| 17 | Parties have fair chance to present their case |
| 18 | Parties with the same computer literacy |
| 19 | Affording access to the internet |
| 20 | Disputants with reasonable time for case preparation |
| 21 | Equal participation in ODR process |
| 22 | Parties have similar internet skills |

⁸¹ Paul F. Colaizzi, *Psychological Research as the Phenomenologist Views It*, in *EXISTENTIAL-PHENOMENOLOGICAL ALTERNATIVES FOR PSYCHOLOGY* 48, 58 (Ronald S. Valle & Mark King eds., 1978); see also CLARK MOUSTAKAS, *PHENOMENOLOGICAL RESEARCH METHODS* 121 (1994).

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| | |
|----|---|
| 23 | Parties with the same language or providing them a translator |
| 24 | Importance of procedural fairness guideline |
| 25 | Self-ethical standards for neutrals |
| 26 | Certification of neutrals by government agencies |
| 27 | Complaint system for neutrals act |
| 28 | Equal behavior regardless of the value of items purchased |
| 29 | Procedural fairness is about voice |
| 30 | Procedural fairness is about respect |
| 31 | Procedural fairness guideline from academic research |
| 32 | Impartiality of decisionmakers |
| 33 | Online skills for online mediators |
| 34 | International independent quality control for ODR providers |
| 35 | Independence of neutrals is procedural fairness |
| 36 | ODR procedural fairness guideline from offline guidelines |
| 37 | Fairness is about predictable outcomes |
| 38 | Quality control quality for procedural fairness |
| 39 | Procedural fairness is good faith for all cases |
| 40 | Parties' confidence in selecting neutrals |
| 41 | Annual reports for ODR practice by experienced ethics committee |
| 42 | Procedural fairness is good faith for all cases |

After identifying these primary codes from the interview transcripts, the Researcher started the next step. The Researcher used the inductive approach to identify key ideas from the primary codes and then categorized and collapsed them into clusters. As a result, a total of 11 clusters were identified from the primary codes and are presented in Tables 3 to 13 below.

Cluster 1. “*Equal Opportunity to be Heard and Present the Case*” identified from primary codes as shown in Table 3.

TABLE 3

| Number | Primary Codes | Cluster 1 |
|--------|---|---|
| 21 | Equal participation in ODR process | <i>Equal Opportunity to be Heard and Present the Case</i> |
| 17 | Parties have fair chance to present their case | |
| 29 | Procedural fairness is about voice | |
| 42 | Procedural fairness is good faith for all cases | |
| 23 | Parties with the same language or providing them a translator | |

Cluster 2. “*Predictable Outcomes*” identified from primary codes as shown in Table 4.

TABLE 4

| Number | Primary Codes | Cluster 2 |
|--------|--|-----------------------------|
| 9 | Consistency of ODR outcomes builds trust | <i>Predictable Outcomes</i> |
| 37 | Fairness is about predictable outcomes | |

Cluster 3. “*Panel of Neutrals and Decisionmakers*” identified from primary codes as shown in Table 5.

TABLE 5

| Number | Primary Code | Cluster 3 |
|--------|---|---|
| 40 | Parties’ confidence in selecting neutrals | <i>Panel of Neutrals and Decisionmakers</i> |

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Cluster 4. “*Treated Equitably, Purchase or Transaction Values Notwithstanding*” identified from primary codes as shown in Table 6.

TABLE 6

| Number | Primary Code | Cluster 4 |
|---------------|---|--|
| 28 | Equal behavior regardless of the value of items purchased | <i>Treated Equitably, Purchase or Transaction Values Notwithstanding</i> |

Cluster 5. “*Minimizing Disputant’s Power Imbalance due to Different Technology Skills*” identified from primary codes as shown in Table 7.

TABLE 7

| Number | Primary Codes | Cluster 5 |
|---------------|--|--|
| 16 | Reducing unequal power | <i>Minimizing Disputant’s Power Imbalance due to Different Technology Skills</i> |
| 19 | Affording access to the internet | |
| 22 | Parties have similar internet skills | |
| 18 | Parties with the same computer literacy | |
| 20 | Disputants with reasonable time for case preparation | |

Cluster 6. “*Parties’ Control over the Process and Outcomes*” identified from primary codes as shown in Table 8.

TABLE 8

| Number | Primary Codes | Cluster 6 |
|---------------|--------------------------------------|---|
| 30 | Procedural fairness is about respect | <i>Parties’ Control Over the Process and Outcomes</i> |
| 14 | Parties propose their own solutions | |
| 10 | Flexibility of ODR outcomes | |

Cluster 7. “*Impartiality and Independency of the Neutrals and the Decisionmakers*” identified from primary codes as shown in Table 9.

TABLE 9

| Number | Primary Codes | Cluster 7 |
|--------|---------------------------------|---|
| 35 | Independency of neutrals | <i>Impartiality and Independency of the Neutrals and the Decisionmakers</i> |
| 32 | Impartiality of decision makers | |

Cluster 8. “*Qualifications and Training of Neutrals*” identified from primary codes as shown in Table 10.

