Managing Procedural Expectations in Small Claims ODR

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Abstract

In this article, the author reflects on the appropriate place of traditional procedural guarantees in the resolution of consumer and small claims disputes using online tools. After examining the key aspects of procedural justice that constitute the right to a fair trial and analysing its effects on procedures designed for low-value disputes, the article argues for a flexible approach that takes procedural proportionality seriously.

Keywords: fair trial, procedural justice, natural justice, waiver, small claims, consumer disputes, proportionality.

It would be difficult to overstate the importance of procedure in the governance of human affairs in general, and the administration of justice in particular. In the following pages, I aim to reflect on the appropriate place of traditional procedural guarantees in the resolution of consumer and small claims disputes using online tools.

1 The Importance of Procedure

From a high-level public policy and institutional design perspective, procedure is crucially important because it allows us to establish legitimacy and to stabilize expectations where disagreement persists over the substantive values underpinning society and the right construction of the norms through which those values are made legally operational. In the context of dispute resolution, it is broadly acknowledged that the quality of the process leading to an outcome is just as important as the substantive quality – often designated as accuracy, or truth – of that outcome. It is no wonder, then, that in the area of dispute resolution writ large – *i.e.* going beyond criminal matters into civil procedure, and beyond state courts into private arbitration – procedural expectations have found expression

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in the form of a fundamental right to a fair trial.[1] Often entrenched in human rights instruments, this right has now been placed, to some extent, beyond the reach of ordinary legislation and therefore depends largely on how the right is interpreted by courts of law.

Given the cross-border nature of a significant portion of e-commerce, it is helpful to take a global perspective on the right to a fair trial. In spite of significant differences in procedural traditions, a remarkable convergence of the requirements of a fair trial (or due process, or natural justice) can be observed across legal traditions. The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* has provided an opportunity to observe this convergence by imposing broadly worded procedural requirements for the enforcement of awards in 157 jurisdictions.[2] More specifically, according to Article V(1)(b) of the *New York Convention*, recognition and enforcement of a foreign arbitral award may be refused, at the request of the party against whom it is invoked, if the said party "was not given proper notice of the appointment of the arbitrator

1 *See* the *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171, Art. 14(1), (entered into force 23 March 1976) [*ICCPR*]: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." For a commentary, *see* S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights*, 3rd ed., Oxford, Oxford University Press, 2013, at 418 ff. *See also Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5, Art. 6(1): "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 interests 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 to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." [*ECHR*]. For a commentary, *see* D. Harris *et al*., *Law of the European Convention on Human Rights*, 3rd ed., Oxford, Oxford University Press, 2014, 370 ff. *See also UNCITRAL Model Law on International Commercial Arbitration*, 11 December 1985, UN Doc. A/40/17, Art. 12 (independence and impartiality of the arbitral tribunal), Art. 18 (equal treatment of the parties and due process) and Art. 34(2)(ii) (annulment of the award for violation of due process) [*Model Law*]. For a commentary, *see* P. Binder, *International Commercial Arbitration and Conciliation in Uncitral Model Law Jurisdictions*, 3rd ed., London, Sweet & Maxwell, 2010, at 276 ff. ("This provision [art 18] was described … as being the Magna Carta of arbitral procedure").

2 *Convention on the Recognition and the Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38, 21 UST 2517 [*New York Convention*]. For the status of the Convention, *see*www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

or of the arbitration proceedings or was otherwise unable to present his case".[3] Moreover, it is widely accepted that similar factual circumstances will allow a state court seized of an application for enforcement the power to refuse of its own motion the application on grounds of violation of public policy.[4] This includes cases of lack of independence and impartiality of the arbitrators.[5]

Scholarly works on these procedural requirements show that the core understanding of the right to a fair trial (or procedural due process) is universal.[6] The details of how far the right extends to various aspects of the trial and in different circumstances, however, remain unsettled. Thus, while the 'impartiality and independence' aspect of a fair trial is clear in its broad outlines, the determination of its precise scope in various domestic and international, public and private contexts remains elusive.[7] Similarly, while the equal right of the parties to be heard is easy to formulate as an abstract and universal principle, the answers to countless process issues thrown up by circumstances and innovation do not flow from the principle without the mediation of interpretation and normative construction. I will mention two areas relevant to consumer ODR where opinion is divided or the position unsettled.

