

**NATIONAL UNIVERSITY OF LESOTHO**

**FACULTY OF LAW**

**THE EFFICIENCY OF THE LESOTHO ELECTRONIC TRANSACTIONS AND  
ELECTRONIC COMMERCE BILL 2013 AND THE COMMERCIAL COURT IN  
ADDRESSING E-COMMERCE DISPUTES.**

**Dissertation submitted in partial fulfillment of the Bachelor of  
Laws Degree (LLB)**

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**MAY 2020**

DECLARATION

I, the undersigned, KEKETSO LESIHLA, hereby declare that this is my own work and that it has not previously been submitted for any degree or examination in any institution or published in any journal, textbook or media.

Signature.....

Date.....

## DEDICATION

To my grandmother Nkhono 'Malebohang Lephaila, it is hard to imagine what life would be without you. Your support and effort did not go unnoticed. This is for you.

## ACKNOWLEDGEMENTS

To the Almighty God, Jesus Christ, your grace has been overwhelming throughout this journey. I simply cannot express my gratitude enough for everything you have done for me. I would also like to extend my heartfelt gratitude to my supervisor Dr 'Matšepo Kulehile, for your invaluable input, your patience in reading my sometimes ambiguous drafts and your guidance in assisting me to better articulate my points. I am grateful. To my grandparents Monaheng Lephaila and 'Malebohang Lephaila, for your incessant support and prayers, I am forever indebted. To my parents Lerato Lephaila and Tšepo Lesihla, I remain forever indebted for everything you have done for me. I would also like to thank my uncle Tšepo Lephaila, for truly and in every sense of the word, being a phone call away. I am also grateful to my brother Motebang Lesihla for always being the one person who made me find humour in my academic frustrations. To my friends, Sentle Letsie and Lineo Leuta, thank you for always listening to my endless complaints about school, this journey would not have been the same without you. Finally, to my classmates and everyone who has in one way or the other, made writing this acknowledgment possible, I am grateful.

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## **Chapter 1: Introduction**

### **1.1 Background**

Technology has revolutionized the commercial industry. The revolution and ease of access to the internet has made it possible for parties all over the globe to engage in commercial transactions electronically.<sup>1</sup> Electronic-commerce can therefore be defined as the purchasing and selling of products or services.<sup>2</sup> Managed by means of a digital environment and engaging methods specifically created for the performance for the receipt or performance of commercial transactions.<sup>3</sup>

There are four main types of transactions in electronic commerce depending on the parties engaged in the transaction.<sup>4</sup> The first one is the business-to-business model which basically embraces transactions between business entities. Then there is the business-to-consumer model, this includes transactions between businesses and customers. Thirdly there is the consumer-to-consumer model which addresses transactions between consumers. The last type is the consumer-to-business model which involves a transaction that is conducted between a consumer and a business entity. The dissertation will be focused on the business-to-consumer model. The model has been preferred because in transactions between consumers and business entities, the consumer has weaker bargaining powers.<sup>5</sup> Should this imbalance not be addressed adequately and effectively it is doubt that the full potential of business to consumer electronic commerce will be realized.<sup>6</sup>

In more detail business-to-consumer model of electronic-commerce can be defined as the value of products and services that individuals purchase online for personal, family and household

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<sup>1</sup>Valdeci Santos and others, 'E-Commerce: A Short History Follow-up on Possible Trends' (2017) 8 (7) International Journal of Business Administration 130 <[www.researchgate.net/publication/321176869](http://www.researchgate.net/publication/321176869)> accessed 09 November 19.

<sup>2</sup>*Ibid* 132.

<sup>3</sup>*Ibid*.

<sup>4</sup>Rajneesh Shahjee, 'The impact of E-commerce on Business Organization' (2016) 4 (27) Scholarly Research Journal for Interdisciplinary Studies 3134-3135 <[www.srjis.com](http://www.srjis.com)> accessed 09 November 19.

<sup>5</sup>Jawahitha Sarabdeen, 'Cyberspace jurisdiction and consumer protection in e-commerce' (2005) 21 (2) Computer Law and Security Review: the International Journal of Technology Law and Practice 155 <[www.sciencedirect.com](http://www.sciencedirect.com)> accessed 10 February 20.

<sup>6</sup>*Ibid*.

purposes.<sup>7</sup> This component of electronic-commerce eliminates almost all barriers that exist in traditional commerce. What this means is that this model places the business of a seller in electronic-commerce at a global stage.<sup>8</sup> Everyone with access to the internet in any part of the world can access the electronic store. It is model that is especially advantageous to both transacting parties the seller is able to access a broader market and a buyer has a wider range of goods and services he can choose from as well as better prices.<sup>9</sup>

Nonetheless, this new way of doing business presents unprecedented challenges with regard to traditional dispute resolution. That is to say, because cyber-transactions are not restricted to a particular geographical location the issue of jurisdiction is bound to be a problem.<sup>10</sup> It is a problem in a sense that a determination of which court has jurisdiction to hear the matter has to be undertaken.<sup>11</sup> With the issue of forum being established another challenge is the choice of the applicable law and the effectiveness of the order of court.<sup>12</sup> Choice of applicable law is a challenge in that domestic laws in the seller and the buyer's state may differ substantially. The conflict of laws presents a challenge to the presiding court as to which law to apply in resolving the matter.

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<sup>7</sup>American Bar Association's Task Force in Electronic Commerce and Alternative Dispute Resolution 'Addressing Disputes in Electronic Commerce: Final Recommendations and Report' (2002) 58 (1) *The Business Lawyer* 425 <<https://jstor.org>> accessed 04 November 19.

According to the United Nations Conference on Trade and Development, report titled 'Lesotho Rapid e-Trade Readiness Assessment' (2019) electronic-commerce does not only present opportunities to individual consumers, it also has the potential to boost economic-growth if opportunities it offers are harnessed by states. It has been reported that if Lesotho embraces electronic-commerce this would potentially boost its economic performance. Electronic-commerce would achieve this by diversifying sources of incomes, improving accessibility to customers, markets and trade information which would in turn be of vital role in ensuring that Lesotho graduates from a least developing country. Electronic-commerce is particularly suitable for startup businesses because it demands less capital in that it requires lesser operational costs in comparison to traditional commerce. This is the case because in electronic-commerce an entrepreneur may only need storage to keep the goods that he is selling. While in traditional commerce he may have cater for rental fees and for overhead expenses such as electricity. This form of doing business is more responsive to the economic status of Lesotho because it requires less capital and if it is fully harnessed it can create employment opportunities which would in turn contribute towards economic-growth.

<sup>8</sup>*Ibid* 422.

<sup>9</sup>Dinesh Gupta and others, 'Traditional Commerce vs E-commerce and the impact of demonetization on E-commerce' (2008) 8 (2) *International Journal of Engineering and management Research* 137. <<http://doi.org/10.31033/ijerm.v8i02.11601>> accessed 09 November 19.

<sup>10</sup>American Bar Association's Task Force in Electronic Commerce and Alternative Dispute Resolution (n 1) 422.

<sup>11</sup> Yun Zhao, *Dispute Resolution in Electronic Commerce* (Studies and Materials on the Settlement of International Disputes, Volume 9, Leiden; Martinus Nijhoff Publishers) (2005) 18 <<https://ru.b-ok.org>> accessed 7 February 2020.

<sup>12</sup>*Ibid*.

The doctrine of effectiveness was defined in the case of *Ewing McDonald v M&M Products*.<sup>13</sup> The court stated that “the doctrine of effectiveness lies at the root of jurisdiction. A judgment would not be effective if it should yield an empty result. The result would be empty if judgment is obtained against a foreign *peregrinus* who is absent from the jurisdiction and who owns no assets in it...” This description illustrates that to preserve their dignity courts of law have to issue out effective orders and to enforce same in the event of non-compliance.

These challenges notwithstanding, businesses and consumers continue to engage in electronic-commerce. As with any commercial setting disputes between contracting parties are bound to arise and the intervention of courts of law becomes necessary especially to safeguard the interests of consumers because of their weaker bargaining power.<sup>14</sup> People continue to participate in electronic-commerce because of opportunities it offers, owing mainly to its convenient and time-saving nature.<sup>15</sup>

However the population of Lesotho has revealed an extremely minimal participation in electronic-commerce.<sup>16</sup> The United Nations Conference on Trade and Development has reported that the cause of this is, *inter alia*, lack of adequate consumer protection.<sup>17</sup> This absence of adequate consumer protection can be attributed to amongst others, the inefficacy of currently employed dispute resolution mechanisms such as litigation.<sup>18</sup> In attempt to respond to changes effected by electronic commerce Lesotho has prepared a bill, the Lesotho Electronic Transactions and Electronic Commerce Bill 2013. The bill recognizes the importance of information and communications technology for the economic and social prosperity of Lesotho. Some of the aims of the bill include promoting the understanding, acceptance and growth in the country’s number of electronic transactions. Another aim is to remove and prevent barriers to electronic communications and social prosperity in Lesotho.

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<sup>13</sup>1991(1) SA 252 at 259-260.

