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# Transnational Consumer Law: Co-Regulation of B2C-E-Commerce

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Keywords: Private Ordering, New Law Merchant, International  
Contracts, Consumer Protection, E-Commerce

JEL Classification: K33, K39

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CLPE Research Paper 3/2007  
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**Gralf-Peter Calliess**

**TRANSNATIONAL CONSUMER LAW: CO-REGULATION  
OF B2C-E-COMMERCE**

Abstract: The nation states provide workable contract enforcement institutions for domestic commerce. Due to a lack of international cooperation the same does not hold true when it comes to cross-border situations. Thus, the institutional organization of international commerce is characterized by its reliance on private ordering or private legal services. Many believe that the emergence of a New Law Merchant can be observed in international commercial arbitration. This trend towards the privatization of commercial law, however, is believed to be limited to the sphere of corporate actors or merchants. When it comes to the protection of weaker contract parties like consumers, self-regulation is not held to be a viable option. In fact, consumers do shop increasingly across borders when engaging in e-commerce, often without noticing. The 1999 OECD Guidelines proposed to tackle the resulting consumer protection concerns by means of co-regulation. In this article, I intend to examine the potential role of private ordering and co-regulation in the area of cross-border consumer contracts. I start with a survey of the different mechanisms of private ordering, which have developed in e-commerce. This illustrates that electronic market places fulfil an essential role in bundling different means of private ordering into what I call transnational civil regimes for consumer protection. Finally, I aim at demonstrating how states, industry, and civil society actors can jointly contribute to the establishment of a civil constitution for such regimes.

Keywords: Private Ordering, New Law Merchant, International Contracts, Consumer Protection, E-Commerce

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# TRANSNATIONAL CONSUMER LAW: CO-REGULATION OF B2C-E-COMMERCE

Graff-Peter Calliess\*

## I. INTRODUCTION

A central function of private law is to facilitate market exchange by enabling economic actors to conciliate their mutual expectations and, thus, to cooperate. This *coordinative function* of private law becomes manifest in the definition of property rights and the enforcement of contractual obligations. Since the principle of party autonomy leaves the decision on substantive issues to contractual self-regulation, private law in this respect is merely a public framework for private ordering. In the modern welfare state, however, private law also fulfils a *regulatory function* in establishing certain constraints to party autonomy with respect to commutative justice and public policy. The legislation on the protection of consumers, as the weaker party in business transactions, figures as a prominent example (Grundmann, Kerber, and Weatherill, 2001).

While consumer protection within domestic markets is a well-established concept, the same does not hold for the international realm, where the enforcement of national protection regimes is hampered by a lack of international cooperation. Until recently this has posed not much of a problem, since consumers rarely engaged in international commerce directly. With the advent of the Internet, however, matters have changed dramatically. In the networked

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\* Dr. jur., Professor for International and European Private Law, Ludwig Maximilians University Munich. This paper was produced during my stay as a visiting researcher at the CRC 597 "Transformations of the State" at the University of Bremen in summer 2006. I wish to thank Harry Bauer for his help in translating substantial parts of this paper into the English language and Martin Klamt for editing.

economy, consumers increasingly shop online often without noticing that they get involved in cross-border situations, in which businesses are able to contract around national consumer rights by means of forum shopping and choice of law (Rothchild, 1999: 893; Calliess, 2006: ch 2-3).

It has been in this context that the issue of *consumer confidence* in business to consumer electronic commerce ('b2c-e-commerce') entered the global agenda (European Commission, 1997; Federal Trade Commission, 2000; OECD, 2006a). While states remained reluctant to regulate cross-border consumer contracts by means of multilateral treaties, international organisations called for *co-regulatory* efforts in addressing the issue. Hence, the 1999 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (the 'OECD Guidelines') read:

'Part II, VI: B.: Businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions. [...]  
Part III: To achieve the purpose of this Recommendation, Member countries should [...] encourage continued private sector leadership that includes the participation of consumer representatives in the development of effective self-regulatory mechanisms that contain

specific, substantive rules for dispute resolution and compliance mechanisms.<sup>1</sup> (see also OECD, 2002)

It is widely accepted that international merchants are able to solve their coordination problems by means of private ordering and, therefore, that they should be allowed to opt out of the state's legal system in handing over disputes to arbitration under the law merchant (Berger, 1999; Zumbansen, 2002; general critique at Cutler, 2003). This assumption's underlying rationale is that there is an absence of public interest in international commerce as merchants presumably meet on an equal footing. Regarding consumer contracts, in turn, private ordering is generally not thought to be an effective and legitimate means for achieving the regulatory functions of private law (Hadfield 2001: 45; European Consumer Law Group, 2001). Thus, the interesting question arises what the concept of co-regulation promoted by the OECD exactly entails, and whether it could at all work in the context of b2c-e-commerce.

In the following, I intend to examine the potential role of private ordering and co-regulation in the area of cross-border consumer contracts. I start with a survey of the different mechanisms of private ordering, which have developed in e-commerce (I.). This illustrates that electronic market places fulfil an essential role in bundling different means of private ordering into what I call *transnational civil regimes* for consumer protection (II.). Finally, I aim at demonstrating how states, industry, and civil society actors can jointly contribute to the establishment of a *civil constitution* for such regimes with respect to the regulatory functions of private law (III.).

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<sup>1</sup> The Guidelines are available at:  
<http://www.oecd.org/dataoecd/18/13/34023235.pdf>. (All links to the Internet in this text are last checked on 20 January 2007.)



## II. PRIVATE ORDERING IN B2C-E-COMMERCE

There is a plethora of literature on private ordering in commercial relations, describing various governance mechanisms that merchants employ in order to reduce the likelihood of opportunistic behaviour among contractual parties (Bernstein, 1992; Benson, 1999; Aviram, 2004; Williamson, 2005; Greif, 2006). These mechanisms are generally applied 'in the shadow of law', but their use is rendered essential in a situation of 'lawlessness', eg, in low developed countries with inefficient legal systems (Dixit, 2004). The latter situation resembles the one in cross-border commerce in which businesses are confronted with constitutional uncertainties resulting from multi-jurisdictional litigation (Schmidtchen, 1990; Streit and Mangels, 1996). In this part of my paper I intend to demonstrate, how the governance mechanisms employed by international merchants are increasingly adapted to b2c-e-commerce transactions as well.

### A. ONLINE REPUTATION

One important mechanism of contractual governance is reputation: people do not engage in opportunistic behaviour in a certain transaction, because they fear that other parties might refrain from entering into future transactions with partners which on the relevant market have a reputation as bad co-operators (Posner, 2000). But the collection and processing of information on the past performance of potential contract partners is costly, since it usually is not spread in an organized manner but rather spontaneously. For this reason the reputation mechanism is categorized as 'informal third-party control' (Panther, 2000). It follows, that the reputation mechanism works most effectively for high volume transactions which legitimize the involved information costs as well as on markets with a limited number of players which interact frequently and, thus, have a high probability of meeting repeatedly (Leeson, forthcoming). The interactive communication capabilities of the Internet, however, have enabled the establishment of large-scale,

'word-of-mouth'-networks at low cost. Online feedback mechanisms introduced by electronic market places have led to an increasing formalisation of the reputation mechanism (Dellarocas, 2003: 1407). In the following, I shall discuss the 'eBay'-feedback system as an example for the adaptation of the reputation mechanism to the needs of large scale and small volume consumer markets with a low probability of repeated transactions (Baron, 2002; Resnick et al., 2006).

In order to enter 'eBay's' electronic market place, seller and buyer first have to become registered members. 'eBay' offers different procedures for identity check, where the appliance of the most rigorous check is indicated by a symbol attached to the member's name. In the aftermath of every transaction, buyer and seller can mutually assess each other – positively, neutral or negatively – and can briefly justify their decision. Negative assessments can be commented on by the assessed and are allowed to be taken back by mutual agreement. In this way, multiple assessments constitute a rating profile of every member, the quality of which is indicated after the member's name by stars and shooting stars in different colorings. This allows potential transaction partners to get information about each other before completion of a contract.<sup>2</sup> Furthermore, those vendors receive the status of a 'PowerSeller' who on average have sold more than 300 items within the last three months or who have generated a turnover of 3,000 Euro and whose ratings are positive to more than 98 percent. Again, this is indicated by a particular symbol after the member's name. New members and those members who have changed their member name are also indicated by particular symbols. In sum, 'eBay' provides a highly formalized reputation system, which offers its members a high

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<sup>2</sup> In principle, this only applies to the buyer, as the vendor cannot know the winner of an auction in advance. Recently, however, eBay has provided sellers with the option of limiting their offer to buyers from a particular region or with a particular minimum rating profile.

degree of transparency through information about the trustworthiness of potential contractual partners. Shopping with a commercial 'PowerSeller' can be considered as safe as shopping with a traditional high street brand like Marks and Spencer for example. Yet, occasional private sellers can also obtain an impeccable reputation over a longer period of time. In contrast, it is more risky to complete a contract with a new vendor lacking a distinct member profile. In such a case, every member has to consider whether she wants to take such a risk; especially, if higher sums of money are involved, additional precautionary measures are available such as an escrow service, which is further detailed below.