There is an important divide between the common and civil law traditions that should be mentioned here. The divide focuses on the right of a party to hear and to answer all communications between the other party and the adjudicator (a judge or an arbitrator). The issue surfaces in cases where mediation is attempted by the person who will act as adjudicator in the course of a procedure leading to adjudication. Lawyers trained in the common law tend to insist that no adjudication can be consistent with procedural public policy if the adjudicator has held caucuses, that is, if separate communications or meetings between the adjudicator and the parties on either side have taken place as part of the mediation effort. To be sure, there is universal agreement that *ex parte* communications with an

3 For an overview, *see* H. Verbist, 'Challenges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention', *in* E. Gaillard & D. Di Pietro (Eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards*, London, Cameron, May 2008, p. 679.

4 Art. V(2)(b): "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … (b) the recognition and enforcement of the award would be contrary to the public policy of that country." *See* B. Hanotiau & O. Caprasse, 'Public Policy in International Commercial Arbitration', *in* E. Gaillard & D. Di Pietro (Eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards*, London, Cameron, May 2008, atp. 819 ff.

5 *Ibid.* at p. 824. *See also* D. Otto & O. Elwan, 'Article V(2)', *in* H. Kronke, P. Nacimiento *et al.* (Eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Alphen aan den Rijn, Kluwer Law International, 2010, p. 345 at p. 370.

6 For an overview *see* N. Kuckes, 'Civil Due Process, Criminal Due Process', *Yale Law & Policy Review*, Vol. 25, No. 1, 2006, p. 1 at 10 ("Within [the] civil model of procedural due process lie at least four distinct elements … : participatory procedures (the affected party is present); an unbiased adjudicator (the decision-maker is a neutral nonparty); prior process (the hearing precedes the adverse action); and continuity (hearing rights attach at all stages)").

7 *See, generally*, F. Gélinas, 'The Dual Rationale of Judicial Independence', *in* A. Marciano (Ed.), *Constitutional Mythologies*, New York, Springer, 2011, p. 146; F. Gélinas, 'The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?', *New York International Law Review*, Vol. 24, No. 1, 2011, pp. 1-48.

adjudicator are not to take place as a matter of general principle.[8] The difference lies in whether it is appropriate – and consistent with public policy – that such communications should take place with the knowledge and consent of the parties. Mounting pressures in favour of efficiency, as well as the growing influence of the Chinese med-arb practices, have combined to push in the direction of allowing combined processes involving caucuses as long as all parties have clearly consented.[9] In this respect, one sign of the growing international consensus is in the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. General Standard 4(d) states that:[10]

> An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

The standard makes clear that arbitrators can assist the parties in reaching a settlement in addition to the arbitrator's main function as adjudicator.[11] The reference to both conciliation and mediation suggests that caucuses are acceptable as long as they do not raise doubts in the adjudicator's mind about her own impartiality and the parties have given their agreement in writing.

Another respect in which the position remains somewhat unsettled is the right to a hearing. Most procedural instruments used internationally allow documents-only procedures but require that a hearing take place if one of the parties requests it. The difficult question here is the contractual limits that can be placed on the right to a hearing and the time from which such limits can validly operate. The question presents itself with respect to both oral pleadings and the hearing of

8 *See, e.g. Goldtron Ltd. v. Media Most B.V.*, No. 02.398 KG (Amsterdam District Court), *YB Comm Arb XXVIII* (2003) 814.

9 *See* K. Fan, 'The Risks of Apparent Bias When an Arbitrator Acts as a Mediator', *YB Private International Law*, Vol. 13, 2011, p. 535 at p. 540.