TABLE 10

| Number | Primary Codes | Cluster 8 |
|--------|---|--|
| 1 | Offline experience for online neutrals | <i>Qualifications and Training of Neutrals and Decision makers</i> |
| 5 | Neutral specific skills | |
| 6 | Quality of neutrals affects dispute resolution services | |
| 7 | In-depth neutral selection process | |
| 8 | Significance of neutral selection guidelines | |
| 26 | Certification of neutrals by government agencies | |
| 33 | Online skills for online mediators | |

Cluster 9. “*Evaluator Systems for Neutrals’ and Decisionmakers’ Practice*” identified from primary codes as shown in Table 11.

TABLE 11

| Number | Primary Codes | Cluster 9 |
|--------|---|--|
| 4 | Feedback system for neutral’s performance | <i>Evaluator Systems for Neutrals’ and</i> |
| 27 | Complaint system for neutral’s act | |

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| | | |
|---------|--|---------------------------------|
| 3 11 | Regular testing of neutrals Regularly re-evaluating neutral's performance | <i>Decisionmakers' Practice</i> |
|---------|--|---------------------------------|

Cluster 10. “*Procedure Guideline*” identified from primary codes as shown in Table 12.

TABLE 12

| Number | Primary Codes | Cluster 10 |
|----------------------------|---|----------------------------|
| 12 15 24 36 31 | Guidelines for ODR procedure ADR guidelines for ODR Importance of procedural fairness guidelines ODR procedural fairness guideline from offline guidelines Procedural fairness guideline from academic research | <i>Procedure Guideline</i> |

Cluster 11. “*Ethical Standards*” identified from primary codes as shown in Table 13.

TABLE 13

| Number | Primary Codes | Cluster 11 |
|---------------------------------|---|--------------------------|
| 34 41 25 13 38 2 | International independent quality control for ODR providers Annual reports for ODR practice by experienced ethics committee Self-ethical standards for neutrals ODR ethical standards create trustable process Control quality for procedural fairness ODR ethics maintains ADR ethics | <i>Ethical Standards</i> |

In the fifth stage of the Colaizzi method of analyzing data, clusters were sorted into a further, rich, thick, exhaustive description of the phenomenon as emergent themes that are the overarching goal of this qualitative data analysis. Six emergent themes were created from clusters in

this research as a thick, rich textual description of ODR providers' experience of resolving online disputes. The six emergent themes are shown in Table 14.

TABLE 14

| Number | Cluster | Emergent Theme |
|--------|--|------------------------|
| 1 | <ul style="list-style-type: none"> • Equal opportunity to be heard and present the case • Minimizing disputant's power imbalance due to different technology skills | <i>Equal Treatment</i> |
| 2 | <ul style="list-style-type: none"> • Treated equitably, purchase or transaction values notwithstanding • Parties control over the process and outcomes | <i>Respect</i> |
| 3 | <ul style="list-style-type: none"> • Impartiality and independence of the neutrals and the decisionmakers • Qualifications and training of neutrals and decisionmakers | <i>Neutrality</i> |
| 4 | <ul style="list-style-type: none"> • Panel of neutrals and decisionmakers • Evaluator systems for neutrals' and decisionmakers' practice | <i>Trustworthiness</i> |
| 5 | <ul style="list-style-type: none"> • Predictable outcomes • Procedural guidelines | <i>Consistency</i> |
| 6 | <ul style="list-style-type: none"> • Ethical standards | <i>Ethicality Rule</i> |

B. *Quantitative Data Collection*

After data in the qualitative phase was analyzed,⁸² the findings were used to develop the second, quantitative phase of the research. To collect quantitative data, an online survey based on the qualitative results was designed to answer the research questions. The statistical software package Statistical Package for the Social Science (SPSS) was used to analyze the survey data.

This Article aims to identify consumers' attitudes regarding e-disputes and concepts of fairness in online disputes resolution systems. The sampling frame and the target population consisted of consumers who had online shopping dispute experience. As it was not possible to provide an equal opportunity for the entire target population in the surrounding area to participate in the survey, this Article utilizes non-probability sampling. This research conducted convenience sampling. Therefore, the Researcher collected names and email addresses from respondents (Victoria University students, Melbourne) and those email addresses were used to distribute the surveys. A minimum of 200 individuals were invited to participate in this survey. The Researcher obtained 108 responses. The questionnaire was created on Qualtrics. This quantitative phase of the study included collecting and analyzing the survey built upon the results drawn from the qualitative data. After the survey was collected from respondents, the data was coded and statistically analyzed through the SPSS software program. The SPSS is one of the best known and most popular software packages for statistical analysis which is available in both professional and student license packages.⁸³

This part of the questionnaire was designed to investigate respondents' attitudes about the definition and importance of fairness in online dispute resolution systems, building on the findings gained from the ODR providers' experiences (see qualitative data collection). Due to the Researcher's concern that respondents would have difficulty understanding the term ODR, the term Online Complaint Management System (OCMS) was used instead. Therefore, in this survey, OCMS is synonymous with ODR in that both terms have exactly the same meaning and impact in this research. Respondents were asked to rate the importance of OCMS (ODR) services based on their experiences.

