Consumer Arbitration Online

Pre-dispute arbitration agreements in
an e-commerce context

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Abstract

This thesis aims to look into the fast-moving world of B2C e-commerce and the disputes arising from it. The transnational character of transactions has revolutionized the way business is being conducted, while this creates issues for the traditionally national jurisdictions to solve disputes when they arise. To provide for appropriate access to justice for consumers, there is a move towards increasing the use of ADR as well as moving dispute resolution online. Such ODR procedures can in many ways meet the particularities that cross-border e-commerce poses. For this to be an attractive possibility, there needs to be a trustworthy system. Both the EU and UNCITRAL are developing frameworks for ODR, however restrictions upon pre-dispute agreements for the use of arbitration limit the choices for providers.

Part I provides a theoretical background into the different venues for dispute resolution and its functions. This part also highlights the issues with the current venues in a cross-border e-commerce context. Part II provides a *de lege lata* analysis of the current state of the legislation on pre-dispute arbitration agreements in Sweden and the EU. Part III focuses on a *de lege ferenda* discussion on what aims and purposes should be considered in regard to legislative intervention.

The conclusion drawn in the last part is that the main reason for the prohibition is the cost aspect, an aspect which considering the movement towards ODR mechanisms needs to be reassessed. A proposed amendment of the prohibition provides for a wider application, limitation on the providers of consumer arbitration where pre-dispute arbitration agreements are used and cost-allocation to prevent excessive costs for consumers.
# Table of Contents

Abstract .................................................................................................................................

Abbreviations ..........................................................................................................................

1 Introduction ..............................................................................................................................1

1.1 Subject .................................................................................................................................1

1.2 Purpose and Research Inquiries .......................................................................................2

1.3 Methodology and Material ...............................................................................................3

1.3.1 General ..............................................................................................................................3

1.3.2 Theoretical Background .................................................................................................4

1.3.3 De Lege Lata ......................................................................................................................4

1.3.4 International Material .....................................................................................................5

1.3.5 De Lege Ferenda ...............................................................................................................6

1.4 Perspectives and Delimitations ...........................................................................................7

1.5 Structure ...............................................................................................................................8

PART I: CONSUMER PROTECTION IN E-COMMERCE .........................................................10

2 Access to Justice in E-Commerce .......................................................................................10

2.1 Introduction ..........................................................................................................................10

2.2 E-Commerce .......................................................................................................................10

2.3 Access to Justice ..................................................................................................................11

2.4 The Function of Different Venues for Dispute Resolution ..............................................13

2.4.1 Swedish Civil Procedure .................................................................................................13

2.4.1.1 Behavior Modification and Conflict Resolution ..........................................................14

2.4.1.2 Other Functions ..........................................................................................................15

2.4.1.3 The Small Claims Procedure ......................................................................................15

2.4.1.4 The European Small Claims Procedure ..................................................................18

2.4.2 Alternative Dispute Resolution ......................................................................................18

2.4.2.1 The Swedish National Board for Consumer Complaints ........................................20

2.4.2.2 Arbitration ...................................................................................................................21

2.5 Conclusion ............................................................................................................................22

3 Venues for Resolving E-Commerce Disputes ...................................................................23

3.1 Introduction ..........................................................................................................................23

3.2 Direct Communication with the Seller ............................................................................23

3.3 The Swedish National Board for Consumer Complaints .............................................23

3.4 The Swedish Small Claims Procedure ............................................................................25

3.5 The EU Small Claims Procedure .....................................................................................26

3.6 Conclusion ............................................................................................................................26

4 Online Dispute Resolution .................................................................................................29

4.1 Introduction ..........................................................................................................................29

4.1.1 Examples of Online Arbitration .....................................................................................29

4.1.2 UNCITRAL’s Framework for ODR ..............................................................................32

4.2 EU Legislation on ODR .....................................................................................................33

4.2.1 The Consumer ADR Directive ......................................................................................34

4.2.2 The Regulation on ODR .................................................................................................36

4.3 Conclusion ............................................................................................................................36

PART II: LEGISLATION RESTRICTING CONSUMER ARBITRATION ........................................37

5 Restriction in Different Instruments ...................................................................................37
5.1 Introduction ........................................................................................................................................... 37
5.2 The Swedish Arbitration Act .................................................................................................................. 37
  5.2.1 Consumer Disputes and Arbitrability .............................................................................................. 37
  5.2.2 The Prohibition Against Pre-Dispute Arbitration Agreements ..................................................... 38
5.3 Section 36 of the Contracts Act ............................................................................................................ 40
5.4 EU Legislation ......................................................................................................................................... 40
  5.4.1 EU Directive on Unfair Terms in Consumer Contracts ................................................................. 40
5.5 Conclusion ............................................................................................................................................... 42

6 What Legal Effect Does the Prohibition Have? ....................................................................................... 43

6.1 Introduction ........................................................................................................................................... 43
6.2 In the Arbitral Proceedings ..................................................................................................................... 43
6.3 After the Arbitral Proceedings .............................................................................................................. 43
  6.3.1 Challenging an Award ...................................................................................................................... 44
  6.3.2 Invalidity Due to Public Policy? ....................................................................................................... 46
6.4 Conclusion ............................................................................................................................................... 48

PART III: USING CONSUMER ARBITRATION TO FACILITATE ACCESS TO JUSTICE IN E-COMMERCE 49

7 Principles and Aims That Should be Looked at When Considering Legislative Intervention ........................ 49

7.1 Introduction ........................................................................................................................................... 49
7.2 The Principle of Contractual Freedom .................................................................................................... 49
7.3 Ensuring Consumers’ Right to Legal Review .......................................................................................... 49
  7.3.1 The Cost Aspect ............................................................................................................................... 49
  7.3.2 The Right to Fair Proceedings ......................................................................................................... 50
7.4 Privatization of Justice ........................................................................................................................... 52
7.5 Predictability ........................................................................................................................................... 53

8 Issues Arising in the Context of E-Commerce .......................................................................................... 54

8.1 Introduction ........................................................................................................................................... 54
8.2 What Legal Review is Waived? .............................................................................................................. 54
8.3 Issues When Classifying Transactions .................................................................................................. 55
8.4 Issues Concerning Applicable Law ....................................................................................................... 56
8.5 How Would Consumer Arbitration Online Work? ............................................................................... 57
  8.5.1 Possibilities with Allowing Pre-Dispute Agreements ...................................................................... 57
  8.5.2 Risks with Allowing Pre-Dispute Agreements ................................................................................ 57
  8.5.3 A Look at Old Precedents on Section 36 of the Contracts Act ....................................................... 58

9 Should the Legislation be Amended to Allow Pre-Dispute Arbitration Agreements? ................................. 61

9.1 Introduction ........................................................................................................................................... 61
9.2 Should Pre-Dispute Arbitration Agreements be Allowed? ..................................................................... 61
9.3 How Should such a Regulation be Designed? ....................................................................................... 62
  9.3.1 Widening the Reach ........................................................................................................................ 62
  9.3.2 Control the Providers of Consumer Arbitration .............................................................................. 63
  9.3.3 To Which Extent Should Pre-Dispute Arbitration Agreements be Allowed? ............................... 63
    9.3.3.1 Conditionally Binding Agreements ............................................................................................ 63
    9.3.3.2 Cost-Allocation ............................................................................................................................ 64
9.4 Proposed Outlines for the New Legislation ............................................................................................ 65
9.5 Concluding Remarks .............................................................................................................................. 66

10 List of Cited Works ................................................................................................................................... 68
Abbreviations

AAA  American Arbitration Association
ADR  Alternative Dispute Resolution
B2B  Business-to-business
B2C  Business-to-consumer
C2C  Consumer-to-consumer
CIETAC  Chinese International Economic and Trade Arbitration Commission
ECHR  European Convention on Human Rights
ECJ  EU Court of Justice
EU  European Union
HKIAC  Hong Kong International Arbitration Centre
JT  Juridisk Tidsskrift
NJA  Nytt Juridiskt Arkiv
ODR  Online Dispute Resolution
Prop.  Government Bill (sw. proposition)
SCC  Stockholm Chamber of Commerce (in reference to the Arbitration Institute)
SOU  Government Official Reports (sw. Statens offentliga utredningar)
SvJT  Svensk Juristtidning
UNCITRAL  United Nations Commission on International Trade Law
1 Introduction

1.1 SUBJECT

Using ICT (Information and Communications Technology) as a platform for doing business is a relatively new phenomenon, blurring the borders between countries and continents. This has opened up huge new opportunities for business in general, not least in business-to-consumer (B2C) relations. E-commerce in B2C relations in Sweden has seen close to a 1,000% growth since 2003, even doubling in turnover since 2009, and the growth is expected to continue.¹ At the same time, the rise of e-commerce puts the legal systems to new challenges. As e-commerce is rapidly increasing, these transactions are potentially leaving consumers vulnerable, especially in a cross-border context where efficient redress mechanisms are more difficult to find in case of a dispute.²

As a response to this deficiency, a number of traditional alternative dispute resolution (ADR) methods have been transformed for the online environment, to what is commonly referred to as online dispute resolution (ODR). Early successful examples of ODR-systems in B2C-relations includes eBay and PayPal, whose dispute resolution systems have successfully managed to bridge the gap between consumers and businesses, resulting in fast and efficient resolutions in disputes relating to their services.³

In recent years, a number of big organizations and international bodies have shown increased interest in the use of ODR, including the EU and UNCITRAL. The EU has recently adopted two intertwines initiatives, a Consumer ADR Directive and an ODR Regulation, aiming to bridge the gaps between the member states national ADR bodies by creating a unified standard of proceedings and adopting an ODR platform where consumers will be able to search for the appropriate ADR-body and conduct the proceedings online. UNCITRAL currently have a working group that is under way to develop model rules for ODR

¹ Härifrån till framtiden, p. 35.
² According to a study made by the EU Commission of consumer attitude in cross-border trade and consumer protection, the main reasons for not pursuing complaints is that it would take too long, the sums involved were to small and that a satisfactory solution appeared unlikely, see Flash Eurobarometer 358, p. 7.
³ See, eg, Del Duca, Rule & Zbynek.
proceedings, focusing on low-value and high-volume disputes, in both business-to-business (B2B) and B2C relations.\(^4\)

While the EU approach leaves arbitration out of the equation, UNCITRAL's draft rules include arbitration in its arsenal for solving disputes. Arbitration has historically speaking been a venue to solve commercial disputes, especially in a transnational context. Among its advantages are speedy, confidential and cost effective resolutions that are final and enforceable practically all over the world due to the vast adoption of the New York Convention. Even though several of these arguments at first glance may appear to be a good fit for B2C-disputes as well, arbitration in consumer disputes are fairly uncommon. In a number of countries, the possibilities of using pre-arbitration agreements to bind consumers are restricted or prohibited due to public policy considerations.\(^5\) The reasons behind these restrictive views on consumer arbitration are typically of the same nature: consumers are a weaker party in relation to the seller both in regards to knowledge and bargaining power, and the cost of the arbitration proceedings risk leading to instances where consumers risk having to refrain from taking legal action due to the cost aspect.\(^6\)

However, as ADR-solutions are moving online and adapting to a new environment, new opportunities and solutions emerge. In the light of the recent international movement in support of ODR, this thesis’ aim is to investigate whether the restrictions set up on pre-dispute arbitration agreements in B2C-disputes are successfully protecting consumers in cross-border e-commerce.

1.2 Purpose and Research Inquiries

Due to the increasing interest in using ICT as a means to help resolve disputes in general, the aim of this thesis is to evaluate the prohibition of pre-dispute arbitration agreements in this context by answering the following research inquiry:

\(\text{Does the current prohibition of pre-dispute arbitration agreements in B2C-relations harm consumers’ access to justice in cross-border e-commerce?}\)

\(^4\) A/CN.9/WG.III/WP.133, p. 2.
\(^5\) See A/CN.9/706, para. 1. See also below chapter 5.
This general inquiry contains several sub questions. The initial question will be to look at consumers’ access to justice in e-commerce today, which venues are available for resolving disputes and the function and purpose that they serve in society. A second question will be to analyse the restriction on pre-dispute arbitration agreements in different instruments. A third question will be to look into the purposes and aims behind the restrictions and evaluate its appropriateness with regard to cross-border e-commerce. A fourth question will be to propose how an amendment to allow pre-dispute arbitration agreements should be made.

1.3 METHODOLOGY AND MATERIAL

1.3.1 GENERAL
To answer the research inquiry, a discussion de lege ferenda will have to be made. For this discussion to be made in an appropriate way, the thesis will have to take on a wider perspective where not only traditionally relevant legal sources will be used. In this respect, Agell speaks of a constructive jurisprudence that enables a more free discussion compared to when trying to discern the current state of the law. Agell makes a distinction between ultimate and primary goals with legal rules. In this respect, it is not refuted that the prohibition very effectively reaches its primary goal, to prohibit pre-dispute arbitration agreements. If there by necessity is a connection between the primary and ultimate goal, consumer protection, is what this thesis aims to question.

The thesis consists of three parts. The starting point will be to look at the restriction from what it is trying to accomplish – ensuring consumers right to legal review of their claims. This will be done by looking into the concept of access to justice and provide a brief overview of the possible venues to bring a claim and the function of them and evaluate in an e-commerce context. Part II will build on the conclusions from the first part by investigating the restriction of pre-dispute arbitration agreements de lege lata by answering how the restriction is constructed in different instruments and what the legal effect of it is. Part III then takes on a more defined de lege ferenda character by analysing the appropriateness of the prohibition related to the conclusions in part one. This will be done by presenting principles and aims that should

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7 See Olsen, p. 136.
8 Agell, p. 246 f. See also Kleineman, p. 39.
9 See Agell, p. 249.
be considered in regards to legislative intervention in this area, followed by subsequent issues that could arise in an e-commerce context that an allowance of pre-dispute arbitration agreements could bring. Finally, a proposal on a revision of the current legislation will be presented.

1.3.2 THEORETICAL BACKGROUND

The first part aims to propose that two different societal movements are changing the context in which disputes arise and how they consequently are solved. The first movement is e-commerce, and the inevitable move to businesses conducted online and the issues this creates when disputes arise. The second one is the emergence of ODR, particularly online arbitration, as a possible venue that could be suited for handling these disputes. In this part, it has been necessary to broaden the materials used. By taking a more practical approach, the overview of current venues does not in any way aim to be complete. Instead it will point out some inherent issues that these venues are facing. This will serve as a necessary backcloth for the later evaluation of the prohibition, as it is necessary to put into its context.

1.3.3 DE LEGE LATA

The second part will analyse the current state of the law. This will be done by using the doctrine of the hierarchy of legal sources (sw. rättskälleläran). The main sources of law in Sweden are regarded to be: EU law, the Swedish Constitution, Swedish laws and regulations, Supreme Court and Supreme Administrative Court precedents, preparatory works and scholarly work.10

Arbitration differs in character from other legal areas, mainly due to the fact that arbitration is an alternative dispute resolution mechanism. This makes it necessary to apply a different handling of the legal sources than in more traditional areas of law. This is due to the wide possibilities of keeping the proceedings confidential, resulting that few awards ever gets public.11 Since arbitral awards can’t be challenged on material grounds,12 awards only become public when one party has challenged the validity of the award, resulting in a court review of the case where the award then becomes a public document. This leads to limited availability

10 See Bernitz, p. 32 f. and Lehrberg, p. 90 ff. But see Sandgren.
11 See Hobér, Extinctive prescription and applicable law, p. 28.
12 See Heuman, Skiljemannarätt, p. 584.
of precedents in general. However, since the focus of this thesis is on consumer arbitration, this is not as big of an issue as when looking at more typical arbitration issues.

This highlights two areas of law with greatly different purposes. International arbitration, and arbitration in general, has the characteristics of freedom of the parties, party autonomy and confidentiality of the proceedings. Consumer protection on the other hand, rests on the assumption that consumers as a collective are a weaker party, resulting in not as favourable terms as if they had been on equal standing with the business. Party autonomy and the freedom of the parties to conduct their business to their own liking are thus restricted by the interests of consumers as a collective. This is something that is discussed on a public policy level, either by the legislator or courts. In the area of consumer protection, especially the ECJ has shown a desire to allow for a further reaching control over arbitral proceedings than otherwise is the case.\textsuperscript{13} The ECJ has also stated that it requires positive actions unconnected to the parties to a specific contract in order to restore equality between the parties. This makes the availability of case law in this area not as big of an issue.