## B. TRUSTMARKS AND CODES OF CONDUCT

Following the principle 'caveat emptor', trustmarks offer a functional equivalent to trademarks in that both bundle information on a supplier in an easily accessible form and, thus, replace for individual investigations into its reputation. Trustmarks are of special importance to Small and Medium-Sized Enterprises (SMEs) which are unable to build up their own trademark on the global electronic market place. They are awarded to vendors by a neutral third party, given that specific criteria prescribed in a code of conduct have been met (for the distinction of 'trust' in a vendor and 'reliance' on an independent third party see Pichler, 2000). Originally, trustmarks were awarded to products with regard to their technical standard. In principle, trustmarks can also be used to establish socio-ethical standards or to secure compliance with legal norms. Private, state and hybrid institutions can play a crucial part in their award and monitoring. Businesses voluntarily submit themselves to such standards and monitoring as they hope to gain competitive advantages through the trustmark. The German 'blue angel' and the European 'eco-label' applied such a conception to

environmental standards (cf. Teubner, Farmer, and Murphy, 1994; Pfaff and Sanchirico, 2000: 189).<sup>3</sup> In the debate over Internet governance, such trustmarks are discussed as a means for the protection of privacy, consumers, and children (Wagemans, 2003; Spletter, 2003).

Following the Internet euphoria of the late nineties, in b2c-e-commerce numerous trustmark schemes have been established, but only a few of those have achieved some significance in the market place (see GBDE, 2000; see also Nordquist, Andersson, and Dzepina, 2002). Particularly successful has been the 'BBBOnLine Reliability Seal', which following an initiative by the Canadian and US-American Chambers of Commerce is used by almost 20,000 web pages.<sup>4</sup> In order to obtain the seal, an Internet vendor has among other things to become a member of the 'Better Business Bureau' (BBB) located at the headquarters of her business, he has to follow the 'BBB Code of Online Business Practices'<sup>5</sup> based on the 'OECD Guidelines' and she has to subject herself to an alternative dispute resolution procedure that accords with BBB's fairness criteria.<sup>6</sup> To give an example, a pre-dispute, binding arbitration clause in a contract is only admissible, if the consumer has been fully informed about its consequences and costs, provided that the consumer signs

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<sup>3</sup> Cf. <http://blauer-engel.de> and <http://www.eco-label.com/german/>; for a survey of environmental trustmarks see [www.label-online.de](http://www.label-online.de).

<sup>4</sup> See <http://www.bbbonline.org/consumer>

<sup>5</sup> Available at:  
<http://www.bbbonline.org/reliability/code/CodeEnglish.doc>

<sup>6</sup> "To agree to participate in binding arbitration under BBB Rules of Arbitration (Binding) if the consumer also agrees, or in non-binding informal dispute settlement (IDS) under the BBB Rules for IDS for unresolved consumer complaints involving Participant's products or services. Alternatively, a company may pre-commit to a dispute settlement process through a provider other than the BBB, if the BBB determines the dispute settlement process substantially complies with BBB consumer dispute resolution criteria.", available at: <http://www.bbbonline.org/reliability/dr.asp>.

the clause separately and that such acceptance is not a precondition for the transaction itself.<sup>7</sup>

With more than 1500 certified traders the private company 'Trusted Shops' is one of the leading providers of trustmarks in Europe.<sup>8</sup> Participating traders have to meet certification criteria, which follow current German and European legal regulations in the field of distant selling and electronic commerce.<sup>9</sup> Furthermore, 'Trusted Shops' assessment encompasses credit ratings, safety technology, transparency of prices, customer services and privacy issues. In collaboration with the credit insurer 'Atradius', 'Trusted Shops' additionally offers a money-back guarantee covering failed delivery, failed refund after return, and credit card fraud, which is free of cost to buyers. Moreover, 'Trusted Shops' provides a central customer service and dispute resolution procedure. Customers can contact a multilingual service centre with any arising issue via phone, email or Internet. According to 'Trusted Shops', thus far there has been not a single court case filed between a customer and an online shop because of the mediation procedures in place. Certification criteria are continuously revised in collaboration with an advisory board encompassing among others members of consumer protection agencies and academics. Participating vendors are informed about new developments in law. All online shops can be accessed via a central portal, which consumers can use to search

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<sup>7</sup> 'In order to ensure that the consumer has knowingly chosen arbitration as the method of resolving disputes covered by the arbitration clause, binding arbitration clauses must contain the following: A separate signature line, appearing immediately below the arbitration clause, for the consumer to sign to acknowledge acceptance of the terms of the arbitration clause; and, a statement that the consumer will not be bound by the terms of the clause unless the consumer signs on the signature line.':

<http://www.bbbonline.org/reliability/dr.asp>.

<sup>8</sup> For the following see:

<http://www.trustedshops.com/en/trustedshops/index.html>.

<sup>9</sup> [http://www.trustedshops.com/en/shops/obligations\\_en.html](http://www.trustedshops.com/en/shops/obligations_en.html)

for particular goods. For all mentioned services vendors pay graded fees according to their turnover. Additionally, for their online shops and advertising campaigns vendors are offered pre-certified web hosting and software solutions. Although also big brands like 'Aral', 'Dell', 'Dorint', etc. have joined; 'Trusted Shops' remains committed to be a platform that especially allows SMEs to access e-commerce.

This example highlights that trustmark providers can generate a realm of private order, which rests not only on norms as part of codes of conduct but also on a combination of an insurance for filed payment and alternative dispute resolution procedures. Such an arrangement increases the security level to such an extent that e-shopping is rendered more reliable than traditional brick and mortar business dealings, in which customers have to assert their legal rights in court and in which they carry the risk of insolvency. The withdrawal of the trustmark itself works as a powerful sanction mechanism. The severity of such a sanction as well as the credibility of its threat, however, depends on the success of the trustmark provider: only if the trustmark has gained some weight within the market place can its withdrawal pose a serious competitive disadvantage to vendors. At the same time, only an economically successful trustmark provider can afford to lose vendors as clients. The success of trustmarks depends on three decisive factors usually termed as 'critical mass, financial sustainability, and branding' (Wagemans, 2003: 14). As mechanisms of private ordering trustmarks are network goods by nature (Aviram, 2003). This is the reason why international cooperation between trustmark schemes and both the interlinking with (eg, market places, ADR) and the embedding in already existing mechanisms of self-regulation (eg, Chamber of Commerce) seems particularly apposite.

### C. ONLINE DISPUTE RESOLUTION

The notion that the Internet's communicative potential can be used to establish alternative forms of dispute resolution procedures dates back to the mid-1990s (Post, 1995; Karamon, 1996: 537; Cona, 1997: 975; Eisen, 1998: 1305; Almaguer and Baggot, 1998: 711; Bordone, 1998: 175; Perritt, 2000: 675). The term 'online dispute resolution' (ODR) covers on the one hand conflicts arising from the use of the Internet itself, such as disputes over domain names or e-commerce transactions, on the other hand services of alternative dispute resolution provided via the Internet (eADR) (Hörnle, 2001; Teitz, 2001: 990; Schultz, 2004: 71; Ponte, 2004). The latter includes the whole range of traditional ADR procedures - informal assisted negotiation, mediation, and formal arbitration - in so far as the involved parties and a neutral third party communicate via email or via password protected web pages, they electronically exchange documents and photographs ('written proceedings'), and they even negotiate simultaneously in chat-rooms, via phone or in videoconferences ('quasi hearings') (Krause, 2001: 457, 460). The kind and extent of the use of information and communication technology not only depends on its spread among potential users but also on the aim and kind of dispute resolution procedure. When, for example, in international commercial arbitration the formal requirements of the 1958 New York Convention are of concern, high technical standards are necessary, while in more informal dispute resolution procedures easily accessible, timely and inexpensive solutions are required (Hörnle, 2003).

Moreover, software supported negotiation systems allow parties to settle disputes without involvement of a neutral third party (Lodder and Thiessen, 2003). Thus, based on game theoretical premises automatic negotiation systems are offered for those conflicts in which solely the amount of a sum is disputed, such as in insurance cases. Within a 'blind bidding'-procedure, the parties submit their offer for a settlement within a number of rounds; yet, their offer remains unknown to the opposite party. Then, computer

software fixes a binding sum for the settlement based on the arithmetic mean of all offers and given that the final sum remains within a certain range, eg, a difference of 30 percent (see the survey of providers in Tyler and Bretherton, 2003). Besides, systems exist that provide parties with a password-protected space for negotiation. Via menu-driven input masks, they allow parties to closer define the object of dispute, to fix their aims, to deduce the willingness to compromise and to reach voluntary settlement by standardized information about possible ways to resolution.<sup>10</sup> Hence, ODR can be distinguished from more traditional procedures of ADR in that technology takes part as a 'fourth party' (Katsh and Rifkin, 2001: 93; Lodder and Thiessen, 2003).