<sup>14</sup>Shawn Kopel, *Guide to Business Law* Oxford University Press (4<sup>th</sup> edition, Oxford University Press 2009) 461.

<sup>15</sup>Gupta (n 9).

<sup>16</sup>United Nations Conference on Trade and Development, ‘Lesotho Rapid e-Trade Readiness Assessment’ (2019) UN Publication Geneva executive summary <<https://creativecommons.org/licenses/by/3.0/igo/>> accessed 20 October 19.

<sup>17</sup>*Ibid.*

<sup>18</sup>*Ibid.*

## 1.2 Problem Statement

Dispute resolution mechanisms currently employed in Lesotho seem to be inefficient to resolve disputes that may arise when one is transacting online. The absence of readily and easily accessible dispute resolution mechanisms implies that consumers transacting over the internet are susceptible to exploitation by sellers. This exploitation is intensified by *inter alia* lack of personal contact between the seller and buyer. In addition to this, the fact that goods being purchased online can only be seen on just a screen means the consumer is unable to physically examine that the product is fit for the purpose for which it is intended.<sup>19</sup>

Should a consumer upon delivery of goods ordered online discover that the product is unsatisfactory, this would present a dilemma on how he is going to enforce the contract against the seller mostly because of absence of forum. This form of commerce presents unprecedented challenges for traditional courts because it demands a special approach to jurisdiction and enforceability of court orders. Nonetheless Lesotho's dispute resolution mechanisms seem to be only responsive to the needs of traditional commerce. This *status quo* poses a serious threat to the improvement of participation in electronic-commerce because it perpetuates lack of trust and confidence in electronic-commerce which in turn fuels minimal participation.

In an attempt to resolve the complex issues that electronic commerce has given rise to, Lesotho has prepared the Electronic transactions and Electronic Commerce Bill of 2013 however the bill does not as yet specify how disputes that arise in online transactions are to be resolved. Currently Lesotho uses traditional disputes resolution mechanisms such as the commercial court to resolve commercial disputes. The challenge that confronts traditional mechanisms is that they are governed by trite principles such as jurisdiction.<sup>20</sup> Principles such as jurisdiction do not seem to be electronic commerce friendly. Mainly because jurisdiction is geographical in nature while electronic commerce may not necessarily be limited to one particular geographic setting.<sup>21</sup>

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<sup>19</sup>Gupta (n 9) 138.

<sup>20</sup>Zhao (n 11) 18.

<sup>21</sup>*Mc Donalds* (n 13).

### **1.3 Hypothesis**

This research will be carried out on the assumption that minimal participation in electronic-commerce in Lesotho is attributable to absence of an enabling legal instrument. That is, an instrument which provides comprehensive dispute resolution and redress mechanisms in electronic commercial transactions.

### **1.4 Research Question**

Do traditional dispute resolution mechanisms and the proposed Lesotho Electronic Transactions and Electronic Commerce Bill 2013 address dispute resolution in electronic-commerce?

### **1.5 Research Objective**

The main objective of this paper is to propose electronic-commerce friendly dispute resolution and redress measures that can be adopted into the Bill for a better response to the demands of electronic-commerce. The specific objectives are:

1. To illustrate the inefficiency of the traditional dispute resolution mechanisms in addressing a dispute that arises in the context of electronic-commerce.
2. To examine the efficiency of the Lesotho Electronic Transactions and Electronic Commerce Bill of 2013 in addressing lack of recourse to predictable and transparent dispute settlement mechanisms.
3. To examine the extent to which currently employed electronic-commerce dispute resolution mechanisms in other jurisdictions such as electronic-negotiation, electronic-mediation and electronic-arbitration can be implemented in Lesotho.<sup>22</sup>
4. To recommend electronic-commerce responsive dispute resolution measures that can be adopted and modified into the Lesotho Bill.

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<sup>22</sup>Julio Cesar Betancourt and Zlatanska, 'Online Dispute Resolution (ODR): What is it, and is it the way forward?' (2013) 79 (3) Chartered Institute of Arbitration 259-262 <<https://ssrn.com/abstract=2325422>> accessed 26 November 19.

## **1.6 Methodology**

The research method that will be used in this paper will be desktop based. Both primary and secondary sources of law will be employed to carry out the research. Accordingly, much reliance will be placed on law textbooks, law articles and legal writings, statutes, as well as case law from Lesotho and other jurisdictions as sources of information of this paper.

## **1.7 Significance of study**

The relevance of this research is that the world is currently in a digital era. Almost everything can be done digitally, from video conferences to transacting online. This revolution in the manner of doing things demands a responsive legal system which is crucial in creating a technology friendly environment. The environment is attainable only if we have measures that have been invented to respond the demands of the digitalization. One way of building this ecosystem is through having dispute resolution mechanisms that are meant to solve challenges that traditional modes of resolving disputes are unable to tackle.

## **1.8 Chapter Overview**

### Chapter 1: Introduction

This chapter being introductory, gives a brief definition of electronic-commerce, its types and also touches on how it has improved commerce. The chapter also mentions briefly the opportunities of electronic-commerce. This chapter highlights some of the legal challenges that electronic-commerce poses with respect to dispute resolution. The aim of this chapter is equally to stress the importance of why Lesotho has to invoke dispute resolution mechanisms that respond to the demands of electronic commerce.

### Chapter 2: Review of the current dispute resolution mechanisms in commercial transactions in Lesotho and their efficacy in the electronic commercial transactions domain.

This part of the research will evaluate whether the mechanisms currently employed in resolving commercial disputes such as the commercial division of the High Court are sufficient in handling disputes that arise in the context of electronic-commerce. This will be undertaken with the objective of pointing out the gaps of these traditional dispute resolution mechanisms in

addressing cyber-transactions. The chapter will also discuss the Lesotho's Electronic Transactions and Electronic Commerce Bill of 2013 in addressing dispute resolution.

### Chapter 3: Reflection on electronic-commerce dispute resolution mechanisms in other jurisdictions.

In this chapter a reflection will be made on dispute resolution measures available in other jurisdictions such as the South Africa and its South African Consumer Affairs Committee.<sup>23</sup> A reflection on other available options from some jurisdictions commonly referred to as online dispute resolution mechanisms will also be undertaken. These options include electronic-negotiation, electronic-mediation and electronic-arbitration.<sup>24</sup> This part of the research will also reflect on international instruments such as the Organization for Economic Co-operation and Development Guidelines for Consumer Protection.<sup>25</sup> In this chapter a discussion of the South African Electronic Communications and Transactions Act No.25 of 2002 will also be undertaken. This reflection will be carried out with the aim of comparing some of the advantages of those mechanisms with those currently employed in Lesotho.

### Chapter 4: Recommendations and Conclusions

This will be the final part of the dissertation, it will be dedicated towards recommending dispute resolution mechanisms that can be adopted and modified into Lesotho's Electronic Transactions and Electronic Commerce Bill 2013. These mechanisms will assist in terms of addressing disputes more effectively in electronic-commercial transactions.

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<sup>23</sup> Section 49 of the South African Electronic Communications and Transactions Act provides that a consumer may lodge a complaint with the Consumer Affairs Committee in respect of any non-compliance with the provisions under the chapter on consumer protection by the supplier. The act defines the Consumer Affairs Committee as a committee established by section 2 of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988. One its functions is to receive and dispose of representations in relation to any matter with which the consumer affairs.

<sup>24</sup>Betancourt and Zlatanska (n 22).

<sup>25</sup>According to the U.S Mission to the Organization for Economic Cooperation & Development available at <<https://usoecd.usmission.gov/our-relationship/about-the-oecd/what-is-the-oecd/>> accessed on 7 March 2010. It is an organization that was set up to oversee the distribution or aid for Europe's reconstruction after World War II. It is a forum where the governments of 36 member states with market economies work with each other as well as with other non-member economies to promote economic growth, prosperity, and sustainable development. The organization provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies. It operates as an important site for the construction, standardization, and dissemination of transnational policy ideas.

## **Chapter 2: Review of the Current dispute resolution mechanisms in commercial transactions in Lesotho and their efficacy in the electronic commercial domain.**

### **2.1 Introduction**

Litigation is the most common method of dispute resolution.<sup>26</sup> It is a formal public process of resolving disputes before national courts.<sup>27</sup> With the prevalence of internet use nowadays, it is just another ordinary task for an individual to purchase items on the click of a button. As often occurs in human relations disputes arise between transacting parties. Now, the cyberspace cannot be narrowed down to any particular location. This presents an unprecedented challenge to the courts of law which are found on trite principles such as jurisdiction. In the wake of these new developments, the question is whether litigation is still an appropriate mechanism for resolving disputes that arise in the context of electronic commerce.

In this chapter, a brief narration of the historical background to the introduction of courts will be undertaken. This will be achieved by narrating how disputes were resolved before the introduction of the court system, followed by the events that lead to the reform of dispute resolution and the reforms that took place. The chapter will again, look into what has been done in Lesotho to address electronic commerce. Subsequently a discussion of the benefits derived from the functions of the commercial courts will also be undertaken. The chapter will then examine some of the challenges which confront traditional commercial courts as courts of adjudication in the context of electronic commerce.