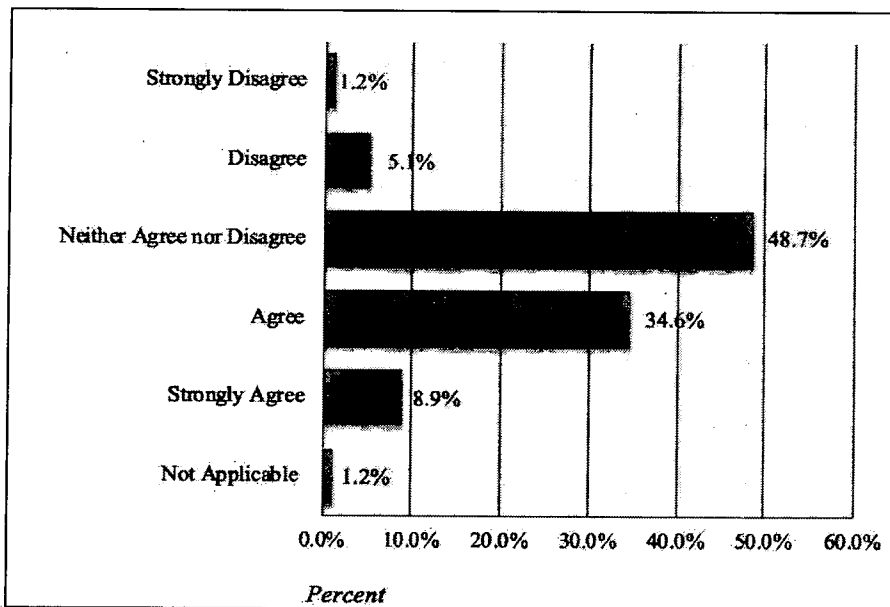
⁸² See *supra* Part III.A.

⁸³ JOHN W. CRESWELL, EDUCATIONAL RESEARCH: PLANNING, CONDUCTING, AND EVALUATING QUANTITATIVE AND QUALITATIVE RESEARCH 225–26 (2002).

1. *SATISFACTION WITH OCMS OUTCOMES*

Figure 1 indicates the satisfaction of the respondents with OCMS outcomes. Almost half of the seventy-eight respondents (thirty-eight, or 48.7%) “Neither agree nor disagree,” as they were not sure about their consent in relation to the OCMS results, while thirty-five respondents (43.5%) “Agree” or “Strongly agree” with their outcomes. Only five respondents (6.7%) “Disagree” or “Strongly disagree.”

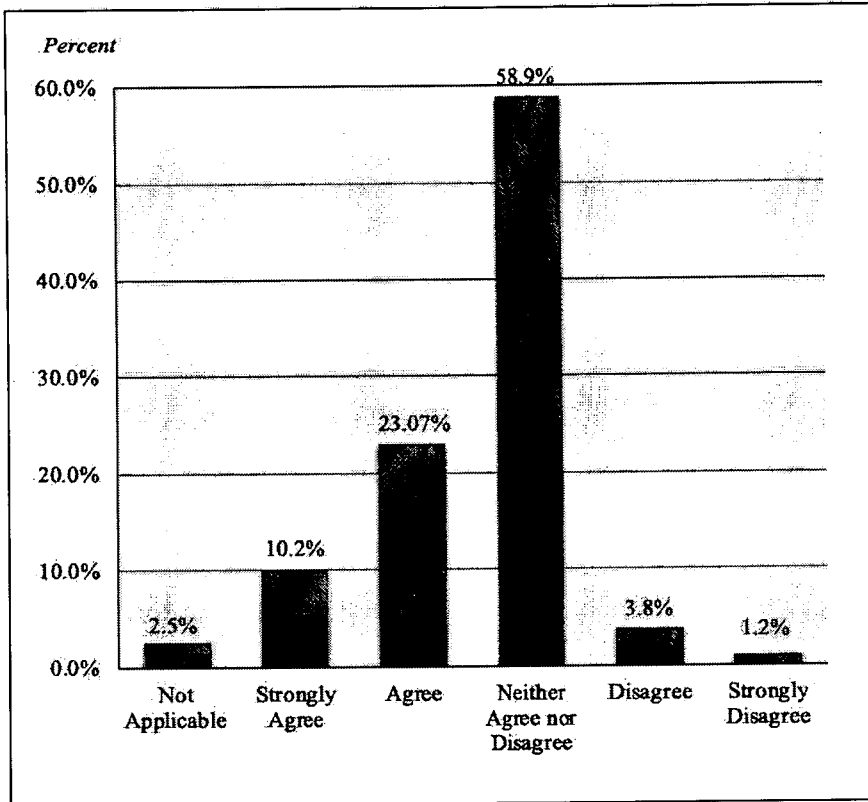
FIGURE 1



2. *QUALITY OF OUTCOMES*

Figure 2 illustrates the respondents’ answer to the question about whether or not OCMS suggests better options for resolving online disputes. More than half of respondents (forty-six respondents, or 58.9%) “Neither agree nor disagree” as they were not sure if OCMS was a better option. Only four respondents (5%) “Disagree” or “Strongly disagree,” and twenty-six respondents (33.9%) “Agree” or “Strongly agree” with the question.