A study by the Australian ministry of justice dating back to 2003 examined 76 ODR web pages worldwide; 42 of which were established in the years 1999/2000 and 19 of which had already ceased to provide their services (Tyler and Bretherton, 2003: 5; updated Tyler, 2004). Only 24 providers submitted information concerning the number of cases dealt with, only eight web pages contained statistical information about achieved results (Tyler and Bretherton, 2003: 9). One can assume that those providers that did not present any information were not particularly successful (Schultz, Kaufmann-Kohler, Langer, and Bonnet, 2001: 67; Kaufmann-Kohler and Schultz, 2004). Among the more successful providers are especially those ODR pages which are linked to a market place for e-commerce or which are run by a Chamber of Commerce or an industry association. The reason for such success may lie in the fact that those pages are easily accessible via the market place or the vendor's web page, that they are partly advertised by a trustmark and that they can be used for free or for a minimal charge due to subsidies by the operators of market places and by subscription (Tyler and Bretherton, 2003: 11).

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<sup>10</sup> For [www.smartsettle.com](http://www.smartsettle.com)'s offer see Lodder and Thiessen, 2003: 5.



In the following, I introduce the most successful ODR model in the area of b2c-e-commerce (cf. Hörnle, 2002). 'SquareTrade' is a private company with its headquarters in San Francisco. Since February 2000, it has dealt with over one million conflicts linked to 120 countries in five languages. This renders 'SquareTrade' market leader for those ODR services dealing with transactions at electronic market places.<sup>11</sup> The dispute resolution procedure is arranged in two phases. At the first level, direct negotiations between the involved parties take place via a secure web page. Communication is organized via interactive input masks, which are constantly revised and improved in the face of new experiences (*software facilitated direct negotiations*). In a majority of cases, the involved parties come to a settlement themselves. If this cannot be achieved, each party can call in a mediator at the second level of the procedure. Based on electronic documentation, the mediator is able to quickly gain an overview of the conflict and to support the parties in their quest for a settlement. Following the party's request, she can even make a non-binding suggestion for a settlement (*online mediation*). Overall, 80 percent of cases can be resolved by a conjoint settlement, which is obeyed in 98 percent of cases. The average duration of a procedure is two weeks.

Based on a cooperation agreement with 'eBay', for 'eBay'-members direct negotiations at 'SquareTrade' are free of charge; the involvement of a mediator is only 20 US dollars. The 'SquareTrade'-ODR service is easily accessible via links at the 'eBay'-web page. Furthermore, for an annual charge 'SquareTrade' offers a trustmark that vendors can bear given that their identity and reliability has been established by 'SquareTrade' and that they subscribe to the 'SquareTrade Selling and Customer Services Standards', which especially demand compromise oriented participation in 'SquareTrade'-ODR procedures as well as strict compliance with

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<sup>11</sup> For the offer of [www.squaretrade.com](http://www.squaretrade.com) see the presentation of its President & CEO (Abernethy, 2003).

settlements achieved there. The high levels of settlement and compliance achieved within 'eBay' can be explained by the impending withdrawal of the trustmark and deterioration of 'eBay'-ratings. As 'eBay'-vendors heavily rely on their reputation via 'SquareTrade' they can also render (unjustified) negative customer ratings objects of dispute. If both parties agree to withdraw a negative rating within the 'SquareTrade'-procedure, the rating is not erased from the 'eBay'-member profile, yet it does not remain part of the 'PowerSeller'-rating, the highest category of which requires 98 percent of positive ratings.

One can record that the success of ODR procedures depends not only on the provision of easy accessible, quick, effective and low-cost dispute resolution, but as well on *linkages* with heavily used market places and with other services providing private order. The example of 'SquareTrade' proves that cost-effective ODR procedures—even covering cross-border transactions—can be organized and are affordable for low volume mass market transactions. 'SquareTrade' has succeeded in integrating its offer to the primary markets for e-commerce, where online disputes evolve. This integration is brought about by a cooperation agreement with the primary market maker 'eBay', and by creating *socio-legal bonds* for potential dispute parties to commit to the process.<sup>12</sup> The 'SquareTrade' mediation process is mandatory to those eBay-sellers, which committed to the trustmark scheme. In addition, the commitment of parties to the process is streamlined by the potential repercussions with the eBay feedback system.

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<sup>12</sup> The term 'legal bond' being used in a very broad sense, including not only contractual design but also all kinds of 'private ordering' (see Mifsud Bonnici and de Vey Mestdagh, 2005: 31-42).

#### D. METHOD OF PAYMENT AND CREDIT SECURITY

In the context of private ordering in e-commerce, the role of payment service providers as *trusted third parties* is of interest. From international commerce it is known that mechanisms such as letters of credit, factoring, forfeiting and credit insurance play a major role in the cushioning of those risks arising out of the consecutive exchange of goods and services (Häberle, 2002). In b2c-e-commerce a number of models have been developed which facilitate consumers to carry the burden of the usually required advance payments. These are introduced in the following. More advanced 'real time e-payment'-technologies aiming at the simultaneous exchange of services and payments in direct e-commerce with digitized goods remain very much in the future.<sup>13</sup>

In b2c-e-commerce payment by credit card is most common (Federal Trade Commission, 2003; cf. OECD, 2006b).<sup>14</sup> Against widespread fear concerning credit card fraud on the Internet, for consumers this method of payment is the most secure as payments in e-commerce requires credit card number and period of validity but no signature of the credit card holder.<sup>15</sup> Hence, consumers can object to transactions with the bank issuing their credit card within six weeks after receipt of the credit card statement. According to the so-called 'credit card charge back'-procedure, the vendor has to

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<sup>13</sup> For the transfer of a 'delivery vs. payment'-system, well-known from stock market clearings, to b2c-e-commerce see European Central Bank, 2004.

<sup>14</sup> Visa is used more often than any other card regarding online shopping, see: <http://www.visaeurope.com/personal/onlineshopping/main.jsp>

<sup>15</sup> Cf. for the German legal situation Meder, 2002. Implementing Art. 8 Distant Selling Directive (97/7/EC), § 676 h BGB only provides a clarification. In praxis the allocation of the burden of proof is decisive. Apart from a given signature, prima facie evidence – that the consumer has handled the transaction herself or has not carefully treated his PIN – only exists in the case of the PIN-procedure, see the German 'Bundesgerichtshof', Judgement of 5 October 2004 (XI ZR 210/03): <http://www.jurpc.de/rechtspr/20040285.htm>

prove that the payment has taken place with consent of the credit card holder. Due to the lack of the consumer's signature, this can only be successful if the vendor can prove that he has delivered goods to the consumer and that the consumer has indeed ordered these goods. Failing such proof, eg because the consumer claims not to have taken the order, the paid purchase price is refunded and the vendor is subject to a hefty charge. In this way, banks have completely passed on the risks of online fraud to online vendors. Yet, due to possible abuse through unjustified complaints, in the meantime online vendors have been offered rating systems for credit card customers in order to identify in advance those consumers marked by numerous charge backs. Somewhat misleadingly termed as consumer protection, yet indeed probably more used to protect vendors, Visa now offers 'Verified by Visa', a system that provides registered customers with an additional password and which allows identifying the customer via a secure 'Visa'-server. Hence, customers cannot claim anymore that they have not ordered a particular good or service.<sup>16</sup>

In the debate on self-regulation in b2c-e-commerce, credit card issuers have early been discussed as playing an important role in providing effective redress to consumers, since via the 'charge back'-procedure they could enforce decisions issued by ODR service providers (Perritt, 2000; ABA, 2002). Yet, this would mean that credit card suppliers either provide fair ODR procedures themselves or cooperate with an established ODR provider in this respect, neither of which is the case. In fact, current 'charge back'-procedures are relatively unfair since vendors are unlikely to succeed in a complaints procedure given the form of evidence necessary plus they have to carry high costs. Moreover, a fair 'charge back'-procedure should not only cover the absence of card

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<sup>16</sup>

<http://www.visaeurope.com/merchant/handlingvisapayments/cardnotpresent/verifiedbyvisa.jsp>

holder authorisation ('I did not do it') but also include other frequently raised complaints, such as 'I did not receive it', 'item not as described', 'item defective', as well as the refund of the purchase price in case of withdrawal and return. In this regard, however, the legal situation differs from country to country: whereas such complaints are ruled out in France, consumers in the US enjoy such rights under the 'Fair Credit Billing Act'. In other countries, the right to complain is stipulated by credit card agreements with the issuing bank; hence, it remains at the bank's discretion whether it further pursues complaints, which are foreseen in the international 'charge back'-rules of credit card issuers (European Commission, 2000; OECD, 2006b: 19). Finally, the credit card system is unsuitable for small value transactions due to its tariff scale.