### **2.2 A brief historical background of dispute resolution mechanisms in Lesotho**

Traditionally chiefs had the automatic right to hold court in their administrative area.<sup>28</sup> However this system of dispute resolution was infested with a host of challenges. Chiefs when adjudicating over matters exploited their positions as judges. They had a tendency to dispense justice according to the ability of the defendant to pay rather than the merits of the case.<sup>29</sup> Cases

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<sup>26</sup> Zhao (n 11) 31.

<sup>27</sup> *Ibid.*

<sup>28</sup> Sam Rugege, 'The struggle over the restructuring of the Basotho or chiefs 'courts: 1903-1950' (1987) 3(2) Lesotho Law Journal 159, 159.

<sup>29</sup> *Ibid* 160.

of the poor commoners were deferred in the preference to those of the wealthy and influential.<sup>30</sup> Dispute settlement was used as a source of income by chiefs who appropriated fines levied and shared in the damages awarded against a party in his court.<sup>31</sup> There were grievances by subjects, of unequal treatment in the chief's courts.<sup>32</sup> Subjects were also discontent about the undue delays in disposing of cases.<sup>33</sup> In essence, chiefs became obstructors of justice rather than dispensers of justice.<sup>34</sup>

As a response to the then prevailing circumstances, the 1922 revised edition of the Laws of Leretholi provided that parties had the right to appeal the chief's decisions. The laws allowed a party to appeal until the paramount chief's court was reached. From the paramount chief's court one could appeal to the court of the resident commissioner or an assistant commissioner.<sup>35</sup> Further reforms took place in 1938. The Native Administration Proclamation<sup>36</sup> and the Native Courts Proclamation<sup>37</sup> were introduced.<sup>38</sup> The Native Administration Proclamation laid out the functions of the chiefs; it virtually reduced them to police agents. According to the proclamation, chiefs were to maintain order and to assist in the prevention of the commission of crimes by any native.<sup>39</sup>

On the other hand, the Native Courts Proclamation authorized the resident commissioner to issue warrants recognizing or establishing chief's court. Previously, chiefs when discharging their adjudicative responsibilities could be assisted by all men within the area of the court.<sup>40</sup> Visitors also had full rights of participating at all levels of the process to assist the court in arriving at a fair and just decision.<sup>41</sup> Conversely, in terms of section 2 of the Native Courts Proclamation the Resident Commissioner with the approval of the High Commissioner could prescribe the constitution of any Native Court. The Resident Commissioner could also determine the order of

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<sup>30</sup> *Ibid* 163.

<sup>31</sup> *Ibid* 160.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid* 167.

<sup>35</sup> *Ibid*.

<sup>36</sup> Native Administration Proclamation (NO.61/1938).

<sup>37</sup> Native Courts Proclamation (NO.62/1938).

<sup>38</sup> *Ibid* 177.

<sup>39</sup> S 6 (2) Native Administration Proclamation (NO.61/1938).

<sup>40</sup> Nqosa Mahao 'Colonial Rule and the Transformation of Chieftainship in Southern Africa: A case Study on Lesotho' (2007) 21 (2) *Speculum Juris* 206, 207 <<https://unisa.ac.za>> accessed 08 March 20.

<sup>41</sup> *Ibid*.

precedence among the members thereof, or the powers and duties of any persons acting as assessors to any such Court. These courts were different from the previous chief's court, in that, in terms of section 21 of the Native Courts Proclamation it became an offence to hold a court without a warrant. Prior to the introduction of the proclamation chiefs did not need a warrant to hold court within their area.<sup>42</sup> Consequently, the automatic right of a chief to hold a court in his area of jurisdiction disappeared.

Additionally in 1938 fundamental changes took place.<sup>43</sup> The court of the resident commissioner was replaced by a newly constituted high court.<sup>44</sup> In the same manner magistrate courts were introduced in place of the assistant commissioner's court to handle cases of lesser importance.<sup>45</sup> Traditional chief's courts were replaced by central and local courts. In 1966 Lesotho established its own court of appeal as the apex court.<sup>46</sup> Owing to the demands of the nationals of Lesotho in relation to dispute resolution, the legislature found it fitting to introduce several statutory courts. These include the children's court established by section 133(1) of the Children's Protection and Welfare Act.<sup>47</sup> To respond to the demands of the commercial community the legislature has found it convenient to introduce the commercial court.

### **2.3 Lesotho's position in the face of electronic commerce**

In an attempt to respond to the changes in commerce that is the shift to electronic commerce, the parliament of Lesotho has been focused on a Lesotho Electronic Transactions and Electronic Commerce Bill which is intended to govern electronic commerce once passed into law.<sup>48</sup> Currently section 43 as well as the Bill in its entirety does not yet specify the complaints procedure in the context of the electronic-commerce.

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<sup>42</sup> Rugege (n 28).

<sup>43</sup> Sebastian Poulter, 'Dual Marriages in Lesotho' (1977) 3 <<https://opendocs.ids.ac.uk>> accessed 7 February 19.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Children's Protection and Welfare Act No.7 of 2011.

<sup>48</sup> Lehlohonolo Ramokanate, 'The Lesotho Electronic Transactions and Electronic Commerce Bill: Will it replace the common law of contract as we know it?' (2015) 22 (1-2) Lesotho Law Journal 117, 119.

Nonetheless, Lesotho has a commercial court as the second division of the high court. It was established in terms of legal notice no. 91 of 2009 as a division within the high court.<sup>49</sup> The purpose of the commercial court is:

[T]o deliver to the commercial community, an efficient, expeditious and cost effective mode of adjudicating disputes that affect the economic, commercial and financial life of Lesotho directly and significantly; and to put in place effective measures for designing the machinery for judicial resolution of commercial disputes and an accessible judicial and suitable case management system.<sup>50</sup>

Principles on which the judicial system for commercial actions is based include dealing with the case with reasonable speed, offer appropriate procedures at reasonable costs and be simple, transparent and understandable to those who use it. Other principles are to ensure as much certainty as possible and to be resourced and organized.<sup>51</sup> Rule 10 (1) of the High Court (Commercial Court) Rules 2011 provides that the business of the commercial court shall constitute all actions arising out of or connected with any relationship of a commercial nature, whether contractual or not.

As a specialized court, the commercial court presents a vast array of benefits to the commercial community. It has been stated in one court decision that:

[T]he trend is to set up as many specialized courts as possible because the general feeling is that with the emergence of diverse novel phenomena, the more the courts with specialized training in those areas are set up, the better and more effective will the justice system operate.<sup>52</sup>

On the note of greater efficiency, when matters are handled by judges who are well versed in commercial cases this opens doors to streamlined operations and efficient processing.<sup>53</sup> This in

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<sup>49</sup> Itumeleng Shale, 'The law and legal research in Lesotho' (2014) <[www.nyuglobal.org/globex/lesotho.htm](http://www.nyuglobal.org/globex/lesotho.htm)> accessed 3 February 20.

<sup>50</sup> High Court (Commercial Court) Rules 2011, Rule 4.

<sup>51</sup> *Ibid* Rule 5.

<sup>52</sup> *Motaung v National University of Lesotho* CIV/APN/182/06, 8.

<sup>53</sup> Heike Gramckow and Walsh, 'Developing Specialized Court Services. International Experiences and lessons learned' (2013) Legal Vice Presidency The World Bank 6 <[www.worldbank.org](http://www.worldbank.org)> accessed 5 February 20.

turn translates into higher quality decisions.<sup>54</sup> Specialized courts are also catalysts to uniformity of decisions in their respective areas.<sup>55</sup> This uniformity contributes to greater predictability and confidence in the courts and possibly to lower litigation costs.<sup>56</sup>

Commercial courts also play an active role in the advancement of economic development.<sup>57</sup> That is to say because of the confidence that they bestow on commercial players, investors are likely to incorporate companies in Lesotho. Equally, there is a higher possibility that nationals of other states will complete transactions within Lesotho.<sup>58</sup> When commercial cases are resolved in a timely fashion with well-established rules and procedures, this has a positive impact on the business climate.<sup>59</sup> Investors perceive less risk and are more willing to invest.<sup>60</sup> These advantages notwithstanding, the commercial court faces serious challenges in the face of electronic commerce.

#### **2.4 Challenges that confront the commercial court of Lesotho as a dispute resolution mechanism in the context of electronic commerce**

Account being given to the global nature of electronic commerce, the potential for cross-border disputes in electronic contracts is much greater than in paper based environment, where most contracts are domestic in nature.<sup>61</sup> In the cyberspace geographical and time limits faced in real space are not obstacles.<sup>62</sup> Geographical boundaries determine legal jurisdictions in real space but these do not exist in the cyberspace, which is everywhere and anywhere.<sup>63</sup> At the forefront of the hurdles that would confront the commercial court should it be engaged in resolving disputes that arise in the context of electronic commerce is jurisdiction.<sup>64</sup>

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Alice Reidel and Selepane, 'Reforming Civil Courts to Enhance the Business Environment in Lesotho' April 2015 paragraph 1 <<https://www.mcc.gov>> accessed 5 February 20.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Faye Wang, 'Obstacles and Solutions to Internet Jurisdiction: A comparative Analysis of the EU and the US laws. Journal of International Commercial Law and Technology' (2008) 3 (4) abstract <[www.researchgate.net](http://www.researchgate.net)> accessed 7 February 20.