In this sense, it could be argued that this thesis is less about arbitration and more about the level of consumer protection in regards to arbitration. Arbitration as an institute for dispute resolution are well established historically. It is first with the emergence of a growing group of people having enough money to spend on more than just their livelihood in the later half of the 20\textsuperscript{th} century that the idea of consumer rights and protection started attracting attention.\textsuperscript{14}

\subsection{INTERNATIONAL MATERIAL}
Contrary to what is the case with arbitration in general, where wide similarities across different jurisdictions arbitration acts can be seen,\textsuperscript{15} the aspect of consumer protection that arises in connection to restricting pre-dispute arbitration agreements makes comparisons somewhat less important. For example, the UNCITRAL Model Law\textsuperscript{16} lacks a provision on restriction on consumer arbitration. Legislation based on the Model Law has been adopted in

\textsuperscript{13} See chapter 6.3.2.
\textsuperscript{14} See SOU 1978:40, p. 31 f.
\textsuperscript{15} See Lehrberg, p. 231.
67 states, and the lack of a provision on consumer arbitration speaks the domestic nature of consumer protective rules. Even though the Swedish Arbitration Act (SAA) is not based on the Model Law, it has influenced the legislation in Sweden as well. When discussing consumer protective regulation, this occurs on both national and EU level. This makes EU legislation the most prominent source of international material.

1.3.5 De lege ferenda

The last part will end up in an analysis de lege ferenda of the prohibition by looking into the principles and aims that are necessary to have in mind when considering legislative intervention. To evaluate the adequacy of possible changes to the legislation, these will be assessed against such principles and purpose arguments that can be considered to be of fundamental value in both Swedish and EU context and therefore of value to have in mind when legislative efforts are considered. This will be done specifically with cross-border e-commerce and the conclusions drawn in earlier parts in mind.

One issue this thesis faces is to relate the consumer protection and arbitration to the subject of e-commerce. Most of the legislation and cases on consumer arbitration available has not been developed or adjudicated in an environment where e-commerce has been as prominent as today. This makes it fundamental to try to discern the aims and purposes behind the legislation, and apply this to the context of e-commerce. Another aspect to be mindful of this is if there are other considerations that should be made in this new context.

One area of particular importance when discussing de lege ferenda is the restrictions that EU law puts on the Swedish legislation. This will be regarded in the discussion on how changes to the legislation should be made.

There will not be a division between reasoning de lege lata and de lege ferenda in the thesis to avoid repeating the same arguments on several occasions. However, the third and last part will clearly have a more normative approach.

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18 The Model Law has however been taken into account in the legislative efforts, see SOU 1994:81 p. 73 f. and Prop. 1998/99:35, p. 44 ff.
19 See Lehrberg, p. 199 f. and 234.
20 See chapter 2.2 for more about e-commerce.
1.4 Perspectives and Delimitations

This thesis will take on a perspective in which disputes where the consumer wants to bring a claim towards a seller are the main focus. This has to do with the consumer centric focus of the subject, as well as the design of several EU instruments and the Complaints Board in Sweden. It is however not possible, nor desirable, to exclude other party constellations completely and such aspects will be touched upon where appropriate.

This thesis will focus on smaller claims. The Swedish small claims procedure is limited to claims that does not exceed half the base amount according to the Social Insurance Code (2010:110), which for 2015 equals to 22 250 SEK. The EU Small Claims Procedure has a value limit equal to 2 000 €. It is claims within these limits that are of particular interest to look at, which means that higher value disputes will not receive specific attention.

Furthermore, the thesis will focus on cross-border disputes that arise within an EU-context. In the context of this thesis, a cross-border dispute/case is a contractual dispute arising from a sales or service contract where, at the time the consumer orders the goods or services, the consumer is resident in a Member State other than the Member State in which the trader is established.21

E-commerce is a wide term that covers a number of situations. In this context the term will be used exclusively referring to B2C-relations if nothing else is stated. In the Act on Electronic Commerce (2002:562) the broader term “information society services”, in which e-commerce is a big part, is defined in section 2 as: any services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. This is a wide definition covering a lot of different situations. In this thesis, e-commerce will be narrowed down to mean a sales or service contract where the trader, or the trader’s intermediary, has offered goods or services on a website or by other electronic means and the consumer has ordered such goods or services on that website or by other electronic means.22

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22 Similar to the definition of “online sales or service contract” in Regulation (EU) No 524/2013.
When referring to *arbitration*, I refer only to processes that are binding and end in an enforceable award in accordance with applicable legislation. There are a number of quasi-arbitration instruments internationally, and if referred to it will be for comparative purposes only and clearly noted that they are not otherwise arbitrations in the context of this thesis.

Due to the restrictions on this thesis, it is further necessary to limit the scope to disputes that fall under the prohibition in section 6(1) of the SAA. It has also been necessary to leave out summary processes, which could be of interest when investigating smaller claims. They are typically a fast way to get an enforceable verdict when the claim is not disputed. However, this is typically more of interest when looking at claims brought by a seller wanting to get paid, which also explains why it is left out.

Due to the binding mechanisms of arbitration and the focus on the prohibition on pre-dispute arbitration agreements, it has been necessary to exclude mechanisms where consumers as a collective can bring group actions in regards to a seller or trader, although this is a vital instrument since the risk on the individual consumer is low. Multi-party arbitrations are a beast of its own and trying to analyse whether it could be a venue for collective consumer claims is outside the scope of this thesis.

There are a number of industry tribunals in specific sectors that are of interest as they complement the Complaints Boards competence to try consumer claims. It is however outside the scope of this thesis to consider them, which is why only disputes that fall under the Complaints Board's competence will be discussed.

1.5 **Structure**

Part I will start of in chapter 2 by looking into consumer protection in the context of e-commerce and the different venues for dispute resolution available for access to justice.

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23 This should typically correspond to the restriction to e-commerce transactions, but it is possible that some transactions that are exempted could fall under this.

24 In Sweden this is regulated in the Act on Group Action (2002:599). For more information about this instrument in Sweden, see several books from Per Henrik Lindblom, e.g. *Grupptalan: det anglo-amerikanska class action institutet ur svenskt perspektiv* (1989) and *Grupptalan i Sverige: bakgrund och kommentarer till lagen om grupprättegång* (2008).

Chapter 3 will look at how a cross-border e-commerce dispute can be resolved today. Chapter 4 will present the reader to online dispute resolution and a number of initiatives to make it an attractive venue for the resolving of cross-border e-commerce disputes.

Part II will initially in chapter 5 look at the restriction of pre-dispute arbitration agreements in different legal instruments on a national and EU level. Chapter 6 will then look into the legal effect of those restrictions.

The final part III will present a de lege ferenda discussion, starting in chapter 7 where relevant principles and aims in regards to legislative intervention are deliberated on. Chapter 8 will then highlight issues relevant in an e-commerce context in regards to the prohibition. Finally, in chapter 9 the presented arguments will be weighted and evaluated to assess whether an amendment is suitable, as well as a proposal on how such an amendment should be made.
PART I: CONSUMER PROTECTION IN E-COMMERCE

2 Access to Justice in E-Commerce

2.1 INTRODUCTION

This part aims to investigate the ultimate goal of the restriction – allowing for consumers to have their claims get a legal review. This will be done by first giving an introduction to e-commerce and the contents of access to justice, followed by a look into the functions and purpose of different venues that provide dispute resolution. A brief overview into the particularities of e-commerce will be followed by a look at how initiatives into ODR are trying to provide for a more efficient and convenient dispute resolution.

2.2 E-COMMERCE

72% of Swedish consumers buy goods online each quarter. Out of these consumers, 33% has bought goods from traders not residing in Sweden.\(^{26}\) E-commerce in Sweden increased with 16% during 2014, and the growth is expected to continue.\(^{27}\) E-commerce now equals 6.4% of the total retail shopping in Sweden (42.9 billion SEK).\(^{28}\) Home electronics, clothes, shoes, books and media are the biggest industries when it comes to e-commerce, with several others just starting to grow.\(^{29}\) In total, Swedish consumers bought goods from foreign traders to a value of 11.5 billion SEK 2014.\(^{30}\) Only 6% of consumers in Sweden never use the Internet to buy goods in a year.\(^{31}\)

Compared to the rest of the EU, these numbers are high. In 2012 over half of the European consumers used the Internet to buy goods in the last 12 months.\(^{32}\) 59% of EU consumers feel confident purchasing from their own country, compared to just 36% from a trader in another EU-country.\(^{33}\) This is troubling, as EU’s vision of an internal market without borders is clearly still just a vision in regards to e-commerce. This could be due to a number of aspects.

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\(^{26}\) E-barometern 2014, p. 15.
\(^{27}\) Ibid, p. 8.
\(^{28}\) E-barometern 2014, pp. 8-10 and Härifrån till framtid, p. 35.
\(^{29}\) E-barometern 2014, p. 10.
\(^{30}\) Ibid, p. 16.
\(^{31}\) Ibid, p. 12.
\(^{32}\) Flash Eurobarometer 358, p. 5.
\(^{33}\) Ibid, p. 5.
The selection of goods, having a website in Swedish, Swedish support, possibly faster delivery and so on are all well-founded reasons to choose a Swedish retailer above a foreign one. However, the study also shows a declining confidence in dispute resolution.34

These numbers should not be seen as hard facts in regards to how well certain dispute mechanisms are working.35 They can be an indicator, but this is a study on consumer attitude, not on how well actual disputes are resolved. An alternative can seem confusing and unlikely, but in reality provide for a fast and efficient resolution and vice versa. What these statistics can say however is that consumers are increasingly pessimistic about their chances to resolve disputes in relation to e-commerce. This pessimism is worrying, as it is likely to affect their choice of purchasing channel. It may lead to consumers choosing other channels than the Internet altogether, or choosing businesses that have a strong presence within their own country with physical stores just so they have somewhere to go if something goes wrong.

2.3 Access to Justice

The term access to justice was first introduced in the legal doctrine by Mauro Cappelletti and Bryant Garth in the 1970s.36 Access to justice has been described with help of “the wave-metaphor”37, as its advance can be seen as three waves, mainly connected with its chronological development and debate in the US. The first wave concerns the reform of institutions for delivering legal services to the poor, the second wave the strengthening of the representation of diffuse interests, such as those of consumers, and the third wave was a shift in focus to a broader conception of access to justice, mainly focusing on the use of ADR. This thesis will focus on the last two waves. The focus when talking about access to justice today is less “formal” and more focused on providing access to justice in practice, not just on paper.38 Lindblom argues that the debate on access to justice is one of the most important in the debate on international procedural law during the second half of the 20th century, allowing for a citizen perspective on the law.39

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35 EU’s focus on trust and efficiency from a consumer perspective has been critized, see Aslam, 3.1. Aslam argues that consumers wants to trust in the system that provides for them.
36 Their ”The Florence Access to Justice Project” is published in four parts, Access to Justice, I-IV.
37 See Cappelletti & Garth, p. 22 ff.
38 See Lindblom, Progressiv process, p. 306 ff.
39 See Lindblom, ADR, p. 102.
Access to justice can be seen as having two sides. Substantial access to justice consists of the substantive rules that ensure consumer protection. Procedural access to justice consists of the procedural rules that are in place to safeguard the substantive rules. Naturally, the two are intertwined, and even the best of procedural rules will not satisfy the need for consumer protection if the substantive rules are ‘bad’ and vice versa.\textsuperscript{40} Geraint Howells and Stephen Weatherill have simply put it: “consumer rights are only as effective as their enforcement”.\textsuperscript{41} While a lot of issues surround the substantive side as well, especially in a transnational context,\textsuperscript{42} this thesis will from here on focus on the procedural side of access to justice. A study on the state of access to justice in Europe led by the European Union Agency for Fundamental Rights has come to the conclusion that access to justice comprises of five pillars\textsuperscript{43}:

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

Using these five pillars, the term access to justice can be used to express one or more of their meaning in different contexts.\textsuperscript{44} Access to justice as a term is not commonly used as legal terminology. However, the contents of access to justice are recognized as core human rights at a global level. Access to justice comprises, as can be seen by the definition above, such basic legal terminology as effective redress, access to courts, fair trial, redress, judicial protection and due process.\textsuperscript{45} The United Nations’ Universal Declaration of Human Rights state that “everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.\textsuperscript{46} At a European level, there is a clear right to trial and effective remedies in several instruments. The Charter of Fundamental Rights of the European Union (Charter of Rights) provides the right to an
effective remedy and a fair trial.\footnote{Charters of Rights, art. 47.} The ECHR provides the right to a fair trial and effective remedies.\footnote{ECHR, art. 6 and 13.}

One key part of access to justice has been to provide a separate process for smaller claims.\footnote{See Cappelletti & Garth, p. 69 ff.} However, access to justice is to be given a wide meaning and not be reserved for judicial processes in court.\footnote{See Lindblom, Progressiv process, p. 305.} In the field of consumer protective legislation, Hellner argues that “a typical feature of this field is that both access to the courts and assistance by trained lawyers are only minor parts of the general issues of access to justice”.\footnote{Hellner, p. 727 f.}

In Europe, there has long been a movement towards the promotion of access to justice, and the Council of Europe issued a recommendation on access to justice already 1981.\footnote{Council of Europe, Recommendation No. R (81) 7.} EU have enacted legislation on a small claims procedure (see below 2.4.1.2 and 3.5), a Mediation Directive\footnote{Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.}, Legal Aid Directive\footnote{Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.} and now also the new initiatives on ODR (see below 4.2).

2.4 THE FUNCTION OF DIFFERENT VENUES FOR DISPUTE RESOLUTION

In order to understand the available venues for dispute resolution and their role, it is necessary to have an understanding what their functions and purposes are. This will be done by looking generally into the two main arches of dispute resolution, the regular civil procedure and ADR. These will be explained and the available venues in Sweden will be put into context.

2.4.1 SWEDISH CIVIL PROCEDURE

In Sweden, there is a lack of statement as to the general purpose of the civil procedure as an institution. The fundamental legal basis for the judicial process is found in the Constitution, simply stating that “courts exist for the administration of justice”.\footnote{See the Instruction of Government (1974:152), chapter 1 article 8. There is no definition of “administration of justice” within the Constitution, but in chapter 11 article 5 of the Instruction of Government it is said that “a legal dispute between individuals may not be settled by an authority other than a court of law except in accordance with law”.} This has led to that most
of the discussion regarding the function of the civil procedure has been concerning value statements based on arguments of judicial policy-nature. What is decisive is many times the author’s view on what role the law has in the society. Two main functions of the civil procedure can however be distinguished.

2.4.1.1 Behavior Modification and Conflict Resolution

Ekélöf is of the opinion that the main task of the administration of justice is to ensure the material legal provisions’ impact within the society. This is called the function of behavior modification and occurs on a general level in society. It is thanks to the courts that the civil legislation gets its impact. The courts’ possibility to force a party that hasn’t fulfilled a commitment creates a security within the society. Ekélöf also states the importance of favorable judgments on a larger scale in a certain area of law, leading to that actors in general can feel confident (for example get paid on time) because otherwise the courts are a last resort for collecting their claim.

Of opposite view is Lindell, that questions the possibilities for the administration of justice to work as behavior modifying within society. There are so many other actors affecting the general morale in the society that the courts role should not be overstated. He claims that one of the most important tasks of the civil procedure is to settle the dispute at hand, a function of conflict resolution. Contrary to behavior modification that occurs on a general level, conflict resolution concerns an individual level. In favour of weighting this over the element of behavior modification, is the fact that in civil disputes, the parties may at any time choose to withdraw from the judicial proceeding to negotiate a settlement, resulting in conflict resolution instead of impact of the material provisions. Lindblom can be found somewhere in the middle, arguing that the main task of the civil procedure is to attribute to a maximum impact for the aims behind the material provisions, although this can be broken down into two parts: conflict resolution (reparative, retrospective) and behavior modification (preventative, forward-looking).

56 See Andersson, p. 204 f.
57 See Ekélöf & Edelstam, p. 20.
58 See Lindell, Civilprocessen, s. 29.
59 Ibid, s. 29 ff.
60 Lindblom, Progressiv process, p. 52 ff. Lindblom’s view on a number issues, i.e. how behavior modification is to be reached, differs from Ekélöf, but is outside the scope of this thesis to go into.
Regardless the weight of the functions, it is clear that both are important for the regular civil procedure. While Lindell have a point that the possibility for the judicial system to work behavior modifying could be overstated, it seems inevitable that an inefficient system would cause society’s obedience to the contents of the law to decline. The importance of conflict resolution is however often of more weight, as is reflected by the possibility to withdraw from any civil procedure to negotiate a settlement.