'E-payment'-service providers like 'PayPal' take advantage of this gap.<sup>17</sup> 'PayPal' offers to its 56 million users a system of payment that allows transferring money to people in 45 countries provided they have an email address. The system requires opening a password protected 'PayPal'-account, to which money can be transferred or for which a direct debit agreement can be authorized. In a protected procedure money can then be transferred via email. The transferred amount is credited to the recipient's 'PayPal'-account, which can be opened free of charge even after receipt of the email transfer. Credit can be transferred to a bank account at every time. This standard service is for both parties free of charge, yet there is no pay of interest on credit. 'PayPal' offers special accounts for companies that allow accepting credit card payments via 'PayPal', even if the vendor does not participate in the credit card system. Since 'PayPal' has been acquired by 'eBay' in 2002, 'PayPal' offers a special service for 'eBay'-auctions. For 'eBay'-buyers, who pay via 'PayPal', a money-back guarantee takes effect in cases where goods are 'not received or significantly not as

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<sup>17</sup> [www.paypal.com](http://www.paypal.com)

described' up to a value of 1,000 US dollars; for transactions not covered, 'PayPal' provides a 'Buyer Complaint Process' in order to solve complaints. Additionally, 'PayPal' offers support for companies both in averting 'credit card charge backs' and by providing a 'seller protection policy', which covers losses up to 5,000 US dollars provided that the vendor carefully follows particular standards. In the context of settling disputed transactions, 'PayPal' follows a rigid policy of freezing affected credit. Together with 'PayPal's' partly limited attainability, this has led to criticism from companies and customers alike.<sup>18</sup>

Finally, comparable to a letter of credit 'Escrow.com' offers an online escrow service, the use of which is recommended to customers by 'eBay' for transactions involving higher sums and unknown contractual partners.<sup>19</sup> At first, buyer and seller register via 'Escrow.com's' protected web page and then have to specify their terms of trade, among those a detailed description of the merchandize, of its price, of the method and insurance of delivery, of the way to carry costs and of the period in which the buyer has the right to return the good. Then the buyer deposits the purchase price in an escrow account, 'Escrow.com' informs the vendor about payment receipt, which causes the vendor to dispatch the ordered good in a way that allows proof of delivery (eg, UPS). If the time allowed returning the good passes without the buyer's complaint, the purchase price is paid out to the vendor. In case the buyer does not want to keep the good, she returns it and gets back the purchase price (less 0.85 percent as escrow charge) and dispatch costs according to previous agreement, provided that within a

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<sup>18</sup> See the critical web pages [www.paypalsucks.com](http://www.paypalsucks.com) and [www.paypalwarning.com](http://www.paypalwarning.com) where vendors complain that 'PayPal' would deliberately delay complaints for months in order to benefit from the interest for blocked credits. Whereas consumers claim that PayPal would like to withdraw their right to the 'credit card charge back'-procedure.

<sup>19</sup> [www.escrow.com](http://www.escrow.com); see also the 'Safe Trade program' by [www.iloxx.de](http://www.iloxx.de).

specified period the vendor has not objected to the return of the good. In the latter case, the purchase price remains with 'Escrow.com' without interest pay until buyer and seller have come to a mutual agreement. According to 'Escrow.com's' terms of trade, after 60 days the matter is passed on to the 'American Arbitration Association' (AAA) in order to come to a binding decision. In the meantime, the involved parties are free to turn, for instance, to 'SquareTrade' in order to find an amicable solution, yet 'Escrow.com' does not provide any binding rules concerning this procedure.

### **III. CONSUMER PROTECTING CIVIL REGIMES: THE ROLE OF VIRTUAL MARKET PLACES**

The above survey of self-regulation in the global electronic market place has demonstrated that mechanisms of contractual governance ranging from reputation and the involvement of trustworthy third parties as intermediaries to alternative dispute resolution - all of which are well known from the debates on private ordering in international commerce - have been refined and adapted in order to be used as well in the field of b2c-e-commerce; here commercial providers of ordering services have especially been successful. Yet, each of the introduced services alone leaves a number of problems unattended. If problems arise after a transaction was entered into, it is hardly of use that the contractual partner has carefully been chosen on the basis of his reputation according to an individual rating system or her participation in a trustmark scheme. The handling of payments by an escrow service leads to no solution eg in case of a disputed withdrawal, where it remains unclear in which procedure the dispute should be settled. For often after dispute has arisen, the involved parties are unable to agree on a

particular procedure.<sup>20</sup> Similarly, an ODR procedure is of no use, if its result is not implemented by the involved parties due to the impending loss of reputation or with the help of a payment service.

Opportunistic behaviour can occur not only in the parties' direct contractual relationship, but also in the context of private ordering services offered by third parties. Eg a vendor might not only fail to perform as contractually promised, but he might in addition fail to respond to a claim brought in an ODR procedure, or he might fail to abide to a mutual agreement found in such ODR procedure. However, the efficacy of private ordering can be enhanced by combining different governance mechanisms, especially if it is agreed upon in advance which authority to turn to in case of a dispute and if the parties' use of ODR procedures can be linked back to online reputation systems on the primary markets. Negative ratings are then not only given to sellers who deliver low-quality goods or to buyers who fail to pay, but also to those who behave uncooperatively in mediation, who do not follow settlements agreed on, or who evade an ongoing ODR procedure of an 'e-payment' provider via a parallel 'credit card charge back', etc.

In international commerce, the necessary *interlinking* of different private ordering services regularly occurs in relation to an individual transaction. Of course one can find standardized contract clauses such as the 'Incoterms' of the International

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<sup>20</sup> See a Statement of the General Counsel of the American Arbitration Association, Ms. Peterson, available at [http://commdocs.house.gov/committees/judiciary/hju65871.000/hju65871\\_0.H TM](http://commdocs.house.gov/committees/judiciary/hju65871.000/hju65871_0.H TM): 'About 95 percent of the arbitrations that come to the Association result from pre-dispute arbitration clauses. Our 75 years of experience indicates that at the time a dispute arises people can't agree on anything. ... So the choice before this committee is not pre-dispute or post-dispute, it is pre-dispute or litigation, because our experience shows that post-dispute arbitration is something that people won't agree to.'; the same is reported by the CEO of 'SquareTrade' (Abernethy, 2003: 8).



Chamber of Commerce, standard forms for different arrangements concerning letters of credit, and model arbitration clauses referencing the rules of certain arbitration institutions. Yet these are individually tailored by international law firms into a *contractual regime* as complete as possible. In consumer markets, in turn, there is a higher need for standardisation, which is usually satisfied by companies' general business terms. Due to their unilateral imposition on customers, however, such terms and conditions are hardly suitable to achieve a satisfactory level of consumer protection. In the domestic context, this is the rationale of state intervention through coercive consumer protection laws and judicial review. Similarly, in global b2c-e-commerce there exists a demand for a neutral third party that could standardize private ordering services and tie them into effective *civil regimes*.

In this context, operators of virtual market places perform an important function. For even more than medieval harbours, fairs and market places, operators of electronic market places stand in international competition for suppliers and consumers. In order to attract turnover, it is not only necessary to provide efficient technical infrastructure, but also to establish a 'safe harbour'-policy, which strengthens the trust of potential customers into the fairness of transactions handled at the market place. As international stock markets offer additional services for the handling of transactions (clearing) and try to establish standards of transparency and investor protection transcending legal minimum requirements, (Adolff, 2003: 61-91; Damrau, 2003) operators of virtual market places make an effort to establish a market order that both fosters consumer trust and satisfies the needs of small and medium enterprises.

Founded 1995 in California, 'eBay' has developed from an electronic advertisement section via a platform for online auctions into the currently most popular site for Internet business between costumers and especially small businesses. It encompasses more than 100 million registered users throughout the world and 24

localized web pages ('the world's online marketplace').<sup>21</sup> In order to increase the attractiveness of the market place, 'eBay' fosters the public spirit among its users, which leads to the emergence of a private market order.<sup>22</sup> As a virtual market place is a network good, the benefit of which increases with the number of participants, the level of regulation has only slowly been increased reflecting costumers' needs and numbers (Baron, 2002). As already presented, the core of this market order is a rating system, which has been developed further by the introduction of star ratings and trust symbols. Through cooperation with the ODR provider 'SquareTrade' and escrow services<sup>23</sup> as well as the buying up of the payment service provider 'PayPal', it has been embedded in a *network* of private services providing order.<sup>24</sup> As an additional service 'eBay' offers security tips to buyers and sellers with special attention given to international transactions.<sup>25</sup>

'eBay's' market order is based on the 'user agreement' and a number of additional 'policies', which regulate the behaviour of members at

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<http://pages.ebay.com/aboutebay/thecompany/companyoverview.html>: Currently, 'with millions of buyers and sellers worldwide, eBay offers localized sites in the following markets': Australia, Austria, Belgium, Canada, China, France, Germany, Hong Kong, India, Ireland, Italy, Malaysia, the Netherlands, New Zealand, the Philippines, Poland, Singapore, South Korea, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, and the United States. 'In addition, eBay has a presence in Latin America through its investment MercadoLibre.com.'