10 For a detailed analysis of the 2014 version of the *IBA Guidelines*, *see* N. Voser & A. Petti, 'The Revised IBA Guidelines on Conflict of Interest in International Arbitration', *ASA Bull*, Vol. 33, No. 1, 2015, pp. 6-36.

11 For an overview on the existing understandings of the adjudicative functions of arbitrators, *see* G. Marchisio, *The Notion of Award in International Commercial Arbitration*, Alphen aan den Rijn: Kluwer Law International, 2017, pp. 13-24.

fact and expert witnesses. Again here, the tendency among lawyers trained in the common law procedural tradition is to insist on an absolute right to put questions orally to any fact or expert witness who has submitted a witness statement or expert report. This position has been embraced to an extent in international arbitration, where it is commonly held that the failure of witnesses to appear at a hearing without a valid reason can lead to their written evidence being discarded by the arbitrators.[12] The extent to which the right to cross-examine fact and expert witnesses can be waived and if so when, however, remains unclear. The recently adopted expedited procedure of the 2017 ICC Arbitration Rules – a set of rules which is normally considered as incorporated into the agreement of the parties to the arbitration[13] – appears to empower the arbitral tribunal to refuse a request for a hearing. Article 3(5) of the Expedited Procedure states that "The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts."[14] The willingness to invoke such a provision in order to refuse the cross-examination of fact witnesses or experts who have filed written evidence that the tribunal intends to consider, however, remains to be seen and appears uncertain. In other words, having an eye on the reviewing courts – at the seat of arbitration and at the likely places of enforcement – and their possible approach to this procedural point, arbitrators are likely to err on the side of caution, and some of them may well consider that Article 3(5), or similar provisions, cannot operate as an effective advance waiver of the right to cross-examine a witness whose written statement or report will be considered. This is an example of the kind of situation where favouring procedural caution can work against the effectiveness of an expedited procedure designed, in the interest of or with the agreement of the parties, with proportionality in mind.

Some years ago, I had occasion to raise some doubts about the cautious approach to waiver in the context of the right to an impartial and independent tribunal.[15] The point was exploratory but bears repeating here in respect of other aspects of the umbrella right to a fair trial. The point is that waiver and consent cannot be analysed in the same way in relation to procedural rights as they can be in relation to substantive rights. That is because civil adjudication relies entirely on the litigants to bring forth and to define the issues to be decided. Because of the '*principe dispositif*', or principle of 'party initiative', adjudication remains fun-

12 *See* Art. 4(7) of the 2010 *IBA Rules on the Taking of Evidence*: "If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise."

13 For an overview, *see* J. Ricardo Feris, 'The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions: A View from Inside the Institution', *ICC Bull*, Vol. 1, 2017, p. 63; G. Marchisio, 'Recent Solutions to Old Problems: A Look at the Expedited Procedure under the Newly Revised ICC Rules of Arbitration', *ICC Bull*, Vol. 1, 2017, p. 176.

14 *See* 2017 *ICC Rules*, Appendix VI, Art. 3(5).

15 Gélinas, 2011, at pp. 44-47.

damentally tied to party autonomy.[16] No matter how fundamental or mandatory a substantive right may be, there is never any question of forcing the creditor of that right to pursue it in the adjudicative mode. If creditors of substantive rights have the agency to decide not to pursue them at all in the adjudicative mode, should their right to pursue them under procedural terms of their choosing not be recognized? The full logical implications of this principle of party initiative do not seem to have been fully worked out in respect of how we treat waivers in matters of procedure. Working these out may well open up some of the conceptual space we need to adapt dispute resolution processes to small claims and consumer disputes.