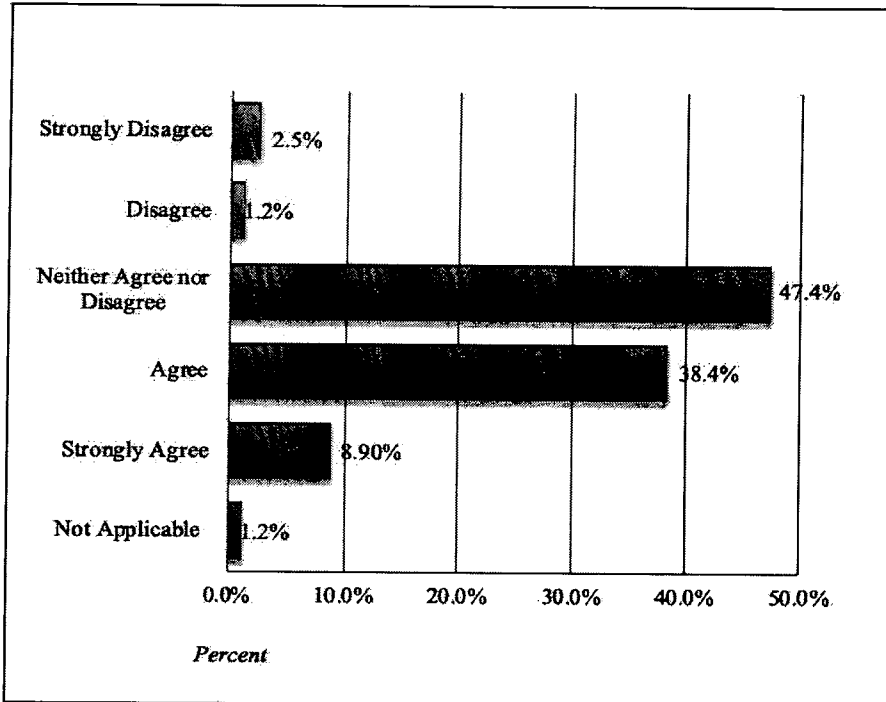
FIGURE 2



3. *FAIRNESS*

Figure 3 summarizes the response to the statement about whether or not respondents believed the OCMS was a fair mechanism. The thirty-seven respondents (47.3%) who answered “Agree” or “Strongly agree” were equal to those who were most likely to “Neither agree nor disagree.” Only three respondents (3.7 %) believed that OCMS was an unfair mechanism.

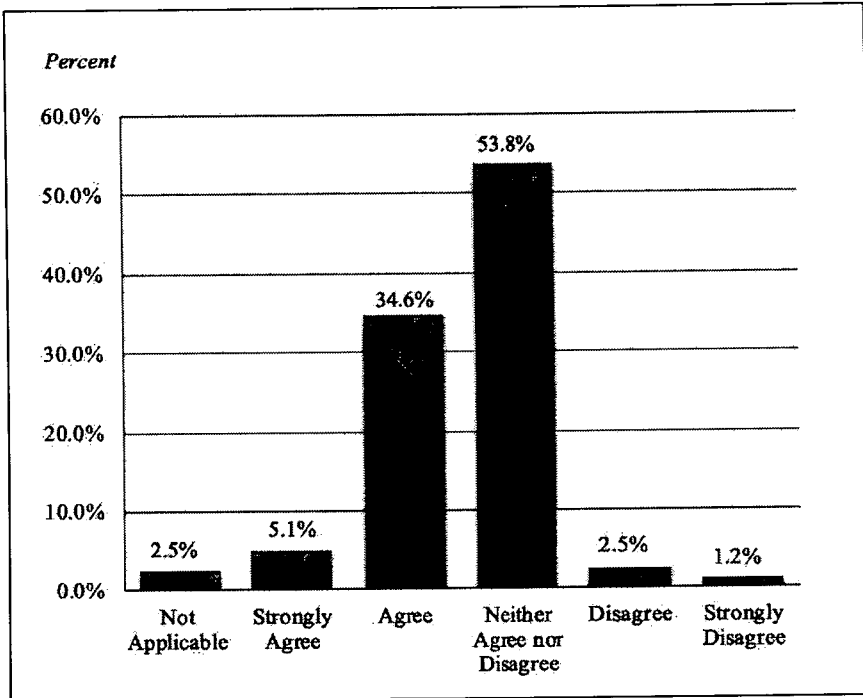
FIGURE 3



4. FAIRNESS OF NEUTRALS

Figure 4 presents the data from respondents' answers to the question whether they thought neutrals (third parties) in OCMS were fair. Over half of the respondents (forty-two respondents, or 53.8%) "Neither agree nor disagree." Of the remainder, thirty-one respondents (39.7%) "Agreed" or "Strongly agree," while only three respondents (3.7%) "Disagree" or "Strongly disagree."

FIGURE 4



IV. FINDINGS AND DISCUSSION

This Article aims to discover the elements that contribute to measuring and defining procedural justice in ODR systems. The interview and survey data presented were used to answer this research question. Analyzing the qualitative research and finding themes gained from the interviews, the Researcher identified six themes as elements that are related and contribute to measuring procedural fairness in ODR systems, including: voice, respect, neutrality, trustworthiness, consistency, and ethicality rule.⁸⁴ The quantitative research findings from the surveys show the importance of the fairness of the process (procedural justice) in ODR for users.⁸⁵ Although consumers were not sure about the quality of ODR outcomes (distributive justice),⁸⁶ almost half (47.3%) considered that ODR was a

⁸⁴ See *supra* Part III.A.