22 <http://pages.ebay.com/aboutebay/community.html>

23 Eg eBay Germany cooperates with the escrow service 'iloxx Safetrade': [www.iloxx.de](http://www.iloxx.de).

24 <http://pages.ebay.com/securitycenter/>

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<http://offer.ebay.com/ws/eBayISAPI.dll?GlobalTradeHub&hubType=0>

the market place and their relationship with 'eBay' itself.<sup>26</sup> These detailed rules are centrally laid down by 'eBay', yet they root in closely observed customer habits at the market place. They are constantly revised both in exchange with members of 'eBay'-fora and as reaction to arising issues becoming evident through the offered protection programs for buyers and sellers. 'SquareTrade' also contributes to norm development at the market place. Although 'SquareTrade'-mediators issue no rulings the *ratio decidendi* of which could work as foundation for a precedent, they do not act arbitrarily but on the basis of those experiences gained in handling countless 'eBay'-disputes. From these standardized solutions for repeated conflicts, certain patterns develop that 'SquareTrade' includes in its menu-driven software for direct negotiations between parties (Abernethy, 2003: 5). As sanction for norm violations, the online reputation mechanism is available (*informal third-party-control*). This mechanism is fostered by 'eBay' via the introduction of a new option for sellers: 'buyer-requirements'.<sup>27</sup> Accordingly, buyers can be excluded who have a negative assessment, frequent 'item not paid'-warnings<sup>28</sup> or no 'PayPal'-account.<sup>29</sup> On the other hand, 'eBay' itself has the possibility of punishing violations of the market order by imposing

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<sup>26</sup> <http://pages.ebay.com/help/policies>: 1. Rules for Buyers, 2. Rules for Sellers, 3. Rules for Everyone, 4. Prohibited and Restricted Items, 5. Rules about Intellectual Property, 6. Feedback, 7. Privacy, 8. Identity.

<sup>27</sup> As eBay rules provide for the binding nature of an offer (see Oberlandesgericht Hamm, Decision of 14 December 2000 (2 U 58/00), *Neue Juristische Wochenschrift* (NJW) 2001: 1142; Bundesgerichtshof, Decision of 7 November 2001 (VIII ZR 13/01), NJW 2002: 363; summarised also at [http://www.lrz-muenchen.de/~Lorenz/urteile/njw02\\_363.htm](http://www.lrz-muenchen.de/~Lorenz/urteile/njw02_363.htm)), thus far sellers have not been able to select their buyer.

<sup>28</sup> <http://pages.ebay.de/help/tp/unpaid-item-process.html>

<sup>29</sup> <http://pages.ebay.com/help/sell/buyer-requirements.html>

sanctions: from warnings, the temporary freezing of an account to the exclusion of an involved member (*formal third-party-control*).<sup>30</sup>

Against this backdrop, it is hardly surprising that the literature refers to the regime established by 'eBay' as an autonomous legal order (Katsh, Rifkin and Gaitenby, 2000: 705; Baron, 2002; Schultz, 2005: 27). Although the market place is not located outside the state's legal order—especially in Germany numerous judgments concerning 'eBay'-transactions have been passed<sup>31</sup>—courts can only partially and indirectly impact on 'eBay's' market order. Recently, the German Federal Supreme Court (the 'Bundesgerichtshof') decided that in the context of 'eBay'-auctions consumers have a right of withdrawal as 'eBay'-auctions are no auctions according to section 156 German civil code (the 'BGB'), ie the exception of section 312d sec. 4 no. 5 BGB cannot be applied.<sup>32</sup> According to sections 312d and 355 BGB, the unfounded cancellation of a contract is possible at every time even before the dispatch of a good; this contradicts the main 'eBay'-principle for buyers, which holds that a purchased good generally has to be paid and that an unpaid good principally leads to a warning to the buyer due to his lack of reliability—all this independently of a right of withdrawal granted by the seller.<sup>33</sup> Admittedly, 'eBay' cautions no buyer for

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<sup>30</sup> See § 4 of the user agreement of eBay Germany:  
<http://pages.ebay.de/help/policies/user-agreement.html?ssPageName=f:f:DE>

<sup>31</sup> An up to date collection of verdicts, including many full texts, can be found under: <http://www.internetrecht-rostock.de/ebay-und-internetauktionen.htm>.

<sup>32</sup> Bundesgerichtshof, Decision of 3 November 2004 (VIII ZR 375/03), JurPC Web-Dok. 281/2004: <http://www.jurpc.de/rechtspr/20040281.htm>; with critical remarks Janal, 2005; critical also Spindler, 2005.

<sup>33</sup> § 9 of the terms of trade of eBay.de:  
<http://pages.ebay.de/help/policies/user-agreement.html?ssPageName=f:f:DE>;  
see as well: <http://pages.ebay.de/help/policies/unpaid-item-process.html>.  
Interestingly, the Amtsgericht Bremen, Decision of 20 October 2005 (16 C 168/O5), recently ruled, that a contractual penalty clause applying in case of an unwarranted exercise of a right to rescission (ie item not paid) is not an unfair

exercising her right of withdrawal; yet, the latter's immanent possibility of misuse by its frequent and arbitrary exercise—producing high costs for vendors and 'eBay' due to the necessary refund of fees for commission and offer—can be tamed via negative feed back of the 'eBay'-community. Otherwise, the effect of the judgment remains limited to those cases in which German law is applicable. Concerning cross-border transactions, German consumers can refer to the BGH, yet they might find hardly any understanding from the international 'eBay'-community for a behaviour that jeopardizes the economic rationale and attraction of online auctions and which consequently questions the market order fundamentally. In the case of withdrawing an order from an American seller, the eBay-'private legal system' might hardly help a German consumer to get a refund.

#### **IV. CIVIL CONSTITUTION: REFLEXIVE CONSUMER PROTECTION LAW**

Civil regimes protecting consumers in the field of global e-commerce have become independent from the legal order of states by linking private rule making (codes of conduct) with alternative dispute resolution procedures (ODR) and mechanisms of socio-economic sanctioning (reputation, loss of trustmark, exclusion) and enforcement (money-back guarantee, charge back). Since a complex variety of such regimes has emerged, we can draw the picture of a *competition among civil regimes*, in which different providers of private order compete for the trust of vendors and consumers alike. With regard to the substantive consumer protection standards applied by such regimes, the 'Alternative Dispute Resolution Guidelines' agreed on by the 'Global Business Dialogue on

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business term under the European unfair contract terms directive (93/13/EEC). Thus, a buyer who refused to pay for a car he purchased by an auction on eBay was ordered to pay damages: <http://www.internetrecht-rostock.de/ebayurteil29.htm>.

Electronic Commerce' (GBDe) and 'Consumers International' in November 2003 read:

'Applicable Rules: One of the principal reasons why business, consumers and governments consider the development of ADR systems to be of such strategic importance for the enhancement of consumer trust in electronic commerce is that such systems can settle disputes in an adequate fashion *without* necessarily engaging in cumbersome, costly, and difficult research on the detailed legal rules that would have to be applied in an official court procedure. [...] ADR dispute resolution officers *may decide in equity and/or on the basis of codes of conduct*. This flexibility as regards the grounds for ADR decisions provides an opportunity for the development of high standards of consumer protection worldwide.' (GBDe, 2003: 59)

Accompanying the thus described privatisation of consumer contract law, the issue is that consumer contracts are *triangularized* because providers of private order place themselves as 'neutral third party' in-between companies and the consumer, which renders the latter not only a recipient of goods but also a consumer of *private legal services* (for the arising trinity of potential contractual relationships see Hacke, 2001: 31). Here, we deal with *reflexive consumer contract law* in so far as those procedural conditions are concerned which render the private generation of substantial consumer contract law as fair. The thesis put forward here is that the establishment of effective consumer protecting civil regimes will factually displace state consumer contract law in particular areas of e-commerce, especially in formally organized virtual market places. This is why the emerging transnational consumer contract law requires an embedding in a procedural constitution of freedom, which at the same time enables the *privatisation of civil law* and adds the necessary *civilisation to private law*.

In this respect, the necessary constitutionalization of consumer protecting civil regimes has to distinguish between an interior and an exterior constitution: the emergence of transnational consumer contract law as a legal *system* is, on the one hand, characterized by *reflexivity*, ie the application of a process to itself (eg, making norms on the making of norms, arbitrating over arbitration, self-regulation of self-regulation, etc.); hence, societal self-organisation constitutes an interior *spontaneous constitution* of private regimes quasi by itself (see Teubner, 2004). On the other hand, private regimes require embedding in a *public framework* that facilitates societal self-organisation as an exercise of party autonomy and at the same time limits it with respect to third party interests and public policy. Here the phenomena of normative reflexivity entrenched in private regimes as well as their public framework work as mutually compensatory constitutional orders. In the context of global governance, this renders their boundaries fuzzy. Encompassing the collaboration of state, industry, and civil society actors, they appear as a *hybrid order*, (Engel, 2001: 569) which shall be termed as *civil constitution*.