From the foregoing, one can see that key procedural guarantees in contemporary legal thinking have acquired such a heightened status that, in many settings, they are placed beyond the reach of legislative power and the exercise of party autonomy. In my view, this status may be too elevated, at least in settings where parties are in a comparable bargaining position. If traditional procedural rights are sometimes considered sufficiently important to trump party autonomy even in those settings, how can one hope to manage, in the consumer context, the high expectations they create?

2 Procedural Expectations in the Consumer Context

Considerable efforts have been invested in finding ways to resolve the cross-border consumer dispute conundrum. Private-sector innovations have gone to great lengths to introduce non-binding conflict management processes using charge-back protocols, insurance-model schemes implementing no-questions-asked return policies, and online structured negotiation and mediation tools including blind bidding.[17] However, in many cases, large retailers have set up their online retail operations in national silos to avoid the regulatory difficulties raised by cross-border commerce with consumers, thus depriving consumers and the world economy of the competition benefits of global e-commerce.

Among the most significant efforts deployed in the public realm have been those of UNCITRAL, which for many years supported a large working group with

16 *See* 2004 *ALI/UNIDROIT Principles of Transnational Civil Procedure*, Principle n. 10(5) (codifying the right of a party to modify or voluntarily terminate the procedural proceeding): "The parties should have a right to voluntary termination or modification of the proceeding or any part of it, by withdrawal, admission, or settlement. A party should not be permitted unilaterally to terminate or modify the action when prejudice to another party would result." *See also* H.P. Glenn, 'The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards for Adjudication?', *Uniform Law Review*, Vol. 9, 2004, p. 829 at p. 830 ("[P]arty control or disposition (the "dispositive" principle) of the nature and object of the dispute are common to [the romano-canonical and common law procedural traditions], indicating their fundamentally western and liberal character").

17 *See, e.g.* J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge, Cambridge University Press, 2009, p. 75 ff; A.J. Schmitz & C. Rule, 'The New Handshake: Where We Are Now', *International Journal of Online Dispute Resolution*, 2016, p. 84.

broad-ranging informal stakeholder representation.[18] For many reasons that cannot be explored here, these efforts have come to very little. Central among the reasons for this disappointing outcome is a seemingly irreconcilable difference in views about the role of consent and party autonomy in the design of the relevant dispute resolution model.[19] Is a consumer's consent sufficiently informed to effect a valid waiver of important procedural rights? If so, when? And, can out-of-court procedures ever be binding on the consumer? National laws provide different answers to these questions, making international consensus extremely difficult.

To observers from countries outside the European Union and the United States of America, it may appear as though a middle ground position would be ideal. Treating consumer transactions, for the purpose of arbitration, as though they were freely negotiated contracts between parties of comparable bargaining power seems unreasonable to most people outside the USA. Treating consumers as though they have no agency whatsoever when it comes to procedural rights also seems unreasonable to most people. There is now significant movement at the state level in the USA towards a heightened degree of protection for consum-

18 I am referring to UNCITRAL's Working Group n. III (Online Dispute Resolution). *See Report of the United Nations Commission on International Trade Law*, Forty-third Session, 21 June-9 July 2010), A/65/17 at para. 257 ("After discussion, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business-to-consumer transactions"). *See also* United Nations Commission on International Trade Law, Forty-third session New York, 21 June-9 July 2010, *Possible future work on online dispute resolution in cross-border electronic commerce transactions* (Note by the Secretariat), A/CN.9/706 (detailing the reasons behind the creation of a separate Working Group).

19 *See* UNCITRAL, Working Group n. III, *Draft Outcome Document Reflecting Elements and Principles of an ODR Process* (22 December 2015, A/CN.9/WG.III/WP.140). The instrument highlights these difficulties. In this respect, section III ("Stages of an ODR Process") introduces the idea of an escalation process, although avoiding any reference to a precise dispute resolution mechanism for each stage, particularly when preliminary negotiation/mediation has failed:

> "18. The process of an online dispute resolution proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.
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> 19. The ODR process may commence when a claimant submits a notice of claim through the ODR platform to the ODR administrator. The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings – a technology-enabled negotiation – commences, in which the claimant and respondent negotiate directly with oneanother through the ODR platform.
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> 20. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, 'facilitated settlement' stage … In that stage of proceedings, the ODR administrator appoints a *neutral* … who communicates with the parties in an attempt to reach a settlement.
>
> 21. If facilitated settlement fails, a third and final stage of proceedings might commence. In that stage of proceeding, the ODR administrator may remind the parties, or set out for the parties, possible process options to choose." [references omitted]

ers and other groups who transact in a weak bargaining position.[20] Although the movement at the state level looks strong and in some respects promising, the various initiatives pushing in the same direction at the federal level are not likely to

20 Most recently, the Supreme Court of California, in *McGill v. Citibank*, 393 P3d 85 (Cal Sup Ct 2017), held that a provision of a pre-dispute arbitration agreement waiving a consumer's statutory right to seek public injunctive relief under California's Consumers Legal Remedies Act, Unfair Competition Law or False Advertising Law violates California public policy and, as such, is unenforceable, and that the California rule is not pre-empted by the Federal Arbitration Act (FAA). Another example concerns the approach adopted by state Attorneys General to the rule that was introduced by the Consumer Financial Protection Bureau (CFBP; the US federal agency in charge of enforcing federal consumer financial laws and protecting consumers in the financial marketplace). The CFPB rule (82 Fed. Reg. 33428, § 1040.4.(a)(1) (10 July 2017)) would have imposed significant limitations on arbitration had it not been nullified by Congress in October 2017. However, prior to its nullification, the rule was well received by state Attorneys General. Nineteen state Attorneys General, including the Attorneys General of New York, California, Massachusetts, Illinois and Delaware, jointly sent a letter to the CFBP, supporting the rule and even taking it a step further by encouraging the CFBP to consider regulations as to "total prohibition of mandatory, predispute arbitration clauses in consumer financial contracts" (www.mass.gov/ago/docs/consumer/cfpb-multistate-letter.pdf). In addition, there are several cases where federal Courts of Appeals applying state laws distinguished the matters before them from the US Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S Ct 1740 (2011), which held that the arbitration agreement waiving the possibility of any class arbitration is enforceable as the FAA pre-empts states' judicial rule regarding the unconscionability of such waivers in consumer contracts – so as to avoid the pre-emption of the state law by the FAA. *See, e.g. Richmond Health Facilities v. Nichols*, 811 F3d 192 (6th Cir 2016) (distinguishing the case from Concepcion and holding that under Kentucky law the executrix of a decedent's estate is not a party to the arbitration agreement between the nursing facility and the decedent and, as such, the executrix may not be compelled to arbitrate a wrongful death claim against the facility operators) and *Noohi v. Toll Bros*, 708 F3d 599 (4th Cir 2013) (distinguishing the case from Conception and holding that under Maryland law the arbitration clause lacked mutuality of consideration and was thus unenforceable).

prosper under the current administration.[21] The European Union has also been working hard to find ways of making cross-border consumer dispute resolution a