<sup>62</sup> Zhao (n 11) 18.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* 32.

Jurisdiction refers to the authority vested in a court by law to adjudicate upon, determine and dispose of a matter.<sup>65</sup> This authority is purely territorial; it does not extend beyond the boundaries of or over subjects or subject-matter not connected with the territory of the ordained territory.<sup>66</sup> In considering whether a court of law has jurisdiction a dual inquiry has to be undertaken. The first question is whether there is a recognized ground of jurisdiction and if there is the next inquiry is whether the doctrine of effectiveness is satisfied.<sup>67</sup> The latter inquiry looks into whether the court has the power to give effect to the judgment sought.<sup>68</sup>

In alignment with the first requirement, the common law provides that a court has jurisdiction over persons domiciled in, persons residing or being in and causes arising in its area of jurisdiction.<sup>69</sup> Further the principle of *actor sequitor forum rei* dictates that an *incola* who wishes to pursue a peregrinus is obliged to travel to the latter's forum to sue, but such an *incola* can only be sued in his forum.<sup>70</sup>

Furthermore a court can also have the authority to hear a matter on the basis of the maxim *ad fundandam jurisdictionem*.<sup>71</sup> The maxim provides that arrest of the defendant or attachment of his property confers jurisdiction to the court.<sup>72</sup> The attachment of the property serves to found or confirm jurisdiction which in turn enables the court to pronounce an effective order.<sup>73</sup> Nonetheless, in *Malachi v Cape Dance Academy*<sup>74</sup> the South African constitutional court declared the procedure of *arrest tanquam suspectus de fuga* unconstitutional and invalid. The principle empowers an *incola* to apply for the arrest of a *peregrinus* present within the area of the jurisdiction in order the court to found jurisdiction. One of the grounds on which the court declared it unconstitutional was that it is illogical that incarceration of a person could ever be justified where liability has not been proved. It arrived at this conclusion by taking into consideration that imprisonment for non-payment of an established debt is unconstitutional.

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<sup>65</sup> *McDonalds* (n 13) 257.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Bisonboard Ltd v K Brau Woodworking Machinery* 1991 (1) SA 482 AD at 539 .

<sup>68</sup> *Ibid.*

<sup>69</sup> *Mcdonalds* (n 13) at 285.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> 2010 (6) SA 1 CC.

A court of law may also have jurisdiction on the basis of *forum rei sitae*, which principle permits a foreign plaintiff to sue a foreign defendant in an area where the immovable property of the defendant is situated.<sup>75</sup> A court can equally exercise jurisdiction over a defendant without his implied or express consent in respect of a contract entered into or performed in its area of jurisdiction.<sup>76</sup> Statutory provisions may similarly grant jurisdiction to a court under a number of causes such as section 73 of the Land Act which confers the district land courts with jurisdiction over land disputes that arise in their respective districts.

Reverting to the second requirement of jurisdiction, once the court is satisfied that it can hear a matter, the court also has to establish whether it can issue out an effective order. The purpose of the doctrine of effectiveness is to guard against the pronouncement of judgments that have no effect.<sup>77</sup> Therefore the doctrine demands that before a court of law can hear and determine a matter it must have satisfied itself that it can give effect to its judgment. For an order of court to be effective the defendant must reside within the court's area of the jurisdiction or some form of arrest to found or confirm jurisdiction must take place.<sup>78</sup> On the other hand, effectiveness might be at the root of jurisdiction; but it is not necessarily a criterion for its existence.<sup>79</sup> The question whether a court can give an effective judgment must be coupled with a search for an appropriate ground of jurisdiction. Neither of these two is sufficient for jurisdiction but both are necessary for the establishment of jurisdiction.<sup>80</sup>

For the Lesotho commercial court to have jurisdiction, firstly, the parties to the dispute have to be domiciled in, resident in or present in Lesotho to be amenable to its jurisdiction. The presence of both parties to a transaction in one jurisdiction is not always possible in electronic commerce because there are no geographical limits in the cyberspace.<sup>81</sup> That is to say, disputants could be at opposite sides of the globe. The disputing party in Lesotho cannot institute the matter in the commercial court unless the other party has property in Lesotho. The property could serve the purpose of confirming the jurisdiction of the commercial court and in the event that the court decides in the plaintiff's favor, judgment can be levied on the property. Rule 6 of the High Court

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<sup>75</sup> *Di Bona v Di Bona* 1993 (2) SA 682 at 696.

<sup>76</sup> *Bisonboard* (n 67) 495.

<sup>77</sup> *Mcdonalds* (n 13).

<sup>78</sup> *Gallo Africa Ltd and others v Sting Music* [2010] ZASCA 96 at paragraph 10.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Zhao* (n 11) 18.

Rules 1980, provides that a court may on application, permit to be attached property of a *peregrinus* in order to give the court jurisdiction in an action.

In the same vein, rule 7 (1) of the High Court Rules 1980 provides that any person may be arrested in order to compel him to answer any claim and to abide the judgment of the court therein if the cause of action is more than M300 (Three Hundred Maloti). Similarly, a challenge to this ground of founding jurisdiction is that the vendor may be in a country far away from Lesotho because of the global nature of electronic commerce. If the commercial court was to pronounce itself on a matter that it has no jurisdiction to hear, its judgment would be a nullity therefore ineffective.<sup>82</sup>

It is an established principle of international law that every state is sovereign and that for another state to exercise extraterritorial jurisdiction over its nationals would be to undermine this sovereignty.<sup>83</sup> States can only exercise extraterritorial jurisdiction under the principle of universality in respect of internationally recognized crimes such as genocide.<sup>84</sup> This is a principle that allows or requires a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.<sup>85</sup> The principle is derived from the view that certain conduct concerns the entire international community of states therefore the prosecution of the offenders by any state is warranted.<sup>86</sup> It is common in electronic commerce that a transaction involves nationals of two different states. This being the case, the commercial court will have the necessary jurisdiction to adjudicate over a dispute in a limited number of instances.

The commercial court will firstly have jurisdiction where the parties in their contract have included a clause that confers it with such jurisdiction.<sup>87</sup> It will also have jurisdiction where the other party has property in Lesotho or the infringing party is within the jurisdictional area of Lesotho. The challenges that this grounds present is that in the case of choice of forum it may be difficult for the commercial court to give effect to its order because it cannot enforce its order

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<sup>82</sup> *Mcdonalds* (n 13) 257.

<sup>83</sup> American Society of International Law, 'Jurisdictional, Preliminary, and Procedural Concerns' (2014) Benchbook on International Law II.A (Diane Marie Amann ed.,) <[www.asil.org/benchbook/jurisdiction.pdf](http://www.asil.org/benchbook/jurisdiction.pdf)> accessed 13 February 20.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Bisonboard* (n 67).

against a national of another state. So far as attachment of property and arrest to found jurisdiction are concerned, it is quite unlikely that the commercial court would be able to found jurisdiction on these grounds. This is so because the infringing party may not have any property in Lesotho or may have never been in Lesotho. Therefore the issue of jurisdiction presents a challenge to the Lesotho commercial court because of the prevalence of cross-border disputes in electronic commerce.

Another challenge that confronts the commercial court as dispute resolution mechanism is that its proceedings are quite lengthy especially when viewed in the context of electronic commerce.<sup>88</sup> Litigation can carry on for a long time because of the backlog of cases which need to be decided. In order for court rulings to be impactful in the commercial world they have to be made quickly and in alignment with economic activities.<sup>89</sup> Electronic commerce is extremely fast paced; one can complete a transaction at the click of a button because it breaks all barriers present in traditional commerce.<sup>90</sup> It therefore demands a dispute resolution mechanism which can harness its rapid nature.

With regard to the length of proceedings in the commercial court, in terms of rule 13(1) of the High Court (Commercial Court Rules) 2011, the plaintiff has to cause all pleadings commencing the action to be registered with the registrar. Furthermore rule 13(3) of the High Court (Commercial Court Rules) 2011, provides that all subsequent documents concerning the case have to be filed with the registrar. The implication of this is that the defendant also has to be afforded an opportunity to file his pleadings. Rule 18 (3) of the High Court Rules 1980 provides that after being served with a summons, the defendant must be allowed not less than seven days to enter appearance to oppose. This seven or more days that the defendant has to be given is by itself lengthy when taking into account the rapidness with which transactions are completed online. It follows therefore that when the matter appears before a judge, there's a possibility that the aggrieved party would have lost interest in the case. There is also the increased likelihood that his confidence in electronic commerce will be reduced.

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<sup>88</sup>Robin Cupido, 'Online Dispute Resolution: An African Perspective' (2016) Scientific Corporations 2nd International Conference on Social Science 183 <<https://ase-scoop.org>> accessed 6 March 20.

<sup>89</sup>Zhao (n 11) 31.

<sup>90</sup>*Ibid* 18.