2.4.1.2 Other Functions
Lindell argues that an important function for the civil procedure is to offer legal protection. What this means is that individuals must have the possibility to realize their legal claims and in this way receive legal protection. In this way, the proceedings have a realizing purpose. This resembles Ekelöf’s view on behavior modification in sense that the judicial system can’t be evaluated without considering its impact or effect for society. Lindell’s view on legal protection is however more concerned with the individual’s rights while Ekelöf talks on a general level.

Beside these main tasks, Lindblom has identified a number of other functions that the civil procedure is to provide for, namely the creating and controlling functions. The courts creating function is mainly accomplished when they are forced to fill out the material legal provisions, as Lindblom argues that clarifying what the law consists of with precedents only contributes to the behavior modification. The control function is exercised when the courts review if an authority’s decision is in accordance with the law or if a law or regulation is in accordance with the Constitution or other superior legislation.

2.4.1.3 The Small Claims Procedure
To ensure that the substantial consumer protective rules are effective, it is vital to have an efficient procedure by which they can be safeguarded. The ordinary proceedings have had focus on delivering a procedure that is in accordance with the rule of law. The downside of this is that with legal security and formalism comes high costs. When a small claim is at hand,

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61 Lindell, Civilprocessen, p. 21 f.
62 In his later works, Lindblom has added a fifth element of communicative functions he claims the courts to have. These functions are hardly central, but in this context it can be noted that he sees ”participation” för the citizens in the proceedings to have a democratic value and that the importance of personal redress should not be underestimated, Lindblom, ADR, p. 113.
63 See Lindblom, Progressiv process, p. 55 f.
64 Ibid, p. 73 ff.
65 See Cappelletti & Garth, p. 123.
it is obvious that it is not likely that a weaker party will bring an action to court if the costs of the proceedings are higher than the claim itself. In these cases, the aim to ensure a high level of legal security hinders the possibilities of effective legal protection. The introduction of a separate small claims procedure can be seen as a part of two reforms during the start of the 1970s; strengthening consumer protection and improving the efficiency within the judicial organisation and the proceedings themselves.66

The aim behind the small claims procedure is to strengthen individuals’ legal protection and increase the possibility for the material legal provisions to have an impact. For this to be possible, the procedure has to balance cost and simplifying the procedure on the one hand, and legal security on the other. It also needs to ensure a fair and efficient procedure even though the parties are imbalanced. These two areas, cost-related and party-related, are something that the procedure has to manage to be efficient. Cost is usually lowered by limiting the need for legal counsel and the possibility of appeal. This can also be done by making the procedure consist of more written elements.

The differing strength of the parties can be due to inferior knowledge, economic factors or legal imbalance in relation to the trader.67 Typically, a consumer is less informed about his rights and duties than a trader, leading to difficulties in evaluating his legal position and phrasing it in front of a court.68 Traders also typically have an economic advantage as well as a greater experience from managing conflicts and legal proceedings than consumers.69 In this sense, the traders can be seen as repeat-players (the “haves”) versus one-shot consumers (the “have-nots”).70 The repeat-player is typically a bigger entity and the dispute is smaller in regards to the entity’s total assets, compared to a one-shot litigant where the outcome of the dispute can have big importance for the one-shotter’s economic situation. The repeat-player can also see beyond the individual case in order to develop a relationship with law firm, also allowing for bigger risk in the individual case for an estimated gain in the long run. This is compared to a consumer, where a greater risk normally results in a strategy to minimize the loss, where the trader can afford a big loss in one case if that means maximizing the win over

66 See Lihné, p. 9.
67 See Linton, p. 29.
68 Ibid, p. 29.
70 See Galanter, where he introduced these concepts in the middle of the 1970’s.
a number of cases. A one-shot consumer is also more likely to trade in a legal certainty or the creation of favourable precedents in exchange for an immediate economic gain. A trader can also choose to go into a process simply to uphold the willingness to pay in his consumers.

The special rules on smaller claims are regulated within the main Code of Judicial Procedure (1942:740). Most of the provisions are the same as the ordinary civil procedure, however there are a few key provisions that aims to bring down the costs of the proceedings. According to section 1:3 d of the Code of Judicial Procedure, the court consist of a single judge instead of three. The compensation for which the other party can be compensated for by the losing party is limited. Previously there were special restrictions on appeal, however since the introduction of a general requirement of a review permit, these general rules apply. Furthermore, the possibility to receive legal aid is heavily restricted. The practical effect of the small claims procedure has been disappointing judging from the fact that it is to provide a venue for consumers to get legal review. Around 90% of the small claims disputes between a business and a consumer are brought by a business as claimant and a consumer as respondent.

It is clear that the background for introducing the small claims procedure is to enable legal protection. There is an inherent contraposition between ensuring a proper outcome in each and every case and the interest of achieving a fast and cost effective, and therefore more frequently used, court proceedings. The enabling of legal protection also means a possibility for behaviour modification and conflict resolution. The availability of legal redress results in keeping the willingness to abide by the law as well as facilitating settlements to avoid a judicial process.


72 Ibid, p. 100 ff.
73 Ibid, p. 103.
75 Ibid, sections 49:1 and 14.
76 Legal Aid will only be given when special reasons exist. See Legal Aid Act (1996:1619), section 11(4).
77 This high number in itself is not necessary a problem. However, the number of consumers that bring claims are very low, see, eg, Hällström, p. 33 ff.
2.4.1.4 The European Small Claims Procedure

Many EU member states have introduced simplified civil procedures for small claims since the costs, delays and complexities connected with litigation do not decrease proportionally to the value of the claim. This is even more so an issue in cross-border cases, when trying to obtain a fast and inexpensive judgment that are enforceable. This is the reason why the EU with Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007, has established a European small claims procedure.

The procedure is available as an in-court alternative to the existing procedures under national law.\(^\text{80}\) The aim of the regulation is to speed up and simplify litigation concerning small claims in cross-border cases and to reduce cost.\(^\text{81}\) The objective set out is to facilitate access to justice by eliminating the distortion of competition within the internal market due to imbalances with regard to the functioning of the procedural means in different member states, and to guarantee a level playing-field within the European Union.\(^\text{82}\) It is handled as a mainly written procedure\(^\text{83}\), aimed at being available without legal representation\(^\text{84}\) and shall be recognised and enforced, notwithstanding any possible appeal, without the need for a declaration of enforceability and without possibility to oppose its recognition\(^\text{85}\).

2.4.2 Alternative Dispute Resolution

Although there is no general definition of ADR, the term generally refers to dispute resolution out-of-court.\(^\text{86}\) This thesis will only look into out-of-court solutions that are voluntary. The European Commission has defined ADR as covering out-of-court measures that lead to the settling of disputes through a third party, such as an arbitrator, mediator or an ombudsman. This third party can resolve the dispute by either imposing a solution or simply try to bring the parties together by assisting them in finding a solution.\(^\text{87}\) A common goal for ADR is to facilitate settlements, a main function of conflict resolution.\(^\text{88}\) General characteristics of ADR are its voluntary and confidential nature, and wide possibilities to adjust the process to the

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\(^{81}\) Ibid, art. 1 and recital 8.
\(^{82}\) Ibid, recital 7.
\(^{83}\) Ibid, arts. 5, 8 and 9.
\(^{84}\) Ibid, art. 10 and recital 15.
\(^{85}\) Ibid, arts. 15, 17, 18 and 20-23.
\(^{86}\) For the purposes of this thesis, any in-court and court-mandated ADR are outside the definition.
\(^{88}\) See Lindell, Alternativ rättskipning, p. 48.
parties’ needs. ADR aims to facilitate a speedy and low cost solution that are more time efficient and flexible than ordinary procedures before the court. While the state-run sanction mechanisms, access to court and enforcement, is the ultimate guarantee for a material legal provision to serve its purpose and work behaviour modifying, at least a few of its purposes, reparation and prevention, can be accomplished through the use of ADR.89

ADR has been growing in popularity in the member states of the EU, and are particularly well suited for consumer related disputes involving small monetary claims.90 The use of ADR is also acknowledged as an important part of providing accessible and efficient redress to consumers at EU level. The EU have for a long time been active in support of ADR by enacting a number of recommendations and Directives.91 There is also a growing trend by private entities to adopt cross-border ADR mechanisms.92 Recently, the UNCITRAL has initiated work to develop a comprehensive framework on the use of ODR to resolve low-value high-volume disputes arising from e-commerce, see below chapter 4.1.2. Also, the OECD has highlighted the importance to foster cross-border dispute resolution mechanisms and finding suitable solutions for ADR.93

The use of ADR is not uncontroversial. Fiss has criticised the use of ADR since it causes a decline of the impact of the material legal provisions, mainly to the detriment of the weaker party.94 This argument is related to the function of behaviour modification. Lindblom argues along the same line, that ADR fails to live up to most of the functions of the regular civil procedure, and that the use of ADR takes away the possibility for the regular civil procedure to fulfil its functions.95 He also notes that what is best for the parties are not necessarily what is best for the citizens in general in relation to the aspect of behaviour modification. However, Lindell argues that the theory of behaviour modification belongs to the history in a world

89 See Lindblom, Progressiv process, p. 305.
90 See Micklitz, Reich & Rott, p. 341.
92 For example, the European Car Rental Conciliation Service adopted in 2010. It helps customers with unresolved complaints concerning cross border vehicle rentals within Europe, see www.leaseurope.org/index.php?page=consumer-redress-service.
93 See also OECD, Recommendation on Consumer Dispute Resolution and Redress (Paris, OECD, 2007).
94 See Fiss.
95 See Lindblom, ADR, p. 110.
where relations and disputes are transnational. Lindell poses a rhetorical question: should Swedish courts try to direct the behaviour in for example Germany and France? 

2.4.2.1 THE SWEDISH NATIONAL BOARD FOR CONSUMER COMPLAINTS

The Complaints Board is a separate governmental authority whose activities are regulated in the Instruction for the Complaints Board (2007:1041). Its purpose is to give consumers a fast, easy and cheap way to get their compensation claims tried. Heuman has interpreted the purpose of the Complaints Board so as to make it so easily accessible and advantageous for the consumer that they won’t refrain from getting their disputes solved only due to their own convenience. The review the Complaints Board undertakes will be made impartially and independently without applying the legislation in a particularly consumer friendly way.

The procedure is writing-only and voluntary for the parties to participate in. The Complaints Board is not bound by the procedural rules of the Code of Judicial Procedure, which allows for a more flexible handling, although the procedure is contradictory and relies on the same fundamental principles as the Code of Judicial Procedure is built upon. If the Complaints Board has authority to try the case, it ends in a recommendation that is not binding on the parties. However, traders that refuse to follow the recommendations get named-and-shamed on a “black list” for consumers to avoid. The Complaints Board will not try the claim if there is an on-going court proceeding or the claim has been tried by another governmental organ. Claims can also be written off, for example if the parties have reached a settlement. It is clear that the Complaints Board is a subsidiary alternative that focuses on conflict resolution. When the recommendations are expedited they become public, and claims of principal importance are reported in a database available to the public on the Complaints Board’s web site.

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96 See Lindell, Alternativ rättskipning, p. 58 f.
97 Ibid, p. 58.
100 Ibid, p. 574.
103 See SOU 2014:47, p. 68.
105 The focus on conflict resolution will be strengthened if the current proposal in SOU 2014:47 gets implemented, as the Complaints Board will actively engage in negotiating settlements, see SOU 2014:47, p. 332 ff.
The Complaints Board satisfies the two main functions of regular civil procedure. As an ADR-body, its main function is to resolve the conflict between the parties at hand, if possible by facilitating a settlement. It also provides an element of behaviour modification, as important recommendations are published and at least in theory, this should affect the actors in society. This is further strengthened by its specialised nature, giving extra weight to its recommendations, while lacking the binding power only having the weight of its arguments to rest on. The specialization of the Complaints Board on consumer disputes likely makes it more competent to review these disputes than a District Court would be.

2.4.2.2 Arbitration

According to fundamental Swedish law, procedural agreements that have the effect of depriving a party the right to bring an action before the court are invalid, if not otherwise explicitly stated. Arbitration is a by law permitted way to waive the rights to the courts administration of justice. Unlike court proceedings, arbitration is only available upon the choice of the parties – they have to agree to arbitration either before or after a dispute has arisen.

Since arbitration is a form of ADR, the focus is on conflict resolution. Unlike other ADR methods however, arbitration aims to replace the judicial proceedings by imposing a final and binding solution upon the parties. A court can’t retry a claim that is subject to an arbitral award, it has the power of *res judicata*. Arbitration is a one-instance procedure without the possibility to appeal on material grounds, and can only be challenged in a limited manner. This is an outflow of the parties’ contractual freedom, which includes the right to appoint a private adjudication body to solve their disputes. Since an arbitral award is enforceable as a court verdict, it is however in the state’s interest that certain assurance as to fundamental principles of due process is guaranteed. The responsibility that the arbitrators are independent and impartial and how the proceedings are conducted is largely up to the parties themselves to

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106 See Lindblom, *ADR*, p. 112.
ensure.\footnote{See Heuman, Skiljemannarätt, p. 17 ff.} Furthermore, the arbitral tribunal is to adjudicate cases in accordance with the current state of the law, unless the parties explicitly decide otherwise.\footnote{See Lindell, Alternativ rättskipning, p. 15 f. The parties can give the arbitral tribunal the power to decide the case \textit{ex aequo et bono}.}

The criticism towards ADR discussed above (in chapter 2.4.2) is not as prevalent when it comes to arbitration. This has to do with the fundamental difference between providing a \textit{replacement} (arbitration) and an \textit{alternative} (other ADR methods) to the judicial procedure. There is no reason to believe that an arbitral tribunal is not as competent as a court to discern the current state of the law and let the material legal provisions have its impact. Another argument is that the creating function cannot be fulfilled by any ADR entities including arbitration, and if it is made it can be attacked on democratic and constitutional grounds.\footnote{See Lindblom, ADR, p. 112.}

Arbitral awards, as emanating from private dispute resolution, can likely not be given the same weight as court precedents even when made available. They can however be used as to identify the view on the arbitral legal position (\textit{skiljerättsliga rättsläget}) in practise.\footnote{Cf Madsen, Skiljeförfarande, p. 64. See also Lindblom, ADR, p. 113.}

### 2.5 Conclusion

The foundation of consumer protection is to have access to justice. Access to justice is a wide concept that covers both in-court and out-of-court venues to resolve claims efficiently. The traditional functions of regular civil procedure are mainly behaviour modification on a general level and conflict resolution on an individual level. Several additional functions can also be found, such as offering legal protection and the courts’ creating and controlling functions. The nature of the small claim procedure makes its functions tilt more towards ensuring legal protection and conflict resolution in the individual case. ADR focuses on facilitating settlements and conflict resolution. ADR has been highlighted as particularly well suited for smaller claims movement. Arbitration differs from other ADR procedures as it aims to replace the judicial review by offering a final and binding solution. Arbitration is also characterised by its focus on providing conflict resolution and the ability to adapt the process to the needs of the parties.
3 Venues for Resolving E-Commerce Disputes

3.1 INTRODUCTION

This chapter will briefly look into the venues described in the previous chapter when it comes to consumer claims. The focus of this chapter is the issues these venues faces in regards to cross-border e-commerce. This will necessarily cause some repetition from the last chapter, but will be kept to a minimum.

3.2 DIRECT COMMUNICATION WITH THE SELLER

The first step when handling a claim due to a faulty or wrong item, or late delivery etc. is to put the seller on notice within a reasonable time. Many disputes can be handled just by initiating contact with the seller, either by the seller acknowledging a faulty product or simply being anxious of keeping its goodwill and satisfied customers. A prerequisite for an effective ‘internal’ handling of disputes should rest on the fact that traders are concerned about consumer satisfaction as well as the existence of efficient alternatives in the event of a disagreement. If the contact doesn’t lead to any satisfactory result, the consumer can contact a consumer advisor available in most municipalities and get advice on what to do next, or choose to use one of the available venues below.