The establishment of a global civil constitution for transnational consumer contract law mainly concerns the justification of reflexive institutions, which organize the described phenomena of self-regulation and private ordering in a way that, on the one hand, fosters effective redress through alternative mechanisms of consumer protection and, on the other hand, guarantees the fairness and justice of such procedures towards consumers and businesses. In the following, different approaches for the constitutionalization of consumer protecting civil regimes are introduced. Although both aspects cannot be sharply distinguished, the focus is on the substantial contract law (*rights*) (1) and on the procedural aspects of consumer law (*remedies*) (2).

## A. REFLEXIVE TRUSTMARKS: CONTRACTUAL STANDARDS OF HYBRID ORGANISATIONS

Trustmarks are awarded on the basis of a catalogue of criteria regularly consolidated in a code of conduct. For the Internet and e-commerce a plethora of trustmarks is available which on the basis of different criteria aim at enhancing the protection of consumers, children, and privacy or any combination of these. While, on the one hand, it is claimed that the best trustmarks prevail due to the invisible hand of competition, it is, on the other hand, feared that due to the wide variety of offers consumers could lose overview and, hence, that the general trust into the industry could vanish.<sup>34</sup> Certainly, a sound regulatory competition between different trustmark schemes only works if consumers are not misled by trustmark providers, who apply inferior standards which are not sufficiently monitored.

In order to increase the transparency in the field of trustmarks, the notion has emerged that quality requirements should be developed in collaboration of states, industry, and consumer associations (Nordquist, Andersson and Dzepina, 2002). In so far as the compliance with minimum requirements established by co-regulation is here rewarded with the award of a secondary trustmark (*trustmark of trustmarks*), we deal with a reflexive form of self-regulation, which even regulates the conditions for its own possibility via self-regulation. Initial approaches to such civil constitutions have first been developed at the national level (a). From here they can be linked to supranational (b) and global civil constitutions (c) via cooperation.

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<sup>34</sup> For this and the following cf. the report of the Irish EU-Presidency presented at the European Consumer Day 2004 Conference 'Building Consumer Confidence in the European Online Marketplace, Dublin Castle, 15th March 2004', p. 8, available at:  
<http://register.consilium.eu.int/pdf/en/04/st09/st09466.en04.pdf>



## 1. SECONDARY TRUSTMARKS AT THE NATIONAL LEVEL

On suggestion of the British government, the 'Alliance for Electronic Business' has in collaboration with the 'Consumers' Association' founded a consumer protection initiative in the field of self-regulation in e-commerce in 1999. Its aim was to fix minimum standards in the face of the proliferation of trustmark programs.<sup>35</sup> For it, the non-profit organisation 'TrustUK' has been set up, the board of which consists of representatives of the Chambers of Commerce and of consumer associations. 'TrustUK' established its own trustmark, which is however not directly awarded to vendors. As most companies are member of a Chamber of Commerce or of an association that binds its members to a code of practice, these 'code owners' are granted the license for the distribution of the trustmark given that their members' codes are in accordance with 'TrustUK's' minimum requirements. Participating vendors bear either the 'TrustUK' label alone or together with the trustmark of the 'code owner'; if issues arise consumers have to contact the 'code owner' directly. Only if the consumer claims that the latter has not settled a dispute in accordance with 'TrustUK's' guidelines, there is the possibility to turn to 'TrustUK' directly. Currently, four 'code owners' are accredited to 'TrustUK' covering more than 4,000 web traders.

The German initiative 'D21' is a network of political parties, enterprises, associations and other institutions ('public private partnership'). Its aim is to improve the main conditions for Germany to quickly and successfully transit into the information and knowledge society.<sup>36</sup> In July 2002 members of the initiative have agreed on the D21 quality criteria for Internet offers ('D21-Qualitätskriterien für Internet-Angebote'), which—as amended in

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<sup>35</sup> [www.trustuk.org.uk](http://www.trustuk.org.uk)

<sup>36</sup> [www.initiatived21.de](http://www.initiatived21.de)

2005<sup>37</sup>—put the OECD Guidelines on the basis of European and German law in concrete terms; furthermore, the criteria explain and amend the latter. Currently, the initiative D21 recommends five trustmarks meeting its quality criteria.<sup>38</sup> The monitoring and further development of these criteria have been transferred to a trustmark monitoring board, which apart from representatives of participating companies consists of each a representative of the ministry of economic affairs, of the federal data protection office and of a consumer association ('Verbraucherzentrale Bundesverband e.V.') (Föhlisch, 2004). However, such initiatives at the national level enhance the transparency of the trustmark market to a certain extent, yet due to their gearing to national law they do not contribute much to solving issues of cross-border consumer contracts (see also Nordquist, Andersson and Dzepina, 2002).

## 2. SUPRANATIONAL STANDARDISATION VIA CO-REGULATION?

With regard to cross-border situations inside the European internal market, the question which Member State's consumer protection standards shall apply, in principle, could be answered easily as the minimum standards of consumer contract law are established in the European *acquis communautaire*, ie a variety of EC Directives. Yet, attempts by the European Commission to unify the contract law of the Member States have failed so far, often due to the resistance of consumer associations and national governments which agreed on a minimum harmonisation of consumer rights, but prevented the necessary combination of such measures with the 'country of origin'-principle (see also Calliess, 2003). Hence, one

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<sup>37</sup> Updated version: [http://www.internet-guetesiegel.de/docs/D21\\_Qualitaetskriterien\\_2005.pdf](http://www.internet-guetesiegel.de/docs/D21_Qualitaetskriterien_2005.pdf)

<sup>38</sup> [www.internet-guetesiegel.de](http://www.internet-guetesiegel.de): Apart from Trusted Shops and among others, Euro-Label Deutschland of the EHI ([www.shopinfo.net](http://www.shopinfo.net)) and S@fer-Shopping ([www.safer-shopping.de](http://www.safer-shopping.de)) run by the TÜV Süd are part of this initiative.

could ask whether it would not be a viable alternative to state-controlled legal harmonisation to generate substantive 'Principles of European Consumer Contracts' via self-regulation, for instance by developing Europe-wide recommended general contract terms (European Commission, 2003: 21 ff., at 4.2), or relating specifically to b2c-e-commerce by elaborating a European code of conduct which could be applied in cross-border ADR-procedures as institutionalized in the EEJ-NET.<sup>39</sup>

The European Commission, indeed, aims at such a project in the frame of its 'e-confidence' initiative. In its action plan concerning 'eEurope 2005', the following aims are introduced:

'Trust and confidence. By end 2003, the Commission, together with the private sector, consumer organisations and Member States will examine possibilities of establishing a European-wide online dispute resolution system. To facilitate cross-border electronic transactions for SMEs, the Commission will further support the establishment of online information systems on legal issues. The Commission will work with stakeholders on trustmarks requirements with a view to a recommendation on consumer confidence in electronic commerce.' (European Commission, 2002a: 15)

In order to prepare such a recommendation, the Commission has established an 'e-confidence forum' at the Joint Research Center in the year 2000. In this context, a 'drafting group' comprising members of industry and consumer associations has drawn up 'principles for e-commerce codes of conduct'.<sup>40</sup> On this basis, the European industrial and consumer associations UNICE and BEUC

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<sup>39</sup> See:

[http://ec.europa.eu/consumers/redress/out\\_of\\_court/eej\\_net/index\\_en.htm](http://ec.europa.eu/consumers/redress/out_of_court/eej_net/index_en.htm)

<sup>40</sup> On file with author.

have agreed on 'European trustmark requirements' (ETR). For their implementation, a committee of association members shall be established and an 'e-confidence' web page shall be set up. Providers of trustmarks, who want to join this portal, have to pass an annual assessment of their compliance with the ETR through an independent third party (eg, auditors) (see BEUC/UNICE, 2001). Since announcement of the program in October 2001, there have, however, been no recognisable steps towards the establishment of the system. In November 2004, the Commission finally accepted the failure of the initiative and blamed the industry for a lack of interest in the implementation of the ETR, especially with regard to the financing (see European Commission, 2004). This lack of interest may root in the fact that the ETR have been developed by association officials who stand more for a traditional industrial society than a modern information society. In addition, it remains unclear how the ETR could contribute to the problems of cross-border b2c-e-commerce. In this respect the ETR approach – praised by the Commission – is aiming for a race to the top:

'The ETR offer a basis for good online practice. They do not seek to override or replace any mandatory provisions at European level. They are supplementary to legal obligations and do not affect consumers' statutory rights.' (BEUC/UNICE, 2001: 5)<sup>41</sup>

In this respect, the ETR accord with consumerists, who demand that soft law generated in the process of self-legislation should only lead to an increase in the level of protection, but under no circumstances to a softening or evasion of those obligatory consumer protection regulations in place in a consumer's home

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<sup>41</sup> Appraisal of the European Commission, 2004: 9: 'The Commission Services are of the view that codes such as the ETR are most useful if they contain provisions that set an even higher standard of consumer protection than the protection offered by legislation.'

country (European Consumer Law Group, 2001). Yet, as the ETR refers to nationally applicable law in almost all important points, they appear strangely anaemic and do neither guide SMEs to those regulations they should adopt for Europe-wide sales nor do they work as standard for ADR-decisions in consequential conflicts. For the problem of EU-wide cross-border b2c-e-commerce is to have uniform legal standards which provide the necessary certainty, and not just another code like the ETR which merely adds to the existing regulatory chaos. One can suspect that the protagonists involved with the ETR are too close to the European legislative process which does prevent the 'e-confidence' initiative to become an independent stimulus for the generation of certainty of the law and justice in the internal market.