21 It should be noted that the US Supreme Court over the past years has favoured strict enforcement of arbitration agreements. In this regard, three of its decisions particularly stand out: *Allied-Bruce Terminex v. Dobson*, 513 US 265 (1995), *AT&T Mobility v. Concepcion*, 131 S Ct 1740 (2011), and *American Exp Co v. Italian Colors Rest*, 133 S Ct 2304 (2013). The three decisions, when read together, provide that generally the Federal Arbitration Act (FAA) pre-empts state laws prohibiting arbitration of consumer disputes even if the arbitration clause has waived the consumers' right to launch/join any class action or class arbitration and also even if the costs of customers' individually arbitrating a federal statutory claim exceed the potential recovery. However, during the presidency of Mr. Obama, there was a considerable momentum in federal agencies to adopt pro-consumer regulations, which under the new administration were either nullified, revised or not finalized. There are three notable examples in this regard. The first example concerns the Consumer Financial Protection Bureau (CFPB). The CFPB was tasked by the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), § 1028, with submitting a report to Congress on "the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services", and was also authorized to adopt necessary regulations. The CFBP submitted the report to Congress in March 2015 (http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) and issued its final rule in July 2017 prohibiting providers of consumer financial products/services from relying on pre-dispute arbitration agreements to stop consumers from launching/joining class actions in courts (Arbitration Agreements, 82 Fed. Reg. 33428, § 1040.4.(a)(1) (July 10, 2017), www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-14225.pdf). The rules were believed to result in removing arbitration clauses altogether from the targeted financial agreements because, as put by a commentator, "without the 'carrot' of a class arbitration waiver, a company has no incentive to offer, much less to cover the costs of, individual consumer arbitration." (R.L. Lampley, 'The CFPB Proposed Arbitration Ban, the Rule, the Data, and Some Considerations for Change', *BLT*, May 2017, www.americanbar.org/publications/blt/2017/05/07_lampley.html). However, the CFPB rule was nullified by Congress. Soon after the CFPB issued its rule in July 2017, the Republican-controlled House of Representatives in Congress exercised its authority under the Congressional Review Act to pass a resolution nullifying the CFPB rule, which passed Senate in October 2017 (HRJ Res. 111, 115th Cong (2017), www.congress.gov/115/bills/hjres111/BILLS-115hjres111rds.pdf; and website of Congress www.congress.gov/bill/115th-congress/house-joint-resolution/111/actions). The second rule that suffered the same fate concerns the Federal Communication Commission (FCC), which in November 2016 published its rule imposing significant restrictions on the use of consumers' information by Internet service providers (Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 87274 (2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1103/FCC-16-148A1.pdf). In the rule, the FCC had asserted its 'serious concerns' about pre-dispute arbitration agreements and its plan to address the matter in 2017. However, in January 2017, Congress nullified the rule altogether (SJ Res. 34, 115th Cong (2017), www.congress.gov/115/bills/sjres34/BILLS-115sjres34enr.pdf). The third example concerns the Centers for Medicare & Medicaid Services, which is part of the US Department of Health and Human Services. It published its final rule in October 2016 prohibiting the use of pre-dispute arbitration clauses in long-term care facilities agreements (Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, § 483.70, 81 Fed. Reg. 68688 (2016), www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf). The rule was challenged in court by the American Health Care Association and a group of nursing homes, following which the rule was revised and the prohibition against pre-dispute arbitration clauses was lifted in June 2017 (CMS press release, *CMS Issues Proposed Revision Requirements for Long-Term Care Facilities' Arbitration Agreements*, 5 June 2017, www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-06-05.html#).

practicable avenue, at least within the EU.[22] In this area, legislative initiatives have to contend with the evolving case law under Article 6 of the European Convention on Human Rights. Here, traditional conceptions of the trial are set against innovative and practical ways of dealing with a new problem.

I will mention only one initiative demonstrating both the tension between the traditional conception of the right to a fair trial and the alternative models put forth to make cross-border commerce, including e-commerce, viable for small transactions. This initiative is the European Small Claims procedure.[23] The procedure establishes that the parties are by default to be heard in writing.[24] An oral hearing is to be held only if it is considered, by the adjudicator, "to be necessary or if a party so requests".[25] This is not inconsistent with a standard position seen in many instruments, including some international arbitration instruments. The position recognizes that by default there will be a hearing, but the adjudicator is given discretion and will not hold a hearing if it is not useful or necessary, unless a party requests it.[26] However, the relevant regulation goes further, and this is where I see progress made from a rigid traditional position. The regulation provides that the party's request for an oral hearing can be refused if it is "obviously not necessary for the fair conduct of the proceedings". This is a small step. But it is indicative, in my view, of the willingness at the European level to advance "practicable" interpretations of the provisions guaranteeing the right to a fair trial. It is this kind of value-balancing exercise that is at the core of the work that is needed to make cross-border consumer e-commerce work smoothly.