3.3 THE SWEDISH NATIONAL BOARD FOR CONSUMER COMPLAINTS

Most consumers will likely first turn to the Complaints Board, as their services are free of charge that does not require the consent of the trader to assess the claim. Consumers can easily turn in the application either online or by using a standard form or telephone. Furthermore, there are value limits and restrictions on which kind of claims the Complaints Board will review. These value limits are effectively leaving out a part of e-commerce transactions from its competence, since the value limits are set quite high. There is an area of disputes of relative high value merchandise for a consumer that the Complaints Board cannot

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113 Otherwise the right to assert a defect or other faults may not be asserted. Two months since the buyer detected the defect is always within the limit, section 23 of the Consumer Sales Act (1990:932).
115 See the Swedish Consumer Agency Statute Book, KOVFS 2009:1. The value limits are: SEK 500 (shoes, textiles and ”general”), SEK 1,000 (electronics, motor vehicles, travel, furniture and cleaning services) and SEK 2,000 (banking, housing, boating or insurance). There is however a proposal to roughly halving the value limits to live up to requirements of EU legislation. See SOU 2014:47, p. 213 ff. The new limits would be SEK 300, 500 and 1,000 for the same division of claims as today.
try, at the same time as even just the application fee in court is higher or equally high as the good itself.\textsuperscript{116}

Especially relevant in a cross-border context, is that the business has to have a sufficient connection to Sweden for the Complaints Board to assess the claim. As long as the business is established in Sweden, it doesn’t matter where the consumer is situated. When the business is situated outside Sweden, and the consumer is residing in Sweden, the Complaints Board will try the dispute if the business \textit{directs} its business towards Sweden.\textsuperscript{117} If the dispute doesn’t have enough connection to Sweden, there are EU-initiatives created to help consumer with cross-border claims by making consumer authorities cooperate with each other.\textsuperscript{118}

A normal processing time is at least six months from when the application is turned in until a recommendation is issued.\textsuperscript{119} The Consumer ADR Directive requires an outcome of the procedure to be made available within 90 calendar days from the date which the ADR entity received the \textit{complete complaint file}, although it is unclear when that time should start counting.\textsuperscript{120} Even though the recommendations are not binding and therefore not enforceable, they generally have a high level of compliance.\textsuperscript{121} During the years 2011-2013 just over 70\% of the recommendations was followed, with some discrepancies between industries. For instance, product categories that are common in e-commerce, such as shoes and textiles\textsuperscript{122}, have seen a decrease in compliance in the last years.\textsuperscript{123} This is not surprising, as the incentives for foreign businesses to comply with a recommendation from a Swedish governmental authority is likely not that high, especially if the business haven’t participated in the

\textsuperscript{116} See below chapter 2.4.3-4 regarding small claims procedures in court.
\textsuperscript{117} This assessment is done in accordance with the principles set out in article 6.1 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). If Swedish law is to be applied, the Complaints Board will try the claim. See SOU 2014:47, p. 180 f.
\textsuperscript{118} The European Commission have created a number of networks such as the European Consumer Centres Network, which aim is to facilitate finding extra-judicial solutions to cross-border disputes. See also www.econsumer.gov.
\textsuperscript{119} See SOU 2014:47, p. 77 f.
\textsuperscript{121} The accuracy of the statistics can however be questioned. It is based on consumer feedback after the dispute has been resolved to see if the trader has complied with the recommendation. A lack of feedback from the consumer is counted as if the trader has complied with its recommendation. There is also a lack of data regarding if the consumer follows the recommendations in case the Complaints Board decides in favor of the trader, which of course is relevant to any business thinking about participating in the proceeding. See SOU 2014:47, p. 145 f.
\textsuperscript{122} See chapter 2.2.
\textsuperscript{123} See SOU 2014:47, p. 146.
procedure. Neither will foreign businesses benefit from any efforts to build confidence by involving the trade and industry as suggested in SOU 2014:47.\(^\text{124}\)

To live up to the demands set out in the new Consumer ADR Directive, some major changes to the Complaints Board are expected. A recent SOU has proposed how these changes will be made, including a new instruction in which its activities are regulated.\(^\text{125}\) A higher caseload is expected due to lowering of the value limits and widened scope of the Complaints Board’s activities, which will be addressed by a more efficient procedure, strengthened internal organisation and shortened processing times.\(^\text{126}\)

### 3.4 The Swedish Small Claims Procedure

If a business doesn’t abide by the recommendation of the Complaints Board, it can’t try the claim or the consumer is simply not satisfied with the outcome, the only venue left is to go to court.

For a case to be tried according to the rules on smaller claims, it has to be obvious that the claim does not exceed half the base amount according to the Social Insurance Code (2010:110), which for 2015 equals to SEK 22,250.\(^\text{127}\) Recent changes to the legislation have doubled the fee to apply for a summons. Today the application fee for a small claim is SEK 900.\(^\text{128}\) When bringing an action to a Swedish District Court, the court can’t try the claim if it doesn’t have jurisdiction. If jurisdiction exists, it is not certain that Swedish law will apply. Both jurisdiction and applicable law will typically be assessed by looking at whether the business directs its activities towards Sweden.\(^\text{129}\) The other party also have to be served with the summons.\(^\text{130}\) If a respondent does get served and show willingness to participate in the

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\(^{125}\) *Ibid*, p. 352.


\(^{127}\) The value of the claim is set at the time of the commencement of the action, and does not include costs for litigation, section 1:3d(3) of the Code of Judicial Procedure.

\(^{128}\) See the Regulation on Fees in the General Courts (1987:452).

\(^{129}\) Regarding jurisdiction this is stated in article 17(c) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Regarding applicable law this is stated in article 6.1 of Regulation (EC) No 593/2008.

\(^{130}\) There is an EU regulation regarding service of documents within the EU, see Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).
proceedings, other issues arise. Since it is in a Swedish court, the language of the proceedings is Swedish. This means that the respondent might have to get a lawyer or some kind of translator in Sweden.

Since the enactment of the new Regulation that came into force 15 January 2015, there is no longer necessary to apply for a special exequatur procedure to have a judgment recognised or enforced in other member states.\(^{131}\) There are however still some possibilities for the other party to hinder enforcement.\(^{132}\)

Applying this to an e-commerce dispute, it is apparent that it can be costly to try a case even under the small claims procedure. Considering the application fee of SEK 900, in addition to the risk of having to pay one-hour legal counselling, cost for travel and subsistence for a party from another country for a main hearing and possibly translation of documents, and it quickly becomes a big sum.\(^{133}\) Beyond this, there is a significant time factor to consider as legal proceedings can drag on.

### 3.5 The EU Small Claims Procedure

For the court being able to handle a case under the regulation it must have jurisdiction, which is decided in the same way as under the small claims procedure above. The case must have a cross-border character, concern certain legal questions (civil and commercial claims with a few exceptions) and be under the threshold of EUR 2,000.\(^{134}\) If the court has jurisdiction but another requirement is not met, the court is to proceed with the claim under applicable national rules.\(^{135}\)

The regulation is supplemented with the Act on European Small Claims Procedure (2008:1038) in Sweden regarding certain practical matters, such as the court’s jurisdiction, which rules to apply when the regulation lacks provisions and time limits regarding certain legal remedies. An application is to be handed to the District Court, section 2 of the Act on European Small Claims Procedure. The provisions on the national small claims procedure are

\(^{131}\) See Regulation (EU) No 1215/2012, arts. 36 and 39.

\(^{132}\) Ibid, art. 45.

\(^{133}\) See Code of Judicial Procedure, section 18:8a.

\(^{134}\) See Regulation (EC) No 861/2007, arts. 2-4.

\(^{135}\) Ibid, art. 4.3.
applicable to the procedure where the Regulation is silent.\textsuperscript{136} This also means that the same cost rules apply, as well as the most of the same issues, including the fact that the proceedings are in Swedish.\textsuperscript{137} There are however some time limits that aim to speed up the proceedings.\textsuperscript{138}

Its impact and use so far has been limited, to say the least. 86\% of citizens and over 50\% of the courts asked had never even heard about the procedure, which inherently makes it hard to use efficiently.\textsuperscript{139} Furthermore, the use and implementation between countries differs greatly. One independent survey\textsuperscript{140} shows the same disheartening results, also pointing to a lack of assistance for consumers and the availability of forms. One much greater problem however, is concerning the enforcement of judgments. The survey shows that favourable outcomes have not been enforced in many cases. This is due to protracting from the other party, lack of information regarding how and where to apply for enforcement etc., leading to consumers abandoning enforcement.\textsuperscript{141}

There is currently a proposal for a revision of the regulation underway, suggesting, among else, to increase the threshold of the value of which claims it’s applicable to EUR 10,000, increasing the use of ICT to communicate with the court, and lowering the court fees to combat disproportionate fees in relation to the value of the claim.\textsuperscript{142}

### 3.6 CONCLUSION

E-commerce is growing and the globalization of B2C-relations is no longer just a theoretical future. Consumers can buy anything they want from anywhere in the world, and with this comes challenges in the form of a lack of transnational redress mechanisms. Many disputes can be solved simply by direct communication with the seller. The traditional venues for resolving disputes faces common challenges when facing cross-border e-commerce disputes, such as practical issues as language, location and the issue of cost being multiplied, as well as legal issues surrounding as jurisdiction and applicable law.

\textsuperscript{137} See, Regulation (EC) No 861/2007, arts. 6 and 16.
\textsuperscript{138} \textit{Ibid}, arts. 2(2), 5(3), 7(1) and 14.
\textsuperscript{139} See COM(2013) 795, p. 8 f.
\textsuperscript{140} ECC-Net, \textit{European Small Claim Procedure Report}.
\textsuperscript{141} \textit{Ibid}, p. 22 f.
\textsuperscript{142} See COM(2013) 795.
The Complaints Board is an attractive venue that traditionally has had a big role in the resolution of consumer disputes. However, e-commerce poses new challenges, where the high value limits can leave consumers without redress. The same goes for which claims they can try, as foreign businesses have to direct their activities towards Sweden. Furthermore, it is likely less enticing for foreign businesses to participate or follow recommendations from a Swedish authority when they lack the influence and coordination that Swedish businesses have with the Complaints Board.

The only alternative to resolve a dispute finally and binding is to go to court, where there are two different procedures regarding smaller claims. The Swedish rules on smaller claims offer a somewhat simplified procedure, but the cost can still be high and works as a barrier for many e-commerce transactions that still can be of significant value for the individual consumer. This also gets amplified by the question on jurisdiction and applicable law, as well as the fact that the procedure has to be conducted in Swedish. The other alternative is the EU small claims procedure, which in theory should provide for a cheap, fast and final resolution of the dispute. However, it is virtually unknown both to courts and citizens, and the cost is equal to the Swedish rules. Furthermore, the supposedly easier enforcement has yet to prove successful in practise.
4 Online Dispute Resolution

4.1 INTRODUCTION

ODR has come as a reaction to the growing e-commerce, and the need to settle these disputes efficiently.\textsuperscript{143} The birth of ODR can be traced back to the end of the last millennium, where initiatives in both Canada and the USA experimented with online processes.\textsuperscript{144} ODR originates from alternative dispute resolution. In addition to bringing more traditional ADR methods online, such as negotiation, mediation and arbitration, several more innovative ways of dispute resolution has emerged, such as “crowdsourced justice”\textsuperscript{145} and blind-bidding negotiations\textsuperscript{146}. UNCITRAL has defined ODR as “a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology”.\textsuperscript{147} The most successful examples of ODR systems in B2C-relations include systems run by eBay and PayPal. These ODR systems, incorporating negotiation and mediation, have successfully managed to bridge the gap between consumers and businesses using their platform, resulting in fast and efficient resolutions in disputes.\textsuperscript{148}

4.1.1 EXAMPLES OF ONLINE ARBITRATION

Online arbitration has so far been adopted mostly in B2B-relations, and there are a number of services providing this in different forms. The key aspects of conducting arbitration online is the possibilities of reducing cost, improving speed and the simple fact that the parties don’t have to be present at the same place. I will now briefly present a few of the providers of online arbitration, to illustrate how it can work. In this part, I will also consider B2B-services as they are so far more widely adopted and give a good insight into how online arbitration works.

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\textsuperscript{143} See Del Duca, Rule & Zbynek, p. 61.
\textsuperscript{144} See Shah, p. 19 ff.
\textsuperscript{145} One type of crowdsourced justice are “mock-trials” that assembles a jury of voluntaries online, letting them decide the case based on a set of facts. See van der Henk & Dimov, p. 101.
\textsuperscript{146} Blind-bidding is a concept where the parties try to reach a monetary settlement without knowing the other parties offer. See Hörmle, p. 2.
\textsuperscript{147} A/CN.9/WG.II/WP.133, draft art. 2 (definitions). Kaufmann-Kohler and Schultz has defined ODR as “a broad term that encompasses forms of Alternative Dispute Resolution (ADR) and court proceedings which use internet as a part of the dispute resolution process”, see Kaufmann-Kohler & Schultz, p. 7.
\textsuperscript{148} See, eg, Del Duca, Rule & Zbynek.
The Hong Kong International Arbitration Centre (HKIAC) have developed what they call “Electronic Transaction Arbitration Rules” in order to resolve consumer disputes.\(^{149}\) The most prominent option is to conduct hearings “in person, by videolink, by telephone or on-line (by email or by other electronic or computer communication)”.\(^{150}\) Since these rules are from 2002, they are a bit dated in language and shape. There is a lack of a hub for the process online, and there is no specific mention about the use of online communication in regard to the submission of documents or otherwise related to the communication between the parties.\(^{151}\)

The Chinese International Economic and Trade Arbitration Commission (CIETAC) have developed online arbitration rules in order to resolve e-commerce disputes.\(^{152}\) These rules, effective from 1 January 2015, and have a more clearly online-based focus. There is an online dispute resolution centre maintained by the CIETAC where cases can be submitted and resolved.\(^{153}\) However, the claimant may decide the way of communication, and can choose to use regular mail for communications.\(^{154}\) There is a clear preference for electronic communication in regards to communication, submission of evidence and witness testimonies and, if any, hearings, with non-online based alternatives as a last resort mainly at the discretion of the arbitral tribunal.\(^{155}\) There are also different procedures with shorter time limits available in relation to the value of the claim.\(^{156}\)

The American Arbitration Association’s (AAA) International Centre for Dispute Resolution (ICDR) has launched an ODR Program to resolve disputes between manufacturers and suppliers quickly, fairly and inexpensively in order to help them move on with their business relationship.\(^{157}\) The whole process is online-based via the AAA Webfile platform. The process consists of two stages, negotiation and arbitration, and the whole process is to take a

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\(^{149}\) Hong Kong International Arbitration Centre Electronic Transaction Arbitration Rules (Adopted to take effect from 1 January 2002).

\(^{150}\) See HKIAC Electronic Transaction Arbitration Rules, art. 9.

\(^{151}\) There is a provision as to when an e-mail has to be deemed received however, HKIAC Electronic Transaction Arbitration Rules, art. 4.5.


\(^{153}\) See CIETAC Online Arbitration Rules, arts. 2.4-5 and 53.

\(^{154}\) Ibid, art. 12.

\(^{155}\) See, eg, CIETAC Online Arbitration Rules, arts. 9, 10, 30, 36-37.

\(^{156}\) CIETAC Online Arbitration Rules, Summary Procedures (Chapter 4) and Expedited Procedures (Chapter 5).

\(^{157}\) ICDR Protocol for Manufacturer/Supplier Disputes (amended and effective July 1, 2011).
maximum of 66 days. The negotiation stage is done by a method called double blind bidding, where neither party knows the other party’s offer or demand. This is automated in the sense that the neutral third party is an automated system designed to declare a settlement when one side’s offer is equal or greater than the other side’s demand. The ICDR ODR Program has a successful track record and has been used to facilitate over 200,000 settlements. In the arbitration stage, there is no information exchange or evidentiary hearing other than via the AAA Webfile platform. Furthermore, the whole process is documents-only. The arbitration award is to be filed on the AAA Webfile platform within 30 days from the progression to the arbitration stage. Total costs of the proceedings are USD 500 for the negotiation stage, and an additional USD 1,000 if it proceeds to the arbitration stage.

Swiftcourt is a Swedish initiative providing binding arbitration online. Swiftcourt offer services both when incorporated into a contract and on a standalone basis. Their main focus is to offer a quick, cost-efficient service that promises a resolution within 6 weeks from the application. Swiftcourt’s arbitration procedure is currently offered at a flat fee of SEK 1,500 per party, which Swiftcourt claims is cheaper than going to court where the application fee alone is SEK 2,800. Swiftcourt’s rules provide for a review of a single arbitrator. The fixed fee and single set of rules deviates from other providers and obviously enhances predictability for the parties, but it hardly seems reasonable that simple disputes of low value should warrant the same fee as more complex and high value disputes.

eQuibbly is another private initiative offering an online arbitration service. eQuibbly uses a streamlined procedure where everything is handled on an online platform. Cases are decided by a single arbitrator and all communications are handled through the online platform as a documents-only procedure. Similar to Swiftcourt, a flat fee (of USD 500) is used to attract the attention of smaller claims.