Furthermore, costs also pose a challenge to the engagement of litigation in resolving cyber disputes. The high costs that one can possibly incur when they have resorted to litigation are also not favorable to electronic commerce.<sup>91</sup> In some instances it may happen that the costs of litigation are equivalent to or exceed the claim sought.<sup>92</sup> In litigation one may have to invoke the assistance of counsel and the fees maybe hefty. Another costly aspect of litigation is that according to the maxim *actor sequitor forum rei* the aggrieved party has to travel to the infringing party's state forum to institute an action against him. It may happen that the amount involved is far less than the amount that one would incur in travelling to the court with appropriate jurisdiction.<sup>93</sup> The high costs one incurs in litigation can possibly deter individuals from taking the legal route to resolve the dispute which can ultimately contribute to lower confidence in electronic commerce.

Lastly the adversarial nature of litigation can destroy future relations between the parties involved in the dispute which can also negatively impact further business undertakings.<sup>94</sup> Just as with traditional business setting, litigation is not necessarily the best way to resolve disputes in cyber disputes. This is because of the winner takes all approach which is not formulated on the premise of conserving relationships.<sup>95</sup> This approach places too much emphasis on the rights and entitlements of the parties, and too little on compassion and regard for parties' business relationships.<sup>96</sup>

## **2.5 Conclusion**

In conclusion, on account of the above mentioned challenges the commercial court may not be the most suited dispute resolution mechanism in respect of disputes that arise in the context of electronic commerce. So far as dispute resolution is concerned, it is therefore not advisable for the commercial court to be tasked with resolving electronic-commerce disputes, but to fill the lacuna in the Bill. Consequently, this necessitates a reflection into how other jurisdictions resolve

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<sup>91</sup> Cupido (n 88).

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Margaret Wang, 'Are Alternative Dispute Methods Superior to Litigation in Resolving Disputes in International Commerce' (2000) *Arbitration International* 16 (2) 189 <<https://academic.oup.com>> accessed 19 March 20.

<sup>96</sup> *Ibid.*

these kinds of disputes and how those mechanisms can be adopted and modified to suit the economic climate of Lesotho.

## **Chapter 3: Reflection on electronic-commerce dispute resolution mechanisms in other jurisdictions.**

### **3.1 Introduction**

In the preceding chapter, it was indicated that in Lesotho, the commercial court is dedicated towards disposing commercial disputes. This chapter aims to reflect on the use of Alternative Dispute Resolution (ADR) measures for online dispute resolution in other jurisdictions. This undertaking will be done with the objective of attempting to find out whether some of those options can be adopted and modified to fit the legal and economic position of the Kingdom of Lesotho. To achieve this, the paper will proceed by first giving a brief description of traditional ADR. This will be followed by a reflection into the ADR mechanisms engaged in resolving consumer disputes in South Africa with particular attention to electronic commerce disputes.

The undertaking will be achieved by looking into how the South African ADR mechanisms operate. Advantages as well as challenges that confront these mechanisms will also be highlighted. The chapter will then reflect on the position of dispute resolution in electronic commerce internationally. This will be done by looking into some of the provisions of international instruments. Finally an exploration into the use of online dispute resolution in disposing electronic commerce disputes will be undertaken. Thereafter, the benefits and limitations of online dispute resolution will also be explored.

### **3.2 Traditional Alternative dispute resolution measures**

ADR covers a wide range of mechanisms for resolving disputes between parties outside formal court procedures.<sup>97</sup> Some types of ADR include negotiation, mediation, arbitration and ombudsman.<sup>98</sup> Negotiation means that the parties to a dispute negotiate or talk among themselves to resolve the conflict or to come to a compromise between themselves.<sup>99</sup> Mediation attempts to resolve the disputes between the parties by the assistance of a mediator who is a skilled, independent third party.<sup>100</sup> It is consensual in a sense that mediation will take place only

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<sup>97</sup> Zhao (n 11) 33.

<sup>98</sup> *Ibid.*

<sup>99</sup> Wang (n 95) 191.

<sup>100</sup> *Ibid* 192.

if both parties agree to engage a mediator.<sup>101</sup> The mediator's duty is to only facilitate communication and negotiation between the parties and has no power to impose a solution upon them.<sup>102</sup> Its objective is to reach a voluntary agreement between the parties.<sup>103</sup>

Arbitration is a semi-judicial and a more formal dispute resolution process whereby parties refer their dispute to an arbitrator, who is a qualified and independent third party, for determination.<sup>104</sup> The decision of the arbitrator is final and binding on both parties. The rationale behind arbitration is that, this process is capable of diverting commercial disputes away from the legal system into a self-regulated system.<sup>105</sup> The aim of arbitration is to assist businessmen, who need a speedy, inexpensive dispute settlement but who were unwilling to abandon the benefits of legal counsel.<sup>106</sup>

Ordinarily, the term ombudsman refers to a legislative entity that deals with grievances against the state.<sup>107</sup> Nonetheless, there are organizational ombudsman which are equally creatures of statute, whose role is to facilitate individual problem solving.<sup>108</sup> The ombudsman is mandated to make recommendations for systematic change, based on patterns of complaints that it receives.<sup>109</sup> In essence therefore ombuds are obligated to take steps to prevent future recurrence of problems within a particular industry.<sup>110</sup>

In juxtaposition with challenges that confront litigation, ADR presents a plethora of advantages. Firstly, it assists disputants to reach a speedy and cost effective solution.<sup>111</sup> Secondly, jurisdictional issues that confront traditional courts disappear when disputes are resolved in this way, because ADR is consensual.<sup>112</sup> Thirdly, it can lead to business-driven solutions. It is so because, this way of resolving disputes is geared more towards prioritizing the interests of

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> Office of the Ombudsman, 'Core Functions' <[www.ombudsman.org.ls](http://www.ombudsman.org.ls)> accessed 20 March 20.

<sup>108</sup> Marsha Wagner, 'The organizational Ombudsman as Change Agent' (2000) 16 (1) Negotiation Journal 99 <[www.academia.edu](http://www.academia.edu)> accessed 20 March 20.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> Zhao (n 11) 34.

<sup>112</sup> *Ibid.*

disputants. This means that parties to a dispute have more influence on how the decision is reached. ADR is therefore instrumental to the preservation of valuable long-term relationships.<sup>113</sup>

### **3.3 The South African position on dispute resolution in electronic commerce**

South Africa has been marked as a significant electronic commerce force in the African region and is currently the only sub-Saharan country to show any growth in electronic commerce.<sup>114</sup> The introduction of the Electronic Communications Transactions Act<sup>115</sup> formed the legal recognition of electronic commerce in South Africa.<sup>116</sup> The act caters for the facilitation and regulation of electronic communications and transactions.<sup>117</sup> In terms of section 2 (1) (e) of the Electronic Communications Transaction Act, its primary objective is to facilitate and provide legal certainty on electronic commerce and electronic records.

Consumer confidence in electronic commerce demands that consumers should have access to fair and effective redress if they are not satisfied with some aspect of the transaction.<sup>118</sup> Effective redress is necessary to eliminate the need for long and arduous litigation process while ensuring a strong and effective consumer protection in an online environment.<sup>119</sup> It is necessary to adopt alternative and easy to use mechanisms for consumer dispute resolution. Redress and enforcement mechanisms are required.<sup>120</sup>

To this end, section 49 of the Electronic Communications and Transactions Act points to the Consumer Affairs Committee as a body with which a consumer may lodge a complaint in the case of non-compliance with the consumer protection provisions. The act defines the Consumer Affairs Committee as a committee established by Section 2 of the Consumer Affairs (Unfair Business Practices) Act.<sup>121</sup> However, the Consumer Affairs (Unfair Business Practices) Act has

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<sup>113</sup> *Ibid.*

<sup>114</sup> Cupido (n 88).

<sup>115</sup> No.25 of 2002.

<sup>116</sup> Lance Michalson and van Zyl, 'Getting the deal through e-commerce in 31 jurisdictions worldwide South Africa' (2009) 161 <[www.michalson.com](http://www.michalson.com)> accessed 4 March 20.

<sup>117</sup> *Ibid.*

<sup>118</sup> Department of Communications, 'A green paper on Electronic Commerce for South Africa' (2002) 75 <[www.gov.za](http://www.gov.za)> accessed 4 March 2020.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> NO.71 of 1988.

been repealed by the Consumer Protection Act,<sup>122</sup> herein referred to as the CPA. The act come into effect in 2011.