At the European level, the 'Euro-Label' system however provides a functioning alternative, which has been established due to an initiative of the trade association 'EuroCommerce' in 2002.<sup>42</sup> 'Euro-Label' is a network of national trustmark providers from Austria, Germany, France, Spain, Poland and Italy that awards trustmarks on the basis of a common European code of conduct via co-branding. 'Euro-Label' also handles cross-border complaints against its 429 certified shops. If in this way issues cannot be resolved, the consumer is referred to the EEJ-Net. The 'European code of conduct' is relatively detailed; instead of sweeping references to nationally applicable law, it details the concrete rules of the *acquis communautaire*. Concerning withdrawals, for instance, it repeats the EU directive on distance contracts, which states that the withdrawal period has to be at least seven working days, does not commence before prior information and delivery and ceases after three months at latest. Certification, though, happens by national authorities according to local standards. It cannot be overseen whether the European Codex will be of crucial importance beyond

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<sup>42</sup> [www.euro-label.com](http://www.euro-label.com)

its function as minimum standard for participating national trustmark providers, for instance in the arbitration of cross-border disputes. Its wording, however, would render it more apposite than the ETR.

### 3. GLOBAL LINKAGE

Already in 2001, the 'Global Business Dialogue on E-Commerce' (GBDe) published recommendations concerning trustmarks, including both guidelines for trustmark providers and minimum standards for the codes of conduct applicable to their online traders (GBDe, 2001). Also in 2001, the European umbrella organisation of the Chambers of Commerce 'Eurochambres', the mail order firm 'FEDMA' and the US-American 'BBBOnline' launched the 'Global Trustmark Alliance' (GTA) as a common initiative in order to further develop and implement global standards. Its aim is to unite national and regional trustmark initiatives on the basis of common minimum standards under the umbrella of the global GTA trustmark, which is intended to be pursued as a co-branding endeavour.<sup>43</sup> In the meantime, the GTA membership has been expanded especially by Asian organisations and on the occasion of the annual meeting of the GBDe in November 2004, an organisational committee was installed and given the task of preparing 'best practices' (GTA, 2004). Given the global reach of the GTA initiative and based on OECD guidelines and the recommendations of the GBDe, it can be expected that the emerging code of conduct will set relevant standards for a transnational consumer contract law.

The involved organisations also intend to cooperate in the handling of cross-border disputes. A good example is the cooperation agreement on mutual cooperation in cross-border e-commerce complaints signed by 'ECOM ADR', a pilot project commissioned

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<sup>43</sup> See <http://www.bbbonline.org/about/press/2001/042301.asp>

by the Japanese Ministry of Economy, Trade and Industry (METI) and operated by Next Generation Electronic Commerce Promotion Council of Japan (ECOM),<sup>44</sup> and the US Better Business Bureau in 2002, where complaints from consumers in one country against an e-trader situated in the other country are exchanged and both organisations work together, if necessary assisting in language problems. As of October 2004, 45 complaints from Japanese consumers against US-based companies were forwarded from ECOM-ADR to BBB-Online, and 22 of these disputes had been settled. 12 disputes came to Japan in turn out of which only 2 could be settled, while the other cases involved fraud, where eg businesses turned out not to exist at all in Japan (Sawada, 2004). Although ECOM ADR ceased its operations as of March 2006, the quite impressive resolution rate of BBB-Online may be taken as an outlook on how a seamless ODR-network for cross-border b2c-e-commerce might work in the future. Thus, similar cooperation agreements have been implemented between 'BBBOnline' and trustmark providers from the United Kingdom, which jointly created a webpage for cross-border ADR,<sup>45</sup> and more recently with the Israel-based initiative Public Trust.<sup>46</sup>

## B. LAW-CONSUMER PROTECTION: ODR STANDARDS AND THEIR IMPLEMENTATION

Set down in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the 'right to a fair trial' is the codification of the citizens' claim to jurisdiction directly following from the ban on self-help. The Convention frames this claim within the rule of law:

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<sup>44</sup> See: <http://www.ecom.jp/adr/en/index.html>; see as well as the outline in (Sawada, 2004).

<sup>45</sup> See: <http://www.crossborderadr.org/>

<sup>46</sup> See: <http://www.bbb.org/alerts/article.asp?ID=658>

In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly [...].<sup>47</sup>

The inherent procedural guarantees are not only the kernel of the European civil procedure, (Wolf, 2000) they also impact on alternative arbitration procedures provided that those are binding to the parties involved (Schiavetta, 2004). In this way, the European Court of Human Rights has acknowledged that one can give up one's right to access to court, yet such renunciation, for instance as part of a arbitration clause, is only effective if it is voluntary and explicitly expressed. Furthermore, by the judicial review of private arbitration tribunals the state remains obliged to guarantee the core of fundamental procedural rights, like the right to be heard, judicial independence and procedural neutrality (cf. for the jurisdiction Schiavetta, 2004). From the vantage point of ODR procedures in the field of b2c-e-commerce, these principles are not only in force for consumer arbitration in a narrow sense, they can also become relevant on the side of companies as they set obligatory and binding procedures, like those in the case of 'Online Confidence's' arbitration procedure concerning amounts in dispute up to 5,000 Euro (see Schiavetta, 2004).

Yet, even if the parties' right to access to court is not limited in any way, there is demand for principles concerning the transparency and fairness of ODR procedures. Hence, companies, which have contractually committed themselves to participate in an online mediation procedure if demanded by a customer—like in the trustmark programs of 'SquareTrade'—have to be informed in advance about procedural conditions. In a similar way, the 'SquareTrade'-trustmark can only then enhance consumer trust in

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<sup>47</sup> <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>



e-commerce if the consumer is able to form an impression of the course of the procedure and of whether it appears to be fair and reasonable with respect to the neutrality of mediators, to costs, to the promise for the implementation of negotiation results, etc. On this matter, providers of ODR procedures can be subject to certain pre-contractual obligations to inform customers (Ponte, 2002: 321).

In order to render the market for ODR services more transparent and to establish certain minimum standards of fairness under mentioned circumstances, different ODR service providers have (a) suggested different measures in order to guarantee compliance with these principles (b).

#### 1. GUIDELINES FOR PROVIDERS OF ODR PROCEDURES

Initially one has to keep in mind that there exists a number of principles for traditional ADR procedures in consumer affairs that special guidelines for b2c-e-commerce can build upon: this includes the 15 principles of the 'Due Process Protocol for Mediation and Arbitration of Consumer Disputes' of 1998. The AAA has made compliance with these standards precondition for consumer arbitration procedures (for the necessity to adopt the protocol to the Internet see Ponte, 2002a: 441); similarly, it is a precondition for the participation in the 'EEJ-Net' to follow the European Commission's recommendations concerning dispute settlement (98/257/EG) and Mediation (2001/310/EG) in consumer affairs.<sup>48</sup> A first outcome of the consultations on the European Commission's 'Green Paper on Alternative Dispute Settlement in Civil and Commercial Matters' (2002b) is the 'European Code of Conduct for Mediators'<sup>49</sup>, which contains a number of ethical principles and

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<sup>48</sup> See:  
[http://ec.europa.eu/consumers/redress/out\\_of\\_court/adr\\_recommendations\\_en.htm](http://ec.europa.eu/consumers/redress/out_of_court/adr_recommendations_en.htm)

<sup>49</sup> [http://www.cto.int/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://www.cto.int/adr/adr_ec_code_conduct_en.pdf)

which can be adopted by single mediators or institutional providers of mediation procedures.