159 See ICDR Protocol for Manufacturer/Supplier Disputes, p. 6.
162 Swiftcourt seem to put some focus on C2C-disputes via online marketplaces such as Blocket and eBay, which would indicate that most cases would likely fall under the small claims procedure and therefore have an application fee of 900 SEK (see above chapter 3.4).
There are a number of different ways online arbitration works. Firstly, it can be a part of a system (typically with negotiation and/or mediation) or it can be standalone arbitration. The level of adaption of to the online environment also differs, from online-only where there are virtual hubs for everything related to the process and all communication is made in this setting, to partly online processes allowing parts of the communication to be made through regular mail or hearings. They all have in common that they strive for a quicker, more efficient and cost-effective process with the help of ICT.

4.1.2 UNCITRAL’s Framework for ODR
During its 43rd session in June-July 2010, the UNCITRAL Commission decided to establish a working group to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions. The main ambition of the UNCITRAL initiative is to develop a trusted, normative framework for ODR. In establishing this normative framework, UNCITRAL is planning to draft the following six “model” rules and guidelines: (1) Procedural Rules for ODR, (2) Guidelines for Neutrals, (3) Minimum Standards for ODR Providers, (4) Supplementary Rules for ODR Providers, (5) Substantive Legal Principles for Resolving Disputes and (6) Cross-border Enforcement Mechanisms. To date UNCITRAL has commenced its work on the procedural rules for ODR but has not yet produced drafts of any of the other rules and guidelines.

One part of this is the development of a set of draft procedural rules, similar to those UNCITRAL has drafted in a number of other areas. The draft rules will be applicable to both B2B and B2C-relations. This has to do with the inherent issues raised in an online environment to distinguish between consumer and businesses in practise. The procedure will focus on low-value and high-volume cross-border e-commerce transactions. The rules have had to be developed in two tracks, where only one ends in a binding arbitration stage, to accommodate both jurisdictions that allow pre-dispute arbitration agreements and those that do not. This development has not yet resulted in any final drafts due to a number of issues, mainly regarding the widely differing views on pre-dispute arbitration agreements across different

165 See A/CN.9/706.
166 See A/CN9/WG III/WP.112, para. 3.
167 See A/CN.9/833, para. 33.
The rules are designed to offer several stages, starting with negotiation, and if no settlement is reached, moving into the facilitated settlement (mediation) stage, and if there still is no consensus, binding arbitration as the final stage.

4.2 EU Legislation on ODR

In addition to coordinating a unified small claims procedure in-court, EU has shown increasing interest in using out of-court measures to resolve consumer dispute, especially in a cross-border setting. EU has, as previously stated, for a long time been pushing for both access to justice and ADR for consumers as important issues. Now, these ambitions have led to EU legislation on ODR to help remedy these issues. This has been done by enacting two different pieces of legislation, the Directive 2013/11/EU (the Consumer ADR Directive) and Regulation (EU) No 524/2013 (the ODR Regulation). The Consumer ADR Directive and the ODR Regulation are meant to be two interlinked and complementary legislative instruments. Their shared purpose is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by providing independent, impartial, transparent, effective, fast and fair out-of-court procedures to settle disputes. The aim is to rectify the current varying coverage of ADR in regard to business sectors and geographical areas, lack of knowledge and information and the varying quality of ADR entities. The Directive is to be implemented into national legislation by 15th of July 2015 while the ODR regulation and its ODR platform is to be fully in force by 9th of January 2016.

The contents of these acts have resulted in several proposed changes to Swedish legislation. These include changes to the Complaints Board (see above 3.3) and have also led to the Swedish Bar Association starting a consumer complaints tribunal in regards to lawyer disputes. The overview of the Swedish legislation has also lead to a proposal for a new act on alternative dispute resolution of consumer disputes, mainly handling the practicalities surrounding the ODR platform and the monitoring of the listed entities (see below).

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169 The length of time it has taken the Working Group to finalize their texts has been criticised by the Commission, see A/CN.9/833, para. 18.
4.2.1 The Consumer ADR Directive

There are requirements on the member states, ADR entities and businesses set up in the Directive. The requirements are far-reaching and aim to provide a general boost to ADR entities in e-commerce. A monitoring body is to be designated to oversee and approve entities onto a list, in which the entities that are on it have to live up to the Directive’s requirements.\(^{175}\) In Sweden, it is mainly the Complaints Board that are affected by this regulation, along with some industry-specific entities.\(^{176}\)

The Directive is limited to apply to ADR entities that resolve disputes through an ADR procedure.\(^{177}\) An ADR entity is “any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure”.\(^{178}\) This is a wide definition, and basically all possible entities that are established on a durable basis falls within the definition.\(^{179}\) The same goes for ADR procedures, which is any procedure “for the out-of-court resolution […] through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution”, that also complies with the requirements set out in the Directive.\(^{180}\) This definition should not limit its reach, not as long as it resembles the conventional ADR methods, such as mediation and arbitration. Important to note is that the requirements within the Directive only applies to the entities that are listed according to article 20, otherwise they are not ADR entities in the sense of the Directive.\(^{181}\)

All traders are required to give information to their consumers about the ADR entity or entities by which the trader is covered, article 13. As for the ADR entities, they are required to cooperate and exchange experience in regards to best practises with other ADR entities both on a national and union level, article 16. The ADR entities are further required to cooperate with national authorities to ensure that Union legal acts are enforced in their practise, article 17. Except for basic information to be provided to the competent monitoring body, every two years, the ADR entities also have to provide information on, inter alia: the number and type of

\(^{175}\) Section 3 of the proposal to a new act on alternative dispute resolution of consumer disputes appoints the Government as the monitoring body, or the authority it appoints, see SOU 2014:47 p. 35 ff.

\(^{176}\) See SOU 2014:47, p. 172 f.

\(^{177}\) See Directive 2013/11/EU, art. 4(g-h).

\(^{178}\) Ibid, art. 4(h).

\(^{179}\) Ibid, art. 4(h).

\(^{180}\) Ibid, art 4(g).

\(^{181}\) Ibid, art 4(h).
disputes received, percentage of procedures discontinued before an outcome was reached, average time for resolution of disputes and the rate of compliance.\textsuperscript{182} In regards to the service itself, it must live up to the quality requirements set out in Chapter II of the Directive. The requirements set out in the Directive regarding information are to be closely monitored and combined with penalties if infringed upon.\textsuperscript{183}

Although the Directive seems to allow for arbitration under its definition of an ADR entity and ADR procedure, it is clear that it is not meant for arbitration. Article 1, laying out the purpose of the Directive, states that the right to access to the judicial system may not be deprived from the consumers.\textsuperscript{184} The requirements in articles 9-10 are so restrictive that any binding solution is difficult to achieve, since the consumer shall have the possibility to withdraw from the procedure at any stage and be informed that they have a choice whether to follow a proposed solution or not. This leaves any entity wishing to provide binding arbitration online or offline for consumer disputes having to act outside of the forthcoming ODR platform and its monitoring system. The Consumer ADR Directive focuses on voluntary and non-binding procedures that don’t restrict the possibility for the consumers’ access to court or arbitration.

It has been suggested in the SOU that this should allow, and welcome, industry-specific entities to apply for, and receive, a place on the list that is to be created to list all the ADR entities that comply with the Directives provisions.\textsuperscript{185} However, private entities acting within the same field as covered by the Complaints Board should not be allowed to exist within the system even if they comply with the requirements of the Directive.\textsuperscript{186} The reason stated for this is to keep the system clear for both businesses and consumers, and not confuse the consumers. This shows an unwillingness to allow for private organisations to take part of the dispute resolution of e-commerce.

\textsuperscript{182} Ibid, art. 19.
\textsuperscript{183} See Directive 2011/13/EU, art. 21 and recital 55-56. In the proposal to incorporate this Directive into Swedish law, this is incorporated connecting to the current legislation on market disruption charges within the Marketing Act (2008:486), see SOU 2014:47, p. 47.
\textsuperscript{184} See also Directive 2013/11/EU, recital 29 and 45.
\textsuperscript{185} See SOU 2014:47, p. 173 ff.
\textsuperscript{186} Ibid, p. 175.
4.2.2 THE REGULATION ON ODR

The aim of the ODR platform is to offer consumers and traders a single point of entry for the out-of-court resolution of e-commerce disputes. The ODR regulation further applies to domestic as well as cross-border online sales in order to ensure a true level playing field.\textsuperscript{187} It is the Commission that has the task to develop, operate and maintain the ODR platform. Article 5 of the Regulation states how the ODR platform should work and which functions it should have. It should be easily accessible and provide for online filing of complaints in all official EU languages, informing the respondent party of a complaint and identify relevant ADR entity and transmit the case there. The ODR platform will offer an electronic case management tool as well as necessary translation for the parties to conduct the proceedings.\textsuperscript{188} This is highly ambitious and the question is if the requirements of the Directive and ODR platform will be enough to provide for easy access to different ADR entities where the experience and quality will be similar.

4.3 CONCLUSION

ODR is attracting attention from a number of different areas. The issues surrounding e-commerce are apparent and the need to settle them has caused different solutions to emerge. The main issues are to develop trust and a wide reach while maintaining accessibility. The UNCITRAL and EU have chosen different approaches to the issue, where UNCITRAL’s are highly ambitious and intending to develop a global framework for these disputes. UNCITRAL has the intention of incorporating arbitration into this framework, but are opposed by the jurisdictions restricting pre-dispute arbitration agreements. The EU approach is more realistic, since it uses the existing ADR entities in the member states as the base. Issues here are more about the implementation and question if an even level of quality and application in between countries are fulfilled. Seeing how the EU Small Claims Procedure has struggled, these are valid concerns.

\textsuperscript{187} See Regulation 524/2013/EU, recital 11.
\textsuperscript{188} \textit{Ibid}, article 5 and recital 19.
PART II: LEGISLATION RESTRICTING CONSUMER ARBITRATION

5 Restriction in Different Instruments

5.1 INTRODUCTION
The restriction on pre-dispute arbitration agreements occurs in a number of different instruments on a national and EU level. While they all have the basis in consumer protective thoughts, the instruments uphold consumer protection in different ways. As will be seen below, Sweden has a clear prohibition on pre-dispute arbitration agreements, while EU has a restriction with a number of requirements that has to be fulfilled in order for the restriction to apply. It can however be argued that the EU restriction in reality often is a prohibition, which is why the term prohibition will be used in this thesis when speaking generally about the legislation on pre-dispute arbitration agreements.

5.2 THE SWEDISH ARBITRATION ACT

5.2.1 CONSUMER DISPUTES AND ARBITRABILITY
The fundamental basis for any arbitral proceeding is the arbitration agreement. Here, the general requirements for a valid arbitration agreement will not be discussed. What is of interest here is the area in which arbitration agreements can be validly concluded. It is important to note, that the SAA does apply to consumer disputes. According to section 1 of the SAA, disputes in which the parties can reach settlements may be referred to arbitration. This also sets the limit to which disputes an arbitral tribunal can try. There is no general definition on what constitutes arbitrability, that has to be found in the substantive provisions of Swedish law. Non-arbitrable disputes typically correspond with disputes that are not amendable to out of court settlements. The term arbitrability are reserved for disputes that can be decided by an arbitral tribunal either before or after a dispute has materialized. Generally a dispute is arbitrable as long as there is no third party interest related to the matter.

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189 Contra Lindell, Civilprocessen, p. 611. Lindell wrongly states that the SAA does not apply to disputes in B2C-relations when the arbitration agreement has been concluded before the dispute has materialised. It does apply, however such agreement may not be invoked, and can if the arbitral tribunal decides it has jurisdiction be challenged in accordance with the provisions of the SAA (see below in chapter 6).
of the dispute.\textsuperscript{191} Even though certain other interests come into play in the consideration of consumer protection, as their rights are often protected as a collective, in the individual case there are no such issues. Consumer disputes are therefore per se arbitrable.\textsuperscript{192}

5.2.2 THE PROHIBITION AGAINST PRE-DISPUTE ARBITRATION AGREEMENTS

"Where a dispute between a business enterprise and a consumer concerns goods, services, or any other products supplied principally for private use, an arbitration agreement may not be invoked where such was entered into prior to the dispute." – section 6 of the SAA, first sentence.

Even though the dispute matter is arbitrable, there are some restrictions set upon the parties’ contractual freedom. The prohibition on pre-dispute arbitration agreement is a general restriction in order to protect consumers as a weaker party. Several conditions have to be met for the provision to apply. Firstly, it has to be an agreement between a business enterprise and a consumer. Arbitration agreements between two individuals/consumers are not covered by the prohibition. There are no closer definitions of the terms neither in the legislation nor in the preparatory works, but according to Lindskog they should correspond to the same terms in other consumer protective legislation.\textsuperscript{193} This means that a consumer is an individual that acts mainly for private consumption outside of his trade, business or profession. A trader on the other hand, is any individual or legal person that acts for purposes relating to his trade, business or profession. According to Lindskog, if the buyer perceives the seller as a business enterprise, a pre-dispute arbitration agreement should only be void if the perceived business enterprise misled the buyer in this respect.\textsuperscript{194} Lindskog argues the same should apply from the businesses view, the definite factor should be how the buyer is perceived by the business enterprise, and not his or hers objective status. Therefore, if the business enterprise has a warranted belief that the consumer was a business enterprise, the consumer should be bound by any pre-dispute arbitration agreement.\textsuperscript{195} This could be particularly difficult to ascertain in the context of e-commerce, where personal contacts are rare and business can usually be conducted without any form of personal interaction. Taking into consideration the effect of

\textsuperscript{191} See Prop. 1998/99:35, p. 140. To which extent third party interests has to be felt see Heuman, \textit{Arbitration Law}, p. 139.
\textsuperscript{193} See Lindskog, p. 349, footnote 14-15.
\textsuperscript{194} \textit{Ibid}, p. 349.
\textsuperscript{195} \textit{Ibid}. 
falling inside or outside the prohibition, caution is necessary if the businesses perception of the buyer is the defining factor.

Secondly, the agreement has to concern a product supplied *principally for private use*, which is tied together with the consumer definition. The restriction is only to the private use, as it covers all types of performances.\(^\text{196}\) The requirement for being supplied principally for private use is the purpose at the time of the conclusion of the contract. The determining factor should be how the business enterprise has had reason to perceive the purpose. If the purpose is mixed, an assessment of what the main purpose is should be deciding.\(^\text{197}\) In an e-commerce setting, it can be questioned how this perception of a buyer’s purpose can be accomplished. It can hardly be demanded that the seller makes any inquiries into the position of the buyer, and if the buyer poses as a consumer or business, it seems unlikely that any further investigation from the business side would lead to another conclusion. At the same time, it seems unlikely that a buyer, that is in fact a consumer, could lose the right to refer to the invalidity of an arbitration agreement under section 6 of the SAA simply by “acting” like a business.

Thirdly, the arbitration agreement has to be *entered into prior to the dispute*. This means that agreements entered into when a dispute has materialized are admissible. Therefore the time of which an agreement is deemed to have been concluded is of utmost importance. It is not enough that the arbitration agreement has been concluded at a later date than the main contract for example, there has to be an actual disagreement.\(^\text{198}\) Exactly when a dispute has arisen to be covered by the prohibition is somewhat unclear, but in light of the provision’s protective purpose, Lindskog states that it should be interpreted extensively so that a consumer only can conclude an agreement to arbitrate when it is clear that there is an imminent legal dispute.\(^\text{199}\) Since there is no formal requirements to conclude an arbitration agreement according to Swedish law, there is a possibility for an invalid pre-arbitration agreement to be “healed” by a later agreement due to “implicated actions” (*konkludent handlande*) if both parties act as if there was a valid arbitration agreement. The implications of this will be discussed below in chapter 6.

\(^{196}\) Ibid.
\(^{197}\) Ibid.
\(^{198}\) Ibid, p. 351.
5.3 Section 36 of the Contracts Act

The fact that an arbitration agreement regarding a B2C-dispute is concluded after an existing dispute has arisen, and therefore is not void in accordance to section 6 of the SAA, doesn’t prevent that it can be modified or declared unenforceable in accordance with section 36 of the Contracts Act.\(^{200}\) According to section 36 paragraph 1, a contract term or condition may be modified or set aside if that term or condition is unconscionable having regard to the contents of the agreement and other the circumstances surrounding the agreement. The use of section 36 in regards to arbitration agreements was mentioned in the preparatory works to section 36 of the Contracts Act.\(^{201}\)

The rationale behind the application is to safeguard the equality of arms between the parties. It is typically applied when the courts have considered that it to be unreasonable to uphold the arbitration agreement.\(^{202}\) Earlier precedents are mainly regarding B2C-disputes, which since the introduction of the prohibition in the SAA has lost most of its relevance.\(^{203}\) The use of section 36 of the Contracts Act is still possible on a B2C-agreement that has been concluded after a dispute has materialised. According to Lindskog, the fact that the agreement is concluded after a dispute has arisen, which means that the consumer have a better chance to evaluate its consequences, should lead to that an application of section 36 requires something more than the mere fact that he or she is in an economically inferior position.\(^{204}\)

5.4 EU Legislation

5.4.1 EU Directive on Unfair Terms in Consumer Contracts

Directive 93/13/EEC (Unfair Terms Directive) has the purpose is to approximate the Member States laws, regulations and administrative provisions relating to unfair terms in contracts concluded between consumers and sellers or suppliers.\(^{205}\) EU’s justification for consumer


\(^{203}\) Some of these precedents are discussed below in connection to a revision of the legislation, see chapter 8.5.3.