⁸⁵ See *supra* Part III.B.

⁸⁶ See *supra* Part III.B.2.

fair mechanism,⁸⁷ and a great number agreed about the neutrality (fairness) of the neutrals (39.7%).⁸⁸ This led to their satisfaction with the results for nearly half of respondents (43.5%), even though the results were not what they expected.⁸⁹

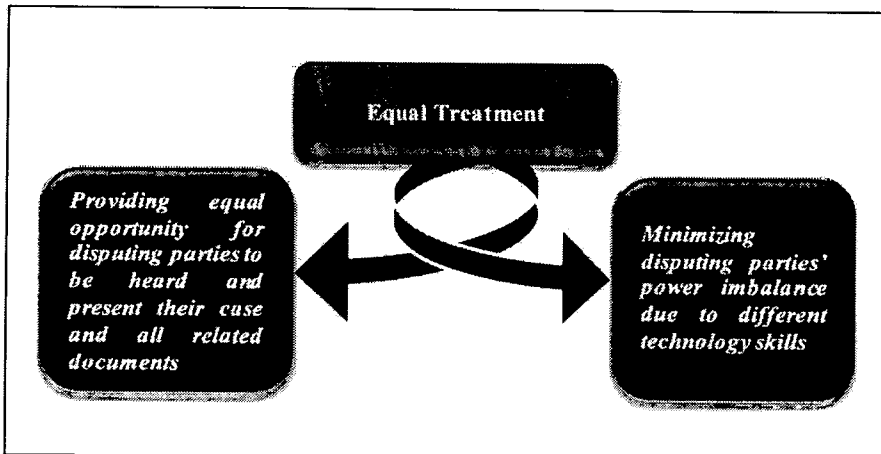
Finally, after interpreting the findings from both qualitative and quantitative data, this research found six elements to measure and define procedural fairness in ODR mechanisms. These elements are: 1) equal treatment, 2) respect, 3) neutrality, 4) consistency, 5) trustworthiness, and 6) ethicality rule.

A. *Equal Treatment*

This is one of the most important elements that should be used to define and measure procedural fairness in any online dispute resolution mechanism. The justification for its significance is that individuals will not accept the outcomes of ODR systems if they receive unequal treatment from decisionmakers. There are two criteria for equal treatment, which are illustrated in Figure 5:

- 1) Providing equal opportunity for disputing parties to be heard and present their case and all related documents (e.g., parties should have the same language or be provided with a translator); and
- 2) Minimizing the power imbalance of disputing parties due to different technology skills (e.g., parties should have similar internet skills).

FIGURE 5



⁸⁷ See *supra* Part III.B.3.

⁸⁸ See *supra* Part III.B.4.

⁸⁹ See *supra* Part III.B.1.

The first aspect that provides an equal opportunity for disputants to present their case and to be heard has also been noted by previous researchers such as Tyler,⁹⁰ Leventhal,⁹¹ Thibaut and Walker,⁹² and Hancock and d'Estrée⁹³ as an aspect of the voice criteria of procedural justice in dispute resolution systems. Moreover, in ODR systems, Cho noted that parties should be given equal and reasonable opportunity to present their case.⁹⁴ For example, mediators in online mediation should have equal treatment for parties⁹⁵ and provide equal opportunity for them to present their case.⁹⁶

Therefore, the equal treatment element recognized in this research for procedural fairness in ODR has the same definition as the voice element for procedural fairness that has been discussed in previous studies. However, in this research the voice element is called equal treatment due to the existence of technology in ODR.

B. *Respect*

Another element identified in this research is the measurement of procedural fairness in ODR systems. This means ODR providers should behave respectfully to parties, because when individuals receive respectful behaviour from decisionmakers and neutrals in ODR, it enhances their satisfaction with the fairness of the procedure. Findings in this research identified three components of the respect element:

- 1) Providing an opportunity for disputing parties to have control over the process and their outcomes (e.g., they can propose solutions where their rights are protected);
- 2) Dignity for and equitable treatment of disputing parties regardless of the value of the purchase or the social status of the parties; and
- 3) The proceedings should not be delayed without a reasonable cause.

The above components of the respect element are illustrated in Figure 6.

⁹⁰ Tyler, *supra* note 41, at 887.

⁹¹ Leventhal, *supra* note 42, at 23.

⁹² THIBAUT & WALKER, *supra* note 38, at 9–12.