Generally, the CPA is applicable to suppliers who supply goods and services in the ordinary course of business, for consideration.<sup>123</sup> Owing to its broad application, the CPA in most cases applies together with other pieces of legislation such as Electronic Communications and Transactions Act, depending on the type of consumer agreement.<sup>124</sup> In terms of section 3 (1) the CPA, one of the objectives of the Act, includes providing a consistent, accessible and consensual resolution of disputes arising from consumer transactions. Another objective is the provision of an accessible, consistent, harmonized, effective and efficient system of redress for consumers.<sup>125</sup>

Section 85 (1) of the CPA establishes the National Consumer Commission as an organ of state within the public administration, but as an institution outside the public service. The commission has jurisdiction throughout the Republic of South Africa.<sup>126</sup> The National Consumer Commission is responsible for the enforcement of the CPA by amongst other things, promoting informal resolution of any disputes arising in terms of the CPA between the consumer and a supplier.<sup>127</sup> It is also responsible for receiving complaints concerning alleged conduct or offences.<sup>128</sup> The commission may also investigate and evaluate alleged prohibited conduct and offences.<sup>129</sup> Additionally, the commission may issue and enforce compliance notices and negotiate and conclude undertakings and consent orders.<sup>130</sup> The commission may also make referrals to the National Consumer Tribunal or another regulatory authority with jurisdiction over the matter.<sup>131</sup>

National Consumer Tribunal is an independent adjudicative and *ad hoc* body established in terms of section 26 of the National Credit Act.<sup>132</sup> The tribunal has concurrent jurisdiction over consumer rights; it can hear disputes arising in terms of the CPA including disputes in relation to

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<sup>122</sup> Consumer Protection Act NO.68 of 2008.

<sup>123</sup> Jacolien Barnard, 'The role of comparative law in consumer protection law: A South African perspective' (2017) 29 (2) South African Mercantile Law Journal 376 <<https://repository.up.ac.za>> accessed 17 March 20.

<sup>124</sup> *Ibid* 379.

<sup>125</sup> Consumer Protection Act 2008, S 3 (1) g.

<sup>126</sup> Consumer Protection Act 2008, S 85 (2) (a).

<sup>127</sup> Consumer Protection Act 2008 S 99 (a).

<sup>128</sup> Consumer Protection Act 2008 S 99 (b).

<sup>129</sup> Consumer Protection Act 2008 S 99 (d).

<sup>130</sup> Consumer Protection Act 2008 S 99 (e).

<sup>131</sup> Consumer Protection Act 2008 S 72 (1) (b) & (c).

<sup>132</sup> National Credit Act No.34 of 2004.

consumer credit agreements in terms of the National Credit Act. After it has received a complaint, the tribunal has to conduct a hearing of a matter in accordance with the applicable provisions which is inquisitorial, quick, informal and in accordance with the rules of natural justice.<sup>133</sup> The National Consumer Tribunal may then grant temporary relief, declare conduct as prohibited in terms of the CPA, impose administrative penalties and confirm consent orders.<sup>134</sup> Any decision that the National Consumer Tribunal makes has the same status as a decision made by the High Court.<sup>135</sup> This means that the tribunal may record settlement between the disputing parties as a consent order.<sup>136</sup>

Additionally, in terms of section 72 (1) of the CPA, the commission may also refer a complaint that it receives to an ADR agent, a provincial consumer authority or a consumer court. In terms of section 70 (1) (a) of the CPA, the ADR measures through which a consumer may lodge a complaint, may be an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud. Secondly, a consumer may apply to an industry ombud accredited in terms section 82 (6) of the CPA.<sup>137</sup> Thirdly, a consumer may engage a person or an entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer dispute.<sup>138</sup> Lastly, a consumer may apply to the consumer court of the province with jurisdiction over the matter, if there is such a court, subject to the law establishing or governing that consumer court.<sup>139</sup>

The term ombud is derived from the institution of the ombudsman; however, there are fundamental differences between the ombuds engaged in consumer dispute resolution and the public ombudsman.<sup>140</sup> The significance of this distinction is that, this research will not be concerned with grievances against the state which is normally a function reserved for the

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<sup>133</sup>Jacolien Barnard and Emilia Mišćenić, 'The role of courts in the application of consumer protection law: A comparative perspective' (2019) 44 (1) *Juridical Science* 121 <[www.researchgate.net](http://www.researchgate.net)> accessed 17 March 20.

<sup>134</sup>*Ibid* 122.

<sup>135</sup>*Ibid*.

<sup>136</sup> Y Mupangavanhu 'An analysis of the dispute resolution mechanism under the Consumer Protection Act 68 of 2008' (2012) 15 (5) *Potchefstroom Electronic Law Journal* 327 <<https://journals.assaf.org.za>> accessed 18 March 20.

<sup>137</sup> Consumer Protection Act 2008 S 70 (1) (b).

<sup>138</sup> *Ibid* S 70 (1) (c).

<sup>139</sup> *Ibid* S 70 (1) (d).

<sup>140</sup> C Van Heerden and J Barnard, 'Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2011) 6 (3) *Journal of International Commercial Law and Technology* 134 <<https://repository.up.ac.za>> accessed 16 March 20.

ombudsman.<sup>141</sup> Rather the paper focuses on ombuds dedicated to resolving consumer disputes. An example of an ombud relevant to the discussion at hand is the ombud for Financial Services Providers. This is a statutory ombud engaged in resolving consumer disputes concerning financial institutions such as banks.<sup>142</sup> In respect of the financial services ombud, a consumer can complain about a supplier that is a financial institution, provided that the institution belongs to an ombud scheme recognized under the financial Services Ombud Schemes Act 37 of 2004.<sup>143</sup> The matter can then, as one of the available alternatives to an infringed consumer, be referred to the ombud scheme for resolution in terms of section 70 (1) (a) CPA.<sup>144</sup> The ombud may also facilitate the dispute through the use of conciliation, mediation or arbitration.<sup>145</sup>

An industry ombud accredited in terms of section 82 (6) of the CPA includes the Consumer Goods and Services Ombud. This industry ombud was established to guide suppliers as to what is considered the minimum standards of conduct expected when engaging with a consumer and to assist in resolving disputes that arise between suppliers.<sup>146</sup> Conversely, the decisions of the ombud are only enforceable against subscribers unless any other party to the dispute agrees to the jurisdiction of the ombud.<sup>147</sup> After receiving a complaint, the ombud may in order to settle the dispute speedily, make an assessment of the merits of the complaint, without conducting an investigation and suggest to the parties how the matter should be resolved.<sup>148</sup> The ombud may, at its discretion meditate over a matter if it believes it is appropriate taking into account the wishes of the parties.<sup>149</sup>

Finally, consumer court is defined as a body of that name, or a tribunal, that has been established in terms of the applicable consumer legislation.<sup>150</sup> As with the ombuds and ADR agents, a consumer court may record a resolution or settlement as an order which order may be a consent

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<sup>141</sup> Office of the Ombudsman (n 107).

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> Mupangavanhu (n 136) 330.

<sup>146</sup> The Consumer Goods and Services Industry Code of Conduct Preamble (2005) <[www.csgo.org.za](http://www.csgo.org.za)> accessed 18 March 20.

<sup>147</sup> *Ibid* Interpretation of CGSO.

<sup>148</sup> *Ibid* Code 11.51.

<sup>149</sup> *Ibid* Code 11.6.1.

<sup>150</sup> *Ibid.*

order.<sup>151</sup> These avenues of redress available in terms of the CPA imply that ADR agents must be approached before judicial redress may be obtained.<sup>152</sup>

In comparison to litigation, ADR is more advantageous to parties to a dispute.<sup>153</sup> It is relatively affordable, thus more empowering to the consumer and it is not time consuming.<sup>154</sup> The reduced costs of ADR make it a more preferable option because sometimes an infringed buyer's claim may involve a relatively small amount.<sup>155</sup> Consideration being given to the advantages of ADR over litigation, particularly the speed of ADR in solving disputes, ADR appears to be a better suited method in the fast paced arena of electronic commerce. ADR is preferable in electronic commerce because it is a private process based on party agreement.<sup>156</sup> This therefore eliminates the need of the claiming party to lodge a claim in various jurisdictions by reason of the underlying commercial relationship that gave rise to the dispute.<sup>157</sup> Conversely, these traditional ADR measures are not without their fair share of challenges, both in resolving disputes that do not emerge online and online disputes.

### **3.3.1 Challenges to the South African ADR measures**

Electronic commerce takes place over the internet, meaning that it is quite impossible to pin it down to a particular location. Conversely, the ADR measures mandated to address consumer protection in South Africa can only be found in the Republic. The location of these mechanisms give an impression that both parties to a transaction have to be in South at the time of adjudication, which is a rarity because of electronic commerce does not recognize any borders. In addition, some of these mechanisms such as the Financial Services Ombud are specialized. These Ombuds can only hear complaints that concern financial service providers.<sup>158</sup> Thus, giving an impression that cyber consumers transacting in other industries will be left with no other option but to pursue litigation, which is quite not preferable as aforementioned.

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<sup>151</sup> Van Heerden and Barnard (n 140) 135.

<sup>152</sup> *Ibid* 136.

<sup>153</sup> Mupangavanhu (n 136) 329.

<sup>154</sup> *Ibid*.

<sup>155</sup> Zhao (n 11) 34.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid*.

<sup>158</sup> Barnard and Mišćenić (n 133) 126.

Furthermore, it is quite possible that handling online and offline matters can prove quite overwhelming for these ADR measures. For instance, the National Consumer Commission is currently inundated with consumer disputes and seems to struggle with the manpower to handle and investigate consumer disputes.<sup>159</sup> On the same note, to date, there are only three consumer courts in South Africa, situated in Gauteng, Free State and in Limpopo.<sup>160</sup> This can possibly lead to a backlog of cases which will translate in a negative impact on electronic commerce because of reduced consumer confidence. Another reason why these ADR mechanisms are not likely to succeed in handling cyber disputes is that their functions are limited. An example of this is that the National Consumer Tribunal is prohibited from determining the fairness or unfairness of consumer contracts or the determination of unconscionable conduct of in terms of the CPA, this function is reserved for civil courts.<sup>161</sup>

Owing to the nature of ADR, the recommendations and decisions that these bodies make are not binding and are more susceptible to being ignored by suppliers.<sup>162</sup> Traditional ADR procedures, arbitration, mediation and negotiation provide an ideal framework to use in solving offline disputes.<sup>163</sup> However, these procedures have proved quite inadequate in addressing electronic commercial transactions thus necessitating the introduction of a new system.<sup>164</sup> This new system is based on existing ADR rules; it has come to be known as online dispute resolution.<sup>165</sup> In simple terms online dispute resolution, refers to use and adaption of traditional ADR models to resolve disputes which arise online.<sup>166</sup>

### **3.3.2 Dispute Resolution in electronic-commerce internationally**

The United Nations Conference on Trade and Development has made a note on dispute resolution and redress, in a session held on the 9 and 10<sup>th</sup> of July 2018.<sup>167</sup> The note states that the right of consumers to access dispute resolution and to obtain redress should be considered in the

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<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid* 124.

<sup>162</sup> Barnard (n 123).

<sup>163</sup> Cupido (n 88) 184.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> United Nations Conference on Trade and Development, 'Dispute Resolution and Redress' (2018) <<https://unctad.org>> paragraph 2 accessed 14 November 19.

wider context of the right of consumers to access justice.<sup>168</sup> It further provides that, for consumer rights to be effective, they need to be enforceable. Aggrieved consumers should also be able to solve disputes with suppliers in a fair, affordable and swift manner.

To attain this, the note stipulates that in order to achieve effectiveness, expeditiousness and enforceability in resolving electronic commerce disputes, the mechanism used to undertake such must be accessible online, the parties must be promptly notified, the outcome must be reached within a short of time such as 90 days and it must be possible to enforce the decision directly.<sup>169</sup> The note also underscored the importance of the role that government authorities in promoting effective compliance in consumer protection laws.<sup>170</sup>

In a similar vein, the Organization for Economic Corporation and Development (OECD)<sup>171</sup> introduced guidelines for Consumer Protection in the context of electronic commerce. These guidelines were designed to ensure that consumers are no less protected when shopping online than when they buy from their local store or order from a catalogue.<sup>172</sup> The guidelines are thus only applicable to business-to-consumer transactions. One of the objectives of the guidelines is to encourage affordable and timely dispute resolution and redress.<sup>173</sup> The guidelines provide that in implementing some of the provisions such as ADR mechanisms, businesses, consumer representatives and governments should employ information technologies innovatively.<sup>174</sup>

On the note of innovative use of technology in ADR, online negotiation is currently the mostly developed method of online dispute resolution (hereafter ODR) in the United States of

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* Paragraph 43 (e ).

<sup>170</sup> *Ibid* Paragraph 2.

<sup>171</sup> According to the U.S Mission to the Organization for Economic Cooperation & Development available at <<https://usoecd.usmission.gov/our-relationship/about-the-oecd/what-is-the-oecd/>> accessed on 7 March 2020, the OECD is an organization that was set up to oversee the distribution or aid for Europe's reconstruction after World War II. It is a forum where the governments of 36 member states with market economies work with each other as well as with other non-member economies to promote economic growth, prosperity, and sustainable development. The organization provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies. It operates as an important site for the construction, standardization, and dissemination of transnational policy ideas.

<sup>172</sup> Organization for Economic Corporation and Development, 'The Guidelines for Consumer Protection in the Context of Electronic Commerce' <[www.oecd.org](http://www.oecd.org)> accessed 18 March 20.

<sup>173</sup> OECD Guidelines for Consumer Protection in the Context of Electronic Commerce paragraph vi (B).

<sup>174</sup> *Ibid* paragraph VI (B) (iv).

America.<sup>175</sup> In America, large-scale online transaction providers such as eBay provide their own low-cost claims dispute resolution systems.<sup>176</sup> One such system is eBay Dispute Resolution Centre, which is now considered one of the biggest ODR providers in the world.<sup>177</sup> The platform allows traders and buyers to resolve their dispute by direct communication and for the most part without a third party human intervention.<sup>178</sup> The system is built around a model of problem diagnosis followed up by automated negotiation and ends with mediation and negotiation.<sup>179</sup>

Unlike in traditional negotiation where disputants reach an agreement by themselves, the whole process of online negotiation is conducted by software without human intervention.<sup>180</sup> Online negotiation works through the use of an expert system to automatically settle financial claims.<sup>181</sup> One such successful technological platform in online negotiation is known as blind-bidding.<sup>182</sup> This platform is used to determine economic settlement for claims which liability is not denied. It is mostly suitable in situations where the liability of the party is not disputed, but the parties are not in agreement on the compensation due.<sup>183</sup>

Another dispute resolution mechanism used to resolve online disputes is online mediation.<sup>184</sup> Online mediation can be defined as a system based as opposed to a face-to-face based mechanism where a mediator, who is an impartial third party facilitates the negotiation between the parties.<sup>185</sup> This ODR method is thriving in Europe and the United States.<sup>186</sup> Firms that offer mediation have set up websites to facilitate the resolution of disputes.<sup>187</sup> The websites use online technologies such as email, chat rooms and video conferencing.<sup>188</sup> On the other hand with online

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<sup>175</sup>Nwandem Osinachi Victor, 'Online Dispute Resolution: Scope and Matters Arising' 4 <<https://ssrn.com/abstract=252926>> accessed 26 November 19.

<sup>176</sup> Luca Dal Pubel, 'E-Bay Dispute Resolution and Revolution: An Investigation on a successful ODR Model' (2018) Information and Knowledge Society 132 < <https://researchgate.net> > accessed 26 April 20.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid* 133.

<sup>179</sup> *Ibid.*

<sup>180</sup> Victor (n 175).

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> Betancourt and Zlatanska (n 22).

<sup>185</sup> *Ibid.*

<sup>186</sup> Victor (n 175) 4.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

arbitration, there is no difference between it and offline arbitration besides that online arbitration takes place over the internet.<sup>189</sup>

In online arbitration, the parties, the arbitral tribunal as well as all participants are expected to make use of electronic devices to take part in the arbitral proceedings.<sup>190</sup> The arbitral tribunal does not fall under any particular jurisdiction. Instead, the online arbitration provider will have the authority to hear the matter if the opposing party announces their consent to the referral of the matter to such a tribunal.<sup>191</sup> The tribunal will equally have jurisdiction if the buyer clicked the “I agree” or “I accept” button on website of a seller which included an arbitration clause in the terms and conditions section.<sup>192</sup> One leading online arbitration entity is the internet-ARBitration.<sup>193</sup> Here parties can file their cases free of charge. It typically resolves disputes relating to e-commerce, domain issues and intellectual property matters.<sup>194</sup>

The most significant benefit of ODR is that it permits communication at a distance which in turn eliminates the need for travelling thus substantially reducing costs.<sup>195</sup> Another benefit is that some of the websites of ODR providers are available twenty four hours a day and seven days a week.<sup>196</sup> This means that once a dispute arises, parties can resolve their issues immediately without the need to wait for months before their matter goes to trial.<sup>197</sup> ODR aids international trade by eliminating the geographic obstacles to justice.<sup>198</sup>

Nevertheless, there are a number of challenges and limitations that ODR faces. There is belief that online negotiation through email can lead to misunderstandings.<sup>199</sup> While communicating through emails, there is a possibility that parties will end up misreading each other’s messaging.<sup>200</sup> Research has also revealed that email negotiations increased diminished

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<sup>189</sup> *Ibid.*

<sup>190</sup> Betancourt and Zlatanska (n 22) 262.

<sup>191</sup> Victor (n 80) 9.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid* 6-7.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid* 9.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid* 10.

<sup>199</sup> Betancourt and Zlatanska (n 22) 260.

<sup>200</sup> *Ibid.*

information sharing, diminished process cooperation and diminished trust.<sup>201</sup> Email negotiation is hampered by the absence of information that can be derived from facial expressions, eye contact and body gestures.<sup>202</sup> There is also an argument against online mediation to the effect that, lack of face to face encounter makes it harder for the mediator to establish parties' trust and confidence in the procedure.<sup>203</sup>

Another challenge that confronts ODR is the protection of sensitive materials.<sup>204</sup> An important feature of ADR is confidentiality.<sup>205</sup> The protection of trust in ADR is extremely crucial because parties are more likely to speak freely if they have the assurance that their words will not be used against them.<sup>206</sup> The absence of trust on the part of one party therefore places the ADR in jeopardy. In ODR there is no assurance that documents can be kept confidential because internet hackers can easily break in to databases of websites, print and handout, for instance, email inboxes without the knowledge and consent of the parties.<sup>207</sup>

### **3.3.3 Analysis**

In comparison to the consumer confidence fostered by the Lesotho commercial court in commerce generally, the ADR measures employed by the Republic of South Africa, facilitate and provide consumer confidence in commerce on quite a larger scale. This is especially the case when taking into account the informal nature of the mechanisms used in South Africa. It is relatively easier for consumers to approach these institutions because they do not have to seek the assistance of counsel. However, the most significant challenge with regards to the South African ADR is that the measures are traditional commerce orientated. That is to say, the mechanisms were created to cater for disputes that arise in paper based transactions; this means that if the same measures are to be employed in electronic-commerce they have to be modified. These ADR measures used in South Africa appear to be more beneficial to traditional commerce than to electronic commerce. Even in traditional commerce these mechanisms are still quite

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<sup>201</sup> *Ibid.*

<sup>202</sup> Janice Nadler and Shestowsky, 'Negotiation, Information Technology and the Problem of the Faceless Other' (2006) Negotiation theory and research 165 <<https://northwestern.edu>> accessed 23 April 20.

<sup>203</sup> Victor (n 175) 11.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

inadequate, for instance the fact that there are only three consumer courts in South Africa means that it is not easy for consumers to access these courts.

On the other hand, ODR seems like the most suited option in resolving electronic-commerce disputes. This is particularly because this manner of resolving disputes takes place electronically, meaning that dispute resolution will also not recognize borders in the same way that electronic commerce does acknowledge borders. ODR is the most appropriate manner to resolve cyber disputes because the issue of increased possibility of misunderstanding can be overcome by the use of inventions such as video-conferencing.<sup>208</sup> Jurisdictional issues, lengthy and costly proceedings that confront the Lesotho commercial court as the elected forum in resolving cyber disputes disappear in the face of ODR. Currently, there is no legitimate and workable choice of law and jurisdiction provisions that regulate electronic commerce.<sup>209</sup>

As such, most online sellers include in their electronic contracts, clauses specifying the choice of law and choice of forum.<sup>210</sup> In a cyber-transaction a consumer is usually required to accept the purchase at the merchant's terms.<sup>211</sup> A consumer has no bargaining powers in most electronic contracts, thus for the consumer the transaction is a take it or leave it.<sup>212</sup> These clauses found in electronic contracts, empower the seller to specify which ODR provider will hear the matter and which law will be applied in resolving the dispute. Some ODR providers work independently to offer their intermediary services to disputing parties.<sup>213</sup> ODR providers are guided by agreements between disputants. Therefore, ODR overcomes the question of jurisdiction and choice of law through the cooperation of cyber sellers and ODR providers. That is to say, sellers have an obligation to ensure that their electronic contracts include the choice of forum and choice of law clauses to assist ODR providers in carrying out their functions.

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<sup>208</sup> Betancourt and Zlatanska (n 22) 260.

<sup>209</sup> Victoria C. Crawford, 'A Proposal to Use Alternate Dispute Resolution as foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a model' (2002) 25 (7) *Hastings International and Comparative Law Review* 387 <[https://repository.uchastings.edu/hastings\\_international\\_comparative\\_law\\_review/vol25/iss3/7](https://repository.uchastings.edu/hastings_international_comparative_law_review/vol25/iss3/7)> accessed 25 April 20.

<sup>210</sup> Victor (n 175) 9.

<sup>211</sup> Crawford (n 209).

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

However, enforcement still remains a challenge for ODR. There is a recommendation that enforcement of cyber decisions has to operate in a non-traditional manner.<sup>214</sup> A suggestion that has been made is that, if a party fails to comply with an enforcement agreement, the ODR service provider could prevent the seller from selling or buying on certain sites.<sup>215</sup> Another argument that has been advanced on why enforcement should be limited to the cyberspace is that this will avoid conflict with the physical world enforcement capabilities.<sup>216</sup>

### **3.3.4 Conclusion**

In a nutshell, the legislator when deciding which institution is to be entrusted with the responsibility of disposing electronic commerce disputes has to be guided by the suitability and the effectiveness of measures that are currently employed in other jurisdictions. As matters currently stand, it seems that ODR is the most fitting way to resolve electronic commerce disputes. The next chapter will embark on making recommendations that can possibly be considered by the legislator in filling the bill so as far dispute resolution is concerned.

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<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

## **Chapter 4: Conclusions and Recommendations.**

### **4.1 Introduction**

This is the final chapter of the research, as such it will include a summary of findings discovered in chapters. The chapter will also include the conclusions section, this part of the research aims to conclude on whether the hypothesis as assumed in chapter one was correct or not. In this chapter, some recommendations and suggestions for further study will also be made.

### **4.2 Summary of findings**

Chapter two involved finding out whether the commercial court is suited for resolving disputes in the context of electronic commerce. Presently, in the Kingdom of Lesotho, the commercial court is dedicated towards the disposition of commercial disputes. The chapter revealed that the commercial court is not quite suited for the task. Briefly, some of the reasons that were identified include the fact that the jurisdiction of the commercial court is limited. Particularly when taking into account that in the physical world, jurisdiction is territorial while on the other hand, electronic commerce is borderless. Still on the issue of jurisdiction, the chapter further revealed that the commercial court would not be in position to issue out an effective order because enforcement of that order would be a challenge mainly because of the location of the parties to the dispute.

Additionally, the chapter indicated that because the business-consumer electronic commerce model typically involves small-value claims, it is not economically viable for consumers in cyber transactions to pursue the matter through the courts of law. The costs, as well as the length of proceedings involved in litigation were also identified as some of the reasons why litigation is not the most suited method to resolve electronic commerce disputes.

In chapter three, the quest was to find out how other jurisdictions handled dispute resolution in electronic commerce. The chapter revealed that traditional ADR mechanisms employed to address consumer disputes in South Africa are not quite suited to resolve cyber disputes. It revealed further that this is because the mechanisms are only located in South Africa. This is a challenge because it is quite rare that in all cyber cases, disputants will both be in South Africa. In addition, the chapter pointed out that if tasked to resolve online disputes it is quite possible

that these South African mechanisms could be overwhelmed with cases because these institutions are already struggling to handle offline disputes.

The chapter went on to look into how disputes are handled internationally. It revealed that ODR has been bestowed recognition as the best method to resolve electronic commerce disputes internationally. ODR has the capacity to overcome most challenges that cripple litigation in respect of electronic disputes. Moreover, the chapter indicated that ODR overcomes jurisdictional issues through cooperation between ODR service providers and cyber merchants. Another reason that was advanced on why ODR is the most ideal method is that it provides the most ideal atmosphere for resolving cyber disputes because both use the same medium, the internet. Finally, the chapter indicated that enforcement of ODR decisions is still a challenge. Nonetheless, a suggestion to the resolution of this issue is that enforcement should equally take place online. One way that has been advanced to do this is that a service provider should block a non-compliant party from selling and buying from certain sites.

### **4.3 Conclusions**

This research was carried out on the assumption that minimal participation in electronic commerce in Lesotho is caused by absence of an enabling instrument which entails a comprehensive dispute resolution and redress mechanisms in electronic commerce. This hypothesis is correct to a certain extent and also incorrect to a certain extent. The hypothesis is correct in a sense that without an enabling instrument, spelling out how and where one can find a suitable mechanism to enforce their electronic contract. Consumers are somehow left with no other option but to pursue the matter through the traditional legal route which as it has already been indicated is not quite suitable in resolving cyber disputes. This in a way works against fostering the necessary consumer confidence required to increase participation in electronic commerce in Lesotho. The hypothesis is also incorrect, because it appears from the research that the structures of traditional dispute resolution mechanisms are not designed to cater for paperless transactions. The inadequacy of the traditional mechanisms renders online buyers with a limited enforcement option. In conclusion therefore, the cause of minimal participation in electronic commerce in Lesotho can partly be attributed to absence of an enabling instrument. However, it appears from the research that the main cause of the minimal participation lies with the design of traditional dispute resolution mechanisms.

#### **4.4 Recommendations**

In filling up the dispute resolution procedure section in the Lesotho Electronic Transactions and Electronic Commerce Bill, the legislator has to opt for ODR. To achieve this, the legislator has to collaborate with software programmers, electronic sellers, and lawyers to come up with a suitable ODR solution to meet the economic position of Lesotho. The role of programmers could be to design suitable ODR programs while the role of lawyers would be to assist in how electronic contracts should be drafted. Lawyers can also be engaged as electronic arbitrators and electronic mediators. Lastly, the role of cyber sellers would be to ensure that every seller accepts and agrees to be bound by the choice of law and choice of forum clause in order to ensure ODR operates smoothly.

#### **4.5 Suggestions for further research**

Electronic commerce is extremely different from traditional commerce. Thus it requires a different approach to dispute resolution. Now, the question that arises is whether businesses engaged in electronic commerce should be encouraged to establish fair, effective and transparent mechanisms or should dispute resolution be approached uniformly. That is, should electronic commerce be self-regulatory or should international laws and consumer standards be brought together to regulate electronic commerce?

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