\(^{204}\) See Lindskog, p. 352.

\(^{205}\) Directive 93/13/EEC, art. 1.1.
policy intervention in this area can be attributed to the asymmetry of economic power between the parties.206

The Directive prohibits contractual terms between a consumer and a trader that haven’t been individually negotiated, and causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer.207 In case there has been individual negotiation regarding a certain term, the remaining terms of the contract will be subject to review under the Directive.208 Exactly what constitutes an individual negotiation is unclear. Can a choice for consumers between two boxes, where ticking one reserves the right to go to court and the other one waiving that right in favour of arbitration be seen as individually negotiated? Pre-formulated terms are explained in article 3(1) as terms that are drafted in advance, but only if it leads to the consumer not having “been able to influence the substance of the term”. In this scenario, the consumer has not been able to influence the substance, but whether it should be a term at all. Any such terms must be seen as individually negotiated and therefore falls outside the scope of the Directive. This means that any such agreement is allowed according to the Unfair Terms Directive.

If the term is not individually negotiated, an assessment of the term will be made in light of all relevant circumstances to decide its validity, article 4.1. However, article 3.3 refers to an annex, containing an indicative and non-exhaustive list of terms that may be regarded as unfair. Subparagraph (q) of paragraph 1 of the Annex states that terms that have the objective or effect of:

“excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions”

The list is only indicative and not binding in regards to the list of terms included therein.209 Article 6(1) states that the member states shall take necessary measures to ensure that unfair terms shall not be binding on the consumer and that the contract shall continue to bind the

206 See Micklitz, Reich & Rott, p. 122.
207 Directive 93/13/EEC, art. 3.
208 See Micklitz, Reich & Rott, p. 128 ff.
209 See Commission/Kingdom of Sweden (C-478/99, EU:C:2002:281), para. 20. It can however be seen as having an indirect binding effect because it concretises the general clause, see Micklitz, Reich & Rott, p. 145.
parties upon the remaining terms if it is capable of continuing in existence without the unfair term. This is in Swedish law in regards to arbitration agreements accomplished by section 6 of the SAA, but also in theory in the Consumer Contracts Act that has incorporated the Directive into Swedish law. The Directive also requires for possibility of market law intervention preventing further use of unfair terms in article 7.

5.5 CONCLUSION

The main provisions restricting the use of pre-dispute arbitration agreements are found in section 6 of the SAA and the Unfair Terms Directive. While the SAA provides for a complete prohibition, the Unfair Terms Directive only restricts the use of pre-dispute arbitration agreements that are unfair and not individually negotiated. Thus, the Unfair Terms Directive provides for some possibilities to conclude pre-dispute arbitration agreements. A general weakness in the SAA and the Unfair Terms Directive is that since post-dispute arbitration agreements are allowed, the point in which an agreement is concluded becomes paramount.
6 What Legal Effect Does the Prohibition Have?

6.1 INTRODUCTION

To further understand the implications of the prohibitions, it is necessary to look at what the effects of them are. What does it mean that an arbitration agreement in violation of section 6 of the SAA “may not be invoked”? In this context, it is worth noting that the grounds for invalidity and challenging an award may not be waived through an agreement between the parties in B2C-relations.\textsuperscript{210}

6.2 IN THE ARBITRAL PROCEEDINGS

If there is a pre-dispute arbitration agreement in a B2C-contract, neither party is allowed to invoke the arbitration agreement. The invalidity applies to both the business enterprise and the consumer, with the effect that neither the consumer nor the business enterprise is bound by it.\textsuperscript{211} But what happens if one does invoke it? In non-arbitrable disputes, the claim has to be dismissed \textit{ex officio} by the arbitral tribunal.\textsuperscript{212} Since consumer disputes are in fact arbitrable, it is only upon the demand of the consumer or business that the arbitral tribunal are required to dismiss such a dispute.\textsuperscript{213} The question then becomes when this has to be raised for the arbitral tribunal to be required to dismiss the claim. This is connected to when such objections are to be raised and will be further discussed in connection to the challenging of an award.

6.3 AFTER THE ARBITRAL PROCEEDINGS

As previously stated, arbitral awards can’t be appealed and reviewed on material grounds. The SAA distinguishes between \textit{invalid} awards (section 33) and \textit{challengeable} awards (section 34). Awards that fall under section 33 are invalid \textit{ipso facto} and \textit{ab finite}. Legally,

\textsuperscript{210} There is a possibility to limit, or exclude, the grounds for challenging an award in section 51 of the SAA, but only in commercial (B2B) relationships where none of the parties are domiciled or have its place of business in Sweden.

\textsuperscript{211} Lindskog is critical towards that also the business is unbouned, since the regulation aims to protect the weaker party. See Lindskog, p. 348.


they don’t exist, and therefore no time limits in respect to bringing action in court applies.\textsuperscript{214} Challengeable awards have to be challenged within three months from which the party received the award in its final form.\textsuperscript{215} In section 34(2) of the SAA there is also a preclusion rule requiring the party to object to the ground used for challenging an award during the proceedings, if it were known, to not lose the right to challenge the award on that ground. Left unchallenged, the award will remain final and binding when the time limit has run out.\textsuperscript{216} There are different underlying interests explaining the division. The grounds for invalidity under section 33 are related to situations of public and/or third party interest, while section 34 covers situations that are under the control of the parties.\textsuperscript{217}

6.3.1 CHALLENGING AN AWARD

According to the preparatory works to the SAA, it is clear that arbitral proceedings that have been conducted in B2C-relations in violation of section 6 of the SAA are to be challenged in accordance with section 34 paragraph 1, stating that the award is not covered by a valid arbitration agreement between the parties.\textsuperscript{218} This is also in line with what Lindskog, Hobér and Heuman states.\textsuperscript{219} This ground is applicable if the parties haven’t concluded an arbitration agreement at all as well as if the arbitrators have tried a question that falls outside of a valid agreement.\textsuperscript{220} And, as previously indicated, it is also applicable when there is a particular provision prohibiting pre-dispute agreements.\textsuperscript{221} Unreasonableness according to section 36 of the Contracts Act can be referred to as a ground for challenging the award under section 34 p. 1.\textsuperscript{222}

When the SAA was enacted, this ground was moved from earlier being a ground for invalidity,\textsuperscript{223} to now being a ground for challenging the award.\textsuperscript{224} As previously stated, the

\textsuperscript{215} See the SAA, section 34(3).
\textsuperscript{216} See the SAA, section 34(3).
\textsuperscript{217} See Prop. 1998/99:35, p. 139 ff. and 231 ff. and Hobér, \textit{International Commercial Arbitration}, 8.04. The Inquiry evaluating the current SAA has recently proposed to move the ground of public policy from section 33 to section 34 and repeal the remaining parts of section 33 altogether, see SOU 2015:37, p. 122 ff.
\textsuperscript{219} See Hobér, \textit{International Commercial Arbitration}, 8.03.
\textsuperscript{223} Ibid, p. 232 f.
\textsuperscript{224} See the old Act on Arbitrators (1929:145), section 20(1).
aim of the grounds for invalidity is to be related to public or third party interests, which a lack of valid arbitration agreement generally does not have.225

This brings a few complications: moving it to a ground for challenging an award means that the preclusion rule is applicable.226 This rule states that a party is deemed to have waived the right to rely upon that circumstance, given that he or she has knowledge of the circumstance and hasn’t objected in the proceedings. Heuman is of the opinion that the consumer is bound by the agreement if he or she doesn’t demand a dismissal the first time he or she appears in the case.227 In the preparatory works, it is only generally stated that a party that is unaware that the arbitration agreement is void can’t be seen as having refrained from referring to the circumstance, meaning that the party’s right to refer to it when challenging an award would still be intact.228 Lindskog is of the opinion that this is misguided, since an arbitration agreement can be concluded through general principles of contract law.229 Therefore, although knowledge is a requirement for the preclusion rule in section 34 paragraph 2 of the SAA to be applicable, the participation in the proceedings results in a new arbitration agreement by “implicated actions”, making the old arbitration agreement obsolete.230

Lindskog’s reasoning is convincing and must be how the Swedish prohibition is thought to work in relation to an objection under 34 § of the SAA. However, it can be questioned if this effect was desired when moving the provision from resulting in invalidity to a ground for challenging an award. The argumentation in the preparatory works suggest otherwise. Furthermore, such a restrictive view on the possibilities for courts to review an award where section 6 of the SAA has been violated clashes not only with its purported consumer protective aims but also with precedents from the ECJ, suggesting a much greater possibility of review of the arbitration agreement should exist. This is what will be discussed below.

226 Ibid, p. 147.
227 See Heuman, Skiljemannarätt, p. 21 note 16.
229 There are no formal requirements that an arbitration agreement shall be in writing under Swedish law, see section 1 of the SAA.
230 See Lindskog, p. 352, footnote 29.
6.3.2 INVALIDITY DUE TO PUBLIC POLICY?

In the case *Eco Swiss/Benetton*\(^{231}\) the ECJ stated that it is in the interest of efficient arbitration proceedings that review of arbitral awards should be limited in scope and that annulment or refusal to recognise an award should be possible only in exceptional circumstances.\(^ {232}\) That case was however not regarding consumer arbitration, but commercial arbitration. The ECJ found in that case that where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award, and the application is based on rules regarding public policy, it must also grant such an application where the basis for compliance is EU rules of this type.\(^ {233}\)

The Eco Swiss-case was referred to in case *Claro/Móvil*,\(^ {234}\) which concerned a B2C pre-dispute arbitration clause, and the applicability of the statements made in *Eco-Swiss/Benetton* in regards to the Unfair Terms Directive were put even more clearly in case *Asturcom*\(^ {235}\) where the ECJ stated that article 6 of that Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.\(^ {236}\)

In *Claro/Móvil*, the consumer was unaware of his rights, and first pleaded invalidity in an action for annulment and not during the arbitration proceedings. The ECJ stated that the national court had to, in the action for annulment, first determine whether the arbitration agreement was void. If the agreement contained an unfair term, then it had to annul the award.\(^ {237}\) In case *Asturcom*, the ECJ clarified that this is the case even when the arbitral award has become final and received the force of res judicata, if the consumer hasn’t taken part of the proceedings nor brought an action for annulment of the award.\(^ {238}\) The ECJ thus places a huge responsibility on the courts to have an inquisitorial role in order to “make up for the total inertia on the part of the consumer”.\(^ {239}\)

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\(^{231}\) Eco Swiss/Benetton (C-126/97, EU:C:1999:269). ECJ cases are referred in accordance with the “new” way since all judgments are only officially made available online, see Lindblom.

\(^{232}\) See Eco Swiss/Benetton, para. 35.

\(^{233}\) Ibid, para. 37.

\(^{234}\) See Claro/Móvil (C-168/05, EU:C:2006:675), paras. 34-35.

\(^{235}\) Asturcom Telecomunicaciones SL/Cristina Rodríguez Nogueira (C-40/08, EU:C:2009:615).

\(^{236}\) See Asturcom, para. 52.

\(^{237}\) See Claro/Móvil, paras. 38-39.

\(^{238}\) See Asturcom, paras. 49-59.

\(^{239}\) Ibid, para. 47.
This is highly controversial, as it effectively infringes on the finality of arbitral awards and the effectiveness of arbitration. Graf and Appleton states that the Asturcom reasoning making article 6 of the Directive part of public policy, allows for a review not only of grounds that the arbitration clause is unfair but also any other contract term applied by the arbitral tribunal.\footnote{See Graf & Appleton, p. 416 f.} This opens the door for a comprehensive court review of arbitral awards contrary to general principles of arbitration law. Piers is of the same opinion, arguing that this infringes on the member states’ procedural autonomy as well as contradicting the nature of arbitration.\footnote{See Piers, p. 209 ff.} Graf and Appleton concludes by stating that where issues regarding unfair terms may arise, it could be more efficient for businesses to avoid B2C arbitration clauses with consumers in the EU, and instead resolve disputes in national courts to avoid duplicative proceedings and costs.\footnote{See Graf & Appleton, p. 417 f.}

This also brings implications when it comes to applying the reasoning of the ECJ to the Swedish legislation. There are two types of public policy in the SAA that can render awards invalid, violation of procedural and substantive public policy.\footnote{See section 33. See also Hobér, International Commercial Arbitration, 8.33-8.49 and Prop. 1998/99:35, p. 232.} Substantive public policy can, like the ECJ cases suggest, be seen as an infringement on arbitral awards final and binding nature, as it enables the court to review the merits of an arbitral award for the purpose of determining whether it is invalid or not.\footnote{See Hobér, International Commercial Arbitration, 8.40.} The grounds of invalidity are meant to be exhaustive as well as interpreted and applied restrictively.\footnote{See Prop. 1998/99:35, p. 141 f. and 231, Hobér, International Commercial Arbitration, 8.26-28 and Heuman, Skiljemannarätt, p. 584.} Public policy typically has a very high threshold.\footnote{According to Hobér, no award has ever been declared invalid in Swedish courts on the ground of violation of public policy, Hobér, International Commercial Arbitration, 8.33. See also Prop. 1998/99:35, p. 231.} Hobér states that only a violation of the most basic rules of fairness and justice can be a violation of public policy-standard.\footnote{See Hobér, International Commercial Arbitration, 8.33.}

These arguments of public policy suggest that awards from B2C-arbitral proceedings have to be able to be tried under section 33 p. 2 of the SAA. It is clear that this is a differing view.
from the Swedish legislator and Lindskog.248 Another complication that follows from seeing this as a ground of public policy is relating to the separation of the two concepts of challengeable and invalid awards.249 This would mean that these awards legally don’t exist and that no time limit would apply for challenging it. This might have something to do with the different views on grounds of public policy internationally, as only Sweden and Finland has such a division in regards to challenging and invalidating an award, where public policy can be ground for invalidity without any time limit.250 Seeing as this is a direction taken by the ECJ, the outcomes this has in regards to Swedish law clashes – the public policy ground the ECJ refers to is not equal to the one that the Swedish legislator.

6.4 CONCLUSION

The effects of the legal restrictions are unclear. The lack of cases tried and materials written about it in a Swedish context does not help, which is likely due to the preventative effect of the legislation – it is not attractive for businesses to use arbitration clauses in B2C-relations. Therefore the practical issues are limited. This is nonetheless interesting since the aim of this thesis is to question the ground for legislation and a possible revision. The different legislation on national and EU level are not consistent in its design or application.

248 Lindskog has argued that the Claro/Móvil case merely states that the national court has to try the reasonableness of the arbitration agreement. In that review, the court is free to take into consideration the fact that the consumer hasn’t pleaded invalidity, even if the arbitration proceedings has proven burdensome or unreasonable towards the consumer, see Lindskog, p. 351 f., footnote 28. This contradicts the reasoning in the Asturcom case and must be taken lightly.

249 This problem could be eradicated if the changes to the SAA that are proposed in SOU 2015:37 are implemented, see above note 220. However, this would lead to a forced marriage where the preclusion rule clearly would be seriously impaired in regards to consumers. It is apparent that this is not something the legislator have thought of, resulting in an unfortunate unconsistency between EU and national law.

250 See SOU 2015:37, p. 125.
PART III: USING CONSUMER ARBITRATION TO FACILITATE ACCESS TO JUSTICE IN E-COMMERCE

7 Principles and Aims That Should be Looked at When Considering Legislative Intervention

7.1 INTRODUCTION

In this part, principles and aims that should be considered in relation to legislative intervention will be looked at to provide for a fuller picture of the issue.