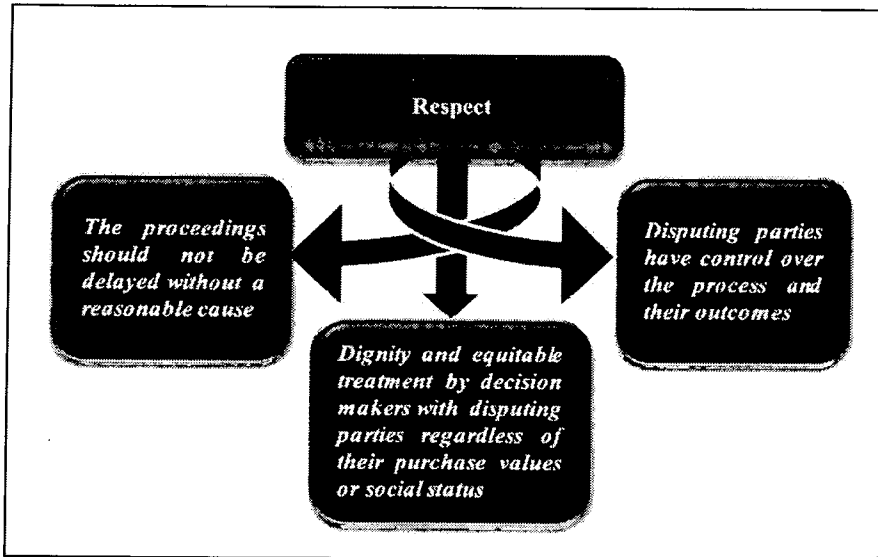
⁹³ Hancock & d'Estrée, *supra* note 43, at 131.

⁹⁴ CHO, *supra* note 11, at 64.

⁹⁵ HÖRNLE, *supra* note 69, at 138.

⁹⁶ Schmitz, *supra* note 70, at 328.

FIGURE 6



The literature emphasizes respectful treatment as a criterion that establishes procedural fairness. As suggested by Lind and colleagues,⁹⁷ Leventhal,⁹⁸ and Hollander-Blumoff and Tyler,⁹⁹ decisionmakers should protect individuals' rights and treat people with dignity.

Thibaut and Walker argue that decision control for parties is part of the voice element in procedural justice; in contrast this research has found that decision control for parties is a sign of respectful behavior by dispute resolution systems such as ODR. This has been confirmed by other ODR research; the need to treat parties in ODR equally, regardless of their social and economic status, has been reiterated by Schmitz.¹⁰⁰ Moreover, to create respect in ODR procedures, the proceedings should not be delayed without any reasonable cause, as mentioned by Cho.¹⁰¹ Therefore, this research explored the significance of the respect element as one of the six elements that define and measure procedural fairness in ODR.

⁹⁷ Lind et al., *supra* note 44, at 958.

⁹⁸ See Leventhal, *supra* note 42, at 30.

⁹⁹ Hollander-Blumoff & Tyler, *supra* note 60, at 8–11.

¹⁰⁰ Schmitz, *supra* note 70, at 328.

¹⁰¹ CHO, *supra* note 11, at 60.

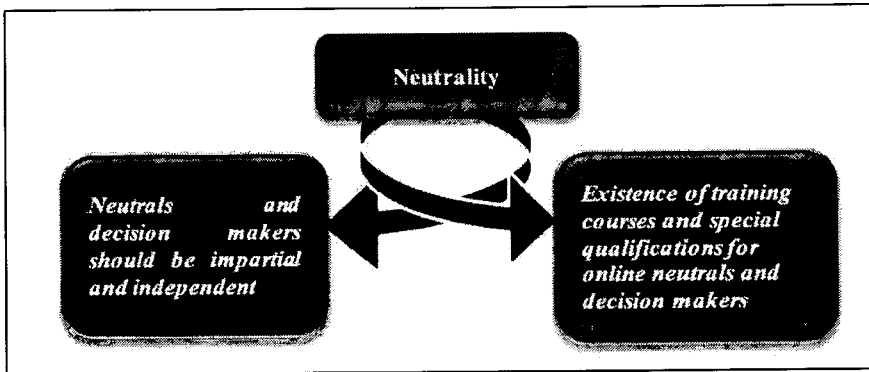
C. Neutrality

Neutrality is the third element recognized in this research, and it encompasses procedural justice in ODR systems. Neutrality is an important factor in ODR systems, especially as ODR takes place in an online space, as it is difficult for parties to trust neutrals due to the absence of face-to-face interaction. Additionally, disputing parties are influenced by judgments made by neutrals and decisionmakers, so it is important to be skilled and trusted. If disputants consider the outcomes as unfair, one of the matters on which they may focus is unbiased behavior and discrimination that they have experienced from decisionmakers or neutrals during the process. Therefore, to establish neutrality of procedural fairness in ODR, the following two issues need to be addressed:

- 1) Neutrals and decisionmakers should be impartial and independent; and
- 2) Training courses and special qualifications for online neutrals and decisionmakers (e.g., providing a mediator or arbitrator with offline experience as well as online experience to learn independence in online resolution cases).

Figure 7 portrays this relationship.

FIGURE 7



Online neutrals need to have online skills and qualifications to work on online systems. Moreover, the existence of an in-depth neutral selection process and selection guideline can improve the quality of more inexperienced neutrals. Neutrality is an essential criterion of procedural justice, and it has also been

explored by previous researchers such as Leventhal¹⁰² and Tyler.¹⁰³ In other words, neutrals and decisionmakers need to demonstrate honest and impartial behavior in justice system processes. Neutrality is a compulsory element of procedural fairness in ODR systems that will make parties believe in the truthworthiness of the decisionmakers and encourage the parties to respect the decisionmakers, the process, and the outcomes.