Based on extensive consultations, the 'Task Force on Electronic Commerce and Alternative Dispute Resolution' of the 'American Bar Association' (ABA) published 'Recommended Best Practices by Online Dispute Resolution Service Providers' in September 2002. These are meant as non-binding point of orientation for ODR service providers, consumers and trustmark providers and suggest that an ODR service provider informs its users about all fairness relevant features of a procedure in a transparent way (ABA, 2002). In November 2003 the 'Task Force on Consumer Policy for e-Business' of the 'International Chamber of Commerce' (ICC) has published 'Best Practices for Online Dispute Resolution (ODR) in b2c and C2C transactions', which contain guidelines both for enterprises handling b2c-e-commerce and for ODR service providers (ICC, 2003). At the same time, the 'Global Business Dialogue on E-Commerce' (GBDe) and 'Consumers International' (CI) have agreed on common 'Alternative Dispute Resolution Guidelines' for b2c-e-commerce, which contain recommendations for enterprises, ODR service providers, and governments (GBDe, 2003).

## 2. THE IMPLEMENTATION OF GLOBAL ODR STANDARDS

To implement the discussed standards for ODR service providers, a number of measures have been discussed reaching from self-regulation to national outline legislation. In this context, the role of the state tends to be more emphasized than this is usually the case (Schultz, 2003). With respect to transnational consumer contract law, the suggested ODR standards touch upon the relationship between citizens and the state and, hence, they concern the kernel of the law of the constitutional law set down in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On the one side, such standards have to be developed and spread by institutions that leave no doubt about

their neutrality face to conflicting interests and thus enjoy unreserved trust of all involved (cf. ABA, 2002: 32 f.; Davis, 2002: 529). Initiatives for self-regulation, led by industry and commerce such as the GBDe or the ICC, do not meet these criteria on their own.<sup>50</sup> On the other side, ODR standards that have been developed with the support of states are advantageous as they can work as guideline for judicial review in particular cases. The terms of trade of ODR service providers as well as terms of trade clauses concerning dispute settlement in consumer contracts cannot easily be declared ineffective if they stand in accordance with globally accepted ODR standards.

With the establishment of the European Extra-Judicial Network (EEJ-NET) as well as the above mentioned EU-recommendations, the European Commission in particular has demonstrated what a functioning state organisation at the supranational level could contribute. Following this model, the ABA Task Force has discussed the set up of a 'Global Dispute Clearing House', which would deal with issues arising out of cross-border consumer contracts, which consumers could turn to if problems emerge and which would be responsible for transferring conflicts to those ODR procedures accredited on the basis of global ODR standards. Furthermore, it was considered to establish an ODR trustmark, which can be awarded to those ODR service providers following ODR standards developed by the 'Global Online Standards Commission' (ABA, 2002: 27 ff.; cf. Davis, 2002; Schultz, 2004).

Yet, the ABA Task Force concludes that the ODR market is not mature enough in order to already set up binding standards ('not one size fits all'). Moreover, an agreement about such standards in a

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<sup>50</sup> For this reason the GBDe developed its ADR Guidelines in cooperation with Consumers International. The Guidelines call for governments to initiate 'government accreditation' and/or 'government-backed assessment rules' together with industry and consumer representatives, and on a global level only.

'Global Online Standards Commission' under international law is unlikely due to the apparent divergences, eg, between the USA and the EU concerning the authorisation of consumer arbitration jurisdiction. Additionally, the accreditation of ODR providers with a global ODR trustmark would require substantial financial and personal resources, which would be desirable yet seem unachievable. In the current situation, for companies it is of prime importance to avoid dispute by setting up effective consumer complaint procedures ('customer satisfaction systems'). Furthermore, as a first step it is suggested to establish an '*i-ADR-Center*', which is given the task of consolidating information about available dispute resolution procedures on the web ('low cost, low profile'). Without being assessed, ODR provider can initially commit themselves to ODR standards such as the ABA Best Practices. At first financed by the state, such a centre for information could later function as a basis for the more advanced notion of a 'Dispute-Clearinghouse' or 'ODR-Trustmark-Centers' (ABA, 2002: 31 ff.).

More than two years after the ABA recommendations have been published, however, the suggested '*i-ADR-Center*' has not been established; presumably no sponsor for the project could be found, despite the pursued approach ('low cost, low profile'). Taking the EEJ-NET as a blue print, the UN would actually be the right point of contact. UNECE has indeed organized conferences concerning ODR in 2002 and 2003 in Geneva; in 2004, the third 'UN-Forum on Online Dispute Resolution' took place at the University of Melbourne in cooperation with UNESCO.<sup>51</sup> Due to its chronic lack of financing and efficacy, the UN is hardly able to contribute more than its name to the development of global ODR standards. The organisation of the conferences as well as the publication of the results was taken on by academic institutions. For instance, the

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<sup>51</sup> <http://odrforum2004.themediationroom.com/>

'Center for Information Technology and Dispute Resolution' (CITDR) at the University of Massachusetts provides the web site [www.odr.info](http://www.odr.info), where not only the presentations of the UN-ODR forum are published,<sup>52</sup> but also broad information is available about ODR providers, ODR standards, literature, etc. This actually meets the described functions of the 'i-ADR-Center' suggested by the ABA Task Force.<sup>53</sup> Similar to the Transnational Law Database CENTRAL concerning the Lex Mercatoria at the University of Cologne, in the area of transnational consumer contract law science can play an important part through the systematisation of information.<sup>54</sup>

Finally, I would like to introduce the model of state incentives that combines the compliance with certain standards and the granting of legal privileges. Thus, the Act on ADR of North Rhine Westphalia couples the accreditation of a mediation institution with the advantage of executing a settlement comparable to a court ruling, provided compliance with the standards of transparency and fairness set forth in the Act.<sup>55</sup> During the political debate on the so-called Brussels-I-Regulation, the responsible committee of the European Parliament suggested that in deviation to Article 17 of the Regulation enterprises should be allowed to introduce a choice of court clause in consumer contracts if in return they subject themselves to an acknowledged out of court dispute settlement body (Wallis, 2000). The notion that the state facilitates ADR provided compliance with certain minimum conditions of due process is well established in international commercial arbitration,

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<sup>52</sup> <http://www.odr.info/unece2003/index.htm>

<sup>53</sup> Although the information is not always comprehensive and up to date, since ODR.info relies on voluntary contributions mostly by academics.

<sup>54</sup> See eg the Transnational Law Database on the New Law Merchant established at the Center for Transnational Law (Professor K P Berger) of the University of Cologne: [www.tldb.net](http://www.tldb.net)

<sup>55</sup> The 'GüSchlG NRW' is available through: <http://www.streitschlichtung.nrw.de/streit/gesetz.php>

where arbitral awards corresponding with the requirements outlined in the 1958 New York Convention and the 1985 UNCITRAL Model Law are recognized and enforced by the state (Redfern and Hunter, 2004). It seems logical, yet hardly realistic to suggest that taking the juridical review of private arbitral awards as model, compliance with globally accepted ODR standards could be guaranteed by setting up an international public online court, where appeals against outcomes of ODR-procedures could be lodged (see Schultz, 2003).

## V. CONCLUSION

In this paper I have shown, that the private governance mechanisms which have been developed in international commerce between merchants in order to tackle opportunism in cross-border economic exchange in a situation of constitutional uncertainty, i.e. the absence of a world state effectively guaranteeing the protection of property rights and the enforcement of contracts, recently have successfully been adapted to the new phenomenon of cross-border electronic commerce between businesses and consumers. Thus, private ordering has proven to be a valuable alternative to state law not only in the apolitical domain of merchant law, where predominantly coordinative problems arise, but might as well contribute to the solution of regulatory problems in the area of consumer law, where the protection of weaker parties is at stake.

One reason for this success is that the protection of consumers is in the rational self-interest of businesses which intend to engage in cross-border commerce with foreign consumers: In order to convince consumers to enter the borderless global retail-market, businesses have to invest in building consumer confidence in electronic commerce by employing various consumer protecting governance mechanisms. Another reason is the emergence of businesses which do not engage in the primary markets for consumer products and services themselves, but act as market makers between other businesses and consumers, and, thus, on a

secondary market for private legal services: These intermediaries are economically interested in attracting a maximum of sellers as well as buyers to participate in their market places. Therefore, it lies in their rational self-interest to act as a neutral party towards both sides of the market, businesses as well as consumers. Electronic market places are, therefore, in a perfect position to effectively bundle different private governance mechanisms into what I call consumer protecting civil regimes.

As has been shown in part three of this paper, however, a variety of consumer protection concerns remain to be solved. If consumers on the electronic world market place are able to choose between different consumer protecting civil regimes, there is the need for transparency with regard to the offered level of protection as well as the effectiveness and fairness of such regimes. In other words there is a need for substantive as well as procedural minimum standards regarding the private provision of consumer protecting services, i.e. 'law-consumer protection'. As such standards for the border-less character of b2c-e-commerce have to have a truly transnational character, they are developed outside the traditional international law sphere on the basis of co-regulatory efforts between states, industry, and civil society actors. There can be observed a variety of efforts to establish such global minimum standards which contribute to the future establishment of a 'civil constitution' of transnational consumer contract law.

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