7.2 THE PRINCIPLE OF CONTRACTUAL FREEDOM

A natural starting point when it comes to the conclusion of contracts is the principle of contractual freedom. In general, the principle gives parties wide possibilities to agree on terms and condition of their choosing. However, when it comes to arbitration agreements, other fundamental values needs to be considered.\(^{251}\) EU has expressively stated the principle as a reason to intervene with consumer policy legislation to combat the asymmetry of economic powers that it leads to. Contracts are normally pre-formulated by one contract party without negotiation. This leads to terms that are governed by underlying interests of the businesses own rationalization interest and its interest of shifting the risk, leading to an imbalance that favours the business to the detriment of the consumer and the public in general.\(^{252}\) This imbalance requires positive actions unconnected to the parties to a specific contract in order to restore equality between the parties.\(^{253}\)

7.3 ENSURING CONSUMERS’ RIGHT TO LEGAL REVIEW

7.3.1 THE COST ASPECT

The risk of *high cost* of arbitration is mainly due to the fact that the parties are not only responsible for the cost of legal representation but also for the costs of the arbitral tribunal,

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\(^{252}\) See Micklitz, Reich & Rott, p. 122.

\(^{253}\) See, eg, Claro/Móvil, para. 26.
contrary to a judge in court that are paid for by the state. This is not covered by any legal aid or legal assistance insurance.\textsuperscript{254} Important to note in this regard, is that the arbitral tribunal typically requires a retainer paid in advance to advance with the procedure. In a Government Official Report before the SAA was enacted, it was to look at whether to strengthen the protection of economically weaker parties. A survey looking into if the current legislation put parties bound by an arbitration agreement in a position where the costs of the proceedings led to them not pursuing their rights in a greater way than if they would have been able to go to court. The survey found that this was the case, and that this risk was most apparent in B2C-relations.\textsuperscript{255} Although these arbitration agreements could be struck down under current legislation prohibiting unfair contract terms, a strict prohibition was argued to be likely to have more effect.\textsuperscript{256} This has also been noted by the legislator, that it should not be possible to enter into a contract and waiving the right to court procedure while at the same time not being able to afford the arbitral proceedings.\textsuperscript{257} This meant a guarantee for the consumer to be able to try these disputes in an affordable court proceeding, and not having to waive that right due to the cost of the arbitral proceedings. When a dispute has arisen however, consumers have always been free to enter into an arbitration agreement.\textsuperscript{258}

7.3.2 THE RIGHT TO FAIR PROCEEDINGS

The right to fair proceedings can be divided into two parts, one relating to the purported imbalance between the parties the risk that the stronger party uses this to skew the fairness of the proceedings, and the second one whether the procedure notwithstanding any imbalance is fair.

The stronger party can use the upper hand to formulate terms that further exaggerates an \textit{imbalance between the parties}, for example by getting to choose the arbitral tribunal. A question is if the same imbalance between the parties as has been referred to before in chapter 2.4.1.3 is justified in an e-commerce context. In regards to businesses, there are a number of new difficulties that arises: customers can now be residing in an unlimited number of

\begin{itemize}
\item \textsuperscript{254} Neither are claims falling under the small claims procedure, which should be kept in mind (see chapter 2.4.1.3).
\item \textsuperscript{255} See SOU 1995:65, p. 203.
\item \textsuperscript{256} See Prop. 1973:87, p. 143.
\item \textsuperscript{257} See SOU 1995:65, p. 205.
\item \textsuperscript{258} See Prop. 1973:87, p. 203.
\end{itemize}
countries, and consumer friendly legislation provides that most cases have to be tried in the consumer’s jurisdiction. This provides for difficulties overseeing legislation, what is expected of the business and naturally higher costs if having to litigate in several countries. Another big difference is the scale on which businesses are done. Many e-businesses are small, and the possibilities to ship all over the world are naturally a great opportunity. At the same time, this can get overwhelming for a small trader to have to be subject to rules that are mainly enacted with big businesses in mind. One article by Aslam argues that the impact of e-commerce are changing the way traders think about good business, and that a more consumer centric model are prevalent in the world of e-commerce.259 A good example of this is Amazon and eBay, where the traders are rated based on consumer satisfaction and there are effective remedies against the traders operated on these sites.260

In regards to the ECHR, the right to a fair trial and effective remedies are regulated in articles 6 and 13. It states that everyone, in the determination of his civil rights, is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law and that violations of the ECHR needs effective remedy.261 As to the subject matter of a dispute, it is clear that matters that can be subject to arbitration fall under article 6.1.262 However, a “tribunal established by law” does not include an arbitral tribunal in a voluntary arbitration proceeding. A “tribunal” in that sense is a governmental adjudicative organ that exercises judicial functions within its competence according to established law under its own procedural rules.263 These rights conferred to individuals in article 6.1 can however be waived. An arbitration agreement in principle is viewed as a valid waiver of those rights and has the effect of procedural hindrance (processhinder).264 In Suovaniemi v. Finland265 it was stated that it is not possible to waive all the rights contained within article 6 of the ECHR. Exactly which rights that are possible to waive haven’t been clarified. It can be assumed that the ECHR imposes on the convention states to ensure that certain fundamental due process requirements are upheld, even if the right to court is waived.266

259 See Aslam, 3.3-3.4.
260 See Rule & Friedberg, p. 196 ff.
261 For a more thorough review, see Danelius, p. 131, 154 f. and 291 ff.
262 See Lindell, Alternativ rättskipning, p. 211.
264 See Deweer v. Belgium, 27 February 1980, no. 6903/75 and Suovaniemi and others v. Finland, 23 February 1999, no. 31737/96. See also Lindell, p. 211.
265 Suovaniemi and others v. Finland, 23 February 1999, no. 31737/96.
266 Cf SOU 2007:26, p. 156 f.
However, as has been seen in Part I, the small claims procedure by its nature lowers the bar for legal security in order to accommodate legal protection and availability. Arbitration is generally seen as a waiver of some of the rights contained in article 6 of the ECHR. Arbitration in smaller claims has to be evaluated against similar small claims procedures in court. In relation to article 6 of the ECHR, the most apparent concern in streamlining arbitration is regarding the right to an oral hearing. The right to a hearing is not absolute, but it is questionable if the parties can waive that right beforehand.\textsuperscript{267} The contradictory nature of the proceedings is also of fundamental importance.\textsuperscript{268} The parties have to be able to question the evidence put forward by the other party. Both these concerns can be remedied by allowing for example an online hearing, something that not all services looked at in chapter 4.1.1 provides.\textsuperscript{269} Furthermore, Westberg argues that if the arbitral tribunal is to adjudicate the claim \textit{ex aequo et bono}, then the rights contained in article 6 of the ECHR are being violated if such procedures are recognised as binding.\textsuperscript{270} However, if the basic requirements of article 6 of the ECHR are fulfilled, there is nothing preventing a streamlining of the arbitral procedure in an online environment.

\subsection*{7.4 Privatization of Justice}

There are also more general concerns. One such is that allowing arbitration could \textit{deprive the courts of its role as the entity for administration of justice} within the society and that there is a risk that the district courts get impoverished and their role diminished.\textsuperscript{271} This is connected with the fundamental function of the civil procedure to work behaviour modifying. If the state is not in control of the administration of justice, it can’t ensure that the material legal provisions get maximum impact. There is also a factor of trust, and if the courts lose their role within the society as the entity to administer justice, the trust in the judicial system will go down.

Westberg argues that the stance on privatization of justice comes down to which view one has on democracy and the administration of justice. One approach is based on the assumption that

\begin{itemize}
  \item \textsuperscript{267} See Danelius, p. 224 ff.
  \item \textsuperscript{268} \textit{Ibid.}, p. 257 ff.
  \item \textsuperscript{269} The more streamlined procedures seem to omit this possibility, probably in order to maintain efficiency, see, eg, Swiftcourt’s Arbitration Rules, art. 1.3 and eQuibbly Arbitration Rules, R-20(2) and 14(4).
  \item \textsuperscript{270} See Westberg, p. 364 note 30. Some online arbitration provides allows for this, see, eg, eQuibbly Arbitration Rules, R-23.
  \item \textsuperscript{271} See Prop. 1973:87, p. 131 f.
\end{itemize}
a strong, state-run administration of justice is necessary to uphold the democratic governance, while another is that it democracy is best exercised by the individuals themselves. The latter would push for diversity in regards to dispute resolution where the state-run administration of justice is not exclusive but subject to competition, all to optimize society’s resources.\textsuperscript{272} This thesis does not aim to dive further into this discussion, it can merely be noted that arbitration has great historical roots and few should object to its existence, rather the opposite.\textsuperscript{273}

7.5 **Predictability**

Predictability is of value in two senses, regarding the regulation itself and predictability as a part of behaviour modification in society. It is naturally valuable to have a clear and easy regulation that makes it easy to predict in which cases an arbitration agreement will stand and not.\textsuperscript{274} This argument was raised in the preparatory works in favour for a complete prohibition on pre-dispute arbitration agreements.\textsuperscript{275} By allowing pre-dispute arbitration agreements to some extent, there is an uncertainty about which agreements that are allowed and which are not. This is suitable to keep to a minimum, especially when it regards such fundamental rights as the right to legal review. Also noted, was the lack of any *practical need* for the use of pre-dispute arbitration agreements.\textsuperscript{276} Considering the changes in how to conduct dispute resolution online, this should rather be an argument in favour of allowing pre-dispute arbitration agreements today.

It is also important to know how the judicial system works and that equal cases will lead to equal result. Since the possibilities to review arbitral awards are limited, the predictability for the actors within society could get damaged, as the insight would be limited and it would be difficult to assess the validity of a claim. The result of this could be far-reaching and trust in the judicial system would decrease. It has been argued from the legislator’s view that the lack of precedents in the area of contract law makes it desirable to have more cases adjudicated in court than by an arbitral tribunal.\textsuperscript{277}

\textsuperscript{272} See Westberg, p. 362 f.
\textsuperscript{273} To enhance Sweden’s attractiveness as a country for arbitration for foreign parties have been one of the purposes behind the revision of the SAA, see SOU 2015:37, Annex 1, p. 214 ff.
\textsuperscript{274} See SOU 1995:65, p. 212.
\textsuperscript{276} *Ibid.*
\textsuperscript{277} See Prop. 1998/99:35, p. 34.
8 Issues Arising in the Context of E-Commerce

8.1 Introduction

When the prohibition was introduced in Sweden, e-commerce did not exist, at least not to the same extent as today. It can be questioned if its unique nature poses challenges to the judicial system that raises other issues worth examining when discussing the suitability of a prohibition on pre-dispute arbitration agreements. E-commerce is, as has been previously discussed, facilitating cross-border shopping that leads to previously non-existing challenges when disputes arise. The prohibition on pre-dispute arbitration agreements is naturally presupposing the existence of other efficient ways to resolve disputes.

8.2 What Legal Review is Waived?

When the prohibition first was introduced with the Small Claims Act, the promises of its success were high. The prohibition on pre-dispute arbitration agreements was seen as necessary in order to have it fulfilling its aims of providing legal protection and enabling consumers to try their legal claims and not have arbitration clauses preventing this. At that time, the cost of arbitral proceedings was generally much higher than the cost of a judicial review. However, at the same time, the report acknowledged that also the costs of going to court could prevent a party from getting their case tried. This however shows that there is a connection and correlation between the prohibition on pre-dispute arbitration agreements and the access to court proceedings.

Since the prohibition was introduced into Swedish legislation, the application fee to apply for a summons in court has been doubled. The increase of cross-border disputes creates issues in regards to choice of forum and applicable law. Cross-border disputes also lead to issues with language barriers, as proceedings are to be conducted in Swedish. The time which it takes to conduct a proceeding can in many cases be seen as unattractive, including possibilities to appeal.

280 Ibid, p. 205.
Another aspect is the use of ADR to resolve disputes. As has been stated above, the use of arbitration is more a replacement of the judicial process than other ADR-entities. Since ADR don’t restrict the parties’ possibilities to go to court, they are not restricting parties bound by an arbitration agreement to take proceed into an arbitration either. However, just as the efficiency of the Complaints Board is fundamental as an alternative to court proceedings, it is also relevant when examining the prohibition on pre-dispute arbitration agreements. In a domestic context, the Complaints Board has always had a very strong standing. As has been discussed in chapter 3.3 there are several obstacles to maintaining or attaining that position in a cross-border context.

8.3 ISSUES WHEN CLASSIFYING TRANSACTIONS

The possibilities of e-commerce have made it much easier to sell products and services. This has led to a number of new areas of commerce that previously hasn’t existed in the scale it is today. The parties may also be less known to each other compared to doing business in a more traditional sense, and businesses and consumers can interact on the same markets. As the prohibition only applies to B2C-disptues, the definition of who is seen as a business enterprise becomes paramount. This is relevant in two ways: firstly, determining who the buyer is, and secondly, who the seller is.

As to uncertainty regarding who the buyer is, this is an issue that has been acknowledged internationally. This is the reason why their mandate from the UNCITRAL Commission to the working group developing draft ODR procedural rules covers both business and consumer disputes. Especially in an e-commerce context, it is hard to differentiate between business and individuals. It also adds a layer of uncertainty when making transactions of lower value and there is interest in incorporating an arbitration clause into the agreement. Who is to make that assessment? And what kind of certification is required to be certain that a counterparty has the standing it claims? And, as the definition of who is a consumer differs around the world, according to which legislation is this to be decided? These reasons, along with concerns in regards to the additional procedural costs that classifying transactions would lead to as well as issues regarding implementation and enforcement, has been raised during the work of
UNCITRAL’s working group as reasons for a unified framework where all claims of low value are to be settled under the same rules.\textsuperscript{281}

Even looking at situations where both parties are likely to be defined as individuals, the legislative coherency can be questioned. The possibilities for individuals to sell items straight to other consumers, \textit{C2C-transactions}, is today a widespread area of business that have been enabled by the Internet, reaching wide markets on sites like Blocket, eBay and Tradera. Interestingly, the online arbitration solution Swiftcourt promotes its service to be incorporated in C2C contracts on such sites\textsuperscript{282} This can be both new and used products, ranging from low value items to more high value, such as cars, expensive electronics and boats, etc. Sure, the parties are likely more balanced in regards to each other. It is however not likely that this formal balance is something that will make a buyer more concerned about a contractual term stipulating arbitration as the venue to handle any disputes than if it were business as the selling party. The issue here is that the consumer doesn’t care, have the knowledge of or simply is ignorant to what effect the term might have. This is also confirmed when looking at the intentions behind the legislative efforts to restrict pre-dispute arbitration agreements. Both national and EU legislation focuses more on the effects that the formal imbalance leads to, the contents of the contractual terms. Why would a term depriving a consumer of their right to legal review in that regard be permissible just because the seller is an individual?

### 8.4 Issues Concerning Applicable Law

Even though the issue might not have to be handled in court, the issue of applicable law still exists. In a transnational perspective, which law should apply? There are still considerable differences concerning the level of consumer protection, even within the EU. Existing consumer protective legislation provide for the consumers residence to decide the applicable law.\textsuperscript{283} How are the business supposed to know all substantive consumer protective legislation within the EU for example? Unless there is an equal level of substantive consumer protection in the EU, it will pose serious issues especially for smaller businesses to comply with consumer protective legislation in a cross-border context. Interesting to note in this area, is

\textsuperscript{281} A/CN.9/833, para. 33.
\textsuperscript{282} See http://swiftcourt.se/site/page?view=clause.
\textsuperscript{283} See chapter 3.4.
UNCITRALs pragmatic approach with a vision to adopt a global framework on substantive legal principles.\textsuperscript{284} This is however still just a vision.

8.5 HOW WOULD CONSUMER ARBITRATION ONLINE WORK?

As illustrated above in chapter 4.1.1, online arbitration is already offered by a number of different providers, both established actors in arbitration and newcomers. In this section, I will analyse how consumer arbitration online could develop if pre-dispute arbitration agreements were to be allowed. To illustrate this, I will use the previous sections and provide for a scenario where online arbitration is conducted in a way that fully makes use of the possibilities, and a scenario where the risks of pre-dispute arbitration agreements are highlighted.

8.5.1 POSSIBILITIES WITH ALLOWING PRE-DISPUTE AGREEMENTS

In a perfect world, the use of online arbitration would bring a number of positive effects. As has been seen by existing procedures, there are realistic possibilities of streamlining the procedure in order to establish a fast and efficient procedure. Inspired by the emergence of many expedited procedures in general, and particularly the ones in an online environment, there are great opportunities to limit the costs by using one arbitrator, strict time lines, interactive and helpful forms and possibilities to enhance the assistance for the consumers. The asynchronous nature of ICT would provide for an optimization for the parties to put time into the dispute when their schedule allows, without being bound by anything else. This could lead to processes that render final awards in a matter of weeks or months, instead of the six months that the Complaints Board take to render a recommendation, or years in a normal court procedure. It would also help to reduce the burden on the judicial system and the Complaints Board with disputes that arguably are not that important for the state to put resources into solving. Arguably, it could also open up for disputes to get tried that otherwise no one would bother to try.