D. *Trustworthiness*

The fourth element that has significant impact on the procedural fairness of ODR systems is trustworthiness. The reason for this criterion is that individuals will trust, accept, and follow the rules and procedures if they feel the authorities are fair. In fact, in ODR systems, the quality of treatment and the decisionmaking process shape the attitude of disputing parties about the trustworthiness of the authorities. Therefore, disputants consider it important whether or not mediators or arbitrators in their ODR process care about their case and try to find the best solution. Trustworthiness in ODR systems should be provided through two aspects:

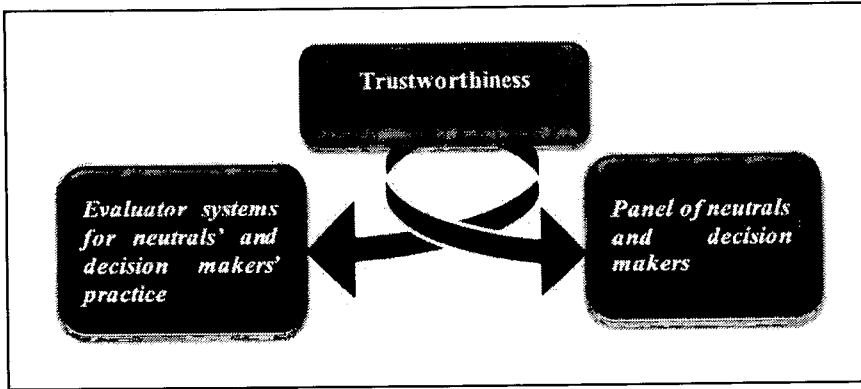
- 1) Evaluator systems for neutrals' and decisionmakers' practice (e.g., parties can make complaints against neutrals or give feedback to inform ODR providers about their neutrals' performance. Even the system itself could test neutrals regularly to see whether or not they have the minimum qualifications); and
- 2) A panel of neutrals and decisionmakers.

For example, the existence of a brief bio of each mediator or arbitrator will help parties to choose who they prefer, and it will create trust. Figure 8 presents the nature of trustworthiness.

¹⁰² Leventhal, *supra* note 42, at 26.

¹⁰³ Tyler, *supra* note 41, at 888–89.

FIGURE 8



This element has been noted by previous commentators, such as Leventhal¹⁰⁴ and Tyler,¹⁰⁵ who focused on trustworthiness as a significant element of procedural fairness that is multi-faceted, consisting of ability, benevolence, and integrity.¹⁰⁶ One of the ODR principles mentioned by Kaufmann-Kohler and Schultz is that “trustworthiness is within the discretion of the neutral,” which means integrity and authenticity in all circumstances has been considered.¹⁰⁷

E. Consistency

Consistency is an important element in measuring procedural fairness of ODR systems. Individuals evaluate the procedure based on established procedural expectations. When this expected procedure is deviated from or inconsistent, then parties will perceive the process to be less fair. Moreover, as mentioned in the literature review, based on Lind’s fairness heuristic theory, individuals—before taking their case into a justice system—might feel uncertain about their relationship with the authority or they might have difficulty trusting the authority.¹⁰⁸

This issue is even stronger in ODR due to the lack of face-to-face communication. Before entering ODR systems, parties will start to collect information about the process and the trustworthiness of the system. When

¹⁰⁴ Leventhal, *supra* note 42, at 37.

¹⁰⁵ Tyler, *supra* note 41, at 887.

¹⁰⁶ *Id.* at 890.

¹⁰⁷ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 190.

¹⁰⁸ LIND, *supra* note 49.

they are informed, they will expect certain procedures, so these expectations will shape their perception about fairness. Therefore, there is a need for consistent procedures in ODR systems as they shape parties' expectations about procedural fairness. In ODR systems, to maintain consistency of rule, two requirements need to be considered:

- 1) The existence of procedural guidelines (e.g., ODR providers could adopt rules and principles for their procedure from well-established ADR guidelines); and
- 2) The existence of consistent and predictable outcomes, which also leads to trust.

FIGURE 9

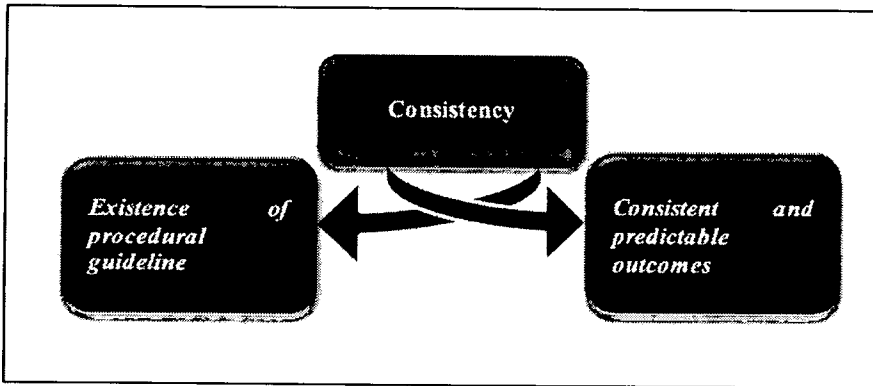


Figure 9 illustrates the importance of the consistency element in ODR systems. Relevant research studies, such those conducted by Leventhal,¹⁰⁹ Bos and colleagues,¹¹⁰ Lind,¹¹¹ and Greenberg¹¹² have focused on the significant influence of consistency on procedural fairness. When individuals are given information about the procedure, they are informed about what to expect and will then view events in a way that is either compatible or incompatible with their expectations. So, individual's expectations have more effect on procedural fairness of the process compared to what they actually experience during the process or the outcome.

