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online dispute resolution: theory and practice

a treatise on technology and dispute resolution

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Online Dispute Resolution: Theory and Practice

A Treatise on Technology and Dispute Resolution

Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey
(Eds.)

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Foreword

Is court a service or a place? When people or organizations are in dispute, must they congregate in physical courtrooms to resolve their differences?

It does seem to be deeply imbued in conventional Western thinking that when serious conflicts arise in society, then the warring people become parties and it is to some court that they head: at law school, students are often taught that the court is the definitive forum and mechanism for settling differences; in our literature, the courtroom is the theatre in which many disagreements are played out; and the lay perception of the administration of justice is frequently articulated in terms of wood paneled hearing rooms, arcane procedures and judges in robes.

Critics of the court system, however, have for long challenged whether courts are indeed the best placed institution and method for resolving many kinds of dispute. Opponents have argued, for example, that pursuing an action in the courts is too confrontational, too time-consuming and too costly. Many have gone further and called for the widespread adoption of ADR, alternative dispute resolution.

This collection of essays – written by undoubted authorities in the field – is concerned with one emerging category of alternative dispute resolution, known as online dispute resolution, or ODR. When a conflict is handled using ODR, a traditional courtroom is not employed. Instead, the process of resolving a dispute is entirely or largely conducted through the Internet. Of course, as this volume shows, this snapshot of ODR is an oversimplification. In the pages that follow, it is made clear that many techniques fall under the umbrella of ODR, such as e-mediation, e-negotiation, and e-arbitration, and that these techniques can be deployed in sorting out a wide range of disagreements – from consumer disputes to problems arising from e-commerce, from quarrels amongst citizens to conflicts between individuals and the state. The book also shows that ODR is already being embraced, albeit in varying degrees, in North America, Europe, Asia, Australia, Africa, and Latin America.

In a world in which the Internet is so firmly embedded, it should come as no revelation that online methods might be devised for sorting out at least some tensions and clashes that arise amongst human beings. And yet, most lawyers and many litigators have not yet heard of ODR. More disconcertingly, when seasoned legal advisers are introduced to the notion of ODR, they often regard it with distrust and as a curiosity that will remain forever on the edge of their world. The skeptics quickly question the fairness, openness, rigor and reliability of ODR. These misgivings are not to be dismissed lightly. Instead, in this book, measured, compelling and reassuring accounts of ODR are offered, addressing a wide range of related issues, including trust, justice, cultural context, and the interaction of ODR

with traditional judicial systems. Even in the chapters that explore the potential of artificial intelligence and mobile technology for ODR, the tone is not evangelical.

Nonetheless, it is hard to digest the theory and case studies presented here and not feel a strong sense of optimism that we are on the threshold of a new era for dispute resolution; that we are being offered a glimpse of methods for settling disagreements that will incur costs that are, at last, proportionate to the amounts at issue. The credibility of legal systems around the world is currently being challenged by disgruntled users – from impoverished individuals through to multinational businesses – who claim that the courts are no longer an affordable or sensible forum for disposing of many of their conflicts.

In these difficult economic times, ODR offers the promise of robust and yet radically less expensive dispute resolution. And while it may seem alien or outlandish for lawyers, policymakers and opinion formers of today, few of these belong to the Internet generation. Future generations, for whom working and socialising online is second nature, may regard ODR as an entirely natural facility, much more so than conventional courts.

For long, I have described ODR as an example, in law, of a disruptive technology – one whose introduction can fundamentally challenge and change working practices of the past. For whom, though, is ODR disruptive? The harsh truth is that ODR is most disruptive for those who currently make a living from traditional litigation. For lawyers and public servants whose careers are in the courts, ODR may well be regarded as threatening. This should not deter us from evolving techniques that better meet the needs of Internet-based societies. It is not the purpose of the courts to provide lawyers with a livelihood. Crucially, what may be disruptive for law firms may be empowering for those who have problems to resolve.

As with all disruptive technologies, ODR is not therefore an uncontroversial field of theory and practice. That is why this book is so important. Until now, much discussion of ODR has been anecdotal and speculative. In gathering together the essays that follow, Mohamed Wahab, Ethan Katsh and Daniel Rainey have taken the debate and theory about ODR to a new level – a standard of discourse that is better informed, more systematic, and rooted more reliably in experience of live systems.

I wish the work every success.

Professor Richard Susskind OBE
IT Adviser to the Lord Chief Justice of England and Wales
President of the Society for Computers and Law

Abbreviations

AAA's	American Arbitration Association
ABA	American Bar Association
ACUS	Administrative Conference of the United States
ADR	Alternative Dispute Resolution
AECE	La Associación Española de la Economia Digital
AI	Artificial Intelligence
ANRT	National Telecommunications Regulatory Agency
ASEAN	Association of South East Asian Nations
B2B	Business to Business
BATNA	best alternative to a negotiated agreement
BBB	Better Business Bureau
BC	British Columbia
BFSO	Banking and Financial Services Ombudsman
BILETA	British & Irish Law, Education and Technology Association
BIS	Business Information Systems
BSA	Business Software Alliance
C2B	Consumer to Business
C2C	Consumer to Consumer
CA	Certificate Authority
CAV	Consumer Affairs Victoria
CCC	Consumers Coordination Council
CCP	Commonwealth Court Portal
CDA	Communications Decency Act
CDRI	Court Dispute Resolution International
CE	European Committee of Standardization
CEJA	Council on Ethical and Judicial Affairs
CEO	Chief Executive Officer
CIDIP	Conferencias Interamericanas Especializades de Derecho Internacional Privado
CMS	Case Management System
CNN	Cable News Network
CNSS	National Social Security Fund
CORE	Consumer Online Resource & Empowerment Centre

CRDP	Centre de recherche en droit public
CSP	Certificate Service Providers
CWA	CEN Workshop Agreement
DOS	Disk Operating System
DSCV	Dispute Settlement Centre of Victoria
DSD	Dispute Systems Design
DSR	Detailer Seller Rating
EC	European Commission
ECC	European Consumer Centres
ECLAC	Economic Commission for Latin America and the Caribbean
ECODIR	Electronic Consumer Dispute Resolution
ECT	Electronic Communications and Transactions Act
EDR	Electronic Dispute Resolution
EEC	European Economic Community
ERIA	Economic Research Institute for ASEAN and East Asia
ESP	E-Signature Service Provider
EU	European Union
F2F	Face to Face
FDI	Foreign Direct Investment
FDR	Family Dispute Resolution
FEDMA	The Federation of European Direct and Interactive Marketing
FHA	Fair Housing Act
FICS	Financial Industry Complaints Service
FMCS	Federal Mediation and Conciliation Service
FOIA	Freedom of Information Act
FOS	Financial Ombudsman Service
G2C	Governmental to Citizen
GBD	Global Business Dialogue
GDP	Gross Domestic Product
HLSO	High Level Summit Organizing Committee
IAAA	International Arbitration Amendment Act 2010
IACM	International Association for Conflict Management
ICANN	Internet Corporation for Assigned Names and Numbers
ICASA	Independent Communications Authority of South Africa

ICC	International Chamber of Commerce
ICCP	Information, Computer and Communications Policy
ICDR	International Centre for Dispute Resolution
ICT	Information and Communication Technology
IDB	Inter-American Development Bank
IDP	Internally Displaced Persons
IFJ	International Federation of Journalists
IICL	Institute for International and Comparative Law
ILCE	Latin American E-commerce Institute
IOS	Insurance Ombudsman Service
IP	Internet Protocol
IRA	Irish Republican Army
IT	Information Technology
ITAC	Information Technology Academia Collaboration
ITIDA	Information Technology Industry Development Agency
LGDCU	Ley General Defensa consumidores y usuarios (General Law on Consumer and User Protection)
LIT	Legal Information Technology
M2B	Mobile to Business
MCOL	Money Claim Online
MDG	Millennium Development Goals
MFF	Mutual Feedback Withdrawal
NADRAC	National Alternative Dispute Resolution Advisory Council
NARA	National Archives and Records Administration
NCA	National Credit Act No. 34 of 2005
NCAIR	National Centre for Automated Information Research
NGO	Non-Governmental Organization
NMB	National Mediation Board
NRI	Network Readiness Index
NSF	National Science Foundation
NTRA	National Telecommunications Regulatory Authority
OAS	Organization of American States
OCA	Online Consumer Abitration
OCAA	Online Consumer Arbitration Awards

OCDE	Organization for Economic Cooperation and Development
ODR	Online Dispute Resolution
OECD	Organization for Economic Cooperation and Development
OGIS	Office of Government Information Services
PC	Personal Computer
PCOL	Possession Claim Online
PKI	Public Key Infrastructure
PM	Prime Minister
R&D	Research and Development
SAIIP	South African Institute of Intellectual Property Law
SANCO	South African National Civic Organization
SCT	Small Claims Tribunal
SDRCC	Sports Dispute Resolution Center of Canada
SMS	Short Message Service
T2	Technology-reliant to technology-reliant
TABD	Transatlantic Business Dialogue
TACD	Transatlantic Consumer Dialogue
TAGS	Technology Assisted Group Solutions
TIO	Telecommunication Industry Ombudsman
TISCO	Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTY	Teletypewriter
UAB	University of Alabama at Birmingham
UCLA	University of California, Los Angeles
UDRP	Uniform Dispute Resolution Policy
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commissions on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commissions for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research

UNV	United Nations Volunteers
US	United States
USD	United States Dollars
USDA	United States Department of Agriculture
VoIP	Voice over Internet Protocol
WATNA	Worst Alternatives to a Negotiated Agreement
WIPO	World Intellectual Property Organization
WSI	World Summit on the Information Society
ZADRR	ZA Dispute Resolution Regulations

List of Existing ODR Providers

1. ODRWorld <www.odrworld.com>
2. ODRChina <www.odrchina.com/index.php>
3. ODRMalaysia <www.odrmalaysia.com>
4. ODRAustralia <www.odraustralia.com>
5. ODRIndia <www.odrindia.com>
6. SmartSettle <www.smartsettle.com>
7. Cybersettle <www.cybersettle.com>
8. RisolviOnline <www.risolvionline.com>
9. TheMediationRoom <www.themediationroom1.com>
10. CORE <www.corenic.org/dispute-policy.htm>
11. Net-Case at the International Chamber of Commerce (ICC)
12. Web-File at the AAA's online arbitration <https://apps.adr.org/webfile/>
13. Austrian Internet Ombudsman <www.ombudsmann.at/>
14. Electronic Consumer Dispute Resolution (ECODIR) <www.ecodir.org>
15. Uniform Domain Names Dispute Resolution Policy (UDRP) at Internet Corporation for Assigned Names and Numbers (ICANN) <www.icann.org/en/udrp/udrp.htm>
16. NetNeutrals <http://netneutrals.com/>
17. Consumer Affairs Victoria (CAV) <www.consumer.vic.gov.au>
18. Family_Winner
19. Telecommunication Industry Ombudsman (TIO) <www.tio.com.au>
20. Financial Ombudsman Service (FOS) <www.financial-ombudsman.org.uk>
21. South African Institute of Intellectual Property Law (SAIIPL) <www.saiipl.org.za>
22. Onlineombud <www.onlineombud.com/index.html>
23. Cibertribunal Peruano <www.cibertribunalperuano.org>
24. Concilianet <www.concilianet.profeco.gob.mx>
25. Benoam <www.benoam.ne>
26. American Arbitration Association <www.adr.org>
27. Better Business Bureau Online <www.bbbonline.org/>
28. Family Mediation Canada <www.fmc.ca>
29. Federal Mediation and Conciliation Service <www.fmcs.gov>
30. iCourthouse <www.i-courthouse.com>
31. National Arbitration Forum <www.adrforum.com>
32. PayPal <www.paypal.com>
33. Resolution Canada <www.resolutioncanada.ca/>
34. SettleOnline <www.settleonline.com>

35. SettleTheCase <www.settlethecase.com>
36. SmartSettle <www.smartsettle.com/>
37. TRUSTe <www.truste.com>
38. WebAssured <www.webassured.com>
39. Settle Today <www.settletoday.com>
40. Electronic Courthouse <www.electroniccourthouse.com>
41. National Mediation Board <www.nmb.gov>
42. Onlinearbitration.net <www.onlinearbitration.net>
43. Fair Outcomes <www.fairoutcomes.com/>
44. Virtual Courthouse <www.virtualcourthouse.com>
45. net-ARBitration Works <www.net-arb.com>
46. Juripax <www.juripax.com>
47. Chamber Settle
48. Netneutrals <http://netneutrals.com/>
49. Ebay Resolution Center <http://resolutioncenter.ebay.com/>
50. Sports dispute resolution center of Canada <www.crdsc-sdrcc.ca/eng/home.jsp>
51. Fiserv <www.fiserv.com>
52. Centre de Médiation et Arbitrage de Paris <www.cmap.fr>
53. Agència Catalana de Consum <www.consum.cat/>
54. Camera di Commercio di Firenze <www.conciliaonline.net/concilia/>
55. AECE, AUTOCONTROL i Red.es <www.confianzaonline.es>
56. Camera di Commercio di Ancona <www.an.camcom.gov.it>
57. Der Internet Ombudsmann <www.ombudsmann.at>
58. Mediar Online <www.mediaronline.com>
59. Allegro
60. Modria <www.modria.com>
61. Mediate.com <www.mediate.com>

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Mohamed S. Abdel Wahab

Dr. Mohamed S. Abdel Wahab (MCIArb.), *Licence en Droit* (CAI), LL.M. (CAI), *CIArb Dip. International Commercial Arbitration* (Balliol College, Oxford University), MPhil and Ph.D (Manchester University, UK), is an Assistant Professor, Faculty of Law (Cairo University, Egypt). He is a Founding Partner of Zulficar & Partners where he serves as the head of the Firm's International Arbitration and Project Finance/PPP Groups. Dr. Abdel Wahab is an approved Tutor, Vice-Chairman of the Cairo branch of the Chartered Institute of Arbitrators, and Chair of the Institute's Technology Committee. Dr. Abdel Wahab also holds a number of visiting posts in Egypt, the UK, and the USA. He is currently a Fellow of the Centre for Technology and Dispute Resolution at the University of Massachusetts, USA and Adjunct Professor and Faculty Coordinator for the Indiana University LL.M. Program in Business and Comparative Law (Egypt). Dr. Abdel Wahab is a Senior Counselor for International Legal Affairs and International Contracts at the Information Technology Industry Development Agency (ITIDA).

He regularly appears as arbitrator, expert, and counsel in major ad-hoc and institutional arbitral proceedings subject to Egyptian and foreign laws such as English, French, Emirati, Saudi and Swiss Laws, where he has prosecuted arbitral proceedings across diverse investment and commercial spectrums. Dr. Abdel Wahab is also a CEDR accredited mediator, member of the LCIA Arab Users Council, and Mediation Consultant to the World Bank. He is a leading ODR scholar, who holds over forty five prizes for academic achievement, and has is widely published in learned international journals and is a regular speaker in national and international conferences on International Commercial Arbitration, Online Dispute Resolution, Private International Law, Project Finance and PPPs, and IT Law.

Jeffrey Aresty

Jeffrey Aresty is licensed to practice law in Massachusetts and the District of Columbia. In addition to his law degree (Boston University Law, 1976), he also earned masters of laws degrees in taxation (1979) and international banking (1993) from Boston University Law School. He has an extensive background in negotiating and structuring international joint venture relationships, establishing direct and indirect sales, marketing and manufacturing operations in Europe, South America and the Far East, negotiating and structuring licensing, sales, service, and other agreements necessary to transfer technology, staff foreign operations, market products and services. Mr. Aresty is the editor of *The ABA Guide to International Business Negotiations*, the premier legal text on the subject.

Karim Benyekhlef

Karim Benyekhlef has been a professor in the Faculty of Law of the Université de Montréal since 1989, and since 1990 he has been seconded to the Centre de recherche en droit public, of which he has been the Director since 2006. A member of the Quebec Bar since 1985, he praticed in the federal Department of Justice from 1986 to 1989. His areas of teaching and research are information technology law, constitutional law (human rights and freedoms), international law, and legal theory and history. In 1995, Prof. Benyekhkef, founded the electronic law journal *Lex Electronica* (<www.lex-electronica.org>), and is also the originator of one of the first on-line dispute resolution projects (the CyberTribunal project, 1996-1999, eResolution, 1999-2001, and ECODIR project, 2000-: <www.ecodir.org>).

He is the director of the Cyberjustice Laboratory: <http://laboratoiresurlacyberjustice.org/en/index_en.html>.

Pablo Cortés

Pablo Cortés (Licenciado, LL.M, Ph.D.) is a lecturer in law at University of Leicester, UK, and a qualified attorney (non-practising) in Spain. His research interests lie in the intersection of ADR, ODR, consumer protection, and civil procedure. He has recently published a monograph entitled *Online Dispute Resolution for Consumers in the European Union* (Routledge, 2010). He is a fellow of the Center for Technology and Dispute Resolution (UMASS) and has carried out expert appointments by UNCITRAL and the European Commission.

Ruhan Devanesan

Ruhan Devanesan is the Executive Director of the Internet Bar Organization; a legal non-profit with experience in applied research in the fields of law, technology and international development. Ruhan specializes in ICT4Peace, ICT4D, non-profit management, human rights law, international development, conflict resolution, grassroots development.

Noam Ebner

Noam Ebner is an assistant professor at The Werner Institute at Creighton University's School of Law, where he chairs the online graduate program in Negotiation and Dispute Resolution. In addition to writing on his two research interests – negotiation pedagogy and ODR – Noam has published many simulations and teaching guides for use in the negotiation and conflict resolution classroom.

Frank Fowlie

Dr. Frank Fowlie is the CEO of internetombudsman.biz. Frank was the inaugural Ombudsman at the Internet Corporation for Assigned Names and Numbers. Frank holds

a Doctor of Conflict Resolution (DCR) from La Trobe University, Melbourne. Frank is also an alumnus of the University of Manitoba, University of Regina, and Royal Roads University where he earned a Master of Arts in Conflict Analysis and Management. Frank has taken training as a negotiation instructor at the Program on Negotiation at Harvard Law School, and is a Fellow with the National Centre for Technology and Dispute Resolution at the University of Massachusetts – Amherst. Frank holds the designation of Chartered Mediator. Frank and his wife Mary Ann live in British Columbia.

Bryan Hanson

Bryan Hanson is the Assistant Director of The Werner Institute at Creighton University. Bryan draws on his knowledge of conflict management system design and experience as a practitioner in the field of conflict resolution to support the establishment of the Werner Institute as a premier resource for conflict management and conflict resolution education in the Midwest. Alongside his work with the Werner Institute he also devotes time to mediating, facilitating and providing training in conflict resolution. Bryan has an M.A. from John F. Kennedy University in Organizational Psychology and a graduate certificate from John F. Kennedy University in Organizational Conflict Management.

Sanjana Hattotuwa

Sanjana Hattotuwa is a TED Fellow, using and advocating Information and Communications Technologies (ICTs) for over ten years to strengthen peace building, reconciliation, human rights and democratic governance. He set up and curates the award winning Ground views (<www.groundviews.org>), Sri Lanka's first civic media website. Teaching new media literacy and web activism locally and internationally, he also work extensively on information management during crises, both sudden-onset and protracted.

Bruce Hiebert

Dr. Bruce Hiebert is Vice President for Applications and Ethics, Smartsettle (iCan Systems Inc.). He is a Senior Faculty at the University of Canada West and Adjunct Professor at Vancouver School of Theology. He has trained in pastoral counselling and mediation, and is a certified Smartsettle facilitator. He has fifteen years of senior management and management consulting in a wide range of industries. He holds a Ph.D. in historical ethics from Simon Fraser University, Canada and is an award winning instructor in business, philosophy and religion. He is the author of *Your Soul at Work* (Northstone, 2005) and *Good Work* (Northstone, 1996).

Ethan Katsh

Professor Katsh is the director of the Center for Technology and Dispute Resolution and Professor Emeritus of Legal Studies at the University of Massachusetts. Along with Janet

Rifkin, he wrote the first book on ODR, *Online Dispute Resolution: Resolving Disputes in Cyerspace* (2001). Professor Katsh is a graduate of the Yale Law School and was one of the first legal scholars to recognize the impact new information technologies would have on law. He is one of the founders of the field of ODR and author of two books on law and technology, *Law in a Digital World* (Oxford University Press, 1995) and *The Electronic Media and the Transformation of Law* (Oxford University Press, 1989). He is currently consultant on online dispute resolution to two federal agencies.

Professor Katsh has chaired the International Forums on Online Dispute Resolution, held in Geneva in 2002 and 2003, Melbourne in 2004, Cairo in 2006, Liverpool in 2007, Hong Kong in 2007, Victoria (Canada) in 2008, Haifa, Israel in June 2009, Buenos Aires in 2010 and Chennai (India) in February 2011. He has been Visiting Professor of Law and Cyberspace at Brandeis University, is on the Board of Advisors of the Democracy Design Workshop, the legal advisory board of the InSites E-governance and Civic Engagement Project, the Board of Editors of Conflict Resolution Quarterly, and is a Fellow of the American Bar Foundation. Professor Katsh received the Chancellor's Medal and gave the campus Distinguished Faculty Lecture in October 2006.

Tommy Li

Mr. Tommy Li is an IT Expert and Management Consultant.

Chinthaka Liyanage

Chinthaka Liyanage has been a law lecturer at the Faculty of Law University of Colombo, Sri Lanka since 2000. He holds LL.B Degree from the University of Colombo and LL.M. Degree in Commercial Law from the University of Melbourne. Chinthaka is currently enrolled as a Ph.D. student, focusing on Online Consumer Arbitration, in the School of Law, La Trobe University, Australia. His research interests are in Online Dispute Resolution, International Commercial Arbitration and International Commercial Law.

Arno R. Lodder

Arno R. Lodder is professor of Internet Governance and Regulation at the department of Transnational Legal Studies of VU University Amsterdam. His research focuses on the tension between what is technically possible and legally allowed, *e.g.* on Cyberwar, The Internet of Things and the EU FP7 Hemolia-project Anti Money Laundering (2011-2014). Lodder published on various topics such as spam, social networks, virtual worlds, electronic signatures, and online dispute resolution (*e.g.*, in 2010 with John Zeleznikow Enhanced Dispute Resolution through the use of Information Technology published by Cambridge University Press).

Paul Miniato

Paul Miniato is a certified Smartsettle facilitator, and is working towards a certificate in third-party mediation with the Justice Institute of BC. With four decades of experience in the computer industry, he is an active member of Smartsettle (iCan Systems Inc) and has been assisting with the Smartsettle products since 2007.

Chittu Nagarajan

Chittu Nagarajan is currently Head of Community Courts, eBay & PayPal and Chief Mediator and Head of ODRWORLD.com. Chittu holds a first degree in History and a second degree in Law (UK). She has as a Legal Practicing Certificate and is a trained Mediator. Chittu's passion is in Online Dispute Resolution, Conflict Resolution, Cyberlaws and Intellectual Property. Chittu was responsible for developing the first Online Dispute Resolution service in India and Malaysia, and has been working on the following Online Dispute Resolution sites; ODRWORLD, ODRINDIA, ODR CHINA, and ODRMALASYIA.

Arthur Pearlstein

Arthur Pearlstein, Professor of Law and Director of the Werner Institute for Negotiation and Dispute Resolution at Creighton University, received his B.A from Haverford College, his J.D. from Harvard Law School cum laude, and his Master's in Dispute Resolution from the Straus Institute for Dispute Resolution at Pepperdine University. Immediately prior to joining the Creighton faculty, Professor Pearlstein served as the general counsel and director of Alternative Dispute Resolution and International Programs at the Federal Mediation and Conciliation Service (FMCS). In addition to his work as a lawyer, mediator, and facilitator, Professor Pearlstein has substantial teaching experience both overseas and in the US. He has taught language, cross-cultural communications and negotiations skills as a visiting lecturer to foreign university students and professionals in law, business, and international relations, including at such institutions as the International Islamic University in Kuala Lumpur, Malaysia, and Bilkent University in Ankara, Turkey. His research and praxis interests include dispute systems design, emergence and private ordering in conflict resolution, and intergovernmental and cross-cultural collaboration.

Marta Poblet

Marta Poblet is the director of the UAB Institute of Law and Technology, where coordinates a number of research projects dealing with law and technology, judicial systems, legal professions, and alternative dispute resolution systems. She holds a J.D. from the Stanford University (Stanford Law School, 2002) and a M.A. in International Legal Studies (Stanford Law School, 2000). She is also a past Fellow of the Stanford Center on International Conflict and Negotiation (2001). Her research interests cover technology-oriented developments in legal organizations, judicial systems, mediation systems, online dispute resolution (ODR)

and, more recently, mobile dispute resolution (an emerging field that focuses on the use of mobile phones and cell networks to facilitate the management and resolution of conflicts).

Orna Rabinovich-Einy

Orna Rabinovich-Einy is an assistant professor at the Faculty of Law at the University of Haifa. Her areas of expertise are alternative dispute resolution, online dispute resolution, and civil procedure, with research focusing on the relationship between formal and informal justice systems, dispute system design and the impact of technology on dispute resolution. She is a fellow of the Haifa Forum of Law and Society, the Haifa Center for Law and Technology, and the Center for Information Technology and Dispute Resolution at UMass, Amherst. Rabinovich-Einy holds a doctorate in Law (J.S.D.) degree from Columbia University. She was admitted to the Bar in Israel (1998) and New York (2001) and was certified as a mediator in New York by the Safe Horizon Mediation Center (2003).

Daniel Rainey

Daniel Rainey is the Chief of Staff for the National Mediation Board (NMB), the US government agency charged with dispute resolution in the airline and railroad industries in the United States. While at the NMB he has guided their ADR programs into a leading role in online dispute resolution, integrating technology into all of the agency's mission areas and winning the National Archivist's award for managing electronic records. He regularly is a speaker at international conferences concerned with online dispute resolution, and he is a contributor to a number of publications dedicated to online dispute resolution and the application of technology to the broader field of dispute resolution. He is a member of the Association for Conflict Resolution (ACR), and past Chair of the ACR ODR Section. He is a member of the ABA Section of Dispute Resolution and the co-Chair of their ODR interest group. He is an adjunct member of the faculty in the graduate dispute resolution programs at Creighton University and Southern Methodist University.

Vikki Rogers

Vikki Rogers is the Director of the Institute of International Commercial Law at Pace Law School. She teaches and advises in the areas of international sales law, international arbitration and online dispute resolution (ODR) and is regularly invited to speak on such topics. She also maintains the award-winning online CISG Database. Her current publications focus on international sales law, international consumer law, ODR (for domestic and cross-border disputes), and electronic and mobile commerce. Prior to her position as Director at Pace, she worked as an associate at Mazur, Carp & Rubin, PC, and Shearman & Sterling (New York and Germany), focusing her practice on construction law arbitration and litigation, both domestic and international. She was also an international case manager

at the ICDR at the AAA in New York, and has worked as a research fellow at the Universities of Heidelberg and Cologne in Germany.

Graham Ross
Graham is a UK lawyer/mediator and the founder of a number of IT and the law projects including LAWTEL, the UK law update service, We Can Settle, the first ODR service in the UK, (designing the blind bidding software at the heart of the system) and TheMediationRoom.com, for whom he designed their online mediation platform. Graham was host of the 5th International Conference on ODR held in Liverpool in 2007. Graham was a member of the Working Party of the European Committee on Standardisation (CE) which developed a taxonomy for ODR and currently is a team member of the EMCOD project (www.emcod.net) which is creating a facility for the EU for the measurement of justice through ODR. Graham is also a leading trainer in ODR having written the accredited distance training course in ODR provided by The Mediation Room to mediators in over fifteen countries.

Colin Rule
Colin Rule is CEO of Modria.com, an online dispute resolution service provider in Silicon Valley, and a non-resident Fellow at the Center for Internet and Society at Stanford Law School. From 2003 to 2011 he served as eBay and PayPal's first director of Online Dispute Resolution, designing and implementing systems that now resolve more than 60 million disputes each year. Mr. Rule is the author of *Online Dispute Resolution for Business*, published by Jossey-Bass in September 2002.

Harpreet Singh
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INTRODUCTION

In 2011, the world was able to witness the ultimate power of information and communication technologies ('ICTs') in a socio-political context. A tidal wave of revolutions in the Middle East was spurred through online communication between netizens and citizens. Less visibly, the ongoing proliferation and advancement of ICTs is having a profound impact in all regions of the globe in diverse socio-legal, economic, cultural, and political continua. As this book documents, ICTs are fundamentally changing institutions in every country, altering our shared world and our particular cultures and institutions.

The spread of ICTs, as a non-linear, asymmetric, and highly differentiated phenomenon, has intensified socio-cultural, political, economic, and legal interaction between diverse societies and systems. The technological revolution brought by the Internet has altered the scale according to which human affairs are being conducted and has fostered a new medium that has impacted well-established legal conceptions, especially with respect to dispute resolution. The acceleration of change, the increasing complexity of relationships and transactions and the lowering of costs of publication and organization are all accompanied by disputes and, in response, there is a growing need for the kinds of creative technology-assisted dispute resolution processes discussed in this book.

John Naisbit was unequivocally right when he stated that 'instantaneous global communications have given us a window on the world through which can be seen both the wonder of it all and the things that make us wonder about it all'.[1] In cyberspace, there is rapid growth and deployment of new communication technologies, speed and mobility are increasing while costs and barriers to access are decreasing, Communication tools such as texting, electronic mail, message posting, electronic discussion groups, web-based conferencing, and videoconferencing, have made it possible for people to virtually communicate asynchronously and synchronously from almost anywhere.

The utilization of these new means of telecommunication, information processing and data storage have facilitated online interactions and e-commerce and m-commerce transactions that take a mere fraction of a second to be completed. Accordingly, the new virtual and frequently mobile media require the presence of an efficient and adequate system of dispute resolution that addresses a range of possible disputes, and promotes trust and confidence in doing business online.

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1 J. Naisbitt, *Global Parado*, New York, William Morrow and Company 1994, p. 192.

The most well-known book on dispute resolution, *Getting to Yes* by Roger Fisher and William Ury, was published in 1981, exactly thirty years ago. It argued that a new approach to dispute resolution was needed because 'conflict is a growth industry'[2] and courts were inadequate and inefficient in responding to disputes. During the last three decades, the Alternative Dispute Resolution ('ADR') processes of negotiation, mediation, arbitration, have not only grown in use but have became the primary forms of dispute resolution.

The year 1981 was also significant for the world of technology. It was the year that the IBM PC, one of the most important contributors to the growth in the use of computers during the last three decades, was introduced. If ADR contributed to moving dispute resolution out of court, the PC contributed to moving technology into the home, the workplace and, indeed, almost any other place one can think of. This contributed to economic growth and, as described in this book, to conflict again becoming a growth industry and again generating a need for new approaches to dispute resolution.

The idea of this book materialized when it became evident that the ODR has spawned a new culture of dispute resolution with new norms, schemes, and applications. It may be viewed as a parallel universe that co-exists with and also interacts with traditional forms of dispute resolution. This book comes as a timely initiative and a promising project is engaging many authorities of the ODR field look closely at the interplay between law, technology, and dispute resolution. The context for this and timeliness of the book stems from the fact that the UNCITRAL has acknowledged the distinctiveness of the ODR field by establishing a new Working Group dedicated for ODR as a special and independent track of dispute resolution.

This need for a comprehensive sourcebook for ODR cannot be overlooked. It is ten years since the first books about ODR were published and there has been significant activity and accomplishment in the interim. In 2000, for example, the process for settling domain name disputes still relied on the faxing and mailing of paper documents. Ten years later, more than 30,000 domain name disputes have been handled and almost everything about the process is online. Ten years ago, the most notable example of ODR was its use in thousands of eBay buyer-seller transactions where buyers and sellers were unlikely to be able to meet face to face and dollar amounts were often too small to litigate in court. Today, eBay handles over sixty million in a year.

This book is intended to provide an in-depth analysis and overview of not only the past and present but also the future of ODR. It is intended to serve as a guide to scholars and

2 R. Fisher and W. Ury, *Getting to Yes*, New York, Penguin Books 1981, p. xvii.

practitioners having an interest in the interplay between dispute resolution and ICTs. The book employs international, comparative, empirical, and interdisciplinary approaches to a myriad of legal and technical issues across the ODR spectrum. ODR is a field that lies at the intersection of dispute resolution and technology and our challenge has been to examine the many different areas that are being touched by these elements of modern life.

This book is divided into two main parts. The first part is dedicated to scrutinizing ODR, its applications, its interconnection with established legal and extra-legal doctrines and principles, as well as its past, present, and future. The second part shall map and track ODR and its applications on regional and continental levels, where six chapters are dedicated to mapping ODR in Europe, North America, Asia, Africa, Australia, and South America. Whilst acknowledging the rapid advancement in ICTs and the dynamic nature of dispute resolution schemes and principles, this book promises its readers rewarding and durable, as well as timely content.

As explained in the first chapter of this book, ODR was initially thought of as a means of redress for disputes that arose online, disputes often between parties in different countries and in which courts and face to face ADR were not feasible. Successes in those disputes led to the use of ODR in traditional offline disputes, sometimes to assist a mediator or arbitrator and sometimes to replace the third party altogether. Today, as 'the digital world merges with the physical world',[3] ODR is moving forward on two tracks. It is building upon and being integrated into familiar dispute resolution processes. It is also generating novel approaches to responding to and preventing conflict, approaches that could not have been developed in a face to face world.

ODR is a multifaceted phenomenon and is worthy of the kind of broad treatment provided by this book. Whilst acknowledging ODR as a dispute resolution, and possibly dispute prevention, field, it seems abundantly clear throughout the book that the term 'ODR' is not subject to universal agreement over its meaning and scope. ODR is described by some as technology-assisted dispute resolution, by others as technology-facilitated dispute resolution, and by still others as technology based-dispute resolution schemes. The metaphor most commonly used to explain ODR, one that perhaps encompasses all of these characterizations of the use of technology in dispute resolution, is the 'Fourth Party',[4] a phrase meant to indicate that ODR makes technology a presence, sometimes minor and sometimes major, in dispute resolution processes.

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3 N. Gershenfeld, *When Things Start to Think*, Coronet Books, Philidelphia 1999, p. 10.

4 E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, San Francisco 2001.

In the first part of the book, every chapter focuses on one element in the dispute resolution/technology relationship, but every chapter also does more by linking to one or more dispute resolution and/or technology oriented themes and challenges.

Chapter 1 provides a temporal overview and journey into the ODR world, its origins and evolution in an attempt to discern the future trajectory of ODR, which is perceived as the only approach to dispute resolution and prevention that can play a role not only in a highly complex future but one in which change is occurring at a rapid pace.

Chapter 2 offers a theoretical analysis of the ODR field and discusses the potential for the development of an ODR conflict resolution theory, which, as perceived, will eventually challenge the fundamental traditional definitions of interaction in many ways. The authors predict that a general cluster of theories will develop around what they refer to as the 'virtual interaction theory'.

Chapter 3 addresses a disconnect between dispute systems design ('DSD') and ODR. The authors show that the need to integrate technology into the ADR field has been understood only in a narrow area and in a limited fashion. It is argued that the reach of new technologies is far more pervasive and holds a promise for transforming in a very deep sense some of the ADR field's most deep-rooted assumptions in the area of DSD, which employs and embeds technology in the system created in a manner that would lead ODR down a path that will generate new options, new challenges, new roles and new expectations. It is argued that the use of technology tends to lead both to the emergence of more complex processes and also to technological resources to manage these more complex processes.

Chapter 4 focuses on the applications of automated human intelligence in the ODR field, where the authors explore how online dispute resolution systems can offer intelligent negotiation support. The authors also discuss how such intelligent support can be useful in understanding international conflicts and how it is vital that in legal domains, such support focus upon justice rather than merely meeting the interests of the disputants. Throughout the chapter, the authors offer a detailed overview of their model for intelligent online dispute resolution services.

Chapter5 discusses the interplay between ODR and mobile phones. The author submits that in terms of pure business where the models of ODR have changed, it is not the PC but the mobile that is most prevalent as this is what the profit line demands. Moreover, the author emphasizes the role of mobile phones in conflict transformation and in peoples' struggle for democracy in an ever-changing world. The author further advocates strongly that existing ODR providers more rapidly move to mobile platforms.

Chapter 6 addresses the need, prospects, and challenges for the development of a global cross-border ODR redress system, and proposes that the pertinent questions for this decade and beyond concern the scope of such a system, the legal instruments needed to support the system, the logistics and technological building blocks of the system, and identification of the appropriate players that will alter traditional notions of redress to obtain 'rough justice'. The author further submits that the creation of a global ODR system requires an inevitable reconfiguration of basic ADR conceptions to best serve the interests of all stakeholders.

Chapter 7 focuses on the business side of ODR by addressing the relationship between ODR and e-commerce. The author discusses and analyzes the prospects and challenges to integrating ODR in e-commerce. The author provides a succinct overview of the diverse ODR schemes as well as regulatory instruments available for e-commerce transactions and disputes. Moreover, the author sheds light on some of the technical and legal issues in the context of ODR and e-commerce.

Chapter 8 is dedicated to addressing the prospects and scope of settling consumer disputes through ODR schemes. The author analyzes ODR financing issues, procedural standards, and mechanisms for settlement, whether consensual or adjudicative. The chapter concludes by providing an overview of future trends in consumer ODR.

Chapter 9 deals with the interplay between ODR and Online Reputation Systems. The authors provide a detailed comparative analysis of online reputation systems, from legal and technical perspectives, with references to leading precedents and insightful case studies to denote the symbiotic relationship between ODR and online reputation systems. The authors submit that the next wave of sophistication and maturity in online reputation systems will usher in user demands for fairness, justice, and transparency, which necessitate the use of efficient ODR schemes.

Chapter 10 focuses on an essential concern of ODR systems, the role of culture in ODR. The author addresses the interplay between ODR and culture with special emphasis on the basic demands of ODR systems and the proper and efficient use of ODR as a communication channel. In principle, the successful proliferation of ODR services worldwide is conditional upon due consideration of cultural differences. The author submits that the creation of ODR channels offers the possibility for parties from a wide variety of cultures to flex into the norms created by the use of an online system.

Chapter 11 scrutinizes the role of interpersonal trust in ODR, especially in negotiation and mediation. The author also discusses the challenges to trust in ODR processes. The

author submits that trust, for a variety of reasons ranging from technological to psychological, is extremely challenging to develop and maintain online. Nevertheless, online negotiators and mediators may overcome diverse challenges by resorting to, and developing, new methods for trust building online.

Chapter 12 discusses yet another difficult area of ODR, ODR and eGovernment. The authors submit that in order for ODR to make sense in the context of e-government, it is necessary to expand the notion of what ODR is to include functions that help manage conflict that is not resolvable, help facilitate communication in a wide variety of contexts, and help develop and sustain trust in governmental entities and activities. Moreover, the authors acknowledge that ODR has a very solid place in delivering services and resolving disputes within government agencies, disputes between government agencies and citizens, and disputes among private sector organizations seeking government resolution assistance. They further recognize that the very existence of ODR is likely to enhance government transparency, access by citizens to government policy debates, delivery of government services, and redress of citizen grievances, is going to transform the traditional roles and responsibilities of government agencies.

Chapter 13 addresses an intricate issue, the interplay between ODR and traditional theories of justice. The authors attempt to demystify the notion of justice by analyzing diverse forms of justice such as distributive, procedural, retributive, and restorative. The authors further engage in an analysis of the diverse requisites for just and fair ODR schemes, especially that ODR has positively contributed to the creation and shaping of an online justice system. The authors conclude with an examination of the compatibility of ODR schemes with distributive and transformative models of justice.

Chapter 14 analyzes the relationship between ODR, courts, and the judicial system. The authors provide a practical assessment of diverse initiatives of court annexed ODR schemes in the USA, Australia, the UK, and Singapore. The authors conclude with an overview of the future of state sponsored and court annexed ODR schemes.

Chapter 15 provides a theoretical and practical overview of the interplay between ODR and Ombudsmanship. The author provides insightful analysis regarding the role of an ombudsman as distinguished from other conflict resolvers and managers. The author further addresses the role of ODR in the context of ombudsman programs prior to concluding with some guidelines on the use of ODR technology by ombudsman practitioners.

Chapter 16 is dedicated to the theory and practice of e-Negotiations, and the authors provide an in-depth analysis of the essentials of an eNegotiation System components, the

advantages of eNegotiation, and the prospects and challenges of eNegotiation. The authors further provide an overview of their successful and patented eNegotiation system (Smartsettle) prior to concluding with an illustrative example pertaining to water disputes and a final assessment of the future of eNegotiations in the context of ODR.

Chapter 17 is dedicated to yet another crucial ODR scheme that is often perceived as the most successful ODR scheme, e-Mediation. The author provides a detailed overview and assessment of e-mediation's organizational structures, models, advantages and disadvantages, challenges, prerequisites, substantive and process issues, and choice of technology. In the context of the above analysis, the author provides practical examples and information.

Chapter 18 is equally devoted to e-Arbitration as a prominent ODR scheme. The author provides a detailed overview and analysis of the prospects and challenges of e-arbitration in relation to e-arbitration agreements, e-proceedings, and e-awards. Following such analysis, the author sheds light on the recent work of the UNCITRAL's ODR group in this context as well as some successful e-arbitration initiatives prior to concluding with a brief overview of the future of e-arbitration.

The second part of this book is dedicated to mapping and tracking ODR in diverse regions and continents. On such account, chapter 19 provides a detailed overview of diverse ODR initiatives across North America. That authors offer an analysis of ODR projects in the private sector, in the public and governmental sectors, and in relation to professional organizations. The authors' review of the diverse ODR projects extends to both the USA and Canada.

Chapter 20 focuses on ODR in Europe by addressing institutional, public, and private initiatives. The authors also provided an overview of the current European landscape as well as the diverse ODR schemes employed throughout the European continent.

Chapter 21 discusses existing ODR schemes and initiatives in Australia. The authors discuss ODR projects in the government sector, the courts, and in the family sector. The authors equally shed light on the required regulatory framework including references to e-commerce, arbitration, and consumer protection laws. Prior to concluding, the authors also address the Australian Guidelines for Electronic Commerce.

Chapter 22 deals with ODR schemes and initiatives in Asia, and more specifically in China, Japan, and India, where the authors discuss the diverse ODR initiatives existing in such three major economies. The authors equally address the ODR outlook in the three States,

and the chapter includes a succinct report on the Tenth International ODR Forum held in Chennai, India on 7-9 February 2011.

Chapter 23 is concerned with mapping ODR in Latin America, where the author provides a detailed overview of the diverse regulatory initiatives in support of e-commerce and ODR, and sheds light on some promising ODR initiatives in Latin America including Mexico. The author finally concludes by referring to the ODRLatinoamerica social networking initiative for conflict resolution professionals, and by stating that the readiness of the region for the adoption of Global ODR initiatives is conditional upon the promotion of local and regional ODR services that cater for different needs.

Chapter 24 focuses on Africa as a rich and promising continent that is capable of embracing successful ODR initiatives provided that an adequate regulatory and infrastructure framework exists. The author analyzes Africa's ICT and ODR readiness, and provides an overview of the legal and regulatory matrix of ODR related instruments that are needed to boost e-commerce, e-trust, and ultimately ODR. The author concludes by shedding light on two existing ODR related initiatives in South Africa, which appears to be the leading ODR country in Africa. The author also submits that north Africa, especially Egypt, Tunisia, and Morocco rank amongst the leading African States that are capable of fostering and nurturing successful ODR initiatives.

In light of all the above mentioned, this book does offer interdisciplinary analysis of intricate, contemporary, and pervasive issues which remain in a state of flux. It is acknowledged that the ODR field is constantly evolving, and this book does represent a significant and valuable account of legal, technical, and practical scholarship on innovative topics that will continue to remain at the heart of the ODR knowledge base.

By and large, ODR is considered a global phenomenon that requires due consideration of cultural practices, global and local norms, technical and technological standards, and regulatory initiatives. This will certainly pave the way for the development and progression of ODR schemes, applications, and initiatives on local, regional, and global levels.

Finally, the editors hope that readers, whether scholars, students, or practitioners, enjoy and appreciate the availability of a treatise that combines a wealth of theoretical and practical approaches to a multifaceted phenomenon such as ODR. The chapters in the book represent a discussion of the key issues driving the development of ODR, and a lens through which readers may observe and understand the issues facing dispute resolution practitioners as we all struggle with how to integrate ODR and ICTs into 'mainline' dispute resolution theory and practice.

1 ODR: A Look at History

A Few Thoughts About the Present and Some Speculation About the Future

Ethan Katsh

ODR's origins are traceable to the early 1990s and to a prediction and an observation made at the time. The prediction was that the Internet, as it continued to evolve and as its use increased, would not be a harmonious place. This might seem obvious to anyone today when consumer and copyright disputes are commonplace, when identity theft is increasing and when anti-virus software is required simply to keep a computer operating. It was not so obvious, however, in the early to mid-1990s before there was spam, phishing, music downloading, buying and selling online, multi-player games, etc. Indeed, the hope often expressed at that time was that this new online environment for commerce, education and entertainment would find ways to avoid the kinds of conflict that many of these activities had generated in the past in the physical world.

Even some of those who did understand that a highly active, creative and potentially lucrative environment would inevitably generate disputes were, at the same time, skeptical that online resources could be used effectively to assist those involved in a dispute. Dispute resolution, at the time, was assumed to require a face to face meeting, whether in or out of court. The observation alluded to earlier was that dispute resolution, wherever and however it occurred, involved the communication and processing of information. Such interactions might occur most easily face to face but computers were information processing machines and the Internet facilitated communication. Software, by definition, manages the flow of information and, therefore, with appropriate software, interactions between disputants might be managed online in a manner that would lead to an agreement. ODR, therefore, would not only be needed but it would also be feasible.

Some of the early skepticism about the need for and use of ODR derived from the fact that the Internet had been invented in 1969 and for the first twenty to twenty-five years of its existence there were relatively few disputes. Its users during this period were mainly in academia and the military and, when there were disputes in the relatively small user population, they were settled informally. During this period of time, few ordinary citizens were aware of the Internet and if they had been aware, they would have had no way to

connect to it since the first Internet Service Provider did not appear until 1992.[1] It is also fair to say that if one had been aware of the Internet and had somehow connected to it, one would have found it both uninteresting, because of the limited range of activities supported, and uninviting, in that a certain level of computer skills was needed to engage in these activities.

Until 1992, the National Science Foundation, which was managing the Internet at the time, banned its use for commercial purposes.[2] Thus, even if one had found a way to connect to the Internet and even if one also had the computer skills to navigate the Internet, and if one did all this with the goal of purchasing something, one would not have found anything to buy. There were no consumer or commercial disputes not because there had been a systematic and intentional effort to design an environment that would not generate disputes but because there was an online population with very few ways to generate a dispute, certainly far fewer ways than are possible today. Until there were disputes there was no pressing need to think of dispute resolution and the range and quantity of disputes that would suggest a need for dispute resolution were not present until the early to mid-1990s.

1 THE ORIGINS OF ODR

The first half of the 1990s was a period of significant change in the online environment. The World Wide Web was invented in 1989 and ISPs and the first graphical browsers appeared a few years later. Netscape, the most popular browser at the time, was quite user friendly and the online population began to grow as it became easier to acquire Internet access and it was discovered that it was relatively easy to communicate and to obtain large quantities of information online.

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1 S. Ilacqua, "The First ISP", <www.usenix.org/publications/login/1999-2/isp.html>. Even by 1995, it was not very easy for ordinary citizens to obtain Internet access. In April of that year, for example, Alok Kumar wrote: By now everyone has heard of the wonders of the Internet. The media barrages us with daily articles about the Internet's incredible size, skyrocketing growth, and utter trendiness. All the cool people have email addresses and flaunt them. For the most part, however, enthusiasts ignore the challenges faced by ordinary people who try to use the Net. To most folks, the riches of this glamorous information superhighway lurk right around the corner, tantalizing but out of reach. There are several paths to Internet connectivity all based on your position in the world. If you happen to work at a high-tech company or a well connected corporation, then you will already be hooked up the Net. If you happen to be a student at almost any college or university, the school can give you direct access to the Internet via an "e-mail account". If you're still not included in the above, then welcome to the real world, you have lots of company. A. Kumar, "101 Ways to Hook Up to the Internet", <www.duke.edu/eng169s2/group4/alok/English/hookup.htm. See also *Bureau of the Census, Survey of Internet Usage*, Spring 1995, <www.census.gov/mso/www/npr/Inet95fullreport.pdf>.

2 J.P. Kesan and R.C. Shah, "Fool Us Once Shame on You – Fool Us Twice Shame on Us: What We Can Learn From the Privatizations of the Internet Backbone Network and the Domain Name System", 79 *Wash. U. L.Q.* 89 (2001), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260834>.

It was at this time, around 1994, that it began to be clear that cyberspace, in the future, would not be a harmonious place and that there would be a need for tools, resources and expertise in responding to the disputes that would occur. In 1996, the first articles about ODR appeared in a law review,[3] the National Center for Automated Information Research (NCAIR) sponsored the first conference devoted to ODR,[4] and funding from NCAIR launched the first significant ODR projects, the Virtual Magistrate, the Online Ombuds Office at the University of Massachusetts and a family dispute ODR project at the University of Maryland. At that point, the Internet was twenty-seven years old. As already noted, for much of that time it had been used by very limited numbers for fairly limited purposes. The domain name system had come into being in 1985 but in 1990 there were only 7800 domain names and a single person managed the system.[5] Formal dispute resolution systems did not exist and apparently were not needed. This changed, however, as the Internet grew in a variety of new directions. Disputes are a byproduct or side-effect of transactions and relationships since, inevitably, a percentage of interactions in any environment can be expected to encounter problems. With the surge in e-commerce, more transactions were fostered online and, as a result, more reports of disputes were occurring.

A year after the NCAIR conference, the Hewlett Foundation provided a grant to the University of Massachusetts to establish the Center for Information Technology and Dispute Resolution (later the National Center for Technology and Dispute Resolution).[6] The goal of the Center was to support the development of the field of ODR. One of the Center's first activities was to organize Cyberweek, an all-online conference that enabled over four hundred persons from many different countries to engage in discussions about ODR, to participate in simulations and to experience demonstrations of software. Cyberweek has been an ongoing event of the Center and in 2010, it was co-sponsored with the ADR Hub of Creighton University.[7]

There were several physical conferences about ODR held in the late 1990s and the early years of the twenty-first century but the one that has continued to be central to the field is the International ODR Forum. The original idea for the Forum came from Daewon Choi, an official of the United Nations Economic Commission for Europe. Mr. Choi invited me to help organize the Forum, the first two of which were held in Geneva in 2002 and 2003. Since then the Forum has been held in Melbourne (2004), Cairo (2006), Hong Kong

3 E. Katsh, "Dispute Resolution in Cyberspace", 28 *Conn. L. Rev.* (1996) 953; E.C. Lide, "ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation", 12 *Ohio St. J. On Disp. Resol.* (1996) 193.

4 <www.odr.info/ncair>.

5 There are over one hundred million domain names today. See <www.domaintools.com/internet-statistics>.

6 <www.odr.info>.

7 <cyberweek.umasslegal.org/program>.

(2007), Liverpool and Victoria (Canada) (2008), Haifa (Israel) (2009), Buenos Aires (2010), Chennai (India) (2011). The 2012 Forum will be held in Prague in June 2012.

Courts, in the mid-1990s, were beginning to struggle with jurisdictional questions such as where an event occurred if parties were in different places and were interacting online.[8] Many of the legal questions surfacing at the time, however, while interesting, were largely irrelevant to persons who found themselves involved in a dispute arising online. In the vast majority of situations where parties were in different places, land based courts and systems were not really useful options for persons who felt aggrieved.

The network's rapid communication and information processing capabilities, however, did open up opportunities for creative approaches and responses to problem solving for cases that did not go to court. In other words, many of the same forces that contributed to disputes could also be employed to resolve disputes. Today, there is little doubt that there is an ongoing and growing need for ODR. There are indeed large numbers of disputes stemming from online activities; in fact, there are a greater numbers of disputes than anyone predicted. As will be noted later, eBay itself claims to have handled over sixty million disputes during 2010. In addition, over this period of time, how and when ODR is being used has also expanded. Without neglecting the need to respond to disputes arising online, ODR has also been focusing attention on traditional kinds of disputes occurring offline. More to the point, the boundary line between the online and offline worlds is, as "the digital world merges with the physical world",[9] much less clear than it used to be. As a result, the challenge of ODR currently is less focused on where the disputes originated than it is in finding tools and resources that can be as effective in any dispute regardless of where it originated.

2 THE EVOLUTION OF ODR

In one of the earliest pieces written about ODR, it was noted that

> context can influence the approach of the neutral, the choice of process, and the behavior and attitudes of disputants. In any environment, context can affect the kinds of disputes that are likely to arise and also affect who the parties are who are likely to be involved in the dispute. Context implicitly feeds us information about the extent or nature of the injury as well as how the injury or

8 See, for example, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) and *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (1997).

9 N. Gershenfeld, *When Things Start to Think*, Coronet Books, Philidelphia 1999, p. 10.

> dispute is perceived by those involved. Context situates a dispute in a particular time and place, and we react and adjust accordingly as the parameters of the environment become clear to us.[10]

The current online environment may be a descendant of the environment that existed fifteen years ago but the context in which disputes are occurring is vastly different. The range, variety, and number of disputes stemming from online activities have grown as the range, variety and number of online activities have increased. Ten years ago, many were skeptical of the need and potential of ODR; today, it is well understood. Most importantly, ODR, which was originally focused on disputes related to online activities, is now employed in offline disputes. Rather than finding disputes that can utilize ODR, the new challenge is finding tools that can deliver trust, convenience, and expertise for many different kinds of conflicts.[11]

In any context, levels of disputing are influenced by the measures put in place to anticipate and prevent possible disputes.[12] The pioneers of the Internet were simply focused on a technical challenge, on creating new capabilities for communicating; they did not anticipate the kind of growth that has occurred and did not focus on possible long-term social consequences. For most of the first twenty-five years of its existence, the Internet did not address the issue of disputes and dispute resolution because, as noted above, there were sufficiently effective informal processes. By the early 1990s, however, this began to change as many students arrived on campus with personal computers and many people off-campus were becoming aware of the Internet. As more people acquired Internet access and as e-mail and the Web became more easily useable, it was predictable that a growing population of users would generate disputes and this in fact did occur.

In one of the earliest and most famous disputes during that time, a participant in a text-based virtual world, LambdaMoo, assaulted the virtual characters of several women participants.[13] Journalist Julian Dibbell wrote an article entitled *A Rape in Cyberspace*, which remains one of the most thought provoking essays about disputes in cyberspace.[14] It is not

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10 E. Katsh, "The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace", <www.odr.info/ncair/katsh.htm>.

11 E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Disputes in Cyberspace*, (2001) 73 ("[N]o ODR system will be used or be successful unless it is convenient to use, provides a sense of trust and confidence in it use, and also delivers expertise. Described a little differently, such systems need to facilitate access and participation, have legitimacy, and provide value.").

12 E. Katsh and O. Rabinovich-Einy, "Technology and the Future of Dispute Systems Design", *Harvard Negotiation Law Review* (forthcoming).

13 The Case of Mr. Bungle and the "Cyber-Rape", <www.albany.edu/faculty/rpy95/webtext/bungle.htm>.

14 J. Dibbell, "A Rape in Cyberspace: How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database Into a Society", <www.juliandibbell.com/texts/bungle_vv.html>. See also

surprising that the participant, whose name in this virtual world was Mr. Bungle, turned out to be a university student in New York.[15]

Early online disputes involving university students touched a broad range of behaviors. In 1994, one of the first Internet-related copyright cases involved an enterprising M.I.T. student, David LaMacchia. LaMacchia allowed others to upload and download software from his account.[16] Similarly, one of the most publicized early First Amendment disputes on the Net involved a college student from the University of Michigan.[17]

Colleges and university students are still involved in many online conflicts, most notably file sharing. However, the percentage of students in the population of Internet users is much smaller today than it was in the first half of the 1990s. In 1992, Internet Service Providers emerged and it was then possible for persons not affiliated with a university to obtain an account that would provide access to the Internet. With a larger and more global user-base, the range of online interactions as well as the range of disputes began to grow as well.

In August 1995, Jeff Bezos launched Amazon[18] and Pierre Omidyar founded eBay a month later. Netscape's famous initial stock offering was also in the summer of 1995,[19] a year after the first version of the Netscape browser was released. E-commerce depends on users not only being able to conduct transactions, but being willing to do so. Decisions about price are important in attracting the attention of interested buyers, but users still need to trust that the goods exist and will have a timely delivery.[20] Judgments about acceptable levels of risk are affected by many variables and users may assume higher risk in exchange for lower cost or higher cost in exchange for lower risk. eBay's success derived considerably from recognizing this and from putting in place a feedback system to provide buyers with more information about a seller. This system is a reputation device for trust enhancement and risk reduction that involves users posting messages about whether a transaction with a

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J. Mnookin, "Virtual(ly) Law: The Emergence of Law in LambdaMOO", <www.usc.edu/dept/annenberg/vol2/issue1/lambda.html>.

15 S. Wellman, "Radical Scholars Interface at Duke", *Accuracy in Academia*, <www.academia.org/campus_reports/1998/november_1998_1.html>.

16 Online Center for Engineering and Science at Case Western Reserve University, The *David LaMacchia* case, <www.onlineethics.org/Resources/19049/lamindex.aspx>.

17 *United States v. Alkhabaz*, 104 F.3d 1492, 1493 (6th Cir. 1997). See also "Policing the Internet: Jake Baker and Beyond", *Mich. Telecomm. & Tech. L. Rev.*, available at <www.umich.edu/~mttlr/archives/bakerconf>.

18 Amazon.com, Inc., *Annual Report* (Form 10-k), at 3, available at <http://library.corporate-ir.net/library/97/976/97664/items/193688/AMZN2005AnnualReport.pdf>.

19 K. Kelly, "We Are The Web", *Wired* (Aug. 2005), available at <www.wired.wm/wired/archive/13.08/tech.html>.

20 C. Rule, *Online Dispute Resolution for Business*, 2002, pp. 93-94.

particular user was successful. eBay's goal, and the goal of all businesses and marketplaces is to provide both low prices and low risk.

The feedback system on eBay made users feel more confident that problems would not occur but it did not eliminate disputes between buyers and sellers. In 1999, eBay asked the University of Massachusetts Amherst Center for Information Technology and Dispute Resolution to conduct a pilot project to mediate disputes between buyers and sellers.[21] The pilot project handled two hundred disputes in a two week period, by far the largest number of disputes ever handled online, and it prompted eBay to include dispute resolution as an option for buyers and sellers in the event a transaction was unsuccessful. Initially, eBay's dispute resolution process was contracted out to an Internet start-up, SquareTrade, and several years later taken over by eBay. By 2010, the number of disputes handled by eBay reached the extraordinary figure of sixty million.

During the Internet "bubble" of 1999-2000, many ODR start-ups appeared and then disappeared. A few, such as Smartsettle, Cybersettle and The Mediation Room, remain. eBay's original ODR provider, SquareTrade, shifted its attention from ODR to consumer warranties in 2006. ICANN and the Uniform Dispute Resolution Policy for resolving domain name disputes was instituted in 1999. When it began, it was a largely an offline process but over time it has become increasingly online.

As this is being written in the spring of 2011, ODR start-ups are beginning to reappear and it is worth asking whether this is a response to an actual need or is simply a new "bubble". All of the new start-ups cannot be expected to survive but the likelihood is that this is not a repeat of 1999-2000. There are a variety of reasons for this:

Interest in ODR has grown and its focus has expanded. Government agencies, such as the National Mediation Board (NMB)[22] and the Office of Government Information Services (OGIS)[23] in the United States, are adopting and promoting ODR as an effective method of resolving problems with citizens. Government use of ODR promises to be a very large market. eBay is still the most noteworthy ODR effort but there are now others that can be pointed to. Cybersettle, for example, has moved beyond its original focus on insurance disputes and is helping to resolve claims brought against New York City, *e.g.* pothole disputes. The marketplace for ODR is now offline disputes as well as those originating online and public sector disputes as well as those originating in the private sector.

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21 E. Katsh, J. Rifkin and A. Gaitenby, "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law", 15 *Ohio St. J. On Disp. Resol.* (2000), pp. 705, 708-709.

22 <www.nmb.gov>.

23 <www.nara.gov/ogis>.

Interest in ODR has broadened geographically. The annual International Forum on ODR mentioned earlier has been hosted at least once on every continent. The United Nations Commission on International Trade Law (UNCITRAL), the mail United Nations body focused on international trade law, is working on rules and policies for ODR in cross-border disputes. In Israel, *Benoam* is an online arbitration system established in 2002 to resolve subrogation claims between insurance companies over property damages incurred in "fender-bender" car accidents.[24]

Software appropriate for ODR is more available today. More software choices exist, some in general use and some, such as the Community Court of Modria.com and the Web-based applications of Juripax.com and FairOutcomes.com that were specially developed. The last ten years have also seen more interest in ODR on the part of computer scientists and more collaboration between the ODR and computer science fields.

The alternative dispute resolution (ADR) community has come to understand and accept ODR. Part of this is due to increasing use of technology generally. Mediators who may not have used the Web at all in 1999 and were unaware of its potential now use it regularly for e-mail, purchasing goods, etc., and understand the value of the Web much more.

For online disputes, the parties may be looking for a system that can handle the whole process. For offline disputes, however, the most common goal will be to find tools that can enhance elements in the process rather than managing the whole process. If mediation consists of several processes linked together, *e.g.* brainstorming, caucusing, prioritizing options, drafting, etc., software can be targeted to a particular process. For example, STORM, software developed at the University of Massachusetts facilitates brainstorming at a distance. It reduces the need for some face to face meetings and has the added benefit of allowing, if the mediator so desires, brainstorming to be conducted anonymously.[25]

As will be explained below, "conflict is a growth industry"[26] and it is less and less possible for firms to ignore disputes or treat them as a minor and insignificant issue. As explained in more detail below, the Web 2.0 model in which the value of a site derives from the contributions of users has, as an inevitable side effect, disputes. It is also increasingly recognized that ODR has value in two ways, by resolving disputes and also by being part of an institution's trust building effort. During the "bubble" it was assumed that price and convenience were all that mattered to consumers and were what would differentiate sellers from each other. Trust and perception of low risk is now understood

24 See O. Rabinovich-Einy and R. Tsur, "The Case for Greater Formality in ADR: Drawing on the Lessons of Benoam's Private Arbitration System", 34 *Vermont L. Rev.* (2010) pp. 529, 542; O. Rabinovich-Einy and R. Tsur, "Unclogging the Collision Course: The Evolution of Benoam, an Online Private Court", *ACResolution* (Winter 2010), p. 8.

25 E. Katsh and L. Wing, "Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future", (2006) 38 *University of Toledo Law Review* 1.

26 R. Fisher and W. Ury, *Getting to Yes*, New York, Penguin Books 1981, p. xvii.

to be necessary as well and ODR falls in the trust building/risk reduction category when users know that if a problem arises it will be responded to.

The era of ODR has largely paralleled the development and use of the Web. The Web was invented in 1989 but did not begin its sharp rise in use until graphical browsers such as Netscape and Internet Explorer became available several years later. This early period, later labeled Web 1.0, initially brought to users the novel capability of seeing colorful combinations of text and images on a screen and instantly obtaining information at a distance. Search engines came a little later and made finding information even easier but to anyone at that time experiencing the Web for the first time, it was astonishing simply to click on links, view a Web site that might be anywhere, and see the information one was seeking on a screen.

Web 1.0, by providing information about products for sale, was a basic piece of the infrastructure that was necessary for ecommerce to grow. There were other components that gradually appeared. Commercial sites needed not only to provide information about products but to be capable of interacting with potential customers and receiving payments. eBay, when it began, relied on buyers sending checks to sellers and, in general, it took several years for credit card holders to feel safe in providing a credit card number in paying for something. The maturing of Web 1.0 saw an increase in credit card use, reliance on databases and the development of search engines. In general, the Web progressed from providing information to providing goods and services, a progression that is understandable if one sees an interactive service as consisting of a series of information exchanges strung together.

As Web 1.0 matured, it also became more complex. Complexity increased in the sense that Web sites contained more components and many of the components were linked to other Web sites. This impacted disputes because, in general, the more components, connections and relationships there are, the more possibilities there are for something to go wrong. An electronic payment for a purchase that involves communication over a network and a bank or some other financial institution somewhere else approving the transaction while the buyer is still looking at the screen, makes a dispute more likely than when a purchase is made using cash in a physical store face to face. The movement from the original relatively simple Web site providing information to Web sites fostering many millions of transactions was also a movement that made disputes more likely.

The increase in the value and use of the Web has been rapid in the last fifteen years and largely coincided with technological developments that contributed complexity to Web sites, powerful new tools for developers and also ease of use to Web users. The following

technological trends are only a sample of rather remarkable recent advances in communications capabilities, all of which supported the growth of the Web.

Speed – Dial-up connectivity to wired broadband to wireless.
Portability and mobility – Desktop to laptop to netbook to smart phone/tablet.
Storage – Megabytes to gigabytes to terabytes.
Communications – Costly telephony to free (almost) telephony.
Digitized currency – Reliance on paper money to reliance on money in electronic form.

These and other technological developments led not only to a Web with an expanding range of capabilities but to the phenomenon labeled Web 2.0.[27] A key feature of Web 1.0 was that value derived from what the Web site owner provided. Web 2.0 sites get most of their value from users. eBay was an early Web 2.0 company since buying and selling were transactions that provided revenue to eBay but to which eBay was not a party. Wikipedia, Facebook and TripAdvisor are other examples of sites that provide a space but the actual content and value comes from what is provided by users.

This is a development that has been important for the history of ODR. As eBay learned early, as Wikipedia learned over time,[28] and as Facebook will inevitably learn, Web 2.0 companies get value from users but only if the users sense low risk in using the system. Web 1.0 companies could build trust by creating a brand but Web 2.0 sites must figure out in each case how to protect those whose involvement in the site also provides the value of the site. The hope of many Web 2.0 companies initially was that they could simply provide a space for users and not be responsible for problems that surfaced among users. As eBay and Wikipedia illustrate, over time this goal becomes less and less possible. Particularly for Web 2.0 sites, it has become clear that users need to feel as little risk as possible in using a site or they will move on to a competing site. It is in this context that it will be clear that ODR can become an asset to the enterprise rather than being viewed as something peripheral.

3 THE FUTURE TRAJECTORY OF ODR

While the current capabilities of digital devices are enormously impressive, future increases in power and reductions in cost are inevitable. Increasingly powerful information technologies provide capabilities for manipulating and, to a considerable extent, removing constraints of time and space that are present in the physical environment. They foster

27 T. O'Reilly, "What Is Web 2.0", <http://oreilly.com/web2/archive/what-is-web-20.html>.
28 <http://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution>.

entrepreneurship and creativity as faster, cheaper, and more flexible communication and information processing resources become available. They support economic growth as new markets are formed. This is the positive view. The less positive perspective displays a picture of technology-generated change that is broader and deeper and, as a consequence, likely to generate novel uses and, at the same time, more disputes and new kinds of disputes.

As already noted, innovators and entrepreneurs tend to focus more on creating, building and marketing than on trying to figure out the social consequences of what they are building. For example, the inventors of the Internet in 1969 were simply interested in accomplishing the technological feat of moving data over a network. Tim Berners-Lee, the inventor of the Web, wanted to further facilitate the distribution of information.[29] The main goal for subsequent developers of cyberspace, whether it was the creation of browsers, search engines, social media or anything else, was largely the same, to operationalize an idea and, in many cases, to operationalize the idea in a way that maximized financial return.

The late Neil Postman described the effects of technological change as follows:

> [a]ll technological change is a trade-off. I like to call it a Faustian bargain. Technology giveth and technology taketh away. This means that for every advantage a new technology offers, there is always a corresponding disadvantage. The disadvantage may exceed in importance the advantage, or the advantage may well be worth the cost. Now, this may seem to be a rather obvious idea, but you would be surprised at how many people believe that new technologies are unmixed blessings. You need only think of the enthusiasms with which most people approach their understanding of computers. Ask anyone who knows something about computers to talk about them, and you will find that they will, unabashedly and relentlessly, extol the wonders of computers. You will also find that in most cases they will completely neglect to mention any of the liabilities of computers. This is a dangerous imbalance, since the greater the wonders of a technology, the greater will be its negative consequences.[30]

The lack of attention to dispute resolution in many entrepreneurial efforts is a flaw that is compounded by the irrelevance of courts for many if not most disputants. The late Karl Llwellyn, several decades ago, had written "[w]hat, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential,

29 T. Berners-Lee, *Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web by its Inventor*, Harper, San Francisco 1999.

30 <www.mat.upm.es/~jcm/neil-postman--five-things.html>.

disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of law.... This doing something about disputes, this doing of it reasonably, is the business of law". Today, however, the business of law seems less and less to include "doing something about disputes" and it is even more difficult to find examples of it being done "reasonably". As a result, we are in an age where "alternative" dispute resolution has become the primary model for responding to conflict.

Where does this leave ODR and where can we expect ODR to be situated in the future? To many today, ODR is viewed as an extension of ADR in that it largely supports ADR processes and the third party neutral at the heart of ADR processes. It also continues the trend of locating dispute resolution outside the formal institutions supported by government. As it evolves further, however, ODR may be as different from ADR as ADR is from litigation in court.

The metaphor most often employed to explain the use of ODR is the "Fourth Party".[31] In its original and current incarnation, the "Fourth Party" primarily assists the third party neutral, generally providing conveniences and efficiencies. It embodies mostly communications capabilities that allow tasks to be performed more quickly or at a distance. The information processing capability of software is not absent but it is also less developed than the communications side.

The future potential of the "Fourth Party" and the future of ODR is likely to involve fewer advances in speed and greater advances in information processing, an evolution of the less developed side of the "Fourth Party". The authors of another chapter in this book note that:

> [w]hen a negotiation problem is modeled, a computer can act as an intelligent agent using optimization algorithms that seek the best solution...Optimization algorithms utilize detailed and highly accurate information from all parties, information that they would never provide each other and in some cases not entrust to a human mediator. With anything other than the very simplest of cases, this optimization is beyond the capabilities of any unassisted human.[32]

As the possibilities suggested by this statement are pursued, the trajectory of ODR development may be in a direction not really anticipated today, one that takes more seriously the role that information can play not only in how disputes are resolved but in how they can be prevented. The "Fourth Party", in other words, is likely to encroach on the role of

31 E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, San Francisco 2001.

32 See the chapter 16 on ODR and eNegotiation in this volume.

the third party neutral just as ADR and the third party neutral encroached on more formal dispute resolution processes.

Looked at slightly differently, ODR may even turn out to be of value to the courts. If eBay can handle many millions of disputes and government agencies can take advantage of new tools to engage citizens, courts should be able to adapt to a new kind of alternative, one that is less an alternative to litigation and more an alternative to the physical structures in which courts are located and to the inefficient and expensive use of human labor that typifies even small claims courts.[33]

ODR is the only approach to dispute resolution and prevention that can play a role not only in a highly complex future but one in which change is occurring at a rapid pace. Computer scientist Raymond Kurzweil has argued:

> An analysis of the history of technology shows that technological change is exponential, contrary to the common-sense "intuitive linear" view. So we won't experience 100 years of progress in the 21st century–it will be more like 20,000 years of progress (at today's rate). The "returns", such as chip speed and cost-effectiveness, also increase exponentially...Human life has changed far more in the twentieth century than in the nineteenth century. Human life expectancy went from 39 years in 1800 to 47 years in 1900, a 20% increase. It then increased to 77 years by 2000, a 64% increase. Although the railroad was unquestionably important, very few people were impacted by electricity, electric light, telephones, or cars by 1900. These innovations took decades to be adopted by even a quarter of the US population. Adoption of innovations today is faster by an order of magnitude.[34]

It is not unreasonable to look at the field of dispute resolution and conclude that it may also need to change "by an order of magnitude", something only ODR could provide.

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33 For a recommendation on using ODR in small claims courts, see E. Katsh and J. Aresty, "A New Face for Small Claims Court", *Boston Globe*, 29 September 2007, <www.boston.com/news/globe/editorial_opinion/oped/articles/2007/09/29/a_new_face_for_small_claims_courts>.

34 R. Kurzweil, "The Singularity", *The Reality Club*, <www.edge.org/discourse/singularity.html>.

2 Online Dispute Resolution and the Development of Theory

Leah Wing and Daniel Rainey

1 Introduction

A young person seeking higher education in the late twelfth century might have trudged his way through medieval Paris to the complex of learning centers associated with *Notre-Dame* or *Sainte-Genevieve Abbey* seeking admission. Once accepted, the student faced a daunting curriculum that, taken together, covered all the theoretical knowledge faculty deemed worth obtaining. The entire curriculum consisted of the Arts, the Law, Medicine, and Theology. As the modern notion of a University as a self-contained body of scholars and students grew, a few disciplines were added to the four core disciplines of the *Universitas scholarium* of Paris. By the late twentieth century, film studies, black studies, women's studies, computer science, and even conflict resolution had been added to the list of disciplines, each with a growing body of theory.

To put the evolution of a university-based conflict resolution curriculum into perspective, consider that a person born in the year that the world's first graduate degree in conflict resolution was created would not yet be thirty years old at the time of this writing.[1] The Center for Conflict Resolution at George Mason University was made up of faculty from a number of "traditional" disciplines, and, as do all new academic disciplines, it drew upon established theory from related established disciplines.[2] As late as 1996, authors producing works on conflict theory were citing a variety of sources for the theories informing the practice of conflict resolution. As Schellenberg noted:

> The jury is still out on whether conflict studies is to become a discipline in its own right. Some scholars have argued that this field has now developed its own literature and academic programs and therefore should be treated as an

1 The first graduate degree granting conflict resolution program in the world was founded in 1981 and housed in the Center for Conflict Resolution at George Mason University. The Center for Conflict Resolution later became the Institute for Conflict Analysis and Resolution, and finally in 2011 became the School of Conflict Analysis and Resolution.

2 See E.F. Dukes, "Public Conflict Resolution: A Transformative Approach", *Negotiation Journal* (1993) 9, 1, pp. 45-57.

> emerging discipline. Others point out that most of the work still comes from persons who identify themselves primarily with one of the more established disciplines. ... Indeed, the list of disciplines that the systematic study of conflict resolution may draw upon is very long including the full range of the social sciences and the humanities, as well as mathematics and biology.[3]

Few still would argue that conflict resolution has not emerged as an established, albeit young, discipline, and few would deny the sizeable and growing body of scholarship including conflict theory. That body is now large enough to form a coherent whole with internal divisions flourishing such as facilitative and transformative mediation[4] and stimulating substantive critiques from outside[5] as well as from within the discipline.[6]

Notwithstanding significant development on its own, conflict theory has been drawn largely from scholars and practitioners in "traditional" disciplines with an interest in the idea of and the dynamics of conflict. Conflict theorists, at a point when the practice of conflict resolution was becoming a sub-field of study in itself, sometimes struggled with how to fit alternative dispute resolution (ADR) into an overall theory of conflict. Less than a decade ago, Scimecca argued:

> I have presented ... the view that those who practice ADR will not become true professionals until ADR incorporates a theoretical base to undergird its practice, and, until it has such a base, it will remain an instrument of social control. At

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3 J.A. Schellenberg, *Conflict Resolution: Theory, Research, and Practice*, New York, State of New York Press 1996, p. 7.

4 See R.A.B. Bush and J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, San Francisco, Jossey-Bass Publishers 1994 and E.F. Dukes, "Public Conflict Resolution: A Transformative Approach", *Negotiation Journal* (1993) 9, 1, pp. 45-57.

5 See J.S. Auerbach, *Justice Without Law?*, Oxford, Oxford University Press 1983; R. Delgado, C. Dunn, P. Brown, H. Lee, and D. Hubbert, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution", *Wisconsin Law Review* (1985) 6, pp. 1359-1404; O.M. Fiss, "Against settlement", *Yale Law Journal* (1984) 93, 1984, pp. 1073-1090; T. Grillo, "The Mediation Alternative: Process Dangers for Women", *Yale Law Journal* (1991) 100, pp. 1545-1610; S. Riger, "Gender Dilemmas in Sexual Harassment Policies and Procedures", *American Psychologist* (1991) 46, 6, pp. 497-505; and N.R. Rouhana and S.H. Korper, "Case Analysis: Dealing with the Dilemmas Posed by Power Asymmetry in Intergroup Conflict", *Negotiation Journal* (1996), pp. 353-366.

6 C. Cooper, "Mediation in Black and White: Unequal Distribution of Empowerment by Police", *in* J. Asim (Ed.), *Not Guilty: Twelve Black Men Speak Out on Law, Justice, and Life*, New York, Amistad, HarperCollins 2001, pp. 125-141; R. Goldberg, "How Our Worldviews Shape Our Practice", *Conflict Resolution Quarterly* (2009) 26, 4, pp. 405-431; M.A. Trujillo, S.Y. Bowland, L.J. Myers, P.M. Richards and B. Roy (Eds.), *Re-Centering Culture and Knowledge in Conflict Resolution Practice*, Syracuse, Syracuse University Press 2008; N.A. Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?", *Harvard Negotiation Law Review* (2001), 6, pp. 1-96; L. Wing, "Mediation and Inequality Reconsidered: Bringing the Discussion to the Table", *Conflict Resolution Quarterly* (2009) Vol. 26, No. 4, pp. 383-404.

> present, I remain convinced that practitioners do little more than pay lip service to theory.[7]

Scimmeca seems to offer two arguments: first that there was no ADR theory at that time, and second that even if there were a body of ADR theory, practitioners would ignore it. Arguably, he could have been right on both counts in the early 1990s, but clearly in the interim there has developed a body of ADR theory, whether or not we pay attention to it. We suspect there are few who would still hold this "looking down the nose" attitude toward ADR, but it illustrates the progression that is to be expected in the development of theory in any discipline: an effort to separate theoretically from established disciplines, development of internally consistent theories, and, slowly, the addition of sub-disciplines or areas of study,[8] and the confidence to critique areas of weakness from within the field.[9]

Given this, what relationship does online dispute resolution (ODR) have to the conflict theory and ADR theory that has developed? To put it into perspective, consider that a person born when the term ODR was coined in the mid-1990s would, at the time of this writing in 2011, barely be eligible to legally drive an automobile in the United States. It is not surprising, then, to note that there is as yet no substantial body of ODR theory, and it should not be surprising that there persists a reluctance on the part of established conflict resolution and ADR faculty and practitioners to treat ODR as fully legitimate. We argue, therefore, that ODR has been developing without its own cogent theoretical base. Whether attempting to create ODR theories, or for the purpose of critiquing ODR, practitioners have seemed to rely on conflict resolution theory designed for and out of the Face-to-Face (F2F) offline world, and on theoretical traditions from other disciplines. A growing number of creative ways of intervening with the use of technology have yet to be analyzed sufficiently to build a proper theoretical base. While the haphazard approach to furthering ODR has seen some success, we predict that ODR practice will both demand and generate a clearer set of theories grounded in the experience of navigating disputes in non-F2F settings, and we hope our discussion here will, in some small way, help to further these efforts.

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7 J. Scimecca, "Theory and Alternative Dispute Resolution: A Contradiction in Terms?", in D. Sandole and H. van der Merwe (Eds.), *Conflict Resolution Theory and Practice*, Manchester, Manchester University Press 1993, p. 211.

8 Most "recent" academic disciplines have produced works describing the gradual definition of and development of a coherent body of theory and research. For one example particularly germane to conflict resolution and communication, see F.J. Macke, "Communication Left Speechless: A Critical Examination of the Evolution of Speech Communication as an Academic Discipline", *Communication Education* (1991) Vol. 40, Issue 2, pp. 125-143.

9 For a discussion of the growing literature critiquing from within the field, see A.L. Wing, "Social justice and mediation". (Unpublished dissertation on file at University of Massachusetts, Amherst), 2002.

2 ODR: From Whence Theory?

Theory development often is driven by perceived barriers or issues inherent in interaction, and it develops as a way to explain, and ultimately predict, behavior and dynamics in context. As Peter Zima argues:

> The word theory is related to the ancient Greek verb *theorein* which means "to view" or "to observe." So theory [...] could be somewhat generally defined as "observation." [...] This etymological background is of some importance here: for in the modern context it reminds us of the fact that theory is a very specific way of viewing objects and of relating them to one another within a special type of discourse.[10]

Therefore, to begin exploring from whence ODR theory will emerge we briefly examine what challenges and opportunities the addition of technology offers to conflict resolution interactions since we believe they will be central to stimulating new theory development, and, in Zima's words, stimulating a new, specialized type of discourse.

We start with the premise that all forms of dispute resolution are, to one degree or another, exercises in managing communication between and among parties who are interacting during conflict and conflict resolution processes.[11] Thus the dilemmas that ODR disputants and practitioners face that are in need of theorizing, (in other words those that are not effectively addressed by present theories) are likely to emerge from the impact of technology on party interaction and their conflict-related communications. Some of these include the exponentially growing speed, number, and types of disputes; others involve issues of identity (based on anonymity, false identities, or lack of understanding of cultural differences, for example). Many of these issues have already been named[12] but are still in need of theory and strategies (both human and technological) to properly address them. Interestingly, perhaps the most often cited barrier attributed to the practice of ODR is the loss of some nonverbal cues (when ODR occurs using video and audio channels), or the total loss of traditional nonverbal cues (when ODR occurs using synchronous or asynchronous

10 P.V. Zima, *What is Theory? Cultural Theory as Discourse*, London, Continuum International Publishing Group 2007, p. viii (Preface).

11 See K. Avruch, "What Do I Need to Know About Culture? A Researcher Says...", in J.P. Lederach and J.M. Jenner (Eds.), *Into the Eye of theStorm: A Handbook of International Peacebuilding*, San Francisco, Jossey-Bass 2002, pp. 75-87.

12 E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001.

text).[13] The lamentation of this loss is not surprising in the Global North where direct F2F contact is an important cultural value when communicating during conflict and is, therefore, foundational to conflict resolution theory and practice. Thus, technology is routinely viewed as a barrier creating disinterest, mistrust, and confusion over how and why ODR should be utilized. Given the importance of F2F direct contact and communication in both the culture at large and the theory, ethos, and strategies of conflict resolution, it is not a surprise that it is the lens through which ODR is viewed. Yet, continuing to use theories designed for F2F interactions to analyze the impact and possibilities of the new geography of online and other technologically-oriented environments is not adaptive. Instead, we believe it will be the realities of technology-reliant to technology-reliant (T2)[14] interactions that will drive useful theorizing about ODR.

Without new theory, how is it that ODR has been developing within the larger dispute resolution field, which has relied until recently almost entirely on F2F methods of communicating? With the advent and growth of the use of the Internet as a mode or channel of communication, a few dispute resolution practitioners have begun to incorporate technological avenues for communicating. Yet, in some settings worldwide where the internet is not as accessible as mobile phone technology, the latter has become the most dominant avenue for communication beyond F2F.[15] As is argued elsewhere in this book, dispute resolution practitioners are still only at the beginning of understanding and delving into the realm of the mobile phone. Additionally, the use of technology-dependent channels of communication for dispute resolution has yet to be formally incorporated into mainstream teaching and training about how to conduct intervention activities. Despite these conditions we note that the use of technology has begun to creep into practice with increasing momentum; often a manifestation of the ways in which the dispute resolution practitioner has incorporated the online environment into his or her own life, rather than being driven by theory or a set of techniques or strategies that are formalized into practice.

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13 This is noted by parties, mediators, as well as students in ODR classes; the latter of whom routinely identify loss of nonverbal cues as the most significant barrier to the use of ODR tools. One student noted that, "the major advantages relate to speed and convenience and that the major disadvantages relate to the loss of face-to-face non-verbal cues". D. Rainey, "Teaching Online Dispute Resolution", available through Mediate.com at: <www.mediate.com/articles/RaineyD1.cfm>. See also A. Hammond, "How Do You Write 'Yes'?: A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly* (2003) Vol. 20, No. 3, pp. 261-286.

14 Leah Wing coined this phrase to describe the technologically-reliant relationships between disputing parties and any conflict intervenor assisting in ODR; this includes the possibility that a form of technology could be serving as the intervenor (see Katsh's concept of the "Fourth Party" as described in Katsh and Rifkin 2001).

15 S. Hattotuwa, *International Peacemaking and ICT*, The 2011 International Forum on Online Dispute Resolution, 7-9 February 2011, Chennai, India; G. Szlak, "ODR in Latin America", JAMS, New York City, 25 May 2011. Contact: ROSZ – Estudio Rotman and Szlak, <www.estudiorosz.com.ar>.

For example, as email communication began to be a typical form of communication for setting up meetings both in the workplace and in practitioners' private lives, it is not a surprise that it increasingly became used by dispute resolvers to set up intake processes, share information, conduct mediation and facilitation, and to confirm appointments with parties and colleagues.[16] In this way, it has been merely an extension of avenues of communication in which the "distance" created by using technology was not seen as a threat to the process of F2F communication but rather as expediting the management of dispute resolution sessions which would/could still happen in person. In fact, many of the activities were merely being shifted from telephone or postal communications (already seen as more distant than F2F) to online interactions.

As long as there was no precipitating event to shake up the traditional dynamics of mediation, facilitation, and other forms of dispute resolution, new communication channels appear to have been simply added to ADR practice with little thought or organization or seemingly threat to parties or the field.[17] Yet, while in some ways that seamless insertion can prove fruitful, at times, it can also be harmful; for example, in the risky act of sending sensitive information via e-mail. This is perhaps, the *least* secure way to communicate, and yet even before ODR was a recognized concept parties and practitioners were routinely sending personal and sensitive information via e-mail as part of dispute resolution interventions. Even as options and awareness of ODR channels increase, non-secure online channels are being used. But awareness does seem to be growing that true ODR channels, with some security and user controls, add value. As this chapter was being written one of the authors was contacted by parties who had been told by an arbitrator that he wanted submissions by e-mail. Instead, the parties contacted the agency for whom the arbitrator was a contractor and requested a secure workspace on the agency's ODR platform, making it possible to comply with the arbitrator's desire to hear the case by submissions only, and maintaining privacy and confidentiality in a way that is not possible via e-mail. In such ways, then, the new territory of ODR continues to be charted through experimentation, creativity, and risk-taking all of which mark the history of the development of the conflict resolution field. The situation in the recent past has been an exciting place to begin, but not without drawbacks and a need for careful analysis.

The *ad hoc* developments in ODR continued until events outside of the field focused the attention of a growing number of practitioners and scholars to the possibilities of ODR:

16 L.J. Boulle, M.T. Colarella, Jr. and A.P. Picchioni, *Mediation Skills and Techniques*, Newark, Matthew Bender and Company, Inc, LexisNexis Group 2008.

17 Although we will argue that those uses of technology which appeared to substitute it for F2F are seen by many as problematic and often are avoided and mistrusted by practitioners in the field, we highlight here that incorporation of technology by most is done in ways that do not reduce F2F options.

in the early 1990s, the incremental and seemingly random evolution of the use of new technologies in ADR was changed forever. In 1992, the National Science Foundation, for the first time, allowed commercial interaction over the Internet. As a few in the conflict resolution community noticed, this changed the nature of a huge number of interactions, all of which were fraught with the possibility of conflict. Katsh and Rifkin (2001) were among the first to write about the shake-up: their ground-breaking observation was that we, as a society, were now creating a very large number of conflicts that were born online among disputants who had no practical way of engaging in traditional F2F mediation. In this environment, it was absolutely necessary to envision a mode of practice that relied on the same communication channels that were used to create the disputes, and they coined the term "Fourth Party" to describe the interaction of technology with all of the familiar elements of dispute resolution.[18] eBay became the poster child for e-disputes, and a pilot project in 1997 demonstrated that online tools could successfully be used to address online conflict. That pilot project has grown into a dispute resolution system that handles millions of cases per year for eBay. The exponential growth of Internet commerce and the realization by a segment of the ADR community that, in a significant way, a new venue for conflict and conflict resolution had been created, kicked open the door for theory development in ODR.

However, despite the open door, efforts to stimulate ODR theory making have yet to be formally organized either from within the field or by sources outside of it.[19] The results of which have left ODR in a nether-land somewhere between F2F ADR and an under-researched new terrain with new communication patterns creating conditions in which disputants have different needs and options than in F2F interactions. However, ODR, so far primarily text-based, continues to be judged by the cultural norms and theories created in and for the F2F paradigm upon which the conflict resolution field relies. This has created interesting circumstances as those experimenting with ODR have responded to the primary mode of communication through which many of these disputes developed by creating text-based tools.[20] Parties and interveners who were open to using technology were most often using the mode of communication in which they had begun their dispute in order to resolve it, and the impulse to use these channels and to focus on textual communication was understandable: often it is more efficient (allowing for asynchronous participation at the convenience of the parties), cost effective (not requiring payment for phone calls or

18 The term "Fourth Party", coined by Katsh and Rifkin, is described in E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001.

19 See E.F. Dukes, *Resolving Public Conflict*, Manchester and NY, Manchester University Press 1996, for a discussion of the infrastructure within the dispute resolution field and particularly outside of it that fostered the development of the discipline, its institutions, and theory.

20 Katsh and Rifkin (2001).

travel), and is often the only realistic option (when a cross-jurisdictional dispute of little or no monetary value is involved). In addition and importantly, as noted above, text-based elements are central to Global North conflict resolution, the handling of text documents during mediation are quite often a common element of F2F mediation,[21] and we tend to want written documents as methods to formalize agreements and to make commitments "real" and final.[22] Therefore, the choice to rely on text for handling communication during online disputing has a certain resonance with a leading cultural value of many of those who designed the first ODR processes.

However, in the face of these efforts, many in the ADR field continue to lament the loss of non-verbal cues and the unsuitability or awkwardness of using text-based technology for disputes resolution. Even with the addition of more sophisticated channels of Internet communication which allow for the voice to heard or face to be seen (*i.e.* audio and web video, etc.) the lack of more/any nonverbal communication remains a concern.[23] The use of technology to express emotions, improve relationships, increase understanding, and build trust are typically viewed as deeply antithetical to the cultural value placed on direct F2F interactions, especially in conflict resolution situations. We argue that this is a result of the communication and social interaction theories and cultural values upon which the field of dispute resolution heavily relies in the Global North. This includes contact theory which we will discuss as a substantive example to illustrate the challenges facing ODR and the need for new theory to respond to the new geography of conflict and T2T interactions.

Contact theory argues that in-person contact which takes place under certain conditions can be instrumental in reducing prejudice and enhancing understanding of and empathy for others belonging to different groups;[24] since direct contact is "the best way of reducing

21 See discussion of the one text procedure in R. Fisher, and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Boston, Houghton Mifflin 1981. For further discussion of its utilization and importance see L. Susskind and J. Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, N.P., Basic Books 1987.

22 As Boulle, Colatrella, Jr. and Picchioni (2008) point out, "it is now common practice for Agreements to Mediate to stipulate that no decision made in mediation will be final and binding until reduced to writing" (p. 299). See also R. Cohen, *Negotiating Across Cultures*, Washington, D.C., United States Institute for Peace 1991; and W.C. Warters, *Mediation in the Campus Community: Designing and Managing Effective Programs*, San Francisco, Jossey-Bass 2000.

23 E.M. Boucher, J.T. Hancock, and P.J. Dunham, "Interpersonal Sensitivity in Computer-Mediated and Face-to-Face Conversations", *Media Psychology* (2008) Vol. 11, No. 2 April-June, pp. 235-258; D. Rainey, L. Wing and E. Katsh, *Mediator Responses to Online Intervention in Labor Mediation*, (Unpublished research), University of Massachusetts, Amherst 2008.

24 See G.W. Allport, *The Nature of Prejudice*, Cambridge, MA, Addison-Wesley 1954; T.F. Pettigrew and L.R. Tropp, "A Meta-Analytic Test of Intergroup Contact Theory", *Journal of Personality and Social Psychology*, (2006) Vol. 90, No. 5, pp. 751-783.

any tension or hostility that might exist".[25] Contact Theory has significantly informed conflict resolution processes such as facilitation, mediation, and post-war reconciliation,[26] as both theory and practice are saturated with the implications of contact and communications theories based on informal and F2F interactions. Consider, for example, the heavy emphasis placed on F2F "joint sessions" that facilitators and mediators are taught to use as opportunities for parties to "tell their story" in front of "the other" and to listen to the other's story. Mainstream mediation practice, for example, assumes the use of joint sessions, with "private caucuses" being optional forums to prepare for or debrief from the significant engagements with the "other" in the joint sessions.[27] Informal, extra-legal methods of handling disputes such as mediation and facilitation are valued in no small part specifically because they offer the framework for engaging with the other disputant(s) directly and informally F2F. Third parties are trained to cultivate conditions most conducive to promoting the benefits of contact: by seeking to treat the parties as equals, fostering cooperative problem solving for mutual gain, and offering the structure necessary for productive F2F communication. These conditions central to contact theory[28] are utilized in ADR to increase understanding, foster the healing of relationships, reduce conflict, and cultivate mutually acceptable outcomes.[29]

The centrality of these attributes to informal conflict resolution processes is made more evident when we see the emphasis on disputant F2F contact in informal ADR communication strategies. In both mediation and facilitation, third parties typically structure the intervention so that the disputants can speak in front of and directly to one another;[30] mediators are often trained to create ground rules about disputants refraining from speaking to each other only as long as tension is high and then to structure opportunities for direct conversation between the parties later in the mediation process. Communication strategies within such forums also place emphasis on the parties controlling the content of their speech and the timing of when information is shared.[31] Party control over speech and the importance of F2F contact are intertwined as evidenced, for example, by the default within the mainstream approach to mediation which assumes joint sessions with all parties present and allows for rare private sessions only when the parties have something legiti-

25 R. Brown, *Group Processes: Dynamics Within and Between Groups*, Oxford, Blackwell 2000, p. 342.

26 See C. Church, A. Visser, and L.S. Johnson, "A Path to Peace or Persistence? The 'Single Identity' Approach to Conflict Resolution in Northern Ireland", *Conflict Resolution Quarterly* (2004) Vol. 21, No. 3, Spring, pp. 273-293; Dukes (1996).

27 See Boulle, Colarella, Jr. and Picchioni (2008).

28 See Allport (1954) and Pettigrew and Tropp (2006).

29 See further discussion of the literature in Church, Visser, and Johnson (2004), pp. 273-293. See Bush and Folger (1994) for an exploration of these attributes within different approaches to the mediation field.

30 For an interesting discussion of this with regards to seating arrangements during mediation see Boulle, Colarella, Jr., and Picchioni (2008), pp. 41-43.

31 Bush and Folger (1994) and Warters (2000).

mately to share only with the mediator. Party control over the content of their communication and the outcome in such settings are touted as fundamental reasons that disputants rate these informal processes as more successful in healing relationships and offering greater satisfaction with the agreements and their implementation.[32]

Alternatively, the more formalized the setting (in court or even arbitration, for example), the greater the parties' distance from each other physically, in the social context, and in their communication. Simultaneously, rules play an increased role in controlling the communication, information flow, and social interaction between the disputing parties as well as with the third party; this includes rules of evidence; procedures about who can speak about what, to whom, and when; the use of surrogate speakers (attorneys, for example); use of third parties who entirely control the communication processes; a greater reliance on private meetings (between attorney and client, side bars, *ex parte* decisions, etc.); and, importantly, the increased use of text in the proceedings. These settings are not structured to foster the benefits of contact through F2F communication driven by the parties to increase the understanding and build/improve relationships between them. Instead, the separation of people through a variety of communication interventions (use of text documents, private caucuses, surrogate speakers, and communication rules) are meant to distance the parties for a number of reasons including maintaining third party control of process and outcome; protecting parties from abusing each other; and enforcing rules to ensure procedural fairness, which may be valued above enhancing relationships. Mainstream informal dispute resolution forums such as mediation which value bringing parties physically close to each other to facilitate their empowered direct communication, therefore, avoid such strategies that cause distance in proximity and communication.

The reliance on contact theory in the conflict resolution field may have served it well in F2F contexts, but what role should it play in analyses of ODR where F2F is not often central to practices which have already emerged? As we ponder from where ODR theory might emerge, communication theory may prove useful to some extent. Although it is not the intent of this chapter to discuss every body of theory that could contribute to the development of ODR theory, there are two branches of communication theory that we think are particularly ripe for cross-discipline investigation. One is reasonably obvious: Interpersonal Deception Theory. The other is less obvious: Agenda Setting Theory.

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32 See Boulle, Colarella, Jr., and Picchioni (2008); D. Kolb and Associates, *When Talk Works: Profiles of Mediators*, San Francisco, Jossey-Bass 1994; L.R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*, Oxford, Westview 1994; and L. Susskind and J. Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, N.P., Basic Books 1987.

The applicability of Interpersonal Deception theory to ODR seems obvious to us because it tracks very closely with leading cultural perceptions, for example what is probably the most often cited image used to describe interactions on the Internet. In the famous *New Yorker* cartoon one dog, sitting at a computer screen, says to another dog, "On the Internet, nobody knows you're a dog". In somewhat more academic language, Buller and Burgoon describe development of Interpersonal Deception Theory as an attempt to explain the communication patterns and assumptions between those who wish to deceive and those who wish to detect deception.[33] This theory, and the research supporting it, is grounded in Interpersonal Communication theory focused on F2F interaction, and has been adapted to the dispute resolution context, also in the F2F environment.[34] We think the study of deception, and the development of theory surrounding perceptions of truth and deception in an online environment is central to ODR where people are not meeting F2F.

Agenda Setting Theory may also have some relevance to ODR. Agenda setting is, primarily, a mass communication theory, dealing with the phenomenon of salience transfer. Basically, the central tenet of agenda setting is that the media, by choosing what to publish or distribute, have the ability to transfer importance or urgency to one issue over another. The ability of information and communication technology (ICT) systems and the Internet to host and/or create massive multi-party discussions and to invite the creation of an almost unimaginable amount of data over varied communication channels seems to us to suggest that some variant of Agenda Setting Theory may add valuable insights into the development of ODR theory and processes.[35]

Since conflict resolution in the Global North has been built upon the value and centrality of F2F interactions as articulated by contact and the communications theories such as we have discussed above it is not surprising that attempts to handle disputes online has inevitably been viewed as restricting and threatening to the familiar forms of "direct" F2F contact. As previously mentioned, this has impacted interest in and trust for ODR. Therefore, generally, researchers are likely to continue to investigate whether technology can and does enhance "closeness", how it can help eliminate barriers and distances between people,[36] and how it can increase parties' understanding of each other; in other words, to

33 D.B. Buller and J.K. Burgoon, "Interpersonal Deception Theory", *Communication Theory* (1996) Vol. 6, Issue 3, pp. 203-242.

34 See J. Hearn, *Interpersonal Deception Theory: Ten Lessons for Negotiators*, available at Mediate.com: <www.mediate.com/articles/hearnj1.cfm>, last accessed on 16 June 2011.

35 For a discussion of the creation of massive multi-party groups, see the ODR and Government chapter in this book.

36 See R. Spears, T. Postmes, M. Lea, and A. Wolbert, "When Are Net Effects Gross Products? The Power of Influence and the Influence of Power in Computer-Mediated Communication", *Journal of Social Issues* (2002) Vol. 58, No. 1, pp. 91-107.

understand if technology, in non-F2F settings, can serve the same goals that mainstream dispute resolution practice promotes. In this way, major themes within the ODR literature will continue to focus on the attributes of ODR which directly relate to issues of party closeness and communication.[37] Research exploring, for example, technology's impact when there is geographic distance and different time zones (asynchronous engagement), language translation capacity, role of/need for video, lack of body language cues, access to emotional expression and understanding, and simultaneous textual communication (such as in multiparty synchronistic engagement of a kind not possible without talking over each other when speaking in person). Such research, unsurprisingly, applies the same expectations to ODR as for F2F mediation, facilitation, and negotiation. As noted previously, theory and cultural values from the offline F2F environment are typically assumed to be relevant tools to research and explain technologically influenced communication and social interactions. While they may have important currency, we wonder if new channels of communication do not demand a research agenda and practice that are grounded in the culture of that context.[38]

Therefore, we are encouraged that increasingly parties and practitioners are viewing the technosphere of the Internet and mobile phone technology as spaces where new forms of communication can positively impact trust and improve relationships without assuming that close, direct, F2F contact and communication are required. Whether out of experiencing such successes, maintaining faith in the newly emerging culture(s) and communication styles online, or having an adventurous spirit, ODR practitioners continue to move forward. And we believe that ODR theory development will slowly begin to emerge from the investigation of questions not only built on offline theory but also centered on the unique elements of the dispute resolution and human interaction processes occurring in online communication. Questions such as "what are common communication patterns online?"; "what difference does it make that we are not F2F?" and "in what new ways can technology serve to deepen understanding through e-communications?" can contribute to the beginnings of ODR theory building. The field could be further enriched by engaging the body of literature developing outside of the field of conflict resolution which is exploring contact theory as it relates to technology; for example, Amichai-Hamburger and McKenna (from, respectively, Bar-Ilan University and Ben Gurion University in Israel) have begun to question the impact of the Internet on social interaction generally.[39] Already there is some

37 See A. Hammond, "How Do You Write 'Yes'?: A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly* (2003) Vol. 20, No. 3, pp. 261-286.

38 For a further discussion on the importance of culture in dispute resolution, see J.P. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures*, New York, Syracuse University Press 1995.

39 Y. Amichai-Hamburger and K. McKenna, "The Contact Hypothesis Reconsidered: Interacting via the Internet", *Journal of computer-mediated communication*, 2006, available online at <http://jcmc.indiana.edu/vol11/issue3/amichai-hamburger.html>.

pioneering work in ODR examining issues specific to the online environment; one such project funded by the National Science Foundation and conducted by the University of Massachusetts at Amherst and the National Mediation Board in the US, is investigating the impact of anonymity (not available in F2F ADR) on the communication process and human interactions in ODR.[40]

However, unlike some of these new areas of research not based solely on the foundational tenets of offline ADR, we predict that much of early theory development will continue to be based on traditional theory, exploring how technology impacts distance and closeness in social interaction online and, therefore, will include a strong interest in the nature of the difference between textual and oral communication. As noted above, given the heavy emphasis on putting in writing any commitment that is to be of value, the written word carries more weight legally and thus culturally, in general, in the Global North. Therefore, for parties from such cultures or negotiating with those who are, once a communication is written it has more gravitas and carries with it a threat of legal action if it is not upheld. Therefore, to create communication spaces in which parties will be most relaxed, creative, and willing to explore their own views and, importantly, the views of others, mediators and facilitators traditionally have focused almost entirely on oral communication. From such a cultural perspective, when asking parties to "tell their stories" or list their needs/interests, by speaking, they are not "tied" to anything. In other words, they can change their minds or restate something without having to "renege" on a statement, which is often the feeling when something is put in writing. Thus, oral methods of communicating about a dispute are the typical avenues used by third parties in mediation and facilitation. Often it is only when parties have begun to reach the stage in negotiating a resolution when they are making plans about the future, and contact theory's fruits are hopefully being harvested, that third parties routinely encourage the use of text in their engagement with the parties.[41]

Interestingly, third parties themselves do utilize text before then, but they do so in ways that foster closeness between the parties; for example, to organize the communication in ways to create understanding, highlight similarities, and build momentum towards a resolution or transformation of the conflict. To accomplish this, intervenors highlight the differences and similarities between the disputing parties' stories/needs/interests either in their own notes or as "public" notes on a flip chart in front of the disputants or meeting minutes that a facilitator writes up and circulates. In the process, it is common practice

40 This research, "Process Families and Their Application to Online Dispute Resolution", is based on National Science Foundation award #0705772, <www.fastlane.nsf.gov/servlet/showaward?award=0705772>.

41 See Boulle, Colatrella, Jr. and Picchioni (2008).

for the third party to alter the communication as it becomes text listing all the concerns as "agenda items" or "interests/issues" rather than creating separate lists for each party. This strategy reduces the visual distance between the parties and builds a common task for all the parties to work together to address the issues or interests that exist between them. In other words, third parties introduce text to highlight (or at times impose) commonality as a dispute resolution strategy. Arguably, that is because the third party is trying to utilize the strength of the written word to reinforce such claims of commonality as a strategy to move the parties closer together, fostering relationships and joint problem-solving as part of the conflict resolution process. Third parties seek to use text to set up a relationship of commonality and shared commitment to dispute resolution rather than highlighting distance and differences.[42] Therefore, conflict resolution practitioners in the Global North appear to use text most often when it fosters connection and resolution.

While these efforts appear grounded in traditional F2F theories, still we believe they offer potential for some important and exciting research questions such as: Will a new culture emerge online in which text is seen in a new light as more temporal, or more flexible and malleable? Will parties become (have they already become) bi-cultural, living in two worlds, one in which text is weighted heavily and another in which it is less so or at least weighted differently? And as research questions begin to emerge directly from observing the online environment and the increasingly expanding mobile phone architecture of communication rather than concentrating only on questions birthed from the F2F world of conflict resolution, we will start to carve out an ODR research agenda that more fully reflects the realities and potential of the technosphere.

The fact that people are increasingly disputing online, in many cases across legal jurisdictions has already created many demands and opportunities for ODR, thus, providing potentially enormous data pools which could be used for theory building research. The media offered by technology has fostered innovations in both the dispute resolution field and, arguably, in cultures all around the globe offering rich possibilities for cross cultural research on ODR with partners worldwide. We believe that the mere fact that there are many with whom we communicate predominantly in text to both build relationships (romantic, professional, commercial, etc.)[43] as well as to negotiate and resolve conflicts, has undoubtedly impacted our views of the role of text as opposed to F2F oral/aural communication. With the increasing application of technology by offline dispute resolvers to

42 For a discussion of various approaches to carrying this out, see Boulle, Colatrella, Jr. and Picchioni (2008); Bush and Folger (1994); Kolb and Associates (1994); and Susskind and Cruikshank (1987).

43 Although we are reluctant to rely on their statistics, online dating services routinely cite figures in the neighborhood of 18-20% when discussing the number of marriages that began with online dating over the past 2-5 years. For example, see <http://eharmony-blog.com/1018>.

their offline interventions, greater opportunities will emerge to ask new questions about the impact on communication in hybridized settings. Will we find that the lack of F2F communication may not be seen as only creating distance? Might technological forms and tools be creating different kinds of closeness and contact? Or might it even be that closeness and understanding are not the driving values of parties in dispute resolution in online settings? Again, we argue that new approaches to researching ODR theory is needed to explore such questions.

A large segment of society and of the dispute resolution community have trouble conceptualizing the changes in social interaction brought by the Internet. A colleague nearing retirement age recently commented that his son had 300 "friends" on Facebook. An eighteen-year-old might say that this man's son was a social isolate, but our colleague commented that there were not 300 people whom he would say he really knew, much less 300 he would call his friends. Even as many of us see "going online" as constituting a different world, slowly the field of dispute resolution has begun to respond to the availability and use of technology. Dispute resolution theory has yet to catch up.

3 ODR THEORY: WHITHER ARE WE DRIFTING?

It is to be expected that traditional practitioners of dispute resolution initially saw, and to a large extent still view, the introduction of ODR tools as a degradation of and destruction of successful processes. ODR tools will radically change the way dispute resolution is pursued, but seen in context, the Internet and mobile phones are just the most recent in a long line of technologies that have radically changed social interaction. At one time, writing was a new technology, as was printing, and wireless radio, and television, etc. Humanity will survive the introduction of Internet communication, and it will adapt in ways we probably cannot envision. Conflict theories will, in time, begin to make sense of the changes in social interaction that challenge the assumption inherent in the Global North's "offline" conflict resolution theories and practice that F2F human interaction is the most valuable and vital way to address conflict.

Eventually, the development of ODR theory, we think, will challenge the fundamental traditional definitions of interaction in many ways. We predict that a general cluster of theories will develop around what we will, for lack of any precedent, refer to as "virtual interaction theory".[44] Key questions that will begin to develop virtual interaction theory will be related to the transition from one set of accepted channels and sub-channels to new

44 As yet there is no unifying term to refer to the potential universe of ODR theories Virtual Interaction Theory, a term coined by Daniel Rainey, seems to us to be as good a descriptive as any.

channels. For example, we currently use various nonverbal cues to infer motives and meaning in F2F social interaction. What online, non-F2F channels will substitute to allow us to infer meaning and motives online? Human beings will not stop inferring meaning and motive, so there must be examination of how we do it online as opposed to F2F. This research will result in theories that reflect the new virtual communication patterns. Currently, a common metaphor to describe the conflict resolution process has us dealing with parties "at the table". This is a metaphor strongly grounded in traditional practices, and indeed in contact and communication theories based on F2F interactions. Developing ODR theory will, and must, challenge the definition of "the table" and the interactions that occur "around" it.

New technology has changed our world, our interactions, ways of communicating and conflicting. This has already begun to alter our avenues and tools for addressing disputes. If we accept this reality it can require what Stuart Hall calls "a turn" in our thinking about conflict resolution:

> A turn is neither an ending nor a reversal; the process continues in the direction in which it was travelling before, but with a critical break, a deflection. After the turn, all of the terms of a paradigm are not destroyed; instead, the deflection shifts the paradigm in a direction which is different from that which one might have presupposed from the previous moment. It is not an ending, but a break.[45]

The "break" in our world has already happened; however, the "turn" in our discipline has yet to be fully realized in both senses of that word. Such a realization generates analyses to understand the dilemmas that we now face as we chart a direction forward after this "turn". We believe that theory making will be an important part of this process.

45 S. Hall, "Stuart Hall and Sarat Maharaj: Modernity and Difference", in S. Campbell and G. Tawadros (Eds.), *IV Annotations 6*, London, Institute of International Visual Arts 2001, p. 9.

3 Lessons from Online Dispute Resolution for Dispute Systems Design

Orna Rabinovich-Einy and Ethan Katsh

1 Introduction

This chapter addresses a disconnect between two bodies of literature in the ADR field – that relating to "dispute systems design" (DSD) and that relating to "online dispute resolution" (ODR). We show that the need to integrate technology into the ADR field has been understood only in a narrow area and in a limited fashion. To date, technology in dispute resolution has been relegated to the ODR field, viewing it as a niche area relevant mostly to where disputes between parties arose online or are substantively connected to technology. As we will show, the reach of new technologies is far more pervasive and holds a promise for transforming in a very deep sense some of the ADR's field's most deep-rooted assumptions in the area of DSD.

While our main focus is on the lessons of ODR for the DSD field, we believe that the merging of ODR and DSD provides important insights for both the DSD field and the ODR field. In terms of DSD, technology has been challenging some of the field's most basic assumptions, but has also generated new means for addressing and preventing disputes systematically. For ODR, the DSD perspective highlights the need to think of dispute resolution in a systematic way and emphasize the prevention of disputes, rather than focusing on tools for addressing individual disputes on an ad hoc basis.

In the sections that follow, we describe the rise of both ADR and DSD in recent decades, as well as the impact technology has had and can be expected to further have on the evolution of DSD in the future.

2 Lessons of ODR: DSD Meets Technology

2.1 The Rise of ODR

In the late 1990s, with the proliferation of internet communications, it became apparent that the online environment was fast becoming an arena that was rich with disputes but deficient in avenues for effectively addressing them. The unique features of online commu-

nication made traditional, face-to-face dispute resolution processes irrelevant. Since communications could be conducted over distances (oftentimes crossing legal jurisdictions) and identities could be easily masked, familiar means for engendering trust and ensuring the effectiveness of dispute resolution mechanisms were typically missing.[1] Even where some of these difficulties could be mitigated, courts and traditional ADR processes typically remained inaccessible due to the high costs associated with face-to-face processes that required long distance travel and legal representation for dealing with what were often small scale conflicts (in monetary terms).

The realization that the very features that have contributed to the emergence of disputes online – mainly the communication over geographical, cultural and linguistic differences – have also served to make traditional dispute resolution avenues ineffective, has given rise to the development of what has been termed "online dispute resolution", or ODR. Originally, the term referred to processes for dispute resolution that relied on ICT or were being offered through the internet for addressing conflicts that arose online (namely in the e-commerce setting or on online social forums) or were related to the digital environment (such as copyright abuse). Over time, use of such processes has expanded, and these mechanisms are increasingly being offered for the resolution of offline disputes (although interestingly some of the very early ideas for using ODR targeted offline conflicts, offering online processes for addressing family disputes).

The contemporary ODR landscape can be divided into two principal domains – *tools* and *systems*. The first area has involved the development of specific dispute resolution applications that can be used to resolve both online and offline disputes. The future of ODR is assumed by many to lie in an expanding array of tools that will open up new options for third parties.[2] Perceived in this way, ODR is not in itself a distinct field but more like a support system for mediators and arbitrators addressing individual disputes. As mediators have become more comfortable generally in the use of technology, they have increasingly been looking for software applications that could perform a discrete function and could be plugged into their practice in some way.[3] From such a perspective, the future of ODR

1 O. Rabinovich-Einy, "Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation", *Harv. Neg. L. Rev.* (2006) Vol. 11, pp. 257-258.

2 See E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* 2001, pp. 90-116; D. Larson, "Technology Mediated Dispute Resolution", *U. of Toledo L. Rev.* (2006) Vol. 38, pp. 215-217; A.R. Lodder & J. Zeleznikow, "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model", *Harv. Negot. L. Rev.* (2005) Vol. 10, pp. 287-337.

3 For example, the use of software for an online brainstorming process (see E. Katsh & L. Wing, "Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future", *Univ. of Toledo L.Rev.* (2006) Vol. 38, pp. 19-45; see also Debatagraph's visualization tools used for exploring various aspects of a problem and potential solutions (see <http://debategraph.org/>, last accessed 9 May 2011).

would seem to lie in an ongoing evolution of more and more powerful software that could be employed in more and more complicated contexts.

One example of ODR tools is the development of processes for "automated negotiation".[4] In automated negotiation, a human third party such as a mediator or arbitrator is substituted with software-based decision making. Prominent examples of such processes can be found in SquareTrade's[5] or ECODIR's[6] preliminary stage of dispute resolution, as well as in Cybersettle's double-blind bidding process.[7] Another tool consists of "negotiation support systems" – software that assists negotiating parties in determining their own interests as well as reaching a mutually accepted resolution that maximizes joint gain for all parties.[8] Finally, a variety of ODR providers including The Mediation Room,[9] Juripax[10] and Benoam[11] have been for quite some time now operating online platforms that allow mediators and arbitrators to exchange documents and communicate with parties without having to meet face-to-face. These ODR tools are now being used to facilitate the mediation process even when the disputants are in the same room and the conflicts emerged in the offline setting. While the appeal of ODR for online disputes is often obvious and is related to the lack of real alternatives, in the case of the application of ODR tools for offline disputes the main advantages of ODR have been perceived to be the accessibility, low cost and speed of communication through such tools.[12] Over the years, additional advantages have been recognized, which extend beyond efficiency-related considerations, and relate to the potential of new technologies to overcome disputant biases and facilitate parties in reaching better, pareto-optimal resolutions.[13] These qualitative advantages are perhaps even more salient in the second domain in which ODR has developed over the last two decades – the realm of ODR systems.

ODR *systems* include ODR tools (such as those described above) used in a coordinated way within a closed setting by a limited (but potentially very large) number of users who

4 See E. Katsh & O. Rabinovich-Einy, "Technology and the Future of Dispute Systems Design", forthcoming *Harv. Neg. L. Rev.* 2012.

5 Rabinovich-Einy (2006), p. 258.

6 <www.ecodir.org/odrp/details.htm>, last accessed on 7 May 2011.

7 <www.cybersettle.com/pub/home/about.aspx>, last accessed on 7 May 2011.

8 <www.smartsettle.com/resources/275-negotiation-support-system-challenges-and-opportunities>, last accessed on 7 May 2011.

9 <www.themediationroom1.com/>, last accessed on 7 May 2011.

10 <www.juripax.com/>, last accessed on 7 May 2011.

11 <www.benoam.co.il/>, last accessed on 7 May 2011.

12 O, Rabinovich-Einy, "Balancing the Scales: The Ford-Firestone Case, The Internet, and the Future Dispute Resolution Landscape", *Yale Journal of Law & Technology* (2006) Vol. 6, pp. 29-30.

13 E.M. Thiessen & J.P. McMahon, "Beyond Win-Win in Cyberspace", *Ohio St. J. on Disp. Resol* (2000) Vol. 15, pp. 643-667.

are engaged in ongoing interactions with other users and may experience similar types of problems over time. Originally, ODR systems were developed for online disputes and, in the case of systems, for online communities. The paradigmatic example of an ODR system is the eBay dispute resolution mechanism, which is well-known for its high usage rate (now handling well over sixty million disputes annually) and impressive success rates (over 80% of the disputes are satisfactorily resolved through automated mechanisms without a need for any human involvement).[14] eBay, by studying patterns of disputes and developing a system that can handle large numbers of repetitive types of conflicts, has managed to resolve such disputes early on and at a low cost (an essential feature given the low dollar value of many, although certainly not all, eBay transactions). No less important though has been the contribution of eBay's ODR system to the realm of dispute prevention. By studying the data uncovered in the dispute resolution processes, eBay has managed to uncover common sources of problems and to structure information and services on its site so that these problems do not recur.[15]

Another elaborate ODR system that has emerged in another online context, is the one established on Wikipedia.[16] The system offers its users a variety of online parallels to traditional ADR processes (*e.g.*, negotiation, mediation and arbitration), as well as some new variants (such as online polling). Alongside its dispute resolution efforts, Wikipedia is focused on dispute prevention, drawing on technological tools not only for studying patterns of disputes and effective resolution strategies, but also for automatically detecting such problems as illegitimate editing of content on its site and deleting such content immediately, even before abuse has been reported by users. What both eBay and Wikipedia understood early on was that by offering effective dispute resolution mechanisms that were integrated with the site's (or community's) principal mission, they not only satisfactorily address individual disputes, but are also able to prevent problems thereby enhancing trust in the site and improving its content and performance. In this mission, technology was not only a byproduct of such sites' online operations, but proved to be an invaluable tool in detecting problematic patterns and instituting effective, often automated, solutions.

As can be seen from the eBay and Wikipedia examples, companies that operate exclusively online have enjoyed a head start in understanding how influential a communications and information processing capability can be in shaping the nature and quantity of disputes that occur and the options for dispute resolution that will be needed. They have demonstrated the value of not treating disputes as isolated events and of treating the information

14 Katsh & Rabinovich-Einy (2012).

15 *Id.*

16 <http://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution>, last accessed on 7 May 2011.

generated by a functioning dispute system as something that needs to be attended to in order to understand how disputes surface and to identify approaches in how they might be resolved.

The lessons learned by the all-online entities that had no choice but to think in terms of a dispute system are not likely to be confined to such entities in the future. As all institutions adopt communication over the network as a significant part of their operating models, and as online interactions replace many traditional offline interactions, institutions will confront many of the forces, capabilities and opportunities that the all-online entities have already identified. Indeed, to some extent this process has already begun with some offline organizations and companies starting to integrate ODR systems. One example is the adoption of an online arbitration system for the resolution of fender-bender subrogation claims for property damages in the insurance industry in Israel.[17] An entire industry has shifted from litigating these claims to addressing them systematically through an exclusively online system. Beyond the effective and satisfactory resolution of individual disputes, the online system has led to the refinement of the rules governing such claims, thereby enhancing clarity and preventing similar problems from recurring.[18]

Another example is the current experimentation with ODR for addressing Freedom of Information Act (FOIA) disputes in the United States.[19] While up until now each government agency has addressed FOIA claims separately, the introduction of a comprehensive ODR system to deal with FOIA-related disputes promises to create links across agencies thereby enhancing efficiency and satisfaction. Through these links, the ODR system would not only be able to more effectively address systemic patterns of problems that arise repeatedly in these contexts, but would also be able to operate on a preventative level.[20]

As we can see from the brief description of the evolution of the ODR field, the line between on- and offline activities has been constantly shifting, with activities that were considered in the past to be the domain of face-to-face interaction becoming an inherent part of online communication. Parallel to these developments, the distinct characteristics of online communications have been blurred, with digital avenues becoming a primary means for communication between close friends who are based near one another as well as a means for connecting with distant strangers. These changes have meant that the domain of ODR

17 O. Rabinovich-Einy & R. Tsur, "The Case for Greater Formality in ADR: Drawing on the Lessons of Benoam's Private Arbitration System", *Vermont L. Rev.* (2010) Vol. 34, p. 542; O. Rabinovich-Einy & R. Tsur, "Unclogging the Collision Course: The Evolution of Benoam, an Online Private Court", *ACResolution* 2010, p. 8.

18 See generally, Rabinovich-Einy & Tsur "The Case of Greater Formality", 2010.

19 Katsh & Rabinovich-Einy (2012).

20 *Id.*

has also expanded, relaxing many of the assumptions about what is and is not appropriate for online resolution. In the following section, we explore another development in the ADR field that emerged around the same time as internet communications began to spread – the growth of DSD. Despite both developments being grounded in the broader field of ADR and other connections that exist between them, they have thus far occupied distinct spheres, with occasional references to one another, but no systematic effort to think about the deeper connections that exist between them.

2.2 *The Emergence of DSD*

In the late 1980s, Ury, Brett & Goldberg published a book entitled *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*.[21] This book would later be recognized as signaling the birth of the field of DSD. The authors' principal insight was that patterns of disputes can be found in closed settings and, therefore, by institutionalizing avenues for addressing disputes, conflict will be handled more effectively and satisfactorily than through ex-post measures.[22] From the very beginning, it was clear that the emerging field marked a shift from an individual perspective (that was typical of ADR up to that point) to a structural one:

Ury *et al.*'s research was based on empirical data concerning wildcat strikes in the mining industry but they also hoped to provide new perspectives on both dispute resolution and prevention systems in organizations and institutions. They were intrigued by the fact that different mines suffered from different kinds of strikes. The explanation lay in processes and levels of communication between union and management. Communication that focused on interests of the parties and that took place continuously was believed to help prevent strikes. This realization led Ury *et al.* to

> [d]istinguish three major ways of resolving disputes: to reconcile the disputants' underlying interests, to determine who is right, and to determine who has more power. Problem solving negotiation exemplifies the interests approach; going to court, the rights approach; strikes and wars, the power approach. We argue that, in general, an interests approach is less costly and more rewarding than a rights approach, which in turn is less costly and more rewarding than a power approach. The goal, then, is to design a system that provides interests-based procedures for disputants to use whenever possible and low-cost rights proce-

21 W.B. Ury *et al.*, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, 1988.
22 See *id.*, pp. xii-xiii.

dures (such as advisory arbitration) or low-cost power procedures (such as voting) as backups.[23]

In addition, Ury *et al.* offered a four-stage communications-intensive design process comprised of diagnosis, design, implementation, and finally exit, evaluation and diffusion.[24]

Several years later, Costantino & Merchant published the second major building block in the evolution of the DSD field.[25] The Costantino & Merchant book focused attention on the value of identifying patterns of disputes. Where patterns can be identified, the dispute resolution system can move beyond the resolution of individual disputes and enhance prevention on a system-wide basis.[26] In addition, Costantino & Merchant highlighted the benefits of including in the design process those who would be affected by the processes developed.[27] Such practices are clearly relevant to dispute resolution systems which employ the new capabilities embedded in digital technology.[28]

DSD can be viewed as an activity of setting, or resetting, professional, physical, and conceptual boundaries. These different kinds of boundaries can all be linked to and affected by processes of communication. In terms of professional boundaries, a new profession of dispute systems designer emerged. Designers were often trained in ADR or/and organizational development and possessed expertise in conducting the organizational dispute analysis that would underlie the dispute systems design and evaluation. While the literature emphasized the need to consult those affected by the process being designed, the use of an expert designer was generally also seen as necessary. In this environment, internal dispute handlers, such as ombudsmen, became more widely used to oversee these newly established systems.

An important goal of DSD was the establishment of a physical boundary that could separate the dispute resolution system from the other parts of the organization. The rationale was that a secure space was needed for employees to voice concerns and complaints. Confidentiality needed to be provided to those using the system in order to build trust in the system

23 See *id.*, p. XV.
24 See *id.*, pp. 65-83.
25 See C. Costantino & C. Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*, 1996.
26 See *id.*, p. 168.
27 See *id.*, p. 49.
28 See *infra* paragraph 3.

and in the neutrals who were often employees of the organization.[29] This is, of course, important but confidentiality also led to very little documentation being preserved about the operation of the dispute resolution process.[30]

Lastly, DSD has had an impact on conceptual boundaries relating to dispute resolution typologies. The establishment of distinctions among ADR processes was necessary to distinguish internal conflict management systems from the litigation process, something that was important in justifying their establishment and use. Dispute resolution literature tended to view the freedom and flexibility to select one's own dispute resolution process as a principal advantage of ADR. The framework offered by UB&G emphasized the advantages of internal systems and the value of deliberate design. Dispute systems designers have often opted for one or more processes, including mediation, arbitration, and counseling. Clear lines were drawn between interest and rights-based processes and within each category, processes such as mediation tended to have set, predetermined characteristics.

Since the publication of the Costantino & Merchant book, the DSD field has generated a substantial literature on the topic and conflict management systems have been established in many different organizations and institutions.[31] What originally was applied to the workplace setting has expanded and is being employed in additional areas, such as courts,[32] compensation facilities and funds,[33] constitution-drafting,[34] and the international sphere.[35]

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29 See H. Gadlin & E.W. Pino, "Neutrality: A Guide for the Organizational Ombudsperson", *Neg. J.* (1997) Vol. 13, pp. 17-35; M.P. Rowe, "The Corporate Ombudsman: An Overview and Analysis", *Neg. J.* (1987) Vol. 3, pp. 128-129.

30 See H. Gadlin, "The Ombudsman: What's in a Name?", *Neg. J.* (2000) Vol. 16, p. 41.

31 See for example J.P. Conbere, "Theory Building for Conflict Management System Design", *Conflict Res. Q.* (2001) Vol. 19, pp. 215-236; C.A. Costantino, "Using Interest-Based Techniques to Design Conflict Management Systems", *Neg. J.* (1996) Vol. 12, p. 207-214; D.M. Kolb & S.S. Silbey, "Enhancing the Capacity of Organizations to Deal with Disputes", *Neg. J.* (1990) Vol. 6, pp. 297-304; M.P. Rowe, "The Ombudsman's Role in a Dispute Resolution System", *Neg. J.* (1991) Vol. 7, pp. 353-360. A prominent example is Lipsky, Seeber & Fincher's comprehensive book on conflict management systems, published in 2003 (See D.B. Lipsky *et al., Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals*, 2003).

32 See C. Menkel-Meadow, "Are There Systemic Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts", *Harv. Neg. L. Rev.* (2009) Vol. 14, p. 201; O. Rabinovich-Einy, "Beyond Efficiency: The Transformation of Courts through Technology", *UCLA J. of L. & Tech.* (2008) Vol. 12, pp. 1-45.

33 See R.M. Ackerman, "The September 11th Victim Compensation Fund: An Effective Administrative Response to a National Tragedy", *Harv. Negot. L. Rev.* (2005) Vol. 10, pp. 135-229; E. Eiran, "Politics and the 2005 Gaza and North West Bank Compensation and Assistance Facility", 14 *Harv. Negot. L. Rev.* (2009) Vol. 14, pp. 101-121.

34 See Menkel-Meadow (2009), p. 219.

35 See A.K. Schneider, "The Intersection of Dispute Systems Design and Transitional Justice", *Harv. Neg. L. Rev.* (2009) Vol. 14, pp. 289-315.

In all these contexts, it has been recognized that the heart of both dispute resolution and dispute prevention lies in communication between parties as part of a decision-making process. Rather than waiting for disputes to occur, dialogues conducted by potential parties in organizational settings can lead to the design of processes for facilitating information exchange and information processing in other arenas and between different types of stakeholders. Such efforts also had the effect of dimming the distinction between formal and informal dispute resolution,[36] and between dispute resolution and norm generation.[37]

As part of the growth of the field, the Ury *et al.* and Costantino & Merchant models have been revisited in an attempt to address "second generation" DSD issues.[38] Yet, the impact and potential of digital technology on the traditional framework of DSD has not been rigorously studied.[39] Where technology has been discussed, it has been assumed that the role of technology in DSD would be to move the field in the same direction it has been heading rather than being a force that represents a change in direction. Technology however, is often "disruptive", in that it may require a reorienting of accepted practices at the same time that it brings new ways and new ideas about how to achieve goals.[40] It is our view that the introduction of digital technology will generate a highly significant and perhaps radical shift, under which DSD is transformed from a boundary-setting activity to one in which boundaries are constantly being challenged, becoming more diffuse and flexible. One example is the way in which technology has allowed the breaking of traditional distinctions that have long existed within ADR between interest- and rights-based processes, as well as the blurring of boundaries within each process type. This involves generating new types of processes and variations within each familiar category of processes, each with its own

36 For the application of DSD principles to courts: See Menkel-Meadow (2009), p. 201; O. Rabinovich-Einy (2008).

37 With the application of DSD principles in consensus-building processes, they were often being used to generate new norms and shared understandings as opposed to addressing a concrete conflict in accordance with pre-existing norms: see C. Menkel-Meadow, "Peace and Justice: Notes on the Evolution and Purposes of Legal Processes", *Geo. L. J.* (2006) Vol. 94, pp. 572-576.

38 See C.A. Costantino, "Second Generation Organizational Conflict Management Systems Design: A Practitioner's Perspective on Emerging Issues", *Harv. Neg. L. Rev.* (2009) Vol. 14, pp. 81-100; F.E. McGovern, "The Second Generation of Dispute System Design: Recurring Problems and Potential Solutions", *Ohio St. J. on Disp. Resol.* (2008) Vol. 24, pp. 53-79.

39 Notable exceptions are the Bordone article (R.C. Bordone, "Electronic Online Dispute Resolution: A Systems Approach Potential, Problems, and a Proposal", *Harv. Neg. L. Rev.* (1998) Vol. 3, pp. 175-211) and the Lipsky *et al.* book (Lipsky *et al.* (2003), pp. 329-331), which refers to the emergence of ODR. The following are some additional exceptions where ODR is mentioned: See L.B. Bingham *et al.*, "Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace", *Harv. Neg. L. Rev.* (2009) Vol. 14, pp. 14, 17; See Menkel-Meadow (2009), p. 208; S. Smith & J. Martinez, "An Analytic Framework for Dispute Systems Design", *Harv. Neg. L. Rev.* (2009) Vol. 14, pp. 145, 150, 154-156; Eiran (2009), p. 121. More commonly, however, the DSD literature ignores technology.

40 E. Katsh, *The Electronic Media and the Transformation of Law* 1989, pp. 3-5; R. Susskind, *The End of Lawyers* 2008, pp. 93-100.

qualities and traits.[41] We expand on the blurring of boundaries in DSD in these and other realms in the following section.

2.3 THE IMPACT OF NEW TECHNOLOGIES ON DSD: THE BLURRING OF TRADITIONAL BOUNDARIES

2.3.1 Professional Boundaries

The traditional DSD paradigm laid the foundation for both the creation of a new profession of dispute systems designers and a new arena for the delivery of dispute resolution services by professional ombudsmen internally within organizations. The proliferation of digital technologies seems to challenge these professional categories and the boundaries they created on several levels. For one, our understanding of dispute systems designer capabilities, qualities and training can be expected to undergo significant change.[42] While traditionally, both designers and ombudsmen were trained in such areas as organizational development and dispute resolution, the digital environment requires familiarity with the new opportunities and dangers that are associated with digital communication and the use of digital tools for locating, addressing and preventing conflicts. As digital technology becomes an inherent part of the way people interact and organizations function, it will have to be incorporated into the way people communicate about their differences. We can expect a similar development to occur in terms of the spread of ODR systems (either as standalone systems or as an addition to face-to-face ones), requiring designers to better understand the qualities of these technologies and the new opportunities they open up (as well as the barriers and costs they entail).

As part of these changes, dispute systems designers will need to learn to cooperate with technical experts in the development of ODR systems. Working together does not translate into a mere aggregation of perspectives, but may very well result in a product that is altogether different, as a result of the commingling of the very different viewpoints, work processes and orientations each of the disciplines has.

An important new perspective that is bound to deeply impact the DSD field is that of computer scientists who will inevitably be drawn to ODR. Online dispute resolution and DSD have attracted the interest of computer scientists who have recognized that ODR is

41 See *infra* paragraph 2.3.3.

42 See Costantino (2009), pp. 96-97 (raising the question what knowledge, skills and competencies dispute designers should possess).

software-based and, like all forms of dispute resolution, is focused around the management of communication and information. There are many sub-fields of computer science, such as artificial intelligence, process modeling and software engineering, that are likely to find that ODR and DSD provide opportunities for research and practical contributions. As processes that were conducted entirely face to face in the past are joined by processes that are software-based, modes of analysis and presentation are likely to change. Verbal and textual applications, for example, are likely to be joined by visual and graphical resources, by tools for reflection and even by games that provide behavioral insights. In an early example of some of this, the University of Massachusetts Departments of Computer Science and Legal Studies, along with a federal agency, the National Mediation Board, have been working together for seven years with an initial focus on the use of technology in labor disputes.[43] Computer scientists' input in the design phase proved crucial. Their role extended beyond that of mere executioners, uncovering assumptions underlying the ADR-trained designers' choice of goals and means, and, consequently, in refining the goals of these new tools as well as playing a key role in shaping their form.

In addition, user input also has the potential to transform the way in which DSD is understood and practiced. Digital technology can make participation by stakeholders much more meaningful than it has traditionally been by allowing a wide array of voices to be heard. This is due to the capabilities for synthesizing input from a large number of participants,[44] the ability to offer input at convenient times and from afar and, in some cases, the opportunity for anonymous input that comes with digital communication in the post web 2.0 era.[45] Furthermore, users can become actual designers of the dispute resolution systems on which they rely. Wikipedia's informal "mediation cabal" dispute resolution avenue is one example of a bottom up dispute resolution mechanism that exists alongside parallel processes offered by the site.[46] This is another clear manifestation of the threats technology poses for professional boundaries, as individual users, with no background in DSD (nor ADR for that matter) can establish dispute resolution processes and systems. We can expect a layperson's design to differ from that of a professional dispute systems designer, resulting in an end-product that resembles familiar processes, but also departs from some of the basic prevailing assumptions among ADR professionals. It is perhaps not surprising therefore that the mediation cabal process does not offer confidentiality to disputants and all mediation records are widely available online, much more in line with

43 Katsh & Wing (2006), pp. 33-35.

44 See B.S. Noveck, *Wiki Government: How Technology Can Make Government Better, Democracy Stronger, and Citizens More Powerful*, 2009, pp. 14, 18, 181 (for a more general discussion of the phenomenon of "crowd sourcing").

45 See Katsh & Wing (2006), pp. 40-41.

46 <http://en.wikipedia.org/wiki/Wikipedia%3AResolving_disputes>, last accessed on 7 May 2011.

the spirit of current conventions of internet users than the assumptions and policies practiced by ADR professionals. Interestingly, the formal mediation process conducted on Wikipedia, which is a product of "top down" design, is a discrete, closed process.

As we realize the ease with which users and other non-professional dispute system designers can set up a site for receiving and handling complaints, the question arises as to what value does a dispute systems designer add? One important role for professional dispute systems designers lies in their duty to ensure the fairness and effectiveness of such systems. While technology opens the door for greater user involvement and input, it is also true that the manner in which large organizations currently operate may undermine the ability of certain stakeholders to participate in the design process.[47] As we know, technology can subject stakeholders to power, not only empower them. When evaluating these questions, designers need to be aware of the fact that new technologies represent more than a change in arena for the performance of dispute resolution processes; digital technology is transforming the very nature of these processes and changing their characteristics in ways that are bound to have an important impact on stakeholders and the organization alike. As others have demonstrated, technology is by no means neutral and a particular software design reflects a preference for certain values over others.[48] While this is certainly a concern, it should be borne in mind that the danger for misconduct, negligence or incompetence by a third party conducting a private and flexible ADR process in a face-to-face setting can be of similar, if not greater concern.[49] The same software that promotes a particular value choice also makes design choices more visible, minimizes third party discretion due to enhanced structure, and allows for more ex-post study of the impact of design choices and quality control of decision-making where discretion is employed through data documentation and analysis.

Some of the pressures ODR can generate can be expected to impact dispute resolution professionals more generally, not only those designing these systems. Ombudsmen, mediators, arbitrators and others will have to feel comfortable with technological applications of dispute resolution processes and learn to incorporate these tools and systems either as a principal avenue for addressing conflict or as a supplement to more traditional channels. Undoubtedly, many dispute resolution professionals will find these developments threatening, as they will require additional training and learning.

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47 J. DeMars *et al.*, "Virtual Virtues: Ethical Considerations for an Online Dispute Resolution (ODR) Practice", *Disp. Res. Mag.* (2010) Vol. 17, pp. 6-11.

48 See generally H. Nissenbaum, "Values in Technical Design", in C. Mitcham (Ed.,), *Encyclopedia of Science Technology and Ethics* 2005, pp. ixvi, ixvi-ixx (discussing the challenges of integrating values into the design of technology).

49 See Rabinovich-Einy (2006), pp. 266-267.

The threat posed by ODR to some dispute resolution professionals, however, may run deeper than the mere need to learn new skills. As described above, some ODR tools are based on automated negotiation, which allows for the displacement of the third party. As we have seen, for simple, repetitive types of disputes, these tools can be extremely effective in resolving disputes. eBay reports an impressive 80% success rate for its automatic processes. Similarly, Cybersettle reports that its product "has been proven to reduce average claim cycles by reducing time spent in the negotiation and settlement stage of claim handling. The process provides claims management with enhanced control over of loss payments, avoids litigation costs, and lowers administrative expenses".[50] While it may seem unlikely that an automated process can be effective in addressing more complex and idiosyncratic conflicts, these developments could prove significant over time for two reasons. First, the scope of what constitutes simple, repetitive and mold-like disputes for which automated processes could provide an effective response may prove to be substantial. Second, with the evolution of technological tools, the reach of automated processes may expand to include situations that today seem too complex for automated tools.

Clearly, then, dispute systems designers and other dispute resolution professionals will have to demonstrate their relevance in an era in which access, use and control of information is changing, the nature of expertise is shifting and many of the traditional intermediaries are being displaced. They will have to gain a deeper understanding of the impact the shift to digital communication is having on their field and be able to identify what is changing and what is not.

2.3.2 Physical Boundaries

While traditional DSD theory advocated the separation of the dispute resolution system from the other parts of the organization to ensure that a secure space is created for stakeholders to voice concerns and complaints, in the digital era such rigid separation often seems impossible, even undesirable. The fear that access to dispute information may impact the integrity of the dispute resolution process when it is conducted internally can be compensated in the online setting through increased documentation and transparency regarding the content and enforceability of dispute resolution outcomes. The same technology that makes confidentiality more difficult to sustain, can also provide us with alternatives to ensure that organizations or companies do not abuse the dispute resolution data that is now made increasingly accessible to them, and can be mined and used in much more significant ways than in the past.

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50 See <www.cybersettle.com/pub/home/products.aspx>, last accessed 7 May 2011.

To understand why ODR may be attractive to disputants despite the cost in terms of confidentiality, we need to reexamine the rationale for ensuring confidentiality in ADR and the reasons behind the establishment of a "Chinese Wall" between internal dispute resolution units/processes and the rest of the organization's operations. Confidentiality is considered to be a key advantage of ADR processes over formal avenues, drawing disputants to take part in these voluntary processes and allowing them to participate more openly and meaningfully. In terms of confidentiality of proceedings within the organization, the idea was to ensure the independence and impartiality of the dispute resolvers, who were sometimes both employees of the organization and neutrals addressing disputes that relate to the organization, or in which the organization had some indirect interest. The introduction of ODR has challenged the common expectations regarding confidentiality in ADR in general and in internal dispute resolution processes in particular on three levels – the individual level of the disputants, the organizational level (separation between dispute resolution data and other units of an organization), and the intra-organizational level (translating into greater ability and willingness to share dispute resolution data across institutions).

On the individual level, because most ODR processes are based on textual communication, disputants obtain a copy of all communications exchanged as part of the process (with the exception of private communications between the dispute resolver and the other party/ies to the dispute). This means that it can be more difficult to contain the flow of dispute resolution information than in a face-to-face oral process. While parties may commit to maintaining such information secret, the difficulty of regulating party actions over such data has led at least some ODR services, such as SquareTrade when handling eBay disputes, to forego such demands altogether.[51]

But with this risk, also comes an important benefit in terms of quality control over the process, its fairness and effectiveness. Since communications are documented and parties (as well as others) can access them in real time as well as later on, this serves as a check on third party intervention. Through in depth study of particular cases as well as aggregate data on the outcomes delivered under specific third parties or ODR providers, improper conduct, poor performance and problematic process design can be quite easily uncovered.[52] In many instances, current use of ODR has been restricted to "simple", non-emotional disputes where the reduction of privacy has been viewed as insignificant. Our view, however, is that over time we can expect the privacy barrier to use of ODR to further decline. Already, social attitudes towards privacy are changing dramatically with the younger generation

51 Rabinovich-Einy (2006), pp. 274-276.
52 *Id.*, p. 278-280.

willing to disclose an abundance of personal, sensitive information online. While some have viewed these developments as a consequence of ignorance, it seems that the trend is a strong one, most likely irreversible, and its impact will inevitably be a dramatic change in our attitudes towards privacy. In terms of third party neutrality, then, while we may be sacrificing the original means for ensuring independence (mainly through separation and distance), we have opened the door for a different kind of quality control mechanism, operating on both the individual and aggregate levels.

New practices that rely on online communication and information processing are generating and potentially capturing more information during the online dispute resolution process than had occurred when the entire process was conducted face to face. DSD had previously emphasized looking for patterns of disputing conduct and addressing them during the DSD process. ODR will challenge institutions developing dispute systems as efforts are made to build trust in the process and, at the same time, use the information and value that are generated as the parties interact with each other and with the mediator.

In the introduction to *Getting to Yes*, Fisher and Ury note that "conflict is a growth industry".[53] If that was true almost three decades ago, it is even more true today. Disputes are a byproduct of transactions and relationships and when such interactions are novel and also complex, even more disputes are likely to occur. If institutions are to be trusted as they use the new media widely, the trust enhancing value of ODR will need to be recognized in contexts in which disputes do not occur or rarely occur.

As one example, the US government is aggressively trying to increase use of electronic health records.[54] As patients acquire electronic access to records that were rarely accessed when they were in paper form, they are likely to discover errors in the records and questionable diagnoses and characterizations in doctor's notes. It is to be expected that online systems for challenging and correcting information in the record will arise. In addition, these records are perceived not only to be helpful in improving individual health but in improving understanding of public health needs. The government has required that some data on the record be in a structured format that will facilitate the data, without the patient's name included, being transferred to the government for public health purposes. This has privacy implications, since there have been many cases of data being lost in the US and there is evidence that with some effort, almost any data can be re-identified and the patient's

53 R. Fisher & W.L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 1981, p. xvii.

54 D. Blumenthal & M. Tavenner, "The 'Meaningful Use' Regulation for Electronic Health Records", *New England Journal of Medicine* (2010) Vol. 363, No, 6, pp. 501-504.

name revealed. As use of such records increases, patient concerns are likely to arise and online resources for responding to these concerns will be needed.

2.3.3 *Conceptual Boundaries*

As described above, the field of DSD has been premised on the existence of a conceptual boundary separating ADR from what is not ADR and has established additional internal conceptual boundaries within ADR, defining a fixed set of processes, each with their own commonly accepted features. Despite the rhetoric of ADR being comprised of individually tailored processes, leaving much room for creativity and imagination, the reality has been one in which these processes have tended to fit a preexisting mold which is rarely revisited and questioned.

However, developments in the ODR field have undermined what have seemed like firm distinctions between process types, dispute resolution system goals and third party activities. Digital technology is transforming the nature and characteristics of the different dispute resolution processes, blurring prevailing conceptual boundaries within DSD. Dispute systems designers need to realize that the way they have done things in the past is not the only way. Dispute resolution processes can be structured differently than they have been, not only because they must be structured differently when delivered online due to technological constraints, but because it may actually prove to be a better way to design the process in a given context. This realization has blurred conceptual boundaries on several fronts: (1) accepted distinctions between ADR process types and the set of characteristics and assumptions each of these processes has been associated with; (2) common distinctions between formal and informal, confidential and public, flexible and structured are revisited as new hybrid combinations emerge; and (3) the line between the different goals of the system – dispute resolution vs. dispute prevention – are increasingly being blurred with intervention taking place very early on, even without being prompted by a complaint.

In terms of conceptual boundaries between the different ADR processes offered, the emergence of ODR, and more specifically the introduction of technology into the design of the process in the form of the "Fourth Party",[55] have both generated completely new types of processes unimaginable in the face-to-face era and have separated some familiar dispute resolution processes from qualities and traits previously considered significant, if not essential, to their design and operation. A clear example of a new process is the emergence of automated negotiation-based ODR schemes which include, as described above, problem identification processes (eBay), mechanisms for matching problems and solutions

55 Katsh & Rifkin (2001), pp. 93-95.

(SquareTrade), automated negotiation support systems (SmartSettle) and blind bidding tools (CyberSettle).

All of the above processes escape the previously existing clear cut distinction between direct negotiation and third party dispute resolution giving rise to another *sui generis* category in which the fourth party displaces the third party. In these instances, dispute systems design has a crucial role, perhaps more so than in those cases where a human third party is later involved, because in many ways it determines the power allocation between the parties and the manner in which opportunities and challenges are shared by them.

In other cases, ODR processes are offered under the same title as their offline equivalents but may in fact possess very different qualities. The Wikipedia dispute resolution system offers several examples with a somewhat untraditional arbitration process in terms of mandate and procedures for reaching a decision,[56] and an open informal mediation process which also challenges the widespread current notion that mediation should and needs to be offered confidentially.[57] Indeed, as this last point reflects, there is another conceptual boundary, perhaps several boundaries that have been blurred by the shift to digital technology. Not only have dispute resolution processes changed, but our perceptions of what constitute formal versus informal or private as opposed to public dispute resolution have been challenged by developments in the ODR field. Benoam, an online arbitration provider, provides a compelling demonstration of these trends. As stated above, Benoam handles the vast majority of property damages claims between insurance companies in Israel ("fender-bender" claims), which are contractually referred to it *in lieu* of the courts. Benoam has, therefore, in effect displaced the court system in this particular domain of disputes. While Benoam emerged as a means for providing a more efficient alternative to the court system, the system and its rules have evolved significantly over time, rendering this private system increasingly formal and less private by offering more nuanced understandings of both flexibility and confidentiality than those typically held in the dispute resolution arena. Benoam has found that in order to preserve its users' trust, it had to both regulate their conduct closely through elaborate rules and by providing consistency on a substantive level.[58] In terms of restricting user conduct and options on such matters as time extensions and choice of arbitrator, Benoam was limiting somewhat the flexibility of the process and

56 D. Hoffman & S. Mehra, "Wikitruth through Wikiorder", *Emory L. J.* (2010) Vol. 59, pp. 174-175.

57 Of course there are exceptions to this rule offline as well, but they are rare. Mediation is defined and understood to be a confidential process and indeed one in which confidentiality constitutes an essential feature. See for example, Section 8 of the Uniform Mediation Act, available at <www.mediate.com/articles/umafinalstyled.cfm>, last accessed on 7 May 2011.

58 Rabinovich-Einy & Tsur, "The Case of Greater Formality", 2010, pp. 546-552.

the control of the parties but compensated for such loss through ongoing learning of the impact of its rules on participants and outcomes.[59]

Benoam also decided to revisit its initial decision to maintain complete confidentiality of its arbitrators' rulings both internally and externally so as to enhance predictability of the system and, consequently, the consistency and fairness of resolutions rendered. While it chose to sustain external confidentiality, it curtailed somewhat the confidentiality of awards within the system by creating a space in which previous landmark decisions were published and adopted *res judicata* rules and a practice of binding precedents in the system.[60]

We can see how the Benoam case, largely due to the way in which technology has shaped the system and its design, has undermined the sharp dichotomies between flexible and structured systems on the one hand and between private and public systems on the other hand that have typically accompanied the ADR-court divide.

While DSD has traditionally been more focused on full-blown disputes and what is happening downstream, the capability to obtain information from persons or groups who do not yet perceive themselves as parties is a valuable by product of enhanced communications capabilities and, hopefully, a contributor of much more effective dispute prevention strategies. Technology can contribute to this effort in several ways. For one, it can assist in the automatic detection of problems, obviating the need to passively wait for complaints to arrive and allowing proactive remedying of a problem, even before a potential complainant has been made aware of its existence. This example can be evidenced in Wikipedia's use of bots that locate instances of infringement of its policies by editors who abuse content and harm the accuracy and reputation of the content on its site.[61]

Another, perhaps more subtle way in which digital technology promises to enhance prevention efforts is by lowering barriers for voicing complaints and concerns, allowing them to stream in at an early stage, perhaps even before they have materialized into full-fledged disputes or prior to being experienced by additional potential claimants. This impact can be evidenced in the OGIS example, mentioned above. While OGIS was set up to mediate disputes it quickly understood that providing information effectively at an early stage can make unnecessary the providing of a mediator at a later stage.[62] ODR is generally viewed as an alternative to ADR or the courts and is generally evaluated in the same way, largely in terms of numbers of disputes successfully resolved. Our experience with OGIS suggests

59 *Id.*, p. 549.
60 *Id.*, pp. 555-556.
61 Hoffman & Mehra (2010), pp. 207-208.
62 Katsh & Rabinovich-Einy (2012).

that evaluation of an ODR effort may be more complex in that the seeds of an effort to prevent disputes may lie in the technology employed to resolve disputes.

In the OGIS example, many disputes are more a consequence of poor communication than of a clash of interests. While media organizations may be highly familiar with FOIA, individuals filing requests may not understand what information they are entitled or how the process works. Persons requesting files may not trust the agency that possesses the files and the agency may not be providing adequate feedback to the requestor of its need for some additional time to make a decision. In addition, before a decision is reached, many cases involve a negotiation between agency and requestor as to reducing the scope of the request or the size of the request. There is, in other words, an informal dispute resolution process that often occurs before the decision is announced and the manner in which that occurs can affect whether the requestor files a request for assistance with OGIS.

At the same time that technology provides new tools to prevent disputes, it lowers the barriers to complaining and initiating a dispute resolution process. Merely placing forms online or providing easy access to customer service phone numbers will increase the number of filings. Amazon will facilitate the return of books, something it can automate, but makes it extremely difficult to speak to someone. The only way one can find an Amazon phone number is through a search engine, not through the Amazon website. Another way of looking at this is that Amazon can respond to grievances by technology and, by doing so, prevent a grievance from evolving into a dispute.[63]

While the success of ADR agencies that simply resolve disputes may be properly measured by the size of caseload and the manner in which disputes are resolved, agencies using ODR in a way that can impact the larger system that generates disputes may need to be looked at differently. A reduction in caseload in such instances may actually be a sign of success and improving communication may have more long term benefits than responding to individual cases. It is reasonable to assume that the use of technology provides ODR with more opportunities to identify systemic contributors to conflict and systemic opportunities to reduce conflict. In this sense, it is appropriate to characterize ODR processes as being more involved in conflict management than are ADR systems focused on resolving individual cases. The growth in use of ODR can therefore be expected to shine more light on the variables that underlie the emergence of conflicts and lead to efforts to respond to causes of problems.

63 W.L.F. Felstiner, R.L. Abel, A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming", *L. & Soc'y Rev.* (1980) Vol. 15, pp. 631-654.

Finally, digital technology allows those who offer dispute resolution services on- and offline to systematically study patterns of disputes and the effectiveness of avenues for addressing them due to the ease of gathering data and analyzing it through multiple lenses on an ongoing basis. While online entities offering ODR services have had a head start in recognizing this potential (as can be seen in the eBay example described above), there is no reason why these benefits should not be extended to those offering ADR services face-to-face and indeed, more broadly, to courts, who have also been increasingly adopting technology into their case management and filing operations, even if not as a substitute to the proceedings themselves.

The blurring of conceptual boundaries on all three fronts described above calls for an ongoing reevaluation of the assumptions and conceptions that underlie current design of dispute resolution systems and processes, opening up new possibilities and options tailored to particular circumstances.

3 CONCLUSION

Alternative dispute resolution processes have become the primary form of dispute resolution during the last several decades. In the late 1980s, after approximately a decade of growth, it was realized that ADR needed not only skilled practitioners but systems. These systems either assisted practitioners as caseloads increased, or identified causes of disputes and reduced the levels of disputing. After a decade or so of growth in the use of ODR, something very similar is occurring. An array of online tools is being developed to assist practitioners and parties to resolve both online and offline disputes. As we point out in this chapter and as will be developed at greater length in a forthcoming article, ODR needs to orient itself to systems as well as tools and ADR needs to incorporate new technologies into the theory and practice of dispute systems design.[64]

The attraction of ADR at its origins lay mostly in the hope for the resolution of disputes more efficiently, quickly and conveniently than occurred in court. Over time, the value of ADR in being able to generate outcomes that were also more flexible and responsive to the disputant's needs and interests became clear. ODR, in its original form, was also perceived to be largely aimed at providing disputants, often located in different jurisdictions, with a convenient and efficient alternative when no face to face alternative was feasible. Increasingly, however, ODR applications are being linked to powerful information

64 E. Katsh & O. Rabinovich-Einy, "Technology and the Future of Dispute System Design", *Harv. Neg. L. Rev.* 2012 (forthcoming).

machines, machines that either enhance the face to face process or provide parties with alternatives not possible in face to face processes.

Dispute systems design which employs technology and also embeds technology in the system created is likely to lead ODR down a path that will generate new options, new challenges, new roles and new expectations. DSD oriented around ADR highlighted new professional roles and conceptual frameworks, and technology-oriented DSD will likely do the same. The use of technology tends to lead both to the emergence of more complex processes and also to technological resources to manage these more complex processes. Information machines should be particularly adept at preventing disputes by tracking cases and identifying causes of problems. Technology can not only reinforce processes but change them and this is something that is inevitable as the field of DSD itself is transformed by information and communications technologies.

4 Artificial Intelligence and Online Dispute Resolution

Arno R. Lodder and John Zeleznikow

1 Introduction

At the regularly organized UN Forums on ODR, the topic of Artificial Intelligence (AI) and Online Dispute Resolution (ODR) has not been addressed very often.[1] In our 2005 *Harvard Negotiation Law Journal* article we claim:

> Artificial Intelligence involves the study of automated human intelligence. This includes both practically-oriented research, such as building computer applications that perform tasks requiring human intelligence, and fundamental research, such as determining how to represent knowledge in a computer-comprehensible form. At the intersection of Artificial Intelligence on the one hand and law on the other lies a field dedicated to the use of advanced computer technology for legal purposes: Artificial Intelligence and Law.[2]

This chapter examines current research on Artificial Intelligence, Negotiation and Online Dispute Resolution and investigates the development of current applications.

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1 Exceptions include A.R. Lodder and E.M. Thiessen, "The Role of Artificial Intelligence in Online Dispute Resolution", *Proceedings of the UNECE Forum on ODR 2003*, (<www.odr.info/unece2003>) and E.M. Thiessen and J. Zeleznikow, "Technical Aspects of Online Dispute Resolution Challenges and Opportunities", *Proceedings of the United Nations Annual Forum on Online Dispute Resolution 2004* (<www.odr.info/unforum2004/thiessen_zeleznikow.htm>). The authors of this chapter have been working on ODR topics for over ten years now, but for approximately twenty years have also been active in the field of Artificial Intelligence and Law. For an introduction see A.R. Lodder and A. Oskamp (Eds.), *Information Technology and Lawyers. Advanced Technology in the Legal Domain, from Challenges to Daily Routine*, Springer. Moreover, the authors also initiated the ODR workshop series that have been held since 2003 in conjunction with either the International Conference on AI & Law, or the JURIX conferences. In particular the latter indicates there is quite some activity on the intersection of AI and ODR.

2 A.R. Lodder and J. Zeleznikow, "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Systems in a Three Step Mode", *The Harvard Negotiation Law Review* (2005) 10, pp. 287-338.

2 THE LODDER-ZELEZNIKOW THREE STEP MODEL FOR ONLINE DISPUTE RESOLUTION

We have developed a three step model for Online Dispute Resolution.[3] Their Online Dispute Resolution environment should be envisioned as a virtual space in which disputants have a variety of dispute resolution tools at their disposal. Participants can select any tool they consider appropriate for the resolution of their conflict and use the tools in any order or manner they desire, or they can be guided through the process.

The proposed three-step model is based on a fixed order. The system proposed conforms to the following sequencing, which in our opinion produces the most effective Online Dispute Resolution environment:[4]

1. First, the negotiation support tool should provide feedback on the likely outcome(s) of the dispute if the negotiation were to fail – *i.e.*, the "best alternative to a negotiated agreement" (BATNA).
2. Second, the tool should attempt to resolve any existing conflicts using argumentation or dialogue techniques.
3. Third, for those issues not resolved in step two, the tool should employ decision analysis techniques and compensation/trade-off strategies in order to facilitate resolution of the dispute.

Finally, if the result from step three is not acceptable to the parties, the tool should allow the parties to return to step two and repeat the process recursively until either the dispute is resolved or a stalemate occurs. A stalemate occurs when no progress is made when moving from step two to step three or vice versa. Even if a stalemate occurs, suitable forms of Alternative Dispute Resolution (such as blind bidding or arbitration) can be used on a smaller set of issues. By narrowing the issues, time and money can be saved. Further, the disputants may feel it is no longer worth the pain of trying to achieve their initially desired goals.

3 DECISION SUPPORT SYSTEMS

Decision Support Systems supplement human knowledge management skills with computer-based means for managing knowledge. They accept, store, use, receive and present knowledge pertinent to the decisions being made. Decision support tools help decision-

3 *Id.*

4 Unlike many current Online Dispute Resolution Systems, it does not attempt to merely replicate traditional offline ADR systems into an online environment.

makers improve their performance whilst decision-making tools automate the process, leaving a minimal role for the user.[5]

Tools that have been used to develop intelligent negotiation support systems include:

1. *Rule-based reasoning* – where the knowledge of a specific legal domain is represented as a collection of rules of the form *if* <condition(s)> *then* action/conclusion.
2. *Case-based reasoning* – which uses previous experience to analyse or solve a new problem, explain why previous experiences are or are not similar to the present problem and adapts past solutions to meet the requirements.
3. *Machine learning* – where the artificial intelligence system attempts to learn new knowledge automatically.
4. *Neural networks* – A neural network consists of many self-adjusting processing elements cooperating in a densely interconnected network. Each processing element generates a single output signal which is transmitted to the other processing elements. The output signal of a processing element depends on the inputs to the processing element: each input is gated by a weighting factor that determines the amount of influence that the input will have on the output. The strength of the weighting factors is adjusted autonomously by the processing element as data is processed.

Traditionally, negotiation support systems have been template based, with little attention given to the role the system itself should play in negotiations and decision-making support. The primary role of these systems has been to demonstrate to users how close (or far) they are from a negotiated settlement. The systems do not specifically suggest solutions to users. However, by informing users of the issues in dispute and a measure of the level of the disagreement, they provide some decision support.

Eidelman[6] discusses two template-based software systems that are available to help lawyers negotiate: *Negotiator Pro* and *The Art of Negotiating.*

DEUS is a template-based system that displays the level of disagreement, with respect to each item, between disputants.[7] The goals of the parties (and their offers) were set on screen side by side. The model underpinning the program calculates the level of agreement and disagreement between the litigants' goals at any given time. The disputants reach a negotiated settlement when the difference between the goals is reduced to nil. DEUS is useful

5 J. Zeleznikow, "Risk, Negotiation and Argumentation – A Decision Support System Based Approach", *Law, Probability and Risk* (2002), 1 pp. 37-48.

6 J.A. Eidelman, "Software for Negotiations", *Law Practice Management* (2003), 19(7), pp. 50-55.

7 J. Zeleznikow *et al.*, "Computer Tools for aAding Legal Negotiation", *ACIS95 – Sixth Australasian Conference on Information Systems*, Curtin University of Technology, Perth, pp. 231-251.

for gaining an understanding of what issues are in dispute and the extent of the dispute over these issues.

INSPIRE was initially a template-based negotiation support system that used utility functions to graph offers.[8] It enabled disputants to negotiate through the Internet, making extensive use of email and web browser facilities. The system displayed previous and present offers, and used utility functions to evaluate proposals determined to be Pareto-optimal.[9] Disputants communicated by exchanging offers and electronic mail, and could check the closeness of a package to their initial preferences through a utility graph function.

4 USING GAME THEORY AS A BASIS FOR PROVIDING INTELLIGENT NEGOTIATION SUPPORT

Traditional negotiation decision support has focused upon providing users with decision support on how they might best obtain their goals. Such advice is often based on Nash's principles of optimal negotiation or bargaining.[10] Game theory, as opposed to behavioural and descriptive studies, provides formal and normative approaches to model bargaining.

4.1 Adjusted Winner and Smartsettle

Two widely known and used Negotiation Support systems are Adjusted Winner[11] and Smartsettle.[12] Both use game theoretic techniques to provide advice about what they claim are *fair* solutions. These algorithms are fair in the sense that each disputant's desire is equally met. They do not however meet concerns about justice. For example in a Family Law dispute, if the parents were only interested in their own desires and not the paramount

8 G.E. Kersten, "Support for Group Decisions and Negotiations", in J. Climaco. (ed.) *An Overview, in Multiple Criteria Decision Making and Support*, Heidelberg, Springer Verlag 1997.

9 Pareto-optimality refers to a situation where at least one party is better off, without making other parties worse off.

10 Nash showed that a unique optimal solution could be found by maximizing the product of the utilities for cooperative negotiators. He theorized that "we idealize the bargaining problem by assuming that the two individuals are highly rational, that each can accurately compare his desires for various things, that they are equal in bargaining skill, and that each has full knowledge of the tastes and preferences of the other". J. Nash, "Two Person Cooperative Games", *Econometrica* (1953), 21, pp. 128-140.

11 S.J. Brams and A.D. Taylor, *Fair Division, from Cake Cutting to Dispute Resolution*, Cambridge, Cambridge University Press 1996. Adjusted Winner principles have now been developed by Fair Outcomes, Inc. (see <www.appellex.com/>, last accessed 2 April 2011) which provides parties involved in disputes or negotiations with access to systems that is claimed allow fair and equitable outcomes to be achieved with remarkable efficiency. Each of these systems is grounded in mathematical theories of fair division and of games.

12 See <www.smartsettle.com/>, last accessed 2 April 2011, where examples of industrial relations, international conflicts and insurance disputes are given.

interests of the children, neither system would promote the interests of the children. This is contrary to the notion of fairness in Australian Family Law, where the interests of the children are paramount.

Both systems require users to rank and value each issue in dispute, by allocating the sum of one hundred points amongst all the issues. Given these numbers, game theoretic optimisation algorithms are then used to optimise, to an identical extent, each user's desires.

Adjusted Winner divides *n* divisible goods between two parties as fairly as possible.[13] Adjusted Winner starts with the designation of the items in a dispute. If either party says an item is in the dispute, then it is added to the dispute list.[14]

The parties then indicate how much they value each item, by distributing 100 points across them.[15] This information, which may or may not be made public, becomes the basis for fairly dividing the goods and issues at a later stage. Once the points have been assigned by both parties (in secret), a mediator (or a computer) can use Adjusted Winner to allocate the items to each party, and to determine which item (there will be at most one) may need to be divided.

Brams and Taylor claim[16] that the Adjusted Winner algorithm is envy-free,[17] equitable,[18] and efficient.[19]

Thiessen and MacMahon claim that negotiation support packages can assist parties to overcome the challenges of conventional negotiation through a range of analytical tools to clarify interests, identify tradeoffs, recognise party satisfaction and generate optimal solutions.[20] Smartsettle is an interactive computer program developed to assist those involved in negotiating agreements among parties having conflicting objectives. It can be

13 See <www.nyu.edu/projects/adjustedwinner/>, last accessed 2 April 2011 for examples and to use the Adjusted Winner software.

14 The other party could of course give the item the value zero.

15 In fact if the sum of the items was not 100, the numbers should be scaled. Essentially the disputants are being asked how they rank and value the items in dispute.

16 Brams and Taylor (1996).

17 Neither party would want to trade their allocation for their opponent's allocation since both would receive fewer points by accepting their opponent's allocation.

18 Since both parties receive the same number of points.

19 The formal proof in Brams and Taylor (1996) show that there can be *no better* allocation for both players. It should be noted that the initial allocation is efficient, since each player receives all the goods he or she most values, and the equitability adjustment step does not affect efficiency.

20 E.M. Thiessen and J.P. MacMahon, "Beyond Win-Win in Cyberspace", *Ohio State Journal on Dispute Resolution* (2000), 15, p. 643.

used during the negotiation process by opposing parties or by a professional mediator. On the basis of information provided to the program, in confidence, by each party, it can help all parties identify feasible alternatives, if any exist, that should be preferred to each party's proposal. If such alternatives do not exist, the program can help parties develop counter proposals.

Bellucci and Zeleznikow have developed a number of systems that use game theoretic techniques to provide interest based advice about Australian Family Law disputes.

4.2 Family_Winner

Family_Winner takes a common pool of items and distributes them between two parties based on the value of associated ratings.[21] Each item is listed with two ratings (a rating is posted by each party), which signify the item's importance to the party. The algorithm to determine which items are allocated to whom works on the premise that each parties' ratings sum to 100; thereby forcing parties to set priorities. The basic premise of the system is that it allocates items based on whoever values them more. Once an item has been allocated to a party, the ratings of the remaining items are modified (by firing trade-off equations) to ensure the items (and their associated ratings) are ready for the next round of allocation.

Family_Winner allocates items to one of two parties in the dispute. Family_Winner's method of decision support involves a complex number of techniques, including the incorporation of an Issue Decomposition Hierarchy, a Compensation and Trade-off strategy, and an Allocation strategy. The trade-offs pertaining to a disputant are graphically displayed through a series of trade-off maps, while an Issue Decomposition Hierarchy enables disputants to decompose issues to any required level of specification.

When evaluating the Family_Winner system,[22] were made aware of the limitations of using integrative negotiation for providing family mediation decision support. While both the evaluating solicitors and mediators were very impressed with the way Family_Winner suggested trade-offs and compromises, they had one major concern – that in focusing upon negotiation, the system had ignored the issues of justice. For example, Australian Family Law is based upon the paramount needs of the children rather than the interests

21 E. Bellucci and J. Zeleznikow, "Developing Negotiation Decision Support Systems that Support Mediators: A Case Study of the Family_Winner System", *Journal of Artificial Intelligence and Law* (2006), 13(2), pp. 233-271.

22 *Id.*

of the parents. Thus a fair decision meets the needs of the children. So, in distributing property the wealth and needs of the family must be taken into consideration, as well as the contribution each partner made to the marriage.

Given that negotiation support systems should incorporate issues of fairness as well as integrative bargaining, we now discuss the AssetDivider system which combines both principles.

4.3 *The AssetDivider System*

Given that negotiation support systems should incorporate issues of fairness as well as integrative bargaining, Bellucci developed AssetDivider system which combines both principles.[23] AssetDivider incorporates the basis of Family_Winner's allocation and trade-off strategy to decide upon the allocation of assets based on interests and an item's monetary value. The monetary value in a family law property dispute may be compared to the relative importance of an issue in dispute in an international dispute. In a family property dispute one party may have a high emotional attachment to a record collection which has a minimal financial value. Similarly, in an international conflict, one party might be very interested in receiving an apology for a perceived injustice perpetrated by the other party, but otherwise there is minimal compensation for the proposed injustice.

AssetDivider accepts a list of items together with ratings (two per item) to indicate the item's importance to a party. In addition it also accepts the current monetary value of each item in dispute. It is assumed that this dollar value has been negotiated (if necessary) before AssetDivider is used.[24] Accordingly, only one dollar value is entered per item. The proposed percentage split is also entered; this reflects what percentage of the common pool each party is likely to receive in the settlement. AssetDivider's output consists of a list of items allocated to each party. All of the items (except one) on the allocation lists are provided in the intake screen by the disputants. The additional item is a "payout" item, which reflects the amount of money a disputant would need to pay the other party for the items they have been allocated. The ratings of issues are normalised to sum to 100. The level of discourse surrounding an issue can be measured by calculating the numerical distance between the ratings of an issue assigned by each of the parties.

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23 E. Bellucci, "AssetDivider: A New Mediation Tool in Australian Family Law", in *HUCOM 2008: Proceedings of the First International Working Conference on Human Factors and Computational Models in Negotiation*, Delft, Delft University of Technology, pp. 11-18.

24 Sometimes the parties cannot agree on the monetary value of the item. In this case, mediators would reference standard objective tables and the like to reach a consensus. For example, if parties are arguing over the value of a car, then mediators may access websites that gave independent valuations, such as <redbook.com.au>.

AssetDivider's allocation strategy works by allocating an item to the party whose rating is the highest (*i.e.* to parties according to whoever values them the most). It then checks the dollar value of items it has been allocated previously (that is, their current list of items), the dollar value of the item presently allocated and the dollar amount permitted under the percentage split given by mediators. If by allocating the item in question the party exceeds its permitted amount, the item is removed from its allocation list and placed back into negotiation. In this case, the item has not been allocated to a party. If the dollar value of the item was within the limits of the amount permitted under the percentage split rule, then the allocation proceeds.

Once an item has been allocated to a party, the remaining ratings (of items still in dispute) are modified by trade-off equations. These modifications try to mimic the effect losing or gaining an item will have on the rest of the items still in dispute. The equations directly modify ratings by comparing each one against that of the item recently lost or won (each party's set of ratings are modified as a result of an allocation). The equations update ratings based on a number of variables whether the item allocated was lost or gained, the value of the allocated item in relation to items still in dispute and the value of the item whose rating will change as a result. Only the "losing party" in AssetDivider is compensated by the trade-off equations modifying ratings (whereas in Family_Winner both winning and losing parties were affected).

5 NEGOTIATION SUPPORT SYSTEMS

5.1 *BATNAs and Bargaining in the Shadow of the Law*

Principled negotiation promotes deciding issues on their merits rather than through a haggling process focused on what each side says it will and will not do.[25] Amongst the features of principled negotiation are:

1. separating the people from the problem;
2. focusing upon interests rather than positions;
3. insisting upon objective criteria; and
4. knowing your *BATNA*. – The reason you negotiate with someone is to produce better results than would otherwise occur. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of: either a) entering into an

25 R. Fisher and W. Ury, *Getting to YES: Negotiating Agreement Without Giving In*, Boston, Haughton Mifflin 1981.

agreement that you would be better off rejecting or b) rejecting an agreement you would be better off entering into.

Mnookin and Kornhauser introduced the bargaining in the shadow of the trial concept.[26] By examining the case of divorce law, they contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes. Most negotiations in law are often conducted in the shadow of the Law (*i.e.* bargaining in legal domains mimics the probable outcome of litigation).[27]

Related to the concept of a BATNA is the concept of Bargaining in the Shadow of the Law. In writing about the Vanishing American Trial, Galanter argues that whilst litigation in the United States is increasing, the number of trials decided by US judges has declined drastically.[28] Two of the reasons for this phenomenon are because average trials are getting longer and more complex and litigants are using alternative forms of Dispute Resolution.

By developing BATNAs for specific disputes and understanding the bargaining that takes place in the shadow of the law, we can construct useful tools on which negotiation discussions can commence.

5.2 *Intelligent Negotiation Support Systems*

The earliest negotiation support systems that used artificial intelligence were developed by the Rand Corporation in the early 1980s to advise upon risk assessment in damages claims. Lift Dispatching System (LDS) assisted legal experts in settling product liability cases.[29] LDS's knowledge consisted of legislation, case law and, importantly, informal principles and strategies used by lawyers and claims adjustors in settling cases.

NEGOPLAN is a rule-based system written in PROLOG.[30] It addresses a complex, two-party negotiation problem containing the following characteristics: a) many negotiation

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26 R. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce", *Yale Law Journal* (1979), 88, pp. 950-997.

27 R. Cooter, S. Marks and R. Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour", *The Journal of Legal Studies* (1982), 11(2), pp. 225-251. Discusses Bargaining in the Shadow of the Law for civil cases. This model now dominates the literature on civil settlements.

28 M. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts", *Journal of Empirical Legal Studies* (2004),1(3), pp. 459-570.

29 D.A. Waterman, J. Paul and M. Peterson, "Expert Systems for Legal Decision Making", *Expert Systems* 3 (1986), (4), pp. 212-226.

30 S. Matwin *et al.*, "NEGOPLAN: An Expert System Shell for Negotiation Support", *IEEE Expert* (1989), 4(4), pp. 50-62.

issues that are elements of a negotiating party's position; b) negotiation goals that can be reduced to unequivocal statements about the problem domain, and that represent negotiation issues; c) a fluid negotiating environment characterised by changing issues and relations between them; and d) parties negotiating to achieve goals that may change.

The NEGOPLAN method does not simulate the entire negotiation process. It gives one party a competitive advantage. The opposing party's goals and subgoals are hidden from the side supported by NEGOPLAN. The opposing party reveals only those issues that are the subject of the bargaining. NEGOPLAN has been used to advise upon industrial disputes in the Canadian paper industry.

PERSUADER integrated case-based reasoning and game theory to provide decision support with regard to US labor disputes.[31] One of the crucial characteristics of negotiation support is systems that are capable of improving their performance, both in terms of efficiency and solution quality, by employing machine learning techniques. The model integrates case-based reasoning and decision theoretic techniques (multi-attribute utilities) to provide enhanced conflict resolution and negotiation support in group problem solving. In contrast to quantitative models or expert systems that solve each problem from scratch and discard the solution at the end of problem solving, case-based reasoning retains the process and results of its computational decisions so that they can be re-used to solve future related problems. Case-based reasoning is a powerful learning method since it enables a system not only to exploit previous successful decisions, thus short-cutting possibly long reasoning chains, but also to profit from previous failures by using them to recognize similar failures in advance so they can be avoided in the future.

Split-Up provides advice on property distribution following divorce.[32] The aim of the approach used in developing Split-Up was to identify, with domain experts, relevant factors in the distribution of property under Australian family law. They then wanted to assemble a data set of values on these factors from past cases that can be fed to machine learning programs such as neural networks.

Ninety-four variables were identified as relevant for a determination in consultation with experts. The way the factors combine was not elicited from experts as rules or complex formulas. Rather, values on the ninety-four variables were to be extracted from cases pre-

31 K. Sycara, "Machine Learning for Intelligent Support of Conflict Resolution", *Decision Support Systems* (1993), 10, pp. 121-136.

32 A. Stranieri *et al.*, "A Hybrid-Neural Approach to the Automation of Legal Reasoning in the Discretionary Domain of Family Law in Australia", *Artificial Intelligence and Law* 1999, 7(2-3), pp. 153-183, 1999.

viously decided, so that a neural network could learn to mimic the way in which judges had combined variables.

Whilst the Split-Up system was not originally designed to support legal negotiation, it is capable of doing so. Split-Up can be directly used to proffer advice in determining your BATNA. The following example illustrates this point.[33]

Suppose the disputants' goals are entered into the Split-Up system to determine the asset distributions for both W and H. Split-Up first shows both W and H what they would be expected to be awarded by a court if their relative claims were accepted. The litigants are able to have dialogues with the Split-Up system about hypothetical situations. Given the requirements of W and H in a hypothetical example, the Split-Up system provided the following answers as to the percentages of the distributable assets received by each partner:

Table 1 Split-Up

Resolution	**H's %**	**W's %**
Given one accepts W's beliefs	35	65
Given one accepts H's beliefs	58	42
Given one accepts H's beliefs but gives W custody of children	40	60

Clearly, custody of the children is very significant in determining the husband's property distribution. If he were unlikely to win custody of the children, the husband would be well advised to accept forty per cent of the common pool (otherwise he would also risk paying large legal fees and having ongoing conflict).

While Split-Up is a *decision* support system rather than a *negotiation* support system, it does provide disputants with their respective BATNAs and hence provides an important starting point for negotiations.

The BEST-project commenced in 2005 investigates automatically providing information on BATNAs by using semantic web technologies. The aim of the project was to investigate if and to what extent semantic web technologies could help in retrieving relevant case law. BEST supports users by retrieving relevant case law on liability. In this way parties are given the opportunity to form a judgment about whether they could hold another party

33 E. Bellucci and J. Zeleznikow, "Representations for Decision Making Support in Negotiation", *Journal of Decision Support* (2001), 10(3-4), pp. 449-479.

liable for certain caused damages or if they could be held liable themselves. Also, parties can determine the zone of possible agreements for negotiation.

In the BEST system for the intelligent disclosure of case-law the retrieval is based on search terms provided by laymen. The BEST project decoupled the task of giving a meaningful description of the legal case at hand from the task of retrieving similar case law from the public available case law database <www.rechtspraak.nl>.[34]

Vreeswijk and Lodder developed a prototype application for online arbitration. After examining existing services available from providers of online arbitration they noted:[35]

1. A different form should be used for each party;
2. Information should be structured in obvious fields with not too much information accompanying each field;
3. The instructions should be short. More elaborate instructions should be provided via linking;
4. Parties should be kept informed as much as possible about the stages and status of the arbitration, and about the time constraints that hold at any particular moment;
5. Information that is already known by the provider should be included; information should not be asked twice; information should not be represented twice. (Cf. WIPO.);
6. It is of benefit to the arbitration process if a distinction is made between different sorts of replies. For example, submitting a new claim is entirely different from submitting a simple comment on a previous claim.

5.3 *The INSPIRE System*

The INSPIRE system has been specifically developed to study negotiation processes and negotiators' behaviour.[36] This system allows for a large scale systematic study of cultural differences in negotiation. It involves:

1. the construction of InterNeg, a Website "*for and about negotiation*" at <http://invite.concordia.ca/inspire/about.html>;
2. the development of decision and negotiation support methods and systems;

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34 G.R. Wildeboer *et al.*, "Explaining the Relevance of Court Decisions to Laymen", in A.R. Lodder and L. Mommers (eds.), *Proceedings of JURIX 2007*, Amsterdam, IOS Press, pp. 129-138.

35 G.A.W. Vreeswijk and A.R. Lodder, "GearBi: Towards an Online Arbitration Environment Based on the Design Principles Simplicity, Awareness, Orientation, and Timeliness", *Artificial Intelligence and Law* (2005) Volume 13, Issue 2, pp. 297-321.

36 G.E. Kersten and S.J. Noronha, "Negotiation via the World Wide Web: A Cross-cultural Study of Decision Making", *Group Decision and Negotiation* (1999), 8, pp. 251-279.

3. the use of existing and the development of new "auxiliary" systems for data processing, the storage and analysis of negotiation records, and the exchange of multimedia type transactions;
4. the preparation of teaching and training tools and materials;
5. research on the use of the computer and communication technologies in negotiation;
6. research on the difference in negotiation styles that result from the differences in culture, education, age, gender, and related issues, and
7. a study of the negotiations between humans and between humans and computer systems.

The INSPIRE system uses decision theory and supports construction of utility functions. There are four main support functions in INSPIRE. One allows the user to construct a utility function to evaluate her own and her opponent's offers. The second presents negotiation dynamics in a graph on which all offers and counteroffers are plotted. The third records all messages and offers and create a negotiation history. The fourth allows the system to verify the Pareto-optimality of the compromise (if achieved) and if a Pareto non-optimal compromise is achieved it is used to provide negotiators with Pareto improvements that they may consider in the post-settlement stage.

INSPIRE views negotiation as a process occurring in a particular context. It comprises a series of activities beginning with pre-negotiation which involves preparation for negotiation, proceeding through the actual conduct of the negotiation during which messages, arguments, offers and concessions are exchanged and evaluated by the parties until an agreement is reached, and finally, implementation of the agreement. It is usually inappropriate to assume that reaching an agreement is the goal of the negotiation, as is often assumed in low-context societies such as the American. Indeed, in many high-context cultures such as the Japanese, an agreement is viewed as merely the beginning. Revision of the contract and re-negotiation are integral aspects of the negotiation process.

6 CLASSIFYING DISPUTE RESOLUTION SYSTEMS

Thiessen and Zeleznikow observed that Online Dispute Resolution Systems (ODR) can be classified into the following seven categories as indicated in Table 2 below.[37] The systems represent a wide range of approaches to dispute resolution (*e.g.*, Artificial Intelligence, Social Psychology and Game Theory). Given the wide variety of possibilities, it should be clear that there is no universally best approach or technique. Rather, there is an eclectic

37 Thiessen and Zeleznikow (2004).

bag of methods with properties and performance characteristics that vary significantly depending on the context.[38]

What all of the selected ODR Systems have in common is that they provide an alternative to litigation providing a mechanism by which parties involved in a dispute can communicate over the Internet. Many of the illustrated systems are specialized to provide the best approach for a particular path to resolution. The following illustration shows the various possible paths.

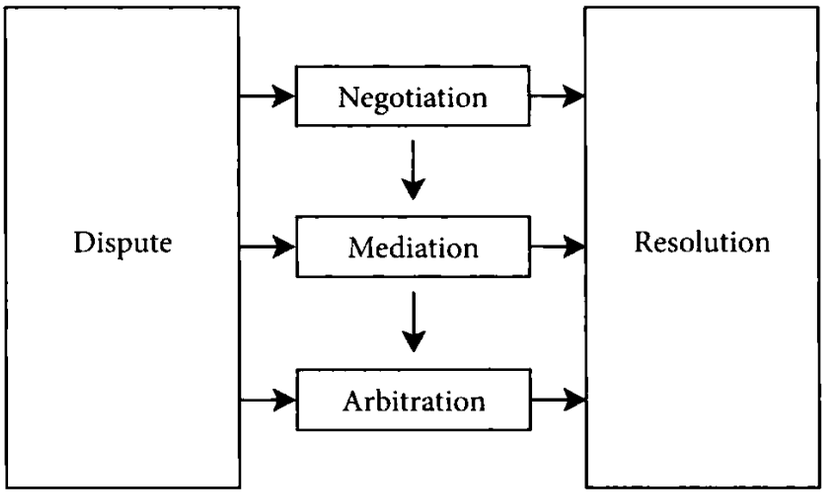
Table 2 Categorization of ODR Systems

I. Category	Methods	Main Players
Information systems	Provision of information that parties can use to resolve their dispute	Scenario Builder Notgoodenough.org
Univariate blind bidding	Automation for single monetary issues	CyberSettle
Document management for negotiation	Facilitators working online and/or offline with parties making use of formal structured document management tools to help them create their contract	Negoisst
eNegotiation (or automated mediation) systems	Sophisticated optimization algorithms to generate optimal solutions for complex problems	Family_Winner Inspire SmartSettle
Customized for negotiation or mediation of a particular type of dispute	Automated negotiation with structured forms	eBay UPI SquareTrade
General virtual mediation rooms	Human mediators working online with parties making use of mediums such as email, instant messengers, telephone and discussion forums	ECODIR Mediation Room SquareTrade
Arbitration systems	Human arbitrators working online with parties making use of mediums such as email, instant messengers, telephone and discussion forums	Word & Bond

The path for eNegotiation systems is typically straight across the top. This means that a confirmed dispute goes through a process of negotiation until a resolution is achieved. The path for parties using a mediation system might go across the middle, while the path for an arbitration system would be across the bottom.

38 N.R. Jennings *et al.*, "Automated Negotiation: Prospects, Methods and Challenges", *Group Decision and Negotiation* (2001), 10 (2), pp. 199-215.

Figure 1 Paths to Resolution



A comprehensive system encourages parties to start with negotiation. If the dispute is not settled with negotiation, the process can progress to mediation and finally recommendation or arbitration, until the dispute is resolved or failure to resolve the dispute is reported. Some systems are designed to resolve disputes that occur online while others are useful for any type of dispute, regardless of where it originated. Parties can resolve their dispute exclusively online or use a process that may also include face-to-face meetings.

Thiessen and Zeleznikow believe ODR systems face five main challenges as they attempt to present an effective medium for online dispute resolution: 1) Problem representation, 2) Preference elicitation, 3) Effective communication, 4) Neutrality provision and 5) Degree of automation.

7 INTELLIGENT TECHNOLOGY APPLIED TO INTERNATIONAL CONFLICTS

Artificial Intelligence and game theory have often been used to support the resolution of international conflicts. MEDIATOR used case retrieval and adaptation[39] to propose solutions to international disputes. The MEDIATOR's task domain is common-sense advice giving for the resolution of resource disputes. The MEDIATOR is loosely modelled after the style of negotiations suggested by the Harvard Project on Negotiation. The MEDIATOR program is responsible for understanding a problem, generating a plan for its solution, evaluating feedback from the disputants, and recovering from reasoning failures.

39 Case adaptation takes a retrieved case that meets most of the needs of the current case and turns it into one that meets all of the case's needs. J.L. Kolodner and L.R. Simpson, "The Mediator: Analysis of an Early Case-Based Problem Solver", *Cognitive Science* (1989),13(4), pp. 507-549.

GENIE integrates rule-based reasoning and multi-attribute analysis to advise upon international disputes.[40] It can aid crisis negotiators in identifying utility maximizing goals and in developing strategies to achieve these goals. GENIE provides the user with a strong set of tools which aid in the search for utility maximizing goals and strategies. However, in a complex negotiating situation, this identification alone does not guarantee that the individual will be able to be successful in achieving utility maximization. The actions of the other negotiators affect the ability of the Decision Support System supported negotiator to achieve his/her goals. Despite this fact, the experimental results show that the Decision support system users generally achieved higher utility scores, and groups in which Decision support system users participated achieved higher overall group scores.

Kraus and others present an automated agent that negotiates efficiently with human players in a simulated bilateral international crisis.[41] The agent negotiates in a situation characterized by time constraints, deadlines, full information, and the possibility of opting out of negotiation. The specific scenario that they focus on concerns a crisis between Spain and Canada over access to a fishery in the North Atlantic. Canada blames Spain for overfishing near its territorial waters and thereby damaging the flatfish stock

There have attempts using game theory to use computer modelling to resolve international disputes. For example, Denoon and Brams have used the Adjusted Winner algorithm to advise upon the claims of China, Taiwan and four members of the Association of Southeast Asian Nations (ASEAN) Vietnam, the Philippines, Malaysia, and Brunei to part or all of the land areas and surrounding waters of the Spratly Islands (a group of over 230 small islands and reefs in the South China Sea), which were believed to have major oil and gas deposits.[42]

Adjusted Winner has also been applied to the Panama Canal treaty and Camp David Accords. Brams and Togman applied the Adjusted Winner procedure to the final status issues between Israel and the Palestinians.[43] They argue that the actual agreement matches fairly closely the advice given by the Adjusted Winner procedure. Rather than indicate the benefits of the Adjusted Winner algorithm for providing negotiation advice, Brams and

40 J. Wilkenfeld *et al.*, "GENIE: A Decision Support System for Crisis Negotiations", *Decision Support Systems* (1995), 14 (4), pp. 369-91.

41 S. Kraus *et al.*, "Resolving Crises Through Automated Bilateral Negotiations", *Artificial Intelligence Journal* (2008), 172(1), pp. 1-18.

42 D. Denoon and S. Brams, "Fair Division: A New Approach to the Spratly Islands Controversy", *International Negotiation* (1997), 2(2), pp. 303-329.

43 S.J. Brams and J.M. Togman, "Camp David: Was the Agreement Fair?", in Frank P. Harvey and Ben D. Mor (eds.), *New Directions in the Study of Conflict, Crisis and War*, London, Macmillan 1998, pp. 306-323.

Togman use compliance with the Adjusted Winner algorithm as a measure of the "fairness" of the agreement reached in the accord.

Adding to the growing experimental literature on fairness, Schneider and Kramer demonstrate that the applicability of these mathematical procedures is limited.[44] Hence we argue that rather than provide a solution to the Israel-Palestinian conflict, it is wider to focus upon the issues in dispute, how much of a road-block each issue is and how can we more appropriately manage (rather than resolve) the conflict.

In an interest-based orientation, the disputants attempt to reconcile their underlying interests. Massoud used interest based negotiation (namely the Adjusted Winner algorithm) to propose a plausible solution to the final status issues between Israel and the Palestinians.[45] His results show that when the issues of security and borders are kept separate, Israel is likely to have its demands met on the issues of security, East Jerusalem, normalization of relations, and water. The Palestinians will win on the issues of sovereignty, Israeli settlements in the West Bank, Israeli settlements in Gaza, and Palestinian refugees. Both sides will need to compromise on the issue of boundaries. If security and borders are lumped together as one issue, Israel and the Palestinians will share on the issue of East Jerusalem.

Korobkin and Zasloff argue that an important failure of bargaining that, inexplicably, receives little serious attention in scholarly journals: the decades-long inability of Israel and the Palestinians to negotiate a treaty to end their conflict and govern their relationship.[46] They conclude that the failure of the parties to date to reach an agreement based on the land-for-peace framework can be attributed to some combination of three common roadblocks to negotiation success: (a) the absence of a bargaining zone, such that no single set of agreement terms would be preferable to continued impasse for both parties; (b) internal division within one or both principal parties, such that an agent or a minority faction with the ability to block an agreement undermines a result that would benefit the party as a whole; and (c) mutual hard bargaining, such that both sides refuse to accept an agreement that would be preferable to impasse and instead hold out for an even more desirable agreement.

44 G. Schneider and U. Kramer, "The Limitations of Fair Division: An Experimental Evaluation of Three Procedures", *Journal of Conflict Resolution* (2004), 48(4), pp. 506-524.

45 T. Massoud, "Fair Division, Adjusted Winner Procedure (AW), and the Israeli-Palestinian Conflict", *Journal of Conflict Resolution* (2000), 44 (3), pp. 333-358.

46 R. Korobkin and J. Zasloff, "Roadblocks to the Roadmap: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict after Yasser Arafat", *Yale Journal of International Law* (2005), 30, pp. 1-80.

They propose that a plan should begin with the United States presenting a non-negotiable set of terms to the two disputing parties that they can either take or leave but not bargain over, maximize the chance that the parties will accept those terms by both including side payments to the parties as part of the proposed deal and simultaneously threatening to withhold political and economic support if the deal is rejected, and take specific steps to work with the disputants and allies to limit the power of Palestinians and Israelis who are opposed to an agreement to stand in its way.

The concept of managing rather than attempting to resolve a dispute is an important one. For example, rather than attempting to resolve a family dispute, should we just manage it so that minimal conflict or disruption occurs? Eventually, the dispute might be more easily resolved or due to the progress of time, the dispute may no longer exist – such as when dependant children become adults.

Zeleznikow contrasted family mediation with the Israeli-Palestinian dispute in an effort to use the AssetDivider system to provide advice about the dispute.[47] He found the major differences to include:

Volume: Whilst each year, there are over 20,000 family mediations in Australia each year (and many more in Canada, United Kingdom and United States), there is only one Israel-Palestinian dispute, which may have diverse facets. Thus, in family mediation, we can learn from the successful resolution of past cases. Since there is such a high volume of such cases, information technology can be gainfully used to provide negotiation advice and as a forum for online dispute resolution.[48] There is however only one Israel – Palestinian conflict (even though there are many side issues) with a long complex history. Hence there are very few similar international disputes from which we can search for suitable techniques for dispute resolution.

Micro vs macro: Essentially family law disputes are two party conflicts. Whilst the discussion should focus upon the children, the dispute is invariably between the parents. Grandparents and friends may offer advice and become involved, but only minimally. The Israel-Palestinian dispute is a very large multi-party dispute.[49]

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47 J. Zeleznikow, *Examining the Israel – Palestinian Dispute from the Lens of Australian Family Mediation*, submitted to Group Decision and Negotiation 2011.

48 E. Bellucci, D. Macfarlane and J. Zeleznikow, "How Information Technology Can Support Family Law and Mediation", *Third Workshop on Legal Informatics and Legal Information Technology* (LIT 2010) in conjunction with 13th International Conference on Business Information Systems (BIS 2010).

49 Although there is an Israeli government with strong powers, it is a coalition of the right, with further rightist ultra-nationalist parties, religious parties and one minor party led by former Labour Prime Minister Ehud Barak in the centre. By taking strong action the Israeli PM takes the risk of jeopardising the majority in the

The use of agents: in family mediation, the parties generally represent themselves. Lawyers can appear but are discouraged from doing so, unless the case is heard by a court. In the Middle East, agents are often used. Indeed, often violence occurs against the agents rather than the party directly involved in the dispute.

Dispute resolution process: There is a well defined transparent process for Australian family mediation. This is not the case in international disputes, and in particular the Middle East conflict. One of the important factors in encouraging negotiation is ensuring *fairness*: in family mediation fairness equates with justice. For international disputes, negotiations tend to focus upon interests: meeting the needs of the parties equally. Whilst there are UN and international courts which can theoretically intervene in international disputes, the ability of such organisations to intervene is very limited compared to the possibilities in family law.

There are also some important similarities between Australian family disputes and the Middle East conflict.

In both domains, parties *need to live together during and after (hopefully) the dispute is resolved* (*i.e.* strengthen relationships) This is also true in neighbourhood disputes but very different to business disputes, where if former partners are involved in protracted disputes then they are unlikely to collaborate at a later stage.

Time is important: in families children and relationships change, so it is important to resolve disputes quickly. In the case of international disputes, governments and attitudes change. The longer it takes to resolve disputes in either domain, the more intransigent the parties become.

In both domains it is possible to measure BATNAs and investigate Bargaining in the Shadow of the Law: in family law, participants use the potential court decision as a BATNA and for Bargaining in the Shadow of the Law. In the Middle East, the BATNA is that the prevailing conflict will continue and possibly escalate.

Knesset. Moreover, there are settler groups who act outside the parliamentary process. The Palestinian camp (for want of a better word) is even more complex. Whilst Hamas control Gaza, the Palestinian Authority is in control of the West Bank. Hezbollah operates from Lebanon whilst there are numerous other groups (such as Islamic Jihad and Popular Front for the Liberation of Palestine), operating in West Bank, Gaza and other areas. There are also other interested nations (Egypt, Iran, Syria, formerly Iraq). Then, there are third parties who claim to have interests in resolving or at least diminishing the dispute – the United Nations, European Union and USA.

Zeleznikow then used the AssetDivider system to advise about the Israel-Palestinian dispute. Amongst the issues that merited analysis and decisions, were:

1. what issues are in dispute; and
2. how the disputing parties value each of these issues.

Of course making decisions about both 1) and 2) is a very difficult task.

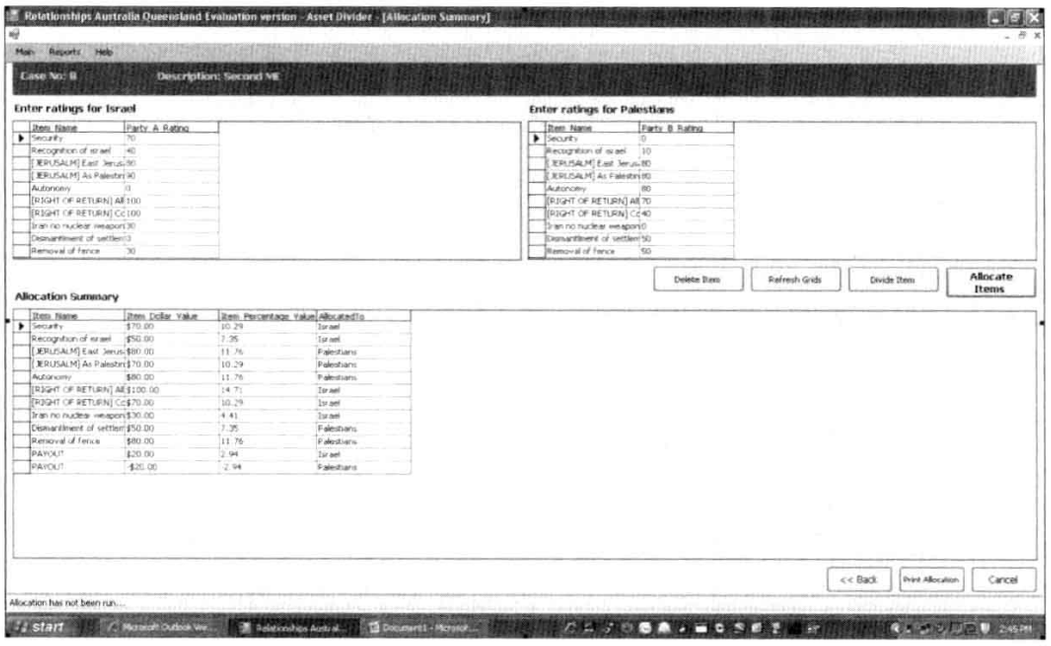
From a historic examination of the Israel-Palestinian Dispute,[50] it was decided that the following were major issues of dispute that affected the protagonists.

1. *Security* – One of Israel's major concerns is the security of its citizens.
2. *Recognition of Israel* – In 1948, when the United Nations created the State of Israel, the Arab countries refused to recognise it.
3. *Autonomy* – it is very important to the Palestinians to create their own state, and not remain under Israeli control or be part of another Arab State (prior to 1967, the West Bank was in Jordan and Gaza in Egypt).
4. *Jerusalem* – Jerusalem and the right of return are perhaps the items on which the protagonists are furthest apart, and hence both parties value them very highly.
5. *Right of return* – A large number of Arabs, fled Israel when the State was created in 1948.
6. *The maintenance of nuclear weapons by Iran* – whilst this might appear to be irrelevant to the Israel – Palestinian dispute, the Israeli government is very worried about Iran acquiring and using nuclear weapons.
7. *Dismantlement of settlements* – since 1967, Israel has built many settlements in both the West Bank and Gaza.
8. *Removal of the fence as a barrier between Israel and the Palestinian Territories.*

Given the eight issues discussed above, we included them as attributes in the negotiation and entered ratings for both Israel and the Palestinians for each issue. Because the current version of AssetDivider is being used, we also needed to incorporate a percentage split (used in AssetDivider to meet issues of justice). In the current use of the system we did not want to bias the negotiations to either party, so we made the percentage split 50/50. In AssetDivider, we gave each item in dispute a numerical value, to indicate its financial value. For the Middle East dispute we decided how important it was to both parties. Thus, the Right of Return was 85, Removal of Fence and Autonomy 80, Jerusalem 75, Security 70, Recognition of Israel and Dismantlement of Settlements 50, and Iran and Nuclear Weapons 30. This data was entered into Figure 2 below.

50 Using Korobkin and Zasloff (2005).

Figure 2 Use of AssetDivider on the Israel-Palestinian Dispute



The Allocation summary indicates the suggestions arising from the AssetDivider system, using interest-based negotiation for the Israel-Palestinian dispute. To meet the interests of both parties equally, Israel would need to give the Palestinians a cash payout.[51]

In this allocation, it is suggested that Israel recognise a Palestinian state, with East Jerusalem as its capital. They would also be asked to dismantle the current security fence and evacuate those smaller settlements that are not in close proximity to current Israeli borders. To make such an agreement acceptable to Israel, the Palestinians would need to recognise the State of Israel and encourage other Arab states to do likewise. Palestinians would have to forgo any right of return to Israel (for which they would be compensated) and do their utmost to ensure no anti-Israel activities emanated from Israeli territories. Further, they would need to encourage Iran not to develop nuclear weapons and not to make belligerent statements against Israel.

Despite the drawbacks of using an interest based decision support system designed to support negotiation in Australian Family Law on the Israel-Palestinian dispute, there are some major benefits to be obtained from the use of the system. The first important point to make is that a logical solution would be the creation of a Palestinian State with East Jerusalem as its capital, as long as the Palestinians recognised Israel, stopped or heavily limited attacks and ceased asking for a right of return. Israel would also need to dismantle

51 The United States might financially support Israel to make such a payout.

the fence and most settlements, whilst Palestine would need to discourage other Arab States and Iran from being belligerent towards Israel.

Interestingly enough this is similar to the Camp David Accords between Israel and Egypt in 1978, where Israel returned certain territory for recognition and security. However, whilst the Camp David Accords have endured, the then Egyptian President Anwar Sadat, who signed the Accords, was assassinated by an Egyptian in 1981, and the Israeli Prime Minister Yitzhak Rabin, who signed the Oslo Accords in 1993, was assassinated by an Israeli in 1995. Clearly, any peace partner is at peril from dissidents on his own side.

The beauty about using AssetDivider is that the system can be used to trial hypothetical cases. If the protagonists are not happy with the system solutions, they can change the items in dispute, how they rate these items or the value of the items and run the system on the new information. The ensuing advice might be more acceptable. If not, the disputants can ask themselves why they are obtaining undesirable results. Perhaps it is because they are not telling the system exactly what they want.

8 CONCLUSION

Traditionally, Online Dispute Resolution Systems have tended to simulate Traditional Alternative Dispute Resolutions, by merely placing them online, without many of the adjustments that could enhance the provision of online services. In 2005 we introduced our model for the introduction of intelligent online dispute resolution services, as discussed in this chapter. In our 2010 book we surveyed the provision of Online Dispute Resolution systems.[52] In this chapter we have explored how online dispute resolution systems can offer intelligent negotiation support. We have also discussed how such advice can be useful in understanding international conflicts and how it is vital that in legal domains, such advice focus upon justice rather than merely meet the interests of the disputants. This topic is the basis of our ongoing research.

52 A.R. Lodder and J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology*, Cambridge, Cambridge University Press, 2010.

5 Mobiles and ODR: Why We Should Care

Sanjana Hattotuwa

> Information technologies can help in many unexpected ways, as well... Consider the sense of subdued frustration in Pakistan about the takeover of the Swat valley by the Taliban, which imposed its own repressive rules, and against which the Pakistani military was, initially, rather unwilling to act. Despite the barbarity of the Taliban rule in the Swat Valley, it looked rather remote to the mainstream Pakistani civil society, and there was a kind of apathy about the state of affairs in Swat. The mobile phone played a major part in changing this situation – a move from which there was an impact on changing the rather passive position of the Pakistani government, as well as that of the military.[1]

The events earlier this year in Tunisia, Egypt, and other countries in the region commonly referred to as the Middle East were powerful markers of how information and communications technologies (ICTs) undergird struggles for democratic governance. It is not only these struggles they support. ICTs are in and of themselves mere tools, and are increasingly used by repressive governments for their own parochial ends, in stark opposition to those who seek to foster democracy and strengthen human rights. This is a double-edged sword, for the same ICTs that help bear witness and strengthen accountability are those that place activists at greater risk.

It is no different with mobile telephony and communications. The mobile phone is to many in this region as well as in my own region – South Asia – their first PC. Mobiles today are more capable in fact than average PCs were a few years ago. They are more pervasive, affordable and utilitarian. The mobile today is first a device for the exchange of information through text messages (SMS), including mobile commerce, and only then a device for voice conversations. In the case of smartphones, the mobile is even more akin to a PC, revolutionising in the vernacular as well as in English, the way content is consumed, disseminated and archived through text, video, audio and photography.

Few in the world of ICT for Development (ICT4D) saw this coming. Fewer in peacebuilding and conflict transformation saw the potential for mobiles even a few years ago. My Masters thesis and other academic writing at the time, based on my work in Sri Lanka using ICTs

1 Amartya Sen, "The Mobile and the World", <http://itidjournal.org/itid/article/view/614>.

and mobiles to transform violent conflict, is still flagged as some of the first forays into what has today become a praxis and theory far more studied, yet perhaps still as misunderstood.[2]

This lack of understanding leads to the oft-repeated mantra that revolutionary use of ICTs drives democratic means and ends writ large, a result that web based social media and mobiles alone are ill placed to engender. It leads to the divorcing of tools from the general socio-political, ethnic, economic, cultural and religious context. It leads to false assumptions that delink the use of ICTs from those that have access to them, and the manner in which they are adopted. It leads to a language of "revolution" prefaced by Facebook and Twitter that does little for the meaningful advancement of these technologies for democracy.

Hyperbole from some quarters of academia and Capitol Hill, who are for obvious reasons keenly interested in championing these developments, often serves to dilute complexity to the point of caricature, and risks the work of activists on the ground. Specifically, those I have encountered in US academe (and the case may well be true elsewhere) and the speeches of Hillary Clinton on Internet Freedom actually and ironically serve to stunt progress on how we use the web and Internet for peace building and democratic ideals. The mainstream media point to Al Jazeera as the new beacon of an engaged media that uses ICTs to get to and report on the pulse of the people in the region, but here again, the media's role in these processes tends to either get romanticised or roundly criticised, with very little nuance. We are in an age of telegenics and sound bites, and ODR's practice, platform and advocates do not stand apart. The very technologies I proposed a few years to the almost immediate dismissal of many in the ODR community at the time are precisely those fuelling the most interest today in processes of conflict transformation around the world. The theatres are different – regime change as opposed to commercial dispute resolution – but the pivotal role mobiles and ICTs can play is no longer contested. Few however know how to strategically leverage these technologies to mitigate, transform and recover from violent conflict.

It is not for outsiders to, in any way, critique processes that controlled by citizenry and in the service of a democratic polity and society. Yet, the question must be asked whether the same technologies that helped them overthrow despotic rulers, for example in Egypt, are those that will be used by them in the longer, more complex process of democratisation. It is the same question we can ask of Barack Obama's supporters – whether what was a precisely engineered, supremely well executed ICTs strategy to garner support for and disseminate information on Obama as a Presidential candidate were the same platforms

2 <http://sites.google.com/site/sanjanah/thoughtsonictandpeacebuilding>.

used by his administration after his election to strengthen participatory democracy in the US. Some commentators have likened the divide between the early promise over Obama's use of new media in the White House[3] and how it quickly fizzled out to the distinction between a leader and an organiser, using new technologies to "pursue power as a means to enact reforms he deems favourable, rather than a means to allow others to enact change as they see fit – presumably those who had previously not had the power to do so".[4]

There is a familiar narrative that emerges. A regime needs to be changed. ICTs, including social networking platforms and mobiles are used to engineer and sustain opposition. These technologies help people swarm in increasing numbers and frequency. In the case of the countries in the so-called Middle East, governments then try to block or curtail access to these technologies. These efforts ultimately fail. The pro-democracy demonstrators prevail. In the US, Barack Obama is elected into office. But then the story ends. Books, interviews, quotes, academic papers, sound bites – the full fifteen minutes of fame looks only at this first blush of democracy's blossoming. We may be too early to critically analyse its second stage – where its institutions and processes are introduced and mainstreamed. It is unclear to what degree ICTs and mobiles can help in this stage. There is plenty of anecdotal evidence from elsewhere, from economists who co-relate the per capita use of mobiles with a percentage increase in GDP, from activists who use mobiles to bear witness over the long term to farmers and fishermen who get better market rates for their produce and daily catch. As *The Economist* notes:

> Mobile phones have proved to be a boon for the poor world. An extra ten mobile phones per 100 people in a typical developing country boosts growth in GDP per person by 0.8 percentage points, according to a recent study. Mobile-phone subscriptions in poorer countries accounted for just a quarter of the global stock in 2000, but had risen to three-quarters of the 4 billion total by the start of this year. The next challenge is to expand the use of mobile technology to access the internet. Despite huge strides in producing cheap netbooks that connect via mobile networks, the mobile phone may still provide the cheapest way to access the internet in the developing world.[5]

We have all read these stories put out by institutions ranging from the World Bank to governments themselves. Increasingly, entering this glut of euphoria and optimism are

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3 *Post-Election Voter Engagement*, Aaron Smith, "The Pew Research Center's Internet & American Life Project", <www.pewinternet.org/Reports/2008/PostElection-Voter-Engagement.aspx>.

4 <http://newsbusters.org/blogs/lachlan-markay/2010/01/05/much-anticipated-obama-transparency-fails-materialize-supporters-cha>.

5 <www.economist.com/node/14529802>.

international NGOs, who look at the use of mobiles and ICTs after natural disasters (*e.g.* Haiti, Pakistan, Japan, the Gulf Oil Spill) and suggest that even here, citizens empowered by ICTs are helping redefine aid and relief work.[6]

More specifically in the domain of ODR, there are now a number of platforms[7] that leverage the power of the mobile, up from almost none just a few years ago. Many will now posit a certain inevitability to this evolution. A few will recognise how far ODR providers have come in the past four to five years – from a complete dismissal of mobile platforms for dispute resolution to the recognition now that they are not just integral to the field, but are its future. One can see this in terms of pure business – where the models of ODR have changed as the platforms and a practice have been introduced to new markets where it is not the PC but the mobile that is most prevalent. There is no option but to change, because the profit line demands it.[8] A less cynical view suggests that though there are now platforms and services built for mobile phone based dispute resolution, there is still little or no strategic understanding about how to use these devices for more complex dispute transformation, a challenge that resonates with recent events in repressive regimes.

The first observation one can make in this regard is that a note of cautious optimism over the increasing use of ICTs for human progress needs to be tempered with how easily they can be manipulated and access shut down completely, or severely curtailed. Myanmar in 2007 and Iran in 2009 tried but failed, at great human and social cost, to use ICTs to overthrow their respective despotic rulers. In my own country Sri Lanka, crimes of mass atrocity and allegations of genocide haunt the incumbent government, which fought a war that despite some of the best ICT infrastructure in the region, was without witness. Mainstream or citizen media captured nothing of what went on in the frontlines of conflict, and even in the Internally Displaced Persons (IDP) camps immediately after the end of war. However, the first images of these camps – that were at the time hellish in the fullest sense of that term – came from a mobile phone, and were published online by me on a citizen journalism platform called *Groundviews*.[9] As the International Federation of Journalists (IFJ) averred:

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6 Disaster Relief 2.0: The Future of Information Sharing in Humanitarian Emergencies, <www.unfoundation.org/press-center/press-releases/2011/disaster-report-2.html>.

7 Technology as Fourth Party in dispute resolution, <www.thehindubusinessline.com/features/eworld/article1447479.ece> and Smartsettle Announces Negotiation. System Destined for iPhone, Safari, <www.smartsettle.com/news-and-events/249-smartsettle-announces-negotiation-for-iphone-safari>.

8 *The size and nature of the mobile web market*, <http://ict4peace.wordpress.com/2010/03/09/the-size-and-nature-of-the-mobile-web-market>.

9 <www.groundviews.org>.

> The citizen journalism website *Groundviews* (<www. groundviews.org>) did some of the most telling early reporting on the conditions within the IDP camps, alerting national and international opinion to the growing conditions of squalor and distress following heavy rains in August and then October 2009. The website's reporting was accompanied by a poignant commentary on the level of concern of the mainstream media in the situation in the camps. Reporting on the IDPs issue was clearly an area of silence for much of the mainstream media. Following the opening of the camps in November and the return of several of the displaced to their home villages, the indifference of the mainstream media persisted. As the silence grew, *Groundviews* did another report, tracking certain of the individuals who had been released from the IDP camps as they went back to their villages to begin the arduous process of reconstructing their lives.[10]

Beyond telegenic revolutions, the longer-term construction and sustenance of meaningful political opinion is a two-way street – mainstream media and national level political rhetoric shapes and is shaped by aspirations of the commons. This is a cycle tough to address through mobiles and ICTs alone if it is founded on repressive governance, if only because such states are also increasingly turning to the power of the Internet, web and mobiles to control citizenry. On the other hand, as we have witnessed in countries such as the Philippines, information in the hands of a public equipped with mobile phones can be a powerful democratic imperative that brings down an authoritarian and corrupt government. However, success stories such as this run the risk of romanticising the gravity of problems that bedevil post-conflict democratic reform. The traditional power of politicians in rigid social structures, a clientelist political architecture along with rampant nepotism and corruption erode the onset of democratic social transformation as promised by ICTs and mobiles.

Beyond the strict confines of ODR, yet deeply linked to it, is how ICTs can expand the ability to identify and mitigate disputes, including violent conflict. Democracy, seen as a dynamic construct reflecting the aspirations of all peoples and the desire for a life free from want and fear, is a living organism kept alive by the degree of citizen participation. This relationship between government and citizens is symbiotic – stable democracy strengthens plural societies who in turn more fully participate in democratic processes to ensure their voices are interwoven into the frameworks of governance. Beyond the rhetoric and the hyperbole, we need to examine what is really meant by expanding access – for

10 *Freedom in Solidarity: Media Working for Peace in South Asia*, published on behalf of the South Asia Media Solidarity Network (SAMSN) by the International Federation of Journalists (IFJ) Asia-Pacific.

instance, what does expanding access mean with populations that grapple with the daily strife of life in the deathly pall of violent conflict? How can ICTs empower those who have been erased or marginalised from national debates on governance and democracy regain a sense of identity, belonging and citizenship? Is the measure of expanded access quantitative – *e.g.* the number of mobile phones/PCs per capita – qualitative – *e.g.* the availability of websites in the vernacular and literacy to understand and communicate through the web – or a mixture of both? Is talk of a new Facebook or Twitter revolution a cruel misnomer in the face of conditions of life that continue to exist in terrains of hopelessness in these countries where so much of media attention has been devoted to regime change?

Following from above, the potential of expanded access to ICTs is deeply linked to the availability mechanisms and devices that operate in the vernacular (not just in English). The qualitative measure of communication in support of peace in post-conflict scenarios is in its ability to contest, amongst other issues, the corrosive structures of politics and governance that gave rise to violence and terrorism. It is a central problem of all pro-democracy movements to sustain the groundswell of support in favour of peace through peaceful means. ICTs can be used to examine the ways through which communities communicate – through metaphors, oral histories, hagiography, ritual, mysticism. Digitally captured, stored and disseminated, these can help communities transcend cycles of violence with support from other communities, the diaspora and an international support network and be a powerful social history of a country's movement from conflict to peace. A community able to articulate its alienation from processes of governance is able to better engage with local and international actors capable of delivering the necessary reform. At the very least, the large well-springs of support marginalised communities can tap into, especially in the diaspora, is a vital bulwark against the depreciation of hope that in turn is a strong factor in the rise of terrorism.

Reading the wealth of literature on ICT, it is easy to forget that it is not a panacea for problems facing developing nations. Normative assumptions about ICT tend in most cases to outstrip knowledge of how technology is actually used. ICTs cannot magically liberate people, alleviate poverty, erase the "digital divide", and ensure prosperity. Much of the literature written on ICT does not treat it as one factor amidst a myriad of others that shape inter-state and intra-state relations in developing countries. Furthermore, in planning for and using ICT, many countries often concentrate on the intervention itself, rather than what they want to accomplish through it. It must be remembered that ICT is a means to an end, not an end in itself.

It is a valid question as to whether those who use the Internet to support progressive social policies adequately realise the long-term nature of social transformation. The caveat of

many who tout the potential of the Internet and New Media for social transformation and empowerment is that the expectation of the time taken for such processes is much shorter than what may be necessary for communal healing after decades of violence. Furthermore, many social activists online suffer from the myopia of believing in short-term social change initiatives automatically resulting in longer-term social change. Unless sustained and constantly adapted to respond to dynamics in polity and society, initiatives for conflict and social transformation that use Internet and web based new media have little chance of success in the long run.

Transforming information to knowledge requires context. Context requires education and the ability to discern bias. Given the problems associated with syllabi and public education in general in regions of protracted conflict, further research is needed to examine the ways in which the Internet and new media may contribute to existing racial and ethnic stereotypes on account of wider access promoting biased information that is uncritically read and understood as the truth.

If this is all somewhat dystopic, it is with reason. The projection of ICTs, web based social media and mobiles as a means to facilitate short-term regime change is a telegenic recipe that has captured the attention of many. We know however that peace and democracy are by definition imperfect constructs, riven by conflict. They are inherently processual in nature, not a perfect *telos* that is ever achievable. To celebrate the courage of a progressive, vocal, web savvy minority who use ICTs to strengthen democracy, especially against great odds, is one thing. To expect a more powerful, entrenched majority to be easily dominated by this is facile. At best, recent world events show that ICTs can help people bear witness as never before, and that this is a way for marginalised or violently erased narratives to be recorded for posterity. This is a far humbler task than regime change, not as mediagenic perhaps, but as important. It is based on the understanding that history is often recorded by the most powerful, but that today, the proliferation of ICTs records (using applications like Microsoft's amazing Photosynth software[11]) can produce snapshots of socio-political, cultural, religious and other identity based perspectives that can contest, frame and illuminate the status quo. The question then is how we take advantage of and strengthen these possibilities and at the same time maintain a critical distance from heady promises and rodomontade. As I note in the foreword to a recently published book on ODR edited by Marta Poblet:[12]

11 <http://photosynth.net.>.

12 Mobile Technologies for Conflict Management: Online Dispute Resolution, Governance, Participation: 2 (Law, Governance and Technology Series), <www.amazon.co.uk/Mobile-Technologies-Conflict-Management-Participation/dp/9400713835>.

> What will it mean to live in a world where an SMS generated a continent away can spark localised violence? What will it mean to use these new technologies to strengthen the essential fragility of peace processes, which only get harder after the cessation of violence? How can we ensure it is used for the purposes envisaged in this book? And will these ICTs test the limits of the freedoms we cherish even in progressive societies when used by those who choose and endorse violence – physical or verbal – as a means to promote their worldviews? How do we temper and seriously critique, without entirely dismissing, the enthusiasm over crowdsourcing and crisis-mapping by looking at contexts other than sudden onset disasters like complex political emergencies? Can ICTs create, sustain, transmit and safeguard any better than in the past hope – that irascibly ethereal construct even during the height of violence? Are all the case studies in this volume, compelling as they may be, initiatives pegged to courageous individuals or minorities that can't be easily scaled up, trans-located or sustained over the long-term especially within cycles of violence? Are most of these initiatives, and ICTs by extension, designed by and developed largely for men? What are the gender considerations of ODR, and do ICTs necessarily empower women or help them, *inter alia*, seek justice?

I have long since believed mobiles would deeply influence the field of conflict transformation and peacebuilding. This is a belief that has fuelled my work leveraging new media in Sri Lanka. Stories over the use of ICTs around the world for conflict transformation are growing. Kashmir's mobile phone totting citizens are the new producers of content that captures the violence that surrounds them, when mainstream media cannot or will not.[13] Bearing witness to the violence of the every day, which is so normalised that it does not even register on the radar of international wire agencies, the content created by youth and young adults with mobile phone is capturing history in the making.[14] An essay by Nik Gowing is worth quoting at length in this regard:

> It was a chance video taken by a New York investment banker that dramatically swung public perceptions of police handling of the G20 protests. Those 41 seconds swiftly exposed apparently incomplete police explanations of how and why Ian Tomlinson died. They alone forced a level of instant accountability from the police about their orders, behaviour and operation.

13 Capturing violent conflict in Kashmir with mobile phones, <http://ict4peace.wordpress.com/2008/09/21/capturing-violent-conflict-in-kashmir-with-mobile-phones>.

14 Capturing violent conflict in Kashmir with mobile phones, <http://ict4peace.wordpress.com/2008/09/21/capturing-violent-conflict-in-kashmir-with-mobile-phones>.

> Like the London police, most major institutions of power, and those working for them, still don't appreciate the full scale and implications of the dramatic new real-time media trend and its profound new impact on their credibility in a moment of crisis.
>
> The on-going investigation into heavy civilian casualties last week when US-led Nato war planes bombed villages in Afghanistan's Farah province recalls how initial official claims were challenged after a similar strike on a school in Azizabad last August. US forces initially claimed only seven people died. NGOs said the bombing killed up to 90. Only after mobile phone video emerged two weeks later did US commanders accept they had to re-examine evidence. In a re-investigation condemned by Human Rights Watch as "deeply flawed" the US had to revise the death toll up to 55, although 22 victims were classified as "anti-coalition militants".
>
> Such examples confirm how new information technologies and dynamics are together driving a wave of democratisation and accountability. It shifts and redefines the nature of power in such moments. It also creates a new policy vulnerability and brittleness for institutions, who then struggle even harder to maintain public confidence.
>
> Increasingly routinely, a cheap, "go-anywhere" camera or mobile phone challenges the credibility of the massive human and financial resources of a government or corporation in an acute crisis. The long-held conventional wisdom of a gulf in time and quality between the news that signals an event and the whole truth eventually emerging is fast being eliminated. The new lightweight technologies available to almost anyone mean a new capacity for instant scrutiny and accountability that is way beyond the narrower, assumed power and influence of the traditional media.[15]

How will these advancements shape ODR? I would like to offer some preliminary thoughts on this score, based on a presentation made at the annual ODR working group meeting, held this year (2011) in Chennai in February.[16]

15 Real-time media is changing our world, <www.guardian.co.uk/commentisfree/2009/may/11/real-time-media-government>.

16 <www.odr2011.org.>.

First, what is recognised and referred to as online dispute resolution today will transform into dispute resolution. In other words, online will be an extension of what is conducted face to face, in person. The process of dispute resolution will no longer differentiate between physical, real world interactions and virtual, web mediated and mobile interactions – they will be seen as parts of a greater process, seamlessly interwoven into various platforms that combine automated processes (bots, artificial intelligence driven software agents) as well as expert human input to facilitate negotiations and discussions. In this sense, ODR may in fact cease to be a term that is used, or useful.

The second driver of change will be the proliferation of mobile devices as well as devices connected via Internet Protocol (IP).[17] In a few years, everyone on this planet will either own or be able to easily access (and afford to use) a mobile device. In more developed regions, everything from home appliances to PCs and other computing devices, including mobiles that are internet enabled, will be connected to the internet. This will result in a world increasingly governed by IP connectivity, leading to products and services that combine the addressability of virtual appliances and devices through the Internet with real world interactions, seamlessly. One can imagine the amount of conflict – device to device first, and device based conflicts with real world impact – this will generate, requiring more dispute resolution mechanisms to be put into play, in more languages, far more pervasively, in more industries and services, to serve an exponentially greater base of humanity. This will be a challenge that is founded on technical issues, but will deeply impact how we interact, share and disseminate information, store knowledge and run our lives.

Linked to this will be the necessary growth of content on mobiles. Gapminder is an excellent way to visualise what's needed.[18] When comparing the mobile phone ownership and income per person for Kenya, India, Sri Lanka and the United States, it is clear that that over 2007 and 2008 – the most recent data on Gapminder – there were dramatic increases for under developed countries over, in this case, the US.[19] The US, with a population of around 296 million in 2005, a per capita income of almost USD 42,000 had a mobile phone penetration (per hundred people) of 72. India, in the same year, had a per capita income of just over USD 2,000 and a mobile penetration of just 8.2, again per 100 people. Fast forward to 2008, and the US mobile phone penetration increased to 89, and its per capita income to around USD 43,000. But in India, even though the per capita income increased only marginally, to around USD 2,700, its mobile phone penetration shows an explosive growth, up from just 8.2 per 100 people three years ago to thirty. Similar results can be seen in Sri Lanka

17 <http://en.wikipedia.org/wiki/Internet_Protocol>.
18 <www.gapminder.org>.
19 <www.bit.ly/frBjxu>.

and Kenya. This clearly demonstrates that the greatest potential for new ODR markets is actually in the developing world, and over mobiles. It also flags that the greatest need for dispute resolution will come from the developing world, which even without the developed world's technical platforms and products, will innovate its own mechanisms and processes. The endogenous ODR initiatives stand to benefit from the expertise and technical experience of existing ODR providers, with the caveat that existing business processes and cultures will need to be revised if they are to embrace the very different economics, expectations and dynamics of these new markets, consisting of cultures and perceptions very different to what current providers of ODR tools expect and have built their tools around.

Add to this the growth of geo-location services (Foursquare, Facebook check-ins, Google Latitude), the evolution of the so-called Web 2.0 platforms including social networking sites like Facebook and Twitter, the growth of Interactive Voice Recognition (IVR) platforms like FreedomFone and finally, with the growing adoption and availability of low-cost broadband, the technical undergirding of ODR shows much promise of supporting new, innovative and pervasive services and products to help users identity, mitigate, transform and recover from conflicts and disputes. These disputes will, as they do today, range from purely commercial arbitration and dispute resolution to the negotiated transformation of complex ethno-political conflict. The ODR platforms will range from those products and services anchored to the provisioning of legal assistance and mediation to those that help bear witness to human rights violations and record them in a manner that supports both retributive and restorative justice mechanisms.

In this rich field, ODR will increasingly grapple with several key challenges. These challenges will come from within the existing ODR community, with competing business interests and a battle for market share leading to platforms and products that lock in users and their information, instead of a more open, platform agnostic approach. There is an annoying tendency, especially in the West, to believe that notions of privacy are radically different in the more densely populated developing world, because personal space is obviously more constrained.

Privacy is indeed a vital issue, but it applies to everyone in virtual domains. Information security is no less important for someone using m-pesa[20] with a mobile phone than it is for someone using online banking through his or her PC and over the web. Privacy is no less an issue for mobile healthcare clinics connected to hospitals over mobiles than it is for patient records stored in larger hospital and national databases. Facebook's largest growth is over mobiles, yet its privacy framework has come under repeated scrutiny by

20 <www.safaricom.co.ke/index.php?id=745>.

governments and privacy watch-guards alike. So-called digital natives[21] will have a very different notion of privacy to those currently developing the ODR platforms and tools, which will impact on how they interact with each other online. Conflicts will arise in this culture clash – with a bias towards more open sharing of even private information clashing with what still is a rather stentorian corporate culture of non-disclosure and the penalisation against full disclosure of private information, even if it is not connected to professional responsibilities. ICTs will help mediate these clashes as much as it will be the means through which they arise in the first place. Existing ODR providers will have to more rapidly move to mobile platforms. This requires significant investment for research and development costs. This high expenditure will foster resistance in even the larger ODR providers to service new markets through mobile means.

What gives hope that these challenges will be overcome is to reflect back on ODR's growth over the past few years. At the ODR working group meeting in Melbourne, back in 2004, I first presented ideas based on what I thought would be drivers of change for dispute resolution – the shift to embrace conflict transformation[22] in contra-distinction to dispute resolution and the need to leverage the mobile phone. It was a hard sell. Many were unconvinced. Today, the outlook is very different. The events this year in Tunisia and Egypt alone suggest that a population can and will use all the ICTs at their disposal to give voice to what is, around the world, a yearning for stronger democratic governance. People and communities, for decades written out of political and social narratives, women, debarred from participating fully in democratic dialogues and processes, children, who can now create their own content – all of these groups and more are competing to establish a democratic space better than what exists today in many parts of the world, including in the developed world. ICTs and mobiles are helping bear witness to this social and political change. It is unclear and perhaps too soon to suggest that this is a new chapter in mankind's progress to a more equitable, just, democratic polity and society. It is abundantly clear however that ICTs will be centre and forward in most of these struggles, and that ODR – or whatever it becomes and is called in years to come – will be a body of knowledge and practice that assists this democratic potential so many of us, around the world, share, believe in and want to leave as the legacy for our children.

21 <http://en.wikipedia.org/wiki/Digital_native>.

22 <http://en.wikipedia.org/wiki/Conflict_transformation>.

6 KNITTING THE SECURITY BLANKET FOR NEW MARKET OPPORTUNITIES

Establishing a Global Online Dispute Resolution System for Cross-Border Online Transactions for the Sale of Goods

Vikki Rogers[*]

1 INTRODUCTION

For the last couple of decades Online Dispute Resolution (ODR) experts have been creating protocols, standards and agreements for the creation of ODR systems that could resolve low-value disputes that extend beyond regional borders. To the dismay of many in this community these various efforts never manifested into a wide-spread program offering redress to parties engaged in cross-border commercial activity. The consequent results to the various stakeholders are clear. Outside a handful of payment intermediaries, consumers have no practical legal protections if they decide to buy cross-border, and as a result – they do not – to the detriment of consumers and businesses.[1] Businesses have lost market opportunities because the legal risks[2] and associated costs are too great.

The domestic legal redress options that exist for low-value disputes are draconian when considering the pulse of the global marketplace and rate of continuous technological innovation and application. Consequently, markets are isolated and practical and effective redress for consumers and businesses that do engage in cross-border exchange is practically non-existent. This chapter proposes that the question of whether the creation of a wide-spread cross-border redress system is necessary and possible is past history. Rather, the pertinent questions for this decade and beyond concern the scope of such a system, the

* The author thanks Nicole Sardinha for her invaluable assistance in the preparation of this chapter.

1 Commission of the European Communities, *Commission Staff Working Document: Report on Cross-Border E-Commerce in the EU*, p. 6 (Brussels, May 3, 2009) ("While e-commerce is taking off at national level (in some countries), it is still relatively uncommon for consumers to use the internet to purchase goods or services in another Member State. As a result, the gap between domestic and cross-border e-commerce is widening: from 2006 to 2008, the share of all EU consumers that have bought at least one item over the internet increased from 27% to 33% while cross border e-commerce remained stable (6% to 7%). The pattern is similar for those with internet access at home: 56% of consumers with the internet at home have made a purchase (in any country including their own) by e-commerce, compared to 50% in 2006, while only 13% (of those with internet access at home) have made a cross-border e-commerce purchase, compared to 12% in 2006." (citations omitted)).

2 *Id.* at 12.

legal instruments needed to support the system, the logistics and technological building blocks of the system, and identification of the appropriate players that will alter traditional notions of redress to obtain "rough justice".[3] ODR is the progressive option to fill the current legal and marketplace gap. It represents a dynamic process that can evolve with the changing marketplace and technological opportunities while preserving the states, individuals and merchants interests.

ODR for high-volume, low-value cross-border e-commerce is also the Petri dish to test new possibilities to address the changing perspectives on the role of the judiciary in providing redress in the new technologically-driven globalized marketplace, as well as redress in the context of particular domestic law disputes where it is clear traditional systems either no longer address the current needs or even exist.

This chapter advocates the position that discussions surrounding the adoption of traditional mechanisms and legal constructs to future marketplaces reflects obsolete thinking and suggests that we must fundamentally challenge the lens through which we see the legal world. I propose that concepts of redress – including the systems and law in which we operate – must change to reflect the merger between the physical and virtual world. This chapter firstly explores the changes that catalyzed this new frontier, namely the existence and role of internet intermediaries in the online commercial marketplace; secondly, initiatives by inter-governmental agencies and NGOs to provide legal instruments and protocols to support regional and global ODR mechanism; and thirdly, potential challenges in the creation of a global ODR mechanism.

2 AN "INTERMEDIARY REVOLUTION": CHANGES IN THE ONLINE COMMERCIAL MARKETPLACE

The critical change that has taken place in the online commercial marketplace is the expansive role of the internet intermediary. This change has fundamentally re-shaped global commercial activity and sparked a renewed and more determined effort to design global ODR systems.

In the context of the e-commerce[4] world, an internet intermediary can be defined broadly as any third party that is not the buyer or seller, but provides some sort of service that facilitates a commercial transaction. The OECD in their report on The Economic and Social Role of Internet Intermediaries[5] provides that: "Internet intermediaries" bring

3 Scott Cooper, Colin Rule & Louis Del Duca, "From Lex Mercatoria to Online Dispute Resolution: Lessons from History in Building Cross Border Redress Systems", 43 *UCC L.J.* 3, (forthcoming 2011).

4 The use of the term "e-commerce" is also intended to include "m-commerce".

5 Organization for Economic Co-operation and Development [OECD], The Economic and Social Role of Internet Intermediaries (Declassified 59th Session of ICCP Committee March 2010), 9, (April 2010). Available at <www.oecd.org/dataoecd/49/4/44949023.pdf>.

together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.

> "Internet intermediaries are mainly from the business sector although there are an increasing number of social platforms. Current Internet intermediaries identified within the scope of this report include [...]:
> - Internet access and service providers (ISPs) [*e.g.*, Verizon Comcast, T-mobile, Vodafone]
> - Data processing and web hosting providers, including domain name registrars [*e.g.*, Go Daddy, Easyspace]
> - Internet search engines and portals [*e.g.*, Google, Yahoo, MSN]
> - E-commerce intermediaries, where these platforms do not take title to the goods being sold [*e.g.*, Amazon, eBay, Ali baba]
> - Internet payment systems [*e.g.*, Visa, PayPal, MasterCard], and
> - Participative networking platforms, which include Internet publishing and broadcasting platforms that do not themselves create or own the content being published or broadcast [*e.g.*, Facebook, LinkedIn, YouTube]."[6]

Both of these are very broad definitions, but they have to be, given the overlapping nature of the services internet intermediaries now provide in facilitating commercial activity.

An obvious example of an intermediary is Google. Among their portfolio of constantly innovating services, Google provides an operating system for mobile phones (providing a means for consumers and merchants to link),[7] they do targeted advertising based on the content of emails,[8] they provide the search engines to identify buyers and sellers (Google Product Search),[9] access to product reviews, Google analytics can help to optimize web site design, marketing and sales,[10] and offer a payment mechanism (Google check-out),

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6 "Organization for Economic Co-operation and Development [OECD]", *The Economic and Social Role of Internet Intermediaries* (Declassified 59th Session of ICCP Committee March 2010), 9, (April 2010). Available at <www.oecd.org/dataoecd/49/4/44949023.pdf>.

7 Google, Google Projects for Android, retrieved 31 March 2011, <code.google.com/android>.

8 Google, Targeted Ads in Gmail, retrieved 31 March 2011, <http://Mail.google.com/mail/help/about_privacy.html#targeted_ads>.

9 Google, <www.google.com>; see also E. Schonefeld, "Google's Africa Strategy: Search and Trade via SMS", *The Washington Post*, 29 June 2001, retrieved 31 March 2011, <www.washingtonpost.com/wp-dyn/content/article/2009/06/29/AR2009062902016.html>.

10 Google, Enterprise-Class Web Analytics Made Smarter, Friendlier and Free, retrieved 31 March 2011, <www.google.com/analytics>.

which offers dispute resolution and chargeback services.[11] Google is even launching a social networking site, Google Me[12] and recently announced the launch of Google wallet.[13]

The "modern" intermediary – *i.e.*, the third party bringing buyers and sellers together online – is by no means limited to Google. By way of a representative sample of the "modern" intermediary at the time of writing this article:

> Facebook is connecting merchants with their membership of over half a billion consumers.[14] Facebook uses its own virtual currency platform, "Facebook credits".[15] Although Facebook does not currently take commission from any physical e-commerce sales made on-site, it does collect 30 percent on purchases of virtual goods, which is estimated to be worth some 5 billion annually.[16] According to Booz & Company, "[s]ocial networks promise to be the next generation of e-commerce engines."[17]
>
> Twitter is also connecting merchants with "followers", and has launched "TwitPay" to process financial transactions using a proprietary payment system.[18]
>
> "EBay is the largest online marketplace in the world, with more than USD 45 billion dollars of merchandise sold on the site each year between more than 90 million active buyers and sellers around the globe. EBay's sites are localized in 16 languages around the world, and the site houses more than four billion feedback ratings left by transaction partners for each other."[19] Although PayPal began modestly as eBay's payment platform they are also continuously expanding. "PayPal generated more than half of its business outside the US for

11 Google, The Google Check-Out Buyer Experience, retrieved 31 March 2011, <http://check-out.google.com/seller/experience.html>.

12 Garret Rogers, "Google Me Coming this Fall?", *ZDNet*, (14 September 2010) <www.zdnet.com/blog/google/google-me-coming-this-fall/2458>.

13 Google, Google Wallet, retrieved June 12, 2011, <www.google.com/wallet>.

14 Facebook, Connect Merchant Payment Services, <www.facebook.com/pages/Connect-Merchant-Payment-Services/54411708737>.

15 Facebook Credits, <www.facebook.com/help/?page=837>.

16 Jake Hird, "Goodbye, E-Commerce, Hello F-Commerce?", *Econsultancy*, 29 March 2010, <http://econsultancy.com/blog/5672-goodbye-e-commerce-hello-f-commerce>.

17 P. Taylor, "Sales Moves from Art to Science," *Financial Times*, 15 March 2011, <www.ft.com/cms/s/0/10067dcc-4eb0-11e0-874e-00144feab49a.html#axzz1Gyde0Q9A>.

18 TwitPay, Social Media Payments, retrieved 31 March 2011, <http://twitpay.com>.

19 Cooper, Rule & Del Duca (forthcoming 2011).

> the first time in the final months of last year, lifting its payments revenues to USD 926m, up 22 per cent from the year before."[20]

The impact of the intermediary is not limited to the developed world, but a big change in recent times is the investment by internet intermediaries to promote online commercial activity in the developing world. And their efforts are paying off. For example, at the time of writing, Alibaba out of China is a direct competitor to eBay. Combining their global platform, Chinese platform and Japanese platform, they have more than fifty million users in more than 200 countries.[21] Taoboa, a subsidiary of Alibaba, is the largest internet retail website in China, serving almost 200 million users and transaction volume exceeding USD 29 billion in 2009.[22] Recently, PayPal and Alibaba joined forces so that PayPal is now available to AliExpress customers. AliExpress is Alibaba's B2B platform that allows small business customers to buy wholesale merchandise for resale.[23]

As mentioned in the OECD report on internet intermediaries,[24] it is not only the e-commerce intermediaries and internet payment systems that have become relevant intermediaries in the developed and developing world, but the very equipment that is used to access these sites is a class of intermediary in and of itself. Mobile phones – which have numbered more than 4.6 billion worldwide by the end of last year[25] – are partnering left and right with other intermediaries to maximize on the services they can offer. Motorola is launching phones in China loaded with the Android operating system.[26] PayPal has launched the 2.0 version of its Send Money application for the iPhone.[27] Verizon Wireless launched a mobile payment service that allows customers to charge online purchases to their cellular phone

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20 R. Waters, "PayPal Helps eBay Beat Expectations", *Financial Times*, 20 January 2011, <www.ft.com/cms/s/0/b1c7b332-2427-11e0-a89a-00144feab49a.html#axzz116h3vQvM>.

21 Alibaba, What is Alibaba, retrieved 30 March 2011, Alibaba Company Profile, <www.alibaba.com/about/en/AboutOurCompany/about.html>.

22 Alibaba, Company Overview, retrieved 30 March 2011, <http://news.alibaba.com/specials/aboutalibaba/aligroup/index.html>.

23 Alibaba.com's AliExpress Platform Now Accepts PayPal, <https://www.thepaypalblog.com/2010/04/alibaba-com%E2%80%99s-aliexpress-platform-now-accepts-paypal/> (26 April 2010).

24 "Organization for Economic Co-operation and Development [OECD]", *The Economic and Social Role of Internet Intermediaries* (Declassified 59th Session of ICCP Committee March 2010), 9, (April 2010). Available at <www.oecd.org/dataoecd/49/4/44949023.pdf>.

25 "Organization for Economic Co-operation and Development [OECD]", *The Economic and Social Role of Internet Intermediaries* (Declassified 59th Session of ICCP Committee March 2010), 25, (April 2010). Available at <www.oecd.org/dataoecd/49/4/44949023.pdf>.

26 Manikandan Raman, "Motorola to Launch Eight New Android Phones in 2010," International Business Times, 28 September 2010, <www.ibtimes.com/articles/66280/20100928/motorola-android-android-3-0-gingerbread-ces-verizon-at-t-china-ctia-t-mobile-sprint-us-las-vegas-gh.htm>.

27 PYMNTS.com, "PayPal Launches New Send Money App for iPhone", retrieved 30 March 2011, <www.pymnts.com/paypal-launches-new-send-money-app-for-iphone>.

bill.[28] Amazon introduced its Mobile Payments Service which helps mobile app developers and mobile web site owners let customers pay using shipping and credit card information stored at Amazon.[29] Verizon Wireless and Skype Communications entered into an agreement resulting in Skype's VoIP service being available as an application on Verizon smartphones.[30] M-PESA is a Safaricom service allowing you to transfer money using a mobile phone.[31] Kenya is the first country in the world to use this service, which is offered in partnership between Safaricom and Vodafone. M-PESA is available to all Safaricom subscribers, even if a user does not have a bank account.

The aforementioned stresses that intermediaries are the game changers for the commercial world and their impact will only increase. Because of the surge of services offered by internet intermediaries there has been a corresponding surge in online commercial activity. As noted in the OECD Report on The Economic and Social Role of Internet Intermediaries (the "Report"):

> Intermediaries create significant market efficiencies by bringing suppliers and demanders closer together, thus decreasing transaction costs such as the cost of searching for a buyer or a seller. They ensure that markets work better and create more competition as well as allow for a greater internationalization of markets. Indeed, Internet intermediaries facilitated trade by allowing the expansion, aggregation and globalisation of markets as well as the customisation of goods and services.[32]

Regarding the impact of intermediaries on online growth opportunities for micro-enterprises, the Report further states:

> Internet intermediaries, in particular e-commerce platforms and search platforms are also considered as enablers of the creation of micro-enterprises. A report by the Interactive Advertising Bureau estimated that over one million people ran one-person firms online in the United States in mid 2009. The report estimated that 120 000 people sell full time on eBay, 500 000 do so part time,

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28 Andrew Nusca, "Verizon Launches Mobile Payment Service for E-Commerce", *ZDNet*, 22 March 2010, <www.zdnet.com/blog/gadgetreviews/verizon-launches-mobile-payment-service-for-e-commerce/13466>.

29 Olga Harif, "M-Commerce's Big Moment", *Bloomberg Businessweek*, 11 October 2009, <www.businessweek.com/technology/content/oct2009/tc20091011_278825.htm>.

30 Skype, Verizon Wireless and Skype Join Forces to Create a Global Mobile Calling Community, retrieved 30 March 2011, <http://about.skype.com/press/2010/02/verizon.html,.

31 Safaricom, M-PESA Services, retrieved 31 March 2011, <www.safaricom.co.ke/index.php?id=257>.

32 "Organization for Economic Co-operation and Development [OECD]," *The Economic and Social Role of Internet Intermediaries* (Declassified 59th Session of ICCP Committee March 2010), 37, (April 2010). Available at <www.oecd.org/dataoecd/49/4/44949023.pdf>.

> and 500 000 earn advertising revenues from blogs, mostly through revenue-sharing schemes of advertising platforms.[33]

Yet given these comments, it is striking that when one looks around the world – even though most of the companies are global – they are operating domestically and cross-border consumer online buying has not expanded at the same level as domestic growth. This is particularly interesting because the regional reports released by governments around the world indicate that businesses are looking to sell cross-border via the internet and that cross-border sales are a necessary component to creating economic stability.[34] As further stated in the Report:

> Facilitation of market entry and operation of small and medium-sized enterprises (SMEs) is critical to the economy, as these firms provide a significant source of jobs and economic growth. The ability of new and small firms to innovate is considered crucial to ensure long-term and sustainable growth, since SMEs tend to harness technological or commercial opportunities that have been neglected by established companies and bring them to market. In this context, platforms that help new firms to be established and grow are crucial to the innovation performance of an economy. Empirical evidence also shows that entrepreneurship, and specifically the process of business turbulence of market entries and exits, positively contributes to economic growth through greater efficiency in the allocation of resources.[35]

Despite the enabling impact of internet intermediaries, online cross-border e-commerce is still a market opportunity that has remained largely untapped. In concert with the continued growth, presence, influence and use of internet intermediaries, security blankets must be knitted to correct this cross-border anomaly and create new marketplace opportunities.

33 *Id.* at 40.

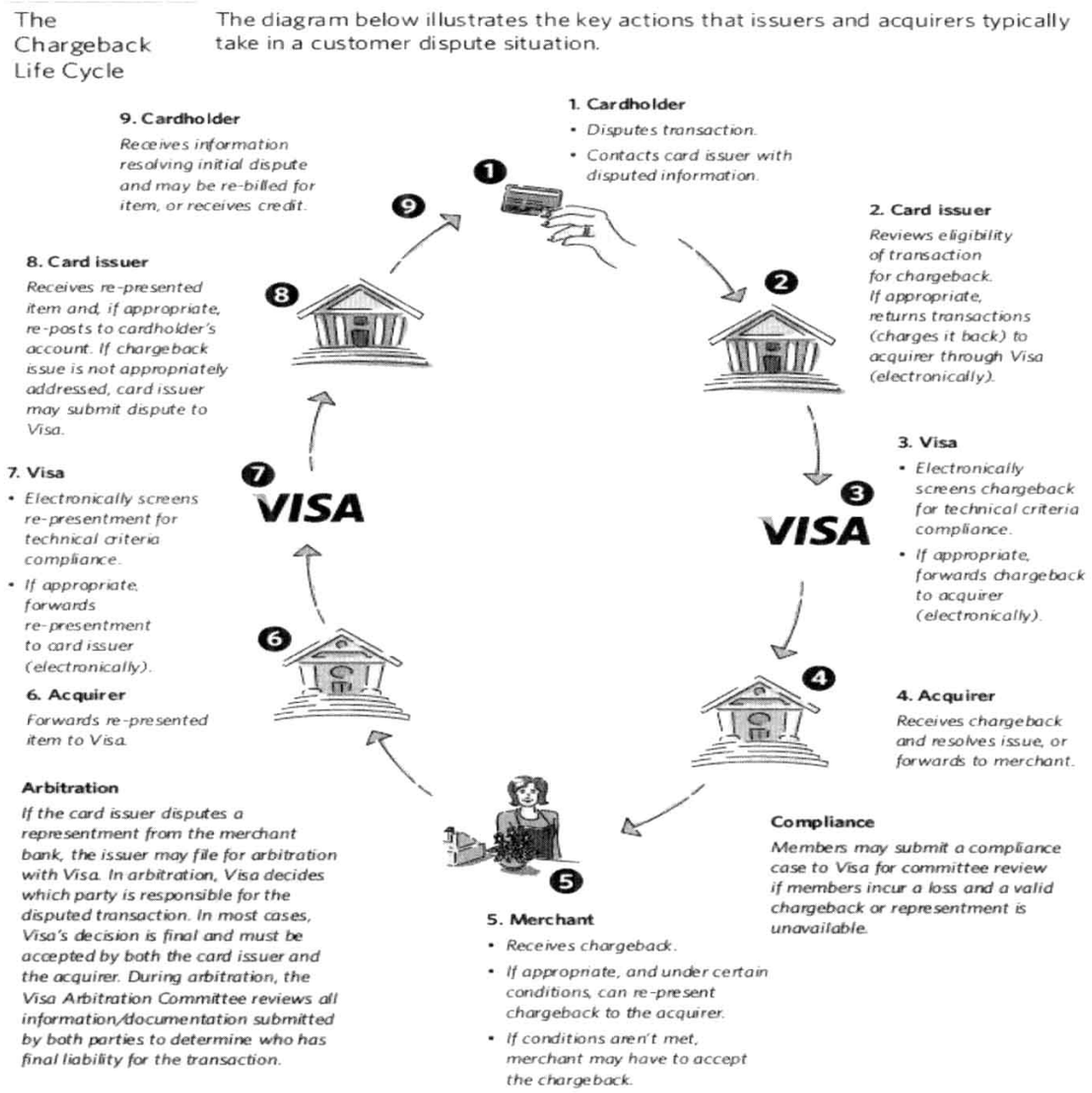
34 Commission of the European Communities, "Commission Staff Working Document: Report on Cross-Border E-Commerce in the EU", *SEC* (2009) 283 final, 3 May 2009, available at <ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf>. See also ERIA Research Project Report, "Establishment of a Secure and Safe E-Commerce Marketplace", Fiscal Year 2009, No. 6, March 2010 (Edited by Prof. Tsuneo Matsumoto). Available at <www.eria.org/research/y2009-no6.html>.

35 *Id.*

2.1 *Would a Global Chargeback System Singularly Provide an Adequate Global Redress Solution?*

The chargeback process is recognized – at least by credit card associations – as an alternative dispute resolution system. However, some others view it as a way to allocate loss between banks and not a "traditional" dispute resolution system. The process is represented below in the Visa chargeback model (included only as a representative sample of the process).[36]

Figure 3 The Chargeback Life Cycle



36 VISA, Chargeback Cycle, retrieved 30 March 2011, <http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/chargeback_cycle.html>.

In the United States the chargeback process is regulated by Regulation Z of the Federal Reserve under the Truth in Lending Act; accordingly the process and rights are not necessarily the same for purchases made in other countries (by non-Americans). Grounds for chargebacks are assigned separate "chargeback reason codes", which vary in content and number by the different credit card associations. The basis for chargebacks includes, but is not limited to:

> "I cancelled the transaction but didn't get credit on my statement";
> "I lost my card and someone used it to buy something";
> "Someone stole my information and card number and used it to buy merchandise on my account or to withdraw money from my bank account" (aka "identity theft");
> "I never received the goods"; and
> "The amount on my statement is wrong."

There is no question that this system offers a level of protection for consumers who make online purchases using their credit cards. It also helps the seller engage customers because this protection is available. Despite these benefits, however, the protection only exists in a limited number of countries for purchases made with a credit card and ignores that there is a significant trend towards the use of other payment mechanisms, including those online payment means as listed in the OECD Draft Report on Consumer Protection in Online and Mobile Payments:[37]

- Personal bank accounts (cheques);
- Debit cards;
- Mediating services (*e.g.*, PayPal, Automated Clearing House (ACH) processing used to move funds electronically);
- Automated mechanism bill payment (*e.g.*, in the US, under the Electronic Benefit Transfer);
- Online Wallets;
- Electronic currency systems (or prepaid payment services);
- Online banking based Internet payments;
- Cash on delivery;
- Escrow services;

37 Commission of the European Communities, "Commission Staff Working Document: Report on Cross-Border E-Commerce in the EU", *SEC* (2009) 283 final, 3 May 2009, available at <http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf>. See also ERIA Research Project Report, Establishment of a Secure and Safe E-Commerce Marketplace, 8, Fiscal Year 2009, No. 6, March 2010 (Prof. Tsuneo Matsumoto (ed.)). Available at <www.eria.org/research/y2009-no6.html>.

- Mobile payment means (Mobile, POS, contactless payments; mobile remote payments made through short messaging (text) services or wireless application protocol (WAP).

On the seller's end there are also some drawbacks to the chargeback system:
- Merchants are charged a fee per chargeback received – generally the higher the frequency, the higher the payment.
- Also there could be habitual reversal of transactions by consumers. If merchants reach a certain level of chargebacks they could lose their right to use a particular credit card.
- The merchant is subject to strict time limits to respond to information requests.

The most striking feature of the chargeback system is that the dispute resolution process is taken out of the hands of the buyer and seller and put into the hands of their banks – which may have competing interests in the resolution of the dispute than the buyer and seller. This may have consequences for sellers that were never intended. In other words, the parties might have settled much sooner or on different terms had they been going through a different process. Moreover, the seller and buyer are also left without transparency, access to information, and assurances regarding the competency of the system.

Given these issues, it has to be questioned whether this system can be categorized purely as a consumer protection mechanism or is it a customer service tool created by credit card companies to promote the use of credit cards? It might be a little of both. In any case, although it does offer some level of complaint handling and protections for disputes over purchases made with a credit card in credit driven environments, it does not reflect the future of payment trends and should probably be considered just one of the options for consumers and merchants, amongst a package of protection, including ODR.

3 APPLICABLE LAW AND JURISDICTION: HAVE STATES TARGETED THE RIGHT ISSUES?

Over the past decades discussions regarding (international) consumer protection and redress in the realm of cross-border e-commerce have assumed ODR as the best – and needed – mechanism to resolve such disputes. Papers, protocols and agreements have been generated supporting this conclusion.[38] eBay/PayPal has created a closed ODR system for

38 International Chamber of Commerce [ICC], "Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C transactions," 2003, available at <www.iccwbo.org/uploadedFiles/ICC/.../ResolvingDisputesOnline.pdf>; International Organization of Standardization [ISO], "Quality Management – Customer Satisfaction – Guidelines for Dispute Resolution External to Organizations", ISO10003:2007, 2007; OECD, "Recommendation on Consumer Dispute Resolution and Redress", 2007, available at <www.oecd.org/dataoecd/43/50/38960101.pdf>; Agreement Reached between Consumers International and the Global Business Dialogue on Electronic Commerce, "Alternative Dispute Resolution

its users and some domestic ODR systems have emerged. Yet, no successful ODR mechanism to resolve cross-border disputes on a regional or global scale (independent of a payment method) has been established. Interestingly, however, inter-governmental agencies and States are now taking a very proactive lead to find solutions and options for the creation of a security blanket in order to encourage an increase in cross-border online B2B and B2C commerce. In particular, proposed options at the Organization of American States (OAS) have taken a couple of forms as described below – not all of which correspond to the recommended ODR option made by consumer, business and inter-governmental organizations.

The OAS, specifically The Seventh Inter-American Specialized Conference on Private International Law, otherwise known as CIDIP VII, is now focusing on consumer protection within the Americas.[39] There are two proposals currently on the table related to cross-border consumer transactions. A Convention on Applicable law proposed by Brazil, Argentina and Paraguay (the "Brazil proposal"),[40] and a proposal to create a region wide cooperative framework for ODR by the US, along with a proposed model law for consumer payment card protection – which includes credit cards and debit cards, and a model law for strengthening consumer protection authorities.[41] There was a third Model Law on jurisdiction proposed by Canada but they have since withdrawn their proposal.[42]

There are two very different approaches being taken, based on different assumptions. The Brazil proposal assumes that high-volume, low-value disputes will be resolved in domestic courts – and therefore they focus on the law that would be applicable in the local

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Guidelines", 2003, available at <www.globaltrustmarkalliance.org/GBDe>; Better Business Bureau [BBB], "Dispute Resolution Processes and Guides," retrieved 31 March 2011, <www.bbb.org/us/Dispute-Resolution-Services/Process>.

39 Permanent Council of the Organization of American States [OAS], Simplified Version of the Final Brazilian Proposal "Buenos Aires Proposal", CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf>. See also OAS, Draft United States Proposal, "Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Dispute", (19 February 2010). Available at <www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf>.

40 Permanent Council of the Organization of American States [OAS], Simplified Version of the Final Brazilian Proposal "Buenos Aires Proposal", CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf>.

41 OAS, Draft United States Proposal, "Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Dispute", (19 February 2010). Available at <www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf>.

42 OAS, Note from the Permanent Mission of Canada Concerning the Topic: Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) - Consumer Protection, CP/CAJP-2912/10 (18 October 2010). Available at <www.oas.org/dil/CIDIP-VII_consumer_protection_canada_proposal.pdf>. (The Canadian Proposal was withdrawn on 14 October 2010 <www.oas.org/dil/CP-CAJP_2912-10_eng.pdf>).

forums.[43] The US takes the position that it is unrealistic to assume that these low-value, cross-border disputes will be settled in court, and they rather propose a system that provides easy access to the consumer to get some sort of redress, without placing an excessive and expensive burden on the merchant.[44]

It should be stressed that Brazil is proposing a convention[45] – hard law, as opposed to the other model law and soft law options available. Second, the Brazil proposal seems to provide as a rule that the law most favorable to the consumer involved in the dispute will be applicable. So, in other words, it effectively eliminates the application of the choice of law clause for cross-border consumer contracts. As for jurisdiction, it appears to create a rule against choice of forum clauses in consumer e-commerce transactions, and generally provides for jurisdiction in the courts of the consumers' home state.

It is difficult to imagine how the Brazilian proposal will benefit the consumer, the merchant or support the growth of cross-border e-commerce. The consumer is required to go to court for a small value dispute – which can be costly and timely, and at the end, the proposal does not provide for an adequate enforcement mechanism. So in reality, there is no means for the consumer to practically get redress. The merchant on the other hand, if they want to sell cross-border has to operate in a legal regime that exposes them to the laws and forum of 34 states. It is equivalent to trying to make a DOS floppy disk work in an iPad. The old approaches are no longer compatible and serve the needs of the new marketplace.

The US proposal reacts to the same set of issues via a completely different approach, based on the assumption that we should not be dealing with conflict of law and forum issues, but rather developing an ADR system to handle all of the high-volume, low value disputes. This concept is generally in accord with other governmental regional programs and sentiments – namely, in Europe – with ECC-Net and Asia with ICA-Net, but the US OAS-ODR proposal is the most classical ODR-like proposal in the world to date.

The ODR proposal includes two parts: the first deals with players. The proposal calls for the creation of a Central Administrator who manages the process, the regional OAS member participants, and approves ODR providers. Then there are the national authorities

43 OAS, Simplified Version of the Final Brazilian Proposal "Buenos Aires Proposal", 3, 5, CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf>.

44 OAS, Draft United States Proposal, Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Dispute, (19 February 2010). Available at <www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf>.

45 OAS, Simplified Version of the Final Brazilian Proposal "Buenos Aires Proposal", 3, 5, CP/CAJP-2652/08 add. 4 (10 November 2008). Available at <www.oas.org/dil/CIDIP-VII_working_doc_cp_simplified_version_final_brazilian_proposal.pdf>.

that will designate a national administrator to monitor the progress, resolution and enforcement of cross-border disputes.

The second part concerns the rules for the operation of the ODR system. It assumes that a merchant will opt into the system and then it gives the consumer the option to initiate a claim against a merchant. The value of the claim is capped at USD 10,000, and the process includes two stages. First, negotiation, to be conducted via the use of software without third party intervention and, and second arbitration, if the consumer agrees to go to this stage. If the dispute reaches stage two, the ODR provider will appoint an arbitrator.

The arbitrator may attempt a facilitated settlement if he or she feels it appropriate to the case – so this is a pseudo mediation stage. Otherwise, the arbitrator issues a final and binding award and places the responsibility on national administrators to enforce if the vendor does not voluntarily comply. The process assumes the costs of the entire process will be placed on the merchant.

This proposal also provides for a relatively high level of consumer agency involvement, which calls into question the resources that governments can put into their agencies in the OAS states, and the consequent scalability of such a system. It also assumes that states throughout the OAS will compromise on the use of arbitration for B2C cross-border disputes. It also remains hard to predict how many consumers will find the system and how many merchants will be willing to opt-in. However, the underlying purpose of the system – to protect consumers and encourage cross-border e-commerce – is preserved in the design.

3.1 ODR at UNCITRAL

In 2009, at the same time the State Department was developing its OAS proposal, it also submitted a proposal to UNCITRAL to hold a colloquium to explore the possibility of assigning ODR to an UNCITRAL Working Group.[46] Subsequently, it was agreed that Pace Law School's Institute of International and Commercial Law (IICL) would co-sponsor a conference with UNCITRAL on the topic, along with Penn State Dickinson School of Law.

In March 2010, a conference was convened at UNCITRAL in Vienna[47] – where it drew in leading experts and about 200 participants to discuss various aspects of the creation of a global ODR system and whether the time was right for UNCITRAL to assign the topic

46 UN Commission on Int'l Trade Law [UNCITRAL], Possible Future Work on Electronic Commerce – Proposal of the United States of America on Online Dispute Resolution, U.N. Doc. A/CN.9/681/Add.2 (18 June 2009) (proposing a colloquium to discuss ODR for disputes for e-commerce transactions). Available at <http://daccess-ods.un.org/TMP/441195.964813232.html>.

47 Pace Law School, A Fresh Look at Online Dispute Resolution (ODR) and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader Consumer and Merchant Conference Agenda, retrieved 30 March 2011, <http://web.pace.edu/page.cfm?doc_id=35565#SCHEDULE>.

to a Working Group. After this meeting, the IICL drafted a paper that was submitted to UNCITRAL, supporting the assignment of a Working group for ODR, to cover both B2B and B2C disputes.[48] Notably, this paper was supported by approximately forty prominent associations around the world, representing academic, commercial and consumer interests reflecting the international consensus to establish a global ODR mechanism.

The formal debate on the assignment was held in July 2010 at the 43rd General Assembly meeting for UNCITRAL in New York.[49] There was overwhelming support for the creation of a Working Group on the subject from all parts of the globe. However, the limited debate focused on how broad the mandate should be for the Working Group, whether to encompass both B2C and B2B disputes, or just the latter. At the close of the debate, a sufficient number of states supported a broader mandate, that it was determined that a Working Group would be established for ODR and it would cover disputes for B2B and B2C online transactions.[50] Given the blur in the identification of a merchant and consumer in the online environment, there was a consensus that the ODR system could be set up to handle high-volume, low-value online disputes between *buyers* and *sellers*.

The first Working Group meeting took place in Vienna in December 2010. A provisional agenda was issued by UNCITRAL indicating that the focus would be on creating generic rules for both types of transactions.[51] The Report of the Working Group identified future work, stating in relevant part:[52]

> Draft generic procedural rules for ODR, including taking into account: the types of claims with which ODR would deal (B2B and B2C cross-border low-value, high-volume transactions); initiation of the online procedure; alerting parties to any agreement with regard to dispute settlement that might be entered into at the time of contracting; stages in the dispute resolution process – including negotiation, conciliation and arbitration; describing substantive legal principles, including equitable principles, for deciding cases and making awards; addressing procedural matters such as representation and language of proceedings; the application of the New York Convention, as discussed; reference to rules of other ODR systems; setting out options, where appropriate;

48 UNCITRAL, Note Supporting, Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, A/CN.9/710 (26 May 2010) (submitted by the Institute of International Commercial Law). Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V10/539/85/PDF/V1053985.pdf?OpenElement>.

49 UNCITRAL, Report of the United Nations Committee on International Trade Law, 51, U.N. Doc. A/65/17 (21 June – 9 July 2010). Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V10/556/48/PDF/V1055648.pdf?OpenElement>.

50 *Id.*

51 UNCITRAL, Provisional Agenda, U.N. Doc. A/CN.9/WG/III/WP. 104 (26 August 2010). Available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/559/93/PDF/V1055993.pdf?OpenElement>.

52 *Id.*

> Draft document setting out principles and issues involved in the design of an ODR system. All documents or other references to ODR to known to the Secretariat would be listed by the Secretariat with references to websites or other sources where they may be found.[53]

Notably, the report also stated:

> 98. [...] There was a general consensus that it could be assumed the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B3C cross-border disputes, but that the reliance on that mechanism alone was insufficient. Discussion then centered on other options that might be used to enforce awards in a more practicable and expedited fashion. One option was to emphasize the use of trustmarks and reliance on merchants to comply with their obligations thereunder. Another was to require certification of merchants, who would undertake to comply with ODR decisions rendered against them. In that regard, it was said to be helpful to gather statistics to show the extent of compliance with awards. Finally, it was stressed than an effective and timely ODR process would contribute to compliance by the parties [...]
> 101. Many delegations supported the approach of using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions – bearing in mind the need for a high consumer protection content – as the basis for deciding case, thus avoiding complex problems that may arise in the interpretation of rules as to applicable law [...]

Since the first Working Group meeting, the Secretariat released a draft set of Procedural Rules.[54] The Rules are intended to cover ODR for B2B and B2C disputes. At the time of drafting this chapter, the draft rules provide for (1) Scope of Application; (2) Definitions; (3) Communications; (4) Commencement [of ODR proceedings]; (5) Negotiation; (6) Appointment of neutral; (7) Facilitated Settlement; (8) Conduct of ODR proceedings; (9) [Issuing of][Communication of][decision][award]; (10) Language of proceedings; (11) Representation; (12) Exclusion of liability; and (13) Costs. States will continue working on these Rules at future Working Group meetings on ODR held twice per year.

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53 This has been completed by the Secretariat at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/559/93/PDF/V1055993.pdf?OpenElement>.

54 UNCITRAL, Working Group III, "Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules", U.N. Doc. A/CN.9/WG.III/WP.107 (17 March 2011).

4 CHALLENGES IN CREATING A GLOBAL ODR SYSTEM

The thought of creating a cross-border dispute resolution system is daunting, but possible. It requires, however, taking the "open" online commercial environment and connecting some dots to create a system that would entice merchants to participate, be easily accessible to consumers, and provide enforceable outcomes. These components can be identified as separate but necessarily inter-connected to the system design considerations. As detailed by Rule, Rogers and Del Duca,[55] there are several challenges in the construction of a Global ODR system. Two of the main challenges are summarized below:

> Volume and Scalability: Currently, "eBay's ODR systems now resolve more than 60 million disputes a year, with that number increasing steadily as transaction volume on the site increases".[56] This reflects volume from one company, while conservative estimates put the volume of global consumer disputes in the hundreds of millions. Any global system must be able to scale for the steady increase in volume as electronic and mobile commerce grows, as well as be sophisticated to transfer cases between jurisdictions and handle relative caseload volumes within jurisdictions.
>
> Diverse Language and Cultures: This is probably one of the more challenging aspects in designing a global redress system. Most likely, local or regional branch offices will need to be established to account for local language, customs and laws (or ODR providers could fill this gap), with a central administrative authority to manage the system software and case flow. Although these centers would be customized to reflect local nuances, the technology implemented across the regions would be uniform.[57] A proposal has been tabled for the creation of an E-Commerce Claims Redress Interchange Standard (ECRI), a multilingual standard for cross-border ODR in the form of an open Industry Specification of ETSI. This standard would be created independent of applicable national law and applicable ODR Rules. The initial draft ECRI proposal provides that the standard would be comprised of the following principal components:
> - Claims
> - Arguments

55 Colin Rule, Vikki Rogers & Louis Del Duca, "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims - OAS Developments", (2010) 42 *UCC L.J.* 221.

56 Cooper, Rule & Del Duca (forthcoming 2011).

57 See OASIS LegalXML Online Dispute Resolution TC, retrieved 31 March 2011, <www.oasis-open.org/committees/tc_home.php?wg_abbrev=legalxml-odr>.

- Remedies
- Words and Sentences
- Resolution including Case Categorization
- Applicable ODR Rules
- Enforcement follow-up
- Identification of disputed items
- Values/date[58]

Significant work has already been accomplished by way of establishing guidelines for the creation of ODR systems.[59] In addition, some countries have established redress systems and/or partnerships with other countries for cross-border complaint handling, *e.g.*, those systems/partnerships established by e-consumer.gov, ICA-Net and Profeco (in Mexico). These guidelines and systems/partnerships must be integrated as efforts to create a global ODR system move forward. Design system issues, as well as the existing standards and systems/partnerships must also be considered within the context of the UNCITRAL instruments to be developed by the Working Group. Many questions still remain to be resolved. What will be the point of intersection between legal rules and system design? How will the creation of the global ODR system be driven, via the creation of the UNCITRAL instruments or the resolution of the system design issues listed above? Will the UNCITRAL legal instruments be sufficient to provide the necessary backbone for a global system? Can one set of instruments satisfy the procedural needs for the resolution of B2B and B2C disputes? Does an effective resolution system require pre-dispute agreements, arbitrators and awards, or would agreements post-dispute, neutrals and decisions be sufficient? What is going to attract merchants to the system (how can contractual relationships be created to bind merchants?), and who would be the relevant parties to the agreement? "Modern" intermediaries revived the work on this subject and logically should be part of the functioning of the system, but where and at what stage? What should be the scope of the substantive principles to base decisions upon – should we have detailed principles for USD 70 disputes or are "symbolic" principles sufficient? How will voluntary

58 ECRI proposal is on file with the author.

59 International Chamber of Commerce [ICC], Resolving Disputes Online: Best Practices for Online Dispute Resolution (ODR) in B2C and C2C transactions, 2003, available at <www.iccwbo.org/uploadedFiles/ICC/.../ResolvingDisputesOnline.pdf>; International Organization of Standardization [ISO], "Quality Management – Customer Satisfaction – Guidelines for Dispute Resolution External to Organizations", ISO10003:2007, 2007; OECD, Recommendation on Consumer Dispute Resolution and Redress, 2007, available at <www.oecd.org/dataoecd/43/50/38960101.pdf>; Agreement Reached between Consumers International and the Global Business Dialogue on Electronic Commerce, Alternative Dispute Resolution Guidelines, 2003, available at <www.globaltrustmarkalliance.org/GBDe/>; Better Business Bureau [BBB], Dispute Resolution Processes and Guides, retrieved 31 March 2011, <www.bbb.org/us/Dispute-Resolution-Services/Process/>; EConsumer.gov, retrieved 31 March 2011, <www.econsumer.gov/english/>; ECC-Net, retrieved 31 March 2011, <www.ecc-net.info>.

compliance with decisions be encouraged? In the alternative, how will cost-effective and practical enforcement be achieved?

As we move forward in answering these questions, I end this chapter with a quote by Alfred North Whitehead, the famous mathematician and philosopher: "Fundamental progress has to do with the reinterpretation of basic ideas".[60]

In creating a global ODR system we must inevitably shape our basic ideas on alternative dispute resolution to make room for technology and the evolving world so we can develop a system that best protects consumers while providing sellers in emerging and developed markets new economic opportunities.

60 W.H. Auden & L. Kronenberger, *The Viking Book of Aphorisms: A Personal Selection* (1962), p. 346.

7 ODR AND E-COMMERCE

Aura Esther Vilalta[*]

The Internet is a powerful technology that enables fast communication, both internationally and locally, and changes behaviors that involve the use and processing of information. Cyberspace, as a consequence, has become a new realm of commerce and a market with various kinds of transactions using acronyms such as: C2C, B2C, B2B, C2B or M2B.[1] It removes traditional barriers between "offerors" (producers, sellers, etc) and "offerees" (clients, users, consumers.). Time, geographical distance and language are no longer obstacles to trade and, consequently, cross border disputes have also increased. In this environment, courts have been losing effectiveness in handling the needs of parties because costs are too disproportionate and proceedings long and cumbersome. Online Dispute Resolution (ODR) mechanisms have emerged, therefore, as a natural response to this international process with the aim of providing an effective way to overcome the existing gap.

1 THEORETICAL FRAMEWORK

The European Union Communication from the Commission on *The Out-of-Court Settlement of Consumer Disputes* of 1998[2] clarified the scope of challenges consumers face. In brief, it recognized that there are three possible ways of improving access to justice: (i) simplification and improvement of legal procedures, (ii) improvement of communication between professionals and consumers, (iii) and the use of out-of-court procedures to settle consumer disputes. Most importantly, it indicated that "far from being alternatives, these three approaches are fully complementary". However, a fundamental difference distinguishes the first approach from the other two. While the first approach remains within the traditional framework of the judicial settlement of disputes and aims to improve the existing systems, the other two remove these disputes from the judicial arena wherever possible. This approach can assist us in drawing the initial boundaries of ADR/ODR methods.

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* This chapter is based on some early findings within the framework of *The Global ODR System Project*, Internet Interdisciplinary Institute (IN3), 2010-2011.

1 C2C (Consumer to Consumer) is a model of e-commerce between consumers. On the other hand, C2B (Consumer to Business) trade is based on business transactions where the buyer or the user determine the terms of sale. Finally, the M2B (Mobile to Business) model refers to e-commerce through mobile technology.

2 Brussels, 30 March 1998. COM(1998) 198 final.

1.1 Description

There are various approaches used to accurately define and describe ODR mechanisms. For instance, Kaufmann-Kohler and Schultz describe three perspectives, namely cyberspace, non-adjudicative ADR and arbitration. These authors also consider that the important trait of a workable definition of ODR is that it focuses upon the issues raised by its overarching feature, being operated online, and thus, they adhere to the definition provided by the American Bar Association Task Force on e-commerce and ADR, extending the definition to include Cyber courts.[3] Another broad approach suggests that ODR methods encompass all the alternatives to court proceedings that are electronically developed (facilitative, evaluative and adjudicative or adversarial).[4]

While ADR and ODR mechanisms share some common traits, such as lower cost, greater speed, more flexibility in outcomes, less adversarial strategies, more informal flow, privacy and solution oriented methods (instead of blame-oriented techniques), it is also true that ODRs feature a host of unique features, which include: (i) the fact that disputants do not have to meet face to face; (ii) the dispute resolution process may occur at any time, regardless of geographical distance; (iii) the possibility of asynchronous communication.[5]

Other traits of ODRs are the number and the nature of the parties involved. In ODR processes, unlike off-line conflict resolution methods, information and communication technologies (ICTs) are always present. Therefore, it is possible to identify the following elements in any ODR system: (i) the parties involved; (ii) the "Third Party", namely a neutral person or mediator, a conciliator or an arbitrator; (iii) the so called "Fourth Party"[6] which refers mainly to the technology involved in the process;[7] (iv) and the "Fifth Party", the provider of ICTs, the technical player.[8]

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3 See G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, The Hague, Kluwer Law International and Schulthess 2004, pp. 7-8.

4 A restrictive perspective considers ODR limited to consensual methods of dispute resolution online.

5 See E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001, p. 96

6 See Katsh & Rifkin (2001), p. 93.

7 To the extent that these methods evolve with technology, they also become "Fourth Party" processes where the "Fourth Party" assumes facilitative and consultative functions and helps to build consensus. See Katsh & Rifkin (2001), pp. 92-94.

8 S. Bol, "An Analysis of the Role of Difference Players in E-mediation: The Legal Implications", in J. Zeleznikow and A.R. Lodder (eds.), *Proceedings of the Second International ODR Workshop*, Tilburg, Wolf Legal Publishers, 2005, pp. 23-30. Also in Centre for Information Technology and Dispute Resolution, Working Papers. Available <www.odr.info/papers.php>, p. 23. See also A.R. Lodder, "The Third Party and Beyond. An Analysis of the Different Parties, in Particular The Fifth, Involved in Online Dispute Resolution", *Information & Communications Technology Law*, (2006) Vol. 15, No. 2, p. 144. Available at <http://ssrn.com/abstract=1269562>.

Finally, one more feature that identifies ODR mechanisms is their unique ability to extend their functionality at the level of conflict prevention by means of information managed to avoid misunderstanding and conflict.

Traditionally, out-of-court methods of dispute resolution (negotiation, bargaining, trade-off and agreements, etc.), unlike judicial processes, draw on the idea of maximizing the satisfaction of disputants, underlying their interests and reaching outcomes that are satisfactory for both parties involved in the conflict. Bentham's classical Principle of Utility [1789][9] underpins the theory and mathematical algorithms applied to negotiation in order to obtain the best results for each disputant.[10]

On the basis of this principle, Fisher and Ury focused on how to promote a fair and successful negotiation and, consequently, on how to establish the "Principled Negotiation" criterion to assist experts in their problem solving tasks:[11] (i) by separating the people from the problem; (ii) focusing on interests rather than positions and rank them; (iii) developing options for mutual gain; (iv) using objective criteria to evaluate interests; (v) and making parties reflect on their BATNAs.

Fisher and Ury described three main decision making strategies commonly used in negotiation: (i) the *Interest-based Strategy* that draws from the technique of underlying interests; (ii) the *Rights-based Strategy* that relies upon accepted principles, rules, provisions or commonly recognized practices that may apply; (iii) and the *Power-based Strategy*, grounded in the power contest of the parties. According to these scholars, the *Interest-based Strategy*[12] is the best option in order to achieve long term outcomes and improved relationships as opposed to the *Right-based Strategy* that merely reproduces adversarial techniques and prolongs dissatisfaction.

Commerce disputes are commonly susceptible to be solved in terms of monetary (financial) agreements. Therefore, many ODR systems integrate technological game-theory strategies and negotiation analyses (based on statistical surveys of human behavior) focusing on

9 Utility, as a measure of relative satisfaction, explains the economic behavior of the parties. As it is well known, the theory of Utilitarianism [Bentham, 1748-1832] considers that systems should aim to maximize the utility of individuals in terms of happiness. It derives from the combination of commodities that an individual would accept to maintain a given level of satisfaction.

10 See J. Neumann & O.J.V. Morgenstern, *Theory of Games and Economic Behavior*, Princeton University Press, 1944.

11 R. Fisher & Bill Ury, *Getting To YES: Negotiating Agreement Without Giving In*, Boston, Houghton Mifflin 1981.

12 Some traditional interest-based strategies are: (i) the *Expanding the Pie* technique; (ii) the *Compensation* or *Trade-off* technique; (iii) and the *Logrolling* technique, where parties collectively seek issues and proposals.

interest-based criteria that offer parties the means for emphasizing and optimizing interests that help them seek solutions within the Zone of Possible Agreements (ZOPA).[13]

1.2 Taxonomy

As mentioned earlier, ODRs operating in the field of e-commerce disputes, like ICTs, are continuously evolving. Therefore, it is difficult to develop a conclusive classification of the different types of ODR in the field of electronic trade as these are likely to expand. Several efforts are being undertaken in this regard in order to facilitate a better understanding of these methods, including the mapping and description of the various forms of electronic methods of resolution. The main difficulty in accomplishing this task derives from the fact that ODRs are continuously broadening boundaries and opening new horizons thanks to innovations and the changing nature of the ICTs. Although ODR was originally designed for the resolution of disputes, they have lately expanded their activities to encompass information services, prevention tasks and technology for accountability purposes. As pointed out by Katsh,[14] "programs online and their capabilities are all works in progress" and are meant to offer a tailored solution to each case. Another concern worth mentioning is the existing multi-tiered and hybrid formulas of ODR mechanisms.

The following are some of the most commonly used modalities of dispute resolution in business and trade.

1.2.1 Automated and Assisted Negotiation

Negotiation is a method devoted to reach the settlement of a dispute through equal bargaining. The parties reach an agreement and settle their claims either on their own or with the "assistance" of technological means. Some of the most significant developments in this field include a blind- bid negotiation, which involves the parties confidentially submitting to the ODR platform the amounts they would consider fair to reach an agreement. If one of the figures coincides with the amounts introduced by the other party, the ODR platform informs the parties that an agreement can be reached on such an amount. In this case, therefore, the ODR platform provides technical assistance to the negotiation, as the software enables parties to analyze their bargaining position and assess their expectations. The information is never disclosed to the counterpart or third parties, and both are free to settle an agreement or to use other means of resolution, instead. In e-commerce, negotiation

13 R. Lewicki, D. Saunders & J. Minton, "Zone of Potential Agreement", *Negotiation* (3rd edn.), Burr Ridge, IL, Irwin-McGraw Hill 1999, pp. 71-74.

14 See *id.*, p. 11.

is, by far, the more widespread and efficient extrajudicial means of conflict resolution between consumers and businesses.

1.2.2 Online Mediation

The term "mediation" encompasses a host of semantic variations. For instance, in those cases where negotiations have not been successful, ODR mechanisms usually scale into a second stage or level and parties step into a mediation process where a third party neutral assists them to create a climate of understanding in order to facilitate an agreement. In this method, two or more parties attempt to voluntarily reach an agreement with the help of a third party. The neutral party is asked to conduct the mediation in an effective, impartial and competent manner. During the mediation the rights of the parties are not assessed by the neutral, who is not entitled to make any decisions.[15]

The online mediation process follows a path or a set of stages regularly subjected to deadlines, record of events, flow processes and, sometimes, complex systems with algorithms that can optimize offers. Electronic systems "assist" the parties generating informal proposals or recommendations, and parties are assisted by mediators that participate online. Communications can be *synchronous* (*e.g.* cyber conferencing, chats) or *asynchronous* (*e.g.* e-mail). Platforms may also have incorporated private chats with the neutral – caucuses – and common areas where each party may assert arguments without showing their identity. These services often offer complementary phone support.

When the conflict affects a number of people, the third party is often referred to as "facilitator". The role of the facilitator is to assist all of those involved in a case to participate freely, ensuring everyone has the possibility to express themselves without the added pressure of power imbalances. The expert party helps re-establish balance in skewed negotiations by managing the group dynamics and the individual power of participants.

15 The distinction between mediation and other alternative methods of dispute resolution through consensus, such as conciliation, is far greater in Europe than in other geographical contexts. Mediation, in any case, is seen as a facilitative method, while conciliation is more evaluative, and the role of the third party is much more active, having the privilege to even suggest formal solutions to the parties. In some countries, like Spain, Italy or Slovenia, mediation is often implemented in practice as a first step in a process leading to arbitration (med-arb). In some European countries agreements reached through mediation may be enforceable, for instance: (i) in France, Art. 1441 of the Code of Civil Procedure provides that either party may request the judge that the agreement submitted be enforceable; (ii) in Slovakia, the mediation agreement is enforceable if it takes the form of a notarial deed; (iii) in Belgium, the judicial order approving a settlement is also enforceable; (v) Holland also provides enforceability effects to agreements approved by a judge. The distinction between mediation and other alternative methods of dispute resolution via consensus (like conciliation) is much sharper in Europe than in other geographical contexts.

1.2.3 Online Conciliation

Online conciliation, the third level in the table of scalability, involves the third party not only assisting in finding a solution but proposing formal solutions as well. In no event, however, does the third party impose an opinion or a solution. The main difference between online conciliation and mediation lies in the fact that conciliators actively assist in the process and build solutions that are then formally submitted to the parties.

1.2.4 Online Arbitration

Arbitration, the most popular amongst the decision-oriented methods of dispute resolution, rests on a key element, the arbitration agreement. Whether in the form of a clause embedded in a contract, or whether an independent document, the arbitration agreement should represent the genuine expression of the parties' self-determination and will. The *iter* through which the arbitrator/s will issue the "verdict" is subject to the rules of the arbitration court. In an *ad hoc* arbitration process instead, parties preserve the right to determine the process flow by means of an agreement. Therefore, there may be as many arbitration proceedings as arbitration courts or *ad hoc* arbitration agreements. All of them, nevertheless, are committed to the respect of the principle of adversarial process.

1.3 Current Legal Framework

1.3.1 International Framework

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of New York [1958] is recognized as one of the most important international instruments with an impact on international trade. According to this significant Convention, parties may agree to undertake and submit to arbitration all or any differences which may have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. In this case, courts of a contracting state shall, at the request of one of the parties, refer the parties to arbitration, unless they find that the said agreement is null and void, inoperative or incapable of being performed.

The UNCITRAL *Model Law on International Commercial Arbitration* [1985],[16] recognizing the value of arbitration as a method of settling disputes arising in international commercial relations, and in view of the desirability of uniformity of the law of arbitral procedures, sets out a legal framework to improve and facilitate the modernization of national laws on arbitration proceedings, taking into account their traits and special needs. The United

16 With amendments adopted in 2006.

Nations has also enacted the UNCITRAL *Model Law on International Commercial Conciliation* [2002] aimed at recognizing the value for international trade of methods for settling commercial disputes in which the parties request a third person to assist them in their attempt to settle the dispute amicably. The United Nations considers that these methods (conciliation, mediation and others of similar importance) deliver significant benefits such as reducing the cases where the dispute leads to the termination of a commercial relationship and reducing costs in the administration of justice by the states.

In addition to this, the United Nations approved an UNCITRAL *Model Law on Electronic Commerce* [1996][17] intended to facilitate the use of modern means of communication and information when bargaining. It creates a functional equivalent for electronic documentation and it adapts some basic traditional concepts such as the notion of "writing", "signature" and "original". Where the law requires information to be in writing, that requirement is considered to be met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. As to the originals, where the law requires information to be presented or retained in its original, that requirement is considered met by data messages if there exists a reliable assurance as to the integrity of the information from the time when it was first generated as a data message, and, where it is required that information be presented, that information can be displayed to the person to whom it is to be presented. This Model Law also determines that in the context of contract formation, an offer and the acceptance of an offer may be expressed by means of data messages and that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.[18] It also defines some rules to determine the legal status of e-mail communications[19] and contains provisions for electronic commerce.

More recently, the *United Nations Convention on the Use of Electronic Communications in International Contracts* [2005] sets out criteria for the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different states. It reinforced the idea that the fact that the parties have their places of business in different states is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

17 Together with a guide to enactment and an important additional item (5 aa), adopted in 1998.

18 Of course, unless otherwise agreed by the parties. See Article 11.

19 As far as the acknowledgement of receipt is concerned, for example, it sets out that when the originator has not agreed with the addressee that the acknowledgement be given in a particular form or method, it may be given by any form of communication by the addressee, automated or otherwise, or any conduct of the addressee sufficient to indicate to the originator that the data message has been received. And if the offeror has stated that the data message is conditional on receipt of the acknowledgement, this data message is treated as never been sent until this acknowledgement is received.

The UNCITRAL *Model Law on Electronic Signatures* [2001] strengthens the legal certainty of trade via the use of electronic signatures by providing the presumption that an electronic signature that meets certain criteria of technical reliability is comparable to a handwritten signature. This Model Law adopted a criterion of technical neutrality to favor the use of any appropriate technology and also defines certain rules of conduct that are essential and may serve as guidance for assessing the duties and responsibilities of the signatories.

Currently, the United Nations, after noticing that small claims that take place in the context of transnational commerce need a legal framework that favors effective means of resolution, committed to this goal has given to Group III UNCITRAL the task to suggest specific rules and standards for ODR dealing in e-commerce.[20]

1.3.2 Europe

As far as civil matters are concerned, after the Recommendation 12/1986 of the Committee of Ministers at the Council of Europe on *Measures to Prevent and Reduce the Workload of the Courts*, the European Union has pledged to introduce extrajudicial mechanisms of dispute resolution, considering the fact that such methods are essential to improve efficiency in the case of small claims. Examples of these include the first *European Commission Communication on Consumer Redress* in 1985[21] and the *Supplementary Communication from the Commission on Consumer Redress* of 7 May 1987.[22]

In 1993, the Commission of the EU published the *Green Paper on Consumer Access to Justice and Dispute Resolution in Consumer within the Single Market*[23] which states that, according to the European Commission, member states must remove barriers to consumers and offer effective instruments of justice. The Commission, therefore, invited member states to work together to enhance the settlement of disputes in cross-border trade.

In 1996, the Commission enacted an *Action Plan on Consumer Access to Justice and the Settlement of Disputes in the Internal Market.*[24] This document outlined specific criteria for the creation of out-of-court procedures applicable to consumer disputes: (i) the impartiality of the body responsible for handling the disputes must be guaranteed; (ii) and the effectiveness of the procedure must be ensured by the existence of clear, simple

20 See 43 session, NY, 21 June - 9 July 2010; ACE.9/710. See also General Assembly Official Report, 65 session, supplement no. 17 (A/65/17).

21 <http://aei.pitt.edu/1596>.

22 See COM (87) 210 final.

23 See COM 93-576 def. 16 November 1993. <http://europa.eu/legislation_summaries/other/l32023_en.htm>.

24 <http://aei.pitt.edu/1180/01/consumer_jsutice_gp_follow_COM_96_13.pdf>.

mechanisms for submitting claims, with establishment of time limits, and with attribution of appropriate investigatory powers to the body responsible.

After the *Action Plan* of Vienna [1998] and the Conclusions of the Tampere European Council [1999], the Council of Ministers invited the Commission of European Communities to the preparation of a *European Green Paper on Alternative Methods for Resolving Conflicts in Civil Law*. At the European Summit in Lisbon, in March 2000, on the topic *Employment and the Information Society*, the European Council[25] asked the Commission and the Council to consider how to increase consumer confidence in electronic businesses, in particular through alternative dispute resolution. This objective was reaffirmed at the European Council in Santa Maria da Feira in June 2000, at the *Global Action Plan e-Europe*. In 2000, the European Parliament stressed "the importance of expanding the methods of-court redress for consumers, particularly in cross-border conflicts". A year later, in a *Communication on the Access to Alternative Dispute Resolution* [21 October 2001], the Commission highlighted the key role of extra-judicial methods in order to improve access to justice for consumers and the significant role of ICT in the provision of means for resolving disputes.[26] Also in 2001, the European Commission created a *Consumer Complaint Form* for consumer disputes. Since then, technology is seen as a central instrument in facilitating the resolution of disputes as it enhances the access, the speed and the control of the settlement process placed in the hands of the parties.

In 19 April 2002, the European Commission published the *The Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*. This paper highlighted the crucial role of ADR as an integral part of the policies aimed at improving access to justice. In 2005, the European Union promoted the creation of a network of European Consumer Centers (ECC-Net) that provides communication and support structure. It consists of national contact points with the "goal to incorporate all ADR and ODR mechanisms". Since then, the European Council and the EU Commission have stressed that in order to avoid litigation it is best for the interests of both consumers and businesses to seek the resolution of conflicts in an amicable manner, and they have also highlighted the significance of devoting efforts to considering alternative methods.[27]

Today, the European Union continues to build on the results of prior programs and promotes the Program approved by the Stockholm European Council on 2 December 2009.

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25 The European Council in December 2001 also stressed "the importance of preventing and resolving social conflicts, and more specifically transnational social conflicts by means of voluntary mediation mechanisms".

26 Communication *Widening Consumer Access to Alternative Dispute Resolution* COM (2001) 161 final, of 4 April 2001. Available at <http://ec.europa.eu/consumers/redress_cons/adr_en.htm#init>.

27 See Rec. 2001/310/EC.

This *Stockholm Program*[28] established a policy and a strategic priority for Europe in the coming years based on the interests and needs of citizens. It entailed: (i) eliminating "barriers to the recognition of legal acts in other member states", (ii) giving priority to "mechanisms that facilitate access to justice, so that people can assert their rights throughout the Union"; (iii) ensuring trust, confidence and understanding; (iv) avoiding overlapping and inconsistency of standards; (v) enhancing horizontal and e-justice to ensure better access to justice; (vi) and also removing the obstacles to resolve civil law issues.

The Stockholm Program placed emphasis on the fact that efforts must continue in order to improve alternative dispute resolution mechanisms, particularly those in consumer law. It also considered that action is necessary to remove language barriers and to enhance electronic tools and modern means of electronic communication (ICTs) to the full extent.

From a regulatory point of view, it is worth noting some European Union legal initiatives undertaken in recent times. Some of these have taken the form of directives, other of mere recommendations. Although recommendations are not legally binding instruments for member states, they have significant political weight and have been used extensively for a soft harmonization in this area of policy. The following are only two examples:

1. As one example, after the Recommendation (98)1 of the Committee of Ministers of the Council of Europe on *Family Mediation*, the European Union enacted a very significant legal instrument, the Recommendation 98/257/EC of the European Commission, of 30 March 1998, on the *Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes*. This instrument proposed a set of recommendations that all bodies with active intervention of a third party that formally proposes or imposes a solution for the out-of-court settlement of consumer disputes respect the following principles: liberty, independence, transparency, effectiveness, legality, adversarial principle and representation.
2. On 4 April 2001 the Commission also approved the Recommendation 2001/310/EC on the *Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes*. This instrument was specifically addressed to any procedure which facilitates the resolution of a consumer dispute by bringing the parties together and assisting them in reaching a solution by common consent. It is designed to stress that electronic commerce facilitates cross-border transactions, which are frequently of low value, and that the resolution of any dispute needs to be simple, quick and inexpensive. Therefore, it considers that technology can contribute to the development of electronic dispute settlement systems, providing mechanisms to effectively settle disputes across

28 <www.se2009.eu/en/the_presidency/about_the_eu/justice_and_home_affairs/1.1965>.

different jurisdictions without the need for face to face contact. The principles that should inspire these methods are: impartiality, transparency, effectiveness and fairness.

As to directives, the first of general scope was the Directive 2000/31/EC of the European Parliament and Council of 8 June 2000, *on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market*, which requires that member states encourage courts, particularly for disputes concerning consumer products, to act in order to provide adequate procedural safeguards for the parties. It emphasizes that member states should ensure that laws do not impede ADR mechanisms, including those using electronic channels. This directive stresses some aspects that are very relevant to e-commerce, such as the place where a service provider is established. According to it, this place should be determined in conformity with the case-law of the European Court of Justice, according to which the concept of place involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period of time. In the case of companies providing services via internet websites, the actual location is not considered to be the place where the technology is found nor the place where the company's website is accessible but the place where the company pursues its economic activity. It also establishes that member states shall ensure that their legal systems allow contracts to be concluded by electronic means and that in cases where recipients of the service place their order through technological means, service providers must acknowledge receipt of the order without undue delay and by electronic means.[29] In addition, the directive finally sets out that member states shall ensure also that their legislation does not hamper the use of out-of-court schemes, "including appropriate electronic means" (Article 17). Finally, the Commission Directive 2008/52/EC of the European Parliament and the Council on *Certain Aspects of Mediation in Civil and Commercial Matters*, of 21 May 2008, seeks to expand the use of mediation in cross-border disputes.[30]

1.3.3 Latin America

The legal systems of Latin American countries have inherited the patterns of Spanish and Portuguese legal systems. Their legal traditions respond, therefore, to continental or civil law. Many of these countries have developed legal frameworks for out-of-court mechanisms and are very receptive to these new opportunities. One issue of particular concern for these nations seems to be the independence of the bodies that carry out extrajudicial resolution processes.

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29 Article 11 also mentions that the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

30 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:IT:PDF>. See also Regulation CE No. 861/2007, of European Parliament of 11 July 2007, that sets out a judicial procedure for small claims in transnational trade between member states.

In many Latin American countries mediation agreements have an enforceable character.[31] In these countries the terms mediation and conciliation are often used interchangeably to refer to both practices and procedures (*e.g.* Colombia, Bolivia, Chile, Argentina). Chambers of Commerce have been very active and have taken several initiatives in the field of arbitration and mediation, in order to promote business and investor's confidence. Many centers offering arbitration and mediation services are attached to Chambers of Commerce that enact specific regulations to comply with. Also worth mentioning are the services provided by the Inter-American Development Bank (IDB) aimed at the resolution of commercial disputes, and also a recent regional initiative from ILCE designed at implementing online dispute resolution schemes in the region for transnational commerce.[32]

1.3.4 Asia

The most widespread form of conflict resolution in the Asian continent is negotiation, because the idea that interpersonal and professional relationships should be preserved at all costs is deeply rooted in all the cultures of this continent. Recent comparative studies show, however, that the influence of European countries and the United States is increasingly significant in Asia and in their legal systems in general. In China and Japan negotiation, mediation and arbitration are prerequisites before referring a case to the courts in civil and commercial disputes. Mediation in China and in Japan is similar to the western concept of reconciliation because the mediator plays a more active role. On the other hand, mediators in these countries can generally play the role of arbitrators if the parties do not reach an agreement without generating ethical problems. India has also developed in recent times the Consumers Coordination Council (CCC) and its CORE center, an online mechanism designed to resolve consumer-related disputes.

Although there are no regional legal initiatives, some of the Asian countries have enacted laws and provisions to provide a legal framework for e-commerce and extrajudicial means

31 For example: (i) in Argentina, mediation agreements are reflected in minutes and communicated to the Ministry of Justice. If the agreement is breached, it may be executed via the procedure of execution of sentence; (ii) in Peru, the Mediation Center verifies the legality of the resolutions adopted by the mediators and the record is straight title run; (iii) in Ecuador, the act of mediation has the effect of a sentence and is therefore enforceable; (iv) also in Colombia, Costa Rica, Nicaragua, Bolivia and Panama, the settlement does result in res judicata and the act is enforceable; (v) in some federal states of Mexico, agreements reached are presented by the mediator to the Director of the Center for Mediation, so that in their presence, the parties ratify its contents and recognize the signatures. And agreements approved by the Director shall have the value of public documents and become enforceable. If the agreement is breached, compliance may be required through enforcement proceedings before the competent judge.

32 <www.einstituto.org/?tag=odr>.

of resolution.[33] Also, it is worth noting a significant regional initiative, the ICA-Network,[34] where several participants from ASEAN and some East Asian countries, including Malaysia, Singapore, Vietnam, Republic of Korea, Philippines and Japan, are implementing a common frame to enhance transnational trade and online disputes resolution mechanisms in the region.

1.3.5 African Countries

Most of the ADR/ODR initiatives in this continent are implemented in countries from the Mediterranean basin: (i) in Egypt, the Cairo Regional Center of Commercial Arbitration has established a set of self- regulatory rules of mediation with detailed references to confidentiality and the obligation to disclose any information that could compromise the independence or impartiality of the mediator; (ii) in Morocco, the Chamber of Commerce of the International Arbitration and Mediation Center (CIMAR) of Rabat and also the Casablanca Chamber of Commerce (CCISCO) and the Conciliation and Arbitration Center of Marrakech offer mediation services; (iii) in Tunisia, the Centre de Conciliation et Arbitrage has its own rules of mediation and conciliation that integrate interesting provisions such as: the prohibition of the mediator or conciliator to carry out the functions of arbitrator in an arbitration concerning the same dispute; or the prohibition to enforce arbitral or judicial proceedings on the views expressed by the parties.

Many African countries have enacted laws to provide a legal framework to protect the practice of arbitration, the best known amongst ADR/ODR mechanisms.[35] Some of the pilot programs implemented in African countries to promote mediation and other alternative methods for the resolution of commercial disputes and for the promotion of trade

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33 In Indonesia, for example, Law No. 30/1999 on Arbitration, requires the arbitration body to first ensure that parties try to reach an amicable settlement. The same law also regulates other forms of alternative dispute resolution. Mediation agreements reached before an arbitral tribunal are contained in an award and become binding and enforceable in court. Also in Japan, mediation agreements that take place before a judge have the same force that a court ruling. Also in Sri Lanka mediation is a necessary step before refering to courts and the outcome, once "ratified" becomes executive. The Arbitration Act, amended in 1995 host a pre-mediation phase. In Pakistan there is an Arbitration Act from 1940, a Conciliation Court Ordinance of 1961 and a Family Court Act of 1964. In China, mediation in trade is articulated by consumer associations and the Rules of the International Committee of China International Economic Arbitration (CIETAC), the center that offers an arbitration that is preceded by mediation attempt; (iii) in Malaysia, the mediator is expected to take an active role and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has largely driven the use of this modality.

34 <www.eria.org/research/y2009-no6.html>.

35 By way of illustration: (i) in Mozambique, Law 11/1999, of 8 July 1999, of Arbitration, Conciliation and Mediation; (ii) in Cabo Verde, the 76/VI/2005 Act, of 16 August, on arbitration, and the Decree 31/2005 of 9 May 2005, on Mediation; (iii) in Angola, Law 16/03, of 25 July, on voluntary arbitration; (iv) in Malawi, there is a pilot mediation project started in 2008 for its implementation among the rural population (85% are farmers); (v) in Nigeria, the Arbitration and Conciliation Act of 14 March 1998; (vi) or in South Africa, the Law 42/1965, governing arbitration agreements.

and small and medium businesses, also deserve to be mentioned. By way of example, the International Association for Development of the World Bank finances a project called International ADR Technical Assistance Center which is aimed at improving investment climate in the states of Abia, Kaduna and Lagos, to facilitate access to justice and to reduce time and costs involved in resolving trade disputes. Also The Union for the Mediterranean (UpM) promotes an economic integration among EU member states, North African countries and Middle Eastern countries. The European Arbitration Court for the Mediterranean and Middle East aims to cooperate in transnational disputes in this region.

1.4 General Principles and Standards

At the international level, ADR mechanisms applied to the field of electronic commerce are subject to recommendations of a number of international non-governmental entities and organizations. Very recently, moreover, some of these entities have also issued a set of standards affecting ODR platforms that have often taken the form of guidelines and codes of conduct, namely: (i) the Global Business Dialogue on e-Society (GBDe) in conjunction with Consumers International generated a guideline for e-commerce disputes called *the GBD Agreement*[36] that describes principles for ADR and refers to the need to adjust these requirements to the online context; (ii) the Organization for Economic Cooperation and Development (OECD) issued guidelines for consumer disputes in e-commerce in 1999; (iii) also the TABD (Transatlantic Business Dialogue;[37] and the TACD (Transatlantic Consumer Dialogue);[38] (iv) the European Committee of Standardization (CEN) issued guidelines containing a classification of ODRs; (vii) the International Chamber of Commerce (ICC) has provided a set of guidelines and describes standards for using websites, e-mails and electronic tools for communication, submission of documents, evidence and filing purposes; (viii) and the American Bar Association (ABA) has released a report on the behavior of players in e-commerce and associated controversies.

Some of these organizations, associations and chambers of commerce have even proceeded to put into practice regulations, standards, guidelines and principles. From the international arena to the various domestic legal systems, organizations and states have acknowledged a range of commonly accepted principles and standards in ADR processes as applicable to ODR. These include the following:

- freedom or private autonomy;
- confidentiality;

36 In November 2003. See <www.gbd-e.org/pubs/ADR_guideline.pdf>.

37 See <www.tabd.com>.

38 See <www.tacd.org>.

- impartiality and independence;
- fairness of procedure;
- efficiency (effectiveness, speed, low cost);
- transparency;
- legality;
- and in some of them, the principle of neutrality and adversarial process.

2 TECHNICAL AND LEGAL ISSUES

The following identifies several significant technical and legal challenges that ODR service providers face currently.

2.1 Identification and Authentication of Parties in ODR Mechanisms

The identification of the parties involved at the beginning of any ODR proceeding is generally verified by means of electronic identity authentication and electronic signature.[39] Currently, the most commonly used electronic authentication mechanisms are electronic signatures such as personal identification numbers (PINS), public key cryptography (PKC), digitalized signatures, or the OK-box, consisting of a click wrap agreement. Electronic signatures provide identification for persons accessing the system and offer certainty as to their personal involvement in the act of signing. They also associate that person with the content of the documents and communications that he/she issues, including an acceptance to initiate an ODR process.[40]

Another important task performed by electronic signatures is to verify that the person appearing online is real and not a mere digital identity. This is also a common problem of e-commerce transactions, which, as stressed by Buti,[41] has been resolved by the market, as the reliability of the "offeror" in an electronic transaction becomes even more important than the physical identity. Therefore, although digital certificates issued by third parties and authorized by state authorities would be the ideal, they are not used in transactions of low value made by non-serial players and in the small claims derived, as the cost of such mechanisms of authentication could be too high.

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39 See *Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods*. United Nations publication, N. E.09.V.4.

40 See UNCITRAL Model Law on *Electronic Signatures*, 2001. See also the European Directive 1999/93/EC on *Electronic Signature*.

41 See "Identification of Parties, Verification and Liability for Actions in ODR Systems", in *2009 International Workshop onADR/ODR: Building Bridges: Legal Framework and Principles*, UOC-IN3, Barcelona, Spain, 15 September 2009. Available at <www.uoc.edu/symposia/adr>.

As for the certification of the site through which ODR services are offered, the service rendered by a trust mark using a secure connection (SSL) allows the "offeree" to verify the real identity of the supplier.

2.2 *Integrity of Communications and Documents*

Given the fact that most electronic documents can become evidence in online adversarial platforms like arbitration, protecting these documents from access and alteration is a key concern. As such, many ODR service providers offer virtual secure environments such as the Net-Case at the International Chamber of Commerce (ICC) or the Web-File at the AAA's online arbitration.

ODR platforms are also committed to provide secure mechanisms for the storage and destruction of information. Documents, databases and other types of information are protected by securing access and storage at the web server and at the local network and local computers (with backups, firewalls, etc.). However, only few ODR mechanisms currently offer such high standards of protection of the integrity of the process because of the high costs associated.

2.3 *Nature of the Parties Involved*

Several difficulties arise when attempting to formally define a theoretical distinction between a "merchant" and a "consumer" at international level. Examples of such complexity are the diverse legal definitions or descriptions of the concept "consumer" that can be found only in Europe. The European Union does not agree on a single uniform definition of the term consumer, although the different definitions provided by the rules consider a consumer to be a person acting outside of his/her professional activity. For the *Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [1968; *Brussels II*, now Regulation EC No. 44/2001] a consumer is an individual acting for a purpose, which can be considered a non-professional activity. The *Rome Convention on the Law Applicable to Contractual Obligations* [1980; now *Rome I*, Regulation No. 593/2008] follows the same line of thought. In the field of Secondary Community Law, several directives have included a specific definition of the consumer in similar terms.[42]

42 By way of illustration: (i) Directive 85/577/EEC *on the Protection of Consumers in respect of Contracts Negotiated away from Business Premises*. 1. ("Doorstep Selling Directive") define consumer as "any individual who [...] acting for purposes which may regarded as outside their professional activities"; (ii) in Council Directive 87/102/EEC of 22 December 1986 *for the approximation of the laws, regulations and administrative*

European Union laws tend to limit the scope of such a concept to the field of natural persons, therefore, excluding companies.[43] The Court of Justice of the European Union has also provided a definition of the term consumer that is somewhat restricted if compared to some of the domestic laws of member states,[44] as it only considers consumers to be individuals who contract a service outside of their profession or employment to meet their personal or family needs and stresses the fact that companies shall not be treated as consumers.

Nevertheless, the definition of consumer is closely intertwined with the evolution experienced by the consumer protection movement in recent decades. Broadly speaking, "consumers" have been defined as a general category used to identify individuals who purchase and use products or services as opposed to "producers", who introduce a product or a service in the market, or as opposed to "distributors", who offer these products or services to interested parties. Historically, and up until the twentieth century, negotiations for the purchase of goods for personal, family or household use were considered to take place between equals. After World War II and with the expansion of large scale markets, this notion changed as there was a significant structural asymmetry in the decision making power between parties and thus, countries began to enact many diverse provisions in order to protect the consumer.

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provisions of the Member States concerning consumer credit, the consumer is a natural person "[...] acting for purposes which can be regarded outside his trade or profession"; (iii) Directive 90/314/EEC on *Package Travel*, defines consumer as "the person who buys or agrees to purchase travel combined (the principal contractor), the person on behalf of which the principal contractor agrees to purchase the package (the other beneficiaries) or person to whom the principal contractor or other beneficiaries transfer the package (assignee)"; (iv) Directive 93/13/EEC of 5 April 1993 on *Unfair Terms in Consumer Contracts*, defines consumer as a natural person that "[...] acts for a purpose unrelated to his duties"; (vi) in the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997, *on the Protection of Consumers in respect of Distance Contracts* consumer is any individual "[...] acting for purposes outside his trade professional"; (vii) The Directive 98/6/EC on *Indication of Prices of Products offered to Consumers* describes consumers as "any person who purchases a product for purposes outside his trade or professional"; (vii) Directive 1999/44/EC *Concerning Certain Aspects of the Sale andGuarantees*, a consumer is a "natural person who [...] acts for purposes that fall within the scope of its professional activity"; (viii) The Directive 2000/31/EC on *Electronic Commerce*, "any person acting for a purpose outside his trade, business or profession"; (ix) The Regulation 178/2002 *Concerning the Principles and Requirements of Food Law* provides a definition of the final consumer as "the ultimate consumer of a food product that does not use food as part of any operation or business activity in the food sector"; (x) also the Directive 2002/65 on *Marketing Range of Financial Services to Consumers*, as "any individual who, in contracts distance, acting for purposes outside his trade or profession"; (xi) And also the Directive 2005/29/EC, *Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market*, describes consumer as "any natural person who, in commercial practices covered by this Directive, is acting outside his trade, business, trade or profession".

43 Recently, there are exceptions, however, as neither the Commission Directive 90/314/EC, nor the latest EU Commission Directive on *Misleading Advertising* does refer specifically to natural persons.

44 Some states have chosen to extend the boundaries of this concept (France and Spain).

The concern about the structural imbalance of decision making power between parties in traditional commerce has generated a vast body of rules designed to protect consumer rights. It is understood that states should also refrain from any invasive behavior that could lead to a loss of individual freedom as a result of their legislative activities. Consequently, welfare states have attempted to combine the rule of law with social justice in the context of bargaining and, as a result, today there are a plethora of specific provisions that introduce legal distinctions, depending on the nature of the parties involved (B2B, B2C). The challenge is to discern, from the diversity of legal descriptions, who is a "consumer". The goal of uniformity in this field is difficult challenge to achieve. Moreover, new actors like small and medium size businesses are currently entering the e-market and suffering from a similar inequality of bargaining power when dealing with big companies or serial players.

In the electronic arena, the structural unbalance of contractual bargaining power between parties makes the traditional contract law system inadequate. The weakness of offerees in electronic transactions has become common. In many agreements, the strongest company may unilaterally establish the terms of the contract – *e.g.* consumer standard form contract, SFC – which the weaker party – consumer or enterprise – is forced to accept.[45]

Schemes and theories of legal invalidity in traditional contract law system are not a useful approach because the asymmetry is permanent and structural. Remedies need to enable the protection of needs and interests of the weakest party. It is clear that today, the so-called status of the consumer is not sufficient to define an area of protection, as the entrepreneur may also be considered the weaker party in relationships with other companies. As a result, the boundaries between players and the distinction between B2B and B2C transactions are not appropriate in electronic commerce. From our view, and from a technical standpoint, it may help the contract law system to grant protection to all players in asymmetric bargaining power contexts in order to prevent the violation of freedom and autonomy of will in electronic commerce.

The European Parliament, concerned about the negative impact of such issues on the internal market, is working on overcoming traditional approaches through the design of an optional instrument (OI) by the Commission of Legal Affairs 2011/2013, of 25 January 2011. Applicable to all participants in transaction B2B and B2C and in national and transnational disputes, this optional instrument would involve one single body of rules with a high level of protection of the rights to all operators.

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45 Data and ideas expressed by the author for the *ODR International Forum* under the title "Global ODR Schemes for B2B, B2C, and C2C Redress", Chennai, India, 7-9 February 2011. Available at <www.odr2011.org/>.

2.4 *Time of Dispatch of Electronic Communications in ODRs*

According to Article 10 of the *UNCITRAL Convention on the Use of Electronic Communications in International Commerce* of 2007, when parties have not otherwise stated and do have a designated electronic address, the time of receipt of a communication is deemed to be the time when it becomes capable of being retrieved by the addressee at the designated address.[46] In the event that the communication is sent to a non-designated electronic address by the party concerned (*e.g.* in the case of the first ODR communication from the service provider to the company that is claiming), the time of receipt of such communication is deemed to be when the addressee becomes aware that it has been sent to that address. In practice however, an acknowledgment of receipt is a common practice that parties agree to comply with.

Notwithstanding, the European Union Directive No. 2000/31/EC, on *Electronic Commerce* sets out that member states shall ensure that in cases where the recipient of the service – the consumer – places his order electronically: (i) the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means[47] and (ii) the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.[48]

2.5 *ODR Process Flow*

The ODR systems currently used in the field of e-commerce have become fast, cost effective, multi-tiered methods of dispute resolution. ODR methods offer very speedy and inexpensive services, as time and distance are no longer obstacles to the process flow and these qualities become, undoubtedly, motivating factors for clients. Many of these ODR mechanisms provide tailored-made, simple processes where in-person hearings are replaced by online communications (with similar functions also designed to ensure parties are heard)[49] and deadlines are very short. While arbitration is the most commonly accepted and disseminated method for high value disputes in e-commerce (B2B), mediation and conciliation prior

46 The anti-spam filters causes additional concerns, as they may impede that the addressee receives the communication.

47 This provision shall not apply to contracts concluded exclusively by Exchange of electronic mail or by equivalent individual communications. See Article 11.

48 This Directive does not apply to services supplied by service providers established in a third country.

49 Oral hearings in arbitration depend on the different rules that exist under national arbitration laws. See Kaufmann-Kohler & Schultz (2004), p. 202: there is either no right to an oral hearing (*e.g.* under English and Swiss laws), or the hearing is held by request of a party (like in Dutch or Italian laws), or the right exists but it can be waived (like in Belgium, France, Swedish laws and the UNCITRAL Model Law).

to an arbitration phase are very popular for low value but high volume claims (B2B and B2C).

The commitment to the principle of freedom or party autonomy is a crucial matter. In multi-tiered processes, where the flow begins with a negotiation and/or mediation phase, one primary concern and prerequisite is to obtain the agreement of the parties to initiate the ODR process. This consent should be informed – informed decision making processes based on transparency – which means that parties may agree on initiating a facilitative and/or evaluative process fully online, and drawing on information[50] such as: (i) contact details, functioning and availability of the procedure; (ii) procedure flow and rules that may be applicable (legal provisions, industry best practice, considerations of equity, codes of conduct); (iii) preliminary requirements that the parties may have to meet, if so; (iv) language in which the procedure will be conducted; (v) the cost, if any; (vi) the timetable applicable to the procedure; (vii) the status of any agreed solution for resolving the dispute; (viii) and their right to refuse to participate or to withdraw from the procedure at any time.

Before agreeing to a suggested solution, ODR platforms should provide the parties with extensive information on the following facts:[51] (i) that they are allowed a reasonable period of time to consider the solution; (ii) that the suggested solution may be less favorable than an outcome determined by a court applying legal rules; (iii) that they have the right to seek independent advice and also to refer the case to another out-of-court dispute resolution mechanism or seek legal redress through their own judicial system.

In practice, the agreement reached through mediation or conciliation, is commonly prepared by the ODR neutral upon the request of the parties. Signing the agreement is generally done by means of any of the electronic signature methods above described. As to the enforcement of the outcome, ODRs addressing e-commerce disputes do not deal with public enforceability aspects. These platforms are most commonly based on achieving consensus and high rates of settlement in the first phase of the process by means of a mutually acceptable agreement. In those cases that are not resolved in the initial phase and escalate to an adjudicative phase, it is necessary to deploy more private, aggressive forms such as pressing to chargeback from the payment intermediary, or communicating negative reviews on public websites, or removing labels. Some states do recognize the enforceability of ODR outcomes.[52]

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50 Many of these information requirements are been compiled in the European Union by means of the Recommendation 98/257/EC.

51 According to some regional requirements, *e.g.* the EU Recommendation No. 98/257/EC.

52 In some European countries the agreement reached in a mediation process can become enforceable. Namely: (i) in France, Article 1441 of the Code of Civil Procedure provides that either party may request from the

Should the process escalate to an arbitration phase, by reason of the above mentioned principle of party autonomy, an arbitration agreement would also be necessary. In the event that parties may not have included an arbitration agreement clause in the contract concluded or on a separate document,[53] this additional consent may be obtained by means of an online acceptance to submit the case to arbitration and its general terms and conditions. The written form that is required under in-person arbitration processes is satisfied in practice by an electronic communication of acceptance, as stated in the *UNCITRAL Recommendation* [2006] *Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1*, of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [1958] which were established to promote a flexible interpretation of the written form requirement for the process of arbitration.

2.6 *Applicable Rules*

One of the main difficulties still faced by ODR bodies responsible for procedures with decision making power (*e.g.* arbitration) is how to determine the applicable law and jurisdiction to issue an award based on grounds of law, or in order to grant interim judicial measures when necessary. Although decisions involving cross border disputes in the field of e-commerce are usually based on equity grounds, some states require that decisions on consumers' claims shall be based on the grounds of law (*e.g.* in Brazil). The European Union accepts the fact that the bodies responsible for adversarial extrajudicial means of resolution may make decisions on the basis of equity and codes of conduct and that these decisions shall always guarantee the level of consumer protection established by existing provisions.[54] ODR service providers, therefore, must also take into account, when dealing with consensual mechanisms, some regional legal provisions.

The above mentioned challenges pose a number of important questions to ODR developers in relation to (i) the way the decision is issued, in practice made electronically; (ii) the basic grounds of the ODR decision, in practice commonly agreed on the basis of equity; (iii) the

court that the agreement be enforceable, (ii) in Slovakia, the mediation agreement is enforceable if it takes the form of a public act; (iii) in Belgium, the court order approving an agreement is enforceable; (iv) in The Netherlands agreements also have enforceability if approved by a judge; (v) in Italy, the Decree provides that the verbal agreement, the contents of which are not contrary to public policy or mandatory rules, it is tested on application well before a formal investigation, by decree of the President of the Tribunal. In addition, in cross-border disputes minutes must be approved by the presiding judge in the district where the agreement has to be enforced and shall be enforceable to the forced expropriation, for specific performance and registration of mortgage claims.

53 Some consumers' protection laws impede to include *ex ante* arbitration clauses among general terms and conditions applicable to the transactions and, in general, any agreement concluded before a dispute arises.

54 See Rec. 98/257/EC.

awareness of the applicable mandatory laws and public policy requirements; (iv) the means by which it is acknowledged the consumer's residence in any claim, in practice through the information supplied by clients to ODR platforms; (vi) the awareness of the applicable procedural law when judicial assistance is needed during the process or for enforcement purposes. In this regard, also the place or seat of the defendant and also of the ODR service provider is an important issue and a challenge yet to be met.[55]

2.7 *Neutrality in Multi-Step Mechanisms*

Many ODR service providers (*e.g.* Chambers of Commerce) in e-commerce offer multi-tiered processes of dispute resolution based on arbitration procedures combined with mediation or conciliation elements. Conducted by arbitrators who mediate or conciliate the parties at a first initial stage, the structure and flow of these processes have spawned some concerns closely connected with the principles of neutrality. Currently, waivers of due process rules are accepted both in practice and these are expressed *ex-post*,[56] or even *ex-ante*,[57] provided there has been an informed consent. Therefore, it is a common practice to refer the case to a med-arb ODR mechanism where the neutral will be vested with the authority to decide the outcome of the dispute should the parties not reach an agreement.

55 Currently the United Nations *Convention on the Use of Electronic Communications in International Contracts* which is applicable to electronic communications in connection with the formation or performance of a contract between parties whose places or business are in different states, regardless the civil or commercial character of the parties or of the contract, sets out that a party's place of business: (i) is presumed to be the location indicated by that party, unless another party demonstrates otherwise; (ii) if one party does not indicate it and has more than one place of business, is that which has the closest relationship to the relevant contract having regard the circumstances known at any time before or at the conclusion of the contract; (iii) and finally, if is a natural person and do not have a place of business, reference is to be made to his habitual residence. The relevance of this international instrument, which is only binding to contracting states that ratify, accept and approve the convention, derives from the fact that offers practical solutions for these issues and highlights the idea that Internet Protocol addresses, domain names o the geographic location of information systems have little value for determining the physical location of the contractual parties. Regarding ODR service providers responsible of adversarial mechanisms such arbitration, is not quite clear that the existing provisions for arbitration may be of any help, specially when it comes to small claims that require simple, fast, cost effective mechanisms of dispute resolution.

56 The *ex ante* waivers are more controversial. See Kaufmann-Kohler & Schultz (2004), p. 204.

57 See in Europe, Judgment of 23 February 1999 in case No. 31.737/96, *Suovaniene and others v. Finland.* The European Court of Human Rights accepts *ex ante* waivers regarding the right to an independent tribunal. In that case, the claimant expressly accepted an expert as arbitrator that acted as counsel for the opponent (informed consent).

2.8 *Ex-Ante Clauses to Mandatory Adjudicative ODR Mechanisms*

Mandatory arbitration clauses in consumer contracts have been a common concern and subject of debate in the European Union. Some countries consider this practice to be illegal as it could deprive those consumers within their jurisdiction from access to courts. Similarly, a number of voices have expressed doubts about the legitimacy of an arbitration clause agreed *ex-ante* precluding parties in dispute from having access to a judicial process while leading them towards a mechanism that issues final binding decisions.

From a regulatory viewpoint, the Directive No. 93/13/EEC on *Unfair Practices* contains an *addendum*, or list of terms considered to be unfair and includes those deemed to have the purpose or effect of excluding or limiting the legal remedies available to the consumer, particularly by requiring the consumer to follow only a single mechanism, arbitration. The purpose of the Directive is to prevent limitation in the defense of the consumer. In addition, Recommendation 98/257/EC states that if the procedures lead to a resolution of the dispute through the active intervention of a third party, according to the principle of freedom, the decision of the body may be binding provided parties were previously informed and accepted explicitly. Following the above mentioned Recommendation, consumers cannot be prohibited from going to court because of a commitment made prior to the origin of the dispute, especially when this commitment has the effect of depriving them of their rights to appeal to a court.

In any case, in our view, it seems clear that *ex-ante* clauses to a "conditional" arbitration for the settlement of a dispute may not be considered illegal where the award is binding on the "offeror" but not on the "offeree" until his/her acceptance. Likewise, the clause or agreement made by the parties, with full knowledge of rights and effects once the dispute has arisen may be considered legal and binding, provided that such process and result does not infringe the rights and the provisions of mandatory laws or public policies of the state where the award shall be enforced.

2.9 *Provisions That Impose a Mandatory Attempt at ODR*

Similarly, some concerns have been raised over ex ante clauses to non-adjudicative online dispute mechanisms. Notwithstanding, a recent European Court decision on the interpretation of the principle of effective judicial protection – Judgment of 18 March 2010 in Case 317/08, *Telecom Italy SpA* – maintains that regarding national provisions setting out a mandatory attempt to settle the dispute as a procedural condition of prosecution of legal proceedings it is legal and it can be achieved, provided that such proceedings do not: (i)

mean a binding decision on the parties, (ii) involve long delays for a trial before the court, (iii) generate disproportionate costs, (iv) constitute the only form of access to conciliation and other alternative means of resolution, (v) or, finally, prevent access to court.

2.10 Determining the Location of the Offeror

As far as determining the location of service providers, Article 6 of the *United Nations Convention on the Use of Electronic Communications in International Contracts* [2005] establishes a certain number of presumptions and default rules aimed at facilitating a determination of a party's location. It attributes primary importance to a party's indication of its relevant place of business.[58] A party's place of business is presumed to be the location indicated by that party, unless another party demonstrates otherwise.[59] Only in case of natural person without place of business, reference is to be made to the person's habitual residence.

According to this significant international legal instrument, it is irrelevant for the purposes of the e-commerce (i) where the location of the equipment and technology supporting an information system used by a party is; (ii) where the information system may be accessed; (iii) or whether the domain name or electronic mail address is connected to a specific country. Likewise, the UNCITRAL *Model Law on Electronic Commerce* [1996] intends to reflect the fact that the location of information systems is irrelevant and sets forth a more objective criterion, namely, the place of business of the parties. References to "place of business", "principal place of business" and "place of habitual residence" are adopted also to bring this Model Law in line with Article 10 of the *United Nations Convention on Contracts for the International Sale of Goods* [1980].

In Europe, the EU Directive 2000/31/EC on *Electronic Commerce* states that in the case of companies providing services via internet websites, the actual location attributed to the process is not considered to be the place where the technology is found nor the place where the company's website is accessible but the place where the company pursues its economic activity. For purposes of determining the site of an ODR, traditional criteria still seem to be applicable. In this regard, the United Nations is considering the elimination of the concept of location and any connection to a domestic law. The *International Centre for Dispute of Investment Convention, Regulation and Rules* [2006] is a good example of this

58 The Convention does not contemplate a duty for the parties to disclose their places of business.

59 If a party has not indicated a place of business and has more than one place of business, is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

approach. The fact is that ODR platforms need to rely on simple, fast, and low cost processes that offer an equitable balance of parties' interests.

3 CONCLUDING INSIGHTS. OVERVIEW OF FUTURE CHALLENGES AND PROSPECTS

Information and Communication Technology (ICTs) is revolutionizing traditional trade. New terminology is used to describe emerging activities, actors participating in them and innovative dispute resolution mechanisms (ODRs). Equally important is the fact that transnational electronic commerce tends to increase and ODRs are the only mechanisms capable of managing and resolving cross-border disputes.

Confidence and trust are key issues in e-commerce and ODRs. To that end, it seems essential to consolidate a legal framework and some of the key principles and standards that are already being applied internationally by a number of stakeholders. In other words, it is necessary to develop a common regulatory framework for all parties regardless of their nature, given the fact that structural asymmetries occur in electronic B2B transactions.

The use of extrajudicial means of resolution does not necessarily imply a reduction of legal protection or a limitation to the access to justice. The use of these mechanisms provides a new level of effectiveness to such recognized rights.

Many initiatives are currently being undertaken to harmonize processes and outcomes in the field of ODR. In the international arena, the United Nations (UNCITRAL) considers it is essential to fill the gap in online cross-border disputes in order to overcome some concerns and the relative stagnation of transnational trade, so that offerors and offerees are given an effective option to resolve conflicts. Accordingly, the UNCITRAL Commission has recently agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to low value cross-border electronic commerce transactions, including B2B and B2C, in order to create an easy and appealing framework for ODRs devoted to cross-border e-commerce.[60]

60 <www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html>.

8 Online Dispute Resolution for Consumers

Online Dispute Resolution Methods for Settling Business to Consumer Conflicts

Pablo Cortés

1 Introduction

ODR in the consumer context refers to the use of ICT tools and methods (usually alternative to the court system) employed by businesses and consumers (B2C) to settle conflicts that arise out of economic transactions between the parties, particularly in e-commerce. It is often distinguished from other fields where ODR is used, such as in the commercial field (B2B), in the public sphere to resolve government and citizen (G2C) disputes, and in the resolution of disputes related to intellectual property. A consumer transaction (B2C), akin to a consumer dispute, will be one where an individual, acting on a personal capacity, buys goods or services for his or her personal use. Conversely, a business is an individual or an entity that acts on a professional capacity selling goods or services as part of their profession.

In a B2C dispute, the aggrieved party is frequently the consumer as they normally pay in advance for their purchased goods and services. Consequently, the consumer is the weaker party in a dispute where the business has the payment and the experience of dealing with similar disputes. Consumers will often get more involved in the dispute, taking it more personal, and thus requiring a more transformative solution, while the business is mostly interested in resolving the dispute as fast and inexpensively as possible.

In certain cases, businesses will be keen in resolving the dispute in order to maintain their reputation. This is relevant when, as it happens in eBay, the buyer leaves feedback after a transaction. When ODR is effectively used in this way, it has an added value for the parties; it increases the consumers' trust in those online sellers that provide ODR services. Greater trust means that reliable sellers would boost their trade and consumers will be protected from the potential abuse by the dominant party in the transaction. ODR services may be employed to ensure that consumers' rights are respected by the online vendor, hence enhancing consumers' confidence in the online transaction.[1] As a result, ODR would

1 This is more needed in cross-border e-commerce. See "EC Staff Working Document Report on Cross-Border E-Commerce", *SEC* (2009) 283 final.

ultimately enhance the business's ability to sell while at the same time protecting the consumer's ability to participate safely in e-commerce.

E-commerce is thought to be one of the areas where ODR will flourish as it seems logical for parties that enter into disputes online to use the same medium, the Internet, to resolve their disputes. The resolution of small value disputes that inevitably arise out of millions of transactions taking place every day between parties located far from each other require the use of cost-efficient methods of dispute resolution. Examples of ODR providers that resolve high volume of consumer disputes are eBay and PayPal, which act as third neutral parties encouraging first business and consumers to reach amicable agreements through automated negotiation, and when parties cannot reach consensual agreements, they adjudicate the disputes.[2]

The expansion of ODR in the consumer context is not simply about reducing the cost of resolving disputes that could be settled face to face. It is mostly about finding innovative ways to settle niche disputes which otherwise would remain unresolved due to the high costs of litigation (not to mention cross-border challenges of conflict of laws) and face to face ADR methods. ODR for consumers should be characterised by being of easy access and user-friendly as well as being cost-effective. Yet, this is not an easy task, particularly in cross-border disputes, where new challenges enter into the paradigm of resolving disputes online.

This chapter starts in part 2 arguing that technology assisted dispute resolution methods are essential to increase consumer access to justice. The chapter does not intend to focus on particular jurisdictions, but many references made in this chapter examine the two largest economies with a relatively unified consumer law, *i.e.* the European Union and United States, since these two jurisdictions take different approaches to consumer protection. Part 3 of this chapter briefly argues that ODR methods and techniques should be employed first and foremost to avoid consumer complaints. Part 4 examines some of the challenges that face the growth of ODR, namely, obtaining sustainable funding to resolve small value disputes, ensuring due process guarantees and raising trust and awareness amongst its users. Part 5 analyzes some of the main ODR methods for resolving disputes; this part is divided into consensual and adjudicative methods, and it is followed by a critical analysis on what are the most suitable ODR methods for resolving consumer disputes. Lastly, Part 6 ventures some thoughts on what the future may hold for consumer ODR services.

2 See "Introducing the PayPal Dispute Resolution Process", available at <www.paypal.com>. Hereinafter all websites have been accessed 1 February 2011.

2 TECHNOLOGY AS A VEHICLE TO IMPROVE CONSUMER ACCESS TO JUSTICE

In some jurisdictions, such as in the 27 Member States of the European Union (EU), consumer protection law is very extensive; in fact European consumers have more rights when buying online than when they go to the local shop. Yet, the existing public enforcement mechanisms are not sufficient to guarantee their rights. When consumer protection law is not coupled with appropriate enforcement mechanisms, it does not increase consumer safety in the online market nor enhance consumer trust.

When consumers individually pursue remedies to their disputes, traditionally the most common forum for resolving them is consumer agencies and courts (especially when there is a small claims court available). In recent times, certain industry sectors are relying on ADR methods, which are increasingly being supported by ICT tools. It is believed that the expansion of these methods is necessary to give consumers appropriate access to justice.[3]

With regards to public enforcement, a number of national agencies assist consumers in resolving their disputes, although the cross-border co-operation between these bodies presently appears to be rather limited.[4] The strategy, however, has been different across the world. For instance, the United States has facilitated the use of class actions to correct market abuses. Hence class actions appeared in the US in order to compensate for the lack of governmental support in enforcing consumer laws. By contrast, in the EU, only thirteen Member States currently allow class actions with certain restrictions under their domestic laws.[5]

The consumer protection policy in the EU is based on the intervention of the public authorities to stop market abuses, while in the US the public policy encourages attorneys to take more initiative in upholding consumer rights and correcting market abuses. One reason for this is that US attorneys may charge contingent fees, with the approval of the court. Recent legislative changes in some European Member States (*e.g.* the UK) tend to follow the US model permitting the charging of conditional fees which allow lawyers not to charge when they lose a case and to obtain an upscale premium (up to 100% of the

3 See generally SANCO 2009 *infra.*

4 See at global level econsumer.gov and at regional level the ECC. European Consumer Centre Ireland Report "The European Marketplace: Consumer Complaints 2005, A Summary Analysis of Consumer Complaints Reported to the ECC-Net" (June 2006).

5 Civil Consulting and Oxford Economics, European Commission, DG SANCO, "Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union", Final Report (26 August 2008) p. 6. The European Commission has highlighted the need for creating a communitarian instrument to address collective redress mechanisms at EU level with cross-border disputes. Currently, 10% of all collective claims have a cross-border element. See European Commission, "Green Paper on Consumer Collective Redress" (27 November 2008) COM(2008) 794 final.

original legal fee) if the case is won.[6] Furthermore, the UK is now considering the introduction of contingency fees á la US in order to cut down on legal costs.[7]

A significant difficulty in class action procedures is the resources needed to reach and communicate with all the claimants. These types of disputes are good options to be managed through the use of ICT tools, particularly with the increase of e-commerce, where the number of disputes augments across borders.[8] The use of technology to negotiate and resolve these disputes may help to overcome difficulties related to the use of litigation in various jurisdictions, and it will ease communications among the many consumer claimants.

The option of commencing legal proceedings for resolving e-commerce disputes of small value is only feasible when there is either the possibility of a collective action, or, if pursued individually, when a small claims procedure is complemented with ICT, *e.g.* Online Small Claims Court. However, these processes encounter difficulties in resolving cross-border disputes. The European Small Claims Procedure, which has been implemented in all the EU Member States since January 2009, uses online standard forms and encourages the use of ICT.[9] If EU Member States incorporate effective ICT tools and flexibility in their use, the judicial process has the potential to become a fully-fleshed ODR process, which would make national courts in the EU more accessible and appropriate to deal effectively with cross-border claims, including those arising out of e-commerce.

When cross-border disputes are resolved in courts, there is an additional issue that must be contemplated: conflict of laws. Currently, there are two opposite approaches worldwide. This can be seen with rules employed in the EU and the US. In the EU, conflicts of laws are resolved according to the Brussels and Rome Regulations,[10] which contrast with the position in US.[11] Under EU law, the tendency is to recognise consumers' habitual residence as the competent forum and consumers' domestic law as the applicable law (country of destination approach) even when there is a contractual clause stating otherwise.[12] Accordingly, it may be expected that if online businesses were susceptible to be sued at the consumers' forum, (regardless how rare this may be!) one would expect the business

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6 W. Emos & N. Garoupa, "US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and Supply of Legal Services", (2006) 27(5) *Managerial and Decision Economics*, p. 379.

7 R. Jackson LJ, *Review of Civil Litigation Costs: Final Report*, 21 December 2009 p. 94.

8 C. Rule, *Online Dispute Resolution for Businesses. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, San Francisco, Jossey-Bass 2002, p. 216.

9 Regulation 861/2007/EC of 11 July 2007 establishing a European Small Claims Procedure OJ L199/1. P. Cortés, "Does the Proposed European Procedure Enhance the Resolution of Small Claims?", (2008) 27(1) *Civil Justice Quarterly*, pp. 83-97.

10 Regulation 593/2008/EC of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) OJ L177/6 of 4 July 2008; Regulation 44/2001/EC of 22 December on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, OJ L12.

11 *Carnival Cruise Lines, Inc. v. Shute*, 499 US 585 (1991).

12 See Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Article 15.1(c); Regulation 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) Article 6.

to prefer the use of ODR. In the US, however, the approach is the opposite, where there is a preference to favour the country of origin approach and to uphold pre-dispute contractual clauses.[13] Consequently, US businesses may be less incentivised in incorporating accessible ODR. In any event, none of the above approaches seem to strike the right balance between the parties. Furthermore, in most cases recourse to the courts may neither be feasible nor desirable for one or both parties; thus, public and private ODR initiatives may be a solution for many B2C e-commerce disputes.

Although it is often assumed that one of the major advantages of ODR is that it avoids jurisdictional issues,[14] it should be noted that ODR services cannot always rely on disputants to co-operate and to always have self-enforcement mechanisms. For this reason, there is a pending need to harmonise conflict of laws through an international convention achieving the necessary compromise to ascertain the jurisdiction for the resolution of consumer disputes.[15]

3 DISPUTE AVOIDANCE BEFORE DISPUTE RESOLUTION

As previously mentioned, this chapter focuses on dispute resolution methods used to deal with B2C disputes. ODR is generally understood as a number of more or less informal dispute resolution processes that take place mainly online and that are provided by independent entities rather than by one of the disputants, *i.e.* automated negotiation, assisted negotiation, mediation, arbitration and small claims court procedures. Moreover, ODR may be split into dispute avoidance and dispute resolution. Dispute avoidance mechanisms include internal complaint procedures, escrows, online payment services, reputation systems and trustmarks. Conflict prevention is of paramount importance and businesses should focus on how to improve it before investing on dispute resolution.[16] ODR can offer added value to businesses that are interested in avoiding complaints from escalating to disputes. With these objectives in mind a number of public initiatives have been developed, such as the econsumer.gov and consumer complaint form, which were designed to standardise

13 J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge, Cambridge University Press 2009, pp. 180-182.

14 M. Philippe, "Now Where do We Stand with Online Dispute Resolution (ODR)?", (2010) 6 *International Business Law Journal*, p. 575.

15 See the failed attempts to achieve this in the Hague Convention. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention) October 1999 and its revision June 2001. T.P. Lester, "Globalize Automatic Choice of Forum: Where Do Internet Consumers Sue?: Proposed Article 7 of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters and Its Possible Effects on e-Commerce", (2003) 9 *New England Journal of International and Comparative Law*, p. 469.

16 See Consumer Focus, "Consumer Focus Response to the OFT Consultation on E-Consumer Protection Strategy" (October 2010), p. 8.

claims and clarify complaints, including those that are originated out of cross-border transactions.[17]

An efficient dispute resolution system needs to be built on solid dispute avoidance mechanisms, which in itself requires consumer empowerment. The latter is achieved by ensuring that businesses provide the necessary information, educating consumers about their rights and obligations, and how to engage in sensible shopping while avoiding transactions with unreliable online businesses.[18] It is also necessary to provide mechanisms to ensure that online businesses recognise and comply with their obligations.[19] Even when disputes arise, ODR providers ought to be used as the last resort to resolve those disputes which cannot be resolved at an early stage between the business and the consumer. This is well illustrated by eBay whose in-house ODR process has resolved hundreds of millions disputes, while its previous preferred ODR provider, SquareTrade (and now PayPal amongst other ODR service providers), resolved just over two million in its life time.[20] ODR providers should assist online businesses in building effective internal complainant procedures, and their disputes should therefore only be outsourced to external ODR providers in the most difficult cases to ensure impartiality and create trust amongst consumers.

4 CONSTRAINTS IN THE EXPANSION OF ODR

There have been many ODR initiatives that have not achieved market implementation. Studies have shown that many ODR providers have ceased operating, and many others have stopped updating their websites.[21] This evidences the number of challenges that hinder the growth of ODR. This section focuses on four aspects that are believed to constrain the expansion of consumer ODR: financing ODR, lack of uniform procedural standards, reluctance to participate in ODR processes, and awareness.

17 See <http://econsumer.gov> <http://ec.europa.eu/consumers/redress/compl/cons_compl/acce_just03_en.pdf>.

18 See for example Howard, the ECC-Net's online shopping assistant. Available at <www.ukecc.net/sub.asp?id=209>, EC Communication COM(2007) 99 Final. p. 5.

19 M. Donnelly and F. White "The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market", in Twigg Flesner *et al.* (eds.), *Yearbook of Consumer Law 2008*, Ashgate, Surrey 2007, pp. 271-296.

20 Author's phone interview with Colin Rule, ODR Director of eBay and PayPal, 23 July 2008.

21 Consumers International "Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-Border Disputes", (2001) <www.consumersinternational.org>; M. Conley Tyler and Di Bretherton, "Seventy-six and Counting: An Analysis of ODR Sites", (2003) Report of Research Conducted for the Department of Justice, Victoria, Australia.

4.1 *Financing ODR Services*

Private funding may secure sufficient income, but it may also jeopardise the independence of an ODR service provider, especially in B2C transactions where a unilateral fees model from the business seems to be the most common way to encourage consumer's participation.[22] In order to avoid a perception of bias, Katsh and Rifkin suggest that the ODR provider should clearly admit if there is any funding given by the business.[23] Transparency should be complemented with additional mechanisms to ensure impartiality, such as systems to handle complaints when procedures were not followed.[24]

Consumers International argues that ODR services should be provided for free or for a moderate cost. Rule suggests the charge of a low fee to discourage frivolous claims, but he warns that if fees are too high, parties may not use ODR.[25] Frivolous claims can also be avoided by charging an administration fee that could be returnable if the consumer succeeds wholly or partly in the claim.

Some successful ODR providers, such as the Austrian Internet Ombudsman, benefit from public funding.[26] This removes bias concerns of private financial support,[27] yet this may result in a heavy burden for taxpayers.[28] In some jurisdictions, dispute resolution is seen as a necessary public service. An example of this would be Spain, where legislation does not allow the operation of dispute resolution services for-profit.[29] This approach, however, discourages the development of the private and competitive ODR industry.[30] It can be argued that for-profit ODR services, as a form of e-commerce, could be allowed as long as they provide transparent services that are monitored by public authorities. This is particularly necessary when ODR services are used for resolving disputes between parties with unequal bargaining power (B2C disputes) and when the costs of dispute resolution (and due process) are reduced in order to deliver a cost-effective ODR process.

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22 Consumers International 2001.

23 E. Katsh and J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001, p. 41.

24 Consumers International 2001.

25 Rule (2002), pp. 119 and 294. United Nations Conference on Trade and Development, "Online Dispute Resolution: E-Commerce and Beyond" in *E-Commerce and Development Report*, (2003) p. 190.

26 For more information see Hörnle (2009), p. 76.

27 CEN/ISS Workshop Agreement on Standardization of Online Dispute Resolution Tools prCWA XXX, 2009 p. 68 at 9.1.

28 J. Hill, *Cross-Border Consumer Contracts*, Oxford University Press, Oxford 2008, pp. 318, 391.

29 See Article 4 of Ley 44/2006 of 29 December of Consumer Protection; Ley 7/1998 of 13 April of General Conditions and Clauses for Consumer Contracts, Ley 60/2003 of 23 December of Arbitration, Real Decreto (Royal Decree, RD) 636/1993 of 3 May 1993 of the Consumer Arbitration System, RD 231/2008 of 15 February of the Consumer Arbitration System.

30 F. Esteban de la Rosa, "Régimen Europeo de la Resolución Electrónica de Litigios (ODR) en la Contratación Internacional de Consumo", in F. Esteban de la Rosa y G. Orozco Pardo, *Mediación y Arbitraje de Consumo. Una Perspectiva Española, Europea y Comparada*, Valencia, Tirant Monografías 713, 2010, p. 204.

Public institutions as well as ODR initiatives seek the creation of a self-financing ODR scheme which does not depend on public funding. It is not clear whether this can always be a workable option, particularly at the beginning when consumers and businesses may not value sufficiently the cost of ODR services. For this reason it has often been proposed public financing to build an ODR network, but expecting to be self-financed once it starts operating.[31] This is not an easy task. In fact there have already been a number of failed attempts. For instance, Electronic Consumer Dispute Resolution (ECODIR) was initially funded by the European Commission, but it did not succeed in becoming a self-financed ODR provider. This may be due to a number of reasons, the major of which was that it failed to get the co-operation of large ecommerce vendors. This was indeed the key strategy of successful ODR providers, such as CyberSettle partnerships with public and private institutions or the Internet Corporation for Assigned Names and Numbers (ICANN) approved Uniform Domain Names Dispute Resolution Policy (UDRP) providers.

Self-financed schemes are more likely to appear when a particular market is highly regulated, for example financial services, travel industry and telecommunications. In many jurisdictions, there are industry ombudsmen or other ADR/ODR services attached to these economic sectors.[32] Consumer law is also increasing in many countries with the growth of the welfare state. It is a question of time before these jurisdictions will be more willing to develop ODR services to ensure the enforcement of the substantive consumer law.

4.2 Uniform Procedural Standards

In ODR, consumers are one-shooters while businesses are repeat players, dealing with dozens of cases at any given time. This increases the imbalance where businesses are likely to make more informed choices than consumers. For this reason it may be preferable if outside bodies set standards ensuring procedural fairness in B2C processes.[33] Due process rights need to be respected, but that is not sufficient, consumers need to perceive that their rights are being respected too.[34] Hence, due process requirements and counterpoise are paramount when there is power imbalance between the disputants. In this regard, key

31 This is the funding scheme employed by major trust marks and current ODR initiatives. See C. Rule, V. Rogers & L. Del Duca, "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims, OAS Developments", A Fresh Look at ODR & Global E-Commerce 29-30 March 2010, United Nations Office, Vienna. See also European Commission Digital Agenda for Europe COM(2010), 245 p. 14.

32 *E.g.* the UK has the Financial Ombudsman, the Office of the Telecommunication Ombudsman and the Energy Ombudsman.

33 Rule (2002), p. 111.

34 *Ibid.*, p. 237. Regarding the importance of perception in the resolution of a dispute see R. Fisher, W. Ury, and B. Patton, *Getting to YES: Negotiating Agreement Without Giving In.*, (2nd ed.) London, Random House Business Books, 1999, pp. 22-30.

procedural issues should be taken into account, such as the need for impartiality, the selection of third neutral parties, legality, fair procedures and the supervision of ODR providers. Fast and inexpensive judicial enforcement when available or self-enforcement mechanisms are also required for the success of ODR services.

During the past decade, a number of recommendations and guidelines were issued with the objective of promoting fair and efficient ADR and ODR participation. Among the existing initiatives from international governmental bodies the most influential is the OECD's Guidelines for Consumer Protection in the Context of Electronic Commerce and the subsequent report on Consumer Dispute Resolution in the Global Market Place.[35] These guidelines were complemented in 2007 by a recommendation on B2C dispute resolution.[36] The OECD has consistently encouraged the promotion of ODR, and it has suggested that the main obstacle for the development of ODR is national differences in existing legal frameworks on ADR, such as differences as to the validity of ADR clauses, enforceability of settlements, procedural principles and so on.[37] The National Center for Technology and Dispute Resolution has issued standards of practice for ODR providers.[38] The United Nations Commission on International Trade Law (UNCITRAL) is now working on uniform legal provisions for consumer ODR.[39]

In addition, business organisations have taken initiatives in this area with the aim of promoting e-commerce and shielding themselves from liability and court procedures.[40] The most relevant initiatives were issued by the Alliance for Global Business,[41] the Global Business Dialogue on Electronic Commerce[42] and the International Chamber of Commerce.[43] Consumer organisations have also contributed to the development of ODR policies, notably the Trans-Atlantic Consumer Dialogue,[44] Consumers International[45] and the

35 9 December 1999, 4 July 2002 and 11 April 2006. Committee on Consumer Policy, "Consumers in the Online Marketplace: The OECD Guidelines Three Years Later", OECD Publications (3 February 2003) DSTI/CP/(2002) 4/Final available at <www.oecd.org>.

36 OECD Recommendation on Consumer Dispute Resolution and Redress (12 July 2007).

37 G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, The Hague, Kluwer Law International 2004, pp. 92-93.

38 Recommended by Advisory Committee of the National Centre for Technology and Dispute, "Standard of Practice", July 2009. Available at <www.icann.org/ombudsman/odr-standards-of-practice-en.pdf>.

39 UNCITRAL, Note by the Secretariat: "Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Transactions" (July 2010).

40 Kaufmann-Kohler & Schultz (2004), p. 104.

41 Alliance for Global Business, "A Global Action Plan for Electronic Business" (July 2002).

42 *E.g.* the Global Business Dialogue on Electronic Commerce, Consumer Confidence Working Group "Alternative Dispute Resolution - The Miami 2000 Recommendations and the Tokyo 2001 Recommendations".

43 The International Chamber of Commerce Best Practices for ODR in B2C Disputes.

44 Global Business Dialogue on Electronic Commerce (GBDe) Recommendations on Alternative Dispute Resolution (September 2000).

45 Consumers International 2001.

International Consumer Protection and Enforcement Network.[46] Also, dispute resolution providers have contributed to the development of ODR standards, *e.g.* the American Bar Association Taskforce on E-Commerce and ADR Recommended Best Practices for ODR Providers.[47] This chapter does not intend to discuss these initiatives in detailed since they have already been discussed elsewhere.[48]

With regards to future normative changes, it seems that the regulation of ODR is going to be slow, particularly at regional and global level. However, there are currently a number of initiatives that examine the possibility of regulating ODR in order to ensure and guarantee that (at least some) ODR service providers comply with minimum due process requirements. With regards to forthcoming initiatives it is important to highlight in the EU the Digital Agenda 2010 which proposes the creation of a pan-European Trustmark.[49] The new aspect of this proposal is that it may consider the possibility of designing a public trustmark that may cohabit with private ones. In November 2011, the European Commission is due to issue to important legislative instruments in the field of consumer ODR. The first one is a directive requiring the provision of ADR services for cross-border B2C disputes and setting minimum standards for ADR methods. The second initiative is a Regulation on consumer ODR setting coordinating.

In this regard, the European Commission is closely following the international developments in the field of ODR, especially the outcome of UNCITRAL working group on ODR. UNCITRAL has the role of harmonising commercial and trade law at international level.[50] Currently, UNCITRAL is examining a set of recommendations, which may include the possibility of creating a model law. The model law would then be employed to indicate the regulation of national laws. Another proposal that is being considered by UNCITRAL is that which has been presented by Organisation of American States (OAS) for the design of a global network of ODR providers.[51] In addition, UNCITRAL is expected to issue a number of recommendations on the contractual use of ODR and the online enforcement of settlements reached through an ODR process.

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46 <www.econsumer.gov>.

47 American Bar Association (ABA) Task Force on E-Commerce and ADR, "Addressing Disputes in Electronic Commerce: Final Report and Recommendations" (2002).

48 B.G. Davis, "Building the Seamless Dispute Resolution Web: A Status Report on the American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution", (2002) 8 *Texas Wesleyan Law Review*, p. 529; L.M. Ponte and T.D. Cavenagh, *Cyberjustice, Online Dispute Resolution for E-Commerce*, New Jersey, Parson Prentice Hall 2005, Appendix A examining the ABA Task Force initiative.

49 Digital Agenda (2010) *supra.*

50 UNCITRAL (2010) *supra.*

51 Rule *et al.* (2010).

4.3 *Reluctance to Participate in ODR Processes*

Another major identifiable challenge faced by ODR is convincing parties to trust and use an ODR service. When an individual has submitted a complaint to an ODR service that is not linked to the other party, the real challenge is to convince the party to participate. This is particularly difficult when there is an imbalance of power between the parties. Participation may also vary depending on the chosen ODR procedure. In case of arbitration, it would be easier to use it when parties have agreed before the dispute arises. This, however, may present legal problems in certain jurisdictions, such as in the EU, where pre-dispute B2C arbitration is only permissible if it is non-binding arbitration, or binding only for the business and not for consumers.[52]

By contrast, other countries, such as the US, allow the use of pre-dispute mandatory arbitration under the national law for the resolution of consumer disputes. Conversely, policy makers in the EU believe that allowing private dispute resolution systems might be introduced at the cost of decreasing the level of consumer protection within the EU.[53] However, this policy could change in the EU if a co-ordinated legal initiative ensures that private ODR services meet sufficient procedural standards and grant the enforcement of consumer rights.[54]

In the case of mediation, it would be less problematic to obtain parties' participation, especially when there is no significant imbalance of power between the parties, where there is an interest in maintaining the relationship and when the dispute is not highly confrontational. Additional incentives can be created in order to encourage parties' participation. In eBay for example, buyers' feedback encourages a seller's participation since the seller wants to avoid negative reviews. Also intermediaries, such as lawyers, consumer organisations and chambers of commerce, may influence the type of dispute resolution mechanisms sought by the parties.[55]

Katsh and Rifkin observe that businesses may be reluctant to offer ODR in case their customers would interpret that disputes arise often.[56] They suggest that ODR may enhance trust in a transaction if consumers are well informed, not just about their rights, but assuring them that they have also the tools to enforce them.[57] For ODR to be trust building, it needs to be advertised appropriately. ODR is frequently offered in the context of affiliation

52 See Recommendation 98/257/CE of the Commission on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes 1998 O.J. (L. 115) VI principle of liberty. See also Annex [q] Directive 1993/13/EC.

53 Hörnle (2009) pp. 174-9.

54 Hill (2008), pp. 318-319 and Cortés (2010), pp. 1-28.

55 I. Ramsay, "Consumer Redress and Access to Justice", in *International Perspectives on Consumers' Access to Justice*, New York, Cambridge University Press 2006, p. 34.

56 Katsh and Rifkin (2001), p. 87.

57 *Ibid.*

programs *i.e.* trustmarks. Traders generally affiliate to these schemes on a voluntary basis to enhance consumer confidence. In this context, the goal of ODR is not just to settle disputes but also to increase consumer confidence in e-commerce.[58]

4.4 Awareness

An additional barrier in the growth of ODR is the lack of awareness. A way of increasing trust and awareness of ODR providers is by an accreditation system.[59] Accredited ODR providers (presumably of those providers that offer the most fair and cost-efficient ODR processes) could obtain certain privileges: they could be publicly endorsed with a trustmark; and as they would be monitored, thus ensuring fair and efficient services.

When ODR is proposed by the consumer, it often happens that the business will refuse its participation.[60] Hence, to ensure the use of ODR businesses must agree in advance to use it and offer it to the consumer when disputes arise.

There is a need to clarify the legal status of ODR decisions and contractual clauses. Thus far ODR has relied on self-regulation leaving many legal questions unanswered, such as the enforceability of decisions and clauses referring parties to an ODR process. This is why, unsurprisingly, enforceability and a mandatory nature are key factors for the success of ODR providers, (*e.g.* the UDRP). How many domain name disputants would otherwise voluntarily agree to use the UDRP if they were not compelled to do so? How many disputants would voluntarily comply with a decision from an adversarial ODR process? Even consensual ODR providers, such as eBay and PayPal, relied on the provision of strong incentives for parties to use ODR: buyers want to obtain economic compensation and sellers want to receive positive feedback from buyers. It must be noted that two of the most successful ODR processes to date (UDRP providers and eBay/PayPal) appeared in a market where disputes were referred to them, and where the market administrator (ICANN and eBay) wanted to avoid being sued by disputants. In addition, in most of these cases parties could not access an offline dispute resolution mechanism for a reasonable cost.

58 J. Nadler, "Electronic Mediated Dispute Resolution and E-Commerce", (2001) 17 *Negotiation Journal*, p. 333.

59 See P. Cortés, "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers", (2011) 19 (1) *International Journal of Law and Information Technology*, pp. 1-28.

60 DG SANCO, Study on the Use of Alternative Dispute Resolution in the European Union, Final Report submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC) Framework Contract Lot 2, 16 October 2009.

5 ODR METHODS EMPLOYED IN THE SETTLEMENT OF CONSUMER CLAIMS

5.1 *Consensual ODR Methods*

Consensual ODR includes mainly negotiation, mediation, and conciliation when taking place with bespoke software whereby parties communicate through the Internet. This section focuses on online mediation because it comprises the majority of the features of the above methods. The goal of mediator is to shift parties focus on legal entitlements towards problem-solving stance in order to maximize the interests of both parties when reaching an agreement.

According to Wissler, there are three types of disputes that are more likely to settle in mediation: disputes where the defendant admits partial or total liability; disputes where parties seek resolution rather than self-recognition; certain categories of disputes are more likely to be settled in mediation, *e.g.* disputes related to the payment of goods or services.[61]

In order to assess the type of cases that would be suitable for online mediation, it is clear to start by referring to those which are unsuitable for online mediation. These are cases involving criminal matters (at least when the victim so decides), disputes where an important legal precedent is sought, or where there is a matter of policy which needs to be addressed. In addition, a major difficulty is to mediate with someone who does not want to be in the mediation process.[62] Online mediation is more appropriate when the disparity of power between the parties is not great, *i.e.* B2B, C2C, B2C (with Small and Medium Enterprises – *i.e.* SMEs). Also, when parties 'want' to resolve the dispute though they are unable or reluctant to physically meet, such as e-commerce disputes.

The use of online mediation for resolving consumer disputes is challenging the traditional notions of litigation and ADR. The potential for online mediation lies in the fact that it reduces barriers in accessing justice by avoiding conflicts of laws and a lengthy adversarial process, thus reducing costs and time. In mediation, both parties are often more satisfied with the outcome and consider the process fairer than adjudicative processes.

It has been suggested elsewhere that under certain circumstances mandatory online mediation has the potential to increase consumer access to justice.[63] Mandatory mediation could request parties to attend in good faith an online meeting with a mediator. This could only be achieved with greater public awareness, removing legal restrictions,[64] increasing

61 R.L. Wissler, "Mediation and Adjudication in the Small Claims Court: The Effects of Processes and Case Characteristics", (1995) 29(2) *Law and Society Review*, pp. 332-334.

62 S. Prince, "Mandatory Mediation: The Ontario Experience", (2007) 26(1) *Civil Justice Quarterly*, p. 84.

63 P. Cortés, "Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues", (2008) 35(1) *Rutgers Computer & Technology Law Journal*, pp. 1-41.

64 In *Rosalba Alassini* (C-317/08) para. 67 the European Court of Justice held that mandatory mediation may only take place if electronic means are not the only means to carry out the mediation. The Court in this case

public funds, facilities and trained mediators,[65] and greater incentives on disputants to participate in online mediation. Mandatory online mediation should have clear limits if used to resolve B2C disputes. For instance, it should be free for the consumer or provided at a low cost; where a mediation settlement is not achieved and the dispute escalates to an online adjudicative process (a judicial process or arbitration), the costs, if any, could be considered as part of the legal costs.

When participants have unequal powers, it should be mandatory to the stronger party to attend an online session, but the option should be given to the consumer to opt out, particularly when a small claims process is available. Conversely, if clear limits are not well defined, mandatory mediation could create new barriers for consumer redress by encouraging them to settle for less than their legal rights. In order to avoid this, consumers should be empowered by being unequivocally informed that they cannot be pressured to settle and being reminded of their right to refuse any offer.

5.1.1 Norm-Educating Model

A number of models can be adopted by the mediator. These models determine how interventionist would be role of the mediator in informing parties about the norms that apply to their dispute. When there is an imbalance of power, it may be desirable to have a mediator who employs a norm-educating model and thus informs the parties, particularly the consumer, about their legal rights. The norm-educating model seems appropriate for consumer mediation as it enhances the autonomy and power of the consumer and ensures a greater level of fairness in the final result.[66] When the mediation is conducted online, this could be carried out in a more impartial manner, by for instance including links to websites that contain information on consumer rights.

5.2 Adjudicative ODR Methods

This section briefly examines some issues regarding the inquisitorial nature of consumer adjudicative methods and two online extra-judicial procedures: the institutionalised Spanish consumer arbitration system, which is currently moving towards the online sphere;[67] and the dispute resolution system for domain names, which is a bespoke administrative process similar to arbitration that might be used as a model for B2C ODR.

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was empathetic with the digitally excluded – *i.e.* consumers who may have limited or no access to the Internet, as they may find their rights difficult to exercise if they could only access to them by electronic means.

65 CEN [Draft] Workshop (2009), pp. 68-69.

66 C. Irvine, "Mediation and Social Norms: A Response to Dame Hazel Genn" (June 2009). Available at <www.mediate.com/articles/irvineC1.cfm>.

67 See Royal Decree 231/2008 of 15 February 2008 of the Consumer Arbitration System.

5.2.2 Inquisitorial Processes

The resolution of consumer disputes through ODR would often require the use of an adjudicative method – *i.e.* a process where the settlement is imposed by the third neutral party. In adjudication, each party has to present his case; but when parties do not have legal representation, it is often preferred the use of an inquisitorial process where the third neutral party carries out a more interventionist role. The inquisitorial role of the third party is generally described as opposed to the adversarial role. A brief explanation of these two roles is considered here pertinent.

Traditionally, in common law systems litigation, as the prime type of adjudication, has been informed by the adversarial principle where parties research the law, present the case, find the evidence and challenge the views of the other party. Parties do all this without the assistance of the judge, who acts as a mere umpire. This feature of common law systems has changed throughout the time in all jurisdictions. In jurisdictions such as the US and those influenced by the American court system, judges have a more interventionist function. However, it must be noted that the role of the judge in the English civil procedure has changed significantly during the last decade with the new managerial powers given to the judiciary after the Woolf Reforms.[68] Despite that some of the differences in approaches have been diluted in England and in other common law jurisdictions with an increasingly interventionist judge,[69] there are still some features inherent in the adversarial nature of the common law tradition that increase costs. One of these typical features is the use of disclosure (or discovery in the US) which, unlike in civil law jurisdictions, is a key feature that may drive up the cost of the proceedings.

On the contrary, in civil law jurisdictions courts (as well as more informal forms of adjudication elsewhere, such as tribunals) employ an inquisitorial approach, thus assisting the parties in presenting their case. Inquisitorial judges have greater discretion in assisting disputants during the civil process, particularly helping with the procedural niceties to those parties without legal representation. This enabling role of judges[70] allows them to investigate on their own volition in order to facilitate the reaching of a more cost-efficient way of resolving disputes. The inquisitorial approach does not place as much stress as the adversarial approach on oral presentations. Furthermore, in the adversarial system the parties have greater control over the process, accordingly, parties, and not the court, call witnesses.[71] This is because the emphasis on the inquisitorial process is on access to justice, while in adversarial process is on the justice on the merits.

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68 Lord Woolf, *Access to Justice*, Final Report (1996) chapter 1.

69 O. Chase *et al.*, *Civil Litigation in Comparative Context*, Thomson West 2007, p. 592.

70 The "enabling role" is a hallmark of judges of modern tribunals. This role is most evidence in disputes between citizen and the State.

71 A. Gillespie, *The English Legal System*, Oxford, OUP 2009, p. 13.

Online adjudication for consumers, (*e.g.* online arbitration) should make an emphasis on access to justice. The third neutral party, be the technology alone (as the fourth party) or the third neutral party assisted with ICT tools, must carry out when necessary an inquisitorial role, ensuring that the power imbalance between the consumer and the business will not allow an unfair result. The inquisitorial role of the neutral party may affect its impartiality, thus it is important for these processes to be monitored by public or accreditation entities. It must be highlighted that the power imbalance between the parties will not only be related to the resources of consumers, but it is also related to the fact that the business is more likely to be a repeat player, dealing with a number of disputes on any given time.

5.2.3 The Spanish Consumer Arbitration Boards

The Spanish Act on the Services of the Information Society opens the possibility of using consumer arbitration and other ADR methods, either offline or online.[72] Spanish law, however, only allows the use of online consumer arbitration when it is provided by the public authorities under the national law.[73] The online procedure is promoted by the government and may take place online, from start to end. The law states all the necessary aspects for the functioning of the online service, such as the determination of the competent arbitration board, the place of arbitration, and the use of electronic signatures and notifications.[74]

The Spanish Consumer Arbitration Boards provide with a voluntary procedure that is characterised for being quick (maximum of four months),[75] confidential, binding, free and flexible – there is no economic limit and parties choose if they want the arbitration to be based on law or equity.[76] Consumer arbitration cannot be used in those cases where there is intoxication, injury, death or reasons to believe that there is a crime involved in the dispute. The Spanish Consumer Protection Act considers a clause that refers consumers to arbitration different to the Public Consumer Arbitration illegal, unless the arbitration institution has been created by statute for a specific sector.[77] This excludes not only private arbitration but any international arbitration.[78]

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72 Ley de Servicios de la Sociedad de la Información 34/2002, Article 32 and para. 2 of *disp. adic.* 3.

73 See Articles 51-55 and fourth final disposition RD 231/2008. See also RD 863/2009.

74 *Ibid.* Currently the videoconference has been implemented in a number of places, including Madrid, Valencia and Murcia.

75 Article 14.1 RDAC. See Spanish Clearing House *Instituto Nacional de Consumo* Memoria del Sistema Arbitral de Consumo (8 April 2005) 109. Available at <www.consumo-inc.es>.

76 Article 1 RD 231/2008.

77 Ley 7/1998, LGDCU disp. adic. 1.26. J. M. Busto Lago, N. Álvarez Lata, F. Peña López, *Reclamaciones De Consumo. Derecho Del Consumidor Desde La Perspectiva Del Consumidor*, Navarra, Aranzadi 2005, p. 125.

78 M. Gonzalo Quiroga, *La Protección Jurídica de los Consumidores*, Madrid, Dykinson S.L. 2003, p. 120.

Only consumers can initiate the procedure by submitting a claim at the closest Arbitration Board to the consumer's domicile. In order to use consumer arbitration, both parties must agree to the use of arbitration after the dispute arises. However, Spanish businesses may be incorporated in the Consumer Arbitration Scheme before the dispute arises. Adhered businesses are registered in a public list and display the official trustmark. In those cases it will only be required that the consumer accepts arbitration after the dispute arises. In other words, there is a pre-dispute arbitration clause which is binding on the business, but not on the consumer.[79] Yet, some businesses adhere only partially to the Consumer Arbitration Scheme, leaving some restrictions regarding economic threshold or the type of disputes that consumers may take to the arbitration board. When the use of arbitration is restricted, businesses will have to include the expression of "Limited Offer" together with the trustmark logo.

Under the new law, mediation is introduced as a prior step before arbitration. Parties automatically participate in mediation unless one of them expressly opposes to it.[80] If the mediation fails, the arbitrators meet the parties at the hearing to evaluate their evidence. The arbitral process may be carried out with an oral hearing (which now can be online) or by submitting documents. There is a preference for meeting the parties rather than conducting an only written procedure because the meeting often facilitates settlements.[81] In the event that an agreement cannot be obtained during the hearing, arbitrators will resolve the dispute based on equity, except the parties expressly agree to request the arbitral award to be based on law. In both cases, the arbitral award is required to be reasoned. A written opinion helps to demonstrate that the procedure is fair and rational, and it can also help to guide the future conduct of the parties. Decisions are binding and enforceable but may be appealed in the higher court on a number of grounds, such as violation of due process rules.

5.2.4 The Uniform Domain Name Dispute Resolution Policy

The UDRP, unlike traditional arbitration, is not intended to supplant court proceedings, but merely to afford an additional forum for dispute resolution, allowing parties to commence legal actions at any stage. Some of the features of the UDRP may be a good model for ODR providers that target B2C disputes.[82] There are nonetheless significant differences between the domain name disputes and e-commerce disputes. Edwards and Williams observe that consumer disputes in the context of e-commerce are often about the expecta-

79 Article 31.4 of Ley 44/2006 of 29 December 2006 on Consumer Protection.

80 Article 38 RD 231/2008.

81 A. Hernández Fernández, "Una Experiencia Paradigmática: El Arbitraje de Consumo On Line en el Marco del Sistema Español de Protección de los Consumidores", Universidad de Valencia (2003) 2 *Revista de Derecho*, p. 13.

82 S. Donahey, "The UDRP Model Applied to Online Consumer Transactions", (2003) 20 *Journal of International Arbitration*, p. 475.

tions of the parties; it is harder, they argue, to assess evidence in e-commerce disputes than in domain name disputes.[83] According to Hörnle, the UDRP model would need to increase due process standards in order to be used for cross-border disputes where parties have unequal bargaining power.[84]

The success of the UDRP as an ODR model for domain names rests on getting disputants to use the UDRP and its efficient self-enforcement mechanism. This self-enforcement mechanism may not be available for some types of disputes, such as mainstream disputes arising out of a transaction between an online vendor and a buyer; except if there is the collaboration of entities that could enforce the outcome, for instance, the payment service (*e.g.* VISA or PayPal) or if a dispute arouse on a third party platform or other intermediary, such as disputes arising out of market places (*e.g.* eBay) or disputes originated from information posted on mass collaboration sites (*e.g.* Facebook and Wikipedia).

Under the UDRP, parties do not sign an arbitration agreement; they submit to the procedure separately: the complainant by filing his complaint, the respondent by registering his domain name. However the UDRP is far from perfect. It has been suggested that the time is right to make a number of amendments to the UDRP policy and rules in order to attain, not only an efficient, but a fairer ODR process.[85] Despite its imperfections, the UDRP illustrates that the success of adjudicative ODR processes depends upon their self-enforcement mechanisms and mandatory participation. When deciding which adjudicative ODR process, judicial or arbitral, is more suitable for B2C disputes, it is necessary to take into account which procedure ensures greater accessibility and fairness, as power imbalance between the parties is likely to be considerable.

6 APPROPRIATE ODR METHODS

It is not possible to single out an ODR method that could be suitable for all type of consumer disputes. It is possible, nevertheless, to extract certain parameters from successful ODR providers that could assist in informing how ODR methods need to be tailored in order to be effective.

Assisted negotiation and online mediation (*e.g.* SquareTrade, eBay and PayPal) have been successful in niche markets by targeting large numbers of similar disputes with highly

83 L. Edwards and C. Wilson, "Redress and Alternative Dispute Resolution in Cross-Border E-Commerce Transactions", DG Internal Policies of the Union, Policy Department Economic and Scientific Policy, Briefing Note (IP/A/IMCO/IC/2006-206), p. 15.

84 Hörnle (2009), pp. 186-219.

85 *Cf.* S. Donahey, "Divergence in the UDRP and the Need for Appellate Review", (2002) 5 *Journal of Internet Law*, p. 1. P. Cortés, "The UDRP Reviewed: The Need for a 'Uniform' Policy", (2008) 14(6) *Computer and Telecommunications Law Review*, pp. 133-139 and "An Analysis of the UDRP Experience: Is It Time for Reform?", (2008) 24 *Computers Law and Security Report*, pp. 349-359. Hörnle (2009), pp. 186-219.

automated ODR models that recognise patterns from comparable disputes matching them with proposed resolutions.[86] These processes have great advantages because they are fast and involve relatively little cost. The limit of these platforms is that they deal only with repetitive and simple disputes. The success of automated processes for consumer disputes depends on the nature of the dispute, the accuracy of the information provided, and the capability of the software or the fourth party in assessing the dispute.

Consensual processes avoid conflicts of laws, hence allowing parties to focus on their respective interests, rather than on what rights they have under the law. The main constraint of these consensual processes is that require all parties to be motivated in resolving their disputes. This begs the question of which situations are the most appropriate for parties to seek compromise? Consensual processes seem appropriate for resolving disputes in high context cultures, where people have close connections over a long period of time, (*e.g.* family disputes). Furthermore, online mediation may be suitable in low context cultures, such as in e-commerce[87] when the mediator adopts a more interventionist role (the norm educating model), if parties are motivated and when the imbalance of power between the parties is not too great – *i.e.* when consumers are dealing with SMEs that encounter seldom disputes.

When the power imbalance is significant, when the consumer is not aware of his legal entitlements and when there is a "genuine social need for an authoritative interpretation of the law", adjudicative public processes may be more adequate for correcting possible abuses of power.[88] Notwithstanding, this is not just a question of power imbalance, but it is also a question of the nature of the rights. Accordingly, in some disputes parties may find a solution without compromising their interests, while in other cases a settlement would only be possible if both parties compromise. Therefore, it would be necessary to indentify under which circumstances one party may renounce a right for the sake of compromise. In the consumer context, it would be necessary to distinguish between the rights that should not be waived by the parties (*e.g.* human rights) while other rights could be considered dispositive rights (*e.g.* right to return the goods).[89] In order to uphold these rights it is necessary not only the use of an adjudicative process, but also the provision of a public appeal system that ensures the application of public mandatory laws, including consumer protection laws.[90] However appeals increase costs and time in the resolution of

86 See <http://pages.ebay.com/services/buyandsell/disputeres.html> and <www.paypal.com/cgi-bin/webscr?cmd=xpt/cps/general/PPDisputeResolution-outside>.

87 Recommendation 2001/310/EC of 4 April 2001 on Principles of for Out-of-Court Bodies Involved in Consensual Resolution of Consumer Disputes 2001 O. J. (L. 109) 56 whereas 2 and 6.

88 O. Fiss, "Against Settlement", (1984) 93 *Yale Law Review*, p. 1087.

89 In the EU the right to a fair trial is contained in Article 6 of the European Convention of Human Rights, and the cooling off period allowing consumers to return goods bought by methods of distance selling, including e-commerce, is contained in Article 6 of the Distance Selling Directive 97/7.

90 Hörnle (2009), p. 161.

disputes, hence, it should be limited to the most deserving cases.[91] Another option to avoid abuses from the business would be the establishment of a supervisory body that monitors ODR service providers. This could be done either through an accreditation system or when an independent institution refers cases to trusted ODR service providers.

Adjudicative procedures may be useful methods for resolving online consumer disputes. Online judicial processes are particularly appropriate for dealing with disputes where parties cannot reach consensus through any other ODR method, when a large disparity of power exists between the parties and when it is necessary to review decisions. Conversely, online arbitration has other advantages: it is custom-tailored to the dispute at hand, it is conclusive and it can replace the jurisdiction of the courts, though online arbitration may also be non-binding or appealable. This is illustrated by the adjudicative UDRP system, which framework is supported by the following three pillars: (i) the UDRP deals only with blatant disputes, which are abusive registrations of domain names made in order to take advantage of the reputation of existing trademarks; (ii) the referral to the UDRP is included through a mandatory contractual clause; and (iii) the UDRP has incorporated a self-enforcement mechanism, even though its decisions are non-binding if the dispute is brought to court.

Similarly, chargebacks and refunds by payment service providers offer a valuable remedy for consumers when using credit cards. Chargebacks reverse all transactions when a fraudulent use has occurred or when there is a violation of the contractual terms. According to the OECD, credit cards are the most common form of payment by consumers in e-commerce transactions.[92] For instance, in the UK consumers have the right to claim damages from the credit card issuer when the purchase value is within the range of GBP 100-GBP 30,000.[93]

Finally, it must be noted that online consumer disputes tend increasingly to be resolved through a tiered process: the first step is a company's internal customer service; the second step, consensual ODR (*i.e.* assisted negotiation, automated negotiation and online mediation); the third step, online arbitration; or a judicial process (when this is an option). The connection between consensual and an effective adjudicative method is essential, because it is often the latter which is an important incentive to bring the parties to the negotiation table.[94] Multi-step dispute resolution processes may become predominant. This approach emphasises the parties' prerequisite to consider consensual processes during the initial stage of their dispute in order to promote less formal, less costly and more efficient dispute

91 *Ibid.*

92 Organization for Economic Co-operation and Development "Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes" (20 December 2006) Available at <www.oecd.org/dataoecd/26/61/36456184.pdf>.

93 Section 75(3)(b) of the Consumer Credit Act 1974.

94 H. Genn, *The Hamlyn Lectures 2008: Judging Civil Justice*, Cambridge, Cambridge University Press, 2010, p. 80. *Cf.* book review P. Cortés (2011) 31(1) *Legal Studies*, pp. 162-166.

resolution methods.[95] However, such an approach should not consider consensual ODR just as a first step before adjudication, but as an alternative and invaluable tool for the resolution of disputes that is offered in conjunction to adjudication.[96]

7 CONCLUSION: FUTURE TRENDS IN CONSUMER ODR

In the developed world, most consumers with Internet connection trade online, from groceries to transport and accommodation. Many consumers have done this for a few years already, but it is in recent times that Internet connection has become a common feature in most households. In the developing world, even though most consumers do not have continuous Internet connection, increasingly many have access to cybercafés and mobile phones, which are used for certain financial transactions, such as to facilitate payments. With online (mis)communications inevitably appear online disputes. It seems that the most obvious field for the development of ODR will have to be e-commerce. If the conflicts arise online, it seems logical that they should be resolved online. This is already happening in a number of areas, such as domain name disputes resolved by ICANN approved UDRP providers, and traditional B2C and B2B disputes in eBay and PayPal. It is very possible that these types of ODR services will augment first with the large digital providers, such as iTunes, or large corporations with a high number of online transactions, such as airlines.

The development of ODR, as with ADR, will probably be sector specific. Whether consumer disputes will be fully centralized remains to be seen, but it seems more likely that ODR providers will develop expertise in specific fields rather than dealing with all types of consumer disputes. Thus, the development of ODR will start to consolidate in certain sectors, such as transport, motor vehicles, and financial disputes.

Another sector where technology will start to develop very soon in countries with widespread Internet connection will be the courts of justice. Currently there are an increasing number of courts that admit online claims through their websites. The implementation of ICT tools in courts is starting to be applied to streamlined processes, such as small claims and money claims procedures. These processes generally make for the largest number of dockets in many courts, so streamlining these processes would help significantly with the administrative load. The development of e-justice will be implemented slowly, but it is not far from the day when certain types of civil cases might benefit from being litigated from the beginning to the end without parties stepping into the court house.

95 T. Stipanowich, "The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution", (2007) 8 *Nevada Law Journal*, p. 427.

96 Hörnle (2009), p. 58.

There will be an increase of online management and online communications which will transform face to face processes into fully institutionalised ODR processes, such as the Spanish online arbitration systems, the money claim online in the UK and the online small claim courts. Online judicial processes will be used when parties are located in different jurisdictions, such as the European Small Claims Procedure (ESCP) which could become the first judicial procedure to incorporate ODR technology to deal with cross-border claims. National courts will start providing e-filing and using case-management technology.[97] The resolution of disputes will be mostly attempted by consensual processes at first, regardless of the amounts of money involved. When consensual processes are not attempted, the courts will start to consider systematically whether these disputes should be first mediated. Hence mediation will become part of the litigation system. Accordingly, legal professionals will advise on the appropriateness of each dispute resolution method.

An important change that will promote the use of ODR services, as it is now happening in the US and the UK, is the loss of monopoly by attorneys in the resolution of disputes. Now, in the UK for instance, lawyers (*i.e.* solicitors and barristers) can enter into partnerships with businesses, accountants and other professionals, which undoubtedly have a more practical (as opposed to legalist) approach when resolving disputes.[98] Mediators, arbitrators, conciliators, and other ADR professionals will be more open to incorporate (as they already do with email) a number of ODR tools to aid in the resolution of their clients' disputes. Also lawyers will be more knowledgeable of conflict management skills and techniques.[99]

There will be a greater interest in the development and implementation of dispute avoidance techniques.[100] ODR providers will develop *ad hoc* ODR mechanisms for online vendors so they can minimize the number of disputes that may arise out of their transactions with consumers. These ODR prevention mechanisms will be highly automated and will resolve the majority of complaints. Only a small number of complaints that are not resolved by these mechanisms will then be outsourced to external ODR providers, which in its majority would be either public or private bodies approved or certified by a public entity. Once a dispute escalates to an external ODR services, disputants will be assisted with a human third neutral party, who will seek for the consensual resolution of the disputes, and failing that, it will issue a recommendation that may be binding on the business but not on the consumer, who would still be able to pursue the judicial avenue.

Consumers will therefore retain the right to go to court. Some jurisdictions will offer a streamlined B2C online small claims procedure; yet this process will likely be more costly

97 R. Susskind, *The End of Lawyers?*, Oxford, OUP, 2008, pp. 201-210.

98 The (UK) Legal Services Act 2007 allows for the creation of Alternative Business Structures (ABS). The Law Society anticipates starting to license ABS in the second half of 2011.

99 J. Macfarlane, *The New Lawyer*, British Columbia, University British Columbia Press 2009.

100 Susskind (2008).

and slower than the previous accredited ODR providers. Furthermore, these judicial processes will increasingly require both parties to have previously attempted the consensual resolution of their disputes; and if they have not tried it, then they will have to justify why; otherwise they will face the payment of legal costs or a fine if the courts consider that one of the parties has acted unreasonably in refusing to participate in consensual processes. Hence consensual ODR would be quasi-mandatory.

The future of ODR is undeniable. Susskind describes ODR as a disruptive legal technology which will liberate a latent market of low value disputes that today remain largely unresolved.[101] According to Katsh, ODR might not have taken over the world the first time around, but technology has gotten to the point where it just does not make sense to not use the Internet to handle disputes.[102] Some of the essential ingredients for the growth of ODR are laying the ground for its market expansion: there is a constant increase in the use of ADR, transnational e-commerce, and online social networking.

ODR might not always provide a perfect solution to resolve all B2C disputes, but it could certainly deliver a satisfactory resolution to many disputes, including those that arise out of the B2C sphere, such as disputes amongst SMEs, or even outside the commercial and online realm, such as citizen to government (C2G) disputes. The need for ODR increases when parties face certain circumstances, such as limited economic resources, vast geographic distance and urgency in the resolution of disputes. It is also an ideal process for isolated B2C transactions where parties prefer less formal legal proceedings and are content to avoid face to face interactions.

This chapter cannot give a definite forecast on how ODR methods for consumer disputes will advance in the next few years. However, it is clear that ICT is developing increasingly faster while ODR service providers are becoming more sophisticated, intuitive and professional. It can be argued that the ODR of the future will be of greater quality, will cater for specific types of consumer disputes, will be predominantly public-operated or monitored, it will be compulsory, largely automated and it will be able to provide many of the functions that currently only a human neutral party can do. Such a system would have to be supported by artificial intelligence, economic incentives and legal standards.

101 Susskind (2008), p. 223.

102 E. Katsh and L. Wing, "Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future", (2006) 38 *University of Toledo Law Review*, p. 26.

9 ODR and Online Reputation Systems

Maintaining Trust and Accuracy Through Effective Redress

Colin Rule and Harpreet Singh

1 Introduction

Researchers at Oxford have discovered that most people can maintain close relationships with a maximum of 150 people at a time.[1] Beyond that number it becomes too complicated to keep track of the details in your head. In ancient times that 150 number was probably adequate for most people, because our ancestors spent the majority of their lives in small communities where they knew pretty much everyone. But in our modern world, where we ride packed commuter trains into large cities and work in skyscrapers filled with thousands of people in cubes, that 150 cap is just too low. We can easily max out our mental capacity before breakfast.

So in response, as our societies have urbanized, we have built increasingly sophisticated systems for keeping track of all the people we have to interact with. These systems have enabled us to grow far beyond our 150 person limit. Using these systems enables us to share our relationships with others, aggregating information into reputation systems that stretch far beyond the scope of our personal interactions. More recently we have enlisted technology to help these systems scale into the millions and even billions.

But as with any complex system, especially one as enormous and complex as a global reputation system, inaccuracies and fraud can arise, and these issues can result in disagreements between users. Timely resolution of these disagreements is essential to the continued health and success of any reputation system. If disagreements go unaddressed and inaccuracies are not fairly addressed, they steadily and inevitably undermine trust in the overall reputation system, which can push the system toward irrelevance and abandonment.

This chapter examines the growth of reputation systems and the resolution mechanisms that have evolved to support them. We discuss the legal context reputation systems operate within, and how it differs between North America and Europe. We then examine two reputation systems in depth, one new and one old: a cutting-edge reputation system called SiteJabber, which collects feedback on websites around the globe; and eBay's feedback system, one of the original online reputation systems, which has collected more than four

1 <www.dailymail.co.uk/news/article-1245684/5-000-friends-Facebook-Scientists-prove-150-cope-with.html>, last accessed 1 March 2011.

billion reviews over the last ten years. We analyze the resolution systems utilized on these platforms in some detail, and then draw some conclusions as to what works and what doesn't in providing redress for reputation systems. We conclude with our projections as to how these systems will need to evolve in the coming years.

2 WHAT ARE ONLINE REPUTATION SYSTEMS?

Reputation systems have existed as long as human commerce. In ancient Mesopotamia traders kept lists of transactions and transaction prices carved in stone to keep track of cross-border purchases.[2] In Renaissance Italy exchanges were recorded in detailed log books to ensure adherence to commercial terms.[3] As the world has industrialized these systems have grown in importance, and the scale and sophistication of reputation systems has grown immeasurably. While these systems have always existed on some level (be it stone carvings or ledger books) the expansion of information and communications technology has truly taken them to the next level. These days we can sort through literally billions of reviews at the click of a button, and billions of people around the world do so repeatedly each day.

Most online reputation systems usually share several characteristics. First, they rely on "user generated content". This means that individuals can log into the system and leave their own reviews on people, products, or services they have experience with. The system administrator sets up the framework and then users come in and populate it with content. Second, these systems usually allow both positive and negative reviews. Users can indicate their opinion of the reviewed individual or service and provide a short comment elaborating on their experience. Third, these systems then organize all of this submitted content so as to make it easily understood, often aggregating the reviews into a "rolled up" metric like a feedback score or a number of stars. The reviews and ratings are then easily searchable, so visitors can come to the reputation system, easily find the individual or service they are interested in learning more about, and then quickly scan and process all the results to draw their own conclusion.

2.1 The Need They Serve

Humans crave information, and reputation systems provide targeted, useful data to help us make informed choices. Many of us now rely on information in reputation systems to

2 <www.suite101.com/content/economic-reasons-behind-the-invention-of-writing-a221934>, last viewed 29 March 2011.

3 <http://acct.tamu.edu/giroux/FIRST.html>, last accessed 1 April 2011.

make the big decisions in our lives, such as where to live, where to send our kids to school, and which doctor to use for our medical treatment. We also carefully monitor the information about ourselves in these systems because we know how important it can be to our future, such as our credit rating, LinkedIn profile, or Google results. One of the most common search terms users enter into sites like Google and Bing is their own name, because people want to know what other people are saying about them.[4]

Many of these reputation systems are focused on trust, enabling individuals to refer to information left by others to better determine who is trustworthy and who is not. For example, you can look your carpenter up in the Better Business Bureau or Chamber of Commerce to see if he has any complaints filed against him. You can check out opposing counsel in Martindale-Hubbell to see what firms he has worked with. You can even look up your new boss in LinkedIn to check out his prior positions. And it's not just individuals who use these reputation systems – corporations constantly monitor the behavior of their buyers so as to minimize risk and financial exposure, from credit checks to loyalty card programs to customer support contacts. Some reputation systems are not public, they are made available only to certain user communities, and it can be difficult to access the information they contain if you are not part of the allowed community.

2.2 How They are Used

The expansion of social networking has made reputation systems even more customizable and personal. Instead of reading through hundreds of random reviews to find the one that is most helpful, or relying on rolled up statistics from hundreds of random strangers, now you can look only at the reviews from your friends, or your neighbors, or left handed people, or Democrats, or Egyptians – whatever combination you think will provide the best sense of what choice might be good for you. And of course businesses can monitor our every click and page view, uncovering truths that we had never admit about ourselves (such as our insatiable interest in celebrity gossip and homemade cat videos).

Reputation systems are not confined only to directories and reviews. Search engines like Google are built essentially as a giant reputation system as well. Google ranks websites on the basis of how many links point at that website. Each link-in is like a mini-review, because no web designer or content generator would link to a website unworthy of attention. This algorithm has turned out to be the best way to organize not only the billions of pages of information available on the internet, but also the entirety of human knowledge, such as books, pictures, and videos. We are using the information in these online reputation systems to guide the future direction of our society, which makes their accuracy all the more important.

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4 <http://en.wikipedia.org/wiki/Egosurfing>, last accessed 1 April 2011.

2.3 *Dealing with Disagreements*

Online Dispute Resolution (or ODR) is intimately tied to reputation systems. Negative ratings in reputation systems usually come from interactions that went wrong in one way or another. Maybe a buyer got a used item when they were promised a new item, or maybe a customer at a hotel got a room that smelled like smoke even though they had paid for a non-smoking room. Initially, ODR can play a crucial role at the point where the problem is reported. Buyers can use ODR to inform sellers they received the wrong item, and a replacement can be shipped. A traveler can inform her or his online booking company that the suite they paid for is unavailable due to repairs, and a refund can be processed immediately. If the problem is resolved quickly and without any drama then the customer is likely to leave a positive review, or no review at all. But if the merchant makes it difficult to report the problem, or drags his feet in fixing it, then the customer is likely to leave a negative review. Studies have shown that users are far more likely to spread the news about negative experiences than positive ones.

But ODR's involvement with online ratings does not end there. Once a negative rating is left the reviewed party may take issue with the rating. Maybe a seller believes the buyer left the negative rating maliciously, or suspects that the buyer was an agent for a competitor looking to besmirch the reputation of the seller. Maybe the rating is factually inaccurate, or perhaps the customer was trying to use the threat of a negative rating to extort the service provider into including additional value not included in the original service agreement.

If reputation systems do not provide fair redress options for disagreements, over time they lose trust, and users move elsewhere. There are many different online reputation systems in operation at any one time, and it is very easy for users to switch to a system they perceive to be more accurate or trustworthy. This trust challenge cuts both ways: if negative reviews are removed in a non-transparent fashion then users will come to question the accuracy of all reviews in the system, presuming that the overall feedback is being "sweetened" so as to be falsely positive. However, if abusive or inaccurate reviews are included in the system, then buyers will become suspicious about the accuracy of the overall reviews in the system, which may undermine their trust and give them an incentive to move to another site. In addition, sellers become increasingly aggravated by unfair reviews, which may encourage them to either game the system (*e.g.* submitting their own false reviews) or to take legal action against the reputation system administrator.

3 LEGAL OBLIGATIONS FOR REPUTATION SYSTEM ADMINISTRATORS

Along with the economic consequences of a loss of user trust, the management of online reputation systems has legal implications as well. False and misleading reviews can cause

an online business to lose valuable sales. If a seller gets a series of negative reviews buyers may see those reviews and avoid transacting with that seller. Or if a buyer does decide to transact with the seller in spite of the negative reviews, they will insist on lower prices (and smaller profits for the seller) because they are pricing in the perceived "riskiness" of the transaction (sometimes called the *trust penalty*). Sellers know that the success of their business is intimately tied to their reputation, and that every negative review comes with a sizable price tag, so they will go to great lengths to protect their online reviews and urge buyers to give them positive feedback. This may lead them to put legal pressure on the reputation system administrator.

In many cases, reviews may also rise to the level of defamation. Defamation, generally, is a false and unprivileged statement of fact that is harmful to someone's reputation, and published as a result of negligence or malice. For instance, an eBay buyer may leave a feedback comment for a seller that says the seller is a convicted felon who stole money and engaged in sexual assault. The comment may be entirely false, left only by an angry buyer looking to settle a score and cause aggravation to the seller. But because the buyer has the right to leave any feedback they like, and because the eBay system publishes said feedback widely and puts it at the top of the seller's feedback page, that comment can have an extremely negative effect on the seller's livelihood. The seller may then accuse eBay of being complicit in the insult.

In the online reputation system context, questions arise as to who is liable for defamation. Due to the fluidity of online identities, allegedly defamed parties often cannot determine who originally authored the review content. In such cases, the only clear target is the reputation system administrator. Consequently, the defamed party seeks to hold the reputation system administrator liable for the review content. Any liability of the reputation system administrator depends on the jurisdiction in which the defamed party brings suit.

Another dynamic of online interaction is anonymity. In many corners of the internet identities can change as easily as one changes an email address. It is relatively easy to create a new account and besmirch a shop, restaurant, or hotel, because a) in many reputation systems the review can be left anonymously, and b) the reviewer faces almost zero risk of ever being caught or held accountable if her or his identity is not shared. Reputation systems are often all the more valuable because a good reputation takes quite a long time to build, making those who consult them less vulnerable to fraudsters who may be continually registering new fake accounts so as to shield their true identities and hide their past bad behavior. But users are rarely required to have a long track record within the reputation system in order to have the right to leave a review.

3.1 *Vetting for Accuracy Versus only a Venue*

In response to this legal exposure, reputation system administrators have chosen a variety of strategies. Some system administrators claim that they are only venues, with no responsibility for the content of the reviews published in their systems. In this manner, they claim they are like an email service provider or a classified ad publisher, with no vetting of the content running through their platform. This enables the system administrator to claim complete indemnification from any liability for the information submitted. Under this approach, the system administrator cannot vet any individual review for accuracy, because if they did so, they would by implication be vouching for the accuracy of all the reviews in its system.

Other reputation systems take a much more proactive stance. They may vet reviewers in advance, or require them to provide some evidence that they actually experienced the service they are reviewing. They may give sellers a chance to publicly respond to the review prior to it going live. They may enable other reviewers to report reviews that seem questionable. Once reviews are reported as being suspicious, the reputation system administrators may contact both the reviewer and the reviewee to get their perspectives on the matter. Usually these approaches only work when the reputation system is very small, because once the system scales into the millions or billions of reviews it is simply impossible for the system administrators to keep up with the volume. This is one of the reasons why smaller communities are often perceived to have more accurate reviews than larger systems. However, larger reputation systems argue that the volume of reviews they receive enables them to be more accurate in aggregate, because the overall sentiment expressed by reviewers is usually right on the money, even if there are the odd abusive or misleading reviews entered into the system.

In practice this black-and-white distinction between approaches becomes more nuanced over time. Reputation system administrators who claim to be only venues will make exceptions in cases where bright lines are crossed, such as threats, profanity, privacy violations, harassment, or criminal activity. And reputation systems that vet submitted reviews will some times allow a borderline review to stay in the system, arguing that it is just one comment out of thousands and should not be an undue burden on the reviewed individual or service. Often review systems start out vetting reviews and then ease off over time as their systems scale into larger volumes.

3.2 *In the United States*

The law related to online reputation systems is still evolving, and there are significant differences between various regions around the world. The United States has a long-standing

commitment to the principle of free speech, which has led the judiciary to take a very tolerant stance toward misleading or false reviews online. Europe, which has active libel and slander laws on the books in many countries, has a less tolerant approach on issues of intentionally false information. Many areas in the developing world have yet to write laws governing these types of speech, so how they would be handled is still very much an open question.

3.2.1 Section 230 of the Communications Decency Act

In the US, liability of reputation system administrators is determined based on Section 230 of the Communications Decency Act.[5] Section 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider". Generally, anyone who repeats someone else's statements is just as responsible for their defamatory content as the original speaker – if they knew, or had reason to know, of the defamation. This standard clearly places a high burden on websites running message boards, chatrooms, and other similar technologies. To alleviate this burden and encourage online services to grow, Congress enacted Section 230, which provides strong protection against liability for Internet websites that provide or republish content authored by others. Essentially, this statute prevents a reputation system administrator from being held liable for publishing material created by third parties (*e.g.* buyers and sellers using the reputation system). However, this immunity is lost if the administrator materially alters the third party content. The US courts have not clearly defined the point at which content alteration goes from acceptable editing to material alteration. The following two cases provide some guidance regarding the liability of administrators in the United States.

3.2.2 *Reit v. Yelp!, Inc.*

In *Reit v. Yelp!, Inc.*,[6] Reit, a dentist, sued the website Yelp.com for defamation. The regional Yelp websites have listings for businesses throughout the United States and Canada and accept reviews of any business or service. Listings vary widely in nature within the site, including listings for storefronts such as restaurants and shops; service businesses such as doctors, hotels, and cultural venues; and non-business locations such as schools, museums, parks, and churches. In *Reit*, the defamation claim arose from a post created by an anonymous Yelp.com user. The user posted a negative, and allegedly defamatory, review about Reit's practice, including statements that his office is "small", "old" and "smelly", and "the equipment is old and dirty". Reit claimed that the number of people who called for appointments dropped from 10-15 per day to 4-5 per day as a result of this post. After

5 47 USC. § 230 (2006).

6 907 N.Y.S.2d 411 (2010).

Reit contacted Yelp about removing the posting, Reit claimed that Yelp removed all the positive postings on Reit's page and only kept the aforementioned negative review.

The New York court in this case ruled that Yelp is an interactive computer service as defined in CDA Section 230 and a "third party information content provider" supplied the allegedly defamatory content at issue. The court found that Yelp's selection of the posts it maintains on Yelp.com can be considered the selection of material for publication, an action "quintessentially related to a publisher's role". Accordingly, the court found the defamation claim barred by CDA 230.

3.2.3 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*

However, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,[7] the Ninth Circuit Court of Appeals did not provide Section 230 immunity for the defendant website operator. Although this website did not employ a reputation system, the case opinion provides another US court's perspective of Section 230.

Roomates.com operates a website designed to match people renting out spare rooms with people looking for a place to live. Before subscribers can search listings or post housing opportunities on Roommate's website, they must create profiles, a process that requires them to answer a series of questions. In addition to requesting basic information – such as name, location and email address – Roommates required each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household. Each subscriber also had to describe his preferences in roommates with respect to the same three criteria: sex, sexual orientation and whether they will bring children to the household. The subscriber enters this information using pre-defined drop-down menu fields. The site also encourages subscribers to provide "Additional Comments" describing themselves and their desired roommate in an open-ended essay. After a new subscriber completes the application, Roommate assembles his answers into a "profile page". The profile page displays the subscriber's pseudonym, his description and his preferences, as divulged through answers to Roommate's questions.

The plaintiffs in this case argued that the questionnaire causes users to make a "statement ... with respect to the sale or rental of a dwelling that indicates ... an intention to make [a] preference, limitation or discrimination" in violation of the Fair Housing Act (FHA). The court held that the manner in which Roomates.com elicited information from users concerning their roommate preferences, and the manner in which it utilized that information in generating roommate matches, the matching service created or developed the information claimed to violate the Fair Housing Act, and thus was responsible for it as an "information content provider". Roommates.com most likely would have been granted Section 230 immunity if it did not mandatorily require FHA violating information from

7 489 F.3d 921 (9th Cir. 2007).

the user. Conversely, the court upheld immunity for the descriptions posted by users in the "Additional Comments" section because users entered information into this section optionally without any requirement or input from Roomates.com.

3.3 *In England*

CDA 230 provides expansive protections for online reputation system administrators, but CDA 230 is only applicable in the United States. Sites such as eBay, Yelp, Trip Advisor, and the like have a worldwide user base. The United Kingdom offers a helpful counter-example to the US approach.

In the UK, the laws of libel and defamation treat a disseminator of information as having "published" material posted by a user and the responsibility is on the reputation system provider to prove that it did not know the publication was defamatory and it was not negligent in failing to know. Clearly, this places a much higher burden on online entities that publish user created content. Under this legal standard, online reputation system administrators in the UK can choose to either actively engage with content created by users or completely turn a blind eye to user posted content.

In the US, CDA 230 allows administrators to use the former approach and remove, edit, and non-materially edit user created posts. Without a CDA 230 equivalent in the UK, the only viable option for reputation system administrators is to allow users to post non-moderated content. One method currently used in the UK is not to have any moderators on message boards or chatrooms. This approach provides the legal defense of arguing that the administrator did not know of any defamatory content.

Clearly, this method can create dangerous and unsafe online environments, especially on sites geared towards younger internet users. However, there is also an upside with this approach for the allegedly defamed party. Once such a party informs the reputation system administrator of the defamatory content, the administrator loses the lack of knowledge defense. The administrator has to take action by verifying the accuracy of the content or removing it since it may be held liable if the content is determined to be defamatory. Conversely, under CDA 230, a reputation system administrator can simply claim immunity even if the defamed party notifies the administrator of potentially defamatory content.

4 REPUTATION SYSTEM CASE STUDIES

In this section, we examine two reputation systems and several of the redress processes employed by those systems to ensure continued trust in the accuracy of the information contained therein. These case studies can provide more helpful context on how these

reputation systems actually work, how they respond to applicable legal requirements, and how they instil and maintain a sense of trustworthiness among their users.

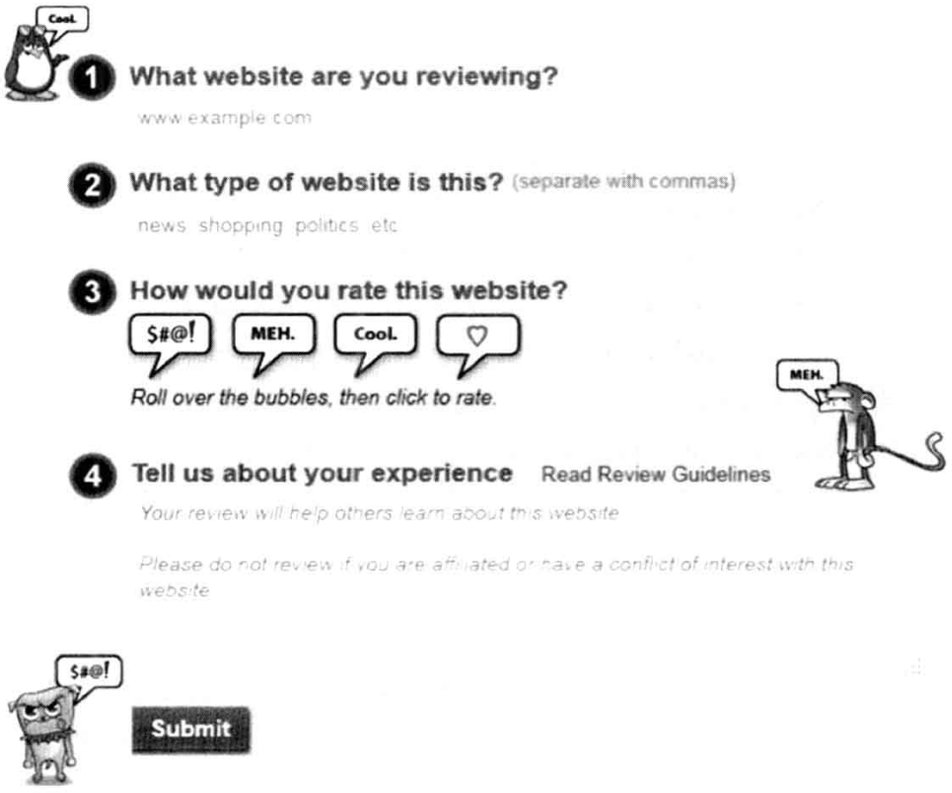
4.1 *SiteJabber.com*

SiteJabber, funded by the National Science Foundation in the United States, is a relatively new reputation system that enables its users to rate other internet websites. SiteJabber's goal is to help "people avoid fraudulent websites and find ones they will love". This goal is accomplished by allowing users to rate websites so as to indicate which ones they like and which ones they do not.

SiteJabber has a clean layout providing easy to navigate pages. The main page has two dynamic sections, "Community Alerts" and "Reviews of the Day", whose content changes based on different factors. The "Community Alerts" section randomly displays websites that have received negative reviews on SiteJabber. A warning in the form of "## members warn about websitename.com" is displayed next to a thumbnail snapshot of the website. Also, included is a portion of the top ranked SiteJabber review for the site. The "Reviews of the Day" section highlights two randomly selected positive reviews. The two selected reviews change daily.

The review interface is quite simple and intuitive. Users enter the domain name of the site they are reviewing, describe the type of website it is, and then select from one of four reviews: $#@! (which indicates extreme unhappiness), MEH (which indicates mild displeasure or neutrality), cool (indicating modest enthusiasm), and ♥, which indicates strong enthusiasm. The site then gives reviewers the ability to provide open form text with additional detail on why they provided the review that they did. The instructions to reviewers specifically say, "Please do not review if you are affiliated [with] or [have a] conflict of interest with this website". The tone of the website is playful and fun, and it uses cartoon characters to provide additional color to the various tiered rating options available (see Figure 4).

Figure 4 Review Input Interface[8]



In terms of redress options provided to site administrators who receive negative reviews they feel are undeserved, there are relatively few options. The "Review Guidelines" provided by SiteJabber state that generally SiteJabber does not remove reviews unless the review fits the following categories: conflicts of interest, second-hand experience based review, personal attacks such as hate speech, bigotry, lewdness, or plagiarism.

To respond to a negative review, the website owner has to contact SiteJabber support. SiteJabber users can also report reviews by clicking on the "Report" below the review. There they are presented with a text box where they can explain why they think the review should be re-examined. SiteJabber is still of a size where they can manually review the information submitted through this channel.

A SiteJabber website review page has three tabs: Reviews, Questions & Answers, & More Info. The review tab displays all of the reviews left by users. The reviews listed can be sorted by relevancy, helpfulness, date, and rating. Helpfulness is determined by the number of users that clicked on the "Helpful?" link below the review. The review structure displays the reviewer's name and whether or not the reviewer is a "Trusted Consumer Advocate". SiteJabber reviewers earn levels for their contributions to the community. Levels are gained by writing reviews, comments, and forum posts that are found helpful

8 This SiteJabber screenshot was taken in February 2011 from <www.sitejabber.com>.

by other community members. By attaining higher levels, users can earn special privileges, such as being recognized as a Trusted Consumer Advocate (which provides greater visibility and weight to reviews). More information on special privileges is disclosed as reviewers advance in levels.

Below each review, there are three links: Helpful, Comments, and Link to this. SiteJabber users can click on these links to provide feedback about the review.

Registered SiteJabber users receive a few additional options and bits of data. For registered users the review structure displays statistical information about the reviewer (*e.g.* number of reviews written and number of helpful clicks received). Also, registered users are given a fourth link at the bottom of each review. This link is titled "Report" and is used to report a review to SiteJabber. Registered users have the option to "Report" any listed comments, Send the commenter a private message, or "Follow" the commenter. Following a user gives you notifications of the followed user's public actions on SiteJabber.

SiteJabber is an excellent example of next-generation online reputation systems, which are designed to gather detailed information from users and organize it so as to make it useful to others. It uses a fun, light-hearted tone to encourage users to visit again, and it offers reviewed sites several options for clarifying and appealing negative reviews. The question is how well these systems will scale as volume increases, and whether or not the information gathered in the system will be deemed trustworthy or accurate enough to convince users to keep coming back.

4.2 eBay's Feedback System

These days, most of the world's internet users know about eBay. It is the largest global e-commerce site, with more than 250 million registered users around the world. eBay made its name in the late 1990s providing online auctions that connected buyers and sellers. It's easy to forget these days, but back in early days of the internet there were actually a wide variety of auction sites serving the US market, not just eBay. Due to the network effect[9] it made sense for all auction traffic to consolidate onto a single site over time, but in the early days it was unclear which auction site would eventually triumph. One of the major reasons why eBay became the winner was its fully integrated online reputation system

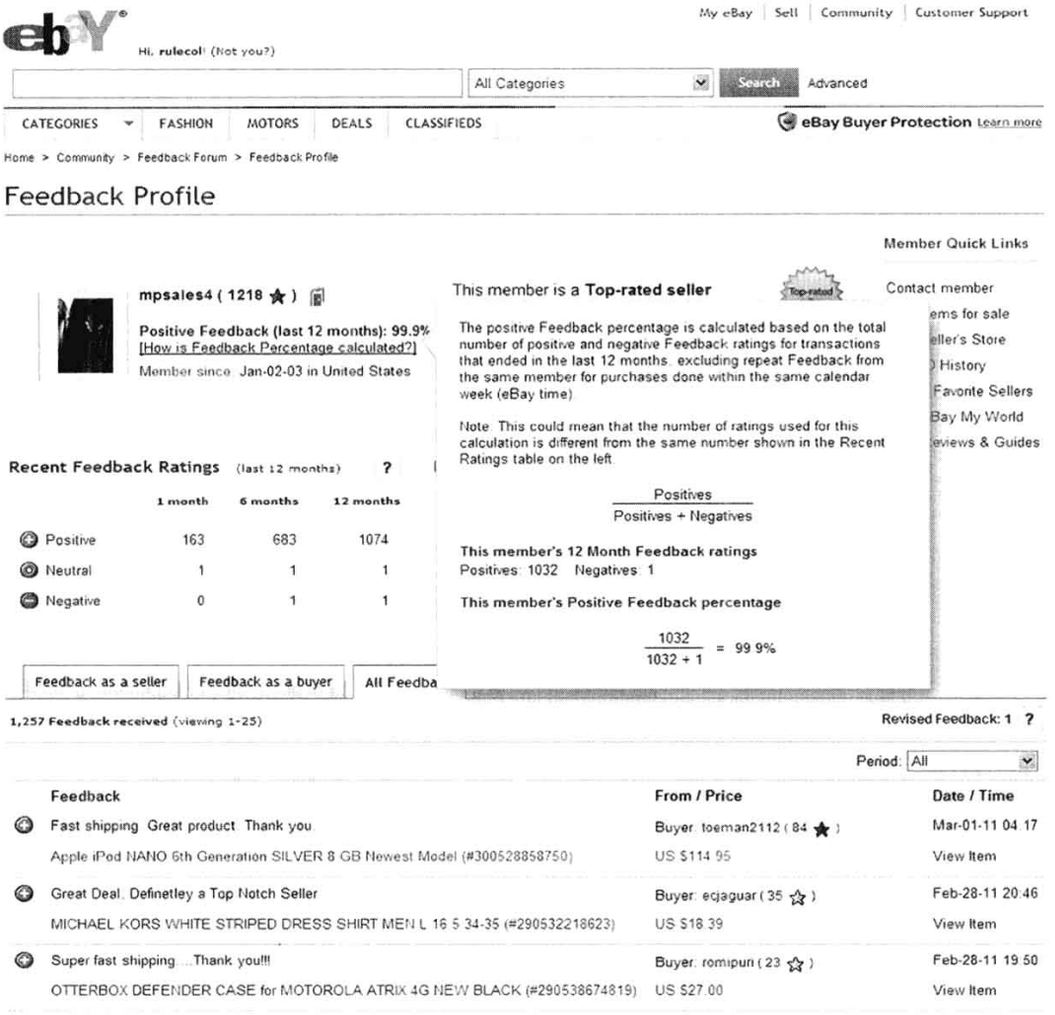
9 The network effect, originally coined by Theodore Vail, the first post patent president of Bell Telephone, describes how the value of a network increases for every additional node added to it. A good example is fax machines: the first person who bought a fax machine purchased a worthless device, but when the second fax machine was purchased the value of the first person's machine increased, and it continued to increase for every additional fax machine sold. Online auction sites operate similarly, in that the more buyers and sellers that participate in the site, the more competition that exists, and the more efficient the market becomes. Previously fragmented markets, such as the market for collectable items like stamps, coins, and antiques, quickly migrated online into a single marketplace because that migration made the market more efficient and improved selection.

called Feedback. At eBay's launch the feedback system was merely a discussion forum where people could leave comments about other users in the system, but as the site scaled up the feedback forum became a highly streamlined system processing billions of reviews. Eventually it became the largest online reputation system ever created.

eBay Feedback is based on a simple concept: buyers and sellers should be able to leave a public evaluation of their transaction partner's performance so that future transaction partners can determine the trustworthiness of that potential partner prior to making the decision to transact with them. The system is quite simple. When buyers purchase an item from the seller, they have the option of leaving a feedback comment. This feedback can be positive, neutral, or negative. eBay then counts up all the feedbacks received by a seller to calculate that seller's feedback score, or the percent of the seller's feedback that is positive. In recent years eBay added a component to the feedback system called Detailed Seller Ratings, or DSRs. DSRs enable the buyer to rate their seller in several different categories (*e.g.*, shipping timeliness, responsiveness, etc.). What is different about DSRs is that the seller does not know the scores left by any individual buyer, they only know their aggregate scores. So if a seller sees his scores going down it is very difficult for him or her to know which of their recent buyers left a low DSR rating to pull down the overall score. It also means that as sellers sell more and more items and receive more reviews each individual DSR matters less to the overall score.

eBay's feedback system works much like the well-known negotiation game the Prisoner's Dilemma. In a single interaction in that game, there is a strong incentive to betray the other side in order to achieve maximum personal benefit. But if the game is played repeatedly, the incentive to betray the other side is removed because over the long-term, the reputation of the repeated betrayer will weaken trust between the parties. Similar to the Prisoner's Dilemma, in a one-off e-commerce transaction there is an incentive to betray the other side if it is unlikely that they will ever transact with you again. However, if your performance in each transaction is made public, then your reputation follows you to future transactions. Your future buyers will be able to see the evaluations from your past buyers, so if those buyers were dissatisfied, future buyers will steer clear of you, or demand much more favorable prices. eBay's feedback system turned e-commerce purchases into repeated game, thereby removing much of the incentive for seller misbehavior.

Figure 5 eBay's Feedback Profile[10]



At inception, feedback was designed to be bi-directional, so buyers could leave feedback for sellers, and vice versa. A few years ago the feedback system was changed so that buyers could leave positive, neutral, or negative feedback for sellers, but sellers could only leave positive feedback for buyers. The rationale for this change was that eBay was the only commercial environment where consumers were rated for their buying performance.[11] eBay was an anomaly in the sense that ratings were bidirectional, and while that might have been good for the resolution platform because it created incentives for both sides to deal honestly with their transaction partners, it did provide something of a disincentive for consumers to leave honest feedback on eBay. On competing marketplaces, like Amazon.com, buyers were not rated by their sellers. eBay had discovered by looking at transac-

10 eBay screenshot taken in February 2011 from <www.ebay.com>.

11 For instance, buyers do not go to a large retailer like Target where they are then rated as they leave the store for how well they shopped and paid for the items that they purchased.

tion histories and reactivation metrics that buyers who received negative feedback from their sellers would often leave eBay, never to return. So a few years ago eBay made the decision to change the feedback system so that buyers were no longer subject to negative reviews from their sellers.

Another dynamic that emerged in eBay's feedback system was a tendency for buyers to self-censor out of fear that they would receive a retaliatory negative rating. In some cases where buyers had a negative purchasing experience from a merchant, they would leave negative feedback for the seller, and the seller, out of anger, would leave negative feedback for the buyer even though the buyer had done nothing wrong. Buyers quickly learned it was easier to either not leave feedback or leave positive feedback so as to avoid the threat of a retaliatory negative. This led to significant "grade inflation" on eBay, where even sketchy sellers could receive ninety-five percent positive ratings, which undermined user confidence in the feedback system as an accurate way to predict likely transaction success.

Sellers very rarely examined the feedback of their buyers prior to the buyer winning an auction or making a purchase from the seller, so feedback was not of great consequence for most buyers. However, buyers almost always examine a seller's feedback prior to placing a bid for purchasing an item from that seller, so feedback was of great consequence for sellers. Sellers who had lots of negative feedback would often receive fewer bids on their listings and would achieve lower final prices than other sellers who have high feedback. In that sense, sellers put much more stake in maintaining very high positive feedback as opposed to buyers. But because feedback was so public (one's feedback score always appears next to one's user name on eBay) both buyers and sellers got quite emotional about negative feedbacks they received, and went to great lengths to try to remove them.

The eBay feedback system has gone through many growing pains over the years, and some have called for the elimination of positive-neutral-negative ratings, instead moving to only the Detailed Seller Ratings (or DSRs, the star-based system). The rationale expressed for this is that DSRs are more in line with emerging web standards for merchant reviews, and that they are anonymous (sellers only see their aggregated DSRs, not the individual ratings left by individual buyers) which encourages buyers to leave honest feedback without fear of reprisal. To date, however, the feedback system remains unchanged, largely due to the fact that many sellers have spent a decade or more building their positive feedback, and they would be quite dismayed to lose it. As a result of that historical inertia, the eBay feedback system probably is not going away any time soon.

4.3 *Examples of Redress Options in eBay's Reputation System*

eBay's enormous transaction volume across a wide number of different categories led to a series of experiments in how best to provide redress within the feedback system. This section details three approaches eBay has utilized and the successes and failures of each.

4.3.1 SquareTrade and Mutual Feedback Withdrawal

SquareTrade provided eBay's first feedback redress process. SquareTrade was an independent company in San Francisco that provided a variety of trust-building services within the eBay marketplace, such as trust seals and dispute resolution. Between 2000 and 2004 SquareTrade handled several million feedback disputes for eBay. Their website presented a short automated negotiation process to eBay buyers and sellers, and if the issue could not be worked out directly through that process, SquareTrade offered a panel of live mediators to work with parties to resolve their disputes. eBay worked closely with SquareTrade for those years and paid SquareTrade a modest fee per case on top of the fee SquareTrade charged case filers who requested the assistance of a mediator. If SquareTrade helped the parties achieve a mutually acceptable solution to the disagreement (usually an agreement to remove both feedbacks left by the buyer and the seller) eBay would enforce the outcome and remove the ratings. SquareTrade also would remove the rating of any user who did not respond to the request to mediate the dispute in question.

SquareTrade's services were largely replaced by a mechanism on eBay called Mutual Feedback Withdrawal (MFF). Mutual Feedback Withdrawal made it possible for a seller to reach an agreement with a buyer to jointly remove feedback. If both sides indicated their agreement through the MFW tool, the feedback was de-scored, meaning the comment would remain on the eBay site, but the positive-neutral-negative rating was not included in the user's overall feedback score. A short notation was also included after the feedback indicating that the comment had been de-scored as a result of the MFW process.

The Mutual Feedback Withdrawal process made sense in an era when feedback was mutual, but once eBay made the decision that buyers could no longer receive negative feedback, the notion of "mutual" withdrawal was meaningless. The MFW process was replaced with a mechanism where the seller can ask the buyer one time if the buyer is willing to remove a negative feedback. If the buyer agrees, the feedback is removed. If the buyer does not agree, or does not respond, the feedback remains and the seller cannot ask again. Also, the buyer cannot unilaterally remove negative feedback, they must respond to a feedback removal request originally initiated by the seller.

4.3.2 Independent Feedback Review

In some categories on eBay, such as automobiles, the asymmetry between buyer and seller feedback valuations made MFW inadequate, because feedback was valued so differently

between users. Buyers can receive lots of positive feedback on low dollar value purchases, while professional sellers may only receive ten or twenty feedback a month, particularly if they are selling expensive automobiles. If an automobile seller receives a negative feedback, therefore, it appears on the front page of their feedback profile for weeks until the seller is able to make enough new sales to push it to a subsequent page. Sellers in the automobile category quickly discovered that these negative feedback ratings had a very tangible impact on their profits. Buyers soon discovered this fact as well, and often did not hesitate to exploit it. A buyer might purchase a car that was described accurately in the listing, but then insist on extra value not included in the original listing while threatening to leave the seller a negative feedback. For instance, a buyer might insist that the seller throw in a set of new tires on a car purchase even though the original listing did not say new tires were included. The seller knows that a negative feedback will impact their business to the tune of USD 1,000 or more of lost business, while the new tires will only set the seller back USD 750. As a result, the seller yields to the buyer's demand and provides new tires so as to avoid the negative feedback.

Sellers became very upset about this exposure to abusive buyer feedback and potential buyer extortion. As a result, working with the eBay Motors team, eBay's Trust and Safety team designed the Independent Feedback (IFR) Review process. This process was intended to provide protection to sellers in eBay motors category should they be exposed to the undeserved feedback from their buyers. The IFR program was designed as an arbitration/evaluation program, along the same design as ICANN's domain name dispute resolution protocol. The IFR program began with three separate online dispute resolution providers: the Better Business Bureau, Net Neutrals (a program of DeMars Associates) and Squaretrade.com. Over time the system evolved to work with only a single provider, NetNeutrals.com.

The program works this way: a user who feels he or she has received an undeserved negative feedback is able to initiate a case through the IFR program. Initially the filing process resided on the eBay.com website, and once the filing was received, it was forwarded on a round robin basis to one of the three approved ODR providers. Once the program condensed down to a single provider after a few years the users were then made able to file the case directly on the NetNeutrals website. When they filed the case the seller indicated why they felt the feedback they received was inappropriate. The IFR program had four clearly stated reasons why feedback could be removed:

- The member leaving the Feedback didn't show a good faith effort to complete the transaction.
- The feedback was not submitted in a reasonable amount of time. Thirty days is usually an adequate period of time to allow for inspection and test drive of a purchased vehicle.

- There is clear and convincing evidence that the transaction-related information contained in the Feedback comment is factually inaccurate, even if this was the result of a misunderstanding or an honest mistake.
- The member leaving the Feedback made an attempt to extract excessive value from their transaction partner. "Extract excessive value" means the buyer or seller is trying to get money, goods or services that are worth more than what was advertised in the listing.[12]

If the seller's complaint did not fit into one of the four categories, the feedback could not be removed. Once the seller explained her or his case, the buyer would be contacted and provided an opportunity to respond as well. The buyer would submit her or his information and also have the ability to review the comments that were submitted by the seller. Once the buyer had completed a submission, the seller had one final opportunity to rebut the buyer's points. Once all of the information was collected from the buyer and the seller the case was forwarded to an independent evaluator who looked at the information submitted and, based on the four rationales for removal under the independent feedback review program, determined if the comment was undeserved.

If the evaluator determined that the feedback was inappropriate, that decision was communicated to eBay. eBay would then take the appropriate action in the feedback system. Negative feedback was never removed from the seller's feedback profile – only the score would be removed from their overall feedback percentage, and a note was appended below the feedback indicating that it had been de-scored as a result of an outcome from IFR process.

NetNeutrals has the advantage of expertise: all of their evaluators are ASE certified technicians, so they can understand the specific problems reported by the buyer and connect it to the particular model or vehicle type in question. NetNeutrals is the online program of DeMars Associates, a face-to-face dispute resolution firm that has handled warranty arbitrations for major automakers for many years. Partnering with a highly credible third party like NetNeutrals – whose panelists have extensive subject matter expertise – lent serious legitimacy for the process, which in turn helped to underscore trust.

4.3.3 The Community Court

The Community Court (found at <http://ebaycourt.com>) is a system in use at eBay India to provide redress to sellers who believe they have received an unfair feedback. Sellers can visit the eBay Court and report the matter, indicating the feedback in question and explaining why they think it was undeserved. Buyers then have an opportunity to log in

12 <http://pages.ebay.com/help/feedback/motors-independent-feedback-review.html>, last accessed 28 March 2011.

and explain their perspective as well. Each side can upload whatever information they think is relevant to the case, including video, images, and documents. Once each side has made their case, the matter is put in front of a jury of twenty-one randomly selected eBay community members. Each member has previously applied to be a juror in the Community Court and met fairly stringent eligibility criteria (*e.g.* time on site, positive feedback). They are also tested at the time of case assignment to ensure that none of the jurors have ever transacted with the buyer and seller involved with the case. The jury is also balanced between buyers and sellers. Each juror evaluates the information submitted by both sides and indicates whether they agree with the buyer, the seller, or if they feel there is not enough information to make a decision. If the buyer prevails, then the feedback is left on the site unchanged. If the seller prevails, the outcome is communicated back to eBay, who removes the feedback in question.

The experience of administering the Community Court over the past three years has illuminated both the strengths and weaknesses of this crowd-sourced approach. Over time, the platform has been revised to improve case assignment, jury balance, and juror engagement. The eBay India team learned from speaking to users that the "court" and "juror" language was not optimal for users, so now the platform speaks instead about community review "panels".

Originally the concern was that there would be a shortage of jurors, but in fact, the eBay Court has had more than enough jurors apply, and as of yet the platform has not needed to compensate jurors for their service in order to keep them engaged. This may be a unique feature of eBay, because eBay has long had an active community with extremely engaged users. Also, the eBay Court administrators have learned how to monitor verdicts and identify troublesome patterns. If a juror's decisions raise concerns, they may be tested out with previously decided cases, or they may stop receiving case referrals altogether.

The feedback on the eBay Court has been very strongly positive, and eBay India has indicated that they love the feature and will support it over the longer term. This crowd-sourced, community-driven approach to providing redress in online reputation systems offers great promise, and it is soon to be implemented on other sites, such as <www.marktplaats.nl>, the largest e-commerce site in The Netherlands.

5 WHY REPUTATION SYSTEMS SHOULD USE ODR

It is true that in the US the Communications Decency Act provides immunity for internet intermediaries in the area of user generated content. Many companies rely on that immunity as the only defense against a potential mountain of litigation from users unhappy with information disseminated through their systems. Because internet companies are so wary of exposure to that liability, many of them would prefer to stay distant from the

content being generated within their reputation systems, because they believe that provides the greatest protection against lawsuits. Legally, this may be the safest approach.

However, this strategy is short-sighted. Reputation systems are created to provide accurate information as to the performance of services or businesses based on prior experience. If there are inaccurate or abusive reviews being left within a reputation system, then those reviews are undermining the system's accuracy. It also is unfair to the reviewed individual, business, or service. These entities may be penalized based on feedback left for them online, and without a redress option, they are powerless to do anything about it. Imagine a small, family-run restaurant, just starting out and building its reputation, that receives an inaccurate or unfair review – maybe from a competitor, or maybe from a customer with some ulterior motive. If that review is disseminated through a powerful internet intermediary, that negative early word of mouth can cause major dislocations in the restaurant's growth plans. And when the restaurant calls up the intermediary and asks to provide evidence that the feedback is not legitimate, the intermediary responds that their policy is not to vet any feedback received. Yes, the CDA may protect the intermediary according to the letter of the law. But what is the right thing to do?

Of course, online reputation system administrators do not want to open the door to lawsuits by playing a more aggressive role in vetting reviews. But reputation systems can partner with outside organizations to provide this redress, insulating themselves from liability while at the same time providing justice to their users. It might be a community-vetting approach, such as the Community Court, where a panel of both active reviewers and reviewed service providers can hear the perspectives on both sides of an issue and render a decision. The community is generating the feedback, so the community should also have the ability to vet the feedback for accuracy and provide fair redress where appropriate. Or it might be an expert-arbitration approach, like NetNeutrals.com, where individual cases are evaluated by qualified third parties. Using mechanisms such as these, the reputation system administrator takes no responsibility for the decision, they just agree to enforce the outcomes rendered.

Some reputation system designers get concerned about the impact on buyer willingness to leave feedback if a redress system is put into place. If buyers know that their feedback may be subject to a subsequent review process, they ask, won't buyers be more reluctant to leave a review in the first place? This is a valid concern, but on the other hand, it might be a good thing for buyers to know that their feedback may be reviewed. They might be less likely to leave an inappropriate or abusive feedback if they have some sense that they may be held accountable for it. Also, if positioned carefully, buyers may appreciate the importance put upon their feedback by the existence of a redress process. That a panel of community members would be brought in to evaluate the comment they left communicates the importance and value placed upon feedback left in the system. The redress process should be framed as an attempt to create fairness, but also a further indicator of the

importance placed upon the buyer's opinion, and as an indicator that the review will have meaningful ramifications. Also, the system should be designed so that buyer has an upside to the process: maybe if the buyer is victorious in the appeal, a comment is appended to the review in question indicating that a review panel affirmed the buyer's original review. In some respects, if buyers are unwilling to show up to defend their reviews, maybe they do not belong in the reputation system.

6 CONCLUSION

The relationship between reputation systems and online dispute resolution is a very symbiotic one. Both redress and reputation are intimately connected to identity. In the face-to-face world, it is almost impossible to shed all vestiges of one's prior identity and to take on a new one, because of unalterable biological characteristics like fingerprints, appearance, or other identifying information such as Social Security numbers or credit history. On the Internet, however, identity can be quite fluid. Online buyers can engage in all sorts of bad behavior and even fraud, and then once their reputation has been entirely discredited, just throw away that identity and create a new one without the baggage of their bad past behavior. This dynamic makes meaningful redress all the more important.

This is as much a challenge for online dispute resolution systems as it is a challenge for many large websites. Proving that people are who they say they are is one of the central difficulties of online interaction. But when it takes a very long time to build a good reputation, it becomes much harder to fake one's identity. New entrants into a marketplace do not have the kind of trust that is built up over many years of good behavior, and as such are frequently regarded with some suspicion. So reputation systems can help to combat some of the abuses that fluid online identities make possible.

Sellers know that their fortunes are directly connected to their feedback rating. Their sale prices and yearly profits are largely dictated by their reviews and feedback scores. And as of the last few years, sites like eBay and Google are beginning to rank search results and tier pricing on the basis of feedback and buyer reporting, so the possible profit margin for a seller is directly tied to the reviews they have received. So the importance of redress in these systems will only grow.

As online reputation systems become more influential and more widespread, the importance of fair redress systems will expand. It may be enough today for reputation system administrators to say that they have no legal obligation to provide redress to sellers who feel that they have received an erroneous review. But over time, the lack of effective redress will undermine the trust and transparency of the reputation system, weakening the loyalty of users. Savvy online reputation system administers will embrace this challenge

and integrate redress into their processes sooner rather than later, so they can get ahead of the curve and use trust as a competitive advantage. They will win over the long term.

Some argue that negative reviews on the internet do not really harm anyone that significantly, so it is not important to provide redress. There are plenty of counterexamples to that assertion. One doesn't have to look far to find many examples of online harassment that have taken place in online reputation systems. Character assassination, cyber-stalking and bullying, and business interference are not unusual. If an unfair negative review helps to crush an online business, who should have the responsibility to address it? It is clear that only the system administrator has that kind of authority. So while the CDA's indemnification may serve as legal protection, there are brand and customer satisfaction issues to be considered as well.

Redress is often seen as a priority during the second-phase of growth. That was what happened in e-commerce, and it is likely to happen that way in online reputation systems. User generated content is powerful and exciting, but it is only the first step. User generated justice is the next step. It is not adequate to just start a reputation system and then disavow responsibility for the content inside of it. The next wave of sophistication and maturity in the online reputation system space will usher in user demands for fairness, justice, and transparency. Those sites that overlook those elements will see their visitors migrate to sites that do not overlook them.

10 ODR AND CULTURE

Daniel Rainey[*]

1 INTRODUCTION

Few, if any, topics in the general field of alternative dispute resolution (ADR) draw more attention than the impact of culture on parties in conflict and the processes they use to resolve conflict. This is easy to understand if one begins with the conviction that all dispute resolution, at whatever level, is essentially an exercise in communication: active parties and third parties engage in interactions within one of a number of process models in order to exchange information and reach understanding. The reader will recognize that exchanging information and achieving understanding can be difficult when there are few overt differences in culture. Even when we are communicating with someone who looks like us, speaks the same language, shares many social rules, shares a national history, etc., the opportunity for misunderstanding is ever present. As technology shrinks the world and generates ever more opportunity for communicating with those of very different cultures, it would seem reasonable to assume that the opportunity for misunderstanding and cultural disconnects are also increasing.

In an essay prepared for the Fourth International Online Dispute Resolution Forum, Rainey and Jadallah argued that one key element driving intercultural misunderstanding in ODR was linked to the basic model of dispute resolution that was dominant at the time – the "North American Model" of dispute resolution.[1] In this chapter I will revisit that argument and add some observations about the evolution of ODR internationally over the past five years. This chapter will begin with some basic definitions of culture, then address the relationship between ODR technology and culture, and finally offer some observations about what may be the short term future of intercultural exchanges mediated by online dispute resolution tools.

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* In the writing of this chapter I have been immeasurably aided by generous and intelligent dialogue with colleagues from around the world. Particularly, I have drawn heavily upon work previously published jointly with Julia G. Morelli and Alma Abdul-Hadi Jadallah. Of course, any errors or misstatements are the product of the author, not my colleagues.

1 D. Rainey and A. Abdul-Hadi Jadallah, "The Culture in the Code", proceedings of the Fourth International Online Dispute Resolution Forum, May 22-23, 2006, Cairo, Egypt.

2 THE QUESTION OF CULTURE

It is tempting to echo Justice Potter Stewart's famous declaration about definitions, and simply say that most people know cultural differences when they see them.[2] In fact, this is probably not true: most experienced third parties can probably recognize or anticipate gross differences in culture, and, to some degree, prepare for those differences in a way that does not compromise efforts to resolve conflict. But subtle differences and "micro-cultures" may be difficult or impossible to spot before they cause problems, if in fact they are going to cause problems.

So, what specifically is culture, or what do we mean when we talk about culture? The very question invites an almost uncountable number of very direct, and sometimes pithy, definitions. There are anthropological definitions, sociological definitions, psychological definitions, etc., *ad infinitum*, most of which share some common features relating to values and learned behavior. Peter Black and Kevin Avruch discuss at length the relationship between culture and conflict, warning that there are a number of "dead ends" inherent in looking at culture through a narrow lens.[3]

Most definitions of culture address norms, beliefs, behaviors, and values held by groups, usually large groups. For a third party engaged primarily in face to face dispute resolution, there are some immediately evident problems with anticipating parties' behavior based on group beliefs and values. One of the differences between the extremes of dispute resolution (face-to-face mediation among small numbers of parties on the one hand, and huge groups with access to ODR platforms on the other hand) is the number of individuals who may be involved directly in dispute resolution efforts. But regardless of whether there are a small number of proximate parties or a large number of parties gathered virtually, there are at least two immediately pressing problems with "reading" culture.

Although some cultural groupings have easily observed external markers, in many cases it is not possible to predict cultural reactions based on individual external appearances. I have a friend who physically looks as if she could come from any number of Mediterranean countries. She does not wear what most North Americans would assume is traditional Muslim garb, and in fact dresses in a very Western fashion-conscious way. She is, in social

2 The full statement from Justice Stewart related to the definition of hard core pornography. His comment about the definition of pornography in the film *The Lovers* is as follows: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Justice Potter Steward, concurring opinion in *Jacobellis v. Ohio* 378 US 184 (1964).

3 P. Black and K. Avruch, "Cultural Relativism, Conflict Resolution, Social Justice", available at <www.gmu.edu/programs/icar/pcs/BlackAvruch61PCS.html>.

settings, very direct and is very comfortable with Western verbal and nonverbal communication patterns. By all outward indications she behaves like and is a "normal" American businesswoman. Taking the overt cultural markers at face value, in a mediation setting one would expect her to exhibit the cultural attributes of an individualist, low context culture.[4] In fact, she is Muslim and holds dear the familial and social norms she learned as a child in her Palestinian family.

Even when the external signs appear to be clear, individual members of a group may, or may not, conform to stereotypes or cultural assumptions associated with the group. I have another friend who is Muslim, wears the hijab when in public, and who exhibits all the outward signs of having been socialized in the Middle East. Taking the overt cultural markers at face value, in a mediation setting one would expect her to exhibit the cultural attributes of a collectivist, high context culture. In fact, she grew up on a farm in Ohio, converted to Islam as an adult, and has a very good grasp of the Western, linear, individualist approach to problem solving.

In both of these cases, the mediator or the other party could expect one set of beliefs and behaviors based on external signs, and be very wrong. I refer to this dilemma as the "Colgate-Crest Caveat". If you have 300 million people in the statistical universe, it is possible to predict within a couple of percentage points which toothpaste they will buy. But if the statistical universe is one person – all bets are off.

As third parties, a problem is created when we assume that group culture is uniformly shared by all group members. In fact, we are all multi-cultural, and although our cultural identities are based in tradition or custom, cultural identification remains fluid, flexible and based on specific situations in which we find ourselves.[5] With the advent of e-commerce and routine interaction among individuals from many countries, legal systems, and cultural groups, one could assume that inter-cultural misunderstanding would be a major feature of dispute resolution online. However, what appears to be happening in the world of international e-commerce is the development of an online culture into which individuals from many local cultures "flex" when they are working online. So, the behaviors or reactions that one might expect from parties if they were sitting at the table together, involved in mediation over an issue related to family or community, are put aside and replaced by

4 Communication in a low context culture is direct, explicit and assumptions are clarified. Indirect nuanced communication and interactions that preserve relationships are valued in cultures that are considered high context. Additional information on this topic is presented later in this chapter.

5 K. Avruch, "Culture", in S. Cheldelin, D. Druckman, and L. Fast (eds.), *Conflict*, Continuum 2008.

appropriate behavior for the online commerce community the parties have joined voluntarily.[6]

Even in social contexts, the increasing exposure to "foreign" cultures through travel and international media has made it possible for individuals to be multi-cultural in a way that was not common a generation ago. A colleague suggests that his intercultural experience has created for him a "cultural supermarket" allowing him to pick and choose which cultural attributes are dominant depending upon the circumstances in which he finds himself.[7]

In addition to the cultural attributes of the parties, it is important to keep in mind the fact that third parties (and fourth parties) bring to the table their own set of values, norms, assumptions, etc., which we can refer to as the "culture of mediation". The focus here is not on the culture of the *mediator* as it would traditionally be defined: the race, age, ethnicity, socio-economic status, etc., of the third party. I refer instead to the *culture of mediation*, created by a complex of assumptions, values, processes, and expectations that the mediator brings to the table as a result of her or his training and interaction with a body of seemingly like-minded professionals. *The Culture in the Code* argued that the North American Model of mediation, and the culture of mediation that it spawned, was a driving force behind much ODR development around the world. In short, the US was exporting the North American culture of mediation in the ADR and ODR work in which US funded professionals were engaged. Six years on from *The Culture in the Code*, the situation seems at least a bit changed. The book for which this chapter is a part is evidence enough that third parties are working to create ODR platforms, and to adapt existing online tools to ODR work, in virtually every major international setting. To this work, they bring local and regional sensibilities and approaches to conflict that have stretched the boundaries of, and perhaps have basically redefined, the culture of mediation in online venues. Even so, it is still necessary to remember that each set of third parties, and developers of fourth party software, bring their own cultural biases to their work.

It is not possible to create a truly comprehensive list of cultural attributes to explain differences, and predict conflict, worldwide. But there are some general cultural tendencies that may cause or drive conflict, and which may be complicated by adding an ODR platform to the dispute resolution mix.

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6 UNCITRAL, the United Nations Commission on International Trade Law, has created a working group to create an online extra-legal system that will address commercial disputes world-wide. See <www.uncitral.org/uncitral/en/index.html>.

7 Dr. Mohamed S. Abdel Wahab, in communication with the author.

First, a common way of conceptualizing cultural differences, on a very broad scale, is to think of the bundles of values, beliefs, and behaviors associated with the polar terms "individualist" and "collectivist". Individual and collective cultures bring broad assumptions to the table, and, importantly, dispute resolution practitioners bring individual and collective cultures of mediation to the table.

Using the United States as an example of an individualist culture, and countries in the Middle East or Asia as examples of collectivist cultures, it is easy to see some fundamental differences that could lead to difficulties in dispute resolution, and which could be affected by ODR system design.

Generally, the individualist US practitioner, approaching conflict from the North American culture of mediation, would approach the resolution of disputes by assuming that the process would:

- be a linear, rational process, moving from point A to settlement;
- seek outcomes that are results oriented and cost-effective;
- limit the importance of interpersonal relationships to practical issues related to the dispute (exceptions include family and to some extent workplace mediation);
- be based on positions and interests expressed by the parties at the table;
- be oriented toward open information sharing;
- attempt to "separate the problem from the people";
- conform to norms of the legal system, and;
- be guided by professionals with process expertise but no necessary subject matter expertise or relationship to the parties.

Generally, the collectivist Middle Easterner or Asian, coming from a very different set of cultural norms and a different culture of mediation, would approach the resolution of disputes by assuming that the process would:

- be relationship based;
- proceed holistically (not just be confined to a narrow issue);
- be based on experience and context;
- be based on parties representing the community;
- be focused on "the greater good";
- find it very difficult to separate the problem from the people;
- seek solutions based on social experience and tradition, and;
- be conducted by third parties chosen according to status and social stratification.[8]

8 See Mohammed Abu Nimer, "Conflict Resolution Training in the Middle East: Lessons to be Learned", *Journal of International Negotiation*, Special Issues on Conflict Resolution Training (Fall, 1997); and J. Laue

What would a problem in dispute resolution based on a cultural element related to individualist/collectivist cultural views look like? A common example relates to the individualist assumption that it is good, perhaps even necessary, to have the "decision maker" at the table during mediation. The individualist culture of mediation suggests that engaging in mediation with parties who cannot make final decisions and who are not prepared to settle may not be productive, and in the extreme may be a waste of time. In collective bargaining, the mediator often expresses this cultural value by insisting that the CEO of the organization be at the table or at least be fully briefed along the way, so that when those at the table make a deal, the person who has to sign it is fully supportive. The same impulse results in many mediators asking the parties at the start of mediation to confirm that they can make and implement a settlement deal. This can be very uncomfortable, even insulting, to parties from collectivist cultures.

In face-to-face sessions, if the mediation is going well, good options are on the table, and things seem to be moving toward a settlement, it is common for the collectivist party to slow things down, or in the eyes of the individualist mediator and the other party, to suddenly have doubts about items that they seem to have supported just moments before. This can cause a great deal of frustration, and it is common for the individualist party and the mediator to believe that the collectivist party is bargaining in bad faith, does not really want to make a deal, etc. In fact, it is highly likely that the sudden reluctance comes from the cultural requirements in a collectivist culture that "solutions" to problems, even problems that seem personal and individual to those of us from the Global North, be discussed and managed with family and possibly with other members of the community before agreements are made.

Rather than exacerbating this type of problem, ODR applications may be uniquely suited to addressing them. For example, an ODR platform established in text form, asynchronously, easily allows for slower paced discussion, and the opportunity for the "principal" parties to discuss issues with a broader community, seek consensus, and return to the online dialogue much more comfortably than if they had been pushed to a resolution in a face-to-face session.

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and G. Cormick, "The Ethics of Social Intervention in Community Disputes", in G. Bermant, H.C. Kelman, and D.P. Warwick (eds.), *The Ethics of Social Intervention* 1978.

Another way of broadly conceptualizing cultural tendencies and their impact on dispute resolution is to think of the values, beliefs, and behaviors associated with "high context" and "low context" cultures.[9]

Members of low context cultures tend to take the view that words have concrete meaning, and that a high level of specificity is important when making agreements to end conflict. Low context cultures like the United States prize written agreements, parsed and massaged by lawyers to nail down exact details in an immutable form. Of course, the courts are filled with disputes about the words that parties put on the page, but still we prize directness and specificity – we want it all spelled out in detail.

Members of high context cultures can be very uncomfortable with directness and specificity. In high context cultures, a word or a phrase can, and most often does, carry a complex of meanings, understood by the members of the culture but opaque to those outside the culture. Low context parties want a written agreement that is so specific and clear that anyone picking it up anywhere at any time can understand the issue and the agreement. In high context cultures, a nod of the head by a respected party, in the context of the community and the discussion, can carry as much or more weight and be understood perfectly by members of the community, just as the painstakingly crafted contract can be understood in low context cultures. In fact, requesting a written agreement can be perceived as an insult or an indicator of a lack of trust in a high context culture.

In an ODR environment, this cultural value is clearly seen in the desire on the part of many who are involved in dispute resolution, both as third parties and as active parties, for "enforceability" in mediation outcomes. If the parties are dispersed and the agreement is not codified in a carefully written agreement, with some external source of enforcement, the low context party may be very uncomfortable and see the process as a waste of time. If there is a written agreement, with an external enforcement mechanism, the high context party may find the process daunting, unnecessary, or even insulting.

Because high context cultures are often also collectivist cultures, a very common problem can be caused by simply naming the issue. The individualist, low context, culture of mediation suggests that the way to start a session is to establish what happened between party A and party B, clearly define the issue, begin to discuss responsibility, and brainstorm options for resolution. In high context cultures, it is often an insult to directly name bad

9 For additional information regarding low and high context cultural traits see various works by E.T. Hall including: *Beyond Culture*, Anchor (1989); and *The Silent Language*, Doubleday (1959) and *The Hidden Dimension*, Doubleday (1966).

or improper behavior, particularly when the bad behavior is attached to an individual. Instead, high context parties are more comfortable with general discussions in which there is little or no labeling of wrongdoing and no direct confrontation. High context parties would rather discuss the situation generally and let the context of everyone's actions make clear the responsibilities of the parties. In an individualist, low context culture, we want the specificity and the contract so that our agreements are enforceable. In high context cultures, the general discussion will lead to understanding: everyone will know what happened and who was at fault, and the agreement, in the context that everyone understands it, will be enforced by the community collectively. In collectivist, high context cultures, Global North parties and mediators might not see a deal at all, but the community in a high context culture may see a very clear deal that can be strongly enforced.

As web video and audio improve, and high definition images and sound are more commonly available, it will be more possible for ODR sessions to be conducted like ADR sessions, with face to face discussions, etc. This may be very good, culturally, in some ways. A synchronous session with non-verbal feedback gives the third party the ability to adjust process quickly based on party feedback. On the other hand, it perpetuates the individualist impulse to gather people at the table who can make a decision and keep them there until they do so. The increasing use of mobile technology to make text based, asynchronous ODR platforms available may be good for allowing collective input and problem solving, but still puts stress on the individualist cultural need for specificity and enforceability.

3 ODR CAVEATS

Given the persistence of cultural differences and their impact on dispute resolution generally, there are three caveats that ODR system designers should keep in mind.

First, there is no truly "uni-cultural" mediation or negotiation environment. The mediator and the parties may all be of the same race, from the same country, of the same age, of the same social class, etc., but no matter how homogeneous the group at the table (or online) may appear there will always be, at some level, cultural divergence. Obviously, the more heterogeneous the group, the more one would expect to find overt cultural elements at work in misunderstandings and confrontations. Unfortunately, what we assume to be obvious may, in fact, mask a level of complexity that could drive apparently homogenous groups to have more cultural conflict than apparently heterogeneous groups.

Second, the culture of mediation is as important as the culture of the parties, and in some cases more important. Design of ODR systems should be undertaken with the understand-

ing that creator biases will influence choices made in the design process, and designers should be aware that maximum flexibility in the configuration of online spaces will increase the "culture-friendly" nature of ODR applications.

Third, designers and practitioners should be aware that online communication in general, including ODR, has created a "third path" into which participants from divergent cultures may flex when working together online. To some degree, the continuing pervasiveness of the Internet, and access to it through ever more "smart" mobile technology, has created a new culture, shared by what have come to be known as "netizens".[10]

4 DEFINITIONS OF CULTURE

Given the expansion of interest in and development of ODR internationally, there are two basic definitions of culture that are more prosaic, and perhaps more utilitarian, than most academic definitions, but which may be widely useful.

The first is a definition for which I have no seminal reference: *culture is the way we do things around here.* This definition of culture has been cited by many practitioners working in organizational change and development, and it is a good shorthand way of thinking about the behaviors that attend to mediation and negotiation.[11] The second relates to the extent that cultural habits and judgments are overt and conscious. Roy Wilkins has said, "culture is what happens when we stop thinking".[12] These definitions take the notion of culture far beyond race, gender, and ethnicity, putting culture squarely in the center of behavior, relationships, and ways of thinking. In the words of a colleague, Janet Murdock, culture is "the operating system on which we load the *software* of our experience".[13]

Avruch warns that there are caveats involved in analytical thinking about the influence of culture in conflicts. It is possible to overplay or overestimate the role of culture in interpreting what is happening in a given conflict. He defines these situations as Type I or Type II errors. In a Type I error, the third party undervalues culture in the analysis of the conflict and thereby appears to have what Avruch calls "a tin ear".[14] In Type II errors, one overvalues culture and its impact on the conflict and the disputants, seeing problems where none may exist.

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10 Netizen is a combination of InterNET and citIZEN, used to denote a person routinely using the Internet.
11 For example, this definition is used in T. Deal and A. Kennedy, *Corporate Cultures*, Perseus Books 1987.
12 This definition was offered during an NPR interview.
13 J. Murdock, *Culture in Mediation*, a training manual used by the Northern Virginia Mediation Service (2010).
14 Avruch (2008), p. 362.

It is impossible to create an exhaustive list of Type I and Type II errors, just as it is impossible to create a full list of cultural differences, but there is an example of a context in which these errors can occur that illustrates a problem of particular importance to ODR practitioners. In face-to-face interaction the third party is able to track communication, picking up cues regarding indicators of racial or ethnic bias. Leaving aside for the moment the issue of the growth of synchronous online exchanges with video components, ODR conducted in an asynchronous, text based environment makes picking up cues regarding attitudes and biases is much more difficult. Monitoring communication is a troublesome task for any intervener, but the skills necessary in an online environment are different from the ones needed in a face-to-face environment.

There has been what I perceive to be a "fork in the road" for ODR, particularly as it applies to research and development of ODR tools. This split, it seems to me, can be seen as a differing set of demands for e-commerce and for more "traditional" third party work in social settings (family mediation, community mediation, etc.), the models for which are drawn from standard ADR practice. E-commerce operates with huge input, disputes that are similar in nature, and disputes in which many cases need only access to information to resolve. This is a "wholesale" approach, and is based on the willingness and ability of large number of culturally diverse parties to flex into the fourth party's structure. This is, obviously, an ideal environment for the "netizen".

More traditional practitioners face fewer cases, more diverse cases, and cases in which there is often some expectation of an ongoing relationship among the parties. There are other differences, but these are the ones that I think really drive research and development in ODR. This is a "retail" approach to ODR, and one where, due to the number of participants and the nature of the issues, individual cultures are more likely to emerge as barriers or problems. I have dubbed this the "Algorithm vs. Art" divide.

On the one hand, e-commerce (and to some degree, government or large multi-party venues) is pushing development of algorithm driven systems that can deal with massive input, sort cases, automatically offer information, and channel cases to live mediators when necessary. On the other hand, traditional ADR, after spending a lot of time borrowing applications from other endeavors (*e.g.*, group and team software) is beginning to push development of analytic and process tools designed to give live mediators information that assists in traditional settings.

eBay has been the poster child for algorithm driven systems, but the work that is currently being done through UNCITRAL to put together an international ODR process for e-commerce may drive the acceptance of algorithm driven systems to new levels. At UMass

Amherst an NSF funded project is beginning that will attempt to use data mining processes to uncover interests and barriers in the conversations that occur across the table in mediation, and in Israel there is work on applying artificial intelligence to the mediation process. There, two questions are driving research – in the short term, are there tools that can assist the mediator, and in the long term, are there systems that can replace the mediator?

Again, the point I am making is that stepping outside the world of online commerce and communication and into the world of social disputes brings with it a change in the perceived need for parties to flex out of their own cultures, and brings a different set of concerns and responsibilities for the third party.

Given these observations, and the fact that a variety of trans-national dispute resolution processes, including a number of online processes, have been successful in handling a wide range of commercial and Internet-based disputes, I think insisting that cultural differences among commercial disputants will radically affect the willingness of parties to use ODR systems is almost surely a "Type II" error. That is to say, arguing that cultural differences will doom commercial ODR to high failure rates, even where the disputant's cultures are quite different, is probably a case of seeing problems where none exist. However, not recognizing the impact of cultural differences in the application of online technology to social disputes is, I think, a Type I error. It also seems clear that cultural influences on ODR will have an impact on international and trans-national disputes, but will perhaps be even more important in intra-national disputes where race, class, sex, tribal affiliation, etc., are important.

The urge to create algorithm driven systems, and to create 'bespoke' systems for e-commerce, is not surprising. The growth of online dispute resolution is, as has been noted by many, tied to the growth of commerce and communication on the Internet. Ethan Katsh observed that:

> The decision by the National Science Foundation in 1992 to lift its ban on Internet-based commercial activity was highly controversial and enormously significant. After the ban's removal, disputes related to online commerce began to surface.[15]

15 E. Katsh, "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace", *Lex Electronica*, (2006) Vol. 10, No. 3 (<www.lex-electronica.org/articles/v10-3/katsh.htm>), p. 3.

A driving force behind the development of online systems was the inability of existing legal systems to cope with disputes among parties geographically dispersed and with no real hope of developing a proximate relationship. As Colin Rule argues:

> Legal systems are tied to geography almost by definition [...] It is obvious that transaction partners who meet on the Web can take little comfort from the redress options provided in the face-to-face world. You can't merely recreate offline judicial mechanisms online and expect them to work, with e-judges making e-rulings enforced by e-police running e-jails. The model doesn't work, on a fundamental level [...][16]

The elements of commercial and purely online disputes exist in a range that is narrower than disputes generated within the family or the community, or among political groups, and lend themselves more to bespoke, model driven, applications. For example, if party A buys something online from party B, it is likely that a dispute, if one exists, will fall into some predictable categories: I did not receive the item; it was not what you advertised it to be; it arrived broken or damaged; you did not pay me, etc. One may be a father, brother, son, elder, leader, etc., in one's home culture, but when operating as a seller or buyer of goods and services over the Internet there is a role one assumes that brings with it expectations and behaviors different from the ones at work in the home culture.

Finally, there is a tacit acknowledgment among most of the disputants involved in trans-national online commerce that, in lieu of a set of universal e-laws, e-judges, and e-police, both parties must, in order to resolve their dispute, find some mutually agreeable process to follow. Both parties step into a process that may not be what either party would prefer, but which is seen by both as an expedient way to reach the goal of resolving their conflict.

By analogy, one could think of athletes competing in international venues. The sports attire may not be what the individual athlete's culture would dictate, and in fact may be somewhat scandalous in the context of the athlete's home culture. The drive for individual achievement and reward may be at odds with the collectivist nature of the athlete's home culture. But, if the athlete wants to play in the international sports arena, there is an understanding that all athletes from all cultures will flex into the expectations and norms established for the competition. In essence, the athlete willingly steps out of her or his home culture and, for a time, steps into the culture of international sports, adopting the rules and norms associated with that context. Individuals who enter into international or trans-national commerce face much the same situation. They can either flex into the norms

16 C. Rule, *Online Dispute Resolution for Business*, San Francisco, Jossey-Bass 2002, p. 5.

and rules associated with online commerce and communication across borders, and the dispute resolution venues that come with those norms and rules, or they can choose not to play. Of course, this is an impossible dilemma. Given the direction in which international commerce has been heading over the last decade, no party, anywhere in the world, can reasonably choose *not* to play in the growing global marketplace.

It would be reasonable to assume that many of the concerns expressed in discussions of the impact of culture on face-to-face dispute resolution would apply to the application of online dispute resolution tools. Kevin Avruch has been a leader in the discussion on the role of culture in conflict, representing a school of thought that has argued against the marginalization of culture in conflict resolution approaches.[17] He argues that culture is an important variable in conflict, and he criticizes theorists who relegate culture to the status of a mute variable in conflict. Avruch argues that culture is present in the parties' and interveners' worldviews, and impacts their analysis and understanding of disputes and social conflicts. He writes that practitioners who take what he calls the "cultural turn" have learned to conceive culture as a) constituting different norms, values and beliefs for socially appropriate ways to "process" conflicts and disputes; b) affecting significant perceptual orientations towards time, risk or uncertainty, affect (in self and others), hierarchy, power, and authority; and c) comprised of different cognitive representations of frames such as schemas, maps, scripts or images bound up in metalinguistic forms as symbols or metaphors. According to this view, to conduct an effective conflict analysis of a dispute requires a cultural analysis to include the perceptual and cognitive features that can impact the communication aspects of conflict both for the parties and interveners.

If one accepts this approach, movement into more culturally sensitive venues presents ODR interveners with questions regarding their readiness to deal with cultural issues and the impact of the technology on the cultural elements of conflict. Among other things, it may be necessary to redefine the notion of cultural competency as a skill that gains additional importance when dealing with intercultural disputes online, and which may look very different from cultural competency applied in face-to-face settings.

If, however, one takes the view that increasing online activity will lead to the creation of Internet citizens with a "third" culture, the cultural elements of conflict analysis may become less important than in traditional, face-to-face conflict analysis.

17 See K. Avruch, "Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice", *Conflict Resolution Quarterly* (2003) Vol. 20, No. 3, pp. 351-371.

5 BASIC DEMANDS ON ODR SYSTEMS

Regardless of the willingness to flex into systems that are not totally compatible with the parties' own home cultures, there are some basic attributes that ODR systems must have in order to be successful, even with parties operating in an online commercial environment, and these basic attributes differ between platforms developed for e-commerce and those developed or used for social disputes.

The need for trust in conflict resolution systems is related directly to the fact that, in order to engage in conflict resolution at all, it is necessary to step forward and, on some level, expose one's self, identifying the issues causing conflict and identifying the other party in the conflict. This is not without risk. A range of fears running from anxiety at actually facing the other party to anxiety regarding information being gathered, stored, and possibly used to cause harm, affect the willingness of parties to use ADR/ODR systems. It is, then, first necessary that parties in dispute resolution trust that they will not be harmed, either by the other party or by the use of the dispute resolution process itself.

In some locations, the trust in law and established systems does not exist, and by extension there is a tendency to distrust any process run by a powerful third party. Two examples will illustrate the problem. In Eastern Europe an ODR project sought to offer dispute resolution, including arbitration, to individuals involved in land ownership disputes. When asked about a pool of arbitrators who would be acceptable to the parties, the response was quick and clear: "we want lawyers from anywhere in the world but here." In Sierra Leone, an access to justice project with an ODR component sought to create intellectual property contracts for artists involved in community building and peace building. The local artists' initial response to rule of law and access to justice was, "we do not want contracts – contracts are just for the big guys to take advantage of the little guys."

In some way, both for online commercial disputes and for social disputes, the ODR provider must establish in her or his service a basic sense of utility and safety for potential users. Without the basic ability to trust the system, commercial disputants may be less willing to flex into the system, and social disputants may not be willing to risk attempts at dispute resolution.

This raises the issue of how parties feel they are being treated by the process, the other party, and the third party. Basic willingness to use dispute resolution systems is enhanced when parties feel they are respected and treated appropriately by the third party and the process. In a commercial context, the buyer/seller relationship and the assumed roles of the parties, drives the perception of appropriateness or respect. In social contexts respect

may be related to social status, age, sex, or other factors that vary widely from culture to culture.[18] Online applications generally treat the parties as equals, with no deference given to either side. In a buyer/seller relationship where the primary issue is likely to be tightly focused and oriented toward a monetary exchange, this likely is not a problem, even across divergent cultures. However, when conflicts move outside the commercial context, treating every participant as an equal may cause discomfort or a feeling of inappropriateness.

The desire to feel that communication is possible and appropriate, is a third constant that all dispute resolution systems must meet, no matter the context. Appropriate communication goes beyond the ability to understand the language being used by the other party, although that is a large factor in international online dispute resolution. Also involved in the concept of appropriate communication is the need for parties to feel that their voices, and their ideas, actually are being heard and understood by the other party. In fact, in some conflict resolution efforts, the ability to convince one party that he or she has been heard and understood may be all that is necessary to open the way to resolution.

In a set of experiments with new software developed under a US National Science Foundation grant,[19] participants were divided into groups and asked to use an asynchronous online application to develop a problem statement, a set of interests, and a list of suggested options for resolving the problem. Afterwards, they were asked to complete a survey in which two of the questions sought to discover if they felt "heard" by the other party and the mediator. In these experiments, over 80% of the respondents indicated that they felt heard by both the other party and by the mediator. The overwhelming majority of the test subjects indicated that they would be willing to use this ODR application again for other conflict resolution efforts.

In these early tests of the ODR prototype software, the application was trusted, the participants felt they were treated appropriately, and they were heard by the other parties. The result was a high level of comfort and a strong willingness to use the ODR application further. The participants were comfortable with technology, and were from the North American culture that created the standard models of dispute resolution on with the ODR application was built. Their level of comfort and their willingness to use the application further may well have been different if they had not been so culturally homogenous.

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18 See Amr Abdallah, "Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature", *Journal of Law and Religion*, Vol. XV, Nos. 1 & 2; and Mohammed Abu Nimer, "Conflict Resolution Training in the Middle East: Lessons to be Learned", *Journal of International Negotiation*, Special Issues on Conflict Resolution Training (Fall, 1997).

19 The primary researchers for the University of Massachusetts at Amherst are Leon Osterweil, Ethan Katsh, and Norman Sondheimer. Significant contributions to the preliminary results cited here were made by Lori Clarke, Leah Wing, Alexander Wise, Alan Gaitenby, Matt Marzilli, and Jane Miller.

Even if one accepts the idea that there are constants across cultures, and constantly required attributes for online and offline dispute resolution systems, there is still the problem of figuring out how to define and achieve trust, respect, and communication across cultures. What looks safe and fair to me may look risky and biased to you. This is where local cultural knowledge is truly key to the creation of successful ODR, and ADR, systems.

5.1 ODR as a Communication Channel

Marshall McLuhan once said: "Today, each of us lives several hundred years in a decade." A decade ago, ICT was beginning to make inroads into the way we communicate, but in the "several hundred years" since 2001, mobile devices and an explosion of communication channels have continued to reshape the way we communicate, with whom we communicate, and to some extent, about what we communicate. As I write this, a colleague is attending an ODR conference in New York City. During the proceedings he is blogging, posting on Twitter, and carrying on a dialogue with students in an online class who are spread from California to Afghanistan. The students, and everyone in the world with an Internet connection, have the ability to get real time information about what is happening at the conference, delivered from the floor of the conference via mobile technology, and they have the opportunity to suggest questions or comments that can be passed along by my colleague. The conference is culturally diverse, the class is culturally diverse, and the audience for the blog and Twitter posts is culturally diverse in a way that is invisible to the individual producing the information that is being posted. If he were addressing a group of people in person, he could assess their cultural status, react to feedback if he got it wrong, and adapt his message to the specific audience. However, in his current situation, there is no way to know who is reading his messages, nor is there a way to judge how the language he uses, the assumptions he makes about common knowledge, etc., are being received. This, I think, is a good description of the impact of technology generally, and of ODR technology specifically.

The opportunities or advantages driving the development and use of ODR technology are pretty well known. ODR allows for participation by a large volume of parties, certainly offering redress or interaction for many who have traditionally been disenfranchised. ODR shrinks distances and makes direct contact possible among far-flung parties, reducing the cost of dispute resolution as it adds convenience. And, importantly, the use of ODR can reduce the risk of participating in dialogue for parties who might be in physical or psychological danger in a face to face dispute resolution environment.

All this would suggest that ODR takes the current state of ADR, expands the opportunity for participation, and adds some benefits related to cost, convenience, and safety. It would be wrong, however, to think of ODR as an analog of ADR, merely a set of processes for addressing conflict that happen to have been offered online. Earlier in this chapter I noted research under an NSF grant in which it became clear that ODR in fact creates new process models distinct from face to face ADR. The introduction of ODR as a channel of communication has its own impact on the process of dispute resolution, and on the cultural influences that attend to various dispute resolution processes.

In the classic "fight, flight, or flex" response to conflict, the creation of ODR channels offers the possibility, perhaps the necessity, for parties from a wide variety of cultures to flex into the norms created by the use of an online system. I wrote earlier in this chapter about the culture of the mediator, and I think it is appropriate to speak of the culture that is created by shared use of online communication channels. Colin Rule has observed:

> We haven't seen any large scale automated systems emerge for [...] neighbor disputes, or landlord-tenant issues. I think one of the big differences is that for eBay, all opt-in – everyone on eBay has already indicated that they are comfortable interacting over technology simply by logging onto eBay and bidding or selling, so when ODR solutions are put in front of them they don't even blink – this is the redress channel they expected, so they just get to it.
>
> [...] will there ever be streamlined, high volume, software-based systems for [...] offline disputes? My answer is, yes, one day there will be. But it may take 10 years. Technology will so permeate our lives that we will come to expect that it will be available to us in every area, including f2f disputes.[20]

If he is right, we are in the process of creating an online culture that may be the default into which we flex when confronted with the possibility of dealing with conflict online.

This would suggest that, while Type I errors may occur in the realm of ODR, we should be mindful that Type II errors – assuming cultural problems exist where they do not – may be the more common mistake as ODR systems and online communication continues to pervade societies globally.

20 C. Rule, May 2011, in a discussion forum with a graduate class in Online Dispute Resolution at Creighton University.

11 ODR and Interpersonal Trust

Noam Ebner[*]

> The existence of trust between individuals makes conflict resolution easier and more effective. This point is obvious to anybody who has been in a conflict. A party who trusts another is likely to believe the other's words, assume that the other will act out of good intentions, and probably look for productive ways to resolve a conflict... The level of trust or distrust in a relationship therefore definitively shapes emergent conflict dynamics...[1]

Trust is on the rise. Perhaps not in practice, but certainly as an area of interest and research. This is clear to anyone tracking the dispute resolution and conflict management fields, and is particularly noticeable in the field of ODR, in which trust has always received special attention.[2]

However, what do people mean when they talk about trust? Zooming in on specific uses of the term, it would seem as if three types of trust are most often discussed:

1. *ODR as a trust-provider/facilitator*: Incorporating ODR into systems such as e-commerce is one measure expected to raise the consumer's level of trust in the system.[3] Future development of the Internet, from a financial perspective, depends to no small extent on the success of e-commerce, which is *absolutely* dependent – perhaps more than on any other element – on trust.[4] This is a fragile condition. As Rule summarized the problem: "Transactions require trust, and the Internet is woefully lacking in trust".[5]
2. *Users' trust in ODR*: ODR must be marketed, and its technology must be constructed, in such a way that the public will trust it as an efficient and effective way of managing their disputes.[6] This is not something to be taken for granted. In addition to the low

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* My thanks to Anita Galajda for her patience and her help while preparing this article.

1 R.J. Lewicki, "Trust, Trust Development and Trust Repair", in M. Deutsch, E.C. Coleman & E.C. Marcus (eds.), *The Handbook of Conflict Resolution*, San Francisco, Jossey-Bass 2006, p. 110.

2 One telling example of this is that in response to a call for proposals for activities to be included in Cyberweek 2010, the most popular topic suggested by people offering to facilitate discussions was on the role of trust in ODR.

3 See C. Rule & L. Friedberg, "The Appropriate Role of Dispute Resolution in Building Trust Online", *Artificial Intelligence and Law* (2005) 13, 2.

4 Y.D. Wang & H.H. Emurian, "An Overview of Online Trust: Concepts, Elements, and Implications", *Computers in Human Behavior* (2005) 21, 1.

5 C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, San Francisco, Jossey-Bass 2002, p. 98.

6 See M. Abdel Wahab, "Does Technology Emasculate Trust? Confidentiality and Security Concerns in Online Arbitration", *ICC Bulletin Special Supplement on Using Technology to Resolve Business Disputes*, No. 667,

level of trust all forms of ADR have encountered at one point or another, what ODR practitioner has not heard claims that the public will not buy in to ODR in general as it is a foreign concept; dispute resolution requires warmth and human interaction and internet communication is cold, and distance-creating?

3. *Interpersonal trust*: Parties utilizing ODR experience not only the distrust levels inherent in most conflict situations – they are also hindered by challenges to trust triggered and maintained by the nature of online communication and of the online environment.

While there are some commonalities to these uses of the term trust, there are conceptual differences between them. Additionally, in each there are fundamentally different players doing the trusting and being trusted (or distrusted). I suggest that in order to develop and best understand the nature and roles of trust as these relate to ODR, these topics and foci should be dealt with separately. In that spirit, this chapter will focus on the third context of trust: interpersonal trust between parties to ODR processes.[7]

The goal of this chapter is to enable online negotiators and mediators to understand the vital role that trust plays in these interactions, to identify process-junctures ripe with potential for trust-building (or trust-breaking), and to apply, at these critical junctures, tested methods for trust-building which facilitate negotiation processes and improve their outcome.

In this chapter, we will first define the notion of trust, as it might be applied to interpersonal interactions in ODR settings. Next, we will review the research exploring the effects that trust, or lack thereof, has on these processes. Having established the beneficial effects of trust, we will discuss why online communication and the online environment pose threats to the formation and maintaining of trust. We will break these media effects down into discrete elements, identifying eleven specific challenges to building and maintaining trust in online interactions. Each will be broken down into a dual perspective: challenges, opportunities and best practices for the online negotiator, and challenges, opportunities and best practices for the online mediator.

2004; P. Gillieron, "From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy", *Ohio St.J. on Disp. Resol.* (2007) 23.

7 That is not to say that the three types of trust do not affect each other. On the contrary, a type of a halo effect is bound to occur: Trust in a system will affect trust in the human at its other end. Trust in humans will affect the ability to complete transactions, etc. For the purposes of this chapter, we will focus on the third type of trust, mentioning the other two only insomuch as they affect the third.

1 DEFINING TRUST

Many attempts have been made to define trust, across a wide range of disciplines. It has often been pointed out that a trans-disciplinary definition of trust is not feasible or desirable; trust can only be defined in-context, through the definer's own particular perspective.[8] Zooming in on the narrower literature on dispute resolution, one still finds varying definitions of trust. For the purpose of having a shared picture of what we refer to in this chapter, I will adopt a definition previously posited,[9] combining three elements suggested in the literature:

- *Risk*: The existence of risk is a precondition for trust. Only when one is at risk, dependent or vulnerable can his/her behavior or expectations demonstrate trust.[10]
- *Uncertainty*: Trust can manifest only when there is a degree of uncertainty regarding another's future behavior; if the other's behavior is pre-ordained or controlled, trust is unnecessary and moot.[11]
- *Expectations*: One expects that his/her cooperation, or other trust-indicating action, will be reciprocated by the other.[12]

Taken together, these elements portray trust in the context of dispute resolution as an expectation that one's cooperation will be reciprocated, in a situation where one stands to lose if the other chooses not to cooperate. To bring that into the world of ODR practice, from the viewpoint of negotiators and then from the perspective of a mediator.

As negotiators we need our negotiation opposites to trust us every time they are asked to bet on our unguaranteed cooperation. We ask them to do this many times during a process, and not only at its culmination. We request they share information, despite the fact that they cannot be absolutely certain we will not use it to their detriment. We need them to invest time in discussing options for achieving our goals, even though they are not guaranteed our own reciprocal efforts regarding their own issues. At the agreement stage, we request our opposites' agreement to a particular solution, which, as a necessity, requires some concession on their part. They are asked to make this concession without

8 J. Boyd, "The Rhetorical Construction of Trust Online", *Communication Theory* (2003) 13, 4; D. Koeh, "The Nature of and Conditions for Online Trust", *Journal of Business Ethics* (2003) 43, 1; Wang (2005).

9 N. Ebner, "Trust-Building in E-Negotiation", in L. Brennan & V. Johnson (eds.), *Computer-Mediation Relationships and Trust: Managerial and Organizational Effects*, Hershey, PA, Information Science Publishing 2007.

10 Boyd (2003).

11 D. Gambetta, "Can we Trust Trust?", in D. Gambetta (ed.), *Trust: Making and Breaking Cooperative Relations* 1988.

12 D.G. Pruitt & M.J. Kimmel, "Twenty Years of Experimental Gaming: Critique, Synthesis, and Suggestions for the Future", *Annual Review of Psychology* (1977) 28.

absolute certainty that we will stand by our own word, and deliver whatever it is we promise in return. The leaps of faith necessary for all these to happen are generated by trust.

As mediators, we need to be aware of, and sometimes to tweak or affect, all the dynamics described in the previous paragraphs, as they play out between disputing parties. We ask them to deal fairly and openly with each other, to discuss their interests with each other and to desist from unilateral actions that might bring one party benefit – in order to advance or protect the mediation. Under the definition we adopted, these are all trust-affecting requests. However, party-party relations are only one of the trust-affected relationships evolving within the mediation process. As mediators, we also ask parties to trust *us* and to trust the mediation *process*, despite the risk and uncertainty involved and despite the fact that their expectations cannot, ultimately, be fully satisfied by us, but rather by the other party. We ask them to desist, delay, or act in parallel to other alternative processes for solving their problems, while at the same time explaining that there is no certainty regarding the outcome of the mediation process. We invite them to divulge information to us, to explore their interests with us, and to reconsider their assessments and offers – even when they are uncomfortable doing this together with the other party – and their agreeing to do so is predicated on their trust in the mediator.

These examples – only the tip of the iceberg, really – demonstrate the practical importance of understanding, and learning to work with, trust – as negotiators and as mediators. Next, let's turn to the research to explore more fully how trust works in these processes.

2 THE ROLE OF TRUST IN NEGOTIATION AND MEDIATION

Trust is essential for conducting any successful negotiation or mediation processes. The professional and academic literature on negotiation and mediation devotes enormous effort to understanding how trust is built, maintained, broken and reconstructed.

Regarding negotiation, research shows trust playing a key role in promoting cooperation,[13] problem solving,[14] information exchange,[15] negotiator effectiveness[16] and achieving integrative solutions.[17] Trust is considered a vital precondition for sharing information,

13 M. Deutsch, "Cooperation and Trust: Some Theoretical Notes", *Nebraska Symposium on Motivation*, Nebraska, University of Nebraska Press 1962.

14 D.G. Pruitt, J.Z. Rubin & S. Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, (3rd ed.) McGraw Hill 2004.

15 M.J. Kimmel *et al.*, "Effects of Trust, Aspiration and Gender on Negotiation Tactics", *J. Pers. Soc. Psychol.* (1980) 38, 1.

16 A.K. Schneider, "Shattering Negotiations Myths: Empirical Evidence on the Effectiveness of Negotiation Style", *Harvard Negotiation Law Review* (2002) 7.

17 R.J. Lewicki & J.A. Litterer, *Negotiation: Readings, Exercises and Cases*, Irwin,1985; D. Lax & J.K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*, Free Press 1986.

arousing generosity and empathy and reciprocating trust-building moves in a negotiation process. Lacking trust one's negotiation opposite leads negotiators to fear that information they impart to that opposite might boomerang back at them, and be used to their own detriment.[18] A trust-filled environment reduces the fear-factor and its resulting behavior. Negotiators no longer focus on the likelihood of perceived catastrophic results in the negotiation process, understanding that the worst outcome of the process will be a mutually agreed upon "no-deal", with the underlying premise of a continuing relationship and possibly of future interactions. This allows for cooperative behavior patterns in the negotiation process. *Dis*trust, on the other hand, causes parties to focus on how their cooperative behavior can be used against them, triggering defensive behavior – negotiators withhold information, attack the other's position and statements, threaten them, and lock themselves into positions from which they cannot easily withdraw.[19] These findings have translated into practice through their centrality in professional training; with negotiation trainees advised to seek out and create opportunities for trust-building whenever possible – as early as possible in the course of a negotiation process,[20] and or even before its formal inception.[21][22]

These findings on negotiation certainly inform the role of trust in mediation as well. The literature on mediation expands on this, taking into account the dual-front nature of trust from a mediation perspective: The trust-relationship between the parties and the mediator, and the trust-relationship between the parties themselves. The mediation literature makes it clear that proper conduct of these two fronts will facilitate resolution; their mismanagement, can quite possibly derail a process. In addition to suggesting trust's general contribution to promoting dispute resolution[23] the literature on mediation suggests additional benefits of trust. Trust in the mediator is an important factor in the question of whether parties agree to mediate, as well as that of whether they settle.[24] The tools of successful mediators include procedures for encouraging interparty trust or suggesting agreements that do not require trust.[25] The ability of a mediator to form rapport with

18 J. Nadler & D. Shestowsky, "Negotiation, Information Technology, and the Problem of the Faceless Other", in L.L. Thompson (ed.), *Negotiation Theory and Research*, New York, Psychology Press 2006.

19 Lewicki & Litterer (1985).

20 *Id.*

21 See M. Morris *et al.*, "Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations", *Group Dynamics: Theory, Research, and Practice* (2002) 6, 1.

22 For recent works on trust in negotiation, see D.L. Ferrin, D.J. Kong & T.K. Dirk, "Trust Building, Diagnosis, and Repair in the Context of Negotiation", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, World Singapore, Scientific Publishing 2011; S. Jang & R. Chua, "Building Intercultural Trust at the Negotiating Table", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, Singapore, World Scientific Publishing 2011.

23 C. Moore, *The Mediation Process*, (3rd ed.) San Francisco, Jossey-Bass 2003.

24 See P.J. Carnevale & D.G. Pruitt, "Negotiation and mediation", *Annu. Rev. Psychol* (1992) 43, 1.

25 *Id.*

parties has been found to be the most important ability or skill a mediator can possess.[26] A primary element of this rapport, as the term was used in this study, was parties' trust in the mediator, also discussed as the mediator gaining the confidence of the parties.[27] The flip side of that coin is that a lack of integrity (including trust-breaking behavior) has been found to be widely viewed as a cause of mediator failure.[28]

2.1 *What Makes Disputants, or Negotiators, Trust Each Other?*

In negotiation (including mediated negotiation), interparty trust develops along three routes:

Deterrence-based or calculus-based trust is premised on our perception that people act out in accordance with their own rational self-interest. While this is in itself a questionable assumption,[29] we still base our trust-decisions on it: we conduct a subjective cost/benefit analysis estimating our opposite's own self-interest, and trust them to act as they committed to insofar as this promotes this self-interest. Our negotiation opposites will keep trust only if their payoff is greater that way. If breaking trust would lead them to larger gain (for example, if we lack the ability to punish them for violating trust) – they are likely to pursue this course.[30] In other words, if we calculate that our opposites consider trustworthy behavior to be in their own self-interest – we can trust them. We do not need to passively assess such trust – it can be directly affected or created, for example by introducing punitive clauses for trust-breaking behavior.[31]

Knowledge-based trust is grounded in the others' predictability. So far as our knowledge of our negotiation opposites allows us to predict their responses and behaviors, we can estimate the degree to which they can be trusted. This form of trust might result from

26 S.B. Goldberg, "The Secrets of Successful Mediators", *Negotiation Journal* (2005) 21, 3; S.B. Goldberg & M.L. Shaw, "The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three", *Negotiation Journal* (2007) 23, 4.

27 On the close relationship between trust and rapport, see J. Nadler, "Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Deal Making", *Harv. Negot. L. Rev.* (2004) 9; A.M. Braeutigam, "What I Hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment", *U. Tol. L. Rev.* (2006) 38.

28 Goldberg (2005).

29 See, *e.g.* N. Ebner & A. Kamp, "Relationship 2.0: Not Setting Students Up for Failure (This Time)", in C. Honeyman, J. Coben & G. De Palo (eds.), *Venturing Beyond the Classroom: Vol. 2 in the Rethinking Negotiation Teaching Series*, St. Paul, MN, DRI Press 2010.

30 G.D. Paulson & C.E. Naquin, "Establishing Trust via Technology: Long Distance Practices and Pitfalls", *International Negotiation* (2004) 9, 2.

31 See R. Axelrod, *The Evolution of Cooperation*, Basic Brook 1984; T.C. Schelling, *The Strategy of Conflict*, (2nd ed.) Harvard University Press 1980; R.J. Lewicki *et al.*, *Negotiation: Readings, Exercises and Cases*, (4th ed.) McGraw-Hill/Irwin 2002.

study of negotiation opposites, or develop over time as we come to know them through a series of interactions.[32]

Identification-based trust is based on us perceiving that our opposites share characteristics, traits and backgrounds with us. People tend to trust negotiation opposites who seem to have these in common with them – even when other factors in the negotiation process may engender suspicion.[33] With the distance and lack of mutual perception inherent in ODR, it comes as no surprise that this route to trust is perhaps the most severely affected by the online medium.[34]

2.2 *Whom Do Negotiators Trust?*

Breaking the above down into practical terms indicates that in a negotiation between Negotiator A and Negotiator B, Negotiator B is more likely to trust Negotiator A if:

a. Negotiator A is perceived as similar to Negotiator B in various ways;
b. Negotiator B holds some power of reward or sanction over Negotiator A;
c. Negotiator A displays a positive attitude towards Negotiator B or initiates trusting, cooperative behavior, which invites reciprocation;
d. Negotiator A makes concessions, signaling motivation for finding a joint solution;[35]
e. Negotiator B anticipates having future interactions with Negotiator A;[36]
f. Negotiator A have been helped by Negotiator B in the past (therefore laying the groundwork for expectations that Negotiator A will reciprocate);
g. Negotiator A is known to have been helpful and cooperative in the past – towards others or, more particularly, towards Negotiator B;[37]
h. Negotiator B feels s/he knows and understands Negotiator A to a degree granting her/him insight into Negotiator A's system of needs, norms and values.

These inter-party trust dynamics will play out in unassisted negotiation processes, as well as in processes facilitated by third parties. Mediators who trigger, promote or highlight these dynamics (depending on their approach and process model), will affect interparty trust. However, what affects the level of trust between parties and mediators?

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32 Lewicki (2002).

33 *Id.*

34 These three routes to establishing trust can each support the dispute resolution process on its own or work in tandem with the others. Lewicki *et al.* (2002) suggest that these three paths to trust are often taken sequentially. Typically, deterrence-based trust forms first. As parties gain knowledge and experience of each other, knowledge-based trust forms. Identification-based trust, particularly in its more extreme forms of empathy, comes last.

35 Lewicki (1985).

36 L.L. Thompson, *The Mind and Heart of the Negotiator*, (2nd ed.) Prentice Hall 2001.

37 Pruitt and Kimmel (1977).

2.3 *What Inspires Parties' Trust in Mediators?*

A survey of mediators clearly showed that the ability to gain a party's trust is held to be *the* most valuable skill of the effective mediator. Mediators suggested that trust was most effectively built though the mediator's empathic listening, and to a lesser extent by the mediator displaying honesty and adherence to ethical considerations.[38] *Parties* to mediation surveyed on this same question agreed with this ranking of trust-building as the effective mediator's primary skill or trait. However they highlighted different mediator actions or tendencies which resulted in them experiencing trust in their mediator. Parties stressed mediators' friendliness, likability, integrity, neutrality, maintaining of confidentiality and preparedness as elements affecting the degree of trust they evoked in parties.[39] These in-depth studies shows that not only do many mediator moves depend on trust, as discussed above – many (or most) mediator moves *affect* trust as well.

3 TRUSTBUILDING TOUGH? WAIT TILL YOU GET ONLINE!

Now that we have understood the nature of trust and its role in dispute resolution, we can explore why this concept is threatened in ODR processes, reliant as they are on online communication. First, we will explain why the Internet, in general, is a trust-adverse environment. Next, we will try to conceptualize the notion of the communication media the Internet provides *simultaneously* supporting and threatening the dispute resolution process by affecting interparty trust. Then, we will be prepared to tackle the challenges ODR process face: What communication media does ODR utilize, and how do they affect trust?

3.1 *Trust in the Online Environment*

Before we examine the way trust is affected by particular media utilized for ODR, we need to dedicate some thought to the overarching sense of distrust people have whenever they approach the Internet. Its positive characteristics and opportunities notwithstanding, the Internet has become something similar to a bad neighborhood after dark. We watch where we are going, try and stay close to familiar sites, and complain about the lack of competent policing. We constantly warn our children regarding this global neighborhood, telling them not to stray from the main road and above all – not to speak to strangers, let alone take candy from them. This environment is fraught with distrust. No matter what we use

38 S.B. Goldberg, "The Secrets of Successful Mediators", *Negotiation Journal* (2005) 2, 3.

39 S.B. Goldberg & M.L. Shaw, "The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three", *Negotiation Journal* (2007) 23, 4.

the Internet for, we are likely to be asked to place our trust in a software platform, a website, an e-vendor or another individual. Patricia Wallace, one of the early writers on the psychology of the Internet, noted how the fact that all of these interactions have been used exploitatively in the past, cause users to approach the Internet bearing a pre-emptive filter of distrust.[40] Over a decade later, this problem has compounded. Even as the Internet has developed into a global library, a world of potential and a connecting media allowing meaningful interactions between everyone on the planet, it has become a hunting ground for predators looking for prey.[41] The predators out for profit are joined by pranksters out there for the thrill, and by others mixing both these motivations.[42] As a result, when we open our browsers or click on our inbox, we are resigned to some level of cautious suspicion, operating at threat warning yellow. This affects any online interactions we engage in.

3.2 *It Gets Worse Once We Start Talking*

Communication, held out to be the great trust builder or restorer, is in itself a *hazard* to trust when conducted at a distance. Indeed, even before the Internet hit computers, research made clear that people communicating at a distance through technological means are likely to experience low levels of interpersonal trust and higher rates of disruption and deterioration than those engaged in face-to-face dialogue. Comparing telephone-based communication with face-to-face communication has shown that face-to-face interactions

40 P.M. Wallace, *The Psychology of the Internet*, Cambridge University Press 1999.

41 While more sinister examples exist this is perhaps best exemplified by the phenomena of spam e-mail. One recent study estimated that the volume of spam e-mail sent worldwide is 62 trillion per day. Contrasted with the 15.6 trillion legitimate e-mails sent daily, spam constitutes about 80% of e-mails sent. See McAfee, *The Carbon Impact of Spam Report*, 2009, available at <http://resources.mcafee.com/content/NACarbonFootprintSpamConfirm>, last accessed 1 January 2011. Other sources cite higher spam rates, and the numbers are certainly constantly on the rise (see, *e.g.*, Symantec, 2010 – <www.symantec.com/business/theme.jsp?themeid=threatreport>, last accessed 1 January 2011).

42 As perhaps evidenced by the huge number of computer viruses written and circulated around the globe. While the initiators of these programs were originally triggered by motivations similar to face-to-face vandalism and the dubious status conferred by like-minded malware authors (see for example, A. Bissett & G. Shipton, "Some Human Dimensions of Computer Virus Creation and Infection", *International Journal of Human-Computer Studies*, (2000) Vol. 52, No. 5, pp. 899-913), the financial implications of such applications were not ignored. In 2008, the number of malicious codes tripled the previous year's figures, rising above the one million varieties mark. Such a rise could probably only be supported if it had financial motivations; it would seem as if over the past few years the for-thrills and for-profit elements of this underworld have merged; malware is now used for identity and financial information theft, and experienced malware writers are marketing kits allowing "newbies" to this new industry to create their own code (see <http://news.bbc.co.uk/2/hi/technology/7154187.stm>; also Symantec, Internet Security Threat Report, 2010, available at <http://eval.symantec.com/mktginfo/enterprise/white_papers/b-whitepaper_internet_security_threat_report_xv_04-2010.en-us.pdf>, last accessed 1 January 2011).

foster rapport, trusting behavior and cooperation, while their absence in phone communication triggers distrusting, competitive and contentious behavior.[43]

These findings were intensified when researchers began exploring the "bad neighborhood" environment of the Internet. Communicating over the Internet, people develop a sense of disinhibition; possible adverse consequences of negative online interactions are ignored by parties, due to physical distance, reduced accountability and a sense of anonymity.[44] They tend to act more contentiously than face-to-face communicators, as evidenced by more frequent occurrences of swearing, name calling, insults and hostile behavior.[45] Through a prism focused on trust, online communicators find it difficult to build the trust necessary for their opposites to perceive them, and construe their intentions, positively. This often results in them losing control – of the process and of their relationship.

What is it about online communication that makes building or maintaining trust so difficult? To explain this, we need to understand a basic principle in communication theory: *the medium matters.* Messages do not just "happen", they are exchanged from one communicator to another via a medium. For convenience's sake, we often assume the medium to be a neutral vehicle for the essence – the message we intended to transmit, or receive. As a result, when we hear a message from another, we assume that we understand them as they meant to be understood. When we say something to another, we assume they understood us as we meant to be heard – or, we blame their own filters for screening us out. What we usually fail to take into account, as we talk, text, phone, mobile phone, e-mail, instant message, Tweet, status change and videoconference our way through life, is that the messages we transmit and receive, and the way we transmit and receive messages, are affected – and sometimes fundamentally altered – by the media we have chosen to convey them through. Understanding the ways in which the medium affects the message – "media effects" – is crucial for designing ODR processes and systems as well as for communicating throughout their implementation.

3.3 *Media Effects*

The communication channel through which negotiations are conducted is neither passive nor neutral. Any communication medium influences both ends of the communication

43 A.L. Drolet & M.W. Morris, "Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts", *Journal of Experimental Social Psychology* (2000) 36.

44 Wallace (1999).

45 S. Kiesler & L. Sproull, "Group Decision Making and Communication Technology", *Organizational Behavior and Human Decision Making* (1992) 52, 1.

loop, affecting what information negotiators share and how that information is conveyed,[46] as well as how that information is received and interpreted. These effects are called "media effects".

Why is some information easily communicated face-to-face, but difficult to convey by e-mail? Why might we respond in one way to something we are told face-to-face, but a very different way to the same message, conveyed by e-mail? Underlying these differences are two dimensions of communication media:[47]

1) *Media richness*: The capacity of any given media to supply "contextual cues": body language, facial expressions, tone of voice, etc. Face-to-face communication is considered a "rich" medium: it allows for all of these, which account for a significant proportion of a message's meaning.[48] E-mail is a "lean" medium because it transmits neither visual nor audio cues; we cannot see the other's gestures or facial expressions, or hear their tone of voice. Denied these contextual cues, negotiators both transmit and receive information differently. Videoconferencing would be somewhere between the two (depending on the quality of transmission, the angle of the cameras, etc.). On the transmitting side, this affects presentation style: e-mail negotiators, as opposed to face-to-face or videoconferencing parties, rely more heavily on logical argumentation, share less personal information and are more task oriented.[49] On the receiving end, further media effects kick in: Information exchanged in e-mail tends to be less nuanced than information exchanged face-to-face,[50] and the elimination of important back-channel and clarifying information such as speech acknowledgements (*e.g.*, "uh-huh" or "huh?") and reactive body language (*e.g.*, nods)[51] compounds this. Communicating through lean media, negotiators focus on the actual *content* of messages,[52] lending much more importance to the words that are chosen, and their interpretation.

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46 Carnevale & Pruitt (1992); R.A. Friedman & S.C. Currall, *E-Mail Escalation: Dispute Exacerbating Elements of Electronic Communication*, Vanderbilt University 2001; K.L. Valley, J. Moag & M.H. Bazerman, "'Matter of Trust Effects of Communication on the Efficiency and Distribution of Outcomes", *Journal of Economic Behavior & Organization* (1998) 34, 2.

47 Z.I. Barsness & A.D. Bhappu, "At the Crossroads of Technology and Culture: Social Influences, Information Sharing, and Sense-making Processes During Negotiations", in M.J. Gelfand & J.M. Brett (eds.), *The Handbook of Negotiation & Culture*, California, Stanford University Press 2004.

48 B.M. DePaulo & H.S. Friedman, "Nonverbal Communication", in D.T. Gilber, S.T. Fiske & G. Lidzey (eds.), *The Handbook of Social Psychology*, Boston, McGraw Hill 1998.

49 See N. Ebner, "Negotiating via e-mail", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, Singapore, World Scientific Publishing 2011.

50 Friedman *et al.* (2001); Valley (1998).

51 B. O'Connaill, S. Whittaker & S. Wilber, "Conversations over Video Conferences: An Evaluation of the Spoken Aspects of Video-Mediated Communication", *Human Computer Interaction* (1993) 8.

52 R.J. Ocker & G.J. Yaverbaum, "Asynchronous Computer-Mediated Communication Versus Face-To-Face Collaboration: Results on Student Learning, Quality and Satisfaction", *Group Decision and Negotiations* (1999) 8, 5.

2) *Interactivity*: This is the potential of the medium to sustain a seamless flow of information between two or more negotiators.[53] Interactivity has two dimensions.

The first, a temporal dimension, captures the *synchronicity* of interactions. Face-to-face communication and videoconferencing are synchronous and co-temporal. Each party receives a message just as it is produced, resulting in speaking "turns" occurring sequentially. E-mail is typically asynchronous: negotiators can read and respond to others' messages whenever they happen to open their inbox or choose to reply. Responses are not necessarily sequential; reading messages out-of-order commonly causes misunderstandings.

The second dimension of interactivity is parallel processing, which describes a medium's ability to allow negotiators to *simultaneously* transmit messages. In face-to-face communication, parallel processing is overt and part of the familiar communication loop. In e-mail communication, simultaneous exchange of messages, or "crossing messages", causes confusion.

In summary, media richness and interactivity account for important differences across media in the structure, style, and content of information exchanged.[54] Face-to-face communication is far from perfect; however, the more we distance ourself from face-to-face communication along spectrums of lean/rich media and interactivity, the more we challenge understanding, comfort and rapport. As we will describe at length, below, the outcome is that these media effects – inherent to ODR – affect trust in a significant, and usually detrimental, fashion.

3.4 Trust Reduction in E-Negotiation and E-Mediation: Are We Sure?

After the previous section, it seems intuitive that interparty trust would be significantly threatened by media effects. Is this borne out by research findings?

Early research showed that negotiators are apt to act contentiously when negotiating with people at a distance such as over the phone.[55] Examining negotiation through "lean media" e-communication, it became apparent to researchers that e-negotiators feel less bound by normatively appropriate behavior than face-to-face negotiators. This plays out in multiple ways, none of them conducive to harmonious agreement: an increased tendency to threaten or voice ultimata,[56] to adopt contentious, "squeaky wheel" behavior and to

53 R. Kraut *et al.*, "Task Requirements & Media Choice in Collaborative Writing", *Human Computer Interactions* (1992) 7, 4.

54 For more detail, see N. Ebner *et al.*, "You've Got Agreement: Negoti@ting Via E-mail", in C. Honeyman, J. Coben & G. De Palo (eds.), *Rethinking Negotiation Teaching: Innovations for Context and Culture*, St. Paul, MN, DRI Press 2009; Ebner (2011).

55 H. Raiffa, *The Art and Science of Negotiation*, Harvard University Press 1982.

56 Morris (2002), p. 21.

engage in flaming,[57] that particularly rapid conflict escalation phenomena found in online text communication. From a trust-perspective, one could say that that e-negotiators work through a communication channel challenging to trust-building and -maintenance. This insight (which may ring true intuitively for many readers and, for others, tap into their own practical experience) is supported both by indirect and direct measurements of trust in e-negotiation processes.

Trust in negotiation is not only a difficult notion to grasp and define; it is also quite difficult to measure. One way to indirectly assess the degree to which an e-medium is conducive to trust is to measure the degree to which parties negotiating through it behave cooperatively throughout the negotiation *process*; another is to measure the degree to which parties are able to achieve integrative, win/win *outcomes*. Such processes and outcomes might be viewed as possible only when parties trust each other enough to discuss their true needs, preferences and priorities and avoid unnecessary posturing, escalation or walk-outs.[58] The majority of experiments measuring these two indicators have shown that e-negotiation entails lower rates of process cooperation, and lower rates of integrative outcomes, when compared to face-to-face negotiation.[59] While these findings are probably only only partially mediated by the issue of trust, other possible explanations suggested,[60] such as increased contentiousness and the difficulty of forming rapport, are also indirect measures of trust, as will be discussed below. These indirect measurements are reinforced by direct questioning of negotiators about the degree of trust they experienced in negotiation counterparts. E-negotiators reported lower levels of trust than did their face-to-face counterparts.[61]

57 L.L. Thompson & J. Nadler, "Negotiating via Information Technology: Theory and Application", *Journal of Social Issues* (2002) 58, 1.

58 See Ebner (2007).

59 V. Arunachalam & W. Dilla, "Judgment Accuracy & Outcomes in Negotiation: A Casual Modeling Analysis of Decision-Aiding Effects", *Organizational Behavior & Human Decision Processes* (1995) 61, 3; Valley (1998); Nadler & Shestowsky (2006). For contrasting research, see A. Galin, M. Gross & G. Gosalker, "E-Negotiation Versus Face-to-Face Negotiation What has Changed- if Anything?", *Computers in Human Behavior* (2007) 23, 1; Nadler & Shestowsky (2006); C.E. Naquin & G.D. Paulson, "Online Bargaining and Interpersonal Trust", *Journal of Applied Psychology* (2003) 88, 1.

60 Ebner (2011).

61 Naquin & Paulson (2003). It should be noted that most of the research detailed above experimented with lean media – e-mail and other text-based channels. Video conferencing has been found to support trust better than text, as should be expected from our discussion of media effects. See N. Bos *et al.*, "Effects of Four Computer-Mediated Communications Channels on Trust Development", *Proceedings of SIGGHI Conference on Human Factors in Computing Systems: Changing the world, changing ourselves*, ACM, 2002. However, videoconferencing is certainly not yet the medium of choice or of market standard in ODR (see Pearlstein, Hanson and Ebner, chapter 19 in this book), and more research is necessary to explore its effect on trust.

3.5 *Challenges to Trust in ODR Processes*

After this discussion of the ways that the internet environment and the communication medium both challenge trust, it should be stressed that their affect spread to all three of the routes to trust mentioned earlier. The development of identification-based trust is hampered by reduction in physical and verbal cues exchanged by parties: we have less to latch on to, and we tend to latch onto elements conducive to the forming of distrust rather than trust. Parties often negotiate with people they do not know, and who are out of the reputation-networks that help us assess and assume what we know about people. People negotiating at-a-distance will often have different cultural norms, making what we assume we know about each other even sketchier. All of these hamper development of knowledge-based trust. Finally, calculus-based trust is handicapped by the limitations of deterrence-at-a-distance. While the US and the Soviet Union's ability to reach out and touch each other allowed some degree of this pillar to form, in smaller-scale transactional interactions elements such as jurisdiction, enforcement, and anonymity make it much more difficult for parties to rely on their ability to affect the other should the deal go sour.

Breaking these wider issues down in this section, we will now frame eleven specific challenges or obstacles to interparty trust in online interactions. After a general portrayal of each obstacle, we will reframe the literature into practical recommendations to negotiators on coping with that obstacle. Next, we will make similar recommendations to mediators.[62] To avoid repetitiveness, it should be said, once and up front, that all of the implications for negotiators are important for mediators to keep in mind. Separate recommendations to mediators will focus, for the main part, on their role in helping parties achieve or maintain a degree of trust suitable for supporting the mediation process. Others will relate to specific issues pertaining to mediator-party trust.

In order to avoid a confusing breakdown of each challenge into several different communication media, the discussion will assume that the primary mode of interaction being used in the interaction is asynchronous exchange of text messages. This way, the discussion addresses the challenges inherent in using very lean media for ODR; challenges and recommendations regarding trust-building in negotiation and mediation through other media can be extrapolated from this, after understanding the different natures of these media as discussed above. Focusing on this medium also owes to its being the most common medium currently used for ODR.[63]

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62 While there is a wide body of literature addressing online communication and online negotiation, relatively few pieces have been written on online mediation (see Ebner, chapter 17 in this book), and only a handful have directly addressed the issue of trust. As a result, some of the recommendations addressing mediators in this chapter are admittedly less grounded in existing literature and combine practical experience and observations with an adaptation of negotiation-related literature to the third party role.

63 See Pearlstein, Hanson & Ebner, chapter 19 in this book.

The following challenges will be discussed:[64]

1. *Lack of contextual cues:* E-negotiators are denied many of the non-verbal cues that we rely on in interpersonal communication for assessing another person's trustworthiness.
2. *Increased attribution, increased misinterpretation:* The tendency to put the worst possible face on another's intentions and meanings increases in e-communication. As a result, e-negotiators will perceive the other's intentions through the most distrusting lens possible.
3. *Increased contentiousness – a vicious cycle:* We have already noted how people are more apt to lash out at each other online. It is difficult to trust someone treating you this way – or to gain someone's trust, after doing this yourself.
4. *Low expectations of trust:* E-negotiators have low expectations regarding the other's trustworthiness walking into the process, and this becomes a self-fulfilling prophesy.
5. *I am anonymous, the other is faceless:* The mutual invisibility inherent in e-negotiation facilitates trust-breaking behavior. It is easier to cause damage to a faceless other, particularly when we feel protected by a shield of anonymity and physical distance.
6. *Physical distance and interpersonal "otherness":* The sense of separation inherent to e-negotiation results in reduced identification with the other, challenging identity-based trust.
7. *Empathy, online?* Building trust by showing empathy for a negotiating opposite is a challenge even in a rich communication channel; in e-negotiation, the need for empathy is often ignored.
8. *Privacy*: In ODR processes, parties can never know who is "in the room" with you. Messages transmitted, or real-time conferences can be recorded and are beyond a party's control. This might lead to reduced information-sharing and risk-taking, associated with trust.
9. *Human expectations and asynchronous communication:* The Internet incorporates two clashing characteristics: instant access to anything and anyone, and asynchronous communication. This duality gives rise to unmatchable expectations between negotiators, breeding distrust.
10. *Diminished party commitment, investment and focus:* Parties to e-mail negotiation might be less motivated than face-to-face negotiators. The low entry costs associated with online processes means that a party's mere agreeing to participate does not have a trust-inducing effect on the other. A lack of constant, active participation might be interpreted by a negotiation opposite as untrustworthiness.
11. *Negotiating the new dispute resolution environment:* The Internet, still a novelty to many, is distrusted even by its most fervent advocates. Additionally, even professional

64 This list incorporates and expands upon a list of challenges discussed in a previous paper, which focused on challenges to e-mail communication in particular. Ebner (2007).

negotiators are inexperienced at e-negotiation, and lack skill at trust-building through online media.

3.5.1 Lack of Contextual Cues

Communicating with one another, people rely on contextual cues to interpret others' messages: their facial expressions, body language, tone of voice and other non-verbal hints "padding" the message itself. We infer most of a message's meaning through these cues, in fact, rather than through the spoken message itself.[65] In the rich medium of face-to-face communication we are so overcome with cues that we allow ourselves to ignore some of them (such as by looking away from our counterpart). Communicating through leaner media, however, we are more active in seeking out such cues. Unable to see the face of the person on the telephone with us, we strain to infer meaning from their tone of voice. Text-based online communication, including e-mail and other communication systems common to ODR providers, is a very lean media for conveying contextual cues. Our usual methods for transmitting our trustworthiness to others are rendered valueless, and the senses we have developed to analyze another's cues for assessing credibility are neutralized. Text-based communicators are denied many of the cues that have been found to inspire trust in face-to-face settings: facial expressions, vocal inflections, physical proximity and touch.[66] Experiments comparing interactions through face-to-face, audio, video and text-based communication, found the last to be the *least* supportive of trust-building.[67] Even video-conferencing still falls far short of face-to-face communication.

One communication tool helpful in face-to-face interactions is very tricky to employ using cue-less, lean media: humor. Recent research has shown humor to be a valuable tool in online negotiation, leading to increased trust and satisfaction levels and higher joint gains. This pays off, directly, to the humorous party, in the form of higher individual gains to the initiators of humorous events.[68] However, as anybody who has communicated online knows, humor is often misunderstood, misinterpreted and misattributed – and can easily backfire.

3.5.1.1 Implications for Negotiators

Learn to read: Text communication is full of cues – just not those we are used to. Do not skim through a message and assume you will get the gist of it; you will get the wrong gist.

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65 Thompson (2001).

66 These cues are at best replaced with a limited range of emoticons. It is unclear whether this may help or interfere: much as with "real" terms, people use and interpret emoticons differently, paving the way for misunderstanding. In formal communication, the use of emoticons has not yet become the norm, leaving communicators with only the text-based channel.

67 Bos (2002).

68 T.R. Kurtzberg, C.E. Naquin & L.Y. Belkin, "Humor as a Relationship-Building Tool in Online Negotiations", *International Journal of Conflict Management* (2009) 20, 4.

Read messages carefully, paying attention to details such as specific wording and phraseology.

Careful with those jokes: If the meaning of a sentence you write is ambiguous, provide the reader with the proper tone of voice to "hear" it in by adding in pointers such as "Forgive my sarcasm, but..." or "Isn't it funny that...", even though you might not do so in a face-to-face setting. When using humor, in particular, add in all the cues you can so as to let your counterpart "hear" your tone, and only do so after considering whether you relationship can overcome a misinterpretation of your intended levity.

3.5.1.2 Implications for Mediators

Forewarn and forearm: Incorporate a comment on the challenges of reduced cues in your introduction. Request parties to be as clear as they can, including regarding the tone of voice they are "speaking" in. Ask them to be descriptive regarding their frame of mind, and that mentioning they are writing something angrily, or sarcastically, is more helpful than being ambiguous.

Ask questions: If one party sends an ambiguous message to another, you might inquire to the author's intentions before the receiver has had time to reply. You might do this in joint communication, hoping to receive an answer that will clarify things to the receiver. You might write back a reframed, clear message, asking the author if this is what was meant. Alternatively, you can use reframing or a direct question in a caucus with the author through private communication, with the aim of understanding the author's frame of mind before you decide how to handle the situation.

Assume the "explainer" role: If a message was mistakenly interpreted by the receiver, and you identify this on your own, you can reframe the message or directly explain (*e.g.*, "It sounds to me as if John is saying etc.")

3.5.2 Increased Attribution, Increased Misunderstanding

Communicating through lean media cues causes the e-negotiators to focus on the actual *content* of the communicator's message – while at the same time denying them the means to properly interpret them. This uncertainty as to how to construe messages increases the tendency toward the fundamental attribution error:[69] parties perceive negative actions or statements on their opposite's part, and interpret these as outgrowth of the other's negative intentions and character – rather than as unintended results of circumstance. Reduced social presence and fewer contextual cues lend a sense of distance and vagueness to the interaction and these are compounded by the media richness element of interactivity: E-negotiators ask fewer clarifying questions than face-to-face negotiators. This leaves more

69 R.M. Kramer, "Power, Paranoia, and Distrust in Organizations", *Research on Negotiation in Organizations* (1995) 5; Thompson (2001).

room for parties to make and reinforce assumptions.[70] Attribution dynamics will cause these assumptions to tend toward the negative. Even if more positive assumptions are made, they are likely to prove unfounded, and one party may later perceive the other's inconsistent actions or statements as a breaking of trust. Failed e-mail negotiations tend to include unclear messages, irrelevant points, and long general statements,[71] each of which provides ample breeding ground for attribution. The power of the fundamental attribution error in e-negotiation, and its effect on interparty trust, is clearly demonstrated by experiments showing that e-negotiators are more likely to suspect their opposite of lying than are face-to-face negotiators, even when no actual deception took place.[72]

3.5.2.1 Implications for Negotiators

As negotiators, we can use the slowed-down pace of asynchronous text communication to improve the crafting of our messages, preempting lack of clarity and misunderstandings.

Use the "subject" field intentionally: The "subject" field introduces your letter (preparing your opposite for the content), provides a frame through which it will be read (diminishing negative interpretation) and allows your opposite to find it when they want to review it for clarity before responding. This field deserves extra focus.

Extra clarity: In addition to careful wording, add on extra "just to clarify" statements even when these would seem superfluous in face-to-face interactions.

Clear bottom line: Finally, your basic message, offer or statement must be kept clear. Even if you elaborate in hopes of being understood better, of humanizing the conversation, or of forming rapport, end every message with a very clear "to summarize" paragraph.

Save by the Bell: When you are concerned that all this mindfulness and caution might not suffice, do not entrust the situation to text communication, if this is possible. If a situation seems to be deteriorating do to misconstrued messages, simply pick up the phone and call, or arrange to meet in person with, your negotiation opposite.

3.5.2.2 Implications for Mediators

Clarify: Ask clarifying questions, even if parties do not. By asking for clarification after an unclear message is sent, but before it is answered, you will slow down the process a bit, as the original receiver will wait for the author's clarification.

Humor-watchers: Keep a close eye on parties' use of humor. Highlight it if it works (such as by chiming in and using it for an opportunity for rapport building) and defuse

70 Thompson & Nadler (2002).

71 L.L. Thompson, *The Mind and Heart of the Negotiator*, (3rd ed.) Prentice Hall 2004.

72 Thompson & Nadler (2002).

the situation if it does not (for example, by explaining straight out the risks of using humor online).

Educate: When attribution seems to be rearing its head, consider relating to its effects head on, by writing something such as "We all know how things get misunderstood in e-mail communication, so let me be as clear as possible on this point...."[73]

3.5.3 Increased Contentiousness: A Vicious Cycle

We have already discussed the tendency of parties-at-a-distance to adopt contentious tactics. As media richness is diminished: the social presence of others is reduced[74] and the perceived social distance among negotiators increases.[75] Online communication tends to be less inhibited, with parties ignoring any adverse consequences of negative online interactions, owing to physical distance, reduced social presence, reduced accountability and a sense of anonymity.[76] Feeling less bound by interaction norms than face-to-face negotiators, online negotiators have an increased tendency to threaten and issue ultimata[77] to lie or deceive;[78] to confront each other negatively, and to engage in flaming.[79] Of course, it is difficult to trust someone treating you this way – or to gain someone's trust, after doing this yourself. This state of affairs offers little incentive to work at trustbuilding, and instead lead parties down a road of competition if not downright aggression. As a result, in addition to lean media such as e-mail accentuating competitive behavior in negotiations,[80] it leaves parties feeling *justified* for choosing this pattern of behavior.[81] Iterated rounds of contentious moves are likely to be mirrored in a cycle of trust-diminishment, with each competitive move justified by saying that the other started the cycle.

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73 S. Summers Raines, "Can Online Mediation be Transformative? Tales From the Front", *Conflict Resolution Quarterly* (2005) 22, 4.

74 J. Short, E. Williams & B. Christie, *The Social Psychology of Telecommunications*, John Wiley and Sons Ltd. 1976; S.P. Weisband & L. Atwater, "Evaluating Self and Others in Electronic and Face-to-Face Groups", *Journal of Applied Psychology* (1999) 84, 4.

75 L.M. Jessup & D. Tansik, "Decision Making in an Automated Environment: The Effects of Anonymity & Proximity with a Group Decision Support System", *Decision Science* (1991) 22, 2; J. Siegel, V. Dubrovsky & S. Kiesler, "Group Processes in Computer-Mediated Communication", *Organization Behavior & Human Decision Processes* (1986) 37, 2.

76 T.L. Griffith & G.B. Northcraft, "Distinguishing Between the Forest and the Trees: Media, Features, and Methodology in Electronic Communication Research", *Organization Science* (1994) 5, 2; Wallace (1999); Thompson (2004).

77 Morris *et al.* (2002).

78 C.E. Naquin, T.R. Kurtzberg & L.Y. Belkin, "The Finer Points of Lying Online: E- Mail Versus Pen and Paper", *Journal of Applied Psychology* (2010) 95, 2.

79 Thompson (2002).

80 Barsness & Bhappu (2004).

81 C.E. Naquin, T.R. Kurtzberg & L.Y. Belkin, "E-Mail Communication and Group Cooperation in Mixed Motive Contexts", *Social Justice Research* (2008) 21, 4.

3.5.3.1 *Implications for Negotiators*

Use cooperative language intentionally: A conscious shift from contentious to cooperative language and cues might have an effect. Using terms such as "cooperation", "agreement" or "relationship" might stave off escalation by reminding the other party of what they are here for, and offering an opportunity to return towards trust-building, as opposed to trust-breaking, dynamics.

Step out, step in: Use your distance from the other to take time and "step out" of the discussion in order to respond thoughtfully, rather than merely reacting to the other party's moves. Encourage your opposite to do the same (*e.g.*, "I realize my 'No' was not what you were hoping to hear; why not take some time to think it over, and write me back with your thoughts tomorrow?").

3.5.3.2 *Implications for Mediators*

Check in often: Keep a close eye on your inbox. Conflict can escalate very quickly in online communication. A quick response, reassurance, or reference to past errors can mean the difference between a routine discussion and extreme trust-breaking behavior, from which there may be no recovery.

Initiate cool-off periods: Parties engaging in flaming can deteriorate months of painstaking trustbuilding efforts in a matter of minutes or hours. You might recommend parties refrain from writing each other for a day or two, to cool off and think about things. Keep your eye on your inbox, though; as they might not be able to refrain from writing.[82]

Shuttle Diplomacy: If parties cannot find the trust necessary to engage in civil conversation with each other, consider writing to each of them separately instead of having them write each other.

Grow thick skin: With online interactions so rife with contentiousness, it should come as no surprise that parties sometimes act contentiously in their dealing with the mediator. Remember the nature of the process and the effects of the media: Do not get insulted, and do not get sucked in.

3.5.4 Low Expectations of Trust

Communicating via e-mail, negotiators experience lower levels of trust in their opposites than those experienced by negotiators in similar face-to-face interactions – at *all* stages of the process.[83] Before the process' inception, e-negotiators report a comparatively low level of trust in their opposite. E-negotiators enter the process with a lower level of pre-negotiation trust in their opposite than do participants in face-to-face negotiations.[84] This initial

82 Summers Raines (2005).
83 Ebner (2007).
84 Naquin & Paulson (2003).

low expectation regarding interpersonal trust ties into the sinister attribution effect by reinforcing the tendency to seek out reasons to distrust, rather than to recognize trustworthy actions. This becomes a self-fulfilling prophecy: we expect to find our negotiation opposites untrustworthy, and indeed – we find them to be so. This low trust-level persists throughout the course of the negotiation, resulting in diminished process cooperation and information sharing.[85] Suspicions run high: E-negotiators are more likely to suspect their opposite of lying, even when no actual deception has taken place.[86] This mixture of low expectations, low trust manifestation and relatively poor outcomes continues the cycle by lowering our trust expectations even further in anticipation of our *next* e-negotiation process. Participants in e-negotiation experience lower levels of *post*-negotiation trust than face-to-face negotiators – and as a result, they show less desire to engage in future interactions with their negotiation opposites.[87] Surprisingly, these findings hold true even when there is no objective difference in the negotiation outcome. A particular outcome reached face-to-face encourages a degree of trust causing negotiators to look favorably on the possibility of future negotiation interaction with their opposite, greater than that same outcome would achieve if reached through e-negotiation.[88]

3.5.4.1 Implications for Negotiators

Begin early: Trustbuilding attempts need to begin before your opposite's initial expectations turn into a self-fulfilling prophecy through attribution. Begin these efforts right at the negotiation's launch – and even before the "official" kick off.[89]

Be prepared for rejection: Your opposite is not expecting to find you trustworthy; do not be surprised, or discouraged, if your early trustbuilding moves are rejected, misconstrued, ignored or simply un-noticed. Keep trying.

Don't stop at success: Trust needs maintaining after it is initially built in order to see it through to the conclusion of a negotiation process. Additionnally, maintaining it in such a manner that it continues beyond the negotiation and supports you in a future interaction with the same opposite requires particular effort in online processes.

3.5.4.2 Implications for Mediators

Tech Tour: As parties enter the platform the first time, give them a guided tour, explaining how the main features work and everything they need to know in order to participate

85 *Id.*

86 Thompson (2002).

87 This trust-downgrading cycle concerns not only one's negotiation opposite, but also ties into one's own self-perceptions regarding negotiation satisfaction and self-trusting: online negotiators tend to feel less satisfied with their outcomes, and less confident in the quality of their performance, than face-to-face negotiators (Naquin & Paulson (2003)).

88 Naquin & Paulson (2003).

89 Morris (2002).

effectively. This enhances parties' trust in the mediator, right from the start.[90] When negotiating through e-mail or any other medium other than a tailored platform, provide very clear instructions on how they are to use the medium and invite them to contact you for further guidance. Your skill with the technology being used for the process translates into parties' trust in you.

Preempt distrust: Help parties recognize, perhaps by means of a comment in your introduction to the process, that the initial misgivings they may feel walking into an e-mediation process are normal. They are a part of the playing field, and *not* (as they may be telling themselves) an intuitive insight into their opposite's true nature or intentions.[91]

3.5.5 I Am Anonymous, the Other Is Faceless

A major challenge to one party's desire to generate trust in their opposite arises from the setting of the encounter itself. Parties sit behind their computers, far away from their faceless opposites, leading each to sense a degree of anonymity, distance and remote detachment. This engenders assumptions that one can get away with trust-breaking behavior at the same time as it lowers moral inhibitions against doing so. This dynamic occurs even when the process takes place between identifiable and accountable parties! The degree of effect this has on negotiation depends on how much effort parties put into "unmasking" each other – or, more pro-actively, unmasking themselves *towards* the other. The more one party perceives the other as an *identifiable other*, as opposed to an anonymous, faceless e-mail address, the more likely they are to share information, rely on them and trust in them.[92] To allow trust to develop, we must incorporate unmasking dynamics into ODR processes – and the earlier on, the better. In fact – there is no need to wait for the main show to begin.

3.5.5.1 Implications for Negotiators

Work at rapport: Negotiators have always been reminded to create a positive and unmasked environment for an upcoming process by using pre-negotiation interactions to create instant or *ad hoc* relationships by "bonding"[93] and by "building rapport".[94] To do so, parties are advised to create opportunities to build a positive rhythm of interaction before they reach the table. However, the light, social interactions this requires do not play out so smoothly or intuitively in online conversations.[95] Work at acquiring this ability. Even one

90 A.M.G. Hammond, "How do You Write 'Yes'? A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly* (2003) 20, 3.

91 Ebner (2007).

92 Nadler & D. Shestowsky (2006).

93 R.M. Shapiro & M.A. Jankowski, *The Power of Nice: How to Negotiate so Everyone Wins – Especially You!*, John Wiley 1998.

94 Drolet & Morris (2000); Thompson (2002).

95 Ebner (2007).

lighter, bonding sentence, in the framework of a more business-like e-mail can have great effect. You will know that it has, if the other party relates to it at the beginning of their next message.

Meet if you can: The challenge of online bonding has led to recommendations that you would do well to hold a preliminary face-to-face meeting with your opposite before beginning an online process, given the potential for trust formed in one venue to spill over into the other.[96]

Schmooze, and schmooze ahead: If a face-to-face meeting is impossible or impractical, as will often be the case in ODR processes, try to reach out, before opening a negotiation process or with its very inception, with a short e-mail or phone call, just to introduce yourself and to conduct some very basic "schmoozing".[97] However, in many ODR processes these suggestions may be impossible, impractical or at odds with the essence of the process. As a result, close attention to an in-process, *online* unmasking process is necessary.

Unmask yourself: If it is easier for parties to act distrustfully towards opposites they view as distant and faceless, eliminate that sense by adopting a proactive agenda of making yourself seem human, present, and real in the other's eyes. This unmasking process might involve sharing personal information, or reducing the perception of distance through shared language, or shared geographical or cultural references. Be selective: consider carefully what to share about yourself, taking advantage of the masking effect to avoid any anticipated bias.

Unmask the other: A phrase commonly used in netiquette codes is "Remember the human": there is a person behind the other screen. Keep this in mind, whether your opposite has had the foresight to engage in unmasking themselves or not. They are not computers or inboxes – they will respond to your messages on emotional, cognitive and behavioral levels which you will then have to deal with.[98] Encourage them to engage in unmasking by asking questions, or dropping other types of references or cues which they may pick up on.

3.5.5.2 *Implications for Mediators*

Jump-start your own rapport: Pre-process communication with parties is your opportunity to begin the process of rapport-building. Your introductory remarks set the tone for the mediation, and should include elements of rapport building and professionalism, allowing parties to feel confidence in you on multiple levels.

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96 E. Rocco, "Trust Breaks Down in Electronic Contexts but Can be Repaired by Some Initial Face-to-Face Contact", *Proceedings of the SIGGHI Conference on Human Factors in Computing Systems*, ACM Press 1998.; J. Zheng *et al.*, "Trust Without Touch: Jumpstarting Long-Distance Trust With Initial Social Activities", *Proceedings of the SIGGHI 2002 Conference on Human Factors in Computing Systems*, ACM Press 2002.

97 Morris (2002); Nadler & Shestowsky (2006).

98 See B. Mayer, *The Dynamics of Conflict Resolution*, San Francisco, Jossey-Bass 2000.

Keep working at it: Continue to look for opportunities to form rapport with the parties. One good venue for this is while caucusing, but it can be done in joint messages as well. Mention the weather in your area, or share something else going on in your neck of the woods. Parties' responses to these comments might indicate their own desire to build rapport.[99]

Model unmasking: Share some personal information about yourself, as positive modeling of open communication. More often than not, at least one of the parties will respond to this, allowing you to create an unmasking dynamic.

3.5.6 Physical Distance and Interpersonal "Otherness"

Taking the previous challenge one step further, online communication not only makes negotiating parties feel anonymous and distant from each other, it causes a perception of difference, of "otherness" between the two parties. Our opposites are anonymous and distant from us, and the structural elements of negotiation has them playing the role of the "other" or the "opponent" – different from us and at odds with us. This poses significant challenges to identity-based trust, which is constructed through perceived *similarities*. This is exacerbated by us knowing little or nothing about many of our online opposites – so this deficit in identification-based trust cannot be counterbalanced by knowledge-based trust. Indeed, the only thing we may know about them is that we need something from them, and/or that they need something from us. This can spiral parties into identification-based *dis*trust, as we subconsciously assume that our mutual demands are manifestations of fundamental dissimilarities; our opposites are *nothing* like us, and their attitudes, personality and interests *conflict* with ours.

3.5.6.1 Implications for Negotiators

Don't just unmask – team up!: This unmasking process can potentially begin to dispel the "otherness" obstacle, close the perceived distances between yourself and the other by searching for an even stronger variation of identification-based trust: shared group membership. When an individual perceives themselves as belonging to the same group as another, their perceptions of the other become more positive and their level of trust in the other increases. This balances out the "otherness" obstacle, which is in essence a way of saying that you and the other party perceive yourselves as belonging to different "out-groups". While in-group members appreciate each other more, intuitively assuming they share positive traits and attributes such as trustworthiness, they perceive out-group members, as possessing inferior qualities and negative intentions. Development of positive attitudes and identification-based trust towards in-group members plays out online much

99 Braeutigam (2006).

as it does offline.[100] resulting in a greater likelihood of agreement between in-group members.[101]

A new way of reading: Tune in closely to the other's messages, in order to discover things to connect to as members of a joint in-group. This involves a different type of message reading, in addition to the usual content-assimilation process. Glean all the information you can from your opposite's introductory e-mail and any personal information included in later messages.

Avoid their stereotyping: Even as you carefully read your opposite's messages to seek out shared in-group affiliation, note whom they might perceive as belonging to an *out*-group – and avoid fitting into these by not divulging details that may paint you as belonging to that group.

3.5.6.2 *Implications for Mediators*

Create a team: Create an *ad-hoc*, mediation process in-group, by using joining terms such as "we have all come here to work on this", "we are not giving up on this".

Careful with caucusing: One effect of caucusing is reinforcing out-group thinking. At best, it reinforces a false in-group dynamic of one party and the mediator, "against" the other party.

Borrow from the future: By discussing parties' futures in terms of a valuable relationship (when relevant), you are, in essence, discussing a future state of in-groupness. Try importing that sense into the current discussion. (*e.g.*, "Let's assume we've worked this out, and three years from now you are working together on an important project. If you encounter disagreement between you, how would you handle that while protecting your project and your relationship?").

3.5.7 Empathy, Online?

Showing empathy as a negotiator or as a third party is a cornerstone of in-process trust-building. One of the basic directives of any book or course focusing on negotiation is that a negotiator should show empathy for his opposite.[102] Mediators are similarly advised to show empathy to parties, either to make up for what they are not receiving from the other party, to give them the support necessary to engage in a difficult process, or to model good communication patterns. Whatever else mediators attempt to achieve by showing empathy,

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100 Wallace (1999).

101 D.A. Moore, T.R. Kurtzberg & L.L. Thompson, "Long & Short Routes to Success in Electronically Mediated Negotiations: Group Affiliations & Good Vibrations", *Organizational Behavior & Human Decision Processes* 1999) 77, 1.

102 W. Ury, *Getting Past No*, Bantam Books 1991; R.H. Mnookin, S.R. Peppet & A.S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, The Belknap Press of Harvard University Press 2000; Schneider (2002).

there is no doubt as to its effect on trust: both mediators and parties to mediation name empathy as a core element in building party-mediator trust.[103]

As any practitioner knows, empathizing is a challenge even in a rich communication channel such as face-to-face meetings. It is usually counterintuitive -practitioners being concerned that showing empathy might be perceived as a display of weakness, or as an unprofessional display of personality and emotion. To counterbalance this, literature and training curricula repeatedly stress that empathizing with another does *not* convey weakness, nor does it require giving anything up; it does, on the other hand, show the other our understanding and recognition. It invites reciprocation, resulting in less tension and contentiousness. Moreover, when used correctly, showing empathy goes a long way towards building trust.

In ODR processes media effects make experiencing and transmitting empathy even more difficult. This often results in practitioners under-investing in empathizing. This is clearly not a helpful path to pursue. Empathy has been found to play the same roles online that it does in face-to-face encounters. Regarding trust, specifically, online negotiators showing empathy are trusted by their negotiation opposites more than those who do not.[104]

How can we show empathy for another person via a communication channel with limited contextual cues? We cannot nod understandingly, or smile and lay a supportive hand on our opposite's own.[105] The e-channel necessitates special methods for showing e-empathy.

3.5.7.1 Implications for Negotiators

Use your regular toolbox: While displaying empathy with body language might be challenged by the media, other methods remain at negotiators' disposal – the online versions of those most basic communication tools negotiators are advised to employ with empathy-showing in mind: Active listening, reflecting or summarizing, and asking relevant, productive and to-the-point questions showing interest in your opposite, their needs and concerns.[106] How might these be done online?

Be descriptive, to show listening: In your writing, be descriptive of your actions in order to paint a picture for your opposite a previous paper. For example, one good way to demonstrate online "listening" might to stress, in replying to your opposite's messages, that we have read what was said: "I read your message carefully" or "Reading your letter

103 Goldberg (2005).

104 J. Feng, J. Lazar & J. Preece, "Empathy and Online Interpersonal Trust: A Fragile Relationship", *Behavior and Information Technology* (2004) 23, 2.

105 While displaying empathy is somewhat easier in videoconferencing, it is still a delicate skill; videoconferencing is currently a bit limited in conveying precise nuance. Time-lag can make some gestures appear clumsy or unsuitable, and - with most of the web cameras currently in use – there is little real sensation of real eye-contact.

106 Ury (1991)

last night, I realized..." might seem like casual opening lines, but they convey a powerful descriptive message to message to your opposite: "I read your message, you have been heard".[107]

Clarifying questions show listening: Copy and paste an ambiguous message right back to your opposite, highlight anything unclear and ask for clarifications. This will not only help you avoid mistakes and breaking trust, it actually *builds* trust, as your message conveys the subtext of "I am listening to you, and it is *very* important for me to make sure I understand you".

Do I dare ask? Ask questions. Take advantage of nature of interactivity in most text-based communication, which allows you to ask multiple questions in a single e-mail without the other breaking in to respond or stopping the flow. This facilitates a show of interest and engagement and shows empathy.

3.5.7.2 Implications for Mediators

The use of all of the tools mentioned above is crucial for creating and maintaining party-mediator trust. In addition the mediator can use them in order to affect interparty trust.

Model communication: Use of these tools can subliminally affect parties, who may start using them themselves. Calling attention to what you are doing can promote this (*e.g.* by writing "I'm going to summarize what I heard you say, just to make sure I'm clear on what you meant", instead of proceeding straight to the summary itself).

Teach communication, achieve empathy: As noted, use of these tools does not come naturally to parties negotiating online. By teaching their use as communication tools, you can also indirectly affect the flow of empathy. For example, teaching parties to ask questions instead of making assumptions, given the challenges of online communication, might result in increased use of questions, effecting a greater show of empathy and as a result – enhancing trust.

3.5.8 Privacy

Maintaining a negotiation process' privacy is never an easy task. In face-to-face negotiation, absent a confidentiality agreement (and too often, in practice, even when one exists!) parties can and do share information about the negotiation with anyone they like. However, meetings can be held behind closed doors, and sensitive information can be related in a lowered voice. Anything shared with external parties will always be subjective, after-the-fact, secondhand (and in legal terms, hearsay). The same extends to mediation: The mediator is bound to respect and maintain parties' privacy, and in many locales, details of the conversations are precluded from being admissible in court. Outside of the mediation room and courthouse, parties can generally share their experiences as they choose. This

107 See Ebner (2007).

balance between in-the-room privacy, and out-of-the-room sharing, is a familiar structural aspect of these processes.

In ODR processes, however, parties never know who is "in the room" with them. One party never knows whether their opposites are showing a message to their boss or colleagues. E-mail messages can easily be forwarded to external parties. Even if the ODR platform requires a password protected entry by each party, who is to say there is no one else sitting next to your opposite, looking on? While video-conferencing, how can you know that your opposite is alone and that there is no-one listening in, off camera? Beyond immediate privacy issues, is the issue of privacy through time: The messages you transmit are recorded, forever archived on your opposite's computer, beyond your control. These might even be tampered with, altering what you wrote or said. Private information shared might become public – due to the other's bad intentions, or just their technical shortcomings. Who among us has never clicked "reply all" instead of reply, and sent a personal message into a public domain? All this might easily lead to the reduced information-sharing and risk-taking associated with low trust.

3.5.8.1 Implications for Negotiators

Before sending messages: Consider each address field carefully. To whom should a message be sent? Should anyone appear in the "cc" field? Do you want anyone invisibly lurking on the conversation, from the "bcc" field?

When receiving messages: Use the same information fields in reverse, to look for breaches of privacy; review the address fields and tracking information visible in messages you receive from your opposite, and if communicating through e-mail – read through the previous messages recorded in the e-mail. Has your opposite included any internal correspondence you might want to see? Forwarded messages to others? CC'ed someone on this latest message to you?

Record and Relate: Record and save the interactions, return to them when things get unclear, and relate to them when it seems the other party is being inconsistent.

Consult: Unless you have bindingly agreed not to, share messages with anybody you feel you need to share them with, and consult – often – about the process.

Watch out: Increasingly, individuals' online activities are becoming public, widespread, sought out by future opponents and admissible in court. Be cautious of what you write in an e-mail, particularly before trust is established. A good rule of thumb might be: Do not write anything in an e-mail that you would not want shown on the news.

3.5.8.2 Implications for Mediators

Do not promise what you cannot keep: Be explicit about what you can promise in terms of confidentiality – and what you cannot. Promise that you will not divulge information, and

describe any security measures your platform incorporates. However, refrain from promising that "We'll all be keeping this secret".

Ask parties: If parties raise privacy concerns, use this as an opportunity for trustbuilding. Ask for their concerns, ask for their recommendations, do the best you can to provide for them and do not force them into participating in a process that disturbs them. This process has important trustbuilding implications on both the mediator-party and on the party-party fronts.

3.5.9 Human Expectations and Asynchronous Communication

The Internet holds the promise of instant access to anything and anyone. We expect quick turnaround for anything we do online, even if there is no contextual justification for this. This expectation of real-time response synchs well with our offline communication patterns, in which real-time communication in the form of face-to-face meetings and phone calls are far more common than letter exchanges through the mail.

On the other hand, most online communication is asynchronous, and includes time-lag and delay. True – e-mails arrive at their destination in an instant, and some ODR platforms immediately notify parties of a new message for them in the process area by e-mail or text message. However, these messages are not read, nor answered, instantly. Parties frequently find themselves waiting for responses from their opposites. This duality of instant and asynchronous gives rise to expectations between negotiators that cannot be met, which breeds anxiety and then suspicion, as distrust of the channel blends with distrust of the other. Not receiving a prompt reply, not only do we question whether our opposites have received our message, we wonder why (if indeed they *have* received it) they are taking so long to respond? E-negotiators build expectations based on their assumption that they can control the rate of message exchange – an assumption they cannot deliver on, and one which the other party is unlikely to. When the other fails to live up to those expectations, frustration and sinister attribution are quick to follow.[108]

3.5.9.1 Implications for Negotiators

Respond quickly: Unresponsiveness or lengthy breaks between messages foster anxiety, a fertile breeding ground for distrust. Billy Joel's advice that "To insure yourself, you've got to provide communication constantly", is a very apt maxim to follow in ODR; Katsh and Rifkin[109] recommend to always respond to an e-mail within twenty-four hours, even if only to say that you are working on, or considering, what your opposite has written, and will get back to them shortly.

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108 Thompson (2002).

109 E. Katsh & J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001.

Respond frequently: Even when there is no expectation of a speedy response, frequent message exchanges are more conducive to trust-building within groups than intermittent communication.[110]

Use asynchronicity: Synchronous communication necessitates responding to our opposite's behavior on the spot. The built-in time-lag provided by asynchronous communication allows you to control your response, to avoid knee-jerk reactions or emotional hijackings[111] and to think proactively. It allows you to fashion and frame your response thoughtfully and carefully. Re-reading a message we have received, or asking a friend or colleague to read it and tell us their thoughts, can help us avoid falling into the pitfall of negative attribution.

3.5.9.2 Implications for Mediators

Responsibility for pace and momentum: Online, mediators have much greater responsibility for managing the pace of the interaction and for maintaining its momentum, than they do in face-to-face settings. The structural element of consistent contact, and conversational responsiveness, built into face-to-face processes do not exist in online mediation. In addition, parties may be at opposite ends of the globe, in different time zones, on different schedules. There are no pre-determined, scheduled, joint areas of time and space that parties share. We have noted several times the potential effects of non-responsiveness that this structure is conducive to. As mediator, it is your job to maintain the process' momentum. Check in with parties regularly. Respond to most, if not all, of the messages received (even if they were not directed at you, this is your opportunity to show attentiveness, to reflect and reframe) Update parties waiting for their opposites, so they feel attended to. Consciously acting in these ways, you will fill some of the gaps left by communication through the online medium; hopefully preventing those gaps being filled by anxiety, frustration, and attribution.[112]

Slow down, speed up: Maintaining momentum does not necessarily mean always maintaining the same pace. If parties seem locked in a flaming cycle, you might suggest they cool off by taking a twenty-four hour break.[113] If you think that a quick response might have a more powerful effect than a delayed response in a particular case, or you feel that a particular delay might threaten the waiting party's trust in the delaying party – reach out with a behind-the-scenes tap, and explain your thinking to the delaying party.

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110 Wallace (1999); J.B. Walther & U. Bunz, "The Rules of Virtual Groups: Trust, Liking, and Performance in Computer-Mediated Communication", *Journal of Communication* (2005) 55, 4.

111 D. Goleman, *Emotional Intelligence*, Bantam Books 1995.

112 See Braeutigam (2006).

113 Summers Raines (2005).

3.5.10 Diminished Party Commitment, Investment and Focus

Parties to ODR processes might be less motivated than those in face-to-face processes. Not having displayed the minimum commitment of getting up, getting dressed and coming to the table, they may have not sunk any costs at all in the process. Online communication may provide the easiest venue of them all for making "shot in the dark" approaches. This might provide partial explanation for reports of higher rates of impasse in e-mail negotiation and for the phenomena of online processes simply evaporating, with one or both parties disappearing.

Even highly-committed parties are likely to suffer media-related effects including confusion, low cognitive retention of previous messages and diminished concentration.[114] This is due to several factors, including time-passage between exchanges, the tendency to answer e-mails in spurts and sections rather blocking out time to write full messages, and the fact that we engage in online communication in less-than-optimal surroundings and circumstances. Many of us are aware of our own tendency to treat our inbox as one part of our media multitasking – and not as something we train our full attention on. We check our e-mail as we surf the web, and we might be carrying on an in-person or a phone conversation at the same time. Proud of our ability to multitask, we fail to realize that we are not as good at this as we like to think we are. Recent research shows that "heavy" multitaskers suffer a range of shortcomings as opposed to "focusers". They are not good at filtering out irrelevant information, and they are easily distracted. They tend to have low detail recall, and they are not skilled at switching between tasks rapidly (a primary element of multitasking behavior).[115] Multitasking parties suffering from any of these shortcomings might be confused and unfocused throughout the process.

3.5.10.1 Implications for Negotiators

Play the field: The low commitment and investment level required to engage in e-mail negotiation allows you to expand your knowledge and improve your BATNA by engaging in multiple processes, within the limitations of any legal good-faith requirements.

Stay on top of things: Keep your counterpart engaged, by providing regular contact – but do not get too pushy.[116]

Bridge time gaps: Use literary style to create the sense of an uninterrupted conversation. For example, write "As I wrote you..." and then copy and paste a quote from your previous letter.

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114 Ebner *et al*(2011).

115 E. Ofir, C. Nass & A.D. Wagner, "Cognitive Control in Media Multitaskers", *Proceedings of the National Academy of Sciences*, 2009.

116 See D. Shipley & W. Schwalbe, "*Send: The Essential Guide to E-Mail for Office and Home*", Alfred A. Knopf 2007, for some guidance on this balance.

Stay focused: The greater the importance of the negotiation to you, the more it pays to concentrate on it. Read and write messages in an environment that allows you to concentrate. Close your Internet web browser while reading and writing a particularly important message.

3.5.10.2 Implications for Mediators

Adapt your style: Parties to online mediation will have lower commitment to the process than face-to-face parties. Learn to identify low-commitment parties, and adapt a style that engages them rather than providing them with reasons (such as heavy investment required) to walk.[117]

Responsibility for pace and momentum: See the discussion above, in the previous section. Keep in mind that delays and unclear structure can cause confusion and crossed messages, and can frustrate low-commitment parties to the degree that they will walk away.

3.5.11 Negotiating the New Dispute Resolution Environment

One of the primary challenges to maintaining trust through online communication is, as Boyd[118] put it, the medium's "novelty, and its attendant mystery". He suggests that there is a degree of spillover: a user's distrust of the medium, due to inexperience, can lead to that user harboring suspicions towards a website's credibility or an e-negotiation opposite's trustworthiness. The flip side of this suggestion is that a successful online experience will therefore lead to a progressively *lower* trust threshold, and the spillover between trust towards the channel and trust towards a dispute opposite might actually begin to work the other way around. In addition, optimism resulting from past experience will facilitate the forming of trust during subsequent interactions. This would suggest that trust-building might become easier as the medium's novelty fades over the course of the next generation.

Here is where the three types of trust listed at the beginning of this chapter come together, and affect one another. Structural solutions have been attempted to several of these challenges. For example, eBay's rating system provides potential clients the opportunity to view the degree to which previous clients were satisfied with a particular vendor. While this system has been very successful in creating an environment of trust sufficient to hold the eBay community together, there are no web-wide rating systems so widely accepted that they have become an integral part of the Internet's commercial infrastructure.[119] In the context of one-on-one processes, structural solutions are even harder to envisage.

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117 S. Summers Raines, "The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace", paper delivered at *The Third Annual Forum on Online Dispute Resolution*, Melbourne, Australia 2004.

118 Boyd (2003), p. 394.

119 Rule & Friedberg (2005).

In a previous piece written with co-authors Anita Bhappu, Jennifer Brown, Kimberlee Kovach and Andrea Kupfer Schneider, focusing on e-mail negotiation, we noted another aspect of the novelty of e-interactions: even professionals in the field are under-trained. The professional and academic negotiation fields have, for the large part, ignored the issue of media effects in training and teaching. Negotiators were trained for interactions "at the table" – always assuming that there would, indeed, be a "table" – some *physical* setting where the parties convened and negotiated.[120] This observation holds true even for e-mail – a familiar medium, compared to some of the channels employed on ODR platforms. Expanding this comment to cover other, less ubiquitous types of media utilized for ODR, the problem is compounded. We have yet to have the benefit of a cadre of professionals trained and experienced in using these media.[121]

3.5.11.1 Implications for Negotiators

Choose your negotiation channel carefully: Do not agree to conduct communication through a medium you are uncomfortable with, and you would be wise to verify that your opposite is comfortable with the medium as well.

You must complete your training: Ignore Yoda's advice at your own peril. E-negotiation is different from face-to-face processes. Understanding the unique dynamics of e-negotiation will put you at an advantage. However, chances are you have not encountered this topic in any negotiation training you have undergone. Reading this chapter is a good start, and there is a growing body of literature on online communication and negotiation you can peruse.

3.5.11.2 Implications for Mediators

Master your technology: As mediator, you must be skilled in operating the platform you are working on, or using the medium you are communicating through. Displays of the mediator's adeptness with the medium builds trust, and displays of clumsiness will erode trust.

Guide parties: Provide guidance to parties regarding the medium before the process starts as a trustbuilding measure, in addition to this facilitating their participation in the process.[122] If a party seems to be having difficulties navigating the technological landscape mid-process, reach out and lend a hand.

120 Ebner *et al.* (2009).

121 On first steps in ODR education, see Pearlstein, Hanson and Ebner, chapter 19 in this book. Also see D. Rainey, *Teaching Online Dispute Resolution: Results form a Survey of Students*, 2010, available at <www.mediate.com/articles/raineyD1.cfm>, last accessed 26 April 2011.

122 Hammond (2003).

Use novelty for rapport: In your introduction, acknowledge that use of this medium for dispute resolution is new, and that Internet-based communication in general is something we are all learning to use, through an ongoing process.

4 CONCLUSION

Trust, that infinitely valuable resource for the purposes of negotiation and dispute resolution, is hard enough to come by under the best of circumstances. Online, for a variety of reasons ranging from technological to psychological, trust is extremely challenging to develop and to maintain. However, awareness and intentional use of online communication media by negotiators and mediators can not only help overcome these challenges, they can provide new methods for trustbuilding unavailable in face-to-face processes.

12 ODR AND GOVERNMENT

Daniel Rainey and Ethan Katsh

1 INTRODUCTION

Much of the discussion linking the terms "ODR" and "government" has been related to governance of the Internet rather than the use of the Internet as a tool for governing. Schultz, for example, argued:

> The common view about the Internet is that we must keep government out of it, that government would kill the Internet through regulation. There is a strong belief that the Internet could do without government ... ODR has grown out of two main social fields, the Internet and alternative dispute resolution (ADR). Both fields share one thing: their resistance to government.[1]

Even the frontier, "anything goes" attitude that Internet users have frequently fostered comes into sporadic contact with a need for governing. ICANN (The Internet Corporation for Assigned Names and Numbers)[2] has since 1998 served as the arbiter or ombudsman for disputes between and among those who seek to use Internet addresses for personal, commercial, and government business. In the process, ICANN developed one of the first global ODR programs in its Ombudsman Office as well as an arbitration process for resolving domain name disputes.

But the issue we will discuss in this chapter is not governance of the Internet. The topic at hand is the use of the Internet to govern, and the role that ODR can play in e-government. A good place to start a discussion about the role of ODR in e-government is to define what is meant by the term "e-government". It seems only appropriate to turn to that font of e-knowledge, Wikipedia, for a definition:

> **e-government** (short for electronic government, also known as **e-gov**, **digital government**, **online government**, or **connected government**) is digital interaction between a government and citizens (G2C), government and busi-

1 T. Schultz, "An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR," Proceedings of the UNECE Forum on ODR 2003, available at <www.odr.info/unece2003>.

2 For information, see <www.icann.org>.

> nesses/commerce/e-commerce (G2B), and between government agencies (G2G), Government-to-Religious Movements/Church (G2R), Government-to-Households (G2H). This digital interaction consists of governance, information and communication technology (ICT), business process re-engineering (BPR), and e-citizen at all levels of government (city, state/provence, national, and international).[3]

Regardless of what one thinks of the veracity or accuracy of Wikipedia information, this seems to us a reasonable starting place for a discussion of e-government. The consistent features of e-government that run across definitions and sources are: 1) the use of ICT, and 2) stress on the varied pathways of communication created by government actions – reaching out to the public, the corporate world, and other local, state, and federal government entities.

Our discussion of e-government will be divided into three main sections: What has changed?; What must government (and e-government) do?; and, Where are e-government and ODR going?

Before we begin, we should disclose that our concept of e-government is heavily influenced by both the value structure and the online experiences of the government of the United States, of which we are both citizens, and from which many if not most of our examples will be drawn. We are cognizant of the fact that in many cases neither the values and laws, nor the online experiences of other countries, will match those of the United States. Our intent is to discuss the insertion of ODR technology into government at a general and theoretical level, but we are aware that, at some point, theory must become practice, and that practice must occur in context. We should also point out that several of the chapters in this book address the issue of ODR technology and its relationship to government, either through the courts and legal system, the regulatory system, or through the use of mobile technology to influence political decisions.

2 THE ADVENT OF THE INTERNET: WHAT HAS CHANGED?

Jeff Aresty, an early advocate for the development of online justice systems and founder of the InternetBar.Org, has described the traditional legal environment as consisting of People, Places, and Paper.[4] It is as easy to see the same boundaries or elements at work in

3 <http://en.wikipedia.org/wiki/E-Government>, last accessed in April 2011.

4 J. Aresty, "Online Dispute Resolution (ODR) and the Legal Complex: Lawyers and Technological Change", Proceedings of the 2007 International Forum on Online Dispute Resolution, Hong Kong, December 2007.

governmental systems as it is in legal systems. In an online, virtual governing environment there are significant shifts in the conception of people, and places, and paper. Perhaps the most quaint, and enduring, vision of the nature of citizen interaction with government is drawn, in the United States, from the mythic picture of the Yankee Town Hall Meeting, where citizens could gather as a group and make their thoughts and feelings known to those who were elected to govern. Norman Rockwell even used this iconic environment as the theme for "Freedom of Speech", one of a set of four paintings depicting the basic freedoms offered by American Democracy.[5]

But it has long been impossible to physically gather any significant portion of the public to confront the government, making it necessary to conceive "the people" as a unified, but physically incorporate mass. Long before the Internet existed in its current form, theorists and social critics addressed the idea of creating a "people" for whom the elected could speak. McGee, in an influential 1975 essay, essentially argued that "the people" "are the political and social myths they accept".[6] We have, as nations, become comfortable with this "virtual" notion of the people. As Giridharadas argued:

> Perhaps the biggest idea to gather speed during the last millennium was that we humans might govern ourselves. But no one really meant it. What we really meant in most places was that we would elect people to govern us and sporadically renew or revoke their contracts. It was enough. There was no practicable way to involve all of us, all the time.[7]

That situation, according to some, may be changing.

The tempting, and conceptually astounding, promise of the Internet is that it may be possible to move "the people" from the virtual, mythic realm into a more concrete arena. Perhaps "the people" can become simply "people". For example, an early experiment with online access for public comment and public input was carried out by the United States Department of Agriculture (USDA) when they were developing standards to define "organic" produce. In the past they had held public meetings and accepted public comments via mail, but for the organic standard they opened the comments to submission via an e-mail account. They received what was, at that time, by far the largest number of comments that had ever been received by the USDA during a comment period for a regulatory

5 Rockwell's The Four Freedoms series was published in the *Saturday Evening Post* on 20 February 1943.

6 M.C. McGee, "In Search of the People: A Rhetorical Alternative", *The Quarterly Journal of Speech*, (1975) Vol. 61, Issue 3, pp. 235-249.

7 A. Giriharadas, "'Athens' on the Net", *The New York Times*, 2009, available at <www.nytimes.com/2009/09/13/weekinreview/13giridharadas.html>.

standard. They received so many comments that the most difficult part of the process was not, as they had assumed, creating a standard that would be acceptable to the widest range of interest groups while protecting the consumer. The most difficult part of the process was figuring out how to handle the volume of comments, first to understand what the comments said, and second to integrate those comments into the report on the final standard. The interests of the "the people" can be used to guide regulatory choices in a rational way. Regulators can argue that "the people" value transparency, accountability, and other goals, and they can generate options for regulation consistent with the "will of the people". But when government goes out to ask a large number of citizens what they think, the very volume of response is likely to overwhelm the decision making process. And, there are other problems with moving from "the people" to open citizen input. The Office of Management and Budget (OMB)'s Office of E-Government and Information Technology website[8] lists legislation going back to the early 1990s and the Clinton administration as relevant to its mission.[9] But in the United States, the current Obama administration, more than any recent administration, has been aggressively working to build e-government into the regulatory structure. As Beth Noveck relates:

> On his first day in office, President Obama issued a "Memorandum for the Heads of Executive Departments and Agencies" calling for the chief technology officer and the Office of Management d Budget to craft an Open Government Directive for greater transparency, participation, and collaboration in every agency.[10]

Noveck, who was one of President Obama's first appointments to the White House Office of Science and Technology Policy (WHOSTP), argues that:

> We have arrived at a moment in time when we can multiply the number and diversity of opportunities for engagement to respond to the complex problems that confront us today.[11]

Riding an optimism about the ability to recast our conception of transparency and citizen involvement, the newly appointed staff launched an ambitious project designed to create

8 <www.whitehouse.gov/omb/e-gov>.

9 The E-Government Act of 2002, The Government Paperwork Elimination Act of 1998, the Clinger-Cohen Act of 1996, the Federal Acquisition Streamlining Act of 1994 (Title V), and the Government Performance Results Act (GRA) of 1993.

10 B.S. Noveck, *Wiki Government*, Brookings Institution Press 2009, p. xi.

11 Noveck (2009), p. xiii.

a "Citizen's Briefing Book", online input that would be presented to the President like his other daily briefings.

Moving to create new channels of citizen input reveals something that any online commercial enterprise understands and has had to cope with: there are a lot of us, and we do not always follow the rules. There are over 300 million individuals in the US. If just .0033% of them want to add their voices to the chorus, that's over 100,000 voices. And the fact that the White House wanted to hear about the most serious problems facing the new administration did not always mesh with the input provided.

> They received 44,000 proposals and 1.4 million votes for those proposals. The results were quietly published, but they were embarrassing – not so much to the administration as to us .... In the middle of two wars and an economic meltdown, the highest-ranking idea was to legalize marijuana, an idea nearly twice as popular as repealing the Bush tax cuts on the wealthy. Legalizing online poker topped the technology ideas, twice as popular as nationwide wi-fi. Revoking the Church of Scientology's tax-exempt status garnered three times more votes than raising funding for childhood cancer.[12]

The obvious conclusion is that the re-conceptualizing of "the people" is going to take some thought, and is going to create unique conflict dynamics in the context of e-government.

If the "people" must be viewed in a new way when engaging in e-government, so must the places in which governing occurs. It is unlikely that we will soon be rid of the grand edifices of government, but citizen use of the Internet to access government services does change the relationship between the citizen and the "place" where government services are rendered.

> The transformation of government with a physical presence that is largely distant to one that is virtual in nature and accessible anywhere at any time is likely to bring a broad spectrum of changes [...] Some of the symbols of government [...] that are tied to physical spaces will obviously not be present in virtual spaces.[13]

In some cases, the symbols of government that may be rendered obsolete by e-government will be missed. There is something comforting and solid about tall columns and the hushed

12 Giridharadas (2009).

13 E. Katsh and D. Rainey, "ODR and Government in a Mobile World", in M. Poblet (ed.), *Mobile Technologies for Conflict Management: Online Dispute Resolution, Governance, Participation*, Springer Press 2011, p. 85.

corridors of power. Some will not be missed. It is now possible in most states in the US to renew a driver's license without that ubiquitous symbol of government – the long queue for service.

Those engaged in the pursuit of e-government have been confronted with the same phenomenon driving development of ODR systems in the world of e-commerce. Not only are there a lot of people who may access online systems to give opinions and request service, the opinions and requests can and do come from across what have traditionally been accepted as stable jurisdictional boundaries. E-commerce has addressed this problem by creating "extra-legal" systems that can handle disputants widely dispersed across geographical, national, and legal boundaries. At eBay, the user agreement seeks to place transactions conducted on its marketplace into its own extra-legal system through the consent of the users when they first create an identity on the eBay system.[14] There is underway a project through UNCITRAL, the United Nations Commission on International Trade Law, seeking to create a worldwide extra-legal, and extra-governmental, program to address disputes created through international online commerce.[15]

Obviously the concerns of and the constraints upon government entities are not the same as those for commercial entities, but it is clear that the strongest impulse in response to cross-boundary disputes has been to create systems that augment or by-pass established channels for dispute resolution. Does this mean that we will begin to see extra-governmental systems created to handle disputes or respond to citizen input? One thing does seem clear: one cannot simply take an existing offline forum like the town hall meeting and create an analog of that system online, expecting that the dynamics of the exchange and the outcome of the debate will be similar in all things except volume. When the research team at the University of Massachusetts at Amherst and the National Mediation Board began the first National Science Foundation (NSF) funded research into the impact of online tools on mediation, their impulse was to clearly document the offline mediation process, and to create a strict analog of that process online. They did so, and found that it did not work.[16] Moving to an online environment, even for disputes created in the offline world, changes the dynamics of interaction, and changes the elements of the dispute resolution process. Government will still have the same physical bodies to deal with, and the physical icons of government still will exist, but pulling virtual input from those people into a virtual government space creates new governing issues.

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14 <http://pages.ebay.com/help/policies/user-agreement.html>.

15 <www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html>.

16 National Science Foundation award #0429297. National Science Foundation, *Process Technology for Achieving Government Online Dispute Resolution*, <www.fastlane.nsf.gov/servlet/showaward?award=0429297>.

Two examples will illustrate the creation of extra-governmental channels. In Sri Lanka, during that country's civil war, a very sophisticated network of online tools was created to monitor actions by the government and the rebels, spread information, create public spaces for discussion, and influence the actions of government.[17] This extra-government network persists after the civil war has ended, and is, in fact, a recasting of the conception of "the people" in Sri Lanka. Famously, in Cairo during the initial stages of the revolution there, social networks became a new means to organize "the people", and when internet access was cut, an alternate channel, text messages, was used to continue to pass information and recruit bodies for protests in Tahrir Square.[18] Obviously, the use of technology to continue building democracy is a separate challenge, and one that is fraught with misuse by those in power who wish to subvert reform, but the ability of technology to radically affect the mobilization of interested citizens has been illustrated amply by the so-called "Arab Spring". The Internet and applications available through the web have become so integrated into reform movements that they are entering into the consciousness of popular culture. For example, the following joke making the rounds on the Internet, from Egypt, distributed in Arabic:

> Two older men were sitting on a curb in Tahrir Square. One said to the other, "what is this Facebook?" The other answered, "an American weapon to bring down tyrants".

Just as the nature of people and places will change, and has changed, so will the nature of the documents created by citizen interaction with government change – governments will have to rethink paper. Two obvious problems in the shift from paper to virtual documents as part of governing are problems with which, again, legal and commercial systems have been struggling for some time: authenticity and identity. If I, as a citizen, go to a physical location controlled by a government agency, fill out a paper form, sign it, and produce some acceptable evidence that I am who I say I am, that document will stand legally as proof of my intent, the government's intent, and the fact that we both endorsed it. If I go online, fill out a web-based form, and submit it through an online application, there is, based on the standards of people/places/paper government, sufficient question about whether I am the person who filled out and signed the form, whether the form in question is the one I filled out, and whether the form exists in the same state that it was in when I signed it. This poses a set of questions, all of which can be answered, but nonetheless questions that attach to efforts to take government online. For the citizen, the question is,

17 <http://groundviews.org>.

18 Interestingly, at the same time, ISPs were being forced to send text messages originating with the Mubarak regime <www.ft.com/cms/s/0/4bf01300-2fc2-11e0-91f8-00144feabdc0.html#axzz1PAJpkcWm>.

"how do I find the government function that I need, and how do I know I have acceptably concluded my duty as a citizen?" For the government, the questions are, "how do I know who you are?" (proof of identity), "how do I know you signed this form?" (document control), and "how do I hold on to this record and make sure it's available in the future?" (archiving and document/records management).

3 WHAT MUST GOVERNMENT (AND E-GOVERNMENT) DO?

For many years it has been the practice of professionals in dispute resolution (or conflict resolution, or conflict intervention, or conflict management, or alternative dispute resolution – or whatever we chose to call our field) to think of the role of ADR as defined by the actions of a third party, maintaining a neutral stance, and striving for resolution of specific disputes or conflicts.[19] This is changing. Almost twenty years ago, Sara Cobb and Janet Rifkin began a discussion of neutrality as a "folk concept" within the dispute resolution field, a sort of moral imperative that, regardless of its impact was assumed to be desirable. Cobb and Rifkin's recasting of the conception of neutrality was followed some years later by Bernie Mayer's *Beyond Neutrality*, and he has added to the assault on orthodoxy by arguing in *Staying With Conflict* that resolution is not always the best or most appropriate goal.[20]

If it were ever the case that questioning neutrality as a stance or resolution as a goal was considered radical, how much more radical must it be to think of the presence and influence of a technological "Fourth Party" with goals beyond resolution of specific disputes and functions beyond neutral mediation? And yet, the "Fourth Party", ODR technology, is with us, and is being used in ways that continue to expand the borders of our conception of dispute resolution as a field, and of online dispute resolution as part of that field.[21]

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19 Of course not all practitioners have subscribed to these limitations. Transformative mediation, for example, explicitly rejects the notion of resolution as a goal. However, neutrality and resolution, and the other standards of the "North American Model" of mediation have had a significant impact on the development of the field, and they have supplied the language which we have commonly used to describe what we do as conflict interveners.

20 See J. Rifkin, J. Millen, and S. Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality", *Mediation Quarterly* (1991) 9(2), pp. 151-163; S. Cobb and J. Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation," *Law and Social Inquiry*, (1991) Vol. 16/1, pp. 25-63; B. Mayer *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, John Wiley and Sons 2004; B. Mayer, *Staying With Conflict: A Strategic Approach to Ongoing Disputes*, John Wiley and Sons 2009.

21 Use of the term "Fourth Party" to refer to ODR technology was coined by Ethan Katsh and Janet Rifkin in *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass 2001.

In order for ODR to make sense in the context of e-government, it also is necessary to expand the notion of what functions ODR is to include functions that help manage conflict that is not resolvable, help facilitate communication in a wide variety of contexts, and help develop and sustain trust in governmental entities and activities. So, supplying information to potential disputants, managing communication and information in the face of potential conflict, and creating trust in organizations and institutions must be seen as legitimate goals and functions of ODR, in addition to the resolution of specific conflicts or disputes.

Part of the reason for this is that, as discussed elsewhere in this book, the whole field of Dispute Systems Design (DSD) is likely to become both more important and more complex as attempts are made to prevent and avoid disputes in addition to resolving them. DSD is premised upon an understanding of patterns and origins of disputes and using that information to change institutional structures in ways that will reduce levels of disputes. Avoiding disputes is more efficient than resolving them but understanding whether there are patterns that can be changed requires data about those patterns. All information technologies, including ODR, collect or are capable of collecting and processing data as the technology is used. This may conflict with some established dispute resolution practices, *e.g.* confidentiality, but pressure to make such changes can be expected to be part of e-government initiatives.

4 WHERE ARE E-GOVERNMENT AND ODR GOING?

This chapter is being written in the Spring of 2011, and it is unclear how the various revolutions in the Middle East will turn out. Even when not successful, these were upheavals in which technology played a role of some importance. There may be some debate as to the degree of influence of Facebook and other social media but it seems clear to us that by providing communications channels that did not exist before, they played a role in helping groups to organize and to identify and express grievances. Looking forward, it is also clear to us that all governments will, to different degrees, be challenged to adapt and respond to individual and group grievances and demands that are now easier to communicate to governments and to express publicly. Government is not an uninvolved spectator to the "conflict is a growth industry" condition in which there are expectations of both rapid and meaningful responses to problems. Indeed, ODR is likely to be an important vehicle for providing redress at a distance in an efficient and effective manner.

Social media that currently have over six hundred million registered users worldwide have been very effective in facilitating expressions of dissatisfaction and the assertion of grievances. A "Facebook revolution" is plausible because Facebook makes it possible to

form groups even when the members of the groups have only a single common interest. Conflict is a growth industry partly because the formation of groups is also a growth industry. Groups that are formed on the basis of weak connections, however, are likely to be effective in demanding change but much less useful, perhaps even an obstacle, to building consensus about large and complex problems. As noted earlier, governments that ask for new ideas need to be well prepared to respond quickly in a constructive manner to proposals for change. New technologies in this context need to be a means to building consensus upon shared values and democratic principles. This is likely a task for something other than Facebook-type software that is based on the lowest common denominator relationship.

Over time, the pressure on governments of all kinds to interact with citizens in novel ways will increase and the pressure for the mode of interaction to be fair and appropriate can also be expected to increase. Dispute resolution, it should be remembered, is important not simply to resolve disputes. It also serves to promote trust in the institutions involved in governing and resolving disputes. In the US, the current dispute resolution infrastructure in government is almost fifteen years old and was established by an Executive Order issued by President Clinton in 1996. Executive Order 12988 states that "claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding".[22] This shift was intended to provide a dispute resolution approach that, when compared to litigation, was less adversarial, more flexible, quicker and less costly. The goal was to be less reliant on lawyers presenting arguments to judges and more reliant on parties working out problems in face to face settings. An interagency working group was established to implement this, ultimately resulting in alternative dispute resolution (ADR) offices being established in over eighty departments and agencies.

During the last fifteen years, as ADR and its emphasis on face to face mediation have been taking hold in the federal government, the private sector has been developing and experimenting with online dispute resolution (ODR). What the private sector has come to understand and what government agencies still largely do not understand is that the Internet can be a valuable communications infrastructure for dispute resolution processes. All forms of dispute resolution revolve around communication and information processing. For the Internet to be adapted to serve the needs of dispute resolution is no different conceptually from adapting the Internet to serve the needs of any other information intensive process, such as online banking, online auctions, online education, etc. Indeed, banks, credit bureaus and other online entities, in addition to eBay, often provide links on their home pages to dispute resolution solutions.

22 <www.justice.gov/adr/EO12988.pdf>.

Efficiency and convenience are the most immediately apparent benefits of ODR. The standard mediation process consists of a series of interactive steps in which mediators work to build trust, identify interests, list issues, brainstorm options, evaluate proposals and draft agreements. Software can be employed to allow some of these tasks to be completed at a distance, thus reducing travel costs and allowing participation whenever convenient. There has, however, been no inter-agency collaboration in identifying or sharing software for some of the stages in mediation. There is, therefore, a critical need for research that can make dispute resolution interactions between citizens and agencies more convenient, outlines some best practices in the use of such applications, and indicates how their use might be evaluated.

Increasing efficiency and convenience for citizens and agencies in interacting with each other can provide immediate and, in many cases, measurable benefits. Software aimed at these goals often replaces a discrete communication task that previously required a physical meeting. For example, the National Mediation Board now conducts some grievance arbitration sessions online, using web video and audio in conjunction with a screen sharing application that allows participants and arbitrators in separate locations to see and hear each other, and share the same documents they would share if the session were held face-to-face. The panel of arbitrators will soon be able to use a single text editing application to create and approve final arbitration awards without ever having to meet in person throughout the entire hearing/award process.

The goal of improving the quality of outcomes or interactions between mediators and the parties is different in that it is the intelligence and information processing capabilities of computers connected to the network that will generally provide solutions. Software, for example, can help guide parties to be more creative and flexible by experimenting with simulations and other tools. Other software will have the goal of helping parties identify results that are more beneficial to each side than a simple compromise would be. Software can possess sufficient intelligence either to interact directly with the parties or to provide new tools to mediators who are interacting with the parties.

The likely impact of expanded use of technology in dispute resolution, if it follows the experience of the introduction of ICT in other contexts, is that new ideas will surface about options that were never before possible. Currently, for example, the mediation process generates information about the conflict and the parties that is used by the mediator to help fashion an agreement. The general practice, at that point, in order to satisfy promises of confidentiality, is to destroy all the information except whether the dispute has been resolved successfully. This is a loss of valuable information and something that is not necessary if technology can separate and preserve data about the conflict from data about

the parties. Put another way, an ICT framework can capture data about patterns of cases without interfering with promises of confidentiality in individual cases and, for some agencies, this can provide guidance about how to use resources in new ways.

One of us has been assisting the US Office of Government Information Services (OGIS), a new agency established in 2009 to mediate Freedom of Information Act disputes. There were over 600,000 FOIA requests filed in 2008 and the expectation was that OGIS would have a very large caseload and need an ODR system to respond to them. It is still too early to reach definitive conclusions but large numbers of disputes have not yet surfaced. The reason for this appears to be that many disputes can be anticipated and prevented by providing better information and more efficient communications channels for requesters to learn what is happening with their request. In other words, a technology-based communications framework can provide more frequent updates and feedback for requesters and reduce the number of complaints that result more from anger and frustration than from disagreement over a decision.

When new online technology is created for any process, the initial impulse is to create online mirror images of the "live" or offline process. After a period of adjustment, creativity and process evolution begin to take place, and things that were not possible without online technology begin to become part of the normal way of doing business. To a great extent, development of ODR tools, for government and for all ADR venues, has been focused on enhancing old ADR methods and bringing efficiency to them through the use of technology. The ongoing discussion about the role of ODR within the larger ADR community is one that generates lively discussion among ADR students and practitioners. There is a continuing debate about whether ADR (*alternative* dispute resolution) is the right name for the field at all, given the fact that by far the majority of disputes are handled by the "alternative" and not by the "normal" channel litigation. There is also a lively discussion about whether ODR technology is now so embedded in the ADR world that there should be no distinction between technology-assisted dispute resolution and non-technology-assisted dispute resolution – it is all ADR, but some of it uses technology.

Regardless of the position one takes in the ADR/ODR discussions, it is important to recognize that the very existence of online tools to enhance government transparency, access by citizens to government policy debates, delivery of government services, and redress of citizen grievances, is going to transform the traditional roles and responsibilities of government agencies. Eventually, ODR technology may change the very nature of government and government dispute resolution, but until then, technology has a very solid place in the present, delivering services and resolving disputes within government agencies, disputes

between government agencies and citizens, and disputes among private sector organizations seeking government resolution assistance.

13 ODR and Justice

An Evaluation of Online Dispute Resolution's Interplay with Traditional Theories of Justice

Ruha Devanesan and Jeffrey Aresty

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.
Martin Luther King, Jr. Letter from a Birmingham Jail (1963)

1 Introduction

In the offline world, the economics and politics of one country can impact and influence those of surrounding countries, as well as countries across the world. Revolutions in Egypt and Libya by individuals frustrated at their governments' domestic policies, for example, drive up the price of gas for a farmer living in Kansas who may never have heard of either Egypt nor Libya, let alone the plight of their citizens.[1] In the online world, this concept is all the more salient because online relationships obey political and geographic boundaries even less than offline interactions. While language barriers and computer literacy can often affect access to online interactions, people are now, more than ever, connected globally through the internet and other Information and Communication Technologies (ICTs).[2]

The ever increasing hyper-connectivity of the online world demands a new system of "rules of interaction" to ensure that people not only treat one another fairly in the online setting, but that they will continue to have faith in and interact within that world.[3] In this chapter,

1 CNN Money, *Oil Surges 6% as Libya Tension Intensifies*. By Ben Rooney, 21 February 2011. Available at <http://money.cnn.com/2011/02/21/markets/oil_world_markets/index.htm?iid=EL>.

2 Secretary Clinton put this point very eloquently in her speech on Internet Freedoms, see H.R. Clinton, *Internet Rights And Wrongs: Choices & Challenges In a Networked World*. Speech delivered at George Washington University, 15 February 2011:"The Internet has become the public space of the 21st century, the world's town square, classroom, marketplace, coffee house, and nightclub. We all shape and are shaped by what happens there. All two billion of us and counting."

3 See *id.*: "To maintain an Internet that delivers the greatest possible benefits to the world, we need to have a serious conversation about the principles that guide us. What rules exist and should not exist and why; what behaviors should be encouraged and discouraged, and how. The goal is not to tell people how to use the Internet, any more than we ought to tell people how to use any public space, whether it's Tahrir Square or Times Square. The value of these spaces derives from the variety of activities people can pursue in them, from holding a rally to selling their wares to having a private conversation. These spaces provide an open

we analyze the interaction between traditional concepts of justice and fields in which Online Dispute Resolution (ODR) has flourished and is burgeoning. We then explore the ways in which justice as traditionally conceptualized is adapting to the digital environment, and ask the question: Are traditional notions of justice relevant to contemporary online interactions between individuals, businesses, and governments?

2 JUSTICE

To understand the impact that ODR has on justice, one must first understand what justice means. This is no simple task as there are many different philosophical conceptions of justice. Most conceptions of justice incorporate "action in accordance with the requirements of some law."[4] Whether these rules are grounded in religious, political or cultural norms, they exist to ensure fair treatment of all members of society. A scholar of conflict resolution at the University of Colorado, Boulder, describes the complex interplaying factors of justice as such:

> Issues of justice arise in several different spheres and play a significant role in causing, perpetuating, and addressing conflict. Just institutions tend to instill a sense of stability, well-being, and satisfaction among members of society, while perceived injustices can lead to dissatisfaction, rebellion, or revolution. Each of the different spheres expresses the principles of justice and fairness in its own way, resulting in different types and concepts of justice: distributive, procedural, retributive, and restorative. These types of justice have important implications for socio-economic, political, civil, and criminal justice at both the national and international level.[5]

The author also identifies certain general goals of justice that are generally accepted by most scholars and implementers of justice, mainly: that justice ensures that people receive their "fair share" of goods and services available, that people receive "fair treatment from society's institutions, that people's actions conform to rules of "fair play", and that any injustices are adequately addressed.[6] *How* each of these goals is reached (*i.e. how* to fairly

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platform and so does the Internet. It does not serve any particular agenda, and it never should. But if people around the world are going to come together every day online and have a safe and productive experience, we need a shared vision to guide us."

4 M. Maiese, "Types of Justice", in Guy Burgess and Heidi Burgess (eds.), *Beyond Intractability*, Conflict Research Consortium, University of Colorado, Boulder. Posted: July 2003. <www.beyondintractability.org/essay/types_of_justice>.

5 *Id.*

6 *Id.*

distribute goods, *how* to ensure that injustices are adequately addressed) remains a question open to interpretation, controversy and debate by justice scholars.

Our aims are therefore two-fold: firstly to outline briefly the relevant Justice vocabulary and theories in order to familiarize readers with the framework through which we, the authors, are evaluating systems (the "hows" referred to above) and then to evaluate whether existing ODR systems are capable of ensuring that people receive their "fair share" of goods and services available, that people receive "fair treatment from society's institutions", that people's actions conform to rules of "fair play", and that "any injustices are adequately addressed."

2.1 Categories and Definitions of Justice

In this section, we shall describe several major categories of Justice: Justice as Freedom; Distributive Justice; Procedural Justice; Retributive Justice; Restorative Justice and finally Transformative Justice. As ODR is largely a way of resolving disputes using age-old methods such as negotiation, mediation, arbitration or conventional litigation, but with new tools, we shall focus largely on the way the new tools, or new *procedures*, introduced by ODR change *procedural justice*. The other major categories of justice shall be discussed in lesser detail, although they too are influenced by new technologies in dispute resolution. These occur, however, mainly through procedural differences between ODR and offline methods of dispute resolution.

2.1.1 Justice as Freedom

Two of the most fundamental concepts that come to mind when we think of justice are *fairness* and *freedom*. One generally thinks of fairness as action that takes into account the rights, property and safety of one's fellows.[7] Freedom is seen as the right of an individual to do (or not to do) whatever one would like. When discussed in the context of individuals' relationship to governments, freedom is called *liberty*. This right is often classified in two categories – *positive liberty* and *negative liberty*.[8]

Positive liberty is the ability or opportunity of an individual to do things. In society, positive liberty may refer to an individual's economic opportunities (*e.g.* to undertake whatever job he or she is qualified for; to earn a salary equal to his or her output; to use his or her

7 N. Rescher, *Distributive Justice*, Washington, D.C., University Press of America, Inc., 1982, p. 5.

8 This particular nomenclature of classification was first conceived by Isaiah Berlin in his book, *Two Concepts of Liberty*, which resulted from a lecture Berlin gave at Oxford University in 1958. The two concepts of which he speaks, however, we conceived long before him by John Stuart Mill. Mill explored these concepts in his book, *On Liberty* (originally published in 1959).

salary to purchase whatever he or she wants) or to political opportunities (*e.g.* to speak, gather or agitate with others on whatever social issue, in whatever location and at whatever time one wishes).[9] Purely theoretical positive liberty is therefore an individual's ability to undertake any action he or she desires, regardless of race, gender, age or any other social or political status.

Negative liberty is an individual's freedom from the interference of others in his or her ability to do or be things.[10] A lack of political freedom in this sense would mean that an individual is prevented from attaining a political goal because of the actions of other individuals (or government). A lack of economic freedom in this sense would mean an individual is unable to do something because he or she is prevented from undertaking the action because of poverty or a lack of financial resources to do so. As Isaiah Berlin, one of the leading scholars on the theory of liberty, points out, "if a man is too poor to afford something on which there is no legal ban – a loaf of bread, a journey round the world, recourse to the law courts – he is as little free to have it as he would be if it were forbidden him by Law".[11] Negative liberty is therefore freedom from tyranny and arbitrary actions by government that would take away an individual's rights (both political and economic) to do what he or she would otherwise be able to do, as well as freedom from levels of poverty that would prevent a person from accessing basic necessities of living.

In the real world, *positive* and *negative* freedoms are never present in their total forms for any individual. An individual's freedom to act within society is often curtailed insofar as it infringes on other individuals' freedoms, because to allow one individual to exercise absolute freedom in all actions might cause interference in others' freedoms. Governments must often impose restrictions on individuals' liberties to ensure that the liberties of the strong (*i.e.* the richer, the more politically influential) do not suppress the liberties of the weak (*i.e.* the poorer, and those lower in social rank).[12]

The balance of freedom against other concerns such as equal distribution of wealth, social order, security and the protection of the minority (to name a few) is an essential function

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9 See I. Berlin (edited by Nigel Warburton), *Two Concepts of Liberty* in *Arguments for Freedom*, Open University 1999, pp. 155-165. Berlin frames this category with a question: "What, or who, is the source of control or interference, that can determine someone to do, or be, one thing rather than another?" See Berlin, p. 155.

10 See *id.*, pp. 155-165. Berlin frames this second category with the question: "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?" See Berlin (1999), p. 155.

11 *Id.* at p. 156.

12 *Id.* at p. 157: "Because they [governments] perceived that human purposes and activities do not automatically harmonize with one another; and, because (whatever their official doctrines) they put high value on other goals, such as justice, or happiness, or culture, or security, or varying degrees of equality, they were prepared to curtail freedom in the interests of other values and, indeed, of freedom itself."

of society as a whole, whether that society is governed by a higher authoritative entity (*i.e.* a central government) or is self-policing and self-governing (*e.g.* open-source programming groups on the internet).[13]

One way in which individual freedoms may be preserved *within* the process of their curtailment by society for the preservation of the freedoms of others and other societal goals is through the establishment of *due process mechanisms.* Due process within the realm of legal discussion refers to the rules of procedure governing how substantive laws are administered in a judicial system. Procedural justice also applies to the ways in which society and governments provide individuals with a predictable, transparent and reasonable process through which society or government goes about activities that curtail individuals' rights. For example, rules of eminent domain (also called *compulsory action* or *expropriation*)[14] and adequate compensation require in most countries that should a government need to take over an individual's land for the sake of a public use, the government must follow a set of pre-determined rules on notification, negotiation, payment of a fair price to the owner of property and, should the owner refuse to allow purchase of their property, rules on court action to resolve the issue. Such rules of procedure ensure that even if an individual's rights are infringed upon by society, the infringement is neither arbitrary nor tyrannical as justification of the acquisition must be made by the government in a court of law, and the property owner has some recourse in court against the government if he or she feels unjustly treated.

Another way in philosophers and scholars of justice have justified curtailing individual freedoms over the last two centuries is through *social contract theory.* Jean-Jacques Rousseau, a seminal philosopher whose theories gave birth to both the French and American Revolutions, eloquently described the relationship between liberty and social contract as follows:

> What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses. If we are to avoid mistake in weighing one against the other, we must clearly distinguish natural liberty, which is bounded only by the strength of the individual, from civil liberty, which is limited by the general will; and possession, which is merely the effect

13 See generally O. Brafman & R.A. Beckstrom, *The Starfish and the Spider: The Unstoppable Power of Leaderless Organizations*, Penguin 2008.

14 Eminent domain is the term used in the United States, whereas compulsory action and expropriation are used in other countries such as the UK, Australia and India to describe the same government action.

> of force or the right of the first occupier, from property, which can be founded only on a positive title.[15]

The relationship between individuals and society (*i.e.*, a group of individuals that operate together) in terms of liberty is therefore a relationship of mutual benefit, according to social contract theorists. Individuals surrender some of their innate natural rights (positive liberties) to society in exchange for an understanding that society at large will help protect them against arbitrary or unfair infringements by others (*i.e.* will provide them with negative liberties).[16]

Justice may therefore be seen as one side of a coin, and liberty the other, when discussing *fairness* in society's relation to individuals. When people give up their liberties and freedoms for the sake of society at large, they seek to have society compensate them with justice[17] in return.

2.1.2 Distributive Justice – Fair Outcomes

Distributive justice theory parses out how and why "wealth, duties and rights, powers and opportunities, offices and honors",[18] to name a few things individuals seek from society, are distributed to individuals within society.[19]

Egalitarianism is one of several major distributive justice theories, and is based on the concept of equality, *i.e.* that every person receives an equal share. Egalitarian justice can be seen as equality of original positions, equality of opportunity, equal proportions of goods and equal rights.[20] Equality of opportunity, equal portions of goods and equal rights therefore often require redistribution by society at large, or by government, as they do not naturally occur without outside interference.

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15 J.J. Rousseau, *On The Social Contracti*, New York, Dover Publications, Inc. 2003, p. 12

16 *Id.*, p. 15: "The common element in these different interests is what forms the social tie; and, were there no point of agreement between them all, no society could exist. It is solely on the basis of this common interest that every society should be governed".

17 *I.e.* their "fair share" of goods and services available, "fair treatment from society's institutions", guarantees that people's actions conform to rules of "fair play", and guarantees that "any injustices are adequately addressed". See Maiese (2003).

18 M. Sandel, *Justice: What's the Right Thing to Do?*, New York, Farrar, Straus, and Giroux 2009.

19 J. Rawls, *A Theory of Justice*, Harvard University Press 1999, p. 4

20 J. Konow, "Which is the Fairest of Them All: A Positive Analysis of Justice Theories", *Journal of Economic Literature*, (2003) Vol. XLI, pp. 1188-1239, 1194.

A second major theory of distributive justice is utilitarianism. Utilitarianism, sometimes referred to as "the greatest happiness principle",[21] is a theory of distributive justice that argues for the greatest amount of good for the greatest number of people.

The difficulties with egalitarianism and utilitarianism are often cited as such: both favor the overall good for the population but do not cater to the individual's sense of justice. Both doctrines sacrifice the right of the individual to choose what his or her idea of a fair outcome is, and instead condone the decision by a higher power (society in general, governments or governing bodies in particular) for the greater good. Another problematic aspect of utilitarian and most egalitarian theories is that measurement of justice is often done through simplistic measurements of wealth (when measuring access to resources) or of policy and laws (when measuring access to rights), which excludes the complex interrelation of other factors that lead to these indicators.

One contemporary justice theorist who offers a more holistic approach to measuring justice is Amartya Sen.[22] Sen, who was awarded the Nobel Prize in 1998 for his work in welfare economics and social choice theory, posits that measurement of justice (and its converse, injustice) must take into account all the factors that lead to a certain outcome. His approach, which is shared by other theorists such as Martha Nussbaum, is called the "Capabilities Approach" to social justice.[23] According to this approach, justice is not just about fair outcomes but about the capabilities of individuals within a social system to achieve their political, social and economic goals and satisfy their needs. The factors contributing to a just outcome consist, for example, of an individual's standing in society (gender, race, age and social class are factors contributing to social standing), an individual's health, education (or access to education), ability to move freely from place to place, ability to freely engage in political activities, ability to hold property and seek employment freely, etc.[24] Sen and Nussbaum argue that in order to really understand just outcomes and the steps necessary to achieve them, we must first understand injustice and the multi-various factors that lead to it in societies. The path to achieving justice, according to Sen, involves governmental and societal focus on individual's freedoms (both positive and negative), with an emphasis on providing individuals with enough of the basic needs (food, shelter, health and education) to be able to make their own individual choices as to other freedoms and opportunities.[25]

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21 This term comes from Jeremy Bentham, one of the first and most influential philosophers on Utilitarianism.

22 See generally, A. Sen, *Development as Freedom*, Anchor Books 1999.

23 *Id.*

24 These are just a few factors listed by Martha Nussbaum, Sen's co-creator of the Capabilities Approach, in her book, see M.C. Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice", *Feminist Economics*, (2003) 9 (2/3), pp. 33-59.

25 See, generally, A. Sen, *The Idea of Justice*, Belknap Press of Harvard University Press 2009; Sen (1999).

2.1.3 Procedural Justice – Fair Processes

Distributive justice concerns how "wealth, duties and rights, powers and opportunities, offices and honors",[26] and other things individuals desire from society, are distributed, and to whom. It therefore deals with *fair outcomes.* Procedural justice concerns fairness in the *process* (rather than the outcome) by which things are distributed or decisions are made. Procedural justice in the legal context is the way in which decisions are made on legal issues before courts of law or other decision-making bodies.

There are many characterizations and categorizations of procedural justice, but for the purposes of this analysis, we shall use a three part model of procedural justice posited by Lawrence Solum, a professor of legal philosophy at the University of Illinois and an internationally renowned philosophy of law expert.[27] Solum divides views and approaches to procedural justice into three models: the *accuracy model*, the *participation model*, and the *balancing model.*[28]

The Accuracy approach to procedural justice requires "the correct application of the law to the facts".[29] Those that approach procedural justice from the accuracy perspective therefore see a set of decision-making rules within government or courts as successful only if those rules ensure that an outcome of a proceeding is the same as that called for by the substantive law upon which decisions are made. This approach requires a consistency of decisions, the neutrality of the decision-maker, transparency in the process of decision-making, correctability of incorrect decisions (*i.e.* an appeals process allowing for correction of errors at lower levels of decision-making hierarchy), and strong discovery and evidence procedures (as these contribute to a better ability to make a decision based on applying substantive law to the facts of the case).

The primary aim of those approaching procedural justice from an accuracy approach is therefore that the correct outcome, based on substantive laws, is reached. This approach

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26 Sandel (2009).

27 Professor Solum's biography may be found at <https://www.law.illinois.edu/faculty/profile/LawrenceSolum>, last accessed 19 March 2011.

28 L.B. Solum, "Procedural Justice", (23 February 2004). *U San Diego Law & Econ Research Paper* No. 04-02; *U San Diego Public Law Research Paper* No. 04-02, p. 111. Available at SSRN: <http://ssrn.com/abstract=508282 or doi:10.2139/ssrn.508282>.

29 *Id.* at p. 55, citing P. Johnston, "Civil Justice Reform: Juggling Between Politics And Perfection", (1994) 62 *Fordham L. Rev.* 833, n. 1 ("I will use the term 'procedural justice' broadly to suggest an assessment of the quality or success of procedural law in providing dispute-resolution participants what we think they are due.").

can be said to fall within the *positive liberties* field of justice, as it prioritizes the accurate determination of each party's legal rights over all other concerns.[30]

The Participation approach to procedural justice focuses primarily on the ability of all interested stakeholders to have a voice in the decision-making process concerning that issue. This model therefore encompasses several procedural requirements, such as notice,[31] opportunity to be heard,[32] fair representation of absent parties,[33] fair value of procedural justice,[34] and the ability to appeal. While the accuracy approach focuses primarily on an accurate outcome of a proceeding, based on substantive law, the participation model prioritizes the ability of all interested parties to be heard in a proceeding. These approaches overlap in some aspects, *e.g.* the right to appeal, but diverge on others. For example, while proponents of the *accuracy approach* might favor the expenditure of limited time and resources in a court proceeding on the collection and review of non-testimonial evidence over testimony (especially if this is called for in the applicable substantive law), proponents of the *participation principle* would argue for all persons who would be subject to a final binding adjudication or who otherwise have a substantial interest in the case to be able to testify if they desired.

The Balancing approach ensures a balance between the accuracy of a substantive outcome with practical concerns like the costs of adjudication, requirements of fairness, participation, and so on. In real-world decision-making proceedings, procedural justice is achieved by balancing cost (in monetary and temporal terms) against accuracy. A legal system operating purely on accuracy or participatory concerns would allow re-litigation of issues in courts until the parties are satisfied with the outcome. However, in most dispute resolution systems, the resources of courts are preserved using legal procedural doctrines and principles, such a *res judicata*, which arguably preserve access to justice for a larger population, but at the expense of the satisfaction of individual litigants as to their particular cases.

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30 Solum (2004), p. 56. Available at SSRN <http://ssrn.com/abstract=508282 or doi:10.2139/ssrn.508282>, citing Robert G. Bone, "Statistical Adjudication: Rights, Justice, And Utility in a World of Process Scarcity", *Vand. L. Rev.*, (1993) 46, 561, 598:"A rights-based theory assumes that the purpose of adjudication is to determine each party's legal rights accurately. Because rights trump social utility, a deprivation of a right cannot be justified by direct appeal to the aggregate social benefits the offending activity makes possible. Thus, if an erroneous result counts as a deprivation of substantive right, procedures that increase error cannot be justified simply by citing the aggregate benefits to all resulting from reduced litigation and delay costs."

31 *I.e.* adequate and timely notice to all interested parties prior to resolution process commencement.

32 *I.e.* equal and meaningful opportunity to present evidence and arguments in the resolution process.

33 *I.e.* the ability for absent parties who are unable to attend hearings for impracticability or other reasons, to be represented fairly by present parties.

34 *I.e.* the right to free/affordable representation in suits for basic liberties.

2.1.4 Retributive Justice – Fair Redress of Harm

Retributive justice is, in general terms, fairness in the rectification of wrongs through punishment. There are several ways in which retributive justice can be implemented. One is *proportional-to-harm punishment*, whereby the wrongdoer is doled out punishment commensurate with the harm exacted on the victim. This is an ancient concept with some of the first recorded examples being the Code of Hamurabi[35] and Old Testament.[36] In contemporary conventional court systems, examples of this justice concept can be found in fines and prison terms whose policy rationales are based on harms done to the victim. Expectation and reliance damages in breach of contract theory also reflect this kind of retributive justice, where the victim of a contractual breach is rewarded damages proportional to the harm suffered.

A second approach to retributive justice is measuring punishment in terms *proportional to gains by the wrongdoer.* In US breach of contract theory, for example, *restitution damages* call for the wrongdoer to pay damages to the claimant in the amount of the wrongdoer's gain from the wrongful transaction.

A third approach is *punitive punishment*, where the policy justification for the punishment doled out to a wrongdoer is not to rectify wrong to the victim nor to deprive the wrongdoer of the gains from his/her wrongdoing, but to deter the wrongdoer and future wrongdoers from committing the same or similar offenses again. Examples of punitive punishment include the death penalty in criminal cases for certain crimes, and punitive damages in breach of contract theory, whereby the wrongdoer is required to pay considerably higher damages than what is necessary to compensate the victim for their loss or to match the amount gained by the wrongdoer.

2.1.5 Transformative and Restorative Justice – Addressing the Cause Behind the Wrong

An alternative to redressing harms by punishing wrongdoers, transformative and restorative justice both seek to achieve fairness by addressing the causes behind the crime or dispute and seeking relational and educational opportunities for victims *and* perpetra-

35 Babylonian codes of law, written circa 1700 BC under the rule of Hamurabi, the sixth king of Babylon.

36 Leviticus 24: 19-21: "If you break a bone, one of your bones shall be broken; if you put out an eye, one of your eyes shall be put out; if you knock out a tooth, one of your teeth shall be knocked out. Whatever injury you cause another person shall be done to you in return."

tors.[37] Transformative justice has been applied in the fields of ethnic conflict resolution[38] and in domestic criminal rehabilitation[39] in some states. In many ways, offline alternative dispute resolution methods incorporate similar ideas of justice to transformative and restorative justice. Negotiation and mediation methods often take parties beyond positions to the interests that lie behind positions. While the adversarial aspects of litigation tend to drive parties to stick to their positions uncompromisingly, most ADR methods encourage the cooperation of parties in finding a middle ground that satisfies all interested parties. As we discuss below, ODR may also provide similar advantages over courtroom civil and criminal proceedings in terms of redressing harms fairly.

2.2 *Conclusions*

The evolving online justice system will require all stakeholders in this new "digital society", whose members comes from all around the globe, to create a justice framework within which they must interact. This online justice system is, in a sense, a chance to redefine the way people interact with each other. One option is to attempt to overlay national justice frameworks on the online setting, which results in the potential for conflicts of laws, as has been seen in numerous areas from privacy to music. This approach is ineffective as it attempts to place geographic jurisdictional boundaries onto an emerging global digital society that is not geographically-bound.

A better approach, in our opinion, would be to create a new set of laws and procedures governing online interactions that take into account the nature of online interactions. In the words of John Rawls:

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37 See, generally, International Center for Transitional Justice, *What is Transitional Justice*, available at <www.ictj.org/en/tj>, last accessed 19 March 2011; Heather Strang & John Braithwaite (eds.), *Restorative Justice and Civil Society*, Cambridge University Press 2001; R. Morris, *Stories of Transformative Justice*, Canadian Scholars Press Inc. 2000; J. Shapland *et al.*, "Situating Restorative Justice Within Criminal Justice", *Theoretical Criminology*, Vol 10(4), pp. 505–532.

38 Two relatively successful African examples of its application are the Truth and Reconciliation Commission in South Africa and the Gacaca Courts Rwanda. To learn more about these, please visit <www.justice.gov.za/trc> (the official website of the South African TRC) and <www.inkiko-gacaca.gov.rw> (the official website of the Gacaca courts of Rwanda), last accessed 19 March 2011. In both instances, the approach taken in healing nations attempting to recover from decades of racial prejudice, human rights abuses, and even genocide, was to attempt to reconcile victims and perpetrators of crime through the processes of dialogue, public confession and forgiveness.

39 See J. Shapland *et al.*, "Situating Restorative Justice Within Criminal Justice", *Theoretical Criminology*, Vol. 10(4), pp. 505-532, for an accounting of three major restorative justice schemes in England and in Wales that included processes of apology, rehabilitation, reparation, healing, restoration, and reintegration into society.

> Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust.[40]

This is no easy task. We believe the creation of a new set of rules for online interactions will require not only extensive research and global consensus building on what differences exist between online society and offline society (research which is currently being undertaken by many eminent scholars),[41] but also the development of best practices in offline legal infrastructure that are best-suited to the online atmosphere *and* innovative legal research on new ways to structure the online legal system.[42] The field of ODR, as we shall detail below, began in the e-commercial sector as an innovative way of dealing with new kinds of human interactions. The growth and success of ODR in the e-commercial field, as well as in other fields such as e-government and e-diplomacy, will require continued innovation and willingness to experiment with new ways of bringing centuries-old ideas of justice from the offline world online. ODR has the potential to transfer existing justice delivery mechanisms to a new social order, but more importantly, it has the potential to *improve* justice delivery in many ways. We shall explore both potentials of this powerful legal tool in the following pages.

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40 J. Rawls, *A Theory of Justice*, Harvard University Press 1999, p. 11

41 To name just a few, see L. Lessig, *Code*, Basic Books 2006; Saul Levmore & Martha C. Nussbaum (eds.), *The Offensive Internet: Speech, Privacy and Reputation* 2010; E. Morozov, *The Net Delusion: The Dark Side of Internet Freedom*, PublicAffairs 2011); J. Goldsmith & T. Wu, *Who Controls the Internet?: Illusions of a Borderless World*, Oxford University Press 2006; H. Abelson *et al.*, *Blown to Bits: Your Life, Liberty and Happiness After the Digital Explosion*, Pearsons Education, Inc 2008; D. Tapscoott & A.D. Williams, *Wikinomics: How Mass Collaboration Changes Everything*, Penguin 2006.

42 Once again, John Rawls' evaluation of what needs to be done in order to achieve a stable and functional society is extremely relevant to the organization of online society. See Rawls (1999), pp. 5-6:"There are other fundamental social problems [besides the problem of agreeing on a conception of justice], in particular those of coordination, efficiency and stability. Thus the plans of individuals need to be fitted together so that their activities are compatible with one another and they can all be carried through without anyone's legitimate expectations being severely disappointed. Moreover, the execution of these plans should lead to the achievement of social ends in ways that are efficient and consistent with justice. And finally, the scheme of social cooperation must be stable: it must be more or less regularly complied with and its basic rules willingly acted upon; and when infractions occur, stabilizing forces should exist that prevent further violations and tend to restore the arrangement."

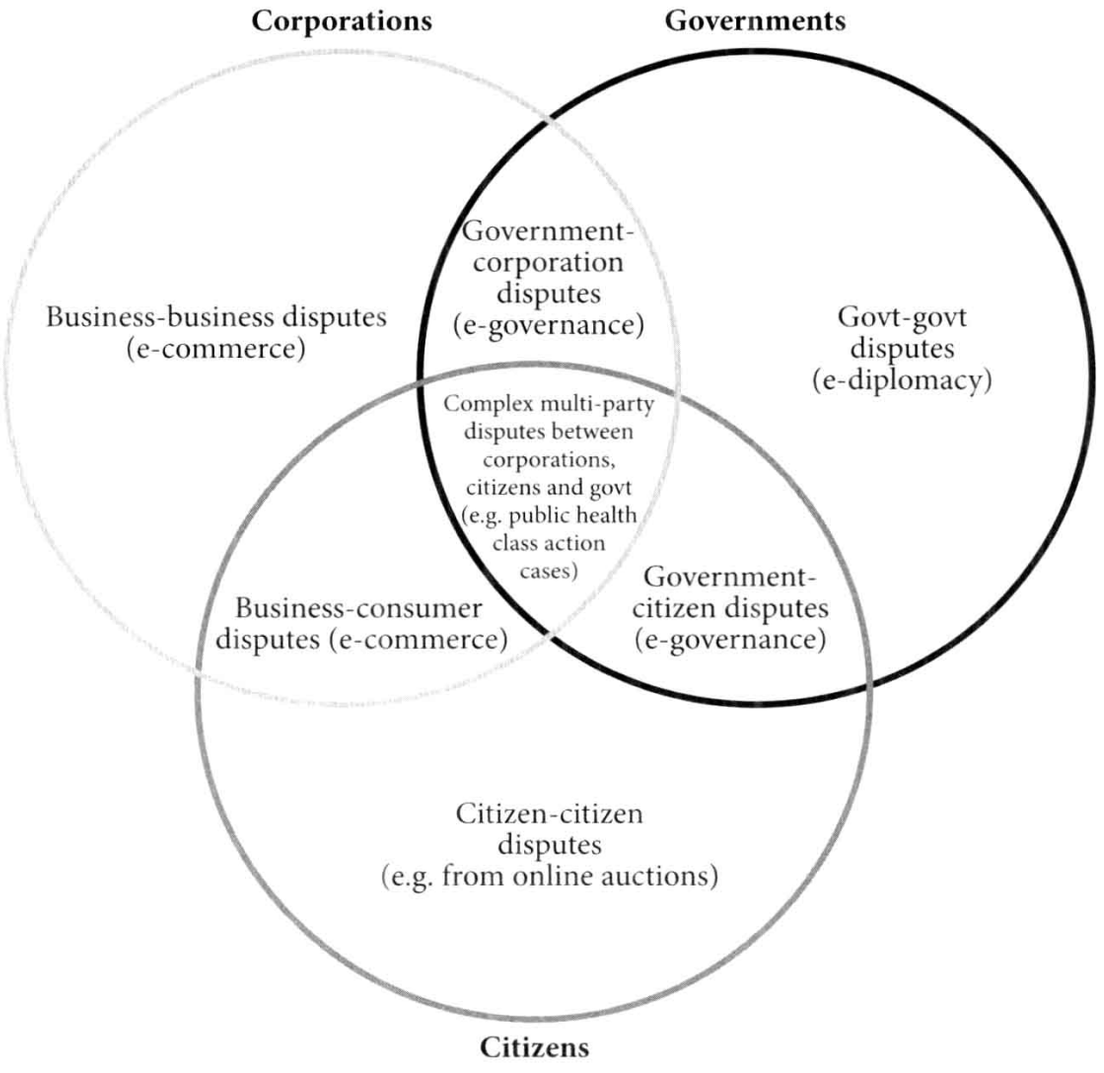
3 ODR AND JUSTICE

The potential field of Online Dispute Resolution (ODR) has seen extensive study and commentary.[43] Most discussion surrounding ODR focuses, however, on its application within the area of e-commerce, that is, commercial interactions between businesses and consumers in the online setting. E-commerce ODR covers dispute resolution in B2B, B2C and C2C situations (business-to-business, business-to-consumer and consumer-to-consumer, respectively). E-commercial ODR has also seen the most implementation and success, compared to ODR in other fields.[44] We shall therefore begin our discussion of the interaction between justice and ODR with a short overview of e-commercial ODR. The potentials for ODR extend, however, beyond e-commerce to the fields of e-governance and e-diplomacy, as other chapters in this book detail. Our analysis therefore turns next to these other potential areas for implementation. We shall end the chapter with a discussion of the potentials of the ODR field in comparison to conventional litigation and offline dispute resolution systems, especially for the next billions – those in developing nations soon to enter digital society.

43 For a list of articles and books on ODR (updated till 2006), please visit <http://odr.info/library.php>, last accessed 23 February 2011.

44 A. Ramasastry, "Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry", 79 *Wash. L. Rev.* 159 (2004), p. 160.

Figure 6 Overview of E-Commercial ODR



In most ODR discussions, the concepts of access to justice, fairness and efficiency emerge as the main advantages over conventional, offline litigation and ADR methods. In discussions of potential ODR drawbacks, again issues of fairness, due process and accessibility arise.[45] Aspirational principles appearing in statements by the commercial ODR community about best practices reflect similar concepts, and as Professor of Law, Anita Ramasastry

45 See generally, Ramasastry (2004); S. Schiavetta, *Online Dispute Resolution, E-Government and Overcoming the Digital Divide*, 20th British & Irish Law, Education and Technology Association Conference, April 2005, Queen's University of Belfast; M. Wahab, *Online Dispute Resolution and Digital Inclusion: Challenging the Global Digital Divide*; UNCTAD E-Commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-Commerce and Beyond*, available at <www.unctad.org/en/docs/ecdr2003ch7_en.pdf>, last accessed 10 February 2011.

points out, if the word "government" is substituted for "business", the principles would apply just as well to G2C ODR.[46]

Table 3 Justice Aspirations of ODR providers

Transparency	ODR programs should provide readily accessible information about all aspects of their services.
Independence	ODR programs should operate independently of business interests.
Impartiality	ODR programs should operate without bias favoring business interests.
Effectiveness	There should be mechanisms to ensure business compliance with ODR outcomes.
Fairness and Integrity	ODR programs should observe due process standards ensuring, that each party to a dispute has equal opportunity to express its point of view.
Accessibility	ODR programs should facilitate easy use by consumers.
Flexibility	ODR programs should permit adaptation of their procedures to suit the circumstances of the particular dispute at hand; recourse to courts by consumers should not be precluded unless by prior and equitable agreement.
Affordability	ODR programs should be affordable for citizens or consumers, particularly in light of the amount of compensation being sought.

Ramasastry emphasizes the hope that many place in ODR, citing major potential improvements to the justice system: "The thought of resolving a dispute between parties in different corners of the globe using personal computers and an Internet connection is appealing... The fact that one might be able to sit at a computer in one's pajamas and have a contract dispute mediated with an Internet merchant sounds quite attractive."[47] She also explains that ODR offers parties similar potential advantages over litigation to offline ADR methods (*e.g.* negotiation, mediation and arbitration) of greater efficiency, greater party control, and lower costs, and in fact *increases* these advantages compared to conventional ADR.[48] If ADR improves access to dispute resolution by making it quicker, cheaper and easier for parties to control, then ODR makes the resolution of disputes *even* quicker, cheaper and easy to conduct, with or without third-party help.

46 The text in this table was taken from Ramasastry (2004), p. 173; see also Pablo Cortes, *Building Legal Standards in the EU for ODR Services*, 2009 International Workshop onADR/ODRs, UOC, Barcelona. The text of this table reflects general consensus amongst many ODR providers and policy makers. The European Commission's recommendations on the handling of out-of-court disputes online, for example, reflect many of these criteria for ODR. See 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (Text with EEA relevance), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998H0257:EN:NOT>.

47 Ramasastry (2004).

48 *Id.*

The earliest applications of ODR occurred within the realm of the earliest Internet activity – interactions between Internet Service Providers and their subscribers, and between domain name owners.[49] The Virtual Magistrate[50] and the Online Ombuds Office[51] were the earliest ODR projects created to resolve online disputes using online tools. Both these websites offered online access to mediators for parties to a dispute, and the ability to resolve the dispute through the submission of information via email.[52]

As online communications technologies have advanced, so has the sophistication of ODR mechanisms, and yet the aspects of *procedural justice* (*i.e.* the fair process of administering justice) and *retributive justice* (*i.e.* the fair redress of harm) detailed in Table 3 are reflective of the age-old societal expectations of conventional judicial systems we have detailed in the first half of this chapter. This is because the fundamental expectation we, as individuals, have of the societies we participate in do not change drastically, even if the new societies in which we engage (*e.g.* digital societies) are in many ways revolutionary and ground-breaking. How ODR systems measure up to these familiar expectations of transparency, accessibility, flexibility and affordability is therefore explored below. We have added three additional categories to those detailed in Table 3, to reflect the complete justice analysis we have outlined in this chapter. The three additional categories are: freedom, distributive justice, and transformative justice, all of which constitute staples of mainstream conceptions of justice, and which should therefore be used as evaluative benchmarks for the ability of ODR to deliver justice in a digital society.

3.1 *Transparency – ODR Programs Should Provide Readily Accessible Information About All Aspects of Their Services*

As ODR is a relatively new form of dispute resolution in comparison to conventional courtroom and ADR methods, an important aspect of accessibility of this mechanism is transparency – the ready availability of information about this kind of dispute resolution, and its associated processes, costs and advantages over the more traditional forms of dispute resolution. This kind of information is also necessary for first-time litigants in a court of law, who may be in need of guidance through the steps of the process, and courts of law

49 UNCTAD E-Commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-Commerce and Beyond*, available at <www.unctad.org/en/docs/ecdr2003ch7_en.pdf >, last accessed 10 February 2011, p. 181.

50 Virtual Magistrate, available at <www.vmag.org>.

51 The Online Ombuds Office was a project of the University of Massachusetts National Center for Technology and Dispute Resolution. See <www.ombuds.org/center/ombuds.html>.

52 See UNCTAD E-commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-commerce and Beyond*, p. 183.

often provide step-by-step guides and instructions, both in-person and online.[53] In terms of transparency, we believe much can be done to improve existing ODR platforms. Most ODR service providers in existence today give very minimal information to end-users about the steps and procedures involved in resolving a dispute through their systems until, perhaps, the end user has signed up to use their services. While this is most probably a result of desires to protect proprietary information as to system design from competitors, what this lack of transparency does is alienate potential users who may already be wary of using a new and alternative dispute resolution mechanism to those they are used to, *i.e.* the courts and conventional offline ADR services.

It is, for instance, surprisingly difficult to glean much concrete information about the *process* of ODR from ODR providers which, as briefly mentioned above in this chapter, is the most significant difference between ODR and offline ADR methods. The processes of ODR can change with different ODR providers, as each utilizes a different combination of computer-assisted and human-assisted processes to arrive at a resolution for parties.[54] Most information on the history, kinds of ODR and instances of application is available not on ODR websites but in articles, books and reports on the industry. While there is information available about the field, therefore, it appears to be available only to industry insiders and academics, and not to the general public.

It could be argued that transparency of ODR processes is not a necessary element of the system that a disputant does not care what technological steps are taken between the registering of a dispute and its resolution, as long as the resolution is agreeable to the disputant. The reality, however, is that a disputant's sense of fairness in a given dispute resolution is dependent on both the outcome and the process of dispute resolution. They may not want to know what kinds of algorithms work to produce recommended outcomes, but, in order to trust that an outcome is fair to them, disputants desire some knowledge on who is deciding the outcome of their dispute, what and how much information this mediator is evaluating (whether it be a person reviewing the case electronically or a computer program), and whether the decision process is uniform and predictable.

ODR, like ADR, is not a public process, but a private one. Therefore case histories and decisions are often not published. This makes the process more opaque than conventional litigation and disputants may feel due process is compromised because they do not know who is deciding their case, or how the person or entity is making their decision (based on

53 See, *e.g.*, Massachusetts Superior Court Department, *Self Help Center for the Massachusetts Court System*, available at <www.mass.gov/courts/selfhelp/index.html>, last accessed 20 May 2011.

54 See UNCTAD E-commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-commerce and Beyond.*

past decisions). While this aspect of ODR may never change, more transparency regarding the decision-making process would, in our opinion, greatly improve public uptake of ODR and therefore improve access to a system that offers many advantages over conventional courts and offline ADR mechanisms.[55]

3.2 *Independence and Impartiality – ODR Programs Should Operate Independently of Business and Government Interests and Should Operate Without Bias Favoring Those Interests*

In order for participants in a dispute resolution mechanism to trust that the outcome is fair, the mechanism must be perceived as impartial and independent of all participating disputants. ODR holds the potential to be much more independent and impartial than conventional courtroom proceedings, as the online mediator is operating remotely, could remain anonymous to the parties, and is never in the same room as disputants, whereas in offline proceedings, proximity of the mediator/judge provides opportunity for influence and bias. A further strength of ODR over offline dispute resolution may be that the mediator, if it is a person, is not chosen by disputants, whereas in offline ADR, mediators and arbitrators are usually agreed-upon by the parties to the dispute. Finally, in cases where ODR is completely technology-mediated (*e.g.* Cybersettle),[56] there is no person to be influenced, and the proceedings are therefore most likely to be impartial. In cases such as this, technology can be used as a separate tool to bring the parties to consensus, with or without a mediator.[57]

Often, however, especially in the case of e-commercial disputes between businesses and consumers (B2C) and governmental-to-citizen dispute resolution processes (G2C), the ODR process is subsidized by the larger entity (the business or government) in order to make the mechanism accessible and affordable to the consumer/citizen. Professor Ramasastry explores in great detail the funding problems of ODR systems in her article on Government-to-Citizen ODR, stating, "generally, the problem with using ODR relates

55 eBay's *Resolution Center* is an exception to the general lack of transparency and information provided by ODR services regarding the ODR process. Within its Customer Support section, eBay guides potential disputants through step-by-step instructions on resolving potential disputes on their own or contacting the Resolution Center for help. A series of "Help" sections also guide users through the stages of dispute resolution. See, generally, eBay Resolution Center, available at <http://resolutioncenter.ebay.com>.

56 UNCTAD E-commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-commerce and Beyond*, p. 187

57 See E. Katsh and A. Gaitenby, *Introduction to Proceedings of the UNECE Forum on ODR 2003*. Available at <www.odr.info/unece2003>: "What will occur over time will be the development of software that takes advantage of machines to compute as well as communicate, to model and monitor, to lay out options and also evaluate options, to provide data necessary for decisions and also to represent data visually so that it can be understood and employed in new ways."

to the economics of ODR".[58] She explains that, especially in cases in which ODR is especially effective (high-volume and low-cost e-commercial disputes), consumers have little incentive to pay the fee for an ODR service if this fee is almost equivalent to or greater than the value of the dispute. Businesses are, however, incentivized to pay this fee, even if individual disputes are over low values, as the resolution of high volumes of small disputes efficiently and quickly saves businesses money in the long run.[59] A similar argument can be made for government's incentive to subsidize G-2-C dispute resolution.[60] The problem with this model, as Thomas Schultz points out in an essay on the role of government in ODR, is that

> If one party pays exclusively or much more than the other party for a dispute resolution, a real or at least a perceived bias inevitably appeals. It is a form of business affiliation that should be avoided, because it lessens trust, and maybe also the quality of justice.[61]

While this may be a concern of some users, the tradeoff between a risk of partiality from a largely computerized, remote and automated dispute resolution mechanism may be outweighed in end-users' minds by the ability to access a resolution of small disputes that is quick, easy and efficient compared to offline litigation or ADR.

3.3 *Effectiveness – There Should Be Mechanisms to Ensure Compliance with ODR Outcomes*

The enforceability of ODR outcomes is crucial to a sense of retributive fairness for participants in the process. This speaks to one of the fundamental aspects of justice that we mentioned at the beginning of the chapter: the requirement that injustices are adequately addressed. To engage with a system in hopes of redressing one's harms, proceed through all necessary steps, receive a conclusive decision with which one is satisfied, and then to have that decision go un-enforced would severely undermine confidence, trust and repeated engagement with the system. The fact that ODR is, like negotiation and mediation in offline ADR services, completely voluntary, means that compliance with ODR decisions is based

58 Ramasastry (2004), pp. 162-167.

59 Instead of paying ODR service fees per transaction, businesses and government have the option of arranging membership fees with ODR providers, which constitute a unilateral fee payment for their services. *Id.*, at p. 165.

60 *Id.*, pp. 162-167.

61 T. Schultz, *An Essay on the Role of Government for ODR, Theoretical Considerations About the Future of ODR*. ADROnline Monthly, August 2003, p. 7. Available at <www.odr.info/unece2003/pdf/Schultz.pdf>.

on the parties voluntarily agreeing to terms of service with ODR providers that give them the power to enforce their decisions within the framework of a specific online community.

Therefore, one of the main issues facing the organizers of an online justice system is how to enforce decisions that are rendered in an ODR environment outside of the community in which the decisions have been rendered. In one sense, by way of comparison, arbitral decisions in the offline world that have cross-border implications also face a hurdle in the enforcement setting. To enforce cross-border decisions, one has to resort to the use of international treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[62] which applies only to States that have adopted the Convention.[63] Clearly, the legal costs associated with the use of an international treaty will limit its utility to high value cases. When dealing with high-volume, low-value disputes (which constitute the most successful application of ODR methods so far),[64] it may not be worth taking an un-complied-with ODR decision to a conventional court system for resolution. While low-value losses may be less harmful to users (both businesses and consumers), a lack of enforcement of resolutions with such disputes, especially because the volume of these kinds of disputes tend to be high, damages the trust and reputation of the ODR system at hand and the e-commercial or e-government system at large.

Examples of online service systems which use their terms of service to enforce ODR decisions within their service platforms are eBay and ICANN. eBay uses PayPal, an electronic payment system, for all transactions occurring on its site and can freeze funds and unilaterally transfer them in accordance with a dispute resolution decision, thereby unilaterally enforcing the decision.[65] Similarly, ICANN, the Internet Corporation for Assigned Names and Numbers, manages all domain name registration and transfers, and, once a dispute

62 SeeConvention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York" Convention) 1958. The text of the convention is available at <http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html>, accessed 21 March 2011.

63 See New York Convention, Article III: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

64 eBay's ODR mechanism is by far the most successful implementation of ODR. This is because, in instances of low-value and high-volume commercial disputes (as is typical of disputes arising out of sales on eBay), users would much rather resolve their disputes quickly and online, within the platform on which the dispute arose, than deal with small-claims court or arbitration to resolve their disputes. See C. Rule, V. Rogers & L. Del Duca, *Designing a Global ODR System for Cross-Border Small Value - High Volume Claims - OAS Developments*, UNCITRAL 2010.

65 *Id.*, p. 7.

between domain name owners and claimants is resolved, can unilaterally change domain name registrations, thereby ensuring effective and quick enforcement.[66]

Because of the current lack of an overarching extrajudicial enforcement mechanism, ODR providers have largely been left to find their own innovative ways to compel the parties using their systems to accept and comply with decisions. Groups that have developed successful online marketplaces such as eBay and PayPal, have understood the need to develop trusting environments to encourage people to use them, and made similar choices as the UDRP by requiring new users to accept terms of service mandating the use of ODR to resolve disputes. Strong incentives are also put in place to create seller feedback mechanisms in addition to the availability of ODR, which makes buyers more comfortable to make their purchases.[67] Compliance with ODR decisions has also been enforced, to a certain degree, by the threat of expulsion from the community within which the non-conforming disputant's harmful behavior was perpetrated.[68]

For disputes relating to goods and service transactions that occur offline, and especially for those occurring in a cross-border setting, enforcement is more difficult, as ODR decisions either must be enforced by domestic judiciaries, or new extrajudicial enforcement mechanism (such as those used by eBay and ICANN) must be invented. Significant steps have already been taken by UNCITRAL to do this by convening States worldwide in an effort to develop Model Rules for high-volume low-value cross border e-commerce.[69] In developing such a system, the foundational idea is that ODR decisions can be enforced in a judicial setting across borders similar to the way that the New York Convention allows judicial enforcement of arbitral decisions. However, enforcement mechanisms for ODR

66 The UDRP domain name system is one of the most successful examples of this. When someone acquires a domain name, there is a global enforcement mechanism built into the process. This has a great deal to do with the fact that when the domain name system was created, it was built with an ultimate off/on switch that was kept in place as the demand for domain names proliferated worldwide. Even though the resolution process for domain name disputes was decentralized geographically, the ultimate enforcement power was kept in this on-off switch environment. The parties acquiring domain names had acquiesced to this process by accepting it through compulsion when they accepted terms of service at the outset; see *id.*

67 On eBay, for example, sellers receive ratings from buyers completed transactions, which eBay posts on each new item sold by sellers. This is a quick and easy way for buyers to select amongst multiple sellers selling the same or similar products, the one with the most positive ratings from previous buyers. This mechanism, in addition to the availability of an easy-to-understand ODR mechanism (eBay offers both "Buyer Protection" and "Seller Protection" which include an ODR mechanism in a suite of tools to help buyers and sellers feel safe in transacting online), helps build trust and confidence in a system, based entirely on extrajudicial enforcement of resolution, should something go wrong with transactions. See eBay website at <www.ebay.com>.

68 See E. Katsh *et al.*, *E-commerce, E-disputes and E-dispute Resolution: In the Shadow of "eBay Law"*, available at <www.umass.edu/cyber/katsh.pdf>.

69 See Pace Law School Institute of International Commercial Law, *UNCITRAL Assigns ODR to a Working Group*, available at <www.cisg.law.pace.edu/cisg/ODR/working_group.html>.

decisions should and most likely will eventually capitalize on the increasing digitization of financial transactions, court proceedings and government records for enforcement. As governments around the world increasingly build their e-government capacities, the enforcement of decisions via ODR could seamlessly occur by communicating decisions directly to relevant government sectors, and updating records to reflect decisions. Similarly, as corporations and citizens increasingly conduct financial transactions online, the use of charge-back mechanisms such as those used by credit card companies and PayPal will make enforcement of ODR decisions easier to realize.[70]

3.4 *Flexibility – ODR Programs Should Permit Adaptation of Their Procedures to Suit the Circumstances of the Particular Dispute at Hand; Recourse to Courts by Consumers Should not Be Precluded Unless by Prior and Equitable Agreement*

One disadvantage of conventional court systems is that there is little flexibility in the procedures used to handle cases arising in different contexts. While courts are divided somewhat into subject-matter-specific jurisdictions (*e.g.* family courts, small-claims courts, criminal courts), the procedures for resolving disputes through the formal system remain very similar, and can be a drain on the resources of those that desire quick and inexpensive settlement of their disputes. When dealing with cross-border disputes, which arise ever more frequently in the online setting between citizens of different countries (or different states within a country), the use of conventional courts is even more of a burden, as at least one party must travel to the jurisdiction of the other to adjudicate the claim. Alternative dispute resolution mechanisms such as negotiation, mediation and arbitration offer disputants flexibility in the settlement of their disputes, and disputants often select which resolution mechanism works best for them based on their relationship with each other, the issue at dispute, the value at dispute (if it is a monetary dispute) and their locations. Therefore, negotiation is common between small parties to disputes of small amounts because it is quickest and cheapest. Mediation is common in the family law context, where parties want their needs and interests heard and want flexibility in selection of outcomes. Arbitration is common in maritime law, where parties are often large shipping and vessel-

70 See PayPal, *Understanding Chargebacks*, available at <https://www.paypal.com/cgi-bin/webscr?cmd=xpt/seller/ChargebackRisk-outside>: A chargeback occurs when a buyer asks their credit card company to remove a charge from their credit card statement. The credit card company will ask the buyer to provide an explanation about why they are disputing the charge.
Two common reasons for reversals or chargebacks are:
- A buyer's credit card number is stolen and used fraudulently
- A buyer makes a purchase, but believes that the seller failed to fulfill their side of the agreement (*e.g.* did not ship the item, shipped an item that was very different from the seller's description, or the item was damaged when the buyer received it).

owning companies, dealing with multi-million-dollar damages, and seeking court-like proceedings that can occur between parties that are often not from the same national jurisdiction.

As Pablo Cortes outlines in his article on building legal standards for ODR in the European Union,[71] there are several kinds of ODR possibilities reflecting several levels of dispute, contextual factors and willingness and desire of disputants to come to a resolution, just as detailed above regarding the offline ADR context. Disputes resolvable by ODR range from B2B, B2C, C2C, G2C and G2C, as detailed in Figure 6. In addition, there are differences in ability and willingness to settle disputes online between parties whose disputes arose over online transactions (*e.g.* in e-commerce) and those that arose offline (*e.g.* a parking ticket, based on which a citizen seeks to resolve the issue with his or her government online). Additional factors are the size and perceived power balance between the two parties to the dispute, and the amount or value of the thing in dispute – for example, a consumer going up against a large corporation over a large-value claim may be uncomfortable with the use of an automated bidding system to resolve the dispute and may seek a more formal adjudication of the dispute in order to feel a greater sense of control over the process. Finally, the digital divide between developed communities and less-developed ones may mean that certain kinds of ODR are not accessible to local populations in certain areas.

Cortes lays out the various ODR possibilities which, like offline ADR, offer far more flexibility for users than conventional courts would, and indeed offer greater flexibility than offline ADR because operating online reduces geographical restrictions on dispute resolution and also eliminates the need for resolution processes to be synchronous – dispute resolution processes may take place in steps, as parties and mediators interact asynchronously on an online platform.[72] Just like offline ADR methods accommodate various needs of disputants, the variety of ODR methods available today accommodate and can be tailored to the disputes at hand:

> [A]utomated negotiation, *e.g.* CyberSettle, can be very useful in settling economic disputes. Assisted negotiation and online mediation, *e.g.* SquareTrade, eBay and PayPal, have been successful targeting large numbers of similar disputes with highly automated ODR models that recognize patterns from com-

71 Cortes (2009).

72 For a good description of the possibilities of asynchronous ODR, see C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, John Wiley and Sons 2002, p. 47.

> parable disputes matching them with proposed resolutions....[73] Consensual processes, such as online mediation and online negotiation, avoid conflicts of laws, where parties can focus on their respective interests, rather than what rights they have under the law. The main constraint of these consensual processes is that requires all parties to be motivated in resolving their disputes.... Online arbitration has major advantages: it is custom-tailored to the dispute at hand, it is conclusive and it can replace the jurisdiction of the courts. Online arbitration may also be non-binding or appealable. A clear example is the success of the UDRP providers that derives from three aspects: (i) it deals only with blatant disputes, which are abusive registrations of domain names made in bad faith in order to take advantage of the reputation of existing trademarks; (ii) its referral is included through a mandatory contractual clause; (iii) it has incorporated a self-enforcement mechanism, even though its decisions are non-binding if the dispute is brought to court.[74]

It therefore appears that ODR providers have made flexibility and responsiveness to business and consumer needs a priority in shaping their software and platforms. One area in which flexibility is lacking, however, is ODR's applicability to mobile platforms to cater to greater populations, especially in developing countries, that do not have access to personal computers and therefore would find it very difficult to engage with such systems online. As mentioned above in our section on *accessibility*, mobile phone use is much more ubiquitous than computer use in the developing world and, with the advent of smartphones and tablets such as the iPad, it is feasible that developing world consumers may leapfrog to use of these devices for most or all of their digital interactions instead of investing in the more expensive alternative of personal computers.[75] The use of mobile devices and tablets instead of personal computers to check email, surf the web and even conduct e-commerce is becoming increasingly popular not only in the developing world but in developed countries as well.[76] Developing mobile and tablet-friendly apps (applications) is therefore crucial to the success of ODR providers in maintaining their appeal to users as a flexible and therefore more accessible option for dispute resolution.

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73 See PayPal's Buyer and Seller's Dispute Resolutions page <http://pages.ebay.com/services/buyandsell/disputeres.html> and <www.paypal.com/cgi-bin/webscr?cmd=xpt/cps/general/PPDisputeResolution-outside>.

74 Cortes (2009), p. 3.

75 See, generally, UNCTAD *Information and Economy Report 2010: ICT, Enterprises and Poverty Alleviation*, available at <http://r0.unctad.org/ecommerce>.

76 See, *e.g. NY Times*, "It's a Mobile Nation as Cellphones and Tablets Take Hold", 10 October 2010, available at <http://bits.blogs.nytimes.com/2010/10/18/its-a-mobile-nation-as-cellphones-and-tablets-take-hold/>, citing Pew Research Center's Internet & American Life Project, available at <www.pewinternet.org/topics/Mobile.aspx>.

ODR platforms should also be flexible in the genre of conflict they can be used to resolve. While e-commercial conflicts are the main kinds of conflicts ODR systems are designed around, citizen-to-government, inter-government and ethnic conflict resolution are all potentially powerful applications of ODR tools and techniques.[77] As of yet, there do not appear to be any ODR platforms designed specifically for ethnic conflict resolution, but several ODR experts, including the authors of this chapter, have been conducting research[78] on the possible adaptation of existing ODR technologies to conflict- and post-conflict countries such as Afghanistan, where ODR tools may be used to help settle civil disputes that perpetuate the state of insecurity in Afghanistan and often lead to violent resolution of conflict because of a lack of other effective recourses.[79] M-jirga is an example of one such research project.[80] The objectives of M-jirga, which began in late 2009, were to create a mediation tool accessible to Afghans by mobile phone. A disputant would be able to call in with an issue, get assigned to a panel of trained Afghan mediators operating remotely, and the other disputant would be contacted for input. Both sides to the dispute would be able to record their case narratives and listen to the narratives of the other side. The panel of mediators (taking the role of Jirga elders) would be convened by phone, listen to all evidence, and then share their opinion with disputants.[81] The development of such flexible approaches to dispute resolution outside of e-commerce and outside of the internet- and computer-based arenas will take creativity and patience, as adoption of new dispute resolutions does not occur overnight. The outcome of the M-Jirga project, for example, appears to be that many think it is a good idea, but few are willing to invest significant resources in piloting such a project. The authors of this chapter, through our organization, the Internet Bar Organization, are currently designing a supporting project to M-Jirga that would use radio platforms to educate the Afghan population, through dramatic narratives, about rule of law issues, and acclimate people to the idea of resolving their issues using technology (calling in to a radio show, for example, is a step towards calling into a mediation

77 For discussion of the potential applications of ODR to ethnic conflict resolution, for example, see S. Hattotuwa, *Mediation from the Palm of Your Hand: Forging the Next Generation ODR Systems.* Available at sites <www.google.com/site/sanjanah/ODR_mobiles.pdf >; see also, Sanjana Hattotuwa, *10 Ideas for Microsoft Humanitarian Systems Group*, InfoShare January 2006, p. 17.

78 M-jirga is a project initiated by Colin Rule, Chittu Nagarajan, Jin Ho Verdonschot, Sanjana Hattotuwa, Jeff Aresty and Daniel Rainey. These ODR experts from varying backgrounds ranging from commercial ODR to commercial and governmental mediation, to ethnic conflict mediators, created a plan to bring ODR services to Afghans via a mobile platform. To learn more about M-Jirga, see C. Rule, "PayPal presentation", *The Mobile Phone Jirga: Supporting Rule of Law in Afghanistan with Online Dispute Resolution*, Available at <www.slideshare.net/crule/the-mjirga supporting-rule-of-law-in-afghanistan-with-odr/>.

79 For a comprehensive review of Afghanistan's judicial problems, see International Crisis Group, *Reforming Afghanistan's Broken Judiciary.* Asia Report N°195 – 17 November 2010.

80 See Colin Rule, PayPal presentation.

81 *Id.*

panel).[82] The radio show would also be a way to collect data on the various complex dispute resolution mechanisms employed across the country, the comfort levels of Afghans with different mechanisms, and so on. This, in turn, would do a great deal in helping customize and tailor an M-Jirga platform to the needs of Afghans.[83]

The payoff of experimenting with new and creative ways of applying ODR outside of e-commerce and outside of developed nations is, in our opinion, well-worth the effort, as there is great potential for growth in technology-assisted dispute resolution in e-government, e-diplomacy and ethnic conflict resolution, and for the improved access to justice that these would provide.[84]

3.5 *Fairness and Integrity – ODR Programs Should Observe Due Process Standards, Ensuring that Each Party to a Dispute Has Equal Opportunity to Express Its Point of View*

The principles expressed by ODR providers on fairness and integrity mirror exactly the principles outlined above in terms of *procedural justice*.[85] Parties' equal opportunity to express their points of view, for example, reflect traditional participatory justice concepts. Integrity of ODR outcomes reflects a desire for *accuracy* of outcomes, a concept we explored above in our section on participatory justice theories.

Because ODR comes in many shapes and sizes, each ODR system has its own benefits and drawbacks when it comes to due process concerns. For example, the major appeal of ODR mechanisms that offer a simple platform for negotiation between parties is that resolutions are quicker and cheaper. While these platforms may vastly improve access to justice for those who would otherwise be unable to resolve small-value issues, they often do not involve any discovery or evidence gathering, consistency or predictability of decisions (as parties come to their own resolution) are not readily apparent, and absent parties may not be fairly represented. On the other hand, more complex multi-stakeholder and multi-issue ODR mechanisms, such as Smartsettle,[86] allow for more robust discovery procedures, and allow multiple parties to participate in the procedures, thereby giving all interested parties the opportunity to be heard. Viewing ODR procedures through a *balancing approach*, it

82 IBO's Internet Silk Road Initiative is currently in its project design and fundraising phase. We hope to pilot it, with grant funding, in the summer or fall of 2011.

83 To learn more about the Internet Bar Organization's Afghan project, please visit <http://internetbar.org/internet-silk-road-initiative>.

84 We shall discuss some of these possibilities further in the sections below.

85 See our section on *Procedural Justice*, earlier in this chapter.

86 See Smartsettle's website at <www.smartsettle.com/products>.

is clear that as formality and availability of due process elements (such as evidentiary robustness and opportunity for multiple parties to be heard) increase, so too do negative factors such as cost and time involved in the process.

In determining whether to accept ODR as a legitimate alternative to conventional offline litigation, governments will make "demands that e-ADR systems meet basic procedural guarantees, such as independence and impartiality, due notice, transparency, and reasonable time and cost".[87]

While some kinds of ODR – those that fall within the more formal and sophisticated part of the ODR continuum – certainly incorporate tools to ensure independence and impartiality of mediators, due notice, and reasonable time and cost (for the amount of work put in by all involved), transparency is likely to always be lower in ODR (as it is in ADR) than in conventional brick and mortar court systems as these are private, not public, processes, and disputants often want their cases and resolutions kept private.[88]

In terms of the ability to appeal decisions (another important due process consideration), ODR mechanisms may not have appeals processes built-in to their system, but the key consideration is that ODR is not the end of the road but the beginning. It is an opportunity to settle things quickly and cheaply. If a disputant is not satisfied with the outcome, they can turn to conventional courts to settle the matter.

The balancing between *accessibility* and quick resolution of one's dispute against due process concerns such as transparency, correctability and consistency of decision is therefore an important process. The availability of multiple options for disputants to choose from is the best solution, and ODR's multiple platforms, ranging from simple negotiation-based platforms to very complex arbitration-like systems holds the potential to offer users the correct fit. Whether all these platforms are accessible to disputants is the next issue we turn to, and one of the most crucial aspects of this chapter. Without accessibility to ODR's tools for a wide range of individuals, not just those engaged in e-commerce and limited e-government initiatives, the vast potentials for ODR to transform the justice field will go untapped.

87 Schiavetta (2005), p. 6.

88 Ramasastry (2004), p. 166.

3.6 *Accessibility – ODR Programs Should Facilitate Easy Use by Consumers*

Accessibility of ODR programs is closely related to their flexibility in catering to users and consumers coming from different technological, socio-economic and cultural backgrounds, as well as in catering to differing kinds of conflicts.

ODR has taken off in the e-commerce context, for example, because it requires both parties to be online and to agree to engage with each other in dispute resolution online. With e-commerce, many of the initial barriers to use of an online justice system are already overcome: those engaged in e-commerce are online, and have enough trust in ICTs to conduct business (and therefore invest their money) that they are likely to use ICTs to resolve disputes arising from that business interaction. Trying to adapt ODR to non-e-commercial spheres, *e.g.* traditional offline business, family law cases or political conflicts, is subject to several challenges:

- Getting people online (an e-literacy challenge);
- Getting people to trust the online forum;
- Getting people to abide by decisions made online, in the real world.

Trust in the system, respect and standing of the Neutral making the decision (whether this neutral be a computer software or a person/panel of persons) and accessibility of the adjudication interface are all critical prerequisites to uptake of ODR and access to ODR's advantages in justice-delivery. Without ease of access, ODR will not grow to supplement traditional justice mechanisms to its truest potential, however effective, cost-saving or otherwise superior it may be compared to other dispute resolution mechanisms.

ODR systems generally reduce cost and increase speed of dispute resolution, thereby increasing access to justice mechanisms for those who have access to a computer. Not all online environments use ODR, however. Social networks, such as Facebook, do not incorporate dispute resolution mechanisms into the back end of their services,[89] emphasizing the need for government oversight of their activities, such as monitoring their privacy practices.[90] Additionally, some commercial environments, such as Craigslist,[91] eschew any form of dispute resolution, letting the buyer know that they use their service at their own

89 Facebook's Terms of Service do contain a section covering Disputes, but this section refers any disputes arising between users and Facebook to conventional offline court resolution, and acts as an Indemnity clause against any other kind of dispute that might occur. See Facebook Terms of Service, available at <www.facebook.com/#!/terms.php>.

90 For Facebook's Privacy Policy, see <www.facebook.com/#!/policy.php>.

91 Craigslist is a very popular hub of online communities, listing free online classified advertisements – with sections devoted to jobs, housing, personals, furniture and discussion forums.

risk.[92] Therefore, while some online service providers dealing with millions of users have realized the need to address disputes arising out of their online interactions, others have neglected the issue, making disputants' only access to dispute resolution expensive, time-consuming and, for the most part, inaccessible offline court-based adjudication or arbitration, which often require end-users to travel to the State of the business' operation to adjudicate.

This essentially constitutes denial of access to procedural justice, in terms of participatory justice, as it renders dispute resolution too expensive and time-intensive for most end-users to consider using, unless they are forced to (*i.e.* they are the defendants in cases brought by these online businesses). Where online businesses are able to offer ODR services instead of referring end-users to arbitration or court proceedings in geographic locations only convenient to the businesses, both consumers and businesses are best served by offering these services to enhance the opportunity for consumers to be heard, and to reduce the costs of adjudication for all parties concerned (both of which improve procedural justice).[93]

Additionally, for the millions of individuals who do not have access to computers or are illiterate in the language of ODR systems (either computer-illiterate or speak and write a different language), the access benefits of online (*i.e.* computer-based) ODR do not ring true. Therefore some of ODR's truest potentials for access lie in expanding into mobile ODR, expanding language and translation capabilities, and, especially in the government context, have public-access booths or computer stations where people can resolve their issues online, either with government or with each other, instead of turning to paper-based systems.[94]

It is often seen as a particularly difficult task bringing ODR to developing countries, especially those currently suffering from a lack of rule of law and ineffective formal judicial systems. We take the stance that this may not necessarily be true. There are two real barriers to ODR uptake, regardless of where in the world disputants are asked to use these systems: the first is a technology barrier ("we are not used to using technology in this way to resolve

92 See Craigslist Terms of Use, Section 4 - *Third Party Content, Sites & Services*, available at <www.craigslist.org/about/terms.of.use>: "You agree that craigslist shall not be responsible or liable for any loss or damage of any sort incurred as the result of any such dealings. If there is a dispute between participants on this site, or between users and any third party, you understand and agree that craigslist is under no obligation to become involved."

93 See our section on *Procedural Justice*.

94 *Id.*, p. 170: "By expanding the methods by which citizens can have claims involving the government adjudicated through the use of ODR, one may ultimately expand access to justice by creating greater opportunities for citizens to interact with the state and to have their grievances resolved in a timely fashion."

disputes – we do not trust or understand technology") and the second is an alternative dispute resolution barrier ("we are not used to using alternatives to the court system to resolve our disputes – we do not trust these alternatives").

While the technology barrier is certainly the most difficult one to overcome in countries with low literacy and low computer-use (*e.g.* Afghanistan), the ADR barrier might indeed be one that is more relevant in developed countries, where people have a higher trust and dependence on conventional court systems (*e.g.* the countries of the EU) than in developing countries. Therefore, while the ADR barrier needs to be addressed in some contexts to build trust in alternative ways of resolving disputes, in others, people are accustomed to resolving their disputes without the courts, and there may be less of a mental and psychological block regarding ADR. Both ODR and informal or customary justice systems operate *outside* of the formal justice system. Both seek to resolve disputes without layers of bureaucracy that create ambiguity, time-delay, unpredictability, and unresponsiveness. Both also often operate to resolve disputes not in a zero-sum manner but in a way that both or all parties to the dispute come away with compromise.

In Afghanistan, for example, most rural Afghans do not turn to courts to resolve disputes, but trust traditional community courts, comprised of community elders, making decisions based on communal understandings of justice, equity and fairness.[95] When asked in a poll why they choose the informal over formal court systems, respondents said they chose Jirgas to resolve their problems because they were accessible (85% responded this), because they felt the Jirgas were fair and trustworthy (73% responded this), because they followed local norms and values (70%) and because they were effective at delivering justice (69%) and resolving cases promptly (66%).[96] These are many of the characteristics we have argued ODR displays in relation to traditional courts (efficiency, accessibility and promptness), and that ADR offers over litigation (reflecting disputants' norms and values). The areas in which ODR must struggle to win over populations in offline communities are, of course, ease of use, trustworthiness, fairness and effectiveness in delivering justice.

If ODR could be accessed via mobile phones, which are nearly ubiquitous in most developing countries,[97] and ODR platforms were designed to offer lower-literacy users high

95 For an in-depth research article on the Jirga and Shura systems of Afghanistan, see A. Wardak, *Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan.* [Unpublished research paper] University of Glamorgan, UK. See also J. Dempsey, *Traditional Dispute Resolution and Stability in Afghanistan*, USIP Peacebrief 10, 16 February 2010

96 Asia Foundation: *Afghanistan in 2010.*

97 Mobile phone access in Afghanistan lies somewhere between 50 and 60%, for example, whereas internet access languishes at 12%. See *Telecoms Network: Afghanistan Telecommunications Profile.* Available at <www.telecomsnetworks.com/regions/africa-middle-east/afghanistan>, last accessed 23 March 2011.

visual, oral and aural interactivity, for example, the technological and literacy barrier to ODR uptake could be reduced. Similarly, while most web-based interaction takes place in English, language flexibility in both web-based and mobile-based ODR platforms would do a great deal in improving access to ODR by a much greater variety of users for whom English is not a native language.

Finally, transparency about ODR processes is something that is currently lacking in mainstream consciousness. Greater clarity and understanding about how ODR works, in laymen's terms, would help improve access and uptake of the technology. Focus on the similarity between ODR and dispute resolution mechanisms that populations are already accustomed to and comfortable with would help build trust and affinity with ODR as a tool. Similarly, explanations detailing how and why ODR is quicker, cheaper and more effective in resolving some disputes than courts, will help attract more users to the system. Finally, affordability, which we address in the following section, is absolutely key to access and uptake, especially by customers in e-commerce or citizens engaged in disputes with their governments, whose disputes are not over values large enough to warrant court-based or even ODR that cost more than the value of their disputes (which average, according to one source, at USD 100 per dispute).[98]

3.7 *Affordability – ODR Programs Should Be Affordable for Citizens or Consumers, Particularly in Light of the Amount of Compensation Being Sought*

ODR systems offer a much cheaper alternative to court-based dispute resolution and even offline ADR providers, because they reduces or eliminates costs of travel, lawyers' fees (as some ODR providers guide users through a series of steps in resolving the dispute themselves, thereby eliminating the need for counsel), costs of meeting rooms and court document filing fees. The main costs associated with providing ODR services are those of the technology (this cost occurs mostly at the front-end of an ODR provider's existence, for software development) and the costs of mediators and staff required to run the platforms. Because ODR platforms can offer a much more light-weight legal framework, costs of dispute resolution can be drastically reduced.[99] eBay's ODR system, for example, offers two options to disputants for resolving their disputes, one of which is free (a web-based

98 See Rule, Rogers & Del Duca (2010).

99 The cost-effectiveness of the ODR platform in comparison to offline ADR or courtroom dispute resolution may decrease when comparing cyber-courts and online adjudicatory bodies with offline processes, because here we deal with more complex platforms, needing more staff and mediator involvement, therefore driving prices up. Nevertheless, the elimination of travel expenses and physical meeting space expenses can still significantly reduce cost of dispute resolution.

forum which allows users to attempt to resolve their differences on their own).[100] The paid option costs the end-user USD15, which buys a mediator to guide disputants through the negotiation process. eBay covers the remainder of the cost.[101]

As we mentioned in our section 3.2 on *Independence and Impartiality*, businesses dealing in high-volume and low-value disputes find it in their interest to subsidize dispute resolution processes with customers, and, in the same vein, customers are not likely to pay much to resolve a dispute with a business over a small value. The arrangement eBay employs may therefore be the most effective not only for businesses dealing with high-volume and small-value disputes, but also for governments dealing with high volumes of small infractions. Running court bureaucracies to handle high volumes of, for example, traffic and parking violations, is very costly to governments and siphons resources away from more complex cases that require the courts' attention. Subsidies from businesses and governments may therefore benefit both these entities and citizens/consumers by providing an alternative dispute resolution mechanism that is more affordable for all and provides greater access to justice overall.

As mentioned in section 3.4 on *Flexibility*, the creation of mobile-based ODR systems could reduce the cost barrier for citizens and consumers even further, especially in the developing world. Development of apps that translate web-based functionalities to mobile-based formats is a thriving industry today,[102] and the recent release of HTML5, which allows for much richer multimedia content design and easier cross-over between web-and mobile-based platforms, have made the coding of sophisticated and robust mobile-based ODR platforms feasible and affordable for ODR companies.[103]

3.8 *Freedom – ODR Programs Should Improve Liberties of Individuals Engaged in Online Society*

The Internet is seen by many as a beacon of freedom – of speech, culture and consumption. It has broken down geographical barriers and allowed people to communicate with, transact with and argue with their counterparts at the farthest corners of the world in a

100 See *eBay Dispute Resolution Overview*, available at <http://pages.ebay.com/services/buyandsell/disputeres.html>.

101 *Id.*

102 See GoMo News (Strategic Mobile News), *Mobile Web Application Development Platforms will Generate USD 2.6 billion by 2015*, 24 March 2011. Available at <www.gomonews.com/mobile-web-application-development-platforms-will-generate-2-6-billion-by-201>.

103 *Id.*

way that could never have been imagined fifty years ago.[104] Internet Freedom has also been held up as a force to promote human rights and democracy by Western governments such as the United States government and the European Parliament, and by international bodies, both from the global north and the global south. The World Summit on the Information Society (WSI), which brings together many nations and supranational organizations in a common goal to promote Information and Communication Technologies,[105] states in its founding charter, for example:

> We ... reaffirm our commitment to the provisions of Article 29 of the Universal Declaration of Human Rights, that everyone has duties to the community in which alone the free and full development of their personality is possible, and that, in the exercise of their rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. In this way, we shall promote an Information Society where human dignity is respected.[106]

The language used by the WSIS in its support of internet freedoms, limited only insofar as the limitations serve to protect the freedoms of others, is classic social contract theory applied to this new "society" formed online. We are today witnessing the effort by this new digital society to invent a framework within which individuals shall interact with each other. Rousseau noted in 1762 that the evolution of a social contract between the governed and the government is inherently based on the notion of reciprocal duties between individuals and the government. While it is agreed by many that there must be a new social

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104 Secretary of State Hilary Clinton addressed this phenomenon in her remarks on Internet Freedom on 15 February 2011: "Two billion people are now online, nearly a third of humankind. We hail from every corner of the world, live under every form of government, and subscribe to every system of beliefs. And increasingly, we are turning to the Internet to conduct important aspects of our lives." See Clinton (2011).

105 The organizers of the WSIS include: International Telecommunication Union, a specialized agency of the United Nations, which had the lead role in organizing the Summit. To assist ITU in its work, the UN Secretary-General appointed a High-level Summit Organization Committee (HLSO) comprising of Executive Heads of the FAO, IAEA, ICAO, ILO, IMO, ITU, UNCTAD, UNDP, UNEP, UNESCO, UNFPA, UNHCHR, UNHCR, UNIDO, UNU, UPU, WFP, WHO, WIPO, WMO, WTO, UN Regional Economic Commissions, and the World Bank. HLSOC also includes IADB, OECD, UNITAR and UNV as observers. A Bureau of the Preparatory Committee, composed of 17 Governments in the Geneva phase and of 32 Governments in the Tunis phase, representing the various regions of the UN System, guided the President of the PrepCom in the preparations of the Summit.

106 See *World Summit on the Information Society Geneva Declaration of Principles 2003*, Article 5. Document WSIS-03/GENEVA/DOC/4-E. Available at <www.itu.int/wsis/docs/geneva/official/dop.html>.

contract,[107] what kind of social contract will emerge in the digital age, and who will be responsible for its drafting, is a subject of a constant debate. Thomas Schultz's take on the government's role in regulating the "Internet is that we must keep government out of it, that government would kill the Internet through regulation... that self-regulation by private players could do without any form of regulation".[108] Yet, others, such as Jonathan Fried of the International Monetary Fund, make a good argument that governments underpin confidence and trust that laws will be just, fairly administered and enforced.[109] Fried has noted as between private actors, laws and administrative frameworks provide certainty to market participants that parties are who they say they are, that documents are authentic, and that contracts will be enforced. Further, as between private actors and government, governments provide the necessary oversight of the framework for policy implementation, which can be especially important internationally when the pace of economic, social and technological changes are rapid.[110]

ODR, in all its shapes and forms, offers one way online societies can regulate themselves – both by providing fair and effective redress mechanisms when individuals violate rules set out by online communities, and by providing deterrence to violations (*i.e.* a conflict prevention mechanism) by ensuring that violations will not go unpunished. It therefore ensures that users of the Internet can continue to interact more freely, and with greater trust, than they would be able to in an online society that is anarchic and open, and leaves them vulnerable to harmful attacks.

3.9 *Distributive Justice – ODR Programs Should Improve the Distribution of Resources Amongst Individuals Online*

The Internet and its accompanying tools have, over the last fifteen years, revolutionized the way people socialize, do business and organize their lives. This has led to an incredible new era of efficiency, communication and collaboration, for example through crowd-sourcing.[111] It is now not uncommon for entrepreneurs to start a small business from the comfort of their living rooms – to purchase the domain name of their website, learn about

107 See, *e.g.* Schultz (2003), p. 7; Notes from Fried presentation at the American Bar Association 2007 Spring Meeting, on *The Importance of Business Law to Economic Development;* World Summit on the Information Society Geneva Declaration of Principles 2003, Art. 5. Document WSIS-03/GENEVA/DOC/4-E.

108 *Id.*

109 Notes from Fried presentation at the American Bar Association 2007 Spring Meeting, on *The Importance of Business Law to Economic Development.*

110 *Id.*

111 Crowd-sourcing, a term coined by author and journalist, Jeff Howe, is a phenomenon that has, like the Internet, blossomed seemingly overnight. It refers to the outsourcing of a task traditionally handled by one or a defined group of workers to the general public through a call for input.

registering their trademarks with the US Patent and Trademark Office, purchase raw materials online, set up a virtual storefront, market and promote products with social networking sites, sell products to customers, field complaints through email or an online complaint form, and resolve issues, virtually all without leaving the couch. This sort of e-commerce is taking place not only in the US and Europe, but in countries like India, where, for example, *India Shop*, a virtual shopping mall, allows craftspeople to sell their wares online.[112] India Shop operates through e-marketers, who promote the goods on the Internet through chat-rooms and mailing lists. Upon receiving sales enquiries, they liaise with the handicraft makers and arrange for the delivery of goods to purchasers.[113] Enterprises such as this one have the potential to activate and engage hundreds of thousands of un- and underemployed individuals all around the world, as new markets open up to them through the internet.

In order to increase opportunities for all individuals around the world to access these technology tools, certain steps must be taken by national governments and others working in underserved communities. At a conference on Internet governance in Egypt in 2009, several experts called for an organized approach to building out infrastructure to support ICT uptake in areas where ICT use is low.[114] Recommendations included understanding that the next billions of Internet and mobile users will not come from developed nations but from "a sizable but less affluent population spread mainly in rural and semi-rural areas, economically not strong, young, with aspiring futures, maybe having limited exposure to Internet or computer or ICT applications".[115] It was also acknowledged that in order to increase Internet access, there needs to be both sufficient supply and effective demand. Increasing demand will have to involve education, awareness and incentives, on top of the necessary build-out of infrastructure (*e.g.* increased network coverage in rural areas) and governmental regulations.[116]

These recommendations have been made by many practitioners and scholars of ICT development around the world, and have been acknowledged on national and supra-

112 UNDP Asia-Pacific Development Information Programme (UNDP-APDIP), *Information and Communication Technologies for Poverty Alleviation/Development Strategies and ICTs Report* (2003), p. 5

113 *Id.*

114 *Internet Governance: Creating Opportunity for All* - The Fourth Internet Governance Forum, Sharm el Sheikh, Egypt, 15-18 November 2009 (Ed. William J. Drake). Available at <www.intgovforum.org/cms/images/2010/book/igf.sharm.book.final.pdf >, last accessed 19 March 2011.

115 K. Karnik, founder-director of ISRO's Development and Education Communicational Unit, speaking at the Fourth Internet Governance Forum. See *Internet Governance: Creating Opportunity for All* - The Fourth Internet Governance Forum 2009, p. 39.

116 P. Hellmonds, head of corporate social responsibility, Nokia Siemens Networks, speaking at the Fourth Internet Governance Forum. See *Internet Governance: Creating Opportunity for All* - The Fourth Internet Governance Forum 2009, p. 39.

national levels. Most countries have an ICT policy, which lays out and directs strategies to build information, communications and technology infrastructures for their societies. Supranational organizations such as the World Summit on the Information Society (WSIS),[117] the United Nations Conference on Trade and Development (UNCTAD),[118] the United Nations Commission on International Trade Law (UNCITRAL)[119] and the United Nations Educational, Scientific and Cultural Organization (UNESCO)[120] have held conferences, written reports and constructed ICT departments within their bureaucracies to analyze and implement best practices in building ICT infrastructure globally. The WSIS, for example, is a conglomeration of many nations and supranational organizations.[121] It promulgated a plan of action in 2003 to improve access to ICTs across the world. The organization views access to ICTs as a fundamental right, under the Universal Declaration of Human Rights,[122] declaring:

> "Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers."[123]

In Articles 8-10 of its Geneva Declaration of Principles, the WSIS lays out the general moral and philosophical approach taken by most governments and non-profits engaged in ICT infrastructure-building and education throughout the world, recognizing "that education, knowledge, information and communication are at the core of human progress,

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117 See World Summit on the Information Society website. Available at <www.itu.int/wsis/index.html>.

118 See UNCTAD, *Information and Communications Technologies for Development*. Available at <http://r0.unctad.org/ecommerce/>.

119 See UNCITRAL, *Electronic Commerce - What (More) Needs to Be Done in Asia?*, available at <www.uncitral.org/pdf/english/whats_new/11_2010/1123_9_FERNANDO.pdf>.

120 See UNESCO, *ICT in Education*, available at <www.unescobkk.org/education/ict>.

121 The organizers of the WSIS include: International Telecommunication Union, a specialized agency of the United Nations, which had the lead role in organizing the Summit. To assist ITU in its work, the UN Secretary-General appointed a High-level Summit Organization Committee (HLSOC) comprising of Executive Heads of the FAO, IAEA, ICAO, ILO, IMO, ITU, UNCTAD, UNDP, UNEP, UNESCO, UNFPA, UNHCHR, UNHCR, UNIDO, UNU, UPU, WFP, WHO, WIPO, WMO, WTO, UN Regional Economic Commissions, and the World Bank. HLSOC also includes IADB, OECD, UNITAR and UNV as observers. A Bureau of the Preparatory Committee, composed of 17 Governments in the Geneva phase and of 32 Governments in the Tunis phase, representing the various regions of the UN System, guided the President of the PrepCom in the preparations of the Summit.

122 The Universal Declaration of Human Rights, Article 19, states: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. See Universal Declaration of Human Rights Article 19, available at <www.un.org/en/documents/udhr/index.shtml>, last accessed 21 March 2011.

123 See World Summit on the Information Society Geneva Declaration of Principles 2003, Article 4. Document WSIS-03/GENEVA/DOC/4-E. Available at <www.itu.int/wsis/docs/geneva/official/dop.html>.

endeavor and well-being " and that ICTs have the capacity to "open new opportunities to higher levels of development",[124] and,"[u]nder favourable conditions, these technologies can be a powerful instrument, increasing productivity, generating economic growth, job creation and employability and improving the quality of life of all".[125] The digital divide that separates rich countries from poor and urban areas from rural was also addressed: "the benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies. We are fully committed to turning this digital divide into a digital opportunity for all, particularly for those who risk being left behind and being further marginalized."[126]

There are several justice concepts, outlined in the first half of this chapter, present in the words of the WSIS Declaration of Principles. First, a strong vein of egalitarian language runs through the Declaration, as it is put forth that, first, access to communications tools is a *fundamental right* for all people in the world.[127] The Declaration states, "Everyone, everywhere should have the opportunity to participate and no one should be excluded".[128] This statement, and Article 10 of the Declaration, speak to an egalitarian notion of the right to access ICTs, regardless of age, gender or geographic location, and acknowledge also that not everyone is operating from an equal starting point.[129] The WSIS's Plan of Action[130] to implement the general calls to action found in the Geneva Declaration, strongly reflects a *capabilities approach* to ensuring equal access to ICTs. Just like Amartya Sen's holistic approach to economic development, the WSIS' approach to ICT growth in underserved communities is a multi-faceted one, tackling cultural and linguistic diversity, respect for cultural identity, traditions and religions, support for local content development and digital archiving of indigenous knowledge.[131] The Plan of Action also includes several provisions aimed at protecting the positive and negative liberties of ICT users across the globe.[132] Therefore individuals' abilities to interact freely using ICTs are curbed only insofar as their actions infringe on the rights of others to use the Internet and other ICTs

124 *Id.*, Article 8.
125 *Id.*, Article 9.
126 *Id.*, Article 10.
127 *Id.*
128 *Id.*
129 See World Summit on the Information Society Geneva Declaration of Principles 2003, Article 10. Document WSIS-03/GENEVA/DOC/4-E: "the benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies."
130 See WSIS Geneva Plan of Action, 2003, available at <www.itu.int/wsis/docs/geneva/official/poa.html>.
131 *Id.*, Article C8, Paragraph 23(e).
132 *Id.*, Article C10, Paragraph 25 (c): All actors in the Information Society should promote the common good, protect privacy and personal data and take appropriate actions and preventive measures, as determined by law, against abusive uses of ICTs such as illegal and other acts motivated by racism, racial discrimination, xenophobia, and related intolerance, hatred, violence, all forms of child abuse, including pedophilia and child pornography, and trafficking in, and exploitation of, human beings.

freely. There is much aspirational language that calls for use of these tools in a positive way.[133] This language hints at a view by those setting policies at the highest levels on ICT use and engagement that the digital spaces into which we are entering require a new social contract.

Despite the generally positive aspirations and overwhelmingly egalitarian and development-focused rhetoric of those setting policies on ICT proliferation, the reality of ICT use is understandably more complicated. Along with the immense potential for good, in the form of increased productivity, increased positive interactions between people (through online social networking, for example) and increased commercial potential through e-commerce and e-banking, the Internet holds an immense potential for unjust behavior.[134] Just as any new and powerful tool may be used for the benefit of humanity, this tool may also be used by those who choose to operate outside of the codes of conduct established by the community, to benefit themselves to the detriment of others in the community.

The euphoria over the Internet's potential is beginning to wear off and giving way to a more balanced evaluation of both its benefits and drawbacks. Evidence of the public's awakening to the Internet's opportunity for abuse was in full view on the cover of *Wired Magazine*, one of the most popular technology publications, with its February 2011 issue, "The Underworld Exposed: A Guided Tour of the Dark Side".[135] In the issue, the magazine explored everything from a tiny village in Romania called "Hackerville" for its incredible number of cybercriminals,[136] to the top applications ("apps") for cybercriminals and their prices (ranging from USD 7,000 for an app that helps hackers intercept banking transactions to the free app that takes websites offline with distributed denial-of-service attacks that the group Anonymous used to take Visa, PayPal and other anti-WikiLeaks companies offline in December 2010).[137] Another example of the awakening of media and academics to the dangers of the Internet is the widely-heralded new book from Belarusian-born journalist and social commentator, Evgeny Morozov, entitled *The Net Delusion: The Dark*

133 *E.g.* in the Tunisian meeting of the WSIS in 2005, the participants reaffirmed their "desire and commitment to build a people-centred, inclusive and development-oriented Information Society, premised on the purposes and principles of the Charter of the United Nations, international law and multilateralism, and respecting fully and upholding the Universal Declaration of Human Rights, so that people everywhere can create, access, utilize and share information and knowledge, to achieve their full potential and to attain the internationally agreed development goals and objectives, including the Millennium Development Goals." See Second Phase of the WSIS (16-18 November 2005, Tunis): Tunis Commitment. WSIS-05/TUNIS/DOC/7.

134 For more background on the potentials for harm in the Internet age, see Levmore & Nussbaum (2010); Morozov (2011); Goldsmith & Wu (2006).

135 *Wired Magazine*, February 2011.

136 N. Schachtman, "Criminal Code", *Wired Magazine*, February 2011, p. 24

137 Y. Bhattacharjee, "Why Does a Remote Town in Romania Have So Many Cybercriminals?", *Wired Magazine*, February 2011, p. 82

Side of Internet Freedom.[138] In this book, Morozov details instance after instance of governments, both authoritarian and professedly democratic, using the Internet to stifle public discussion, access to information and dissent against their governments.[139]

While policy frameworks and regulation on the front end are crucial to the curbing and prevention of such negative and harmful applications of ICT tools, a robust mechanism is needed on the back-end of online interactions, to ensure *fair redress of harms.* This mechanism is most likely to grow out of existing applications of ODR within e-commerce and, in a more limited manner, e-government. It is therefore important to evaluate the existing applications of ODR and its potential to grow to accommodate the multiplicity of harms and disputes that are likely to evolve online, as more and more individuals take up ICTs in their everyday interactions with one-another.

3.10 *Transformative Justice – Do ODR Programs Have the Potential to Transform Conflict Between Individuals and Their States?*

We conclude with a look at the potential for the use of ODR as a tool that can effect the transformation of justice online. In traditional justice theory, transformative justice implies a focus on reforming the perpetrator and bringing the victim and perpetrator, both, to a better place. It implies transforming conflict resolution from a win/lose game into a win/win game. ODR has the potential to take transformative justice online, by changing the way citizens work with each other and with their governments, and by ultimately reaching those who have the least access to justice in ways which change their expectations of how the legal world works.

The use of ODR in diplomacy is a useful example of the potentials of ODR for transforming justice. Diplomacy is, in simple definitional terms, the "art and practice of conducting negotiations between nations".[140] Multi-track Diplomacy is an expansion of this term in recent years to include a more holistic approach to state interaction, including official interactions between governments; unofficial interactions and interventions of non-state actors between nations; peace-building through non-governmental organizations' conflict-resolution work; peacemaking through cross-border business between countries; cultural exchange programs, research, training and education on global or cross-cultural issues; grassroots activism across national boundaries; use of religion in peacemaking; peacemaking through funding of community-based organizations from abroad and finally peace-

138 Morozov (2011).
139 *Id.*
140 Merriam Webster Dictionary, available at <www.merriam-webster.com/dictionary/diplomacy>.

building through communications and information dissemination.[141] This holistic approach to diplomacy reflects Amartya Sen's *Capabilities Approach* to distributive justice in its tackling of the *causes* behind conflict through multi-faceted approaches, and also reflects a strong *transformative justice* strain as multi-track diplomacy is about transforming conflict by resolving issues that led to it, instead of addressing only end-of-the-line manifestations of underlying discontent between nations and communities.

While ODR's potential role in conflict transformation has not received much attention in the decade since ODR's real take-off, some peace and conflict scholars and mediators have called for the exploration of its potential in this field for some years now.[142] This new set of technological tools to aid in age-old dispute resolution mechanisms, tried and tested in the diplomatic sphere, holds great potential to constitute another important "track" in multi-track diplomacy.

Mediation and negotiation are traditional methods of conflict resolution between political enemies, where the mediator is a neutral a third party that both parties agree to. Talks between Israel and Palestine,[143] the IRA Britain in Northern Ireland,[144] and between the Government of Sri Lanka and the Tamil Tigers[145] are just three famous examples of talks mediated by neutrals from third-party countries (the United States has been a mediator in the first two and India in the third instance). This kind of diplomacy uses classical ADR methods. It is not seen by many people as "traditional law" in the sense that it does not rely on courts or the use of written law. This is because the warring parties usually do not share a set of laws that can be looked to in determining who is right or wrong, or in determining how to address a certain party's grievance. The system of international human rights and humanitarian laws is similarly different from traditional domestic legal systems because international laws are not imposed on denizens but instead are only enforceable 1) upon states (not individuals within those states) and 2) if states agree to be bound by those laws and continue to abide by them. International law is therefore *consensual*, much like the private agreements between individuals and businesses in business.

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141 The Institute for Multi-track Diplomacy <www.imtd.org/at-a-glance/mission/working-methods/what-is-multi-track-diplomacy/>, last accessed 8 February 2011.

142 S. Hattotuwa, for example, has written on the potential of ODR for conflict transformation since the mid-2000s. See Sanjana Hattotuwa, *Mediation From the Palm of Your Hand: Forging the Next Generation ODR Systems*; see also, Hattotuwa (2006), p. 17.

143 See, *e.g.* Kenneth W. Stein, "American Mediation of the Palestinian-Israeli Conflict: A Positive Assessment of the April 2002 Powell Mission", *Rivista Italiana di Geopolitica* May 2002, pp. 173-182.

144 George Mitchell, a United States Senator, helped mediate the 1998 Good Friday Negotiations between the parties in Northern Ireland. See BBC, *The Search For Peace: Profile of George Mitchell.* Available at <http://news.bbc.co.uk/hi/english/static/northern_ireland/understanding/profiles/george_mitchell.stm>.

145 See *The Thimpu Talks: 1985 – Sinhala-Tamil Conflict and the India Factor.* Available at <www.sangam.org/BOOKS/thimpu.pdf>.

The use of new technologies to aid the mediation and negotiation between parties to conflict on a state level – *i.e.* between governments or a government and a group within its territory with which it is in conflict – therefore falls within a pattern of operation that has been necessitated in international relations for centuries: a pattern of innovative adaptation of domestic legal systems (where establishment of laws, obligation to follow them and enforcement of redress when laws are disobeyed is easier to achieve) to the international sphere, where none of the domestic tools of establishment, obligation and enforcement exist. The introduction of technology platforms on which to conduct talks that have traditionally taken place offline, often in a neutral third country, could drastically reduce costs and improve efficiency of talks. There are, of course, caveats to the use of ODR to replace aspects of diplomacy that require face-to-face time and relationship-building. In 1997, George Schultz, a seasoned diplomat with the United States, warned against perceiving e-diplomacy (or, as he describes it, digital diplomacy) as a panacea: "Information technology cannot replace solid diplomatic reporting. It is important to distinguish between excellent means of communication and excellent communication. Computers offer the former, and educated men and women can manage the latter."[146] This is certainly true and the key element of relationship-building and in-person trust-creation must remain in any conflict-transformation efforts taken.

ODR tools can, however, supplement these aspects of diplomacy by, for example, enabling quicker transmission of information and negotiation following in-person meetings between mediators and disputants, when they return to their own countries, for example. ODR could, for example, help diplomats engaging in conflict mediation by making scheduling, drafting and archiving tools available to them on a web-based platform. With the ability to create hierarchies of permission for access to each piece of information, the technology behind ODR can do a great deal to help conflict-resolvers manage their caseloads and their communication with each other and their clients.

A crucial caveat to the use of web-based platforms to conduct what can be politically sensitive and high-risk communications, of course, is that such platforms must be secure and all data protected. The November 2010 WikiLeaks leak of diplomatic cables, through which a few hackers managed to access and then publicly release thousands of classified documents from 274 US embassies around the world, dated from 28 December 1966 to 28 February 2010, should give us pause and spur providers of ODR services to tighten security in provision of their services in general.[147] While the leak of any private interaction online is

146 G. Schultz, *Diplomacy in the Information Age*, Talk given at US Institute for Peace, September 1997.

147 See, generally, CNN WikiLeaks Timeline, available at <www.cnn.com/2010/US/11/30/wikileaks.timeline/index.html>.

damaging to trust in Internet communications, the leaking of sensitive diplomatic information has the potential to threaten lives and derail positive peace and development processes.[148] Research into the best applications of ODR technologies to political conflict resolution is therefore warranted, as the potentials for these technologies to improve diplomatic work exist, but any technology used must be carefully tailored to the risks and particularities of diplomacy.

In the work that the authors do for Internet Bar Organization, ODR is one of many technology tools that link technology with law to promote and shape the emerging online justice community. By using technology and the Rule of Law to promote human rights and alleviate poverty, we directly confront those who use technology and the absence of the rule of law to shape a lawless Internet. The opportunity for us to confront today's inequities through a global collaboration to increase access to justice cannot be wasted. Political and economic insecurities are inextricably tied. Most political and ethnic conflicts arise out of some form of economic exploitation, based on social, religious, ethnic or other pretexts. Empowering individuals economically on a grassroots level therefore helps resolve one of the basic contributors to political conflicts. ODR holds the potential for economic empowerment on a grassroots level though e-commerce ODR that is targeted at those at the bottom of the pyramid. Just as an example, the creation of mobile money platforms in Kenya, the Philippines, Bangladesh and Afghanistan, to name just a few countries employing this new means of economic transaction, has opened up access to banking, saving and money transfer to millions of the un-banked.[149] Currently such mobile banking platforms do not come with a built-in dispute resolution mechanism. Disputes over transactions are taken to conventional court systems. The creation of a mobile-based ODR platform that can be accessed via the very tools used by people to conduct their transactions has the potential to build trust in mobile money, and to improve security and accountability of these new systems.

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148 See, *e.g.*, C.R. Albon, *How WikiLeaks Just Set Back Democracy in Zimbabwe*, 28 December 2010, The Atlantic. Available at <www.theatlantic.com/international/archive/2010/12/how-wikileaks-just-set-back-democracy-in-zimbabwe/68598>. When WikiLeaks released a cable detailing the secret work Morgan Tsvangirai, the opposition leader of Zimbabwe and a democratic beacon for the country, was doing with Western countries to foster political reform through sanctions, "Zimbabwe's Mugabe-appointed attorney general announced he was investigating the Prime Minister on treason charges based exclusively on the contents of the leaked cable. While it's unlikely Tsvangirai could be convicted on the contents of the cable alone, the political damage has already been done. The cable provides Mugabe the opportunity to portray Tsvangirai as an agent of foreign governments working against the people of Zimbabwe. Furthermore, it could provide Mugabe with the pretense to abandon the coalition government that allowed Tsvangirai to become prime minister in 2009."

149 See Vodaphone Policy Paper, *The Transformational Potential of M-Transactions*, Policy Paper Series No. 6, July 2007, see, also GSMA, *Mobile Money for the Unbanked*, 2009 Report. Available at <www.mobilemoneyexchange.org/Files/d13c521a>.

4 CONCLUSION

This chapter looked at how ODR's development in its foundational years has helped define and shaped an emerging online justice system. By reviewing the historical definitions of justice and comparing those conceptions with existing aspirations of the ODR community, we revealed that the ODR community holds itself up to ages-old standards of justice, and fares decently in comparison to the court systems and ADR systems it has evolved to supplement. Noting that the most developed forms of ODR have occurred in the e-commerce field, we identified and evaluated this industry by its own aspirational standards: transparency, independence, impartiality, effectiveness, fairness and integrity, accessibility, flexibility and affordability. These same ODR standards can also be applied to the burgeoning ODR use by governments in their relationship with citizens, and nations in their diplomatic relations, as the online justice system continues to grow.

The vision of the Internet as a beacon of freedom, something the UN has endorsed through the World Summit on the Information Society, needs practical, yet inspirational projects to shape it. Access-enhancing initiatives using mobile technologies will redefine justice by creating new opportunities for all to share fairly, and the expansion of ODR to complement these initiatives will promote an honest and trustworthy online society.

While ODR is most often used as a tool on the micro- (that is, person-to-person) level of politics and economics, it has, as we have laid out in this chapter, the potential to *transform* conflicts at the macro- (that is, governmental and state-to-state) level. ODR, applied according to the justice principles laid out in this chapter, holds many possibilities for improving access to justice within sectors of commerce, government and society that have thus far been excluded from conventional court-based justice because of the impracticability of bringing small issues before the courts. Small disputes aggregate into big ones, however, and tackling these disputes using innovative and flexible technology-assisted dispute resolution mechanisms is a powerful idea. We believe it is our duty as lawyers, mediators and human beings in the ODR community to help this field meet its truest justice potential.

14 ODR AND THE COURTS

Nicolas W. Vermeys and Karim Benyekhlef

1 INTRODUCTION

Ever since *online dispute resolution* (ODR) processes first arose in the mid-1990s,[1] their impact on the state's already eroded monopoly on resolving conflicts has been the subject of much debate.[2] This is not to say that the rise of ODR signified the first instance in which individuals chose to settle matters outside of the courtroom – alternative means of settling disputes have been around for ages[3] – but ODR offers a technological shift to dispute resolution, not merely a procedural one. Online environments have created new and unique ways (notably through the use of the so-called fourth party)[4] of settling disputes in a swift, asynchronous (although synchronous solutions are also available), and cost effective manner. Accordingly, ODR can be seen as both a competing and complementary tool to traditional in-court schemes and state-run judicial systems.

But the true essence and scope of the relationship between ODR processes and the courts hinge on a series of criteria, the most prevalent of these being the definition one chooses to adopt to circumscribe the very notion of *online dispute resolution.*

If ODR is interpreted broadly as being the use of online environments to facilitate communications and dispute resolution,[5] then it could be argued that ODR has seeped into the Court process through the use of electronic filing[6] and electronic court management systems.[7] However, if we accept the more conventional definition of ODR as being a process that "utilizes the Internet as a more efficient medium for parties to resolve their disputes

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1 See K. Benyekhlef & F. Gélinas, "Online dispute resolution", *Lex Electronica*, Vol. 10, No. 2, 2005, <www.lex-electronica.org/articles/v10-2/Benyekhlef_Gelinas.pdf>.

2 *Id.*

3 See K. Benyekhlef, *Une possible histoire de la norme*, Thémis, Montreal 2008.

4 See J. Rifkin, "Online Dispute Resolution: Theory and Practice of the Fourth Party", *Conflict Resolution Quarterly* (2001) Vol. 19, No. 1, p. 117 *et seq.*

5 J. Hörlne, "Online Dispute resolution", in R. Bernstein, J.A. Tackaberry & A.L. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, Volume 1 (4th edn.), London, Sweet & Maxwell 2003, p. 782, paragraph 12-004.

6 "Electronic filing or e-filing is a method of filing court documents that uses an electronic format rather than a traditional paper format. Parties convert their documents into the file format designated by the court and file their documents via email or over the Internet." See <www.abanet.org/tech/ltrc/research/efiling/>.

7 A list of such systems can be found here: <www.ncsconline.org/d_tech/vendorlist/vendbyproduct.asp?id=12>.

through a variety of ADR methods",[8] and that "brings disputing parties together 'online' to participate in a dialogue about resolving their dispute",[9] then ODR has yet to make its way into the court system in any significant manner.[10]

Of course, it could be argued that this goes without saying since, according to some, ODR is merely an online transposition of *alternative dispute resolution* (ADR) systems and processes, which, as their name clearly states, serve as an alternative to the Court system.[11] Therefore, to talk about Court sanctioned ODR would be akin to stating that the courts could serve as an alternative to themselves, which is somewhat nonsensical. That is not to say that the state cannot incorporate ODR processes and practices into its arsenal of judicial services,[12] but rather that, according to this approach, the notion of "court-run ODR" seems incongruous.

Other authors, however, prefer to oppose ODR to offline dispute resolution without referring to ADR, in which case the concept of "court-run ODR" becomes completely legitimate:

> Cybercourts are simply court proceedings that use exclusively (or almost exclusively) electronic communication means. They should be, and often are, considered to be part of the ODR movement, for two reasons. First, because the ODR movement emerged because of the clash between the ubiquity of the Internet and the territoriality of traditional, offline dispute resolution mechanisms. The term ODR is thus opposed to offline dispute resolution mechanisms, not to courts. Online ADR is only one part of ODR. Second, courts do not only provide litigation. As I said before, there also is court-based mediation and non-binding arbitration.[13]

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8 See <http://cyber.law.harvard.edu/olds/ecommerce/disputestext.html>.

9 *Id.*

10 For more on this distinction, see R. Susskind, *The End of Lawyers*, Oxford, Oxford University Press 2009, p. 218.

11 "ODR draws its main themes and concepts from alternative dispute resolution (ADR) processes such as negotiation, mediation, and arbitration. ODR uses the opportunities provided by the Internet not only to employ these processes in the online environment but also to enhance these processes when they are used to resolve conflicts in offline environments. [...] Like ADR [...] at its core is the idea of providing dispute resolution in a more flexible and efficient manner than is typical with courts and litigation." E. Katsh & J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass2001, p. 2. See also: Hörlne (2003), p. 779, para. 12-004.

12 For an overview of such practices, see D. Reiling, *Technology for Justice*, Leiden, Leiden University Press 2009.

13 T. Schultz, *An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR*, Proceedings of the UNECE Forum on ODR 2003, p. 5: <www.odr.info/unece2003>.

Nevertheless, as stated by Thomas Schultz, "if we accept that courts can be part of the ODR movement if they provide dispute resolution online, we can think about the advantages that are specific to courts".[14] The legal system can clearly benefit from the incorporation of ODR, and in a way, state-run ODR can serve to eliminate the hurdles private ODR initiatives still face, such as those of confidence and enforcement.[15]

Whilst acknowledging that ODR assumes two roles as a competing and complementing system to state courts, our focus in the following pages shall be exclusively directed to the complementary role of ODR, and to the development of court annexed ODR schemes. Accordingly, we shall commence by providing an overview of how states have started to incorporate ODR into the legal process (2), and then proceed to shed light on possible future paths for state-run ODR systems (3).

2 COURT ANNEXED ODR SCHEMES: AN OVERVIEW OF PAST AND CURRENT PRACTICES

George Santayana argued that "Those who cannot remember the past are condemned to repeat it".[16] We would add that those who do not have knowledge of the present could be wasting their time and efforts. In other words, before embarking on the task of establishing principles and developing software to help in the adoption of ODR solutions by the courts, we should take notice of certain ODR initiatives that have emerged in different jurisdictions around the World. These initiatives, which have registered various degrees of success, can teach us what to do and, more importantly, what not to do when trying to establish how ODR could help to alleviate the courts' burden and backlogs.

The following is a survey of four such initiatives: the Michigan Cyber Court (section 2.1), the Federal Court of Australia's eCourt (section 2.2), Her Majesty's Courts Service's Money Claim Online and Possession Claim Online (section 2.3), and the Subordinate Courts of Singapore's eAlternative Dispute Resolution initiative (section 2.4).[17]

14 *Id.*

15 *Id.*, p. 6.

16 G. Santayana, *The Life of Reason*, New York, Dover Publications 2005: <www.gutenberg.org/catalog/world/readfile?fk_files=1498120>.

17 For descriptions of other similar initiatives, see Susskind (2009), p. 221 *et seq.* See also S. Schiavetta, "Online Dispute Resolution, E-Government and Overcoming the Digital Divide", 2005: <www.bileta.ac.uk/Document%20Library/1/Online%20Dispute%20Resolution,%20E-Government%20and%20Overcoming%20the%20Digital%20Divide.pdf>.

2.1 *Michiga's Defunct Cyber Court*[18]

Perhaps the most ambitious Court annexed ODR project was created by the Michigan legislature when, in 2002, it enacted its "Cyber Court" act[19] which allowed for the creation of "the first courtroom in the nation to fully operate over the Internet using electronic document filing, web-based conferencing, and virtual courtrooms".[20] The Cyber Court was meant to hear cases regarding "business or commercial disputes[21] in which the amount in controversy exceeds USD 2.5 million".[22]

In a paper presenting the Act when it was still in bill form, Marc Shulman, the bill's sponsor, stated that:

> The cyber court will be a model for the future delivery of legal services and will include E-filings, web-based conferencing, virtual courtrooms, the establishment of the feasibility of online dispute resolution, and the use of mediators and judges that have the skills and knowledge to render prompt and competent decisions, all with the intent to provide businesses with an alternative venue to resolve disputes.[23]

The Act, which is incorporated in section 80 of the Revised Judicature Act of 1961,[24] states that:

> Sec. 8001. [...](2) The purpose of the cyber court is to do all of the following:
> a. Establish judicial structures that will help to strengthen and revitalize the economy of this state.

18 For a detailed explanation of the project, see L.M. Ponte, "The Michigan Cyber Court", *N.C. J. L. & Tech.*, (2002) Vol. 4, pp. 51 *et seq.*

19 2001 PA 262.

20 K. Koscielniak & B. Wassom, "Cyber Court", *Michigan Bar Journal* 2008, p. 48.

21 Paragraph 8005 of the Act describes "business or commercial disputes" as the following types of actions:
a) Those involving information technology, software, or website development, maintenance, or hosting.
b) Those involving the internal organization of business entities and the rights or obligations of shareholders, partners, members, owners, officers, directors, or managers.
c) Those arising out of contractual agreements or other business dealings, including licensing, trade secret, noncompete, nonsolicitation, and confidentiality agreements.
d) Those arising out of commercial transactions, including commercial bank transactions.
e) Those arising out of business or commercial insurance policies.
f) Those involving commercial real property.

22 Paragraph 8005 of the Act.

23 M. Shulman, "Cyber Court in Michigan", *Mich. B.J.* (2001) Vol. 80, November, p. 45.

24 P.A.1961, No. 236, paragraph 8001.

b. Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy.
c. Assist the judiciary in responding to the rapid expansion of information technology in this state.
d. Establish a technology-rich system to serve the needs of a judicial system operating in a global economy.
e. Maintain the integrity of the judicial system while applying new technologies to judicial proceedings.
f. Supplement other state programs designed to make the state attractive to technology-driven companies.
g. *Permit alternative dispute resolution mechanisms to benefit from the technology changes.*
h. Establish virtual courtroom facilities, and allow the conducting of court proceedings electronically and the electronic filing of documents. (emphasis added)

Therefore, although the Act mostly focuses on e-filing and courtroom technologies, it also allows for the incorporation of ODR practices within the legal process,[25] most notably, as was stated by Representative Shulman, through the use of Internet teleconferencing chat rooms.[26]

That being said, although the legal framework is in place to allow for the incorporation of ODR practices in this Cyber Court, the state of Michigan has yet to fund the actual infrastructure. As explained by one observer: "a loss of funding and irreconcilable differences over the court's nature and location (*e.g.*, partially physical versus purely electronic) led to an abandonment of the project."[27]

According to others,[28] those were but some of the reasons for the project's ultimate demise:

> Concerns ranged from the reluctance of parties and their lawyers to gamble on an untested system, to uncertainty about the costs and use of new technologies in their case preparation and presentation, to a general distrust of technology. Other concerns included the worry by parties and witnesses that their

25 See paragraph 8023 of the Act. See also Ponte (2002), p. 84.
26 Shulman (2001), p. 47. See also paragraph 8015 of the Act.
27 A. Garofano, "Avoiding Virtual Justice", *Cath. U. L. Rev.* (2007) Vol. 56, p. 688.
28 B.A. Pappas, "Online Court", *UCLA J. L. & Tech.*, 2008, p. 10.

> privacy could be threatened due to the potential broadcast of their personal information online.[29]

It seems that, as with many other failed Court IT projects,[30] the Cyber Court's proponents tried to do too much at once, therefore neglecting to take into account key components such as user acceptance,[31] while underestimating the complexity and costs of the endeavour.[32]

If the Cyber Court experiment could lead us to believe that the use of ODR by the courts is not a worthwhile endeavour, other state-run ODR projects have had much more positive outcomes.

2.2 *The Federal Court of Australia's eCourt*

As explained on the Federal Court of Australia's website:

> The Federal Court's eCourtroom is a virtual courtroom that enables submissions to be exchanged and directions and other orders to be made on-line. The eCourtroom may be used to receive submissions and affidavit evidence and to make orders in a way that emulates actual courtroom proceedings. It may also be used to facilitate mediation [...][33]

The eCourt "is in effect an email service within a secure environment"[34] combined with a message board system similar to that of social media websites such as Facebook. A party

29 *Id.*

30 See for example C. Baar, "Integrated Justice: Privatizing the Fundamentals", *Canadian Public Administration*, (1999) Vol. 42, p. 42 *et seq.*; K. Makin, "Computer lawsuit costs Ontario $63 million", *The Globe and Mail*, 1 June 2005, A1; and S. Lysecki, "Integrated Justice Project 'Too Large, Too Complex, Too Ambitious': AG's office", (2005), available at: <www.allbusiness.com/technology/896690-1.html>, all of whom discuss the failed Ontario Integrated Justice Project. For a more general view of failed Court IT experiments, see Reiling (2010), p. 60 *et seq.*

31 N.W. Vermeys & K. Benyekhlef, "Premiers éléments d'une reformation des processus judiciaires par la technologie", in D. Le Métayer (ed.), *Les technologies de l'information au service des droits: Opportunités, défies, limites*, Brussels, Bruylant 2010, p. 207 *et seq.*

32 Reiling (2009), p. 69.

33 <https://ecourt.fedcourt.gov.au/>. See also B. Tamberlin, "Online Dispute Resolution and the Courts", 2004: <www.odr.info/unforum2004/tamberlin.htm>: "The eCourt is a virtual courtroom that assists in interlocutory matters and allows for directions and other orders to be made online. It may also be used in mediations, where these are directed by the Court and conducted by one of the registrars."

34 "eCourtroom User Guide": <https://ecourt.fedcourt.gov.au/UserManuals/eCourtroom_User_Manual.doc>.

(or judge) simply has to log onto the system with his user name and password[35] to post messages and attach documents on a webpage reserved for the matter in which he is taking part. Once that is done, an email alert is automatically sent to all other participants in the matter. A user then simply has to click on a link included within the email's body to be taken directly "to the related matter and message on the eCourtroom".[36] However, as explained by Justice Brian Tamberlin of the Federal Court of Australia:

> Protocol dictates that only the Judge (or the associate or registrar on the Judge's behalf) may commence the "discussion threads" with orders or directions, and it is in response to these that the parties may submit submissions and affidavit evidence. Discrete interlocutory matters may be conducted this way, or this can be the means for the provision of extra information, submissions and evidence prior to a hearing in court.[37]

Like any "brick and mortar" courtroom, the eCourtroom has a user Protocol, which refers to series of requirements that must be strictly adhered to in order to be allowed to use the system. This Protocol[38] underlines the necessity for parties to abide by general rules of courtroom decorum as if they were in an actual courtroom.[39] Therefore, rules regarding language, contempt of court, and the publicity of hearings[40] are all enforced, as they would be in a "real" offline courtroom.[41]

It is interesting to note that, in test cases, the eCourt has proven to significantly reduce the delays and costs normally associated with a court case[42] by eliminating the need for travel and synchronous communications.

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35 See Tamberlin (2004): "Where a matter has been referred to the eCourt, the parties or their legal representatives, the Judge, associate and registrars may access the forum through the Court's webpage by using a password, which is allocated to the parties once the Judge has directed (and the parties have agreed) that the matter is an appropriate one for the eCourt forum."

36 *Id.*

37 *Id.*

38 See <https://ecourt.fedcourt.gov.au/pagecontent/officalcontent.aspx?contentType=Protocol>.

39 On the importance of staying true to rules of decorum even when using an online environment, see Benyekhlef & Gélinas (2005).

40 It must be noted that proceedings are only made public post facto through the online publication of court transcripts. See <https://ecourt.fedcourt.gov.au/pagecontent/officalcontent.aspx?contentType=Protocol>.

41 See *id.*

42 Tamberlin (2004).

Finally, although the service is available for any type of dispute (as long as the presiding judge deems it useful),[43] it seems to be particularly suitable for bankruptcy cases.[44] In fact, a survey of the five hundred and thirty-two (532) public transcripts currently available for consultation on the eCourtroom website[45] reveals that almost 80% of files relate to bankruptcy matters.[46]

2.3 *The United Kingdom's Money Claim Online and Possession Claim Online*

Money Claim Online[47] (MCOL) and Possession Claim Online[48] (PCOL) are both Internet based services "for claimants and defendants" offered by Her Majesty's Courts Service.[49] As their names suggest, MCOL is a way of "making or responding to a money claim on the internet",[50] while PCOL aims at settling "certain types of possession claims".[51]

2.3.1 Money Claim Online

Money Claim Online allows claimants and defendants to use online forms to settle a money claim rather than incurring the costs associated with a court case.[52] As explained in Practice direction 7E,[53] claimants may use the system "to start certain types of county court claims

43 "Whether a matter, or part of a matter, is to be dealt with on the eCourtroom will be determined by the Court or a Judge having regard to such things as the nature and complexity of the issues to be resolved, the number of parties, the access of each party to email and the Internet, the views of the parties, the nature and extent of any evidence that may be required, and the urgency of the matter or part of a matter." See <https://ecourt.fedcourt.gov.au/pagecontent/officalcontent.aspx?contentType=Protocol>.

44 In 2009-2010, "registrars undertaking general federal law work in the Sydney and Melbourne registries of the Federal Magistrates Court used eCourtroom to finalise in excess of 180 ex parte applications for substituted service in bankruptcy matters, as well as hear applications for the issue of summonses for examination pursuant to s81 of the *Bankruptcy Act 1966*." See Federal Magistrates Court of Australia "Annual Report 2009-2010", p. 41.

45 <https://ecourt.fedcourt.gov.au/PublicTranscript/PublicForumHome.aspx>.

46 According to our research, of the 532 files currently available for consultation, 419 pertain to bankruptcy matters, while 44 deal with appeals and related actions, 25 deal with corporations actions, 12 deal with consumer protection actions, 10 deal with intellectual property actions, 6 deal with administrative law actions, 6 deal with taxation actions 5 deal with miscellaneous actions, 3 deal with industrial actions, and 2 deal with admiralty actions.

47 <https://www.moneyclaim.gov.uk/web/mcol/welcome>.

48 <https://www.possessionclaim.gov.uk/pcol/HomePage.do>.

49 See <https://www.moneyclaim.gov.uk/web/mcol/welcome> and <https://www.possessionclaim.gov.uk/pcol/HomePage.do>.

50 <https://www.moneyclaim.gov.uk/web/mcol/welcome>.

51 <https://www.possessionclaim.gov.uk/pcol/HomePage.do>.

52 This being said, the service is not free. Claimants need to pay a fee ranging from GBP 25 to GBP 595 (depending on the value of the claim) to be able to use MCOL. See: <www.hmcourts-service.gov.uk/courtfinder/forms/ex50_web_0610.pdf>.

53 Available at <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part07e.htm>.

by requesting the issue of a claim form electronically via Her Majesty's Courts Service website". They may also use it to electronically file a request for judgment in default, judgment on acceptance of an admission of the whole of the amount claimed, or the issue of a warrant of execution. Defendants, on the other hand, can use the system to electronically file an acknowledgment of service, a partial admission, a defence or a counterclaim. Both parties may use the system to view an electronic record of the progress of the claim.

It must be noted that the system only allows "claims up to GBP 100,000 (including court fees and solicitor's costs)" against a maximum of two defendants residing in either England or Wales.[54] Also, in order for the claim to be contained exclusively online, the particulars (*i.e.* the details of the case) "must be set out in no more than 1,080 characters (including spaces)". Otherwise, a document containing more detailed information or particulars will have to be sent using more conventional methods of service.

The process is relatively simple. A claimant accesses an online form, which he fills out and files on the MCOL website. Once a claim is filed, the court issues a claim form, a printed copy of which is served to the defendant. The claim form "will have printed on it a unique customer identification number or a password by which the defendant may access details of the claim on Her Majesty's Courts Service website".[55] If the defendant does not answer in the allotted time, the claimant may ask for a default judgement through the platform. If the defendant files a counter claim or a partial admission that is unacceptable to the claimant, "[t]he claim will then be transferred to a local court and no further action can be taken online".[56] In all other scenarios, the case will be considered as being settled. On a final note, it should be underlined that MCOL has proven to be a very successful program. The service is now "dealing with more claims than local courts".[57]

2.3.2 Possession Claim Online

Possession Claim Online allows individuals, solicitors, the government and businesses to file a claim, a warrant or certain other processes related to possession claims[58] electronically through the PCOL website.[59]As with MCOL, a claimant accesses an online form, which he fills out and files on the PCOL website. However, the PCOL process is different in that "the particulars of the claim must be included in the online claim form and may not be

54 See <www.hmcourts-service.gov.uk/onlineservices2/important_info/claim_criteria.htm>.

55 See <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part07e.htm>.

56 See <www.hmcourts-service.gov.uk/onlineservices2/progress_claim/judgment.htm>.

57 Schiavetta (2005). See also Susskind (2009), p. 221.

58 See: <https://www.possessionclaim.gov.uk/pcol/help/hlp.do;jsessionid=0a3f6d0130d5d8a654f9997b48f3b270fce07f5c60d3.e34PaxqLb3iObi0Pbh0Na3uKaNz0n6jAmljGr5XDqQLvpAe#userguide>.

59 See Practice Direction 55B – Possession Claim Online, available at: <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part55b.htm>.

filed separately".[60] Once a claim is filed, the court issues a claim form, a printed copy of which is served to the defendant. The defendant may then file a defence or a counterclaim by filling out his own online form. In certain cases, the parties will be able to communicate with the court "using the messaging service facility, available on the PCOL website".[61] They will also be able to file certain applications online.[62] Although less of a success than MCOL,[63] PCOL remains a good example of effective state-run ODR.

2.4 *The Subordinate Courts of Singapore's eAlternative Dispute Resolution (e@dr)*

As stated on the service's website, "eAlternative Dispute Resolution is a Singapore Subordinate Courts' initiative, for parties in an e-commerce transaction to resolve their disputes on the internet".[64] Rather than commencing an action before the courts, a complainant simply has to fill out an online form describing his grievance and the remedy he seeks. A moderator[65] will then email the respondent and invite her or him to fill out a response form. If the respondent party accepts to take part in this process, a court-appointed mediator[66] will be assigned to the case.[67]

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60 *Id.*

61 *Id.*

62 *Id.*

63 See Susskind (2009), p. 222.

64 See <http://app.subcourts.gov.sg/e-adr/index.aspx>.

65 It must be noted that "[t]he moderator's role is essentially administrative. He will collate the forms [...] and bring the parties together for the use of e@dr".

66 As explained on the service's website: "Where the dispute involves a claim of a small amount (up to S$10,000, or up to S$20,000 by consent of parties), the moderator will channel the dispute to the Small Claims Tribunals to be mediated by a Referee". However, "[w]here the dispute does not fall within the Small Claims Tribunal's jurisdiction, it will be referred to a court mediator". See <http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3882>.

67 See <http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3891>. A more detailed explanation of the process is available at <http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3883>:

1. The complainant (the Requesting Party) files his complaint by submitting a Request for Mediation form, stating his particulars, the complaint and the brief facts relating to it, and propose a solution.
2. Within 3 days of receiving the completed form for Request for Mediation, the moderator will forward to the respondent (the Responding Party) a notice, together with the Requesting Party's complaint. If the Responding Party does not wish to resolve the dispute by e@dr, or does not respond within a certain time set by the moderator, the Requesting Party will be notified, and the matter is terminated.
3. If the Responding Party agrees to e@dr, he will submit a Response form, stating his particulars, his version of events and his proposed solution. The Responding Party may also make a counterclaim against the Requesting Party, where it arises out of the same dispute or transaction. The Responding Party will be required to submit the Response form within 1 to 4 weeks, depending on the nature and complexity of the matter.
4. Within one week of receiving the Response Form, the moderator will notify the parties of the forum for resolution. Based on the nature and complexity of the dispute, the moderator will, at first instance, determine the appropriate channel for resolution. The moderator may channel it to the court mediator,

From that point on, as a rule, "[a]ll communications and correspondences will be done through e-mail for mediation".[68] However, where necessary, "the mediator may ask parties to meet face to face, or to produce and exchange documents and exhibits".[69] If the parties come to an agreement, they will be invited to draft a settlement agreement. However, if they cannot come to an agreement within the allotted time(as set by the mediator),[70] the complainant will either have to file a case or simply abandon the claim.

This service is free, and available to all complainants (even foreign companies or consumers when the complaint relates to a Singaporean)[71] if:

- They have yet to commence any court proceedings;[72]
- They speak English;[73] and
- The dispute relates to "e-Commerce transactions and matters",[74] including "disputes on contracts, intellectual property, [and] domain names".[75]

Finally, since the service is email-based, it goes without saying that it is only available when both parties have an active email account.[76]

3 THE FUTURE OF STATE SPONSORED AND COURT ANNEXED ODR

We have seen that there are already some examples of state sanctioned ODR, but it goes without saying that there is still much that can be done, using online solutions, to make the judicial system more accessible and efficient. This is not to say that we should blindly implement an ODR-based judicial process. As we have stated in other arenas,[77] there are

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the Small Claims Tribunal (SCT), the judge-mediator at CDRI and e.CDRI, SMC or SIAC. This is subject to the consent of the parties as to the mode of determining the dispute, and does not preclude a subsequent change of the forum of settlement.

5. The mediator will set the time-frame for the actual settlement of the dispute. Alternatively, the time-frame will be governed by the rules and regulations of SCT, SMC or SIAC where appropriate. Parties can also suggest a timeframe in agreement, with the approval of the mediator, SCT, SMC or SIAC (as appropriate).

68 See <http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3883>.

69 *Id.*

70 *Id.*

71 "E@dr [Electronic Alternative Dispute Resolution]": <http://app.subcourts.gov.sg/Data/Files/File/e-adr/ElectronicAlternativeDisputeResolution.pdf>.

72 *Id.*

73 See <http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3888>.

74 *Id.*

75 *Id.*

76 "E@dr [Electronic Alternative Dispute Resolution]": <http://app.subcourts.gov.sg/Data/Files/File/e-adr/ElectronicAlternativeDisputeResolution.pdf>. See also: <http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3888>.

77 Vermeys & Benyekhlef (2010).

intrinsic dangers to the thoughtless digitalization of the judicial system. This being said, implementing certain ODR practices, when appropriate, could be beneficial for all participants.

What is appropriate, however, is obviously up for debate. Nevertheless, it does seem, as some authors have pointed out,[78] that:

> Some types of dispute are less likely to be solved by online proceedings than others. E-commerce, for instance, seems better adapted to ODR than family law disputes[79] or criminal cases. Small claims benefit more from the low costs of ODR than large claims.[80]

Indeed, it seems that the use of ODR to settle small claims and therefore free up judges and courtrooms for more complex cases is a given: "[s]mall claims courts, with smaller dollar amounts and less complex issues, are ideally situated to transition their operations online".[81] The e@dr service in Singapore is an example of how ODR practices can be applied to small claims, but the model, although efficient, is relatively rudimentary as it mainly focuses on the use of email when more effective, secure and accessible online dispute resolution technologies are available.

Indeed, numerous advanced ODR platforms aimed at resolving small claims are already being used and could easily be adapted to suit the needs of a state-run small claims court. For example, in 1999, eResolution, a company founded by one of the authors of this paper,[82] signed an agreement with the European Commission to design a web application for resolving online consumer disputes. This application, which would bear the name ECODIR (for *E*lectronic *Co*nsumer *Di*spute *R*esolution), was launched in 2001.

The ECODIR application has two parts: first, a negotiation stage only involving the consumer and the other party (an online merchant, for example). In this stage, consumers are guided by user-friendly questionnaires that invite them to specify the nature of the problem: the consumer is simply asked to check certain boxes corresponding to the situation. The

78 T. Schultz *et al.*, "Online Dispute Resolution: The State of the Art and the Issues", E-Com Research Project of the University of Geneva, Geneva, 2001: <http://www.onlineadr.org/reports/TheBlueBook-2001.pdf>.

79 That being said, it must be pointed out that Australia did incorporate ODR into certain divorce proceedings. See Susskind (2009), p. 221.

80 *Id.*

81 Pappas (2008), p. 2.

82 Karim Benyekhlef and others founded eResolution in 1999. For more on the issue, see K. Benyekhlef, "La résolution en ligne des différends de consommation: un récit autour (et un exemple) du droit postmoderne", in P.-C. Lafond (ed.), *L'accès des consommateurs à la justice*. Cowansville, Yvon Blois 2010, p. 89 *et seq.*

purpose of this approach is to guide consumers, while not allowing them the opportunity to vent too much. The online merchant is also invited to describe its versions of the facts through a guiding table. Upon providing an adequate description of the problem, the parties are invited to suggest ways of resolving it. The solutions appear in a table of proposal summaries that can be changed as counter-proposals are made. If negotiations have not led to a settlement upon a lapse of eighteen days, the parties can refer the dispute to a mediator. This is when the second stage of the ECODIR procedure begins, in which a third party is introduced. The third party takes cognizance of the exchanges between the parties during the negotiation stage, and tries to mediate a settlement. Naturally, the mediation takes place online using tools made available to the parties: secure email exchanges, chat-rooms, secure filing and exchange of documents, etc.[83]

Although the technical aspects and user-friendliness of the application were praised by most (consumer associations, professional associations, industrial groups, the public sector, the European Commission, etc.),[84] the ECODIR Project never really took off for a number of reasons, most notably lack of funding for the platform's deployment phase, and lack of enforcement mechanisms. Were ECODIR or a similar platform to be used by a state-run small claims tribunal, both these issues would become moot.

ODR services, like any other private enterprise, need to foster consumer confidence to be able to perform.[85] This can be done through advertising campaigns or through backing from someone in a position of authority. A fine example of the latter is that of the SquareTrade platform,[86] which was set up specifically to resolve conflicts among users of the eBay auction site. SquareTrade registered impressive results: between 1999 and 2008, its platform was used to handle and resolve two million disputes involving 120 countries and five languages.[87] In other words, the system helped resolve an average of more than 220,000 cases a year. But eBay users did not turn to the SquareTrade platform because of its unique concept. In fact, the SquareTrade platform was quite similar to ECODIR's and to a plethora of other online dispute resolution services which appeared in the early 2000s. SquareTrade succeeded because it was able to take advantage of a captive market in the form of the millions of buyers and sellers on eBay, and because eBay endorsed the platform

83 For a more detailed description of ECODIR's rules of operation, see <www.ecodir.org>.

84 *ECODIR Project, Final Report*, September 2008, p. 40 *et seq.*

85 Pappas (2008), p. 21.

86 <www.squaretrade.com>. Concerning SquareTrade, read the article by SquareTrade's President and CEO: S. Abernethy, "Building Large-Scale Online Dispute Resolution & Trustmark Systems", in E. Katsh *et al.* (eds.), *Online Dispute Resolution (ODR): Technology as the "Fourth Party" Papers and Proceedings of the 2003 United Nations Forum on ODR*: <www.odr.info/unece2003/pdf/Abernethy.pdf>.

87 These statistics were taken from the SquareTrade website (<www.squaretrade.com>) in 2007, but are no longer available online.

and offered a way of enforcing agreements through its policies.[88] This therefore gave eBay users confidence in SquareTrade's capacity to resolve their disputes.

As many others have pointed out, state approval (through legislative or other means) would do the same for any state-run ODR small-claim service:

> [T]he courts can play an instrumental role in providing legitimacy through control. There are actually many advantages to utilizing an online court process (more traditional adjudication facilitated with technology) over a more informal ODR process. First, online courts have more predictable remedies in that the decisions are appealable and enforceable. Judicially mediated settlements are much easier to enforce as they can qualify as "consent judgments" or as another form of enforceable instruments. Also, courts can benefit from the democratic accountability of judges. As an institution, judges have great symbolic capital in the field of dispute resolution. Additionally, online courts, as an arm of the state, have much greater authority to demand the accountability parties often desire from businesses than do private dispute resolution providers.[89]

For these and other reasons, the time finally seems right for the emergence of state-run ODR platforms aimed at resolving small claims disputes. In fact, it is interesting to note that the ECODIR prototype has been presented to various departments of justice (in Québec, Belgium and Luxemburg), and all recognized the usefulness and pertinence of such a system for processing small claims. We therefore predict that these systems should start to emerge in the next few years.

This prediction is somewhat obvious, however, since the CRDP has recently received funding from the Quebec *ministère des Services gouvernementaux* (Department of Government Services) to adapt the ECODIR model to suit the needs of Quebec's small claims court (*i.e.* claims under CAN$ 7,000). Motivation for this test project stems from the government's rumoured will to bow to mounting pressures to raise the maximum value of small claims from CAN$ 7,000 to CAN$ 10,000 or even CAN$ 15,000.[90] If the change does happen, the number of cases filed in small claims court will most probably rise, and demand that more judges be assigned to these cases. Since judges presiding over small claims are

88 It is interesting to point out that, ever since eBay created its own ODR service, SquareTrade shifted its services from ODR to warranty services. See <www.squaretrade.com/pages/about-us-overview>.

89 Pappas (2008), p. 17.

90 This change has been requested by certain stakeholders for many years now (See Louise Rozon, "L'accès à la justice et à la réforme de la Cour des petites créances", *Les Cahiers de droit*, (1999) Vol. 40, No 1, p. 243), and is rumoured to be part of a bill to modify the *Code of civil procedure* (RSQ, c C-25) that should be made available later this year.

Court of Quebec judges, this means that they will not be available to hear more complex legal cases (the Court of Quebec also hears cases relating to criminal matters, appeals from the housing board, adoption cases, most cases where the value of the matter is less than CAN$ 70,000, etc.). Therefore, ODR is seen as a possible way to weed out small claim cases that do not necessitate a judge's intervention so that Court of Quebec justices can concentrate on those cases that do require their involvement. In this context, ODR processes are therefore not perceived as competitors to traditional in-court schemes, but rather as a value added asset to the small claims process.

Also in Canada, British Columbia's Ministry of the Attorney General is also working at developing an ODR platform to settle its province's small claims. The BC program "would largely focus on quantifiable disputes, such as debt claims, perhaps valued up to $10,000".[91] It is interesting to note, however, that said program is not only driven by efficiency and cost-cutting measures. Rather, "[t]he ministry's motivation to move online stems partially from a problem familiar to many employers: the impending mass retirement of baby boomers is expected to leave a big hole in its workforce".[92]

These two examples only help to further emphasize the complementary role that ODR can serve if properly incorporated into the conventional legal process.

But small-claims, although currently the best suited to be settled through the use of ODR platforms because of their low value and relative simplicity (as opposed to more complex cases involving injunctive and other interlocutory measures), should only be the beginning of the court annexed ODR adventure, not its end. As the Australian eCourtroom and countless other ODR experiments[93] have demonstrated, ODR platforms can and should be used for much more complex matters. First, it is important to point out that past experiments[94] have taught us that online dispute resolution can be equally and efficiently

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91 R. Todd, "The New Frontier", *Canadian Lawyer*, 2010: <www.canadianlawyermag.com/The-new-frontier.html>.

92 *Id.*

93 For example, the eResolution system settled complex domain name disputes completely online: "eResolution was founded in the autumn of 1999 and launched its first online dispute settlement service when it received accreditation from ICANN to administer the settlement of disputes concerning domain names, in accordance with ICANN's policy of 1 January 2000. Several hundred cases from all over the world have since been settled through eResolution's technological platform. [...] From the start, eResolution set about transforming the document-based ICANN procedure into an online procedure. The technology eResolution has put in place enables the parties, decision-makers and administrators of cases to do everything online. All the exchanges take place within a secure environment accessible by password and user name." See K. Benyekhlef & F. Gélinas, "International Experience in Regard to Procedures for Settling Conflicts Relating to Copyright in the Digital Environment", *Copyright Bulletin*, (2001) Vol. 35, No. 4, p. 13.

94 These experiments include the afore-mentioned ECODIR as well as the Cybertribunal and eResolution projects. See Benyekhlef (2010), p. 89 *et seq.*

used for off-line and online disputes. Indeed, there is no obstacle to using this technology to facilitate the processing and resolution of conflicts arising in the physical world. Furthermore, although "there are several [...] logistical issues that present a challenge to the launch of an online court, including ensuring valid court appearances, issues with due process, and a digital divide between different segments of society",[95] these issues should not stop us from exploring all that ODR has to offer to the courts, nor should "the lack of personal connection inherent in conducting a court or ODR proceeding electronically".[96] In fact, in certain cases, the lack of physical presence can prove to be a blessing rather than a curse.[97] Informal surveys conducted with parties who took part in proceedings arbitrated through the Cybertribunal project[98] showed that parties did not feel the need to meet since it would incur more costs and delays, without generating any true benefits. On the other hand, meeting might fuel animosity when parties are already hostile towards one-another, diverting the topic from trying to resolve a problem to trying to defeat an enemy.[99]

4 CONCLUSION

ODR practices can and should be adopted by the courts to help settle those cases that are adapted to the online environment. Such measures could go a long way in making the courts more efficient by freeing up judges from hearing cases which could easily have been settled through negotiation or mediation. However, these measures come at a cost. As past and current state-run ODR services have demonstrated, the state needs to invest both financially and politically in these programs for them to work.[100] Lack of funding is ultimately what killed the Michigan Cyber Court before it could take off and, according to some,[101] this lack of funding was the direct result of a lack of political will to support the project.

But one should not throw good money after bad in the sense that we should not invest in ODR programs without first establishing what ODR solutions are compatible with the practices, customs, and principles underpinning our court systems. There is a good reason

95 Pappas (2008), p. 11.

96 *Id.*, p. 15.

97 See Vermeys & Benyekhlef (2010), p. 232 *et seq.*

98 The Cybertribunal was the first online platform integrating both mediation and arbitration. It was launched by the CRDP in 1998 thanks to funding from the *Fonds québécois des autoroutes de l'information*. For more information on the project, see V. Gautrais, K. Benyekhlef & P. Trudel, "Cybermédiation et cyberarbitrage: l'exemple du Cybertribunal", in *Droit de l'informatique et des télécoms*, (1998) Vol. 4, p. 46. See also Benyekhlef (2010), p. 89.

99 *Id.*

100 Pappas (2008), p. 21.

101 For example, see Garofano (2007), p. 688.

why ODR mainly developed outside of the courts: because it was not hindered by the normative order associated with legal systems. However, this order serves a purpose, and simply discarding it because it is incompatible with new technological advances is a mistake.[102] The key to incorporating ODR practices into the courts is to first identify how the technology will impact our practices beyond the simple statement that ODR will make the legal system more efficient and less costly, because a system that is not in line with our values will never work, no matter how inexpensive and expedient it is.

This is one of the basic premises which the Cyberjustice Laboratory upholds amidst undertaking the development of future ODR-based technologies for the courts. The Cyberjustice Laboratory[103] is a research infrastructure housed at the University of Montreal and operated in collaboration with McGill University. It aims to develop different software solutions to the many problems now plaguing the justice system such as costs, delays and lack of confidence, just to name the most obvious. As explained in the Laboratory's promotional documents:

> Thanks to a virtual hearing room, the Laboratory will be used for, among other things, developing a basic software structure for elaborating and testing computer models for facilitating online processing of disputes, digitalization of files, more efficient case management and establishment of decision-assistance systems. The purpose is thus to create software tools that will make it easier to network the court system and offer concrete, functional solutions to the various problems now facing the justice system (long delays, cost of procedures, etc.). These tools will not be limited to simply reproducing court procedures; they may also suggest new ways of doing things and thus revolutionize procedure thanks to innovative software design.[104]

These "new ways of doing things" necessarily include the development of court-run ODR, one of the many tools available to reinvigorate a somewhat withered judicial system.

However, software development is only one of the Laboratory's two primary research areas: *i.e.* the "techno-legal area". The other area reflects the need to modernize procedural law and to damper the obstacles that plague online dispute resolution systems. This "socio-legal area" includes two main objectives:

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102 Benyekhlef & Gélinas (2005), p. 8.

103 See <www.cyberjusticelaboratory.org>.

104 *Cyberjustice Laboratory, Presentation Document*, Montreal, Centre de recherche en droit public, Faculté de droit, Université de Montréal, 2009.

1. To identify psychological, social and cultural factors that are obstacles to or that curb the networking and computerization of the legal system;
2. To provide avenues for restructuring our procedural law in light of findings discovered through work on new models for networking court procedures.

These objectives are admittedly very ambitious and the scope of work promises to be somewhat complex; there are numerous obstacles to the modernization of our legal system but, as demonstrated by the few advances in state-run ODR described herein, the social and societal benefits seem to justify the costs and efforts associated with the implementation of such systems.

15 Online Dispute Resolution and Ombudsmanship

Frank Fowlie

This chapter focuses on the applicability of Online Dispute Resolution (ODR) for a specific dispute resolution mechanism, the Ombudsman. The chapter is based on the experiences and observations of Dr. Frank Fowlie, who served as the Inaugural Ombudsman for the Internet Corporation for Assigned Names and Numbers (ICANN).

It is submitted that ODR is a process that may be applied to Alternative Dispute Resolution (ADR) techniques. Specifically, ODR uses technology, especially the Internet, to augment ADR processes. It has been emphasized that ODR may be applicable to disputes which emanate from either online or real world activities. For example, ODR may be used as a vehicle to handle consumer disputes relating to online purchasing of goods, or it may be used as a resolution system for small claims in direct business to consumer transactions (B2C).

1 Two Types of Online Dispute Resolution

There are two basic branches of ODR, both based on the role of technology. The first branch may be called "Technology Based". Technology-based ODR refers to those systems where technology plays an active role in conducting the dispute resolution. A prominent example of technology-based ODR systems are "blind-bidding" systems. The technology uses multivariate algorithms to help parties arrive at the optimal outcome.

Blind-bidding systems are, for the most part, nascent technologies. They are usually most applicable in situations where there is some tangible and monetary remedy sought by the parties, for example, a refund on a faulty good, or a value for an insurance claim following a car accident. The technology-based system will assist parties to determine Best and Worst Alternatives to a Negotiated Agreement (BATNA and WATNA). The technology receives inputs from the parties, and then draws from them to develop an optimal outcome.

Blind-bidding systems are less likely, as nascent technologies, to be able to provide for the inclusion of the non-quantum based variables, such as apologies, or the creation of new alternative solutions or options beyond the quantum values.

The second branch of ODR consists of technology-assisted solutions. Technology-assisted ODR refers to the use of technology to augment ADR processes that exist independently of the technology. As the following discussion will demonstrate, technology-assisted ODR is well suited for ombudsman work, as its tools allow for an increased efficiency of human-based transactions and activities.

The ICANN Office of the Ombudsman is a good example of a technology-assisted ODR operation. The most important aspect of this position as an ODR provider is the use of an online case management system. The case management system (CMS) facilitates communications and correspondence between complainants, the organization, and the Ombudsman. The CMS augments, but does not replace, the human aspect of the communication.

The ICANN community is an online community. By definition, participants in ICANN are online users, as the role of the organization is to administer the Domain Name System (DNS), which is the addressing backbone of the Internet. Disputes that occur within ICANN may be either in the real world, or online in nature. A unique element of the ICANN Office of the Ombudsman is that it serves a global community. ICANN stakeholders come from every nation in the world and span all twenty-four time zones. As the ICANN Office of the Ombudsman is a sole practitioner office, it would be impossible to be operational twenty-four hours a day to communicate synchronously with complainants. However, using the CMS complainants, the organization and the Ombudsman may engage in asynchronous communication. Asynchronous communication may be described as parties sharing communications that is not a direct real-time conversation. For example, a complainant in Asia may use the CMS to initiate a complaint while the Ombudsman is sleeping in North America; the Ombudsman may then respond to the complainant after office hours have closed in Asia.

The CMS also allows for the collection and analysis of data for statistical reporting. During the case intake process, information such as the country location and category of complaint are recorded. In closing the complaint, the Ombudsman designates the resolution type, and confirms the complaint category. These statistical records help to identify complaint trends which may assist in providing early intervention on systemic issues.

These three technical adjuncts – case management, asynchronous communication, and trend identification – all assist and augment the human-based activity in handling complaints. However, the Ombudsman process is still driven by the human-based activities of investigating; developing questions, options, and recommendations; and communicating findings and reports. Thus, we may conclude that technology-assisted ODR is appropriate for Ombudsmen.

Generally, ODR is a relatively new field in dispute resolution. It remains in its infancy, but it continues to grow in a rapid manner. As ODR has grown, it has begun to codify its activities. For example, in 2009, the Advisory Committee of the National Centre for Technology and Dispute Resolution developed the 'Online Dispute Resolution Standards of Practice'.[1] These standards inform ODR practitioners about basic rules of practice.

2 FOUR PRACTITIONER ROLES IN TECHNOLOGY ASSISTED DISPUTE RESOLUTION

There are four broad categories of practitioners who are well suited to using technology assisted ODR functionalities. These roles include: Online mediators, Online Conflict Managers, Online Conflict Resolvers, and Ombudsmen.

2.1 Online Mediators

In the first role, ODR practitioners may act as mediators. People in conflict with another party may come to an ODR practitioner and say, "Can you help me to negotiate with the person with whom I am in conflict?" The mediator is somewhat passive in the process, in that they are uniquely a conduit for the flow of communication between the parties and are not at all a protagonist. There are several very good examples of this mediation role.[2]

2.2 Online Conflict Managers

Second, there is the role of conflict manager. This role kicks in when one party says that there is a problem and requests the neutral third party to assist in keeping the issue from escalating. The question posed by the parties to the practitioner might be, "Look, we have a relationship, and there is a problem, and we want you to help us manage it before it gets

1 <www.icann.org/ombudsman/odr-standards-of-practice-en.htm>, last accessed 10 December 2010.

2 See, for example, The Mediation Room: <www.themediationroom1.com>, last accessed 12 December 2010.

worse". ODR systems that look at issues such as levels of support or child access in family law are examples of this role.[3]

2.3 *Online Conflict Resolvers*

Third, there is the role of conflict resolver. The conflict resolver takes on this role when the parties say, "We were not able to manage the conflicts between us, or we did not come to you in time to manage those conflicts, and there has now been a meaningful change to our relationship thatwe need the help of a third party to resolve". Both parties may not necessarily share this perspective simultaneously. For example, your bank, because it is a big institution, may think it simply needs to *manage* an issue when it inadvertently overdraws your account; however, to you as the consumer, it is a conflict that needs to be *resolved*, rather than be *managed*, because the overdraft has caused you distrust the bank, and there has been a fundamental change in your relationship with the bank.[4]

2.4 *Ombudsmen*

Fourth, there is the role of the Internet-based Ombudsman, meaning Ombudsmen who are online practitioners. In this final scenario, the parties would come to the Ombudsman and ask the following question: "We have a conflict between us because one of us feels unfairly treated by the other. Can you work with us, evaluate this situation, and if one of us was treated unfairly, can you help us work out a solution that we all can work with and that is fair?"[5] This chapter concerns itself with this last category of practitioner, however, Ombudsmen use a wide range of tools in handling conflict, and they may use the same skill sets as mediators, conflict managers, and conflict resolvers.

3 WHAT IS AN OMBUDSMAN?

An ombudsman is an independent, objective investigator of people's complaints against government agencies and other organizations, both public and private sectors. After a fair,

3 See, for example, Our Family Wizard: <www.ourfamilywizard.com>, last accessed 5 December 2010.

4 See, for example, The Financial Consumer Agency of Canada: <www.fcac-acfc.gc.ca/eng/contactus-eng.asp>, last accessed 7 December 2010.

5 See, for example, ICANN Office of the Ombudsman: <www.icannombudsman.org>, last accessed 1 December 2010.

thorough review, the ombudsman decides if the complaint is justified and makes recommendations to the organization in order to resolve the problem.[6]

Ombudsmanship came into being in 1809, when the Swedish Parliament appointed the first ombudsman to protect citizens from the excesses of bureaucracy.[7] The word ombudsman consists of two parts: *ombuds*, meaning representative; and *man*, a gender-non-specific term meaning the people. Historically, an ombudsman has been the representative of the people in dealings with bureaucracy. In Quebec the ombudsman is referred to as "The Protector of the Citizens", while in France the ombudsman is called "The State Mediator".[8]

Ombudsmen are generally concerned with ensuring that the bureaucracy or agency they oversee fairly treats the members of their constituency. Ombudsmen are generally characterized as being independent, impartial, and neutral advocates neither for the agency nor the complainant, but rather for the principles of administrative fairness. It is worthwhile to consider the distinction between substantive fairness, which can be defined as a fair outcome of an administrative process, and procedural or administrative fairness, which is defined in the following paragraphs.

Ombudsmen are generally concerned with administrative fairness, as opposed to results in regulatory or criminal processes. Ombudsmen deal with the redress of unfair situations rather than the administration of compliance frameworks. The Code of Administrative Justice by the British Columbia Ombudsman lists at least sixteen criteria for administrative fairness. These include issues such as unreasonable delay and unfair procedures.[9]

This chapter relies primarily on that Code of Administrative Justice to provide a working definition of administrative fairness that can be applied consistently and universally for ombudsman purposes. Fairness can have different meanings across context, culture, language, and tradition. The Code of Administrative Fairness provides an excellent example of describing "being fair" in neutral and explicit terms.

Administrative fairness has been defined in the following manner:

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6 Forum of Canadian Ombudsman, 2006, *What is an Ombudsman?*, <www.ombudsmanforum.ca/whatis_e.asp>, last accessed 13 January 2011.

7 United States Ombudsman Association, 2006, *History of the Public Sector Ombudsman*, <http://usoa.nonprofitsites.biz/en/About_Us/history.cfm>, last accessed 13 January 2011.

8 Protecteur de la Citoyenne; Mediateur de L'Etat.

9 British Columbia Ombudsman, 2003, *Special Report 42, Code of Administrative Justice*, <www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2042.pdf>, last accessed 13 January 2011.

> [...] our judges have had an historic association with the concept which we call 'due process of law.' The phrase, which has its roots in the Magna Carta, sums up our attachment to civility no less than to legality. In popular terms, it means fair play: assuring a hearing on the pros and cons of an issue to those affected; apprising them of what they have to meet or, in a criminal case, of the charges against them; giving them an opportunity to produce witnesses and to counter evidence adduced against them; allowing them to present argument on the facts and legal issues raised in the litigation; and assuring them finally of a considered decision by an impartial judge. What is important about due process is the fact that its rationale has taken hold beyond the courtroom and has been applied in administrative proceedings and to public affairs generally. It has, in short, become a social norm, implying both a right of individuals and groups in our society, who have grievances to air, or demands to press, or claims to litigate, to make themselves heard; and correlatively, an obligation to advance their causes through rational procedures which, after painful experience, have displaced naked force as the means through which the case is made for change and the redress of wrongs.[10]

Ombudsmen can be important actors in the overall operation of the civil justice system. They provide alternative dispute resolution[11] services, which may reduce the propensity for costly and time-consuming grievances and litigation. Their existence and presence ensures that administrative fairness is supported in a wide variety of civil and business institutions.

3.1 Three Types of Ombudsmen

Ombudsmen are generally classed in one of three categories: *classical or legislative*, *organizational*, and *executive*.[12]

Classical or legislative ombudsmen are appointed by a national, state or provincial, or municipal legislative body to ensure the fair treatment of the population by the adminis-

10 Justice Bora Laskin, SCC, quoted at Zacks, Micheal, 1999, *Administrative Fairness in the Investigative Process*, in Linda Reif (ed.), *The International Ombudsman Anthology*, The Hague, Kluwer Law International pp. 555-556.

11 "ADR is any method of dispute resolution other than formal adjudication such as court litigation or administrative proceedings. ADR is not a fancy, new approach but rather an alternative – characterized by common sense and flexibility." Cathy Costantino *et al.*, *Designing Conflict Management Systems*, San Francisco, Jossey-Bass 1996, p. 33.

12 There is a category for Advocate Ombudsman, but the research has failed to identify any such programs in existence.

tration. There are numerous examples of classical ombudsmen around the globe. These would include the many municipal, state, provincial, or national ombudsmen appointed by the appropriate level of government. They are located outside of the structure of the agency they oversee, and receive complaints from the external users of services provided by the agency. Classical ombudsmen receive wide-ranging powers to investigate complaints, make reports, make recommendations, andresolve matters.

Organizational ombudsmen are appointed by their respective agencies to receive complaints about fairness issues within the organization. These internal ombudsmen service a community within an organization, such as staff, patients, or students. Organizational ombudsmen are an informal resource and do not conduct investigations, nor do they make reports or recommendations.

Executive ombudsmen are appointed by their agency as an internal dispute resolution resource for complaints generated by an external community. Examples of executive ombudsmen would be bank or insurance ombudsmen, newspaper ombudsmen, and, in the case of ICANN, an Internet Ombudsman.

While executive ombudsman are located within specific agencies, they are different from organizational ombudsmen because the executive ombudsmen deal with an external public and conduct investigations, and may make reports and recommendations, as do classical ombudsmen.

The American Bar Association (ABA) Standards define an executive ombudsman as:

> An executive ombudsman may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, it officials, employees, and contractors.[13]

4 WHAT IS DRIVING THE UPTAKE IN ODR?

There are a number of factors driving the adoption of ODR systems. Access to justice is important. It is undeniable that there are increasing numbers of people in disputes who either lack the resources to engage a lawyer, who do not meet the means test for legal aid, whose issue is outside of the legal aid remit, or those who simply choose to act without representation. Recently, the Supreme Court of Canada published an unrepresented liti-

13 American Bar Association, 2004, *Standards for the Establishment and Operation of OmbudsOffices*, <www.abanet.org/adminlaw/ombuds/115.pdf>, last accessed 13 January 2011.

gant's guide, due to the growth in cases heard by the Court where citizens appear without counsel.[14]

ODR is a vehicle that allows the parties to a dispute to resolve the matter, with or without the participation of third parties. It allows the private ordering of affairs, regardless of locale, jurisdiction, or legislative paradigm. The ability to seek resolution, redress, and potentially justice from the comfort of one's own living room, with little or marginal expense, is attractive to many. This is not to say that ODR is a replacement for brick and mortar court rooms. In fact, ODR may be particularly well-suited to a number of areas where the courts already have jurisdiction. It has its greatest potentials in e-commerce, small claims, and interpersonal disputes.

The astounding growth of e-commerce has drawn the attention of international organizations, such as the United Nations and the Organization for Economic Co-operation and Development (OECD). In 2007, the OECD produced a set of consensus recommendations on Consumer Dispute Resolution and Redress. These recommendations state that processes should enable consumers to conduct the redress procedure without the need for legal representation or assistance, as much as possible. The OECD also recommends the greater use of technology to resolve disputes.[15]

The United Nations, through a number of its bodies, including the World Intellectual Property Organization, the United Nations Commission on International Trade Law,[16] and United Nations Social and Economic Commission for the Asia Pacific, has shown great interest in Online Dispute Resolution.

One of the first and most often accessed ODR systems is the Uniform Domain Name Resolution Policy (UDRP). The UDRP is a policy that has been instituted by the ICANN to deal with disputes over the rightful ownership of domain names, and in particular, cyber-squatting. ICANN has developed a set of rules that describe when someone is disputing a domain's ownership or claims someone is cyber-squatting on a domain. ICANN works with four international arbitration providers: the National Arbitration Forum from the United States, the World Intellectual Property Organization from Geneva, the Czech Arbitration Court Center for Internet Disputes in Prague, and the Asia Domain Name

14 The Supreme Court of Canada <www.scc-csc.gc.ca/rep/index-eng.asp>, last accessed 13 January 2011.

15 Organization for Economic Co-operation and Development, July 2007, OECD Recommendation on Consumer Dispute Resolution and Redress, <www.oecd.org/dataoecd/43/50/38960101.pdf p. 12>, last accessed 5 January 2011.

16 See, for example, <www.uncitral.org/pdf/english/colloquia/ODR/IICL_Bro_2010_v6.pdf>, last accessed 4 January 2010.

Arbitration Centre headquartered in Hong Kong. To give examples of those involved in a UDRP process, a trademark owner who wished to register a domain name may be located in Vancouver, the cyber-squatter in China, and the arbitrator in Europe. This process has worked for thousands of cases around the globe privately, trans-nationally, and outside of the courts. A large body of UDRP related jurisprudence has been established, and this is used by the national courts, who are the appeals bodies.

Finally, in a world that is increasingly concerned with being "green" or eco-friendly, ODR inherently reduces the amount of paper used. Now and in the future, it is possible that disputes make be resolved without the use of paper. For example: small claims discoveries may be conducted by the filing of documents online, parties may be examined through chat rooms, and whole Ombudsman investigations may take place entirely online.

Based on all of this information, it is submitted that the world is increasingly witnessing an accelerated growth in the use of ODR systems and techniques.

5 IS THERE A ROLE FOR ODR IN OMBUDSMAN PROGRAMS?

The previous section underscores reasons why ODR is increasingly becoming used across a wide selection of dispute techniques. The uptake of ODR into Ombudsman programs may be based on any of these factors of economy, efficiency, the environment, or changes in professional acceptance of the technology. ODR techniques may be well used in Ombudsman programs, but in looking at the applicability of ODR three factors must be taken into consideration. First, the Ombudsman practitioner must understand the differences between technology-based and technology-assisted ODR, and must select and implement the appropriate form of ODR for his or her practice. Second, the Ombudsman practitioner should consider a number of criteria to determine how, and in what manner, ODR provides a "fit" with his or her operations. Third, Ombudsman practices may need to be modified in order to integrate ODR into the conduct of work.

5.1 Factor One – Technology-Based or Technology-Assisted ODR for Ombudsmen?

Earlier in the chapter, we looked at the two forms of Online Dispute Resolution – technology-based and technology-assisted ODR. Briefly, we described technology-based ODR primarily as a blind bidding system which allows two parties in a dispute to use multivariate matching to obtain a win–win outcome. Technology-based ODR is likely most applicable

for disputes where there is a quantum involved, *i.e.*, the value for a vehicle in an insurance claim that is disputed between the car's owner and the insurance company.

Technology-assisted ODR uses technology to improve the efficacy of human-based processes. For example, the use of fax machines rather than postal services has improved the rapid exchange of correspondence. Technology-assisted ODR is scalable to the needs, finances, and technical competencies of dispute resolution programs.

In our previous analysis of Ombudsmanship, we underlined that the basis for Ombudsman work is established in the concept of fairness. We emphasized that the concept of fairness is the basis of Ombudsman work. Fairness is not a concept that may be easily actualized in a blind bidding environment. Therefore, we can conclude that technology-assisted ODR is the most appropriate form of ODR for use in Ombudsman programs.

5.2 Factor Two – Criteria to Determine Whether ODR Fits into an Ombudsman Practice

Ombudsmen may wish to consider a number of criteria when planning to implement ODR as a tool, or when considering the scalability of their ODR programs. Consideration of these criteria will inform Ombudsmen about the level of technology they will require to conduct a successful ODR-assisted practice.

The criteria that Ombudsman may wish to consider include:
- Geography;
- Legislative requirements;
- Case management users and complaint volume;
- Literacy and language;
- Internet connectivity;
- Time zones;
- Service requirements;
- Client or audience characteristics;
- Synchronous and asynchronous usage, and
- The socio-cultural context.

5.2.1 Geography

Ombudsmen must take geography into account when they contemplate the use of ODR. Ombudsmen should consider such questions as: Where are the potential system users located? Are they all in one building, or dispersed over several countries or continents? Is

the Ombudsman operation located in one place, or is it a decentralized operation with many offices where information needs to be shared? Does the mandate of the Ombudsman cover a defined geographic area such as a country, province or state, city, or a hospital or university campus? If the Ombudsman operation is located in a corporation or organization, is the client group located in the same location or building, or in multiple locations, cities, provinces or states, or continents?

5.2.2 Legislative Considerations

Before embarking on ODR implementations, Ombudsmen practitioners must evaluate their chartering documents, bylaw, statute or legislation to determine if there are any barriers to using ODR. Ombudsmen must determine if complaints must be delivered in a particular manner. For example, if a signature is required, do intakes have to be done in person to verify identity? Are there privacy or information access laws that impact the use of ODR in the Ombudsman operation?

5.2.3 Case Management Users and Complaint Volume

Ombudsmen need to consider the scalability and cost of ODR with respect to the volume of complaints received, and the number of system users. Obviously, the unit cost for implementation drops if the number of complainants or ombudsman officials using the system is greater. Ombudsmen must carefully consider the per-unit costs against existing costs for travel, investigation interviews, etc., prior to implementation.

ODR has particular appeal when Ombudsman investigations involve systemic events, or when there are multiple complaints on a file. The use of ODR technologies easily tracks large volumes of correspondence, and enables Ombudsman investigators to differentiate or combine fact patterns, evidence, communications, and outcomes, as the investigation and redress process progresses.

5.2.4 Literacy and Language

Ombudsmen must be aware of the languages in which system users may wish to communicate, and ombudsmen must also take into consideration both the general literacy and computer literacy of their client group. If Ombudsmen serve a multi-lingual client group, the ODR system should be designed to accommodate system inputs in all the languages served, or to take into consideration translation services. Translations may be accomplished by using online translation tools, or by using native language translators. Ombudsmen must take translation as a matter of concern for both incoming correspondence from complainants and for outgoing correspondence to them.

Ombudsmen must include the use of language and idioms as part of the general literacy factor. For example, is a client group that usually communicates in slang or patois well served in a written environment?

Ombudsmen, when considering the implementation of ODR, must evaluate the general literacy level of their client group, and their computer literacy.[17] If clients or Ombudsman staff lack either general literacy or computer literacy skills, Ombudsmen should reconsider the implementation of ODR.

5.2.5 Internet Connectivity

Ombudsmen must evaluate the Internet connectivity of their clients. There is an obvious difference between local dial-up access and broadband high speed Internet. Ombudsmen should also consider the availability of computers or mobile technologies that enable clients to access the ODR system. If Ombudsmen are serving clients in areas where there is limited network connectivity, or where there is limited computer access, then ODR may be less successful than an area where there is high broadband or device penetration.

5.2.6 Time Zones

Ombudsmen must consider the hours of access they wish to offer, the time zones they serve, and the appropriate times that clients can access the system. Does the Office wish to be available on a 24/7 basis? Does the Ombudsman serve clients in multiple time zones, *i.e.*, are clients spread across all of Canada – which has six time zones? Are the clients most likely to use the ODR system during working hours, or outside of them?[18]

5.2.7 Service Requirements

Ombudsmen must reflect on the need for service requirements in designing and implementing an ODR system. A Human Rights Ombudsman who investigates unfair *habeas corpus* practices in a conflict zone may have different service response requirements than a consumer-oriented banking Ombudsman program. If clients are at immediate risk, then the ODR system must be designed to be very reactive.

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17 Col. Patrick Stogran was the inaugural Ombudsman Veteran's Affairs Canada. In conversation he assessed his clients' computer literacy and presented an interesting conundrum. On the one hand his client group consisted of young veterans who had served in the Afghanistan conflict. These veterans were all very computer literate and have high internet skills. On the other hand, his clients also consisted of older Second World War and Korean War veterans whose computer literacy skills were generally much lower.

18 A website access visit study conducted by a federal agency in Canada showed that the highest web access by clients occurred after 9 p.m. Client interviews indicated that this was the time of day where young families had put the children in bed, and that parents had time to access the internet without being disturbed.

5.2.8 Client or Audience Characteristics

Is there anything specific about the client group which would inform the Ombudsman about the design of the ODR system? For example, the ICANN Office of the Ombudsman serves a specific audience that is based on some sort of relationship with the Internet. One may infer that this client audience may be highly computer literate. The same may be said for audiences in universities. If the Ombudsman serves a client group that consists of person with disabilities is ODR likely to have the same impact as face-to-face activities?

For example, persons who have disabilities which restrict their mobility may find it more accommodating to use ODR technologies as opposed to having to take great efforts to attend an Ombudsman's office. As well, persons who have disabilities which affect their ability to communicate in person, such as deafness, or psychiatric or cognitive disabilities may find the use of synchronous ODR technologies to be a preferred manner of dealing with their complaint.

5.2.9 Synchronous and Asynchronous Usage

Synchronous use of an ODR system means that the client and the Ombudsman are able to communicate in real time. These real-time online conversations or chats may be conducted through the case management or ODR system, or by other means, such as email or social networks. Asynchronous communication means that the conversation between the parties does not occur in real time.

Well this principle easily applies when there is a time zone change; it also applies in a social or familial context. For example, a young family with children may find it convenient to communicate with the Ombudsman at the end of the day, when the chores are done and the children are tucked away in bed, and this correspondence is received by the Ombudsman the following morning. The Ombudsman replies to the family, and it is received by them later in the evening, etc. This allows provides the family the convenience of having their complaint attended to without having to take time away from work or home responsibilities to visit the Ombudsman's office.

5.2.10 The Sociocultural Context

Ombudsmen wishing to implement ODR systems should take into consideration the general sociocultural context in which they operate. There will be differences in communication and culture between high context and low context societies. This will help inform the Ombudsman of the potential for success. The ODR system must be designed to accommodate the cultural requirements of the client group.

5.3 *Factor Three – Modifying the Ombudsman Practice*

As discussed earlier in this chapter, there are three basic forms of Ombudsmanship – Classical, Executive, and Organizational. Each of them, to some greater or lesser extent, has the capacity to use ODR as a tool in the practice of Ombudsmanship.

Classical Ombudsmen are appointed by a government to receive complaints at a provincial, state, or national level. These complaints relate to the general functioning of governmental administrative activities.

Executive Ombudsmen may be appointed by a government, ministry, corporation, association, or entity to take complaints about specific administrative functions. This is the group of Ombudsmen presently experiencing the greatest growth. Executive Ombudsman may hear complaints from a wide populace that exceeds state or territorial boundaries. For example, the client group may be all of the customers of an international bank, or they may be all of the passengers of a world-wide airline.

Organizational Ombudsmen usually deal with internal clients of an institution, such as employees or students. Organizational Ombudsmen may deal with issues beyond fair administration, and often are involved in relationship issues.

Of these three types of Ombudsman practice, the Executive Ombudsman role is likely the one with whom ODR would have the greatest impact. That is not to say that Classical and Organizational Ombudsmen would not benefit from ODR, but simply that because of the nature of Executive Ombudsmen's potentially wide client bases, ODR may most benefit Executive Ombudsmen.

Ombudsmen might have to modify their practices to accommodate ODR in a number of ways, which might include:

- An appropriate case management and correspondence system. This could be a one-off purpose built ODR system, or it could simply be an existing email program.
- For security reasons, it is strongly advised that the case management or mail systems be housed on a separate, secure server, independent of other applications within the organization, business, or government.
- Be proactive in providing a website that promotes the Ombudsman function and that links to the complaint intake case management system. The website should contain a reasonable amount of self help information to educate, inform, and assist potential clients.

- Have the capacity to provide native language translators for complainants. Community resources may be available to assist.[19] Translators must be covered by either privacy laws or non-disclosure agreements to keep the correspondence they review as private and confidential.
- Be prepared to develop effectiveness measures relating to the use of ODR.
- Ombudsmen, especially those who deal with multi-cultural client groups, must develop a sense of self and their own culture, as they work with online documents to conduct dispute resolution. Culture, in this case, refers especially to how people develop a socio-cultural context to the manner in which they resolve disputes. Practitioners need to be particularly aware of their own culture as they work with clients or institutions that are different from them in the high context-low context[20] scale. In ODR scenarios, Ombudsmen must be prepared to allow correspondents to display their own conflict culture, without the Ombudsman forcing complainants to adopt the Ombudsman's conflict culture.
- Ombudsmen must be able to allot time and energy to work with complainants who have low general or computer literacy skills. The same skills used in active listening may be applied to "active writing".
- Ombudsmen must practice writing skills that will assist in developing a "trust" environment.
- Ombudsmen must be aware that correspondents may have a tendency, with the written word, to stray from core issues and processes. Much of the Ombudsman process will be to focus on these core issues and to use the many tools in the Ombudsman tool box to develop options and possible outcomes.

6 CONCLUSION

Ombudsmanship is a field of dispute resolution which can greatly benefit from the use of Online Dispute Resolution as a tool. There are presently very few Ombudsman operations that practice ODR.[21] Those who have engaged ODR have found that it has the capacity to

19 The ICANN Office of the Ombudsman works with a local refugee, immigrant, and new citizen centre in suburban Vancouver, British Columbia to provide translation services. This creates a win-win scenario.

20 "...the expressions 'high context' and 'low context' are labels denoting inherent cultural differences between societies. High-context and low-context communication refers to how much speakers rely on things other than words to convey meaning. Hall states that in communication, individuals face many more sensory cues than they are able to fully process. In each culture, members have been supplied with specific 'filters' that allow them to focus only on what society has deemed important. In general, cultures that favor low-context communication will pay more attention to the literal meanings of words than to the context surrounding them." MQJeffrey, *High Context vs. Low Context Communication*, <http://hubpages.com/hub/High-Context-vs-Low-Context-Communication>, last accessed 13 January 2011.

21 See for example, the ICANN Office of the Ombudsman <www.icannombudsman.org>.

increase effectiveness in complaint handling. As we enter the second decade of the 21st century, we can expect to see an uptake of ODR in the practice of Ombudsmanship.

Ombudsman practitioners may wish to take the following guidelines into account as they consider the use of ODR technology:

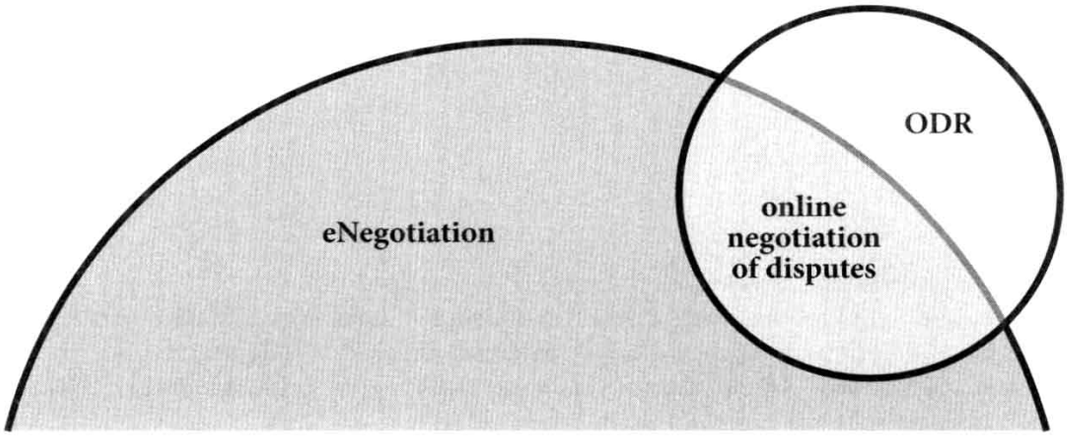
- Timing: is this the appropriate point in time to launch an ODR program? Are there risks or benefits to waiting to start using ODR?
- Economy: Can a case be made for the expenditure of resources, both capital and human to use ODR? Will there be an efficiency gained in managing files or the technology process which makes the operation run more effectively? How can we measure that?
- Audience: Does the use of ODR increase access to Ombudsman operations? Will new users be attracted to the system? Will other users be affected due to a lack of computer literacy? Are there strategies to overcome barriers?Are there particular audience segments which will particularly benefit from ODR?
- Technology: Will ODR technologies replace – improve – or make redundant any existing case management system? Are there compatibility issues? Is a custom designed system most appropriate?
- Organizational communications: How will we inform our audience of the movement towards ODR?
- Practitioner accommodations: What will the Office of the Ombudsman need to do to accommodate the use of ODR into its practice?

16 ODR and eNegotiation

Ernest Thiessen, Paul Miniato and Bruce Hiebert

Online dispute resolution (ODR) and eNegotiation are two overlapping components within the world of electronic group decision support systems. eNegotiation encompasses all online transactions in which two or more parties seek an agreement through negotiation. These negotiations can range from e-Commerce to international peace treaties. ODR includes all forms of electronically assisted dispute resolution, often with human intervention including online mediation and arbitration processes that do not involve negotiation (Figure 7). In exploring the use of eNegotiation for ODR, these boundaries can become fuzzy, and in the future they may blur even more as intelligent agents become part of eNegotiation technologies.

Figure 7 Relationship Between eNegotiation and ODR



1 eNegotiation

eNegotiation is derived from "electronic negotiation" in the same way that e-mail is short for "electronic mail". It is a process that uses a negotiation support system including computers or other forms of electronic communications that enable parties to negotiate their own agreements. In its most advanced form, eNegotiation is a form of artificial intelligence that fully automates mediation (perfectly neutral, super intelligent, and very secure). While in many cases unnecessary, eNegotiations can include face-to-face meetings if such meetings enhance the process.

Research on computer-mediated negotiation or eNegotiation began in the 1970s. The first prototype negotiation support systems were built during the 1980s. The problem of automating the negotiation process is not a simple one. This is evidenced by a myriad of systems (mostly still research efforts) around the world, including the following (in alphabetical order):

- Adjusted Winner[1]
- AniMed[2]
- AutoMed[3]
- Cybersettle[4]
- AssetDivider[5] (previously known as FamilyWinner)
- Fair Outcomes[6]
- Genie[7]
- Genius[8]
- Graph Model[9]
- Invite[10]
- Joint Gains[11]
- Negoisst[12]
- Smartsettle[13]

1 <www.nyu.edu/projects/adjustedwinner>, last accessed 27 January 2011.

2 R. Lin, Y. Gev and S. Kraus"Facilitating Better Negotiation Solutions using AniMed", 2010. Available at <http://u.cs.biu.ac.il/~linraz/Papers/linetal-acan11.pdf>, last accessed 13 June 2011.

3 M. Chalamish and S. Kraus, "AutoMed – An Automated Mediator for Multi-Issue Bilateral Negotiations", *Journal of Autonomous Agents and Multi-Agent System*, 2011.

4 <www.cybersettle.com>, last accessed 27 January 2011.

5 B. Abrahams, E. Bellucci and J. Zeleznikow, "Incorporating Fairness into Development of an Integrated Multi-agent Online Dispute Resolution Environment, Group Decision and Negotiation", published online 3 March 2010: <http://0-www.springerlink.com.library.vu.edu.au/content/2jl7774266830554/fulltext.pdf>.

6 <www.fairoutcomes.com>, last accessed 10 February 2011.

7 J. Wilkenfeld, S. Kraus, K.M. Holley and M.A. Harris, "GENIE: A Decision Support System for Crisis Negotiations", 1999. Available at <www.sciencedirect.com/science/article/pii/016792369400027P>, last accessed on 13 June 2011.

8 R. Lin, S. Kraus, D. Tykhonov, K. Hindriks and C.M. Jonker,"Supporting the Design of General Automated Negotiators", in T. Ito, M. Zhang, V. Robu, S. Fatima, T. Matsuo, and H. Yamaki (eds.), *Innovations in Agent-Based Complex Automated Negotiations*,", Volume 319 of *Studies in Computational Intelligence*, Berlin/Heidelberg, Springer 2010, pp. 69-87.

9 <www.systems.uwaterloo.ca/Faculty/Hipel/SYDE533.html>, last accessed 10 February 2011.

10 <invite.concordia.ca>, last accessed3 March 2011.

11 <www.sal.tkk.fi/en/personnel/raimo.hamalainen/publications>, last accessed 27 January 2011.

12 <www.wi1.uni-hohenheim.de/negoisst.html>, last accessed 27 January 2011.

13 <www.smartsettle.com>, last accessed 27 January 2011.

Among these systems, Cybersettle, Fair Outcomes and Smartsettle are available for commercial application. Cybersettle is a simple system that uses double blind bidding[14] for single-issue negotiations. Fair Outcomes, Inc. provides parties with access to several proprietary systems that are grounded in mathematical theories of fair division and of games. Smartsettle uses a method called visual blind bidding[15] that is applicable to simple cases and scalable to complex multiparty cases. Rapidly expanding computing power means that sophisticated algorithms are the likely direction for future development. More developers will enter the field as the body of knowledge expands and computing power continues to increase. In the long-term, fully automated eNegotiation software systems can be expected.

eNegotiation systems are often contrasted with other negotiation systems that require an intervenor such as a facilitator, a mediator, an arbitrator, or an adjudicator as an integral part of the process. eNegotiation also involves a structured and durable form of information that is exchanged between the parties. In eNegotiation primary parties can easily involve secondary stakeholders as required and quickly communicate the relevant context. The easy inclusion of professionals such as technicians, accountants, engineers, and lawyers ensures that the decision is fully informed and enforceable. In addition to involving secondary stakeholders, the parties may bring in facilitators or mediators (either as unprivileged observers to both sides, or as privileged observers to either side). This permits a graceful transition from stalled eNegotiation to eMediation. The key difference with eNegotiation is that the parties are in full control both during the process and in accepting or rejecting an outcome (Table 4).

Differing eNegotiation systems represent a wide range of approaches to the negotiation process and the correct choice of eNegotiation system can either augment or diminish the possibility of conflict. For example, unstructured email is generally ineffective in resolving disputes and in practice can even create or escalate conflict.[16] Well-designed eNegotiation systems will reduce the conflict or eliminate it by changing the fundamental nature of the interaction between the parties.

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14 In double blind bidding both parties are unaware of the specifics offered by the other party, only that a negotiation is in process. The computer operates according to a formula and when the offers are within a specific range it announces a deal.

15 In visual blind bidding visible suggestions are put forward by each party and the computer operating as an intelligent agent, but each side's acceptances are kept hidden from the other party. The computer announces a deal when hidden acceptances coincide.

16 R.A Friedman and S.C. Currall, "Conflict Escalation: Dispute Exacerbating Elements of E-Mail Communication", *Human Relations* (2003) 56, pp. 1325-1347.

Table 4 Participant Control and Type of Dispute Resolution

Conflict Resolution Continuum	Degree of Control
eNegotiation	most control
offline negotiation	↕
Facilitation	
Mediation	
Arbitration	
Court	least control
Violence	out of control

1.1 eNegotiation System Components

eNegotiation support systems are comprised of several components including communication, structure, decision support, and algorithms. eNegotiation systems incorporate one or more of these components and may do so in significantly different ways.

1.1.1 Communication

Every eNegotiation support system has mechanisms for parties to communicate for the purposes of information exchange, relationship-building, brainstorming, collaborative document production, and other requirements of the process. Communication is greatly facilitated when the parties cannot easily meet in person but have an electronically structured means to facilitate their negotiations. While electronic communication can sometimes hamper the emotional content needed for relationship building, there are times when removing some of the emotional content can help reduce conflict, especially when one party feels dominated. Types of communication support include email, forums, chat, and fax. A special case is when parties speak different languages.[17]eNegotiation using formal processes can more easily include a translation (allowing cross-lingual operation).

1.1.2 Structure

Human communication in negotiation processes ranges from the highly structured to the informal. More structured communication is better suited to an efficient negotiation process and is easily facilitated by eNegotiation. Structured communication enables the production and use of a Framework for Agreement, exchange of package proposals, and double blind-bidding or visual blind-bidding. Managing and structuring communication

17 The implications to eNegotiation of cultural differences other than language is less well understood.

in an eNegotiation system using natural-language processing is likely to be more user-friendly, but currently presents considerable technical challenges.

1.1.3 Decision Support

Computer software designed to facilitate eNegotiation may provide the ability to model a complex problem throughout its evolution. The factors included in these models can include private preferences and relationships between issues under negotiation. Specific software[18] can also assist the parties in clarifying their negotiation context and objectives, evaluating proposals, generating new possibilities, and guiding them toward an outcome.

1.1.4 Optimization

When a negotiation problem is modeled, a computer can act as an intelligent agent using optimizationalgorithms that seek the best solution. Such algorithms create a representation of party preferences that can be used to generate packages (bundled positions on issues) that are helpful in the process. Such suggestions for resolution can be based on private information that remains private to the parties but is visible to the neutral eNegotiation system. A computer generated package can encourage the process, resolve impasses, and improve negotiated agreements – all without reducing the control of the process by the negotiating parties. Optimization algorithms utilize detailed and highly accurate information from all parties, information that they would never provide each other and in some cases not entrust to a human mediator. With anything other than the very simplest of cases, this optimization is beyond the capabilities of any unassisted human.

2 ADVANTAGES OF eNEGOTIATION

eNegotiation systems offer a great many advantages to traditional forms of negotiation. In the field of ODR these advantages can make the difference between achieving a resolution and the necessity of litigation or a failure to address a conflict. While some of these advantages pertain to all eNegotiations systems, others are specific to more complex systems using intelligent agents.

18 C. Boutilier, R.I. Brafman, C. Domshlak, H.H. Hoos and D. Poole, "CP-nets: A Tool for Representing and Reasoning with Conditional Ceteris Paribus Preference Statements", *Journal of Artificial Intelligence Research* (2004) 21, pp. 135-191. Also available online: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.11.495&rep=rep1&type=pdf>, last accessed 13 June 2011.

2.1 High Cost of Conventional Negotiation

Drawn-out negotiations can be very expensive in time, negotiation energy and use of environmental resources, especially when they involve face-to-face meetings or high-priced professionals.

2.1.1 Advantage

A well-designed eNegotiation system, especially one with setup assistants[19] for initial input and modeling, reduces much of the cost of conventional negotiations. The use of experts is minimized and the actual time for negotiation is reduced.

2.2 Coordinating Meeting Time and Space

Conventional dispute resolution meetings require coordination of disputants as well as mediators or arbitrators. Arranging communication can be complex, time consuming, and costly in support resources. These difficulties are multiplied if face-to-face meetings are required.

2.2.1 Advantage

eNegotiation systems offer asynchronous and global access using the Internet. This makes access easy, cuts operational costs, and speeds up the process.

2.3 Complex Problems and Issue-by-Issue Thinking

Many disputes have multiple components and without sophisticated tools to deal with the inherent complexity, decision-makers are forced to deal with issues one at a time. A piecemeal approach to negotiation encourages positional rather than mutual gains bargaining.

2.3.1 Advantage

A well-designed eNegotiation system allows parties to model their entire problem. It allows them to exchange packages and consider packages generated by the system rather than struggle with bits and pieces.

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19 A software setup assistant, sometimes called a "wizard", is a user interface element that presents a user with a sequence of dialog boxes that lead through a series of well-defined steps. Tasks that are complex, infrequently performed, or unfamiliar may be easier to perform using an automated assistant. In contrast, an expert system guides a user through a series of (usually yes/no) questions to solve a problem.

2.4 *Irrational Decisions*

Multiple issues and numerous possible outcomes may lead negotiators to make decisions based on psychological dynamics and emotion rather than reason. These problems are even greater in cases involving multiple parties. Reasonable outcomes are compromised when decision-makers make logic errors, take short-cuts, or permit emotions to get the upper hand when under the stress of intensive negotiations. Without properly assessing the risks, parties are often unrealistically confident of a favourable outcome, should the matter be taken to court.

2.4.1 Advantage

A well-designed eNegotiation system with an intuitive graphical user interface allows parties to model the problem and represent their preferences well. Negotiators can see their situation better in order to reduce complexity and make more rational decisions.

2.5 *Multi-Party Disputes*

Multi-party disputes can be much more complex and require many meetings and expert intervention in order to facilitate resolution of the conflict. Such disputes can be facilitated electronically through document transmission and conference calls, but they still exist primarily in the face-to-face realm.

2.5.1 Advantage

A well-designed eNegotiation system allows multiple parties to interact flexibly and asynchronously. A whole category of disputes currently not being considered for ODR has become appropriate for application of comprehensive eNegotiation systems.

2.6 *Training*

eNegotiation systems can provide unique opportunities for user training. Decision makers can improve their negotiation skills by practicing with hypothetical cases and even simulate their own case before negotiating for real. Role reversal is an ideal training method that can also be used to motivate parties to collaborate in finding a solution to their negotiation problem.

2.6.1 Advantage

Significant time can be saved and a more valuable outcome can be achieved if negotiators agree on an efficient process.

3 CHALLENGES AND OPPORTUNITIES[20]

While the advantages of eNegotiation systems are substantial, there are obstacles to overcome before such systems become not only practical but widespread. As the field develops each of these challenges provides an opportunity for new approaches that will eliminate the challenge and move eNegotiation from obscurity to mainstream. Significantly, many of these are not technical issues but issues related to user understanding and expectations.

3.1 Adoption by Those Currently in Conflict

3.1.1 Challenge

Those currently in a dispute have already made an implicit commitment to a particular method of conflict resolution. Confronted with a new technology, parties will have questions regarding the advantage that new technology might provide to other parties. If one side decides to adopt it, the other side may tend to perceive the technology as biased toward the other, leading to a rejection. This is exacerbated by contexts where negotiations are regular and traditions have arisen regarding their format.

3.1.2 Opportunity

An eNegotiation system with a range of features provides an opportunity for introducing parties to eNegotiation tools in stages. One party might first be persuaded just to use the system's decision support features as an aid to their own side of the negotiation. Later, they could attempt to model their counterparty's preferences and use the tool to simulate the entire negotiation as an aid to better understanding. To provide even greater comfort prior to actual negotiation parties may be given the opportunity to participate in role reversal simulations. Such practices have been shown to be effective in increasing understanding of the negotiations and the value of an eNegotiations tool.[21] With sufficient familiarity all parties can gain enough trust to use an eNegotiation tool in their real-life situation.

20 Portions of the material in this section are adapted from E.M. Thiessen and J. McMahon, "Beyond Win-Win in Cyberspace", *Ohio State Journal on Dispute Resolution* (2000) 15, pp. 643-667.

21 Based on the authors' experience.

3.2 *Social Value of Adversarial Tactics*

3.2.1 Challenge

Inter-personal conflict is highly valued within some sectors of all societies, and even by some cultures as a whole. Win-lose thinking is present everywhere. A focus on individual success encourages face-to-face confrontation rather than mediated and more cooperative computer-based systems. This may be an especially significant issue in cultures where angry confrontation is an expression of manliness.

3.2.2 Opportunity

The productive value and possible individual improvements must be stressed as part of the introduction to these systems. For high-value transactions, where computer-based tools such as spreadsheets are already used, the advantage of sophisticated eNegotiation systems will be recognized much sooner. For low-value transactions, especially in some cultures, it may take explicit marketing programs to demonstrate the value of collaborating using eNegotiation systems.

3.3 *High Cost of eNegotiation Systems*

3.3.1 Challenge

eNegotiation systems are currently very costly to develop. Proprietary systems are beyond the reach of all but the wealthiest corporations.

3.3.2 Opportunity

A robust system easy enough for average technologically literate users to adopt and flexible enough to handle multiple types of conflicts would be of high value as a commercial opportunity.

3.4 *Discomfort with Technology*

3.4.1 Challenge

Only computer-literate individuals are comfortable using technology for a complex process.

3.4.2 Opportunity

Advances in graphical user interfaces now make it possible to build intuitive interfaces for eNegotiation systems, even for users who are not very computer literate. Automated tools

for data gathering and templates for specific negotiation contexts offers further possibilities for creating interfaces that simplify demands on users.

3.5 Secure Systems Accessible to all Parties

3.5.1 Challenge

There exists much distrust of the ability of online systems to deliver reliable, highly secure communication.

3.5.2 Opportunity

eNegotiation systems can use third-party neutral servers and high levels of encryption. This allows for secure and reliable data movement between parties that minimize the risk of privacy violation or loss of communication capacity. In certain high-value cases with extraordinary security requirements, a special dedicated neutral server may be operated under the aegis of a mutually-trusted authority, such as a court, escrow agency, or the UN.

3.6 Useable, Affordable, Multilingual Interface

3.6.1 Challenge

Proprietary systems and user-installed interfaces can be rigid and difficult to use. They may cause conflicts with other systems and be unavailable to disputants who do not own computers.

3.6.2 Opportunity

An eNegotiation system with a web-based interface and multi-lingual capacity holds the potential to be affordable and work within many environments. Web interfaces are popular and relatively well-understood. Such approaches open the possibility of dispute resolution to anyone with access to the Internet.

3.7 User Understanding of Intelligent Agent eNegotiation Tools

3.7.1 Challenge

The concept of "beyond win-win" sounds like an impossibility to many potential users. Some find it difficult to understand how an eNegotiation system can function as an intelligent agent.

3.7.2 Opportunity

eNegotiation developers can produce systems that explain themselves through an interactive, iterative process, leading to better user understanding and increased comfort with the process.

4 SMARTSETTLE: AN ENEGOTIATION SYSTEM WITH APPLICATIONS TO ODR

An example of a comprehensive, multiparty, intelligent-agent eNegotiation systems currently available for commercial use is the Smartsettle Infinity system developed by iCan Systems Inc.[22] and the authors of this chapter. It was designed to meet the challenges represented by a wide range of ODR environments. It integrates sophisticated tools that facilitate non-linear modeling, uses effective optimization algorithms and puts users in control of the process. This leads any number of parties to a relatively quick solution to their negotiation problem.

The Smartsettle system helps parties focus on:
- collaborating regarding their case;
- building a Framework for Agreement;
- keeping track of versions;
- allowing dynamic representation of issues;
- tracking shared issues and private variables with constraints and formulas;
- eliciting and analyzing user-preferences;
- providing a mechanism for the exchange of packaged proposals;
- making intelligent suggestions for resolution.

4.1 Smartsettle Infinity Features

The features of Smartsettle Infinity currently include, a graphical user interface, tools to reduce user barriers, asynchronous and chat communication modes, visual blind bidding, preference elicitation, and optimization. The current system is based on a patented process and has had almost twenty years of development. As commercial use expands iCan expects to move the system to a more intuitively interactive interface that meets more of the challenges of the eNegotiation environment.

22 iCan has a second eNegotiations system, Smartsettle One, a two-party one-issue system comparable to other commercial products such as Cybersettle. <www.smartsettle.com>.

4.1.1 Graphical User Interface

To give the user a sense of relationships a graphical interface is provided (see Figures 8-12 below). This includes sliding scales and line graphs that display the actual value and the relationship between values that the user is looking for. Users can click and drag components for easy interaction.

4.1.2 User Barrier Reduction

To bring down the psychological barriers to using the system, it includes tutorial cases, demonstrations, and hands-on user training with simulations. It can also be used as a stand-alone decision support system for either party.

4.1.3 Communication

To maximize ease of use and security, the system uses encrypted transmissions, an embedded forum system for participants, and a secure off-line mode that ensures no data confidential to one party is transmitted to the other.

4.1.4 Visual Blind Bidding Process

The negotiation process uses visual blind bidding with visible proposals and anonymous suggestions but hidden acceptances that become a deal if they coincide at the end of a session. An algorithm that rewards generosity encourages parties to move quickly to the zone of agreement.

4.1.5 Preference Elicitation and Analysis

In order to maximize satisfaction for all parties, the intelligent agent uses interactive modeling that takes into account user-confidence. It dynamically learns how each party becomes satisfied on each of the issues. With well-represented preferences, every package is rated so that a party can easily compare them.

4.1.6 Optimization

Fair and efficient outcomes are produced with the optimization algorithm "maximize the minimum gain".[23]

23 There are a number of optimization algorithms, starting with the work of Nobel Laureate, John Nash. The version used by Smartsettle and developed by Dr. Ernie Thiessen has been singled out for its excellence. H. Raiffa, *Lectures on Negotiation Analysis*, PON Books 1996.

4.2 *Smartsettle Collaborative Process*

In practice, the Smartsettle Infinity system takes users through a series of eight steps that prepares them for negotiation and puts them in control of a process that quickly leads to a fair and efficient outcome. By following these steps users focus on achieving outcomes that are personally valuable and mutually acceptable rather than caught in a see-saw trade-off process that polarizes participants. These steps are applicable to all negotiations including ODR.

4.2.1 Prepare for Negotiation

The most important participants in any negotiation are the decision makers, but they need to involve other professionals in order that decisions are as well informed as possible. The Smartsettle process is designed to engage top-level decision makers directly in a way that they interact efficiently with other professionals. A well-rounded team can clearly identify the problems to be solved and assign priorities with respect to objectives. It is especially important that the decision makers are familiar with the process. Role playing simulations including role reversal exercises are useful for orientation.

4.2.2 Formulate Alternative Plans

Parties may consider a number of ideas before coming up with one or more plans to consider more seriously for their negotiation. This is a collective process between the participants and may include a number of brainstorming sessions that produce options and generally determine the range of proposals to be negotiated.

4.2.3 Create a Framework for Agreement[24]

A Framework for Agreement is like a final agreement, but with blank spaces representing issues still to be resolved. Building a comprehensive Framework for Agreement is a collaborative exercise that helps to create good will among the parties. It also ensures that the agreement is not derailed later in the process by conflict over specific language. Lawyers for each side should be involved at this stage to make sure that the wording is clear. With an initial draft of the Framework for Agreement in hand, the issues can be summarized. All the issues are then negotiated together as a package. The Framework for Agreement is expected to continue to evolve as the negotiation process clarifies aspects of issues that may not have initially been considered.

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24 Our definition of "Framework for Agreement" is similar to the definition of 'Framework Agreement' defined as "a document in the form of an agreement, but with blank spaces for each term to be resolved by negotiation". R. Fisher, W.L. Ury and B. Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, Houghton Mifflin 1991, p. 171.

4.2.4 Build a Model for Evaluating Packages

The next task is to build a dynamic model for evaluating packages. In most negotiations parts of the model are shared and other parts are kept private. Shared components generally include constraints that all parties agree to. The private components of the model define individual objectives for each party as each party uses the Smartsettle interface to represent their own preferences. Smartsettle has various tools such as "even swaps" that can assist parties to analyze and represent their own preferences. With complex real-world negotiations, this assistance can involve hundreds of millions of computer calculations, evaluating more alternatives in minutes than an unaided human could review in a lifetime. Parties will often return to this stage as negotiations proceed and new relationships between issues are revealed through the evaluation and weighting of various packages.

4.2.5 Exchange Proposals

Once parties have created a model for evaluating packages they can continue the negotiation process by exchanging formal proposals. The initial exchange of optimistic (best conceivable) proposals helps to establish bargaining ranges for all the issues. Parties may wish to continue with counter-proposals in order to narrow bargaining ranges. Additional suggestions can be generated in order to produce settlement options that reflect the preferences of all parties.

4.2.6 Reach a Tentative Agreement

Each party uses their private preference representation model to consider suggestions generated by the system. If a particular package is acceptable to a party, they can place a hidden acceptance on that package (visual blind bidding). A tentative agreement is reached at the end of a session when all parties have accepted at least one package in common. As an intelligent agent, the Smartsettle system generates improved suggestions as the parties evaluate and rank specific packages.

4.2.7 Uncover Hidden Value

Once a tentative agreement is reached, most negotiators forgo hidden value that may remain on the table. Trade-offs that may be relatively minor to one side may generate substantial benefits for another party. Negotiators either have no means of uncovering the hidden value, are too exhausted, or both. Negotiators using Smartsettle can use powerful optimization algorithms to uncover those benefits. Smartsettle uses an algorithm called "maximize the minimum gain" to divide those benefits fairly among all the parties. This improvement replaces the tentative agreement only if all parties agree to it. However, if all parties have accurately modeled their own preferences, the improvement will usually represent a gain for each of them. If, after consideration, a party decides that their preferences could be better represented, they can adjust their model and request that the

improvement process be retried before making their decision on replacing the tentative agreement.

4.2.8 Implement the Agreement

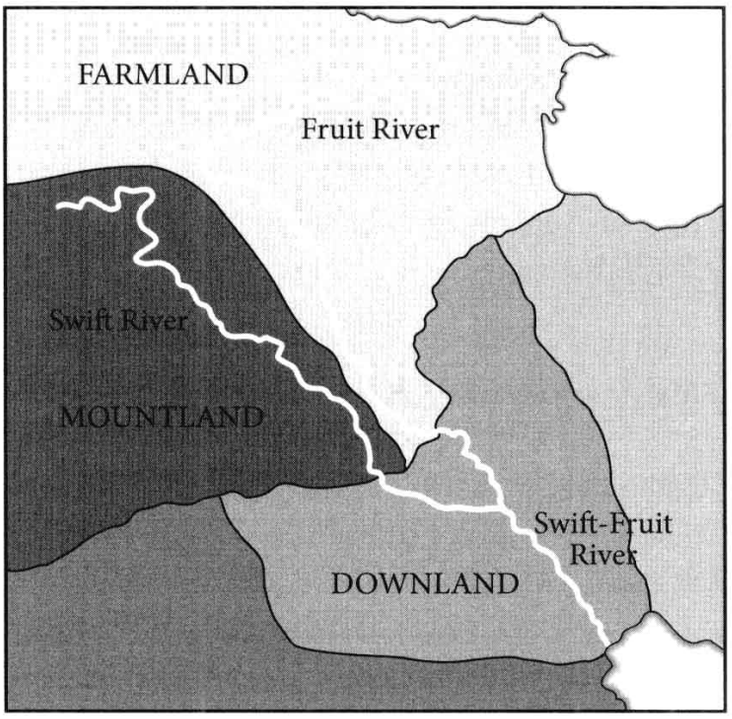
Once an agreement is reached, the Smartsettle process ensures that the agreement is well-crafted and can be implemented immediately. No follow-up drafting process or legal review is necessary. This permits the agreement to be speedily implemented, further improving the whole process for all participants.

5 ILLUSTRATIVE EXAMPLE: THREE NATIONS WATER DISPUTE

The vast majority of ODR applications are for situations where two parties are in dispute over a single issue. However, as the sophistication and capacity of eNegotiation systems expand, it is possible to conceive of complex multiple party disputes using these systems as their primary means of resolving the conflict. In this hypothetical example, three nations are in dispute over the correct conditions of their individual usage of the watershed of their central and shared river system (Figure 8).[25] This case assumes that the three nations have agreed that the dispute must be resolved through negotiation. The actual negotiations in a similar real-life case would be more complex than the version presented here, but a robust eNegotiation system using an approach like Smartsettle could handle that higher level of complexity.

25 The data for this case is loosely drawn from J.M. Trondalen, *Water and Peace for the People: Possible Solutions to Water Disputes in the Middle East*, UNESCO Publishing 2008.

Figure 8 Three nations share a river watershed of vital interest



5.1 *Prepare for Negotiation*

At the beginning, each nation is required to be aware that a conflict exists among the users of the watershed. They must understand that a collaborative resolution of the conflict would be much preferable to the current state or to a solution involving war. The conflict is over the quantity and quality of the water that remains when each of the upstream nations has used the river. The downstream nation has its own purposes that may have an impact on the future use of water by the upstream nations.

5.2 *Formulate Alternative Plans*

From this recognition of conflicting interests, the nations would need to meet and brainstorm possible alternative plans before they can begin organizing for their negotiations. These initial meetings would be based on engineering studies and computer modelling of possible options. Each nation would need to understand the full range of implications for differing water flows and water quality (the key characteristics to be negotiated in this dispute). They should also be in agreement on the core issues that need resolution. In this case there is a key fourth party, a donor capable and willing to provide financial incentives toward a solution. This might be an organization such as the World Bank, the United Nations, or a foreign power with strategic interests in the region.

5.3 *Create a Framework for Agreement*

The outcome of the preliminary process would be the development of a Framework for Agreement. While such a document would typically run to hundreds of pages, it would contain key sections such as the following:

5.3.1 Preamble

Mountland, Farmland, and Downland are sovereign countries that recognize that their future livelihood depends on the joint management of their shared water resources. The headwaters of the Swift River are located in Mountland. The headwaters of the Fruit River are located in Farmland. Swift River flows from Mountland to Downland. Fruit River flows from Farmland to Downland. The confluence of Swift River and Fruit River is located in the center of Downland where it becomes the Swift-Fruit River. Downland would benefit from water quantity and quality guarantees from Mountland and Farmland. Water quality could be enhanced with desalination plants located on the Swift River and Fruit River just upstream of where they flow into Downland. Downland has the ability to produce surplus power that could be transferred to Mountland or Farmland. The Donors are interested in supporting a project that would promote long-term stability in the region.

5.3.2 Core Terms of Agreement

- The discharge guaranteed by Mountland at Downland boundary shall be _____ (5 – 10 bcum/yr).
- The discharge guaranteed by Farmland at Downland boundary shall be _____ (5 – 10 bcum/yr).
- The water quality guaranteed by Mountland at Downland boundary shall be _____ (500 – 600 mg TDS/l).
- Water quality guaranteed by Farmland at Downland boundary shall be _____ (500 – 600 mg TDS/l).
- Power transfer from Downland to Mountland shall be _____ (0 – 30 GWh/yr)
- Power transfer from Downland to Farmland shall be _____ (0 – 30 GWh/yr)
- Funding provided by Donors to Mountland shall be _____ (0-10 billion dollars)
- Funding provided by Donors to Farmland shall be _____ (0-10 billion dollars)

where

- TDS/l = total dissolved solids/liter
- bcum = billion cubic meters
- GWh/yr = gigawatt hours per year

These core conditions would not likely be stated this simply or clearly, but be accompanied by certain caveats. For example, the definitions could be in terms of multi-year moving averages to account for year-by-year weather variations. It might also include financial penalties for violating guarantees. In a real-life case, bargaining ranges would be private, rather than set out in the Framework for Agreement as in this simulation.

5.4 Build a Model for Evaluating Plans

In a negotiation like this, each party would model their preferences and establish the relative importance for each of the issues. To make the presentation simple, the preferences of the parties stated below have been greatly simplified. This information would not be revealed to other parties in a real-life case. However, astute negotiators would often have an approximate idea of the preferences of their counterparties. Note that importance of each issue relates to the given bargaining range.

5.4.1 Mountland

- *Least Important:* water quality guarantee by Farmland
- *Most Important:* donor funding to Mountland

5.4.2 Farmland

- *Least Important:* water quality guarantee by Mountland
- *Most Important:* donor funding to Farmland

5.4.3 Donors

- *Least Important:* discharge guarantee by Farmland
- *Most Important:* donor funding

Donors are not particularly concerned about how the funding is distributed between the parties, so they define one private variable[26] called Total Funding to take the place of the individual funding issues:

```
TotalFunding = MountlandFunding + FarmlandFunding
```

5.4.4 Downland

- *Least Important:* donor funding to Mountland
- *Most Important:* average Downland water quality

26 Variables that appear in formulas are written as they appear in the Smartsettle interface, *i.e.* compound words without spaces. Where no explanation is given, the authors consider them to be self-explanatory.

Downland has defined three private variables to help them better represent their preferences. Downland is not particularly concerned about the quality of water received from each of its upstream neighbours as long as the average quality meets certain standards. This variable, called Average Downland Quality, is tracked in the Smartsettle interface with the following formula:

DownlandQuality = (MountlandDischarge*MountlandWaterQuality + FarmlandDischarge*FarmlandWaterQuality) / (MountlandDischarge + FarmlandDischarge)

Also important is Total Discharge Guarantee. This is defined as:

TotalDischarge = MountlandDischarge + FarmlandDischarge

Less important is Total Power Transfer, defined as:

TotalPower = MountlandPower + FarmlandPower

Once each party has set their own private preferences they prepare packages to be published using the eNegotiation system. What follows are the stages of the negotiation as developed using the Smartsettle Infinity eNegotiation system. To illustrate each stage a screenshot illustrates the process of negotiation from Downland's point of view.

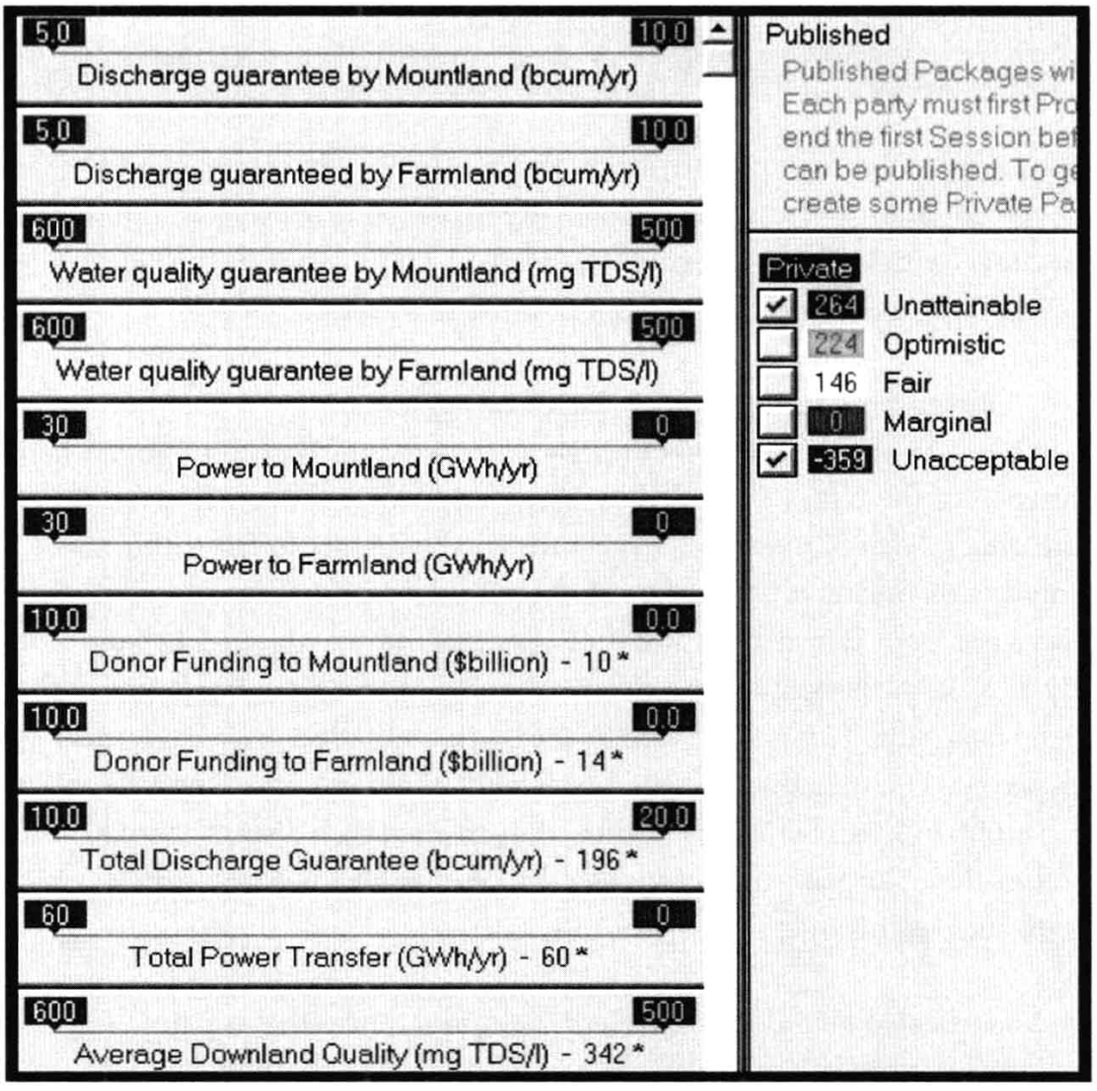
5.4.5 Bargaining Ranges and Relative Importance

In order to set up their private view of the case, each party must specify a private bargaining range for each of the issues, bounded by better and worse outcomes according to their own preferences. Each party should expect the final outcome to fall within those ranges, but can modify them later if that turns out not to be the case. In Figure 9, all the issues and their ranges are from Downland's point of view and shown on the left-hand side of the figure. By default, the bargaining ranges are oriented so that Downland prefers the values on the right-hand side. This is illustrated by the two hypothetical private reference packages being displayed, Unattainable (purple boxes and numbers) and Unacceptable (brown boxes and numbers). In a two-party dispute, the screen of each disputant could be a mirror image of the other, but that would obviously not be possible for every party in a multiparty negotiation such as this one.

Downland has created a model to represent their preferences that is a function of the five variables at the bottom of the list (issues coloured purple and appended with a numeric value and *). Recall that three of those are private variables that do not appear on the counterparty screens. The other variables (coloured black) are not needed and are excluded from Downland's preference representation. The numeric value to the right of each included issue represents the relative importance of that term based on the specified range. Average Downland Quality, a value for the quality of the water entering Downland, is most

important (Value: 342). The weighted relative importance of each of the other four issues are much less (10, 14, 196, and 60). These weights are established by Downland through direct input. They can be modified by Downland and are under the control of the user and by the eNegotiation system itself as the negotiations proceed and other weightings are determined to more accurately represent Downland's interests. Near the beginning of the negotiation, relative importance values may not be well-represented. They become better represented as the negotiation proceeds and parties take advantage of Smartsettle's sophisticated preference analysis routines to fine-tune their preference representation.

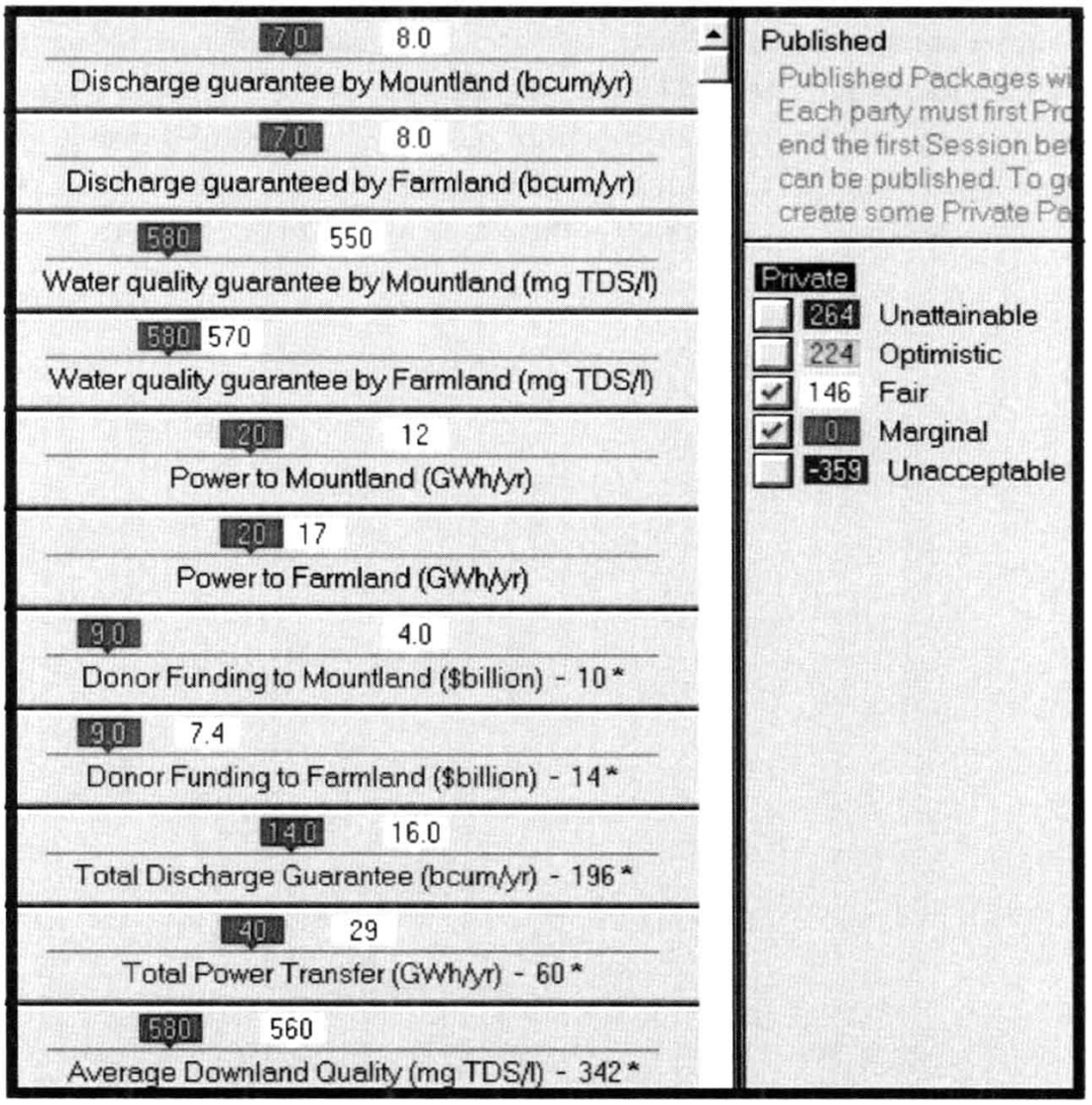
Figure 9 Downland's Bargaining Ranges and Relative Importance



The system evaluates the preferences assigned by Downland's negotiators and assigns to each one a numeric rating. In Downland's case, the values of the packages range from –359 to 264 (shown on the right side of the screen). The high rating minus the low rating

is the sum of all the relative issue importance values. In Figure 10, the issue values of Downland's Fair package, worth 146 points, are compared on the left side of the screen with the issue values of another package named Marginal. Agreeing to anything worse than Marginal would be totally unacceptable to Downland. Downland's goal is not to merely achieve an acceptable package (better than Marginal), but to achieve an outcome that is fair. As such, they are not willing to agree to any package worth less than 146 points. It is important to realize that the specific values identified by this package do not represent the lowest value that is acceptable to them for each issue. The concept of "bottom line" makes no sense when negotiating with packages of issues since there could be any number of packages with different combinations of issue values that could represent the point that the party would walk away from the negotiation.

Figure 10 Downland's Fair and Marginal Packages

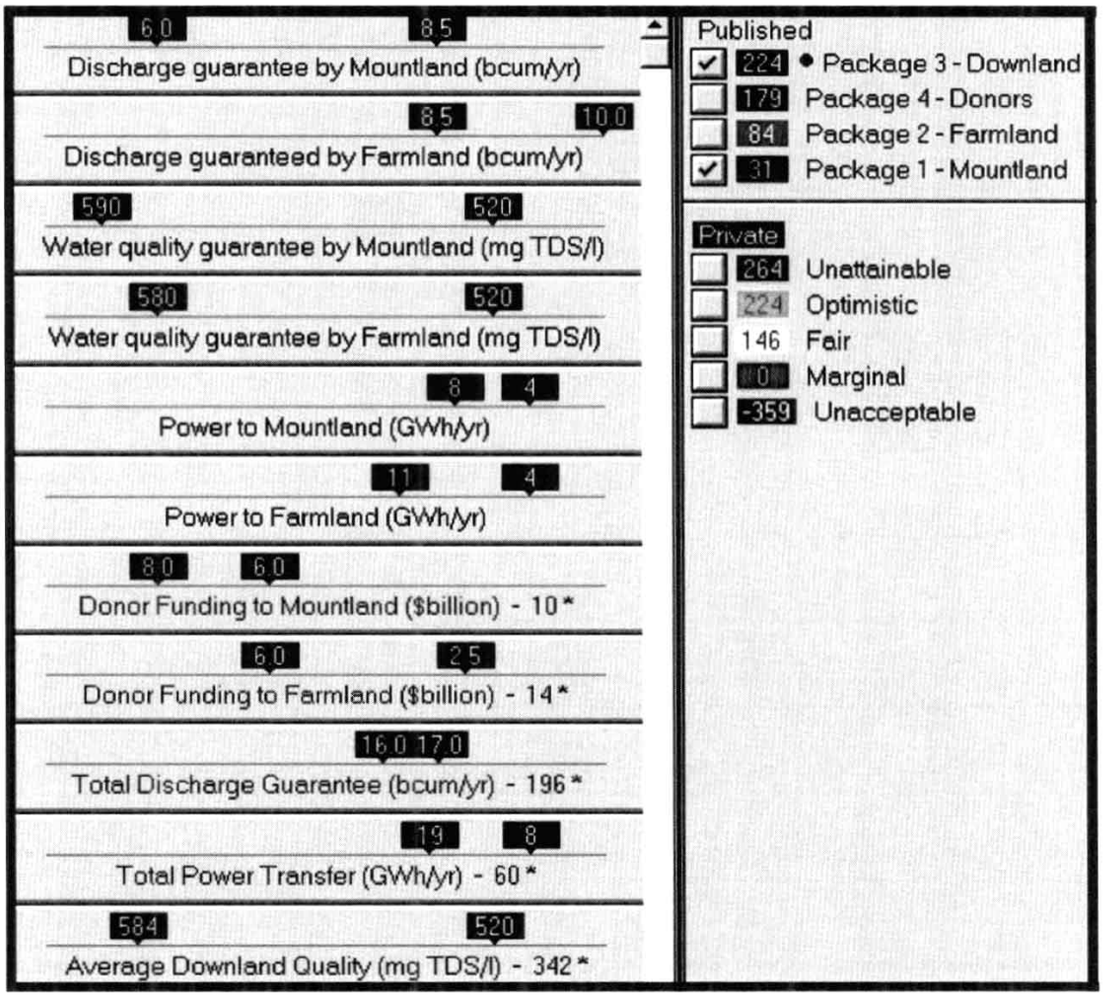


Each party to the negotiation develops similar positions and each party's objective is to achieve an outcome that is fair. Every package presented throughout the negotiation needs careful assessment by Downland's negotiators to be sure that its rating is truly consistent with their preferences. Downland's negotiators may find that they have not correctly modeled their preferences as they assess offers. They can then adjust or change their preferences and the system will correspondingly reset all package ratings.

5.5 Exchange Proposals

When all parties have succeeded in creating a reasonable representation of their own preferences, the next step is to exchange initial optimistic proposals. Figure 11 shows the ranking of the four proposals from Downland's point of view. On the left side, Downland's proposal is being compared with Mountland's proposal. These initial proposals represent to each submitting party a realistic and hoped for outcome to the negotiation, usually something better than what they expect. The result is a situation where all the parties have revealed their desires but have kept hidden what they are really prepared to accept (visual blind bidding). In this first session, Downland could accept the proposal from Donors as better than fair. The proposals from Mountland and Farmland are better than Marginal but Downland does not consider either of them to represent a fair outcome.

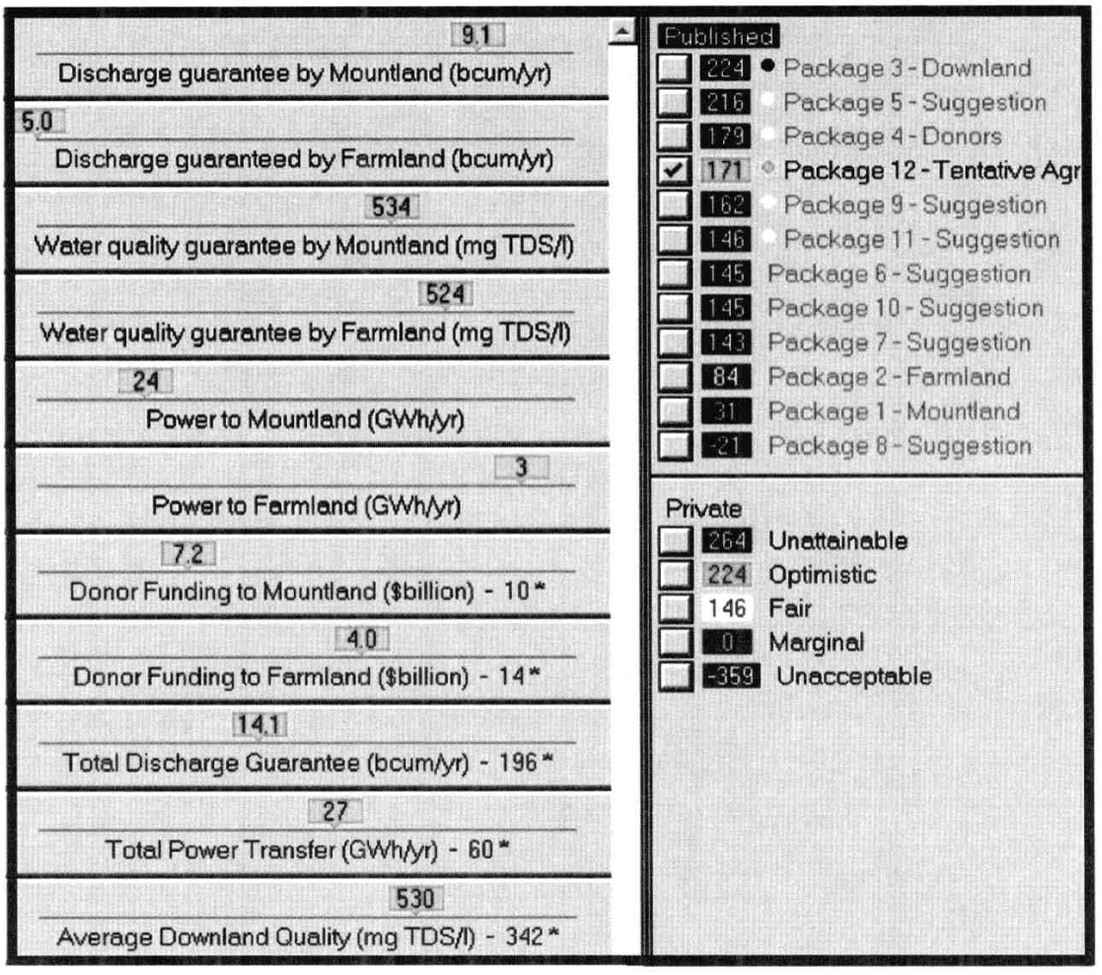
Figure 11 Downland's View of Initial Proposals



5.6 *Reach a Tentative Agreement*

After initial proposals are exchanged, parties can continue with counter-proposals or they can request suggestions to be generated by the eNegotiation system (Figure 12). Parties can also contribute their own suggestions anonymously to the mix. Every party privately evaluates each suggestion for its acceptability. In this case Downland has placed a hidden acceptance (yellow dot) on the five packages that score better than Fair (146+). These acceptances are known only to the system, which then compares them to see if any of the packages is acceptable to all the parties. If all parties have accepted the same package at the end of the session a tentative agreement is identified (green dot beside package 12).

Figure 12 Tentative Agreement Among Packages Acceptable to Downland

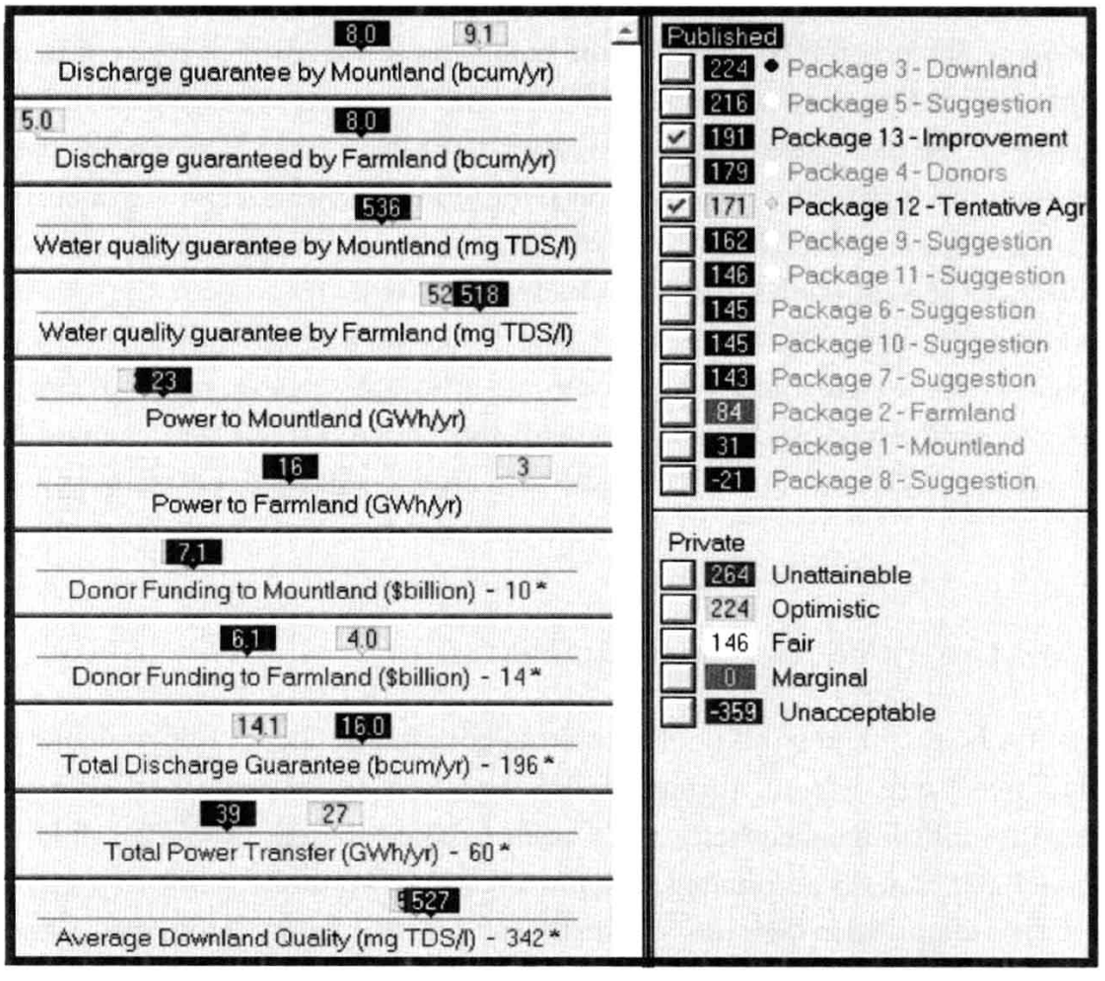


5.7 Uncover Hidden Value

Once a tentative agreement has been reached parties may request the Smartsettle system to look for an improvement. In complex negotiations like this, it is very likely that there is hidden value still on the table. In conventional negotiations, it would be unheard of for a group of international parties dealing with a multitude of issues, to reopen negotiations after reaching a tentative agreement. The task of juggling all the variables in order to find something better for everyone would be virtually impossible without the assistance of computing power. Acting as an intelligent agent, the Smartsettle system is capable of quickly analyzing the full range of possibilities. If the preferences of all parties are well represented, the final optimization process can occur in a relatively short period of time and find an improvement that uncovers remaining hidden value and distributes it fairly among all the parties.

The improvement found by Smartsettle in this simulation is illustrated by Package 13 in Figure 13 as having a rating for Downland that is about ten percent better than the existing tentative agreement. What is not shown is that this same improvement package is also about ten percent better for each of the other three parties, as measured by their own ratings. For this reason, unless they decide to revise their preference model, each of the parties will find it reasonable to accept this improved package in place of the existing tentative agreement. And each will see that they have gained considerable value in the process.

Figure 13 Smartsettle Generated Improvement



5.8 *Implement the Agreement*

Prior to accepting any package proposed for implementation, each party to the negotiation will have carefully inspected that package for its fit with national needs. When an agreement is revealed at the end of a session and no improvements can be found, it is a simple matter of completing the Framework for Agreement that was prepared beforehand with the entire final wording. All that is needed is the announcement and the signing ceremony.

Throughout the process the parties to the dispute focus on achieving national goals and are never aware of the walkaway or other hidden positions of the other parties. There is no posturing or tedious back-and-forth regarding specific individual issues leading to delays or breakdowns in the process and exhausted and frustrated negotiators (and nations). The process has produced an optimal outcome on the basis of clear decision criteria that are acceptable to all parties.

6 THE FUTURE OF ENEGOTIATION AND ODR

As the multinational water dispute case demonstrates, the potential use of eNegotiation in ODR opens the possibility of significant expansion in the array of types of issues and disputants that can be addressed through ODR. As intelligent agent approaches expand and the ease of use increases through more user-friendly systems, it also holds the possibility for the substantial reduction in the need for human arbitrators and mediators in the online environment. More likely, by expanding the range of applications amenable to ODR, advanced eNegotiation systems will lead to a substantial increase in the total number of cases being processed. Since some cases always need assistance beyond that of even the best eNegotiations system, human mediators and arbitrators may be more necessary than currently. Almost certainly, ODR will increase and undergo significant changes to keep pace with technological advances. These changes are most likely to occur in a number of areas.

6.1 Low-Value, Two-Party Disputes

eNegotiation holds the possibility of substantially reducing the cost of resolving simple low-value, two-party disputes through full automation of the process. Well-developed systems with multi-lingual capacity could easily become standard tools for all low-value commercial disputes. As automated systems, their cost would be minimal, especially as they become widespread in their use. Within the framework of some commercial transaction systems, fees for the use of such a system might be included in the cost of the initial transaction leading to essentially free access to ODR for these disputes. In any case, they are likely to become the system of first resort, with disputants attempting an automated solution before the need to move to more sophisticated and costly ODR methods.

6.2 *Commercial Disputes*

Commercial disputes over long distances or crossing jurisdictional boundaries can be extremely time-consuming and costly to resolve, and even more so if face-to-face meetings are required. The use of high-priced experts only drives the cost higher. Sophisticated eNegotiation systems capable of working with multiple issues and remote and asynchronous access become the obvious first step in trying to resolve such disputes. While the cost of setting up such a system is not low, the cost is still going to be much less than that of a conventional system. It is likely that initial commercial agreements regarding goods and services will soon require the use of such mechanisms as the first step for resolving disputes.

6.3 *Multiparty Disputes*

Multiparty disputes can become so complex and expensive to resolve that they are rarely considered outside of the courts. This means that they are only used for very high-value cases. However, there are many other types of multiparty disputes, and moderate or even low-value disputes can be resolved through sophisticated eNegotiation systems. Expect that as the system capacities become understood, groups involved in multiparty disputes will come to rely on such systems as an alternative to extremely expensive court processes.

6.4 *Intergovernmental and Transnational Disputes*

As in the case study, intergovernmental and transnational disputes with multiple parties can gain significant advantages by working through an eNegotiation system. The complexity of the issues such systems can handle far surpasses the capability of humans involved in these types of issues. While these tools are unlikely to replace face-to-face negotiations, they can easily augment those negotiations and improve on final outcomes in a significant way.

6.5 *Reducing the Possibilities for Conflict*

eNegotiation systems offer one further possibility of significance to ODR and that is a reduction in the total level of conflict that requires dispute resolution. eNegotiation systems, with their sophisticated abilities to negotiate settlements that approach the efficiency frontier, and to do so through more collaborative negotiation processes, reduce the likelihood of conflict emerging in the first place. While there are many sources for conflict, a poorly negotiated agreement is certainly one and one that can be reduced, if not eliminated, through advanced eNegotiation systems. Using strong preference analysis tools, operating

in a non-adversarial way that maximizes party satisfaction with the outcomes, eNegotiation systems produce results that lead to long-term cooperative relationships between parties. They also hold open the possibility of continuous cooperation through on-going re-evaluation and negotiation. Use of intelligent agents makes it easy to address changes in the environment that have an impact on the parties involved. eNegotiations could ultimately bring humanity to a point where there are no disputes, but simply points of transition in continuously negotiated circumstances as parties work together to accomplish mutual objectives.

It is clear that eNegotiations are a significant part of ODR. They will expand in that role as more sophisticated eNegotiation systems are developed and users come to accept them as a normal part of the negotiation environment. Strong emphasis needs to be placed on advancing and integrating these systems as commercial, non-governmental, or governmental dispute resolution systems move into the future. However, it is essential to develop these new approaches with flexibility as advanced intelligent agent systems suggest that the very meaning of negotiation could change.

17 E-MEDIATION

Noam Ebner[*]

1 INTRODUCTION: ODR AND E-MEDIATION

Writing on e-mediation as one discrete element in the field of ODR is a sign of the field's maturing. The initial phases of the field's development saw much writing on ODR in general, with multiple processes lumped together under discussions of "technology for ODR" or "justifications for ODR".

Beyond allowing close-up examination of e-mediation, this opportunity to discern between general ODR concepts and e-mediation benefits ODR as a general field as well, as it serves to contrast the important advances this field is making *beyond* mediation.

Bernie Mayer[1] noted how closely the field of conflict resolution is identified with the role of the neutral, and most specifically with mediation. He suggested that while the field offers many other roles, services and areas of expertise, its identification with mediation has offered it numerous advantages – as well as significant constraints.

The particular sub-field of ODR, it would seem, is not quite as closely identified with e-mediation as ADR in general might be. This may be due to the multiple influences informing the rapid evolution of the ODR field. Additionally, the two best-known success stories of the field, cited in just about every paper written on ODR, involve online arbitration (ICANN's UDRP) and assisted negotiation (the primary process of eBay's dispute resolution process). Finally, it may be that there are things inherent to the online environment that are more conducive to other processes, and Fourth Party functions better suited for assisting processes other than mediation. For example, automation functions may be powerful tools in automated and assisted negotiation, allowing dealing with large volumes of similar-type cases/claims – but less helpful in e-mediation. It might be that the Fourth Party provides enough support or assistance on its own in some cases, allowing parties to work things out without involving a human mediator.

In 2005, Melissa Conley Tyler reported that mediation was indeed the most common individual service offered by ODR service providers (closely followed by arbitration). However, out of the 115 operating ODR service providers identified, mediation was offered only by about fifty providers (many of whom offered other services in addition to media-

* My thanks to Anita Galajda for her assistance in preparing this chapter.

1 B.S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, San Francisco, Jossey-Bass 2004.

tion).[2] Recent reviews of service providers seem to support this general observation: Online mediation is an important element in the array of ODR services offered, but the ODR field is not (and never was) synonymous with e-mediation.[3]

However, as ODR breaks its original boundaries and explores implementation of e-mediation in new contexts, e-mediation might regain the primacy in ODR that it enjoys in ADR in general.

To explore these issues, this chapter will open up with a brief discussion of the development of e-mediation within the wider context of ODR growth. Subsequently, a snapshot of the field's *status quo* with respect to stakeholders, modes of communication and technology utilized, as well as the prevailing trends shall be provided. Thereafter, the third section of this chapter will address substantive and process issues in e-mediation: mediation process models, stages and issues, practitioner skills, professional issues, ethics and practitioner standards.

2 HISTORICAL DEVELOPMENT AND EARLY EXPERIMENTS

Katsh and Rifkin[4] described several notable e-mediation projects undertaken during the ODR field's early, experimental phase such as: (a) the Online Ombuds project, which was a pilot ODR program established in 1996,[5] (b) The Maryland Family Mediation project, which was another early initiative funded by the National Center for Automated Information Research (NCAIR) in the United States,[6] (c) the Cybertribunal project at the University

2 M. Conley Tyler & J. Bornstein, "Accreditation of Online Dispute Resolution Practitioners", *Conflict Resolution Quarterly* (2006) 23, 3.

3 See Pearlstein, Hanson & Ebner, see chapter 19.

4 E. Katsh & J. Rifkin & A. Gaitenby, "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law", *Ohio St. J. on Disp. Resol.* (2000), 15.

5 In 1999, it conducted a pilot program for mediation of eBay disputes, an experiment which laid the groundwork for eBay's extensive employment of online negotiation and mediation which continues to this day. Over a two-week period, 225 buyers or sellers responded to an offer for free resolution of buyer-seller complaints. The complaints dealt with feedback, non-delivery of goods and other common eBay issues. Using e-mail for shuttle communication between the parties, due to parties' comfort with the medium, the mediator invited the other party to participate, asked to hear each side's stories, and proceeded to conduct a mediation process similar to face-to-face processes. See a sample transcript of one such process in E. Katsh & J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001. 144 cases, or about 2/3 of the complaint cases, were actually mediated (others were unsuitable for mediation or resolved themselves). Out of these, 46% ended in agreement. See Katsh *et al.*, (2000); L. Ponte & T. Cavenagh, *Cyberjustice: Online Dispute Resolution (ODR) for E-Commerce*, New Jersey, Prentice Hall 2005.

6 In 1996, the Center for Law Practice Technology at the University of Maryland's School of Law initiated a mediation project for family and health care disputes. This project, however, never quite got off the ground. See R.S. Granat, "Creating an Environment for Mediating Disputes On the Internet", Center for Law Practice Technology at the University of Maryland School of Law. A working paper for the NCAIR Conference on On-Line Dispute Resolution, Washington, DC 1996; Katsh (2000); C. Getz, *Closing the Distance with Technology: Report on Phase I of the Technology-Assisted Family Mediation Project*, 2007.

of Montreal School of Law, which later developed into e-Resolution, a commercial service provider providing e-mediation as well as arbitration for domain name disputes,[7] and (d) SquareTrade, which picked up the eBay mediation project where the Online Ombuds left off, as a business venture.[8]

After these initial experiments and projects, the field developed towards offering e-mediation services to the general public. Among the early service providers were Internet Neutral,[9] e-Resolution (see above) and Online Resolution.[10] They dealt with a wide range of dispute types, including business-to-business and business-to-customers commercial disputes, workplace conflicts, and insurance issues. The number of cases that actually went to mediation in these early years was probably low,[11] and indeed, many of the early mediation service providers did not remain active for more than a few years. However, other service providers took their place, and the number of initiatives continues to grow.[12]

3 CURRENT STATE OF THE ART OF E-MEDIATION

E-mediation is now being provided all over the world, by both local and global providers. As envisioned, it is truly a process enabling dispute resolution across cultures, jurisdictions and borders. As early as 2003, Abernethy related that SquareTrade's processes had involved participants from over a 120 countries, and were conducted in five different languages. The geographical spread of service providers since then has resulted in e-mediation making headway in all regions of the world.[13]

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7 This commercial venture operated until 2002. See Katsh and Rifkin (2000).

8 Squaretrade offered a process in which parties to eBay feedback disputes began their contact with each other through automated negotiation, followed up by assisted negotiation. Only if agreement was not reached through these processes, were parties offered the use of a live mediator. Although most cases settled through the automated stages of the process, SquareTrade conducted many human-led mediations. (See C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, San Francisco, Jossey-Bass Inc Pub 2002.) According to Steve Abernethy, president of SquareTrade, during the period between 1999-mid-2003, 80% of the cases involving e-mediation resulted in agreement. While there are no firm numbers available on the volume of cases actually mediated by SquareTrade, there were certainly many thousands. Their operations continued until 2008, after which eBay integrated the feedback dispute resolution process into its in-house dispute resolution operations. eBay continues to implement a hybrid processes beginning with automated negotiation and continuing on to optional human mediator intervention in the event of no agreement. See S. Abernethy, "The Square Trade Experience in Online and Offline Disputes", *Proceedings of the 2003 United Nations Forum on ODR* 2003.

9 See B.L. Beal, "Online Mediation: Has Its Time Come?", *Ohio St. J. on Disp. Resol.* (1999) 15.

10 Rule (2002).

11 See Beal (1999).

12 See Conley Tyler (2006); Pearlstein, Hanson and Ebner, chapter 19 in this book.

13 See Conley Tyler & Bornstein (2006), as well as the chapters on regional ODR development in this book.

3.1 *Organizational Structures for E-Mediation Services*

This section will focus on the prevailing trends and applications in offering e-mediation services.

3.1.1 Regional versus Global

Some service providers hold themselves out as global practitioners, not limiting themselves to any one region.[14] Others, while not explicitly limiting the scope of their operations, do so implicitly by including comments on their website referencing particular areas, organizations and legal issues, by the language/s services are offered in, by a country-specific domain name or by the language in which the website itself is in. Still other service providers limit themselves explicitly to specific countries or areas.[15]

3.1.2 Individual Practitioners versus Institutional "Service Providers"

From the start, examination and discussion of e-mediation (and ODR in general) has tended to focus on "service providers" and not on practitioners. This probably had multiple reasons, some of which are suggested below.

First, this was indeed the actual business model often employed; many of the early ventures in e-mediation were run by a service provider who kept a roster of mediators. OnlineResolution kept a roster of 600 mediators and arbitrators, and SquareTrade had about 300 mediators on their roster.[16] The sites themselves were operated as a business which performed intake of cases, collection of fees, assignment to mediators from the roster, provision of training and support to neutrals, etc.

Second, it is the nature of internet commerce that individuals set up a business and present it as a larger-scale business. This is not only in order to impress; on the web, your catchy name and web domain are part of your branding strategy. "InternetMediationTeam.com" will always be more effective than NoamtheMediator.com.

Third, the previous point is particularly true given the e-mediation's targeted market and clients. Early service providers were attempting to engage with e-commerce entities and integrate themselves into their b2b and b2c operations. A corporate veneer and framework is much more likely to succeed in that.

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14 Examples would include Juripax and TheMediationRoom.

15 *E.g.*, Cybersettle (limiting comments), emediation.nl (language and domain name), and the British Columbia Family Mediation Roster (explicit geographical limitation). An interesting provider in this regard is ODR-World. This website does not limit the scope of its operations, but the same service provider also operates ODRChina, ODRMalaysia, ODRAustralia and ODRIndia, servicing these countries specifically. In essence, it contextualizes its services by offering services to diverse regions in South East Asia and Australia.

16 See Rule (2002).

Fourth, continuing on the previous points, much of the focus (particularly the early focus) of ODR was on *scale*. ODR was seen as particularly effective for handling large volumes of similar disputes; the service-provider model fits that niche.

Finally, with much of the focus on new technological platforms for delivering e-mediation, developers were more likely to be business organizations rather than individual practitioners due to issues of full scale management, cost and expertise.

As a result, in the early days of e-mediation, very few individual practitioners hung out their web-shingle announcing themselves as such. It is difficult to tell whether this precludes individual practitioners having been, behind the scenes the sole operator of an e-mediation service providing site. Most likely, there were some providers with whom this was the case. However, no visible presence of small-shop mediation practitioners was identified on the web in Conley Tyler's 2005 mapping out of the field.

Recently, it would seem that a new trend is developing, of individual practitioners offering e-mediation services without trying to cloak themselves in a larger organizational veneer. An English-language search conducted at the end of 2010 turned up ten such individual practitioners, nine based in the US and one in South Africa (see Pearlstein, Hanson & Ebner, chapter 19 in this book). What might account for this shifting trend? I suggest that three converging factors are at play. First, mediation is ever a competitive market, supply-driven rather than demand-driven,[17] in which every edge a mediator can gain in attracting cases is of great value. Second, mediators, just like the general population, are becoming increasingly adept and comfortable with technology; taking mediation processes online seems more of a logical next step and less of a huge, daunting leap. Finally, the past few years have seen an important increase in the availability of low-to-no cost platforms for communication. The lack of funding or expertise to develop a "real" ODR platform is much less of a hindrance now than it was just a few years ago.

Whether these or other reasons are driving the increase in smaller-scale operations and individual practitioners getting in on the e-mediation market, the practitioners identified so far are probably just the tip of the iceberg of the pool of mediators out there who have actually expanded their practice to incorporate conducting mediation by combinations of email, phone and videoconferencing, and we can expect to see this trend increase in years to come.

3.1.3 Alternative models: Licensing and Partnering

There are some developing models of practice bridging the previous two categories, of regional/global and of institutional service provider/individual practitioner. These would involve service providers who have invested in development of advanced platforms offering

17 Mayer (2004); U. Velikonja, "Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice", *Alb. L. Rev.*(2009) 72.

their use to individual practitioners. This might be done by offering "rooms" to individual mediators on an ad hoc basis or ongoing basis, much in the way a face-to-face mediation center might rent out its meeting room to an individual practitioner (*e.g.*, TheMediation-Room, Juripax).[18] Another model involves a more robust connection between the institutional service provider and individual practitioners, in which the former sets the latter up with a dedicated "space" on their platform, branded according to the practitioner's preferences. There have also been instances of service providers selling country-specific or language-specific licenses or concessions, and other types of partnership.

3.2 Contexts of E-Mediation Application: Mediatability

It is necessary to shed light on specific case elements which might make the online venue a *particularly* suitable arena for mediation. As for areas of particular activity, or dispute areas which seem particularly targeted by service providers, the most common seem to be complaint handling, e-commerce and low-value cases between geographically distant parties. The rationale for targeting these fields in particular would seem to be inherent in the way the promise of ODR was framed by its early propounders. However, these thrusts are not as predominant as they used to be, and perhaps with good reason, given the low level of longevity among early service providers, many of whom targeted these contexts. Reviewing the websites of practitioners and service providers, it is clear that a much wider and more general net is now being cast regarding dispute type and context. Some providers do not limit customers' imaginations to any particular context at all, and others expand on the multiple contexts in which they intervene.

Two things should be kept in mind while considering the spread of e-mediation – in the past, and in the future. The first is that the use of e-mediation process has not developed in line with people's intuitive conceptions regarding types of disputes that can be mediated online. These limiting preconceptions were breached at a very early point in e-mediation's history, as people became accustomed to taking more and more of their lives online. The second thing to keep in mind is that many e-mediation processes take place after disputes have already entered a settlement-through-ODR process. As ODR in general casts a very wide net, different types of cases find themselves funneled through to e-mediation even though these might not have reached e-mediation as a first choice. I will expand on these two points.

3.2.1 E-Mediation: Not What You Would Expect

In a dynamic very reminiscent of the growth of mediation as an area of practice, it would now be difficult to isolate a dispute area in which e-mediation is *not* offered or would not

18 See also Rule (2002).

be considered suitable by a mediator. These include areas in which one might intuitively question the e-channel's suitability. Furthermore, whereas original thinking on ODR envisioned it flourishing as a tool for resolving disputes-at-a-distance, settling online business and other transactional disputes, e-mediation has certainly jumped those conceptual fences and is being offered in other areas. ODR in general has long left behind the conception that it is only suitable for disputes originating in online activity.[19] In addition, it has been shown to be a powerful tool for resolving disputes where geography is not a factor limiting participants' ability to convene face-to-face, and disputes in which emotional, relational and social issues are at least as important as transactional elements.

Two areas demonstrating this last notion are online family mediation and workplace mediation. Somewhat counterintuitively, family mediation has always been an area of interest for e-mediation.[20] Two recent projects – one conducted by Juripax in 2008, and the other conducted by The British Columbia Mediator Roster Society between May 2009 and February 2010 – are both good indicators of the benefits of e-mediation for family cases. Both projects saw high settlement rates, which were complemented with high rates of party satisfaction and willingness to utilize online mediation in the future.[21] Similarly, workplace mediation, while long envisioned as suitable when involving organizations spread out across the globe, or between members of virtual teams working at a distance,[22] is receiving an increased amount of attention as a tool for settings involving close-quarters relationships.[23] A recent study conducted by Juripax has shown that adding an online element to workplace mediation processes contributes to their effectiveness by eliminating asymmetry in hierarchal workplace disputes (such as between subordinates and supervisors).[24] We note these two areas of practice as examples of cases which by nature deal with close-up, emotional and personal issues between parties who know each other well. While certainly not the cases for which ODR was originally envisioned, they (and other areas sharing similar characteristics, such as elder care mediation, health care mediation or others) might prove to be areas of significant growth for e-mediation practice.

19 See Conley Tyler & Bornstein (2006); Rule (2002).

20 See Granat (1996); Rule (2002).

21 K. Bollen & M.C. Euwema, *Online Mediation in Divorce Cases*, Catholic University of Leuven 2010; C. Getz, *Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project*, Victoria, BC British Columbia Mediator Roster Society 2010.

22 See Rule (2002); N. Ebner, "Online Dispute Resolution: Applications for e-HRM", in T. Torres-Coronas & M. Arias-Oliva (eds.), *Encyclopedia of Human Resources Information Systems: Challenges in e-HRM*, Hershey, PA, Idea Group Reference Publishing 2008.

23 The topic of organizational and workplace topic received an impressive amount of attention at Cyberweek 2010. See <http://adrhub.com/forum/topics/odr-for-organizational>, last accessed 20 February 2011.

24 K. Bollen and M.C. Euwema, *Angry at Your Boss or Fearing Your Employee? Negative Affect in Hierarchical Conflicts and the Moderating Role of E-Supported Mediation*, Kyoto, IACM 2009.

3.2.2 E-Mediation: Not Always First Choice

Traditional ADR usually assumes a breakdown in communication or other negotiation difficulties between parties. Coupled with a general interest-based approach, this leads to a state-of the-art in which mediation – regarded as the best communication or negotiation fixer-upper – is viewed as the process of first choice.[25] In ODR, however, this is not the case. In many cases, negotiation difficulties are viewed as being a result of distance, of low dispute-value, or of parties not knowing how to contact each other. As a result, some ODR providers focus on using technology as a way of bringing parties into contact (and sometimes, highly structured contact) without involving a live mediator. In these cases, technology as the Fourth Party functions without a human Third Party.

However, these service providers recognize that many cases fail to reach conclusion for other reasons, and that the presence or assistance of an e-mediator can be helpful. These service providers offer e-mediation, in one form or another, as an add-on process after the "primary" process of negotiation has failed. For example, eBay/PayPal's dispute resolution process includes live mediation for parties who do not reach agreement through the automated process. SmartSettle also offers third party assistance in different forms, and Cybersettle offers "telephone facilitation" in the event that parties to a blind-bidding process to not overlap, but are judged to be sufficiently close to one another that a final nudge might help them to settle the case.

It may be that a shift emphasizing technology as a communication medium more than as a dispute resolution tool in its own self may be inherent in the emergence of an online market of individual private practitioners. A ripple of this phenomenon might be a tipping of the balance back towards human intervention as default, as opposed to automated intervention as default and human intervention as a backup.

3.3 E-Mediation: Advantages and Challenges, Suitability and Conditions

Whilst many scholars have provided an overview of the advantages and disadvantages of e-mediation, it seems in order to shed light on these two lists at this juncture for practical considerations pertinent to the mediatability of certain disputes arising in diverse contexts.

3.3.1 Advantages of Online Mediation

3.3.1.1 Advantages for Parties

- E-mediation is convenient. Parties choose when to participate, at least when employing asynchronous communication; travel time and fuss is eliminated in any event.

25 See F.E.A. Sander & L. Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach", *Harv. Negot. L. Rev.* (2006) 11.

- Parties gain access to mediator expertise beyond that which might be available in any given geographical region.[26]
- The issue of cost remains unresolved. There are different models for pricing e-mediation services, and these are often no different than face-to-face services. However, there certainly is enhanced cost effectiveness, given that parties save on travel cost and perhaps do not dedicate costly work time to a mediation process.

3.3.1.2 Process Advantages

- In asynchronous processes, the slowed-down pace can allow the mediator a more intentional application of the mediator's toolbox. This is enhanced by enhanced opportunities for nuance and subtlety. Mediators might find it easier to tweak and reframe messages. They can create opportunities for, light, behind the scenes contact with each party to a greater degree than face-to-face processes allow, as private communication reduces threats to perceived neutrality. Working with asynchronous methods, mediators can conduct simultaneous caucusing, saving process-time. Further utility can be achieved due to the elimination of those caucuses which face-to-face mediators find they conduct for the sole purpose showing even-handedness.[27]
- Records are preserved and reviewable, allowing for more seamless processes and joint frames of reference.
- Text communication, as a vehicle for mediation has its pros and cons and this issue is oft-debated in the literature. However it is, in practice, the most prevalent form of communication in e-mediation. Some of the benefits associated with text communication for e-mediation are that it often minimizes the effects of "good talkers" gaining the upper hand or of dominant figures causing others to reduce their participation levels.[28] Additionally, the emotion-limiting nature of text communication has been suggested as an advantage in e-negotiation and e-mediation as reducing confrontational dynamics, although this is certainly issue for debate.[29]
- Parties and mediators can engage in discussion without the immediate time pressure and other dynamics associated with synchronous, face-to-face conversations.

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26 Katsh & Rifkin (2000), discuss the basic requirements of any ODR system as being convenience, trust and expertise. We have noted the first two as being inherent in many models of providing e-mediation services. The third, a different kettle of fish altogether, is discussed in Ebner, chapter 11 in this book.

27 C. Rule, *New Mediator Capabilities in Online Dispute Resolution*, 2000. Available at <www.mediate.com/articles/rule.cfm>, last accessed 22 May 2011.

28 L.L. Thompson, *The Mind and Heart of the Negotiator*, (2nd ed.) Prentice Hall 2001.

29 See R.M. Victorio, "Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century", *Pepp. Disp. Resol. L. J.* (2000) 1; N. Ebner *et al.*, "You've Got Agreement: Negoti@ting Via Email", in C. Honeyman, J. Coben & G. De Palo (eds.), *Rethinking Negotiation Teaching: Innovations for Context and Culture*, St. Paul, MN, DRI Press 2009.

- External experts can be consulted with, or brought into the process as necessary, regardless of their geographical location, and without disrupting the process' dynamics.

3.3.2 Disadvantages of E-Mediation

3.3.2.1 Disadvantages for Parties

In cases where parties file a case and are contacted by a mediator assigned by a service provider, it is challenging for parties to connect with mediators or to assess them. Parties cannot rely on local reputation, and there are few internet resources to assist them.[30]

- Good face-to-face negotiators, able to steer interactions (including mediated interactions) their way through communication techniques, conversation dominance, volume or body language, may be handicapped online;
- Archived materials – preserved as video or text – are always out there. Once a party posts something in a discussion forum or participates in a recorded videoconference, their words are out of their hands forever. While many service providers are explicit about their security procedures, there are no certain guarantees in internet security.

3.3.2.2 Process Disadvantages

- The most commonly discussed process disadvantages are the lack of warmth, empathy, immediacy, rapport and other attitudes and affects that make face-to-face mediation what it is. While efforts are made to explain how to compensate for these in online communication, and even to utilize certain characteristics of online communication to achieve gains on these elements beyond what face-to-face communication permits,[31] this is still, in many aspects and to many communicators, an uphill battle.
- Messages conveyed online, and particularly those conveyed through text, are prone to misinterpretation,[32] to misattribution[33] and to causing deterioration of trust.[34]
- The online venue challenges the function served by apology in mediation, given that party sincerity cannot be gauged without contextual cues.[35]

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30 For those seeking to translate this into a business opportunity, <ratemymediator.com> is presently available for sale.

31 See M. Morris *et al.*, "Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations", *Group Dynamics: Theory, Research, and Practice* (2002) 6, 1; N. Ebner, "Trust-Building in E-Negotiation", in L. Brennan & V. Johnson (eds.), *Computer-Mediation Relationships and Trust: Managerial and Organizational Effects*, Hershey, PA, Information Science Publishing 2007; Ebner *et al.* (2009).

32 Thompson (2001).

33 J. Nadler & D. Shestowsky, "Negotiation, Information Technology, and the Problem of the Faceless Other", in L.L. Thompson (ed.), *Negotiation Theory and Research*, New York, Psychology Press 2006.

34 Ebner (2007).

35 See, for example, the Cyberweek 2010 discussion forum led by Sam Edwards, Eileen Barker and Michael Cote. available at <http://adrhub.com/forum/topics/media-effects-online>, and the panel webinar on mediation styles and mediator moves in the online environment, available at

- Face-to-face mediation is transparent regarding the question of who is speaking with whom, at any given moment. As different forum dynamics play out, with all parties convened around a table, parties switching in and out of a mediation room as the mediator caucuses with each of them separately, or mediators conducting shuttle diplomacy between parties ensconced in separate meeting rooms, parties have a clear picture of where the mediator is, and who he or she is speaking to at any given moment. Asynchronous communication, along with mediators' ability to establish private communication with each party separately with the click of a button, increases potential for mediator manipulation and for worries about mediator neutrality. This uncertainty, particularly when left unaddressed, might cause suspicion and loss of trust.[36]

3.3.3 Suitability for E-Mediation

As we have seen, e-mediation has surpassed its own expectations in terms of practice contexts. Combining those initial expectations with what has been observed in practice, what can we learn about e-mediation's suitability for a particular case, or to a particular category of cases? What elements of a case make it suitable for e-mediation? In this case, we would suggest augmenting traditional mediation suitability-tests (such as that recommended by Macfarlane[37]) with the following considerations:

- Are disputants geographically distant from each other (such as is common in e-commerce), or from their preferred neutral?
- Did the dispute itself arise from an online transaction or interaction?
- Is travel to face-to-face mediation impossible, cost prohibitive, or a factor likely to rule out mediation for any other reason?
- Does the dispute include trans-jurisdictional issues, making choice of law or court-decision enforcement difficult?
- Are the parties unwilling, or unable, to meet with each other face-to-face?
- Do scheduling issues or party preferences make it difficult or impractical for parties to convene for face-to-face mediation?
- Is a party/mediator handicapped or disabled in a way challenging travel or convening?
- Are there concerns regarding inter-party violence or intimidation which make convening in the same room a risky prospect?[38]

<http://adrhub.com/forum/topics/live-webinar-online-mediation>. Both URLs were last accessed 19 February 2011.

36 The literature on ODR in general is rich with discussions of advantages and disadvantages of ODR, much of which is applicable to e-mediation. For further discussion focusing specifically on e-mediation, see, for example, Granat (1996); Ponte & Cavenagh (2005).

37 J. MacFarlane, *Dispute Resolution: Readings and Cases*, (2nd ed.), Emond Montgomery 2003.

38 See, regarding emotionally charged family situations, see C. Getz, "Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project,", 2010. Available at <www.mediator-roster.bc.ca/public/pdf/Distance%20Mediation%20Project%20-%20Evalua-

- Have parties participated in the past in e-mediation?

Even one positive answer to these questions is likely to tilt the scales in favor of e-mediation, providing mediation is a suitable process in the first place.[39]

3.3.4 Preconditions for E-Mediation

The previous section describes considerations likely to make choice of e-mediation beneficial. However, e-mediation cannot take place unless certain preconditions are met:

- Parties and mediator must have regular access to internet and computers. This may seem anachronistic to many readers who are so welded to their laptop that they are virtually cyborgs; however, this is not true in many areas in the world and other situations – such as weather conditions or travel – can affect anyone.
- Parties must be competent and comfortable with technology of the type the mediator proposes to employ. While the former issue can be directly affected by training, and this affects the latter, it is hard to directly affect a party's discomfort with an online medium; in some cases, this might rule out e-mediation.
- A shared language or adequate online translation services.
- A contextually suitable degree of privacy and security.[40]

3.3.5 Choice of Technology

As Colin Rule[41] put it, "Technology, like stage lighting for a play, should not be the focus. If people walk out of a play talking about the stage lighting then odds are either the play or the lighting was not a success." Behind the scenes of every play, though, hours can go into discussing the placing of every light bulb and fog machine, often trying to figure out how to render the sources invisible and natural, letting the viewers focus on the actors. Indeed, the ODR field has seen examples of entities getting lost in their technology and paying a price. It has also seen examples of constantly adapting technology to suit users' comfort zones and capabilities in a world setting all these in constant flux.

While one could fill an entire chapter describing the nuances of different technologies that could be used for ODR, this section will avoid that, heeding another of Rule's admonitions: anything written about technology is certain to look silly (or, at best, quaint) after two or three years. Many pages in the ODR literature, and the wider literature on computer-

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tion%20Report%20Final%20June%2030.pdf>, last accessed 11 January 2011. Also see S. Rogers, "Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence", *Ohio St. J. on Disp. Resol.* (2008) 24, regarding restorative-justice oriented processes in cases of gender-based violence.

39 For further discussion of this issue, see S. Summers Raines, "The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace", *The Third Annual Forum on Online Dispute Resolution*, Melbourne, Australia 2004; Ponte & Cavenagh (2005); Getz (2010).

40 Summers Raines (2004).

41 Rule (2002), p. 245.

mediated communication, have been filled with the advantages and disadvantages of text or video communication, or with commentary on email-based communication as opposed to dedicated platforms serving as the basis for communication. In this section, it seems sufficient to recall the original thinking regarding the role and nature of technology in ODR, and connecting that with comments on the current state of the art and developing trends with regards to technology.

One critical process-issue is the question of whether a platform for e-mediation should aim for synchronous or asynchronous communication. This conversation is often intertwined with the question of whether the focus should be on text or on video. One can achieve near-synchronous processes through any text-based platform (including email) although some lend themselves to being fully synchronous (*e.g.*, chat, instant messaging) and others are more commonly encountered as asynchronous (forum discussion posts, email). Katsh and Rifkin[42] recommended against real-time, chat-type interactions. They found that mediators felt rushed, pressured to respond quickly and were less able to control the flow of information between disputants. In addition, this style of communication focuses parties on the text itself. This denies mediators the opportunity to use the on-screen opportunities offered by the Fourth Party. By combining text, images and design, mediators can better provide resolution-oriented surroundings.[43]

Although several service providers have advertised that they used synchronous methods such as IM and chat, it is safe to say that market practice, so far as text-based processes are concerned, have gravitated, or evolved, towards asynchronous methods. While some platforms (such as ODRWorld or RisolviOnline) still offer chat alongside asynchronous forums, these seem to be add-ons to the main venue – the asynchronous forums or rooms the platform provides. Often, the process is asynchronous on multiple levels – as many platforms provides each party with their own private room, allowing multiple people on each side (*e.g.*, a party, her lawyer, her business partner, her husband) to contribute their opinions at their convenience, before the lead party posts a message in the main conference area or forum, visible to the other party and the mediator (for variations on how these forums are set up, I suggest touring and comparing those offered by TheMediationRoom, Juripax and ODRWorld).

Katsh, Rifkin and Gaitenby[44] advised against reliance on email. Again, the rationale behind this was developing software that gives the sense of a shared space and provides opportunities for whole-screen usage. This recommendation necessitated a certain sacrifice from the "convenience" side of the trust-convenience-expertise triangle discussed by Katsh & Rifkin.[45] Parties would have to go to the mountain by accessing a platform, instead of

42 Katsh & Rifkin (2001).
43 *Id.*, pp. 143-145.
44 Katsh, Rifkin & Gaitenby (2000).
45 Katsh & Rifkin (2001).

the mountain coming to their inbox. Some evolution was necessary on this point, in order to keep the mountains accessible. Some platforms worked around this by incorporating email into the platform: Every change on the platform (such as the other party submitting a document) results in each party being sent an automated email notification telling them what occurred; often this letter includes a link leading parties directly to the changed area in the resolution platform.

If the leading platforms use email as a notification method and a portal to the system, and still other service providers seem to use it as a backup method in the event of difficulties with the system, individual practitioners taking their business online tend to use it as a primary form of communication. They seem to be reading the triangle a different way: Convenience is paramount – and email is simplest. They have process expertise – not technological expertise – and process expertise is what they are offering. Finally, it would seem that they feel that the issue of security, long considered by service providers dealing with the corporate world to be of utmost concern (one good reason to avoid email) is simply not that much of an issue to the individual practitioners' target market of people with individual transactional or marital disputes. People trust their email with a great deal of personal information – why should their disputes be any different? This difference in approach saves the individual practitioner a great deal in terms of operating costs. It also allows them to enter a market which has traditionally been perceived to have a prohibitive technological entry-barrier. As we have already noted, small-scale practitioners wanting to go a middle route can rent "rooms" on dedicated platforms from larger providers such as Juripax or TheMediationRoom.

One clear trend emerging from a review of e-mediation service providers is that the age of video has not yet arrived. The state-of-the-art of e-mediation is very solidly text-based. Most of the service providers who advertised use of video conferencing have either removed these references from their websites, or have become inactive (*e.g.*, the now defunct MARS, which differentiated itself from the pack by advertising its unique video platform). ODR providers using video (such as the National Mediation Board) are the exception rather than the norm. If anything, it would seem that service providers are "moving backwards" and reinventing the use of the telephone. This is perhaps in order to appeal to tech-wary customers, or, quite possibly, as communication "packages" including teleconferencing for discussion and email for documents is a very intuitive, reliable and cheap way to do business. While the "online" element is diminished, replaced perhaps by "at-a-distance", we must remember that technology is only a tool, it should not define practice. British Columbia's Family Mediation Roster's recent distance mediation project is a good example of this: all the mediators participating in the project, after participating in training and conducting role-play, initially saw the most potential in using platforms with multiplatform videoconferencing (*i.e.*, more than one person are shown on the screen at once) which allowed for document sharing and editing. In practice, mainly due to parties'

access to, and comfort with, technology, most of the work was done through telephone, teleconference and email – and parties and mediators both expressed high satisfaction rates with the media.[46]

It is to be expected that video will reappear on the e-mediation scene over the next few years; however, this will probably not be the result of service providers incorporating expensive conferencing software into their platforms, but rather instigated by individual practitioners as a result of their lower inhibitions regarding use of low-tech, low-security forms of communication. These practitioners will probably be willing to experiment with readily available free videoconferencing software, such as Skype or dimdim, assuming that if parties are willing to use it to maintain their relationships with their kids and grandchildren, they will trust it for communication with mediators and opposite parties. Service providers working with large commercial entities and government agencies will find it necessary, at some point, to keep the pace by incorporating secure video channels into their platforms.

4 SUBSTANTIVE AND PROCESS ISSUES IN E-MEDITATION

4.1 Process Model

All practice of ADR stems from practitioners' worldviews. This is epitomized by the debate regarding problem solving vs. transformative models of practice,[47] but also ripples through other process model discussions such as Riskin's[48] grid of mediator orientations, strategies and techniques. In considering ODR, the discussion regarding the "why?" and "what?" have been overtaken, to a large extent, by the "how?" This section will include a few brief comments in the hopes of reminding practitioners that with all due respect, technology only lights the stage.

Resolution, settlement and agreement are all terms forming the backbone of ODR terminology much as they do in ADR. However, terminology aside, worldview matters. Perhaps the shortest way to frame the question to be addressed in this section is how does the online environment affect process issues that we hold to be substantive? Is the Fourth Party tilted in favor of one process model over another, or towards one quadrant of Riskin's

46 Getz (2010).

47 R.A. Bush & J.P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, (2nd ed.), San Francisco, Jossey-Bass 2005.

48 L.L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", *Harvard Negotiation Law Review* (1996) 1; L.L. Riskin, "Replacing the Mediator Orientation Grids, Again: Proposing a 'New New Grid System", *Alternatives to the High Cost of Litigation* (2005) 23, 8, pp. 127-132.

grid? These two issues are certainly not identical, but they are intertwined at the practical level, and the few research findings at our disposal have implications for both of them.

To approach these issues, we should first note a couple of comments related to the evolution of ODR and e-mediation. ODR was developed with an eye towards high-volume cases sourcing from e-commerce settings. These initial settings certainly lend themselves towards the boilerplating of disputes noted by Bush and Folger as a hallmark of the problem-solving approach, and may have had some effect on the way ODR terminology developed, and on the way its technology emerged.

As we have seen, e-mediation has oriented itself around text-based, primarily asynchronous platforms and processes. This might stem from practicalities or issues of comfort, however we must remember that the medium is never neutral; communicating through any medium has implications for how messages are transmitted, and how they are received.[49] This cannot help but affect the substance of a process.

Research suggests that the use of asynchronous text-based media leads to more task-oriented and depersonalized communication styles than in face-to-face interactions.[50] This connects to the research indicating that people have (at least) two distinct information-processing modes: an *analytical-rational mode* and an *intuitive-experiential mode*. The former type of people tends to rely more heavily on logic and deductive thinking and their associated tactics (*e.g.*, development of positions and limits, use of logical argumentation, and the presentation of facts). People who adopt an intuitive-experiential mode rely more heavily on intuition and experience and their associated tactics (*e.g.*, appeals to emotion, the presentation of concrete personal stories, and the use of metaphors).[51] Asynchronous, text-based communication does not lend itself equally to these contrasting information-processing styles. Not only does this create a somewhat uneven playing field, favoring individuals who tend towards analytical-rational expression, it leads the conversational dynamics into expression of positions, arguments and facts.

The implications of this for e-mediation might be that, left to its own devices, a conversation aimed at discussing a dispute conducted though asynchronous, text-based media might easily tend towards a problem-solving orientation, frame a narrowly defined problem to be solved, and be addressed by parties and mediator with an evaluative approach.

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49 N. Ebner, "Negotiating via E-Mail", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, World Scientific Publishing, Singapore, 2011.

50 N.J. Kemp and D.R. Rutter, "Duelessness and the Content and Style of Conversation", *British Journal of Social Psychology* (1982) 21.

51 M.J. Gelfand and N. Dyer, "A Cultural Perspective on Negotiation: Progress, Pitfalls, and Prospects," *Applied Psychology: An International Review* (2000) 49, 1.

Certainly this is just one reading of the flowchart connecting communication theory and mediation models and orientations, and empirical research is needed. However, the little research conducted tends to uphold this.

Anne-Marie Hammond[52] conducted an experiment based in a series of e-mediation simulations. Her findings were based on surveys and focus groups conducted with the mediators and with the parties. Some of her findings have important implications to the topic of worldview, orientation and media affects. In her study, most of the mediators, who typified their "normal" (*i.e.*, face-to-face) approach as a hybrid facilitative/evaluative approach, reported that they were able to maintain this style of mediation in the online setting. However, mediators who defined their "normal" approach as being of a more facilitative nature reported that in the online setting they were more directive and also tended to use more problem-solving techniques – hinting at their being more evaluative. Most explained these shifts as necessary to "maintain momentum". Others said they were more active in order to be heard in the non-reactive silence of online communication. Interestingly, some disputants commented that would have preferred even more proactive and directive mediator interventions.

These findings are telling indeed: something in the online environment is conducive to mediators becoming problem solving and directive, while at the same time conditioning parties to accept or desire this approach. This would seem to be a practical implication of the task-oriented mindset and the analytical-rational – favoring mode online communicators – mediators and parties alike – are subtly nudged into by the medium.

Another way in which the online environment leads mediators away, on a very practical level, from a transformative approach and towards a problem-solving approach is that the low degree of interactivity in asynchronous modes of communication[53] shifts focus away from the conversational dynamic and onto the issue at hand. This is the communication theory behind Hammond's description that:

> There was 100 percent agreement by mediators that the asynchronous nature of online communications helped them to focus on the broader picture of the conflict and not just the moment-to-moment interactions. For example, they did not have to concern themselves with interruptions from disputants. 100 percent (of the mediators) also agreed that having time to craft their responses enabled them to express their questions and comments effectively. All consid-

52 A.M.G. Hammond, "How Do You Write 'Yes'? A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly* (2003) 20, 3.

53 See Ebner *et al.* (2009).

> ered that this advantage led them to design more effective interventions. (at 275)

This unanimous description is very telling in terms of understanding which orientation the online environment is more conducive to. Transformative mediation processes are focused, to a large extent, on precisely those moment-to-moment interactions which mediators reported as being handily eliminated by the communication mode. Similarly, transformative mediation is *not* focused (or is even "anti-focused") on "well-crafted and effective mediator comments and questions" in the sense that I am assuming the respondents in the study intended comments and questions that channel disputants away from their conflict and towards resolution. Such comments and questions get in the way of the transformative process.

Given the boilerplating of disputes, and the nature of asynchronous text-based communication, it would hardly seem likely that an eBay feedback dispute could be handled with a transformative approach. And yet, Susan Summers Raines,[54] perhaps the most experienced eBay-cases mediator of them all, suggested that this was not necessarily the case. At least, transformative elements could be adopted in the online mediator's approach, as he or she is mindful of opportunities to highlight opportunities for empowerment and recognition along the road to resolution.

Taking the above into account, it would seem that the best summary is that technology is not neutral. Text based, asynchronous communication, the preferred mode at current in e-mediation, is conducive to mediators adopting problem-solving mindsets, and using increased degrees of evaluative and directive methods. I am in no way taking a stance against this mediator orientation or process approach; however, mediators need to consider that the medium might lead them into acting at odds with their worldview. Once aware of this, mediators should be able to realign themselves to use technology in such a manner so that is supports their worldview.

In addition to the "be aware" suggestion, I will add on another: "set your stage carefully." While it might be most practical to find a technological platform that "works" (in terms of comfort, convenience, etc.), and then to adopt a process model that compliments it or makes best use of it, mediators aiming to be consistent and congruent with their own worldview might be well advised to take the opposite tack: Beginning with a reflection on their approach, mediators then need to find a platform or communication medium that allows for maximum application of this approach, and continue by allowing their approach to inform the way they advertise their services, train parties in the use of their platform and conduct mediation processes.

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54 S. Summers Rains, "Can Online Mediation be Transformative? Tales from the Front", *Conflict Resolution Quarterly* (2005) 22(4), pp. 437-451.

4.2 *Process Issues*

4.2.1 Process Stages

Beyond the general worldview/approach discussion above, not all stages of any particular process-model a mediator is employing are substantially affected by the online medium. Reviewing the process, it would seem that the stages most affected are the early steps of the process, which we will discuss briefly in this section.

4.2.2 Preparation

The pre-process preparation phase requires more intentionality and investment than face-to-face interventions. In addition to any substantive preparation mediators might routinely conduct for any given mediation, there are particular medium-related preparatory actions e-mediators should not neglect. Mediators would do well to use this stage to build rapport with parties, which will translate into in-process trust.[55] They need to find ways to personalize themselves to the parties, eliminating distance and creating social presence – such as through means of introduction, sending a picture or a welcoming video, making an initial phone call to lend voice to the interaction, etc. They need to evaluate parties comfort and experience in the online environment, and the degree to which they are adept with the particular platform or communication method to be used in the actual process. This might include conducting a test run to make sure that everything functions well and that parties know which icons to click on. They need to prepare (and perhaps try out) a backup method for communication in the event that the primary channel fails for whatever reason.[56]

4.2.3 Agreement to Mediate

The usual language of a mediator's typical agreement to mediate must be adapted to incorporate issues pertaining to the online environment, which might include costs for video- or tele-conferencing, methods of accepted and binding signature of documents, etc.[57] In addition, keep in mind that in face-to-face mediation, signing the agreement to mediate is often preceded by an explanation of its content in simple language. In text-based e-mediation, it might seem redundant to write what is essentially the same thing twice. Mediators must find a way to verify that the agreement is understood and accepted. This might be a good reason for using simple-to-understand language in the agreement itself, or for sending the agreement to parties well in advance, with enough time to ask any questions they have before the process is due to begin.

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55 Morris *et al.* (2001).

56 For more on preparing for e-mediation, see S. Jani & C. Getz, *Mediating from a Distance: Suggested Practice Guidelines for Family*, Victoria, BC, British Columbia Mediator Roster Society 2010.

57 *Id.*

4.2.4 Introduction

Parties to online mediation not only need an introduction to the concept and nature of mediation, they also need to understand the nature and rules of the online venue they will be employing for the mediation process. Providing parties with a tour of the platform or some initial training in its operation increases their satisfaction and comfort levels. Parties' sense that their mediator is capable with the technological platform and has a clear road map for the process affects their degree of trust in the mediator.[58] Combined, these issues would suggest the need for a new process stage, in which parties are walked through the platform (individually or jointly), and given an introduction to the online environment as it is used for mediation. Elements of this might include a site tour and tutorial, communication ground rules, instructions for participation, comments regarding language, time zones, synchronous/asynchronous communication and expectations and technical support available to parties.

4.3 Mediators' Skills

What would constitute a full skill-set for online mediators? Raines[59] suggests that there is no need to re-invent the wheel: online mediators require the same general skill-set of a face-to-face mediator, with added twists made necessary by technology. By contrast, the report of the Distance Mediation Project stated very clearly that "Distance mediation employs different skills, and involves a different mediation 'style' rather than simply new tools in the mediation tool box",[60] and noted that mediators expressed desire for specialized training in skills unnecessary for face-to-face settings. It could be posited that by using the face-to-face mediator's skill-set as the baseline and considering what needs to be tweaked or added, we are setting mediators up for confusion and for misapplication of techniques. In the end, both of these approaches combined probably offer a better picture of what is needed: All tools in the traditional mediation need to be closely re-examined for suitability and application online.

There are skills deemed necessary for providing face-to-face services that are simply not necessary in some online venues. Text-based mediators do not need skill in communicating via their own body language, or in interpreting others (although videoconferencing certainly does require these skills). Teaching e-mediators to consciously rely on these cues, as face-to-face mediators are taught, might be burdening them with a handicap that they will feel

58 See Hammond (2003).

59 S. Summers Raines, "Mediating in your Pajamas: The Benefits and Challenges for ODR Practitioners", *Conflict Resolution Quarterly* (2006) 23, 3.

60 Getz (2010), p. 3.

as they begin their online work and find themselves missing these cues. Similarly, skills associated with designing a face-to-face setting for the meeting, choosing suitable seating arrangements, etc. are only very loosely comparable to web-platform design.

Other skills will need to be "tweaked": Mediators skills in process and time – management will need to take different time dynamics into account. Speed and pace have different effects online.[61] Mediators understanding of what happened "during sessions" as opposed to "in-between sessions" will need to shift to incorporate an ongoing, asynchronous process which is always, to some extent, "in-session". They need to accommodate familiar communication skills such as active listening, reflecting and reframing, to the online environment.[62]

Still other skills are unique to the online setting: Mediators will not only require new skills with technology, they will need to be skillful at helping others find their way around technology, and at making them feel at ease with it.

In a previous paper focusing on online negotiation,[63] four skill-sets required for text-based e-negotiators, dealing with writing ability, message management, relationship management and content management were highlighted. While too detailed to summarize in this section, I will note that e-mediators, themselves e-negotiators in addition to being charged with facilitating the parties negotiation, would do well to acquire those skills, and they should certainly form an important part of e-mediator training curriculum.

Beyond skills required of e-negotiators, mediators need skills to serve them in process management and party management. Here are some examples:

- *Technological expertise*: A mediator must be adept with the videoconferencing equipment she conducts her sessions through. If she relies on text communication, typing skills, or adeptness with a talk-to-text conversion program are core capabilities.
- *Social norms*: Online mediators must be able to practice "netiquette" and to understand and cope with the effects of its infractions.
- *Psychology of the medium*: Mediators need to learn the psychological effects of communication at a distance.[64]
- *Trustbuilding*: Mediators need to have a solid understanding of trust dynamics and of how interparty and mediator-party trust is affected and challenged by the online media. This ranges from how to build it to how to maintain it. The devil, it seems, is in the

61 J.M. Brett *et al.*, "Sticks and Stones: Language, Face, and Online Dispute Resolution", *Academy of Management Journal* (2007) 50, 1.

62 See Hammond (2003); Ebner (2007).

63 Ebner (2009).

64 See Jani & Getz (2010).

details. Rifkin[65] notes how trust can erode as a result of mediator response time being slower than parties' expectations. Hammond[66] reports that lack of mediator skill with the technological platform resulted in eroded trust. Katsh, Rifkin and Gaitenby[67] suggested a structural challenge: the one-shot interactions common to the internet make trust difficult to form and maintain. Given these challenges, mediators need to be proactive in building rapport and trust.[68]

- *Dealing with increased anger*: Mediators need to understand the dynamics of online escalation, and how to deal with incidents of interparty flaming. These dynamics, combined with the ease of dropping out of a process necessitates a higher level of repeated validation and empathy, as well as empowerment. Angry words and flaming Escalation can ripple towards the mediator as well, requiring e-mediators to acquire thick skin: with social norms lower in online communication, expressions of anger, attacks and flaming are sometimes directed at the mediator.[69]
- *Maintaining schedules and engagement*: Mediators should set, and adhere to, regular schedule for checking-in and participating.[70] By doing so, they avoid the ease of procrastination associated with online processes, or simply of party drop-out.[71] This also offers a partial remedy to the difficulty of showing mediator engagement. In Hammond's[72] discussion of e-mediation experiments, the desire for more mediator engagement showed up as an issue regarding trust, satisfaction with the process, disputants' ability to see the others' perspectives and empathize, and more. Limited in terms of their ability to use bodily cues, active listening, etc., mediators need new ways to show engagement. Braeutigam[73] suggests constant, regular communication initiated by the mediator to bring some sense of synchronicity to the asynchronous interaction, and a sense of presence and listening.
- *Asynchronous communication*: Mediators need to understand the dynamics of asynchronous communication, and the pitfalls it presents in mediation processes. The anxiety and doubt that accompanies waiting for the other party to respond are a natural breeding ground for distrust and anger. Mediators should find ways to reflect this dynamic and explain it to parties when it seems to be affecting the process. Another

65 J. Rifkin, "Online Dispute Resolution: Theory and Practice of The Fourth Party", *Conflict Resolution Quarterly* (2001) 19, 1.

66 Hammond (2003).

67 Katsh, Rifkin & Gaitenby (2000).

68 A.M. Braeutigam, "What I Hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment", *U.Tol.L.Rev.*(2006) 38. For an expanded discussion of trust in e-mediation, see Ebner in this book.

69 Summers Raines (2006).

70 Hammond (2003).

71 Ebner (2011); Summers Raines (2006).

72 Hammond (2003).

73 Braeutigam (2006).

problem with asynchronous communication is that as time passes, people forget things. Raines[74] recommends that mediators consciously use many summary statements, to overcome the effects of time passing in asynchronous communication.[75]

- *Providing signposts*: Mediators are both more experienced with the platform than parties, and have the advantage of being able to tailor it to their preferences. Parties are likely to be a lot less comfortable and adept.[76] Mediators need to recognize points in the process and/or areas on the platform which tend to confuse people, and provide clear instructions regarding where parties need to go, what they need to do there and when they need to do it by.[77]

4.3.1 Communication and Language Skills

In the piece on e-negotiation mentioned above[78] many of the key communication skills necessary to negotiate effectively online were identified. In this section, several issues that have been raised in the e-mediation literature as particularly important from the third party perspective shall be addressed.

Active listening: Much of a mediator's active listening toolbox, so important for trust- and empathy- building, relies on contextual cues that are not part of text communication. Mirroring or reflecting parties' words back to them is another element that does not translate easily to the online environment. Hammond[79] noted that some mediators reported difficulty with mirroring. Elsewhere,[80] I have noted that reflecting is challenging primarily as it seems superfluous online: If a party's words appear in an email trail, what good will it do to repeat them back to him or her the way we do in face-to-face mediation? And yet, active listening and reflecting serve the same purposes online as they do in face-to-face settings, and mediators cannot afford to pass up these valuable tools for showing empathy and generating trust. A good way for a mediator to demonstrate online listening is to stress, in words, that they have read the party's message. For example, "I read your message carefully" or "Reading your letter last night, I realized..." might seem like casual opening lines, but they convey a powerful message: "you have been heard".

While demonstrating *listening* in e-negotiation may take some creativity, word processing can actually make *reflecting* relatively simple. Cutting, pasting and editing make creating a paraphrased summary of a party's statements an easy task.

Questions: When using questions to further understand a party's position and needs, we can utilize the benefits of word processing to connect our question to specific parts of

74 Summers Raines (2006).
75 *Id.*
76 See Hammond (2003).
77 For other elements recommended for the mediator's skill-set, see Katsh and Rifkin (2001), pp. 147-162.
78 Ebner (2009).
79 Hammond (2003).
80 Ebner (2007).

another's message. This not only makes the question more to the point and part of the flow of conversation, it also incorporates elements of active listening and reflecting. Instead of writing "When do you need the money paid?" we might write "In your last email you wrote 'I am pressed for time and need the money ASAP'. I appreciate that you are in a real rush, however, I also heard your opposite say it will take her a little while to get money together, if indeed you both agree to payment being made. Can you tell me a bit more about our time frame?"

Reframing: Katsh, Rifkin and Gaitenby[81] suggest that reframing is particularly tricky online: it can be done only after the narrative has already unfolded (parties have already sent out, and read, the accusatory or escalatory email) the mediator cannot jump in in the middle with a reframing word or sentence. This is reinforced by written word's characteristic of being recorded and re-accessible; parties can read their opposites annoying email message, ruminate on it over time and enter consecutive, spiraling, anger cycles – all before forming a devastating reply of their own.[82] Parties might have ways to make their angry or toxic statements stand out and aggravate even more, for example by changing font size, writing with all caps or coloring a sentence in red. In asynchronous communication, mediators need to be on the ball in order to interject reframing messages before things fly out of hand. Summers Raines[83] noted that shuttle diplomacy, in which all messages are sent to the mediator rather than being exchanged between parties with the mediator looking on, is particularly helpful for dealing with angry messages. Depending on their approach, mediators might reframe one party's messages before moving them on to the other party, or discuss the message and its potential effects with the sender, reframing it together with them, before moving it on.[84]

Language issues are an immense challenge in online communication,[85] and skills with written language are a must-have in an online mediator's toolbox.[86] The lack of contextual cues such as body language and tone of voice leaves parties and mediators straining to infer meaning from any cue they can get[87] and in particular, attention returns to the actual wording of the text itself. This, as opposed to face-to-face communication in which we infer most of a messages meaning from non-verbal cues.[88] With the written word spotlighted, shades of meaning, subjective interpretation and cultural differences turn every

81 Katsh, Rifkin & Gaitenby (2000).

82 See Nadler & Shestowsky (2006).

83 Summers Raines (2006).

84 Rule (2002).

85 C. Rule and C. Villamore, "The Importance of Language in Online Dispute Resolution", *ICC International Court of Arbitration Bulletin, Special Supplement* 2004.

86 Rifkin (2001).

87 Ebner (2007).

88 A. Mehrabian, "Nonverbal Betrayal of Feeling", *J. of Experimental Research in Personality* (1971) 5, 1, pp. 64-73.

sentence written into a powerful tool for dispute resolution – at the same time it becomes a potential process-wrecker. Accuracy becomes paramount. While pre-written language can be employed and helpful, overly generic language can lend the sense that the mediator is not really present, engaged and listening.[89] The emotional content of language, and the way it affects the framing of the dispute, has also been found to affect the likelihood of resolution.[90] All this, before issues of multiple languages and translation (likely to be encountered in transboundary processes) lend their own challenges.

4.3.2 Professional Issues

4.3.2.1 Training

It is safe to say that while there is wide agreement that e-mediators require specialized skillsets, as discussed in the previous section, and that these require special training, there are no widely accepted standards for training content or style, or indeed many training opportunities at all. Rule,[91] for example, suggested that ODR practitioners should go through a process of studying, participation in simulations, mentoring by an experienced practitioner, participation in discussions on ODR ethical issues with seasoned practitioners and sharing of standard, pre-formed language to be used in ODR processes, with other practitioners for feedback.

However, given the prevailing service provider structure, widespread training did not evolve (as it did, for example, with general ADR training). Any training of e-mediators was conducted by in-house service providers. For example, SquareTrade's mediators were trained in-house, and received coaching on individual cases from SquareTrade's dispute resolution specialist support team.[92] Other service providers engaging a roster of mediators, such as Online Resolution, trained their mediators in use of the online platform.

While NCTDR was the first entity to offer ODR education to the general public, this was more of an introductory course than a training package aimed at professionals. The-MediationRoom is probably the first (and perhaps still the only) entity to offer practical training courses in conducting e-mediation processes. The British Columbia Distance Mediation Project has suggested that its guidelines for distance mediation[93] might serve as the basis for any training program in online mediation. These guidelines – intended as

89 See Rule & Villamore (2005).

90 R. Friedman *et al.*, "The Positive and Negative Effects of Anger on Dispute Resolution: Evidence from Electronically Mediated Disputes", *J, Appl, Psychol* (2004) 89, 2; J.M. Brett *et al., Tortoise or Hare? A Study of the Speed to Resolution in Online Disputes*, 2005. Paper presented at the IACM 17th Annual Conference. Available at <http://ssrn.com/abstract=602021>, last accessed 28 April 2011.

91 Rule (2002).

92 S. Abernathy, "The Square Trade Experience in Online and Offline Disputes", *Proceedings of the 2003United Nations Forum on ODR.*

93 Jani & Getz (2010).

a supplement to basic mediation training – include considerations for suitability of e-mediation for specific cases, technology selection, managing confidentiality and security, online communication skills and more.

There is certainly much to explore in terms of content and methods for e-mediation training at the professional and pedagogical level. Practically speaking, experience with general ADR development has shown that regulation and accreditation of practice and of practitioners often spurs development of training programs. While this is not always a positive route to travel (as the incentives for training development become incentives to avoid further development of training programs), I will take the opportunity to segue into discussion of those two issues.

4.3.2.2 Regulation and Accreditation

The question of whether ODR regulation is desirable, or even possible, has been discussed with some particular attention being paid to e-mediation. As Sarah Cole and Kristen Blankley[94] summarized this somewhat prickly issue, "Policymakers who regulate traditional mediation attempt to balance four general goals: fairness, effectiveness, quality, and access. To the extent that regulation of online mediation is necessary, potential regulators of online mediation should add to that list: access to technology, effectiveness of process as compared to traditional mediation, and quality of mediator services."

However, note Cole and Blankley (correctly, in my view), that not only does this give rise to internal dissonance – as these goals are sometimes incompatible with each other – they are challenged by the formidable external consideration that the Internet, by its very nature, resists regulation. They suggest that regulators prioritize carefully, and aim for small gains and not sweeping regulation of the field.

The issue of regulation overlaps a connected issue, that of accreditation. One means of regulation is by setting up regulatory barriers for practicing in the field. Despite the relative novelty of the field, the question of practitioner accreditation has already been explored, likely due to the ongoing discussion of ADR accreditation. Indeed, Conley Tyler and Bornstein[95] begin their survey of accreditation models for ODR with an overview of accreditation models in the ADR field. While their discussion regards ODR in general and not mediation specifically, many of their suggestions are particularly relevant to practitioners of this process. They surveyed six organizations and service providers conducting some form of accreditation or screening process for practitioners, including government entities and commercial bodies, examining them for entry hurdles to accreditation as well as for requirements posed to practitioners seeking to maintain their accreditation. Beyond regular

94 S.R. Cole and K.M. Blankley, "Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be", *U. Tol. L. Rev.* (2006) 38.

95 M. Conley Tyler & J. Bornstein, "Accreditation of Online Dispute Resolution Practitioners", *Conflict Resolution Quarterly* (2006) 23, 3.

ADR criteria, all of these entities stressed the need for a new knowledge-base and skill-set regarding online interactions.

Other questions regarding accreditation include who should be accrediting, and who should be accredited. Regarding the former, online mediation skills might be incorporated into the accrediting criteria for currently existing accrediting bodies, raising the bar for all mediators seeking accreditation. Alternatively, special bodies (private market or government entities) could accredit online mediators, confer status as an "ODR expert" as a specialty status within a general ADR accreditation or – zooming in even closer – testify that a particular mediator has studied one or more particular skills. Regarding the latter issue, the question of whether individuals should be accredited to practice, or agencies should be accredited to offer services, is an important question.[96] Most online mediation has so far been provided by agencies or service providers, with relatively few "private practitioners" in the field. This centralized model would make accreditation of service providers an important level of oversight. The question of whether individual mediators should undergo accreditation as well also deserves attention. Rule[97] noted how most of the early discussion regarding standards, regulation and accreditation focused on the organization rather than on individual practitioners. He explains how in ODR the organization is identifiable and find-able (through its website, address, management structure, etc.) whereas the individual filling the neutral role might be anywhere in the world, subject to different jurisdictions and legal obligations. Given the shifting trend I have noted in this chapter, regarding the rise of the individual-practitioner model, this might need to be revisited.

4.3.2.3 Ethics

The need for guidelines on ethics in ODR has been under discussion since an early stage in the field's evolution. Many organizations and institutions, professional and governmental, have gotten in on the action by setting up committees and drafting papers, as Conley Tyler[98] notes:

> The American Bar Association established a task force to look at ways of ensuring that ODR services remain effective and ethical (Rule 2002:116). The Online Sector of the Association for Conflict Management prepared Proposed Guidelines for Online Dispute Resolution (Wiener 2001:4). In Australia, NADRAC 2002 provides draft practitioner standards for ODR and the Department of Justice Victoria has commissioned a study into accreditation of ODR practitioners.

96 *Id.*
97 Rule (2002).
98 Conley Tyler & Bomstein (2006).

This flurry of commissions and papers have been augmented by service providers who have drafted their own set of guidelines, whether presenting them as codes of practice or just as part of their "about us" section.

Much of the discussion of ethics pertains to the wider field of ODR, so I will not expand on it here. However, I will make a few comments regarding mediation-specific issues.

Most standards of practice for online mediation have been modeled on traditional mediation practice standards. The one area receiving attention outside of this model is that of technical standards. Service providers often included the quality of their platform and its robustness, as well as the technological proficiency of their mediators, as part of their standards of practice.[99] However, face-to-face standards need to be tweaked to accommodate the online environment and online practice methods. For example, the service provider model described in this chapter necessitates two layers of impartiality: The service provider must be impartial, not only the mediator. As an example of dealing with this issue, I will note that the now-defunct WebMediate clearly stated that not only was it an independent service, but that as a business it did not accept investments from insurance companies or other businesses using the company to resolve disputes.[100] Other service providers took this issue to heart, as well.[101]

While there is not, as of yet, any agreed-upon or institutionalized standards to speak of, recent thinking might be reflected in NCTDR's code of practice.[102] One important section of that code pertains to e-mediation as it voices preference to consensual processes:

> Online Dispute Resolution schemes should encourage parties, whenever appropriate, to resolve their disputes using consensual processes, particularly when the restoration of the social links amongst disputants is of paramount importance, such as in family disputes. Consensual processes however should not be imposed against the will of the parties.

A recent paper by Jo DeMars, Susan Naus Exxon, Kimberly Kovach and Colin Rule[103] reflects some of the areas requiring discussion regarding ODR ethics. One important issue relating to mediation in particular reflects a trend noticeable in the debate on ADR ethics in general: abandoning the primacy given to neutrality and impartiality as guiding professional and ethical beacons, and instead striving to maintain balance between parties.

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99 Ponte & Cavenagh (2005). See, for example, SquareTrade's standards of practice cited on p. 64.

100 *Id.*

101 Beal (1999).

102 NCTDR, Online Dispute Resolution Standards of Practice, 2009. Available at <http://sites.google.com/site/danielraineyorg/Home/organizations---associations/other-projects-1/odr-standards-of-practice>, last accessed 28 April 2011.

103 J. DeMars *et al.*, "Virtual Virtues: Ethical Considerations for an Online Dispute Resolution (ODR) Practice", *Dispute Resolution Magazine*, Fall 2010.

Another issue considered is the potential for system design, or platform choice, to result in biased outcomes. I anticipate that as e-mediation develops and a keener sense for practice develops, opportunities for mediator manipulation of parties will be noted as an area of importance for ethical discussion, and will examined in greater resolution.

4.3.2.4 Co-Mediation

As a final professional issue, I will note that co-mediation – so central to many traditional mediation practices and debates – has completely vanished online. While there might be instances of co-mediation in online practice, I have not identified a single service provider or individual practitioner who have mentioned this mode of practice on their website, nor found mention of this in the ODR literature.

This is not to say that anything in ODR automatically rules out co-mediation. For example, in a mediation simulation on TheMediationRoom's platform (publicly performed at Cyberweek 2010), the mediator, like each of the parties, had his own forum area where he could consult with a "mediator assistant' (in this case – the general public offering input). In real-life settings, that space could be utilized to consult with a coach or a peer. Additionally, there is nothing inherent in ODR that would eliminate the ability to have two mediators "up front", "at the table". Technically, group emails can accommodate another mediator, and suitable videoconferencing equipment can do the same. It certainly may be that issues of cost-efficiency might be at play here, along with a desire to keep the interaction-through-technology as simple as possible without compounding the challenges by having another address to add to the email, another computer capable of crashing, or another bad internet connection knocking out a video transmission. More substantive questions to explore would be whether the underlying theory behind the co-mediation approach is in any way affected by the online environment, or whether mediators' preferences in this regard change as they take their practice online.

5 CONCLUSION

e-Mediation, the most widely offered service in the ODR field, would seem to be facing a growth phase as small-scale practitioners take their traditional practice online, in part or altogether. Current trends indicate that traditionally accepted boundaries regarding areas of practice will cease to hinder mediators, and that mediation will develop in contexts triggering high emotions and involving meaningful relationships. As this expansion occurs, mediators would serve themselves well by reviewing the knowledge gained to-date regarding online communication and process management. They could also conduct their practice with an eye to contributing knowledge to this growing field of practice by docu-

menting their experiences, conducting experiments of their own and sharing these with the e-mediation community.

While e-mediation and face-to-face mediation are certainly closely related, this chapter has demonstrated a wide range of elements characterizing e-mediation as a distinctive field of practice. These distinctive elements might tend to blur in the future, as interactions-at-a-distance continue to become increasingly ubiquitous, and online communication becomes second nature. However, even as the salience of some of the elements described in this chapter recedes, future research might show more significant areas of distinction between the two processes. We might discover, for example, different types of practitioners choosing to engage in each type of mediation, as individuals who would not ordinarily consider practicing mediation face-to-face find themselves very comfortable doing so screen-to-screen, and vice versa. It would be interesting to compare measurements of success across both processes; we would anticipate that practitioners' success practicing one type will not necessarily predict their success practicing the other. Finally, we might discover that different types of people participate as parties in either process, taking advantage of the new type of venue shopping the two processes allow. All this, however, is subject to the caveat that predicting the future of anything technology-related is, at best, a shot in the dark. For the time being, we can enjoy watching the expansion of e-mediation into new dispute contexts, geographical areas and institutions.

18 ODR AND E-ARBITRATION

Trends and Challenges

Mohamed S. Abdel Wahab

The Internet and the technological advancement in information and communication technologies ('ICTs') have significantly altered the way business is conducted and led to an ever-increasing use of electronic instead of paper-based means of communication and data storage. Such ICT revolutionary and innovative applications have been equally extended to the Justice system in a manner that has transmogrified, and continues to do so, in-court and out-of-court dispute resolution techniques and schemes to ensure efficiency, fairness and swift resolution of ensuing disputes.

The assiduous development of new technologies, the proper administration of justice, and access to Alternative Dispute Resolution ('ADR') have facilitated the evolutionary transition from ADR to ODR and the emergence of ODR as a separate and independent field of dispute resolution. Whilst other chapters in the book have addressed, discussed, and analyzed diverse ODR schemes and applications, this chapter shall be dedicated to e-arbitration in an attempt to disambiguate the online arbitration process and assess the opportunities and barriers to the development thereof as an effective ODR scheme.[1]

This chapter shall be divided into six sections. In section 1 the author shall shed light on the conceptual framework of e-arbitration. In section 2 the issues pertaining to the e-arbitration agreement shall be scrutinized. Section 3 shall focus on e-arbitral proceedings, and section 4 shall address e-arbitral awards. Section 5 shall provide an overview of some e-arbitration projects or initiatives. Section 6 shall provide some concluding observations, with an emphasis on the work of the UNCITRAL ODR Working Group.

1 PRELIMINARY CONSIDERATIONS: DEMYSTIFYING E-ARBITRATION

Arbitration, as the most prominent form of traditional out-of-court process, is widely used and globally recognized and applied owing to its default binding nature, finality, global regulation, and enforceability of arbitral awards.[2] Accordingly, taking arbitration online

1 It is worth noting that online arbitration is not an ODR process that is exclusive to online disputes but is equally inclusive of traditional offline disputes.

2 Once a final arbitral award is rendered in binding arbitral proceedings, it enjoys a full *res judicata* effect, in so far as it is not set aside, which bars either party from re-litigating the subject matter of the case.

by utilizing state-of-the-art technologies that are integrated and embedded into arbitral proceedings conducted wholly or substantially online, is a necessary evolutionary phase that matches the transition to a paperless world.

In essence, e-arbitration entails sufficient utilization of ICT applications. That said, it is submitted that for a process to qualify as an e-arbitration scheme, the ICTs employed should not be used as a simple assisting tool in the process but should be integrated and embedded into the process itself and indispensable for its proper functioning and administration.

1.1 Overview of Initial E-Arbitration Projects

Since arbitration is the most prominent method of out-of-court dispute resolution processes, it did not seem surprising that the first ODR project was actually an e-arbitration initiative, namely the *Virtual Magistrate* ('VM').

The VM was launched in March 1996 as an e-arbitration pilot project for the resolution of disputes, involving (1) users of online systems, (2) those who claim to be harmed by wrongful messages, postings, or files and (3) system operators (to the extent that complaints or demands for remedies are directed at system operators). The plan for this pilot project was developed by a working group at a meeting sponsored by the National Center for Automated Information Research (NCAIR) and the Cyberspace Law Institute (CLI) on 25 October 1995.[3] In the fall of 1996, the project was implemented by Villanova University School of Law, and in 1999, responsibility for the project was transferred to Chicago-Kent College of Law at the Illinois Institute of Technology. The arbitration process was conducted for the most part by email, and decisions were to be posted on the Internet although the process itself remained confidential. However, the VM rendered only one decision in 1996 in a case involving a disputed message posted on America Online ('AOL') by Email America.[4]

Nevertheless, the service was not very popular, and it was thought that e-arbitration might not be a very successful ODR mechanism.[5] The failure of the VM was not directly attributed to the nature of the process itself but rather its limited scope, fairly primitive

3 H.H. Perritt, 'Electronic Dispute Resolution' (1996). A paper delivered at the NCAIR Conference. Washington, DC 22 May 1996. See also M. Abdel Wahab, 'The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution' (2004) 21(2) *Journal of International Arbitration*, pp. 143-168.

4 The decision recommended that the message offering the sale of email addresses be removed by AOL because it violated the AOL service agreement as well as Internet customs.

5 E. Katsh and J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001, pp. 56, 107-108.

technology employed, the absence of agreements to use the service, and insufficient publicity. [6]

On a different note, CyberTribunal, which was another e-arbitration project launched in September 1996 under the auspices of the University of Montreal's *Centre de Recherche en Droit Public* ('CRDP'), offered e-arbitration services, and devised and implemented software applications and encryption technologies that guaranteed the security and confidentiality of the proceedings. The rules of procedure were inspired by the procedural rules used in international commercial arbitration such as the United Nations Commission on International Trade Law ('UNCITRAL') and the ICC. User-friendliness, transparency, due process were amongst the most important principles upheld by CyberTribunal.[7] Before the project ended in 1999, it helped resolve over one hundred disputes.

Over the past decade, there were numerous institutions offering e-arbitration services;[8] however, whilst many are no longer in operation,[9] others have emerged as new e-arbitration providers.[10] This is clearly indicative that the ODR, and especially e-arbitration, arena is dynamic and changing. It is submitted that the continuation of providers is essentially dependent on case load, availability of funds, and the providers' ability to improve and upgrade the technology utilized and offered to the parties.

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6 A number of reasons might be the cause for such partial failure: (a) The initial predictions that online service providers would refer large numbers of cases to VM proved to be wrong; (b) the failure of significant numbers of complainants to submit disputes to VM is likely due to the fact they did not know about VM, at least they had no easy way to file a complaint with VM, as contrasted with filing complaints with service providers directly or in other forums. Nevertheless, it seems that the direct reason for this failure was the refusal of defendants to agree to the VM jurisdiction in cases filed by plaintiffs. See Abdel Wahab (2004).

7 For more information on the project, see V. Gautrais, K. Benyekhlef & P. Trudel, 'Cybermédiation et cyberarbitrage : l'exemple du Cybertribunal', in *Droit de l'informatique et des télécoms*, vol. 4, 1998, p. 46. See also F. Gélinas, 'Taking Stock of ODR: From Concept to Business Reality', in *Using Technology to Resolve Business Disputes, Special Supplement - ICC International Court of Arbitration Bulletin* 2004, pp.10-11.

8 A non-exhaustive list of these institutions include: Association of British Travel Agents ('ABTA'); BBBOnline; the CiberTribunal Peruano; the Commercial Initiative for Dispute Resolution; Cyberarbitration; Cybercourt; eResolution; the Honk Kong International Arbitration Center; IntelliCOURT; iCourthouse; Internet Ombudsman; MARS; NovaForum; ODR.NL; Online Resolution; the Resolution Forum; SettleTheCase; SmartSettle; SquareTrade; Trusted Shops; Web Assured; Web Dispute Resolutions; WEBDispute.com; WebMediate; Word&Bond; WIPO; the National Arbitration Forum; the Asian Domain Name Dispute Resolution Center; and the CPR Institute for Dispute Resolution.

9 This includes: the Virtual Magistrate, MARS, eResolution, Online Resolution, Word & Bond, CiberTribunal Peruano, NovaForum, ODR.NL, Online Resolution, etc.

10 See for example, the AAA online arbitration initiatives such as the Manufacturers/Suppliers Online Arbitration Protocol (<www.adr.org/sp.asp?id=35067>); Onlinearbitration.net (www.onlinearbitration.net); net-ARBitration Works (<www.net-arb.com>); ADR.eu (<http://eu.adr.eu/arbitration_platform/overview/index.php>); Online Arbitration Network (<www.oanlive.com>); Inspection Arbitration Service (<http://inspectionarbitrationservice.com/>); eCourt (<www.ecourt.co.uk/arbitration.php>); ZipCourt (<www.zipcourt.com>); and the South African Institute of Intellectual Property Law (SAIIPL) ODR scheme (<www.domaindisputes.co.za/>). An overview of some existing online arbitration providers will be provided herein below.

1.2 *E-Arbitration: Definition and Advantages*

Whilst there exists an ever-increasing plethora of literature addressing the use of ICTs in dispute resolution and arbitration as the global business community's predominant adversarial and adjudicatory scheme, very few have attempted to discern or ascribe a special definition to 'e-arbitration' that clearly discerns its frontiers. This may be partly due to a preference to treat any form of use of ICT in arbitration as an application of e-arbitration. However, such view would ultimately entail, in light of the progressive use and proliferation of ICT applications, the immediate demise of the traditional form of arbitration and the treatment of any form of arbitral proceedings with an ICT component as e-arbitration, which is clearly questionable.

It is submitted that the role technology plays with respect to ODR varies according to the degree of utilisation of modern technological tools and software applications, and the balance between the human factor and the electronic element in the process. On a sliding scale analysis – and according to the role technology plays in the process – ODR schemes could be grouped into three categories: (a) Technology-assisted ODR mechanisms, where the role of technology is restricted to the provision of an adequate and secure medium of communication and information exchange; (b) Technology-based ODR mechanisms where a fully-fledged application of cutting-edge technology is utilised to resolve disputes; and (c) Technology-facilitated online dispute prevention ('ODP') guarantees, which help reduce the risk of potential e-disputes and incontrovertibly enhances trust and security in e-business.[11]

That said, e-arbitration would normally fall within category (a) since the world has not evolved to a stage where the human factor in arbitration, essentially represented in the human arbitrator, is excluded. However, the sheer exchange of electronic communications or submissions, or the simple use of teleconferencing or videoconferencing for an arbitration hearing would not suffice to characterize the process as e-arbitration. These are clear cases of utilization of ICTs in arbitral proceedings.

On such account, e-arbitration, *strictu sensu*, would mean the integration of ICTs into arbitral proceedings to the extent that the latter are conducted wholly or substantially online. This would include filings, submissions, hearings, and awards being made or rendered online. Nevertheless, since such idealistic perception of e-arbitration is not universally shared, it would suffice to state that many institutions and ODR providers attempt to integrate ICTs into arbitral proceedings, with varying degrees, in an attempt to stigmatize the process as an expeditious, cost-effective, and efficient e-arbitration scheme.

In a nutshell, whilst the theory and practice of e-arbitration are not perfectly aligned, the present *status quo* mandates due consideration of the diverse 'deemed e-arbitration

11 Abdel Wahab (2004), pp.167-168.

initiatives' whilst maintaining a firm understanding of e-arbitration as a scheme that entails conducting arbitral proceedings wholly or substantially online.

If compared to traditional offline arbitration, e-arbitration is considered to offer numerous advantages. Firstly, e-arbitration is generally a swift procedure. Secondly, it is much more cost-effective. Thirdly, it offers round the clock accessibility and availability. Fourthly, it offers a more efficient case management. Fifthly, it is suitable for both small claims and highly complex and high value disputes.

Nonetheless, e-arbitration raises a number of concerns, as it is often perceived that the adequate and well-established regulatory framework that governs offline arbitration is lagging behind with respect to e-arbitration. This could be due to some intertwined technical and legal obstacles that may impair the accelerated development, and in some cases the success, of e-arbitration as a major ODR scheme.

E-arbitration related concerns are generally divided into technical and legal concerns. The technical concerns necessarily pertain to technical standards and compatibility of systems, variation in the parties' technical abilities and expertise, security and confidentiality of arbitral proceedings and communications, ability to organize and conduct hearings online, and data integrity and authentication. On a different note, the legal concerns could be grouped into three categories: (a) arbitration agreement related challenges; (b) arbitral proceedings related challenges; and (c) arbitral awards related challenges.

Whilst the technical concerns or challenges are not exclusive to e-arbitration, but necessarily extend to all ODR schemes, they are of paramount importance in the context of arbitral proceedings owing to the legal and adjudicatory nature of such proceedings, which are normally subject to strict procedural norms that are needed to protect the integrity of the proceedings at large to avert subsequent challenge to arbitral awards.

In any event, owing to the integration of ICTs into arbitration in e-arbitral proceedings, the legal and technical challenges are indeed intertwined to the extent that each group of legal challenges scrutinized in the following pages shall include analysis of technology related issues.

Prior to engaging in an analysis of such challenges, it seems in order to determine the scope thereof, as this chapter is not intended to address traditional challenges and issues pertinent to offline arbitral proceedings but rather aims at addressing those important challenges that are exclusively pertinent to e-arbitration.

2 E-ARBITRATION AGREEMENTS

The current legal framework for e-arbitration is provided by multiple layers of soft and hard law regulatory instruments, consisting mainly of international conventions and model

laws.[12] Moreover, many national arbitration laws and institutional rules do not exclude e-arbitration. In fact, some institutional rules provide for expedited online proceedings such as the AAA, the CIArb, the ICC, the CIETAC, the WIPO, the Czech Arbitration Court, and the HKIAC.

With respect to arbitration agreements, the challenge to the proliferation of e-arbitration would be the writing requirement and whether such requirement, for jurisdictions strictly adhering thereto, may be fulfilled electronically through electronic writing and signatures.

2.1 *The 'Writing' Requirement and the Digital Age: the Proliferation of E-Arbitration Agreements*

Hitherto, the prevailing principle in arbitration law and practice is that an arbitration agreement needs to be agreed in 'writing'. National laws differ with respect to the characterization of such requirement. Whilst some laws consider 'writing' a formality,[13] others consider 'writing' for evidentiary purposes.[14] Nevertheless, there is an increasingly endorsed trend to dispense with the 'writing' requirement, especially in the context of international commercial arbitration.[15] However, since the 'writing' requirement continues to pose certain challenges regarding the essence of such requirement and whether it includes e-writing or not, it seems necessary to shed light on the scope of such requirement in reference to the landmark international arbitration instruments, especially the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ('NYC') and the UNCITRAL Model Law on International Commercial Arbitration (1985 as amended in 2006) ('ML').[16]

At the outset, it is worth noting that Article (II) of the NYC and Article 7(2) and Article 7(4) of the ML respectively read as follows:

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12 Whilst such regulatory instruments primarily pertain to traditional offline arbitration, the scope and wording of such instruments do not exclude online proceedings. See for example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the ML, the UNCITRAL Arbitration Rules (1976 as amended in 2010), and the UN Convention on the Use of Electronic Communications in International Contracts (2005), which states in Article (20) that it applies to the 1958 New York Convention.

13 See for example Article (10.2) of the Egyptian Arbitration Law No. 27 of 1994.

14 See for example, Section (5.2) of the English Arbitration Act (1996) and Article (178) of the Swiss Private International Law (1987).

15 See for example Article (1507) of the French Code of Civil and Commercial Procedures, which was amended by virtue of the 13 January 2011 Decree No.48 for the reform of Arbitration, which has entered into force on 1 May 2011. However, French Law distinguished between domestic and international arbitration. Whilst the former necessitates the existence of an agreement in writing, as per Article (1443) of the French Code of Civil and Commercial Procedures, the latter is no longer subject to any formal requirement, as per Article (1507) of the said Law.

16 Owing to the fact that these two instruments impact national laws, reference thereto seems indispensable, especially that the NYC currently has 146 member States, and the ML has inspired national laws in more than 45 States and territories.

> (1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship.
> (2) The term "agreement in writing" shall include an arbitral clause in a contact or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams [...][17]

And

> The arbitration agreement shall be in writing.[18]

And

> The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.[19,20]

A glance at the above mentioned provisions reveals that whilst the 2006 amendment of the ML has explicitly given 'e-writing' the same weight of paper-based writing in so far as the e-communication provided an authentic record of the parties' agreement to arbitrate that is incontrovertibly attributable to parties, the NYC itself has not provided guidance on the scope of the 'writing requirement'.

This is quite understandable since the ML was amended in 2006, when the technological advancement and evolution of ICT applications have become a manifest and incontrovertible reality. The wording of Article (7) of the ML also accounts for future technological developments in so far as the e-communication would provide an authentic record of the agreement.

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17 Article (II) of the NYC.

18 Article 7(2) of the ML [Option 1 for Article (7)].

19 Article 7(4) of the ML [Option 1 for Article (7)].

20 Option 2 for Article (7) of the ML as adopted by the UN in 2006 succinctly states: '"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.' It is manifest that such version excludes any reference to the form of the arbitration agreement or the writing requirement.

On a different note, the NYC is quite old since it was concluded in 1958 – at a time when ICT had not yet realized its potential and fulfilled its destiny.[21] That is why, in 2006, the UNCITRAL issued a recommendation and guidance note on the interpretation of Article (II) of the NYC. The recommendation encourages member states to broadly construe Article (II) since the circumstances listed under paragraph (2) of the said Article are non-exhaustive, and enable parties to invoke Article (VII) to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.[22] This necessarily entails that the 'writing' requirement should be broadly construed to encompass e-writing, especially if the relevant national law recognizes e-communications, e-documents, and e-signatures.

In essence, the UN is incentivizing states to given legal effect to e-writing, especially if their national laws provide for recognition and regulation of e-communications, whether in the form of e-commerce, e-signatures, or e-evidence laws.

In essence, such broad interpretation of the 'writing' requirement, which is consistent with international instruments and arbitration practice, is directly influenced by two factors: (i) the state's perception of arbitration as a general norm or an exception;[23] and (ii) the state's recognition of e-communications, e-documents, and e-signatures.[24]

That said, the validity and recognition of e-arbitration agreements merit due consideration in light of the applicable national laws that should be construed in light of the governing and inspiring international instruments.

For example, Article (1316.1) of the French Civil Code, introduced by the Law of 13 May 2000 relating to E-Evidence (*Loi sur la preuve électronique*), states that 'writing'

21 In 1958, communications where conducted through letters and telegrams. From a technical point of view, it is difficult to see much difference between not only telegram and e-mail, but also telex, facsimile, and e-mail. For each technology, a message is converted to a digital format, then transmitted over a telecommunications network, and finally converted again to a human-readable form. See R. Hill, 'Online Arbitration: Issues and Solutions', (1999) 15 *Arbitration International*, p. 199. Available at <www.umass.edu/dispute/hill.htm>, last accessed 3 November 2011.

22 Article (VII.1) of the NYC states: 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

23 States that consider arbitration an 'exception' to courts' general jurisdiction would likely construe such exception narrowly, which would challenge the validity and weight of e-agreements. However, if States consider arbitration the 'standard scheme/norm' for B2B, or possibly B2C, disputes they would be inclined to recognize and broadly construe the writing requirement to encompass e-agreements in so far as they provide a credible record and are authentic.

24 There is a direct relationship between the regulation and recognition of e-communications/documents/signatures and the broad interpretation of the 'writing' requirement in the context of arbitration agreements.

includes the use of new technologies for the conclusion of an agreement.[25] Moreover, Article (1316.3) states that 'an electronic-based document has the same probative value as a paper-based document'.

Accordingly, the writing requirement enshrined in Article (1443) of the New French Code of Civil Procedures governing the form of domestic arbitration agreements should be construed in light of Article 1316 paragraphs (1) and (3) of the Civil Code.[26]

The same principles should be applicable to the interpretation of the 'writing' requirement, which is enshrined in Article (10.2) of the Egyptian Arbitration Law, especially upon the enactment of the E-Signatures Law No.15 of 2004, which has given e-communications/documents/signatures the same probative value as paper-based documents.[27]

In England, the English Arbitration Act (1996) defines the 'writing' requirement enshrined in Section 5(6) as inclusive of 'being recorded by electronic means'.

In the USA, Article 6(a) of the Federal Uniform Arbitration Act refers to 'an [arbitration] agreement contained in a record'. As per the Act the word 'record' means 'information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form'.

In Germany, Article 1031(5) of the German Code of Civil Procedure explicitly states that the 'written' form shall include 'electronic' form pursuant to Section 126(a) of the German Civil Code.

The above are just examples of the tidal wave sweeping across the world and providing for the recognition of e-communications/documents/signatures, which certainly impacts the recognition of e-arbitration agreements in so far as certain conditions are fulfilled.[28]

In the context of e-arbitration, the importance of such conditions is further amplified and emphasized by confidentiality, privacy, and security concerns. The risks associated with the use of ICT applications and new technologies can be mitigated and minimized through encryption technologies, firewalls and passwords, as well as privacy enhancing technologies ('PETs') to ensure that information about parties remains confidential and secure.

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25 Article (1316.1) states: 'A document in electronic form is admissible as evidence in the same manner as a paper-based document, provided that the person from whom it proceeds can be duly identified and that it be established and stored in conditions calculated to secure its integrity'. See the English version of the French Civil Code. Available at <www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm>, last accessed 20 June 2011.

26 As previously mentioned, Article (1507) of the French Code of Civil and Commercial Procedures, as amended by virtue of the Decree No. 48 of 2011 for the reform of Arbitration, which entered into force on 1 May 2011, has dispensed with any formal requirement, including 'writing', for the conclusion of arbitration agreements in the context of international arbitration.

27 For an overview of the relevant provisions of this Law, see Chapter 24, 'ODR in Africa' in the present book.

28 Generally, these conditions are (a) ability to retrieve and provide a sustainable record of the communication or agreement; (b) possibility of identifying the person(s) associated with such communication or agreement; and (c) availability of adequate technologies that secure the integrity of the communication or agreement.

2.2 *Functional Equivalence and e-Arbitration Agreements – the Click Wrap Saga*

It is worth noting that e-arbitration agreements need not be contained in one signed document but could be included in exchange communications and data messages serving as offer and acceptance, or even incorporated in an e-document by reference to an already concluded e-agreement. Furthermore, it is now an online common practice that a website may contain an offer, including an arbitration clause, and invites a user to accept it by simple clicking on the 'I accept' or 'Yes' button. Most often the user has to fill out a standard form agreement or complete a few blank fields, whereas an arbitration clause remains 'buried' among numerous other general terms and conditions.

Although the information on the website can be structured and presented in many different ways, there are typically some facilities for confirmation and communication of user acceptance. The general principle is that in so far as the acts undertaken to conclude and confirm the conclusion of an e-arbitration agreement constitute a functional equivalence of a standard arbitration agreement, then an e-arbitration agreement is final and binding. Courts in certain jurisdictions have accepted the above mentioned reasoning. For example, US courts tend to hold that 'arbitration clauses in point and click electronic contracts are enforceable [notwithstanding the FAA (9 U.S.C. 4) requirement of a "written" agreement]'. [29]

Nevertheless, two specific issues merit due consideration in this context, mainly e-arbitration agreements in consumer contracts (B2C) and Automated Agent E-Agreements ('AAEA').[30]

2.1.1 E-Arbitration Agreements in Consumer Disputes (B2C)

Whilst e-arbitration in business-to-business ('B2B') disputes does not generally pose problems with respect to issues of arbitrability, e-arbitration in B2C disputes may be quite challenging due to the inherent power disparity between consumers and businesses, which casts doubts on consumers' informed consent.

Consumers very often engage in e-commerce transactions, hence bringing into question the credibility of an arbitration clause incorporated into an e-agreement for the provision of goods or services to consumers. Many arbitration laws limit or reject arbitration in B2C disputes, where consumers are not given the opportunity to negotiate the terms of the agreement. In the virtual world, this concern is further amplified, as consumers could be

29 See *Lieschke et al., v. Realnetworks, Inc.*, 2000 WL 198424 (N.D.Ill. 2-11-2000) and *In re: Realnetworks, Inc, Privacy Litigation*, 2000 WL 631341, F.Supp.2d (No. 00-C-1366) (N.D.Ill. 5-8-2000). Available at <www.technoinformationlaw.net>, last accessed 3 November 2011.

30 Automated Agents are computer programs used to independently initiate an action or respond to electronic documents or messages without intervention or review by an individual at the time of action or response.

bound by an e-agreement whose terms are generally non-negotiable and is just one simple click away. Thus, it is necessary to ascertain the credibility and validity of an e-arbitration clause.

It is worth noting that international instruments such as the 1958 New York and 1961 European Conventions do not provide any guidance with respect to the non-arbitrability of certain disputes and in fact relegate the matter to the applicable national law(s), which are normally the *lex loci arbitri* and the *lex loci executionis*. On such account, national laws indeed become relevant.

Under national laws, there is no uniform rule regarding the arbitrability of consumer disputes. For example, England does not exclude arbitration by means of a contractual clause in consumer contracts. Under the 1996 English Arbitration Act, ss. 89-91 deals with consumer arbitration agreements and provide for the application of the Unfair Terms in Consumer Contracts Regulations ('UTCCR').[31] Section 89(3) of the Act states that rules dealing with consumer arbitration agreements represent overriding mandatory norms and apply regardless of the law applicable to the arbitration agreement.

In the United States, consumer arbitration clauses are held to be enforceable unless they are procedurally unconscionable (which requires a finding of unfairness or lack of notice) or substantially unconscionable (they lead to an unreasonably high expense of arbitration fees imposing a burden on the consumer).[32] With respect to e-contracts concluded with consumers in cross border e-commerce, they are likely to be effective according to federal US law,[33] if prior to the electronic signature or the conclusion of the contract the consumer consented to the use of such means of electronic commerce.[34]

On the EU level, consumer arbitration is to be admissible according to the European Parliament Resolution on the Promotion of Recourse to Arbitration for the Resolution of Legal Conflicts (1994),[35] Commission Recommendation on the Principles Applicable to the Bodies Responsible for Settlement of Consumer Disputes,[36] and the Council Directive

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31 The Unfair Terms in Consumer Contracts Regulations (1994) S.I. 1994/3159 were replaced by the Unfair Terms in Consumer Contracts Regulations (1999) S.I. 1999/2083 to reflect the implementation of the Council Directive 93/13/EEC on unfair terms in consumer contracts OJ L95, 21/4/93 at 29. Section 91(1) of the English Arbitration Act states: 'A term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.'

32 See *Hill v. Gateway* 2000, No. 96-3294, 105 F.3d 1147 (7th Cir. 1997), cert. Denied, 118 S. Ct. 47 (1997) and *Day Brower v. Gateway* 2000, 246 A.2d 246 (N.Y.App. 1998).

33 Electronic Signatures in Global and National Commerce Act (2000).

34 Section 101(c)(1)(A) states: 'Notwithstanding subsection (a), if a statute, regulation or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if – (A) the consumer has affirmatively consented to such use and has not withdrawn such consent.'

35 Resolution of 25/07/94, EU OJ C 205/519, 1995.

36 Commission Recommendation 98/257/EC of 30 March 1998, OJ 115/31 of 17/04/98.

on Unfair Terms in Consumer Contracts (1993).[37] According to the latter, it should be noted that in Schedule 2, Regulation 5(5), which provides an indicative and non-exhaustive list of terms which may be regarded as unfair, (q) deals with unfair dispute resolution clauses and consider terms that have the objective 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, unduly restricting the evidence available to the consumer or imposing on the latter a burden of proof which, according to the applicable law, should lie with another party to the contract to be unfair.

There seems to be no consensus on the interpretation of the wording of letter (q) and whether the mere exclusivity of an arbitration clause may be considered unfair. Although the English Arbitration Act has reduced the ambiguity surrounding the interpretation of (q) by s. 91, it is still uncertain whether the courts in other European States will enforce exclusive arbitration clauses in consumer contracts.[38]

Thus, in order to dispense with potential legal challenge with respect to e-arbitration in consumer disputes, it seems advisable to consider the relevant applicable national law(s). However, it should be noted that if the exclusive e-arbitration agreement is separately negotiated and/or was agreed upon after the dispute has arisen, it should principally be enforceable and, if subject to the EU Directive on Unfair Contract Terms, Regulation (5) thereof would apply.[39]

That said, there exists a number of safe harbour principles or precautionary measures that aim at supporting the reasonableness, fairness, validity, and enforceability of such e-clauses: (i) the consumer should have the opportunity to review e-clauses, and they should be easily visible and accessible; (ii) the consumer should be required to perform some specific act of assent to the terms; (iii) the consumer should be notified that he/she is entering into a binding e-agreement that is equivalent and just as binding as paper and signature based documents; (iv) there should be adequate and clear notice (in block letters or red colour, *etc.*) to such specific e-arbitration agreement; (v) ensure that the consumer cannot obtain the product or service without an explicit consent to these e-clauses,[40] and

37 Council Directive 93/13/EEC OJ L95, 21/4/93, p. 29.

38 It should be noted that unfairness should not be assessed on the sole basis of exclusivity of the arbitration clause. Regulation 6(1) ascertains this principle by stating: 'Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, *taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*'(Emphasis added).

39 Regulation 5 states: 'A contractual term which has not been individually negotiated shall be regarded as *unfair* if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'(Emphasis added).

40 In *Specht v. Netscape Communications Corp.*, 2001 WL 755396, 150 F. Supp. 2d 585 (S.D.N.Y., 5 July 2001) a US Court decided that general conditions containing an arbitral clause could not be invoked against a user

it would be even better to seek an explicit additional and separate consent to such e-arbitration agreement; and (vi) it may be useful to use digital signature technologies and encryption to authenticate an addressee's consent, or maintain additional information which the Internet service provider can capture, including the 'IP address' of the addressee and any other relevant information.

2.2.2 E-Arbitration Agreements in AAEA

With respect to AAEA may be quite problematic in the context of e-arbitration agreements since no direct human intervention in the conclusion of the e-arbitration agreement occurs, which threatens the validity of the parties' consent to arbitration. However, Article (12) of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts (2005) recognizes AAEA by stating that they should not be denied validity or enforceability on the sole premise that no human intervention existed.[41]

In so far as two agents engage in operations that signify agreement, or an individual knowingly interacts with an electronic agent an agreement is duly and validly formed. Whilst national courts have not yet developed case law and precedents on the validity of such e-agreements, it is worth noting the attribution of actions of automated message systems to a person or legal entity is based on the paradigm that an automated message system is capable of performing only within the technical structures of its preset programming. However, it is conceivable that future technological applications and generations of automated information systems may be able to act autonomously through developments in artificial intelligence ('AI') and modify the instructions in its own programs and possibly devise new instructions without direct or indirect human intervention.[42]

If such automated agents become self conscious and autonomous, it would be quite challenging to ascertain the validity of an e-arbitration agreements concluded on behalf of a certain user since such forms of AI would be autonomous and severed from specific users.

Having discussed the crucial issues pertaining to e-arbitration agreements, the author shall shed light in the following section on e-arbitral proceedings.

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who had downloaded a piece of software. In this instance, the user was able to download the software directly by clicking on the 'download' link, without having to click on the 'I accept' button. In summary, a click does not signify acceptance unless it is linked explicitly to the general conditions. A click that simply starts the download without any other reference may therefore be considered inoperative.

41 Article (12) states: 'A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.'

42 United Nations, United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note by the UNCITRAL Secretariat (2007), para. 211, p. 69. Available at <www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf>, last accessed 3 November 2011.

3 E-ARBITRATION PROCEEDINGS

Generally, arbitral proceedings refer to the process and the manner in which arbitration is conducted by an arbitral tribunal and/or administered by an institution (if the arbitration is institutional). E-proceedings normally commence by filing an e-request for arbitration and would involve e-hearings (audio and/or video conferencing), e-submissions and e-production of documents/evidence, e-deliberations, and/or e-communications (whether inter-party, inter-tribunal, and/or party-tribunal), and would normally end by an e-award.

It is unequivocal that arbitral proceedings wholly or substantially conducted online are more cost-effective if compared to traditional offline arbitral proceedings involving face-to-face hearings. However, the use of technology in arbitral proceedings in a manner that would render the process wholly or substantially conducted online may be a double-edged sword, as technology, which is intended to boost efficiency and incentivize conduciveness, may nevertheless be challenging and potentially impeding or inefficient if no adequate measures and applications are utilized to safeguard the integrity, confidentiality, and security of e-proceedings.

3.1 E-Communications, Security, and Confidentiality

ICTs are generally expected to be well integrated into the e-arbitration process. Accordingly, e-communications form an essentially integral part of the proceedings starting from e-filing, exchanged communications, e-hearing, e-deliberations until the rendering of e-awards. In all such processes and communications security, confidentiality, authenticity, and procedural integrity remain a prime directive and an absolute requirement that guarantees the success and continuation of the proceedings in an efficient manner.

At the outset, it is worth noting that confidentiality aims to foster trust by restricting the dissemination of certain information. It is a well-established principle in arbitration, where it represents a key to the success of the process.[43] Accordingly, it is generally hailed as a strategic advantage of international commercial arbitration[44] although some scholars have argued that there is no general duty of confidentiality as such in international arbitra-

43 EC, *Commission green paper on alternative dispute resolution in civil and commercial law*, 19 April 2002, <http://europa.eu.int/eur-lex/en/com/gpr/2002/ com2002_0196en01.pdf>, last accessed on 3 November 2011, at p. 28.

44 L. Trakman, 'Confidentiality in International Commercial Arbitration' (2002) 18 *Arbitration International* 1 at p. 5.

tion.[45] However, practice reveals that confidentiality is of paramount importance to the parties, and many institutional rules provide for a general duty of confidentiality.[46]

Confidentiality concerns all e-proceedings stakeholders: e-arbitration providers, arbitrators, and the parties, as confidentiality in the electronic medium is quite inseparable from security. In any online medium, communications and data may be intercepted, monitored, altered, accessed, downloaded or even destroyed. However, such risks should not be exaggerated, as paper-based documents and traditional communications are not entirely risk-free, as they may be equally forged, altered, accessed, intercepted, or destroyed. Moreover, the risks posed by new technologies can be minimized through the use of encryption technologies, digital signatures, firewalls and passwords, as well as privacy enhancing technologies ('PETs') to ensure that confidential information remains secure.[47] On such account, e-arbitration providers should use effective encryption technologies to ensure the confidentiality of the proceedings and the authenticity of any electronic communications to prevent unauthorized access to information.

The use of encryption technologies with respect to emails and web-based communications (such as Secure Multipurpose Internet Mail Exchange Protocol ('S/MIME') and Pretty Good Privacy ('PGP') for e-mails and Secure Sockets Layer technology ('SSL') and Secure Hypertext Transfer Protocol ('S-HTTP') for web-based communications) is central to the efficiency and integrity of the proceedings. The use of powerful cryptographic products that guarantee both privacy and authentication is indispensable. Even if the information is intercepted, it remains completely incomprehensible.

Regarding SSL and S-HTTP, whilst the former creates a secure connection between a client and a server and has the added feature of being able to encrypt all data passed between the client and the server, including data at the Internet Protocol ('IP') level, the latter only encrypts HTTP-level messages and is designed to transmit individual messages securely. Thus, both could be seen as complementary rather than competing technologies.

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45 J. Paulsson & N. Rawding, 'The Trouble with Confidentiality' (1995) 11 *Arbitration International*, p. 303.

46 The most comprehensive clause on confidentiality is found in the World Intellectual Property Organisation (WIPO) Arbitration Rules. This is probably due to the fact that WIPO is particularly involved in technology and intellectual property disputes, which usually involve trade secrets, patents and copyright materials calling for a high degree of confidentiality. Articles 73-76 of the WIPO Arbitration Rules provide that the existence of an arbitration, the documents and materials produced in the arbitration, including witness testimonials, and the awards shall remain confidential. This general and comprehensive duty of confidentiality binds the parties, their witnesses, the arbitrators and the WIPO Arbitration and Mediation Centre. Only in exceptional circumstances, as when ordered by a court, required by law, agreed by the parties or when the information comes within the public domain will a party be released from its duty of confidentiality and then only within the necessary limits.

47 The OECD has prepared an action plan aimed at securing effective privacy protection online and building trust in business-to-consumer electronic commerce by encouraging the adoption of privacy policies and the use of PETs, whose prime purpose is to help implement privacy principles. See OECD, *Privacy Online: Policy and Practical Guidance* (2003), <www1.oecd.org/publications/e-book/9303051E.PDF>, last accessed 3 November 2011.

In essence, encryption technologies may also be used to secure electronic documents. They prevent unauthorized access and manipulation. This not only includes use of digital signatures, complex multi-layer password applications, use of one-time password generating devices but may also encompass the use of invisible digital watermarks[48] and biometrics.[49]

By and large, the diverse encryption techniques employed with respect to communications to ensure their integrity, security, and confidentiality necessarily extend to encompass e-hearings (whether audio or audio-visual conferencing) and e-deliberations amongst arbitrators.[50] The strength and quality of the signal and connection would depend on the: (a) infrastructure and technical connectivity; (b) compatibility issues; and (c) service availability. Such factors would certainly influence the possible use of audio or video conferencing when e-hearings include cross-examination of experts and witnesses and in cases of multi-party proceedings.[51]

From a purely practical stance, it is worth noting that as at 2011 the age of video-conferencing is still at its infancy worldwide including North America, where excellent broadband infrastructure, and state-of-the-art of communication media do not generally include use of video.[52]

Most of ODR, including e-arbitration, service providers who have advertised use of video conferencing have by now either removed these references from their websites, or have become inactive to the extent that ODR providers offering videoconferencing such as the National Mediation Board are the exception.[53]

3.2 E-Due Process Requirements

The fundamental requirements of due process should be observed in e-arbitral proceedings. Due process is essential to ensure the fairness and impartiality of decisions. Parties should

48 Digital watermarking enables forged copies to be identified. A watermark is introduced throughout a document using an encryption algorithm – or computer instructions – based on a very large prime number. This large number is the key needed to retrieve a watermark. The algorithm selects certain sentences in a document and subtly changes their syntactic structure. See 'Purdue Team Develops Watermark To Protect Electronic Documents', *Science Daily*, 27 April 2001, <www.sciencedaily.com/releases/2001/04/010427071702.htm>, last accessed on 3 November 2011.

49 T. Schultz, *Information Technology and Arbitration*, Kluwer Law International 2006, p. 141.

50 Hearings are not necessarily mandatory and in many cases e-proceedings could proceed on a documents only basis. In some institutions, such as the ICANN, the default rule is that proceedings are documents only. According to ICANN's Uniform Domain Name Dispute Resolution Policy Rules, Rule (13) dealing with In-Person Hearings states, 'There shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint'.

51 For a detailed analysis and checklist of technical issues and examples of video conferencing applications, see Schultz (2006), pp. 168-180.

52 See Chapter 19, 'ODR in North America'.

53 *Ibid.*

be allowed to present their case on equal grounds, present evidence and counterclaims, and be notified of other party's submissions. However, prolonged time limitations for submissions and strict formal procedural rules are not needed in ODR in general and online arbitration in particular, as they will hinder swift decisions. In so far as the parties are treated equally and given equal opportunities to present their cases, fairness is achieved and due process is observed.[54]

Associated with the due process requirements is the concern regarding the exclusive use of technology to conduct arbitral proceedings (such as communicating via emails, secure chat sessions, audio and video conferencing), and whether this could be impede due process. Taking into consideration the parties' freedom to opt for e-proceedings,[55] the parties' choice could either be explicit in their agreement or implicit by conducting the proceedings under the auspices of an ODR provider whose applicable rules and policy provides for the exclusive or non-exclusive usage of online technologies. In the absence of such choice, the arbitral tribunal may conduct e-proceedings, provided that this does not create a situation in which one party is unable to access some information.[56]

Accordingly, e-arbitral proceedings should not be rejected save in cases where online proceedings substantially and adversely affect due process requirements by impeding a party's effective communication and participation, which will result in the creation a form of 'virtual inequality'.

3.3 *E-Management and E-Disclosure*

E-arbitral proceedings are generally expected to be paperless proceedings with submissions being fully, or substantially, made online. It may be worth noting that e-arbitration is so far institutional in nature, where service providers offer their platforms and online facilities for the administration and conduct of the proceedings. The institutional nature of e-arbitration may be due to the fact that the success and efficiency of the process require the availability of adequate and powerful platform with enormous storage capacity and state-of-the-art secure communications system.

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54 Impartiality, fairness, equality, and adversarial procedure as the constituent elements of due process are expressions of a fundamental universal human right to a fair trial sanctioned by Human Rights Conventions and Declarations, almost all national arbitration laws (see *e.g.* section 33 of the English Arbitration Act 1996), the ML (Article 18), and institutional arbitration rules offered by ADR and ODR providers. The New York Convention and the European Convention consider the non-observance of fairness and adversarial procedures in arbitration proceedings sufficient grounds for the annulment and non-enforceability of the award. (see in arbitration Articles V (1)(b) and IX (1)(b) respectively).

55 Hill (1999).

56 For example, it would not be acceptable to impose the transmission of documents via CD-Rom if one party states that it does not have the facilities for reading CD-Roms. *Id.*

Some traditional and well established arbitral institutions have even developed special platforms and services for e-filing and e-management of arbitral proceedings such as the AAA WebFile,[57] the ICC NetCase,[58] and the CIETAC Online Dispute Resolution Centre,[59] which proved to be very successful. In any event, the movement towards global transformation to paperless proceedings seems prevailing and inevitable. To that effect, traditional as well as e-arbitral institutions must ensure the availability of well organized, secure, and efficient platforms that are able to host the diverse facets of arbitral proceedings.

Owing to the accelerated and progressive integration of technology in arbitral proceedings, and since arbitral proceedings may involve: (a) the submission of massive documents including documentary evidence, witness statements, and expert reports; (b) lengthy hearings with multi-participants, it became indispensable to develop some standards and best practices in managing e-proceedings. To that effect, several arbitral institutions have issued guidelines, reports, and protocols on the use of technology in arbitration and

57 AAA WebFile offers fast, convenient online claim filing through our AAA WebFile service. In addition to filing claims, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Neutrals, use a case-customized message board and check the status of their case. See <https://apps.adr.org/webfile/>, last accessed on 3 November 2011.

58 ICC NetCase was launched by the ICC in November 2005 as a service allowing arbitrations to be conducted in a secure online environment. NetCase enables all participants in arbitration to communicate through a secure website hosted by ICC. The service has been subject to periodic improvements so that NetCase enables searching for documents, ability to conduct full text searches in case documents posted on NetCase, irrespective of the format. Moreover, NetCase enables users to update information in real time, exchange views in a secure environment, instead of sending unsecure emails, and post very large documents and numerous documents in several file formats. See Schultz (2006), pp. 93-97.

59 CIETAC, as a well established dispute resolution provider, has pioneered in offering e-arbitration through its dedicated online dispute resolution centre. <www.cietacodr.org>, last accessed on 3 November 2011. On 1 May 2009, the new Online Arbitration Rules ('Online Rules') of CIETAC came into effect. The Online Rules are aimed primarily at e-commerce disputes, without excluding the parties' ability to agree on including other types of disputes. To that effect, the CIETAC Online Dispute Resolution Centre was established to resolve internet domain name disputes and e-commerce disputes. The Online Rules state: (a) the default modes of submission/transmission to be used by the parties and the Secretariat are email, Electronic Data Interchange, facsimile etc (although other traditional modes such as the post and courier may be used depending on the circumstances of the case); (b) there are also provisions for deemed dates and times of receipt of electronically transmitted documents; (c) in relation to electronically produced, transmitted and stored evidence, Article (29) states that evidence's reliability is derived from the reliability of the methods in producing, storing, and authenticating the evidence, as well as in maintaining its integrity; (d) Article (15) states that CIETAC will use its reasonable endeavours to keep data communications secure and encrypted; (e) Article (32) states that the process is generally 'documents only', however Article (33) states that where an oral hearing is necessary, the default mode of hearing is by video conference or other electronic means of communication unless in-person hearings are warranted in light of the circumstances; and (f) Article (37) entitles the arbitral tribunal to engage in a online mediation process during the online arbitral proceedings if so requested by the parties. <www.cietac.org/index/rules/4760665e7716e27f001.cms>, last accessed 3 November 2011.

e-disclosure in arbitral proceedings.[60] These guidelines and protocols aim at the proper integration of technology in arbitral proceedings.

The guidelines and protocols normally address procedural issues pertaining to: the parties' ICT capacity, confidentiality and security protocols, document formatting, referencing system, pagination, categorization, customization for electronic search, pre-hearing arrangements and verification of technical compatibility and adherence to the agreed code of communications.

With respect to e-disclosure or production of documents, which is an area that is exceedingly gaining special attention many institutions such as the IBA, the ICDR-AAA, the CIArb, the CPR, and the ICC have issued guidelines and protocols that are exclusive to e-disclosure.

In 1999, the IBA issued its Rules on Taking of Evidence in International Commercial Arbitration,[61] and such Rules were revised in 2010.[62] From a purely technical stance, the IBA Rules are not exclusive to e-disclosure or e-production of documents. However, the term 'Document' is defined under the 1999 Rules and the new 2010 Rules to encompass electronic documents.[63] In the 2010 revised Rules, reference has been made under Article 3(3)(a)(ii) to 'Document maintained in electronic form', but no attempt to further define such term has been made.

In any event, the 2010 Rules addressed the scope and advisability of 'e-disclosure' (the request for production of electronic communications and electronically stored information such as e-mails, hyperlinked spreadsheets or information stored on mobile phones) and stated under Article 3(3)(a)(ii) that in the case of '*Documents maintained in electronic form*', the requesting party may, or the arbitral tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching in an efficient and economical manner.

In 2008, the ICDR-AAA issued the 'Guidelines for Arbitrators Concerning Exchanges of Information', and whilst such Guidelines were equally not exclusive to e-disclosure, the

60 See for example the ICC Section on Information Technology, *Report on Special IT Requirements in International Arbitration*, Document 42/21-005 (2002); the CIArb, *Protocol for E-Disclosure in Arbitration* (2008); the ICC Commission, *Report of the ICC Commission on Arbitration Task Force on the Production of Electronic Documents in International Arbitration: Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration*, (2011).

61 <www.int-bar.org/images/downloads/iba%20rules%20on%20the%20taking%20of%20evidence.pdf>, last accessed 3 November 2011.

62 <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence>, last accessed 3 November 2011.

63 The 1999 version defines 'Document' as 'a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information'. The 2010 revised Rules defines it in a similar, but not an identical way, as 'a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means'.

Guidelines devoted section (4) to 'electronic documents'. Section (4) states that in case of e-documents, the party in possession thereof may make them available in the form most convenient and economical for it, unless the arbitral tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. In any event, requests for e-documents should be narrowly focused and structured to make searching for them as economical as possible, and the tribunal may direct testing or other means of focusing and limiting any search.

Similarly, in 2008, the CIArb issued their 'Protocol for E-Disclosure in Arbitration'.[64] This Protocol was indeed exclusive to e-disclosure and was incentivized by achieving early consideration of e-disclosure in those cases in which early consideration is necessary and appropriate for the avoidance of unnecessary cost and delay. A request for e-disclosure must be narrow, clearly descriptive, and reasonably justified to prove the relevance and materiality of the requested e-document.[65] The primary source of disclosure of electronic documents should be reasonably accessible data, namely active data, near-line data or offline data on disks. In the absence of particular justification, it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data; or data routinely deleted in the normal course of business operations.[66]

The Protocol specifically states that production of e-documents shall, subject to the tribunal's final determination in the absence of agreement, normally be made in the format in which the information is ordinarily maintained or in a reasonably usable form.[67] The Protocol also refers to the production of 'metadata'[68] and states that a party requesting disclosure of metadata in respect of e-documents shall be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing same.[69]

Furthermore, in 2008 the CPR issued their 'Protocol on Disclosure of Documents and Presentation of Witnesses'.[70] The Protocol, as evident from its title, is not exclusive to e-disclosure but provides useful rules on production of e-documents, which are consistent with the above mentioned rules. Section 1(d)(1) of the Protocol states that emails or electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and

64 <www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf>, last accessed 3 November 2011.

65 Paragraphs (4) and (6) of the Protocol.

66 Paragraph (7) of the Protocol.

67 Paragraph 9(1) of the Protocol.

68 Metadata describes other data. It provides information about a certain item's content. In other words, it is data about data content or content about content, and by describing the contents and context of data files the quality of the original data/files is greatly increased.

69 Paragraph 9(2) of the Protocol.

70 <http://cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx>, last accessed 3 November 2011.

less burdensome to produce when sought pursuant to reasonably specific requests. Moreover, the production of e-documents should be granted only upon extraordinary need, and that requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

Under Section 1(d)(3), it is emphasized that issues regarding the scope of the parties' obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference, or as soon as possible thereafter. Under Schedule 2 Mode (B), it is stated that e-disclosure relates to information from primary storage facilities only. No information required to be disclosed from back up servers or back up tapes, and no disclosure of information from cell phones, PDAs, voicemails, etc. e-disclosure relates to information reasonably accessible from active data.

Most recently, in 2011, the ICC Commission issued its Report on the 'Production of Electronic Documents in International Arbitration'. This comprehensive Report fundamentally states that there is no automatic duty to disclose documents, or right to request or obtain document production, in international arbitration, and the advent of e-documents should not lead to any expansion of the traditional and prevailing approach to document production. Thus, requests for the production of e-documents should remain limited, tailored to the specific circumstances of the case, and subject to the general document production principles of specificity, relevance, materiality, and proportionality.

In essence, the ICC Report builds on the prevailing general principles applicable to production of documents, especially e-documents and endorses the applicable IBA Rules governing taking of evidence in arbitration. To that effect, the ICC Report ascertains that the production of electronic documents, subject to the prevailing principles of specificity, relevance, materiality, and proportionality, should not jeopardize the efficient and cost-effective use of arbitration.

The Report then addresses the characteristics of e-documents[71] and the diverse techniques to efficient management of e-disclosure and e-documents.[72] On such account, the Report confirms: (a) the necessity of addressing e-disclosure as early stages of the proceedings, (b) aversion of fishing expeditions and confining the e-disclosure process to relevant, specific, material, and proportional documents, (c) the need for e-documents to be produced in the most expeditious, cost-effective and efficient form appropriate in the circumstances, (d) due care in dealing and requesting the production of metadata, (e) due consideration

71 These characteristics are: (a) increased volume, (b) dispersal, (c) durability and fragility, (d) use of hardware and software, (e) metadata, and (f) electronic search and review tools.

72 Efficient management involves: (a) limited scope of production, (b) need for IT expertise, (c) cost allocation, (d) form of production, (e) privileged content, and (f) preservation and inferences in case of failure to produce required e-documents.

of costs for e-disclosure, (f) avoidance of privileged and confidential e-documents, and (g) the acknowledging that whilst a party may wish, for its own benefit, to take steps to preserve relevant evidence, it is under no automatic duty to do so, and a tribunal should not consider imposing such a duty absent a specific and warranted reason to do so, such as credible allegations of fraud, forgery, or deliberate tampering with evidence.

By and large, the above confirms that e-proceedings warrant efficient management of evidence and communications, and that e-disclosure or production of e-documents should remain exceptional in nature and subject to the constraints of materiality, specificity, relevance, and proportionality taking into consideration the time and cost associated therewith and the overall pertinence to the issues in dispute. This clearly reflects the challenges posed by integrating ICT in arbitral proceedings and the dire need for efficient and cost effective techniques to adequately address such issues.

3.4 E-Arbitrator and Artificial Intelligence

Another aspect of e-arbitration that pertains to arbitral proceedings is the nature of e-arbitrators and the potential use of ICTs and AI to substitute the human factor.

At the outset, it is generally envisaged that human intervention in traditional dispute resolution processes seems indispensable. However, ODR has spawned its own culture, techniques, and processes to the extent that some ODR schemes are purely ICT based and fully automated. Whilst this has been well addressed under diverse chapters throughout this book, some important questions in the context of e-arbitration remain unanswered and indeed unwarranted: Can e-arbitration be fully automated? Can the proceedings be conducted by non-human neutrals? Can AI and non-human intelligence offer a substitute to human arbitrators?

As anomalous and unreasonable this may seem, these are indeed questions that merit discussion, especially that the near future may hold prospects for such non-human based e-arbitral proceedings.

In principle, it is worth noting that almost all existing rules and laws envisage arbitrators as humans and require them to possess the necessary capacity, impartiality, independence, and ability to decide a case.

The most recent French Law on Arbitration issued by virtue of Decree No. 2011-48 of 13 January 2011 explicitly endorses such requirement and universal presumption that an arbitrator cannot be but a human. Article (1450) of the French Arbitration Law states 'only a natural person having full capacity to exercise his or her rights may act as an arbitrator'. This is also confirmed under Article (16) of the Egyptian Arbitration Law No. 27 of 1994, which provides that an arbitrator cannot be a minor, bankrupt, or subject to any incapacity. Similarly, the English Arbitration Act 1996 irrefutably presupposes that an arbitrator is

inherently and by default a human, as Article (26) deals with the event of the arbitrator's death.

Whilst such requirement, as illustrated under English, French, and Egyptian laws, is certainly shared at a global level by other States,[73] the issue of whether an arbitrator can be an artificial being or non-human based intelligence certainly warrants careful consideration.

It is submitted that arbitrators are irrefutably essential to the arbitration process and that human intervention is pivotal to arbitration and its success. However, one needs to draw a distinction between rational and logical assessment which natural and artificial intelligence are capable of achieving, and the socio-humane print, which only humans are capable of independently demonstrating.

In arbitration, whether traditional or electronic, fact-finding, independent assessment, and critical analysis are essential skills for arbitrators. Such complex and intertwined processes may, in future years, be undertaken by advanced forms of artificial intelligence, if such forms are capable of adapting to diverse variables and exhibiting independence. It is 'independent assessment' that may be subject to rigorous challenges, especially that AI applications are essentially programmed by humans, even if such programming takes place at a basic level, and the AI applications are then able to evolve and engage in a smart self-learning and optimization process.

Whilst ICTs have, thus far, been integrated in e-arbitration in tandem with human arbitrators', who are the award makers, it is not inconceivable that the future would give rise to certain applications that take e-arbitration to new frontiers and uncommonly perceived dimensions.

It is not impossible that, at least for some forms of arbitration where the arbitrators' discretionary powers are restricted by choosing either party's final requests,[74] the future would yield opportunities for AI applications to engage in an assessment process for both parties' proposals before rending a decision in favour of either. This may be truly difficult and challenging in cases where arbitrators are expected to render a traditional arbitral award upon full assessment of the facto-legal matrix of the case and irrespective of either party's requests. Nevertheless, it remains to be seen how national laws and courts would adapt to such prospects of integrating AI into arbitration.

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73 It is submitted that even arbitration laws, which do not explicitly refer to arbitrators as humans, they do implicitly share such understanding through the explicit use of human associated pronouns such as 'he', 'him' etc when referring to arbitrators. See for example section (5) of the US Federal Arbitration Act, which states: '[...]as if *he* or they had been specifically named [...]' and Article 180(2) of the Swiss Private International Law, which states: '[...]If *he* does not possess [...].'

74 This form of arbitration is referred to as either 'pendulum', 'flip-flop', 'final offer', or 'baseball' arbitration.

3.5 *E-Seat and Place of Proceedings*

The seat or place of arbitration, as the location where the award was made,[75] is indeed relevant to the arbitration process, although such relevance is sometimes challenged by some scholars and practitioners. However, the seat or place of arbitration normally determines the nationality of an arbitral award which in turn distinguishes the courts of primary jurisdiction entrusted with any possible challenge or recourse against the arbitral award. The seat or place may also have certain overriding or supplementary rules that supersede or complement the applicable procedural rules chosen by the parties.

In e-arbitration, the determination of the seat of arbitration gives rise to certain problems and challenges relating to the determination thereof in case the parties fail to agree on a specific seat or place of arbitration, as the proceedings normally take place in a virtual setting amongst parties and arbitrators that could be virtually dispersed. In the absence or failure to agree on a seat, some scholars advocate the view that the seat should be the place where the servers are located,[76] or the place where the computer is based, or where the emails of the arbitrator are sent and collected.[77]

However, the above criteria may be quite difficult and/or confusing to be ascertained and may not be a true representation of the parties' intention or expectations. Accordingly, the prevailing criteria, in the absence of the parties' agreement on the seat or place, are (a) the arbitral tribunal shall determine such seat of arbitration;[78] (b) the e-arbitration provider shall determine the seat;[79] and/or (c) the seat shall be that of the e-platform used for the conduct of the e-arbitral proceedings.

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75 The 'seat or place of arbitration' should not be confused with the place where hearing(s) or meeting(s) are conducted, as the arbitral tribunal is generally entitled to hold hearings or meetings wherever appropriate without affecting the location of the judicial seat of arbitration as the place where the award is rendered.

76 M.H.M. Schellekens, 'Online Arbitration and E-commerce', (2002), 9 *Electronic Communication Law Review*, p. 122.

77 A. Vahrenwald, 'Out-of-Court Dispute Settlement Systems for E-Commerce', (2000), *Report on Legal Issues Part IV: Arbitration*, p. 87. Available at <http://tbplaw.com/data/part4.pdf>, last accessed 3 October 2011.

78 This practice exists in traditional arbitration. See for example: Article 20(1) of the ML, which states: 'If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.' This was mirrored under Article 18(1) of the UNCITRAL Arbitration Rules, where it is stated: 'If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.' The same wording was literally adopted under Article 18(1) of the CRCICA Arbitration Rules.

79 It is not uncommon that the service provider/arbitral institution determines the seat in the absence of the parties' choice. Traditional arbitral institutions have often included that in their rules. See for example: Rule (10) of the AAA Arbitration Rules, which states: '[...] If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.' Article (18.1) of the ICC Arbitration Rules, enforceable as of January 2012, states: 'The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.' Article (16.1) of the LCIA Arbitration Rules, which states: 'Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court

With respect to criteria (a) and (b), the following connecting factors merit due consideration to avert an arbitrary or subjective decisions: (i) domicile or place of business if the parties share a common domicile or place of business; (ii) the parties' nationality if they share a common nationality place of potential enforcement, if known and; (iii) location of e-arbitration provider.

Criterion (c), which provides for adopting the place of the e-platform, is equally appealing, especially that it qualifies as an implicit or indirect agreement on the seat of arbitration, as the parties' have voluntarily opted for such e-arbitration provider. However, such criterion should be carefully considered when the e-arbitration provider is located in a place that is different from the location of its e-platform which is used for the purpose of the proceedings. In this case, it seems more realistic to opt for the place where the e-arbitration provider is located, as the parties are using that provider's services.

All the above criteria would only come into effect, if the parties fail to agree on the seat. However, it is worth noting in this context that, unlike traditional offline arbitration providers, e-arbitration providers do not generally include in their rules, if any, provisions regarding the determination of the seat in case if the parties fail to agree, which could be quite problematic in case of cross border disputes.[80]

4 E-ARBITRAL AWARDS

This section does not intend to address traditional issues related to offline arbitral awards, but rather aims at succinctly addressing some pertinent issues in the context of e-awards. The issues that generally pertain to e-awards are (a) e-writing and e-signatures of e-awards; (b) e-notification of e-awards; and (c) enforceability of e-awards.

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determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.' Articles 39(a) and 33(a) of the WIPO Arbitration and Expedited Arbitration Rules state: 'Unless otherwise agreed by the parties, the place of arbitration shall be decided by the Center, taking into consideration any observations of the parties and the circumstances of the arbitration.' However, the AAA-ICDR Rules which apply to international arbitration have opted for a hybrid criterion where Article 13(1) states: 'If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within 60 days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

80 The following institutions do not seem to have accessible or detailed arbitration rules: Net-Arb <www.net-arb.com>; Inspection Arbitration Services <http://inspectionarbitrationservice.com>; odrworld <www.odrworld.com>; Settle Today <www.settletoday.com>; and ZipCourt <www.zipcourt.com>. However, the following institutions have included arbitration rules, but without reference to the seat or place of arbitration: arbitration.in <www.arbitration.in>; eCourt <www.ecourt.co.uk/arbitration.php>; the Czech Arbitration Court Online Platform ADR.eu for domain name disputes <www.adr.eu/>.

4.1 *E-Awards: E-Writing and E-Signatures*

Arbitral awards must generally be in writing and duly signed by the arbitral tribunal. This is a standard global norm and practice.[81] Article IV(1)(a) of the NYC on the Recognition and Enforcement of Foreign Arbitral Awards (1958) requires that the party seeking recognition and/or enforcement of an arbitral award produce the 'duly authenticated original award or a duly certified copy thereof'.

This entails that an e-award must be 'in writing' and duly 'signed'. The challenge in e-arbitration is that e-awards are normally rendered online, which means that they could either be (i) an electronic record of a paper award such as a scanned paper document of a signed original paper award or (ii) an e-award that is rendered in electronic format and digitally signed.

The first type of award is irrelevant to the present analysis, as the award is originally paper based. However, the second type of awards, 'e-awards' is clearly relevant. This e-award is e-written and e-signed. The question is: would an e-award of that form be considered original? If so, would it remain original if it has been printed or reproduced in paper format?

Regarding the writing requirement, this has been discussed and analysed when addressing e-arbitration agreement herein above, so the same principles apply regarding the weight of e-. However, it would suffice to state that (i) in so far as the electronic document provides a functional equivalent of a paper document; and (ii) the relevant applicable law of the State of enforcement (the *lex loci executionis*) subscribes to the functional equivalence doctrine, then the e-award would be considered original. To that effect, and in accordance with international standards, the writing requirement would be met if an e-award is accessible so as to be usable for subsequent reference.[82]

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81 It should be noted that such general and widely respected rule is upheld under Article 31(1) of the ML, Article 1057(2) of the Dutch Arbitration Act 1986 (Book IV of the Code of Civil Procedure), Article 43(1) of the Egyptian Arbitration Act 1994, Article 31(1) of the Russian Arbitration Act 1993, and Articles 1513 and 1515 of the French French Code of Civil and Commercial Procedures, as amended by virtue of the Decree No. 48 of 2011 for the reform of Arbitration does have some exceptions. See for example, Section 52(1) of the English Arbitration Act (1996), which states: 'the parties are free to agree on the form of the award', and Article 189(1) of the Swiss Private International Law (1987), which states: 'The arbitral award shall be rendered according to the procedure and in the form agreed upon by the parties.'

82 This international standard is enshrined in Article 9(2) of the UN Convention on the Use of Electronic Communications in International Contracts (2005) states: 'Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.' The use of the word 'accessible' is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word 'usable' is intended to cover both human use and computer processing. The notion of 'subsequent reference' was preferred to notions such as 'durability' or 'non-alterability', which would have established too harsh standards, and to notions such as 'readability' or 'intelligibility', which might constitute too subjective criteria. See UNCITRAL Secretariat, 'Explanatory Note on the UN Convention on the Use of Electronic Communications in International Con-

Whilst such electronic record of the e-award would qualify as 'writing', it merits authentication and formalization in order to qualify as an original document. In the context of e-awards, this is possible through one of two options: (i) printing the e-award on paper and signing it manually for authentication, which transforms its nature to a paper-based award; and (ii) digitally signing the e-award to authenticate it and ensure that it is treated as an original for the purpose of enforcement.

The present chapter is not intended to discuss e-signatures and the diverse technologies associated therewith. However, it is submitted that the requirements of an e-signature are met if adequate technologies, such as PKI or biometric encryption,[83] are used to identify the signing arbitrator, indicate that arbitrator's intention in respect of the content of the award,[84] and ensure the reliability of the arbitrator's e-signature.[85]

In any event, if the enforcement of an e-award is sought in a national court, national law shall determine which of the above two options is applicable. On one hand, certain national laws may require a paper award that is manually signed, as e-signatures or e-awards are not yet fully recognized or regulated. On the other hand, certain national laws have proceeded to an advanced stage by recognizing e-signatures and validating e-awards. For example, in the USA, the Revised Uniform Arbitration Act of 28 August 2000 states under Article (19): 'An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award.' The words 'or otherwise authenticated' confirm that an arbitrator can execute an award by an

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tracts', para. 146, <www.cnudci.org/pdf/english/texts/electcom/06-57452_Ebook.pdf>, last accessed 1 November 2011. This provision is a mirror image of Article 6(1) of the UNCITRAL Model Law on E-Commerce (1996).

83 PKI is the public key infrastructure, which assumes the use of public key cryptography. The latter is a common method for authenticating a data sender or encrypting data. Public key cryptography is sometimes known as asymmetric cryptography. A PKI encryption infrastructure consists of (i) a certification authority (CA) that issues and verifies digital certificate, which includes the public key or information about the public key; (ii) a registration authority (RA) that acts as the verifier for the certificate; (iii) authority before a digital certificate is issued to a requestor; (iv) one or more directories where the certificates (with their public keys) are held; and (v) a certificate management system. On a different note, biometric encryption refers to technologies that measure and analyze human body characteristics, such as DNA, fingerprints, eye retinas and irises, voice patterns, facial patterns and hand measurements, for authentication purposes. Biometric devices normally consist of: (i) reader or scanning device; (ii) software that converts the scanned information into digital form and compares match points; and (iii) a database that stores the biometric data for comparison.

84 See Article 9(3) of the UN Convention on the Use of Electronic Communications in International Contracts (2005).

85 Reliability is assessed and confirmed if (1) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person; (2) the signature creation data were, at the time of signing, under the control of the signatory and of no other person; and (3) any alteration to the electronic signature, made after the time of signing, is detectable. Such criteria are enshrined under Article 6(3) of the UNCITRAL Model Law on Electronic Signatures (2001).

e-signature. This wording was specifically intended to conform to the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. § 7001.[86]

Moreover, the proper implementation of the 'functional equivalence' doctrine entails that a digitally signed e-award satisfies the requirements of an original award when there is a reliable assurance of its integrity and when it is capable of being displayed to the concerned person to whom it should be presented for enforcement. Thus, when an electronic certificate is added at the end of an 'original' e-award to attest to the 'originality' of that award, or when data is automatically added by computer systems at the start and the finish of a data message in order to transmit it, such additions would be considered as if they were a stamp certifying the originality of the e-award.[87]

By and large, the near future could hold plausible opportunities for the development and implementation of an interconnected electronic pathway through which e-awards may be electronically transferred from one State to the other for enforcement purposes, which marks a total transformation to a paperless society. Such application would also ensure that an original and authentic e-award would remain in its original electronic form across the globe, which would facilitate enforcement of e-awards.

The new e-Apostille Pilot Program ('e-APP') is an interesting development in this regard, as it could provide a medium facilitating cross boarder recognition of foreign e-awards.[88] Under the e-APP, the Hague Conference on Private International Law ('HCCH') and the National Notary Association of the United States ('NNA') are, together with any interested State (or any of its internal jurisdictions), developing, promoting and assisting in the implementation of low-cost, operational and secure software technology for (i) the issuance of and use of e-Apostilles, and (ii) the creation and operation of e-Registers for of e-Apostilles.[89]

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86 An e-signature under the Electronic Signatures in Global and National Commerce Act is intended to mean 'an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record'. 15 U.S.C.A. § 7006(5). See National Conference of Commissioners on Uniform State Laws, Uniform Arbitration Act <www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm>, last accessed 3 November 2011.

87 United Nations, 'UNCITRAL Model Law on Electronic Commerce with Guide to Enactment' (1999), para. 67 <www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>, last accessed 3 November 2011.

88 An Apostille is an additional authenticationrequired for international acceptance of notarized documents, which could include arbitral awards.

89 See <www.e-app.info>, last accessed on 3 November 2011. According to the official press release of the Hague Conference on Private International Law dated 20 May 2011, Spain has already issued and registered its first e-Apostilles using state-of-the-art technology developed under the e-APP (electronic Apostille Pilot Program) for Europe project, thus becoming the second State worldwide (after New Zealand) to have completed a comprehensive implementation of both of the e-APP's components. Full adoption of e-APP means that Spain has implemented a technologically advanced system to facilitate (1) the issuance of and use of electronic Apostilles (e-Apostilles), and (2) the electronic registration of Apostilles in an e-Register that is accessible online. Spain is also unique in that it has become the first State worldwide to develop a central e-Register to operate and record data across multiple domestic jurisdictions.

In practice, this means that the applicant can download e-Apostilles online from the website of the relevant authority in a participating State. The applicant will then obtain an electronic file consisting of a digitally signed e-Apostille and the underlying document such as the original e-award. The e-Apostille can be easily verified in other States via the central e-Register which will contain information regarding Apostilles issued by all competent authorities in the issuing State.

Whilst such e-APP is not dedicated or specifically tailored to e-awards, it testifies to the possibility of inclusion of e-awards therein and/or developing a parallel cross border system for e-awards.

4.2 E-Awards and Notification

In the context of e-arbitration, an award is normally rendered online and notified to the parties by the e-arbitration provider and/or arbitral tribunal. The importance of e-notification stems from the fact that notification of the award informs the parties of the content of the award in preparation of voluntary compliance, recourse, or enforcement.

Whilst such notification is generally unproblematic and many national laws are quite liberal and recognize e-notifications,[90] it is worth noting that e-notifications may not be sufficient or valid under certain national laws. For example, certain laws may require court bailiff or other official forms of notification in order to trigger the rights and obligations of the parties to an award. For example, under Egyptian law, courts have, in the context of traditional offline arbitration, shown inclination to prefer formal court bailiff notification for the aversion of any challenges to institutional or informal notifications.

In any event, it seems advisable to verify any overriding mandatory requirements prevailing under the *lex loci arbitri* and/or the *lex loci executionis* regarding e-notification, as well as other e-award related issues, to avert the lapse of applicable time limits and/or implicit waivers of certain rights or obligations.

4.3 E-Awards and Enforcement

It is unequivocal that arbitral awards are the awaited outcome of the proceedings, and e-arbitration is not an exception in this regard. However, e-awards raise certain concerns with respect to their enforceability. These concerns are (i) the final and binding nature of e-awards; and (ii) the application of the NYC to e-awards.

90 The English Arbitration Act (1996) has opted for a truly liberal approach by explicitly providing under Section 55(1) that the parties are free to agree on the requirements as to notification of the award. In such a case, the parties may well agree that the arbitral award is to be notified to them by e-mail or uploaded on a secure platform accessible to them, which is quite frequent in e-arbitration.

With respect to the final and binding nature of e-awards, not all e-awards are final and binding. For example, under the online arbitration rules of ADR.eu administering domain name disputes through e-proceedings,[91] the decision of the administrative panel is not final and legally binding,[92] as it does not prevent either the complainant or the domain name holder from submitting the dispute to a court of competent jurisdiction for independent resolution before the administrative proceeding is commenced or after it is concluded.[93] Thus, an e-award rendered does not qualify as a final and binding award subject to the enforcement in accordance with the NYC. However, an e-award rendered by the administrative panel shall be implemented by the Registry (EURid) upon the lapse of (30) calendar days from the date of notification of the e-award, provided no court proceeding has been initiated.

On a different note, other e-arbitration providers confirm the finality and binding nature of their awards,[94] which renders it necessary to shed light on the enforceability of e-awards under the NYC since it constitutes the most frequently used Convention to enforce foreign arbitral awards, especially that (146) States have acceded to the Convention, the latest of which is Liechtenstein on 5 October 2011.

With respect to enforceability of e-awards, e-awards may be domestic or international in nature. If an e-award is rendered domestically, enforceability shall be determined in accordance with the procedures and applicable law prevailing and applied by national courts and will vary depending on the State of enforcement and whether its laws recognize and/or enforce e-awards.

However, in case of cross border disputes, e-awards may qualify