8.5.2 RISKS WITH ALLOWING PRE-DISPUTE AGREEMENTS

The use of pre-dispute arbitration agreements could of course lead to consumers having to waive their rights due to a number of reasons that have been covered above in chapter 7.1. This would be up to the legislator, the parties and other actors to be mindful of. The risk is

\textsuperscript{284} See chapter 4.1.2.
that the procedures would be so expensive that consumers would not be able to try their claims. The risk is mainly with the cost aspect, which is tightly connected with how an amendment of the legislation would be made.

Cross-border disputes are by definition transnational, leading to arbitrations where different jurisdictions are involved. This means that even if an arbitral tribunal is assembled and has jurisdiction, mandatory consumer protective provisions that consumers in Sweden are entitled to might not be regarded. These protective provisions is something that both the consumer, at least without counsel, and the arbitral tribunal may be unaware of. This could result in materially inaccurate awards that can’t be appealed or reviewed by a higher instance or court. This would of course be counterproductive and detrimental from a number of aspects.

Pre-dispute arbitration agreements could also risk leading to businesses incorporating such provisions, only to preclude consumers from the alternate cost-spreading technique of group actions.285

8.5.3 A LOOK AT OLD PRECEDEMENTS ON SECTION 36 OF THE CONTRACTS ACT

Before the prohibition was introduced, the legislation had mainly allowed the possibility to leave an arbitration agreement without prejudice under the section 36 of the Contracts Act. In the preparatory works to the SAA, it was noted that B2B-agreements were generally held up in precedents from the Supreme Court, while B2C-agreements were generally set aside.286 To broaden the perspective on the view on pre-dispute arbitration agreements and what implications it can have, a brief look into some of the cases that have been adjudicated under section 36 of the Contacts Act will be made to understand what the Supreme Court has looked at regarding unreasonableness.

In NJA 1981 p. 711,287 the Supreme Court stated that pre-dispute arbitration agreements in general should raise suspicions, due to the risk of high cost causing the consumer to not pursue his or her legal claim. The Supreme Court did however state that technically compli-

285 These aggregated claims are called class actions in the USA, where pre-dispute arbitration agreements are allowed. Empirical studies indicates that pre-dispute arbitration agreements are used for this purpose, see, eg. Eisenberg, Miller & Sherwin.
287 Simultaneously another similar case, NJA 1981 C 57, was adjudicated in a corresponding way.
icated disputes could be well suited for an arbitral proceeding also in consumer disputes, but that the claim at hand did not concern such complicated issues.

In NJA 1982 p. 800, the Supreme Court referred to their previous reasoning in NJA 1981 p. 700, and stated that this was also the case when the business is a smaller enterprise.

NJA 1982 p. 853 provided for an in-depth assessment of the content of the pre-dispute arbitration clause from a perspective of law and order. This was not fulfilled due to a provision that stated that the business would have the final say regarding how the fifth arbitrator would be elected. The arbitration agreement was set aside.

In NJA 1983 p. 510, the pre-dispute arbitration clause withstood the Supreme Court’s assessment. This was due to the fact that the clause was limited in the way the cost could land on the consumer, and this was made clearly both in regards to the other party as well as the arbitrators. The consumer was limited to, in case of losing the dispute, having to pay 10% of the arbitrators’ cost, but maximum half of a base amount. Since this led to a clear and low maximum cost for the consumer, there was no risk that he would lose his right to legal review due to high cost and the clause was therefore not seen as unreasonable.

In NJA 1986 p. 388, an initial question was whether the Supreme Court was the right instance, as an inventor’s claim, connected to a settlement agreement, was connected to his employment or not. This would have meant that the case had to be handed over to the Labour Court. The claim brought was not seen as having sufficient connection to his employment, which led the Supreme Court to assess the balance between the parties. The Supreme Court stated the commercial nature of the agreement, the fact that the arbitration clause was clear and not hidden and that both parties had been represented by counsel. Weighted together, the Supreme Court deemed there were no circumstances that could cause the arbitration clause to be unreasonable.

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288 The Labour Court has taken a liberal stance towards pre-dispute arbitratation agreements. Their general line is that they are allowed, so long as no special circumstance points in another direction. This can be explained by the fact that employees’ generally have their trade union to behind them in such proceedings. See, eg, cases AD 1987 no. 165, 1988 no. 95 and 96, 1994 no. 111, 1996 no. 61, 2002 no. 72 and 2005 no. 79.
It is clear that the main concern for the application of section 36 of the Contracts Act in B2C-relations has been to protect consumers from the costs of the proceedings, when that risk can lead to the consumers having to waive their rights. The argumentation from the Supreme Court indicates that the cost of the proceedings as a general prohibition regardless of the other terms connected to the agreement, while any other term constituting unreasonableness requires an assessment of the particular circumstances of that case. With this reasoning, the only argument in favour of a complete prohibition is the cost aspect, while the rest are sufficiently guarded by section 36 of the Contracts Act.
9 Should the Legislation be Amended to Allow Pre-Dispute Arbitration Agreements?

9.1 INTRODUCTION

In this chapter, the suitability of amending the legislation will be discussed. Firstly, it will be looked at whether an amendment should be made from a wide perspective, considering the arguments that were raised in the previous chapter. Finally, a look into how such an amendment should be made will be presented.

9.2 SHOULD PRE-DISPUTE ARBITRATION AGREEMENTS BE ALLOWED?

There are a number of issues when considering amending the current legislation on restriction of pre-dispute arbitration agreements. The importance of the international aspect can’t be overstated. Firstly, because EU legislation puts a far-reaching restriction on how they can be allowed and to the extent court are to be able to review them. This thesis is limited to looking at cross-border e-commerce in the internal EU market, and the efficiency to solve disputes in a cross-border context by simply amending the Swedish legislation would not solve the overarching issues. Therefore, the following propositions will be made on a generic level that would be applicable also in an EU-context.

It is clear that the most prominent reason for the prohibition is the cost aspect. As has been described above in 8.5.3 relating to the Supreme Court’s earlier precedents, none of the other concerns warrant a general prohibition on pre-dispute arbitration agreements.

Most legislation on allowing pre-dispute arbitration agreement would influence basic arbitral principles as party autonomy, the contractual freedom and equal treatment. This is however, as has been seen in regards to both the Swedish legislator and EU,289 justified to correct the imbalance between the parties.

One important thing to bear in mind is what the possible use of pre-dispute arbitration agreements would be in case of an amended legislation. It is vital to have in mind that allowing pre-dispute arbitration agreements would not by itself change anything. It would be up to

289 See chapter 7.2.
businesses to actively incorporate this into their activities, and this will not happen if there 1) are no incentives to do so, and 2) if the regulation upon the use of such agreements are excessively restrictive or complicated.

In regard to this, it is essential to keep in mind that the focus of this thesis is on smaller claims. As has been described in chapter 2 and 3, the particularities of smaller claims (in particular in e-commerce), are so singular that the type of online arbitration here proposed would only be suitable for a limited category of claims (this withstanding that it could be scaled up to fit other types of claims also). The use would thus be limited to a section of commerce that would not risk depriving the judicial administration of justice its functions on a greater whole. Conversely, the aim is more to enable a legal review in cases where it might not be attractive today.

Overall, since the cost aspect is the main reason in favour for a complete prohibition, the current stream towards providing affordable online arbitration should suffice for a revision of the legislation. Changes in the world of dispute resolution indicate that there is a need to consider allowing pre-dispute arbitration agreements. Although there are valid concerns to be raised about the procedures themselves, as online arbitration is still in its infancy, this is not a reason for a complete prohibition on pre-dispute arbitration agreements.

9.3 **How Should Such a Regulation Be Designed?**

In regards to considering how an amendment should be made, it is valuable to have in mind that predictability and ensuring fair proceedings are important aspects to allow for such agreements. The provision on pre-dispute arbitration agreements would change from a prohibition to a restriction, as the underlying protective thoughts are still

9.3.1 **Widening the Reach**

To accommodate the aims behind the restriction and the issues surrounding the unclear classification of the parties, the restriction should be widened to also include *disputes between two individuals*, engaging outside of their trade, business or profession. This would allow for the buyer to receive the same protection regardless of who happens to be the seller. The other
issue, regarding difficulties differentiating between businesses and consumers, would also diminish from allowing pre-dispute arbitration agreements.

The provision should apply to all terms. Restricting the provision to individually negotiated terms would cause unnecessary difficulties and potentially leave situations worthy of protection outside the provisions reach.

9.3.2 CONTROL THE PROVIDERS OF CONSUMER ARBITRATION

One question is who would or should provide these arbitral proceedings. Given the imbalance between the parties and the typical one-shot nature of disputes the parties in between, there should be assurances that an independent third party provides the framework and oversees the procedures, similar to UNCITRAL’s initiatives. There are already provisions in the SAA allowing for the parties to hand over certain question to be decided by an arbitration institution. To give reasonable assurances that such procedure will be conducted properly, it would be creditable to only allow pre-dispute arbitration agreements when the procedure is to be conducted under specific procedural rules on consumer disputes under the supervision of an arbitration institution. This would provide for trust in the procedure as well as keeping it manageable to oversee.

Another legislative option would be to provide for a similar framework as the Consumer ADR Directive and ODR Regulation offers. This would bring independent and statutory review coupled with effective compliance measures to penalise sub-standard arbitration providers. This would also mean that the provisions on providing information regarding the service, the number of cases, statistics, etc. gets publicised.

9.3.3 TO WHICH EXTENT SHOULD PRE-DISPUTE ARBITRATION AGREEMENTS BE ALLOWED?

9.3.3.1 CONDITIONALLY BINDING AGREEMENTS

One option to allow pre-dispute arbitration agreements would be to only have the business being bound by the agreement, leaving the consumer with an option for either judicial or

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290 See chapter 8.3.
291 See chapter 5.4.1.
292 See the SAA, sections 11 and 17.
293 See chapter 4.2.
arbitral proceedings. For this situation, I will use the term *conditionally binding agreements*. It is not clear if conditionally binding agreements are allowed today or not, if they allow the option to choose for the consumer.\(^\text{294}\) This was suggested as a possible way to allow pre-dispute arbitration agreements in SOU 1995:65, giving the consumer the right to choose to initiate arbitration proceedings or court.\(^\text{295}\) One issue raised with this was that it would require a provision on how to deal with the situation when the other party, the business, wants to initiate proceedings.\(^\text{296}\) Should he be allowed to go to court or initiate arbitral proceedings?

Two different options can be posed: the first one would be to leave the choice for the consumer, that is to let the consumer also decide on the venue in case of a claim initiated by the business, and if no choice is made allow for a subsequent review either in court of arbitral proceedings. This would still allow for arbitration whenever the consumer allows it. However, the business would be dependent on the consumer. The second option would be to limit business claims to judicial proceedings, which would make less sense if the consumer would be open for arbitration.

9.3.3.2 Cost-Allocation

Another possible solution would be to limit the burden of cost on the consumer.\(^\text{297}\) One issue here is the appropriateness of using legislation as a tool to handle these issues. A too detail- oriented legislation could prove to be too complicated to apply, get out-dated or restrict the scope in which arbitral proceedings can be conducted so that is not attractive. Given the relatively few provisions of the SAA, it would also differ from the legislative technique in general. However, since the concerns of consumer protection are seen as a legitimate basis for

\(^{294}\) Having one party freely choosing was deemed unreasonable in NJA 1979 p. 666, however the case concerned two businesses. Heuman argues that it is not possible to draw any general conclusions from this case since the outcome was prompted by a number of factors, all of them relating to the fact that it was the “stronger” side that had the right to choose. Heuman argues that an arbitration agreement between equals may serve an acceptable purpose in certain situations, see Heuman, *Arbitration Law*, p. 113 f. Conditionally binding agreements was also touched upon in NJA 1997 p. 866. The case illustrates the backside of conditionally binding agreements, and what this means for the other party, ultimately risking *deni de justice* if the court decides there is a valid arbitration agreement prohibiting the court to try the case, while at the same time the arbitral tribunal reaches the opposite conclusion. In my view, it seems clear that such an agreement should be accepted when it is the weaker side that is equipped with the right to choose, as long as the agreement otherwise doesn’t skew the balance between the parties in favour of the stronger side. This however presupposes that the agreement provides a provision on how to deal with the other party’s claims.


\(^{296}\) *Ibid.* Due to the lack of practical need of such a legislation it was not further deliberated on.

\(^{297}\) Restricting one party’s responsibility for the costs are permissible according to section 39 of the SAA, if it is jointly agreed upon by the parties. See also NJA 1983 p. 510.
restricting the parties’ contractual freedom, it would be legitimate to intervene with legisla-
tion.

One issue is which costs that would be allocated under the rules. Considering the aim to open up for arbitration in smaller claims, where a legal assistance should not be necessary, this should be limited to the costs of the arbitral tribunal, and leaving the parties to stand their own costs.\footnote{Cf Code of Judicial Procedure, 18:8a.}

Since the cost-sensitivity largely depends on the value of the good at hand, there are obvious difficulties connected with trying to find a generic level that could apply to all disputes. One option would be to relate it to the actual value of the good or service. If a limit would be set at the value of the good or service, possibly with a lower value limit resembling the ones in use by the Complaints Board\footnote{See chapter 3.3.}, however in this sense they would work as the limit for the fee that would apply, not a limit on which claims to try. This would allow the consumer to get a legal review in the cases he or she wishes, while still providing for a lower limit deterring baseless claims. This could also be achieved by adopting similar schedules of cost as is present in for example the SCC rules.\footnote{See SCC, Expedited Arbitration Rules (2010), Appendix III.} This would enhance predictability and provide for a clear view on how much the procedure would cost in relation to the value of the claim.

Another solution would be to let the trader stand the whole cost. Relating to what has been noted about traders earlier, this could prove burdensome. This has however to be compared to the cost of ADR and/or litigation in one or several countries. This could be absorbed more easily as a cost of doing business if the fee is relatively stable and spread out over the activities of a business. And, as noted before, simply allowing the possibility of using pre-dispute arbitration agreements does not in any way make businesses have to use this unless they find reasons to do so.

9.4 Proposed Outlines for the New Legislation

The new legislation would provide for a better adaption to the environment in which e-commerce is made today. It would go from a prohibition to a restriction of pre-dispute arbitra-

\footnote{Cf Code of Judicial Procedure, 18:8a.}
\footnote{See chapter 3.3.}
\footnote{See SCC, Expedited Arbitration Rules (2010), Appendix III.}
tion agreements. Its reach should be widened to also include *disputes between two individuals* to consistently meet the consumer protective aims. In order to provide trust and ensure fair proceedings, a *limitation on the providers* that should be allowed to conduct consumer arbitration where pre-dispute arbitration agreements are allowed. There is a need to help effectively balance the parties, either by allowing for conditionally binding agreements that gives the consumer the possibility to choose between judicial and arbitral proceedings, and/or by providing for *cost-allocation* that restricts the consumers’ responsibility for the cost. Given that the main reason for a prohibition has been the cost aspect, it is appropriate to manage this concern with the amended legislation. There is however a balance between restricting the possible providers to the extent that it does not become attractive, if the legislation is too detail-oriented. Due to the low value of many claims, it is difficult to find a generic way to handle cost-allocation. The most suitable solution would be to allow for schedules of cost like the ones that many arbitration institutes use today, possibly with a provision requiring the cost to be easily understood for the consumer before a dispute has arisen.

9.5 **CONCLUDING REMARKS**

Cross-border e-commerce is an area of immense development where the legislation struggles to keep up and provide regulations and norms. The internal market is an area where the national judicial systems are difficult to coordinate. The increase of low-value and high-volume transactions is exploding and in relation to this the use of ADR and specific small claims procedures are initiated to provide a fast track to justice. This development seems inevitable and there are little reasons for the ordinary judicial system to try and claim jurisdiction over these disputes. Not all disputes are of equal importance, and resolving all cross-border e-commerce disputes in-court would sink the civil procedure.

Although the ADR friendly approach taken by EU, arbitration is left out in the cold. There are certainly well founded reasons for this, as even if the access to court in many smaller claims may be illusionary for regular consumers, it is more offensive to have them being denied a review due to an arbitration agreement. The benefits of ODR and online arbitration are obvious, and they seem like an obvious fit for transactions conducted through the means of ICT.
It seems as though the possibilities for arbitration to be a part of this arsenal of dispute resolution mechanisms in relation to consumer disputes are likely low. ADR is the future, but can it handle the fragmentation and division in between member states? Online arbitration would need a push on a transnational level to get a real chance to attract serious providers and institutions backing it up. Only the future will tell, but the aims of the UNCITRAL to create a transnational framework, fully implementing its own streamlined guidelines and substantive provisions seems like a far cry as of now.
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