¹⁰⁹ Leventhal, *supra* note 42, at 23.

¹¹⁰ Bos et al., *supra* note 51, at 425.

¹¹¹ LIND, *supra* note 49.

¹¹² Greenberg, *supra* note 50, at 342.

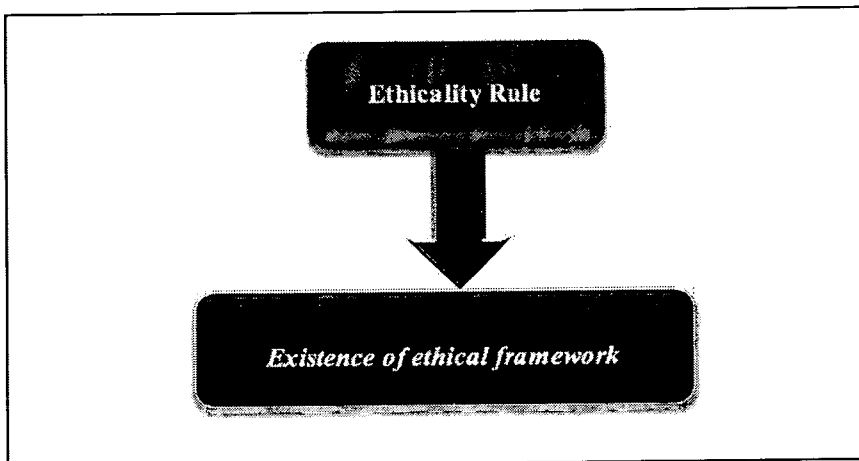
The importance of the fairness and consistency of outcomes in ODR have been discussed in literature relating to ODR, such as Rabinovich-Einy.¹¹³ The existence of standards and guidelines in ODR mechanisms will provide information about the process for parties and will shape their expectations about procedural fairness. In addition, predictable and consistent outcomes will shape parties' expectations about procedural fairness—that if such a dispute happens again there will be consistent solutions. This also helps individuals trust that system, as they find it is consistent.

F. *Ethicality Rule*

The last element found in this research in regard to the definition of procedural fairness in ODR systems is the ethicality rule. It is important that decisionmaking procedures are based on moral values of individuals and ethical standards. The more individuals view the procedure as compatible with ethical values such as the decisionmaker's politeness and concern about their rights, the more likely they will view the process as fair and accept the outcomes. To adhere to the ethicality rule, ODR providers should have an ethical framework or ethical standards for ODR procedures.

An example is the provision of annual reports by an experienced ethics committee to evaluate their system. Moreover, self-ethical standards for neutrals will improve their ethicality rule. Figure 10 shows that having an ethicality rule in systems requires an ethical framework.

FIGURE 10



¹¹³ Rabinovich-Einy, *supra* note 73.

Similarly, Leventhal has identified the ethicality rule as one of the main rules that influences procedural justice.¹¹⁴ Researchers such as Hollander-Blumoff and Tyler¹¹⁵ stress the importance of the relationship between ethical standards and fairness of the process. In ODR, Cho¹¹⁶ indicates that the parties' rights should be protected based on international standards. However, in ODR there should be more attention to this rule, as parties are more vulnerable due to the majority of communication being online and a lack of physical and verbal communication that might cause misunderstandings.

Therefore, the existence of an ethical framework will make individuals in ODR systems feel their rights in the procedure are protected, and they will have more responsibility about outcomes.

V. CONCLUSION

The Researcher set out to answer the research question raised in this study. In doing so, an exploratory, sequential mixed methods approach was adopted. The research question in this study was, "*What is the definition and measurement for concepts of Fairness in ODR systems?*" The study resulted in six elements being identified to measure procedural fairness in ODR systems: equal treatment, respect, neutrality, trustworthiness, consistency, and ethicality rule.

This Article, by investigating these key elements to measure fairness in ODR systems, has added to the growing body of international literature and has filled an important gap in the literature in the ODR field. In terms of the impact of the study findings, with the absence of a universal guideline for ODR systems, this research provides a universal framework and standards for any existing ODR system. This framework will ensure consistency of ODR systems practice, provide greater fairness for its users, and enhance consumer protection.

The findings of this study have practical implications for ODR providers and e-commerce companies. ODR providers should aim to design and develop their programs based on these consistent standards. Decisionmakers and neutrals need to be trained and regularly evaluated to examine their performance based on the system's established rules and principles. Moreover, e-commerce companies should provide information about the availability of ODR services/providers on their website. The results will benefit e-commerce companies by increasing the number of consumers who purchase goods and services online, as these consumer will have confidence that for any potential dispute happens, there is a fair and efficient dispute resolution system available online to resolve their dispute.

¹¹⁴ Leventhal, *supra* note 42, at 33.

¹¹⁵ Hollander-Blumoff & Tyler, *supra* note 60, at 10.

¹¹⁶ CHO, *supra* note 11, at 64.