Looking at the cross-border consumer dispute conundrum holistically, one must accept the reality that the bulk of consumer disputes will continue to be

22 *See, e.g.* Reg. (EU) No. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Reg. (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). Among other things, this regulation has introduced the European ODR Platform: https://ec.europa.eu/consumers/odr/main/ (last accessed 22 June 2017).

23 Reg. (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31 July 2007, pp. 1-22. *See* Art. 1: "This Regulation establishes a European procedure for small claims … intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs. The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States … [the regulation] also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other Member States, of judgments given in one Member State in the European Small Claims Procedure." For an overview, *see* X.E. Kramer, 'A Major Step in the Harmonization of Procedural Law in Europe: The European Small Claims Procedure', *in* A.W. Jongbloed (Ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Antwerpen, Intersentia, 2008, pp. 253-283.

24 Art. 5(1) (Conduct of the Procedure), Reg. (EC) No. 861/2007: "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."

25 *Ibid*.

26 *See, e.g.* Art. 3(5), Appendix VI, 2017 *ICC Arbitration Rules*. *Cf*. Art. 28 of the 2010 UNCITRAL Arbitration Rules (the provision indirectly confirms that the tribunal has discretion as to whether hearings should be held), and Sec. 34(2)(h) of the 1996 English Arbitration Act.

resolved under a 'consensus' model of dispute resolution, that is, through negotiation efforts or mediation processes that steer clear of the adjudicative mode of engagement and do not rely directly on the authority model of adjudication and the procedural requirements that come with it. There is certainly good reason to foster the development of such processes, particularly where one is able to leverage the power of technology to help structure the engagement between disputing parties and to guide them to a resolution without requiring their physical presence. The point I would like to make here very briefly is that, although avenues based on consensus can usefully complement the adjudicative mode of dispute resolution, they cannot replace it entirely.

The consensus model of dispute resolution cannot entirely replace the authority model, because the latter is partly parasitic on the former. While negotiation and mediation processes have considerable flexibility and potential because they are not limited to the vindication of legal rights, the very existence of those rights and their possible vindication in the adjudicative mode are the starting point of, and provide the necessary backdrop to, any consensus processes that lead to acceptable outcomes. It is too often forgotten that consensus without law and its authoritative enforcement is nothing but power. Consumer disputes have as their predicate a power imbalance that is ultimately for the law and its vindication through adjudication to redress. In other words, consensus-based approaches can work properly only if the law and its vindication is effective. "To the extent that the power relations between the parties or stakeholders depend on the legal norms that will govern the resolution of the conflict in respect of both venue and merits, consensus-based approaches can be said to operate under these norms, that is, in the shadow of law."[27] That is the reason why those approaches, even if they can admittedly do wonders in some sectors (*e.g.* blind bidding for insurance claims), should not be touted as a policy alternative to the adjudicative mode of resolution and the vindication of legally-based expectations it can provide, or as a way to avoid facing the policy choices that are needed to manage procedural expectations.

3 Conclusion

In addition to the crucial role they play in framing the parties' substantive expectations in consensus-based processes, adjudicative processes naturally constitute the default position for the resolution of all disputes. Those cases in which an acceptable resolution through negotiation or mediation cannot be found will always need a practicable fallback mechanism, and that mechanism must leave consumers with the sense that justice can speak the truth to economic power. That sense depends not necessarily, in my view, on the religious observance of

27 F. Gélinas, 'Conflict Resolution in Sustainability Disputes: Authority and Consensus in the Shadow of Law', *in* S.-L. Hsu & P. Molinari (Eds.), *Sustainable Development and the Law: People, Environment, Culture*, Montreal, Canadian Institute for the Administration of Justice, 2008, p. 21 at p. 26.

the most exacting procedural standards, but rather, as with so many things, on a proper regard for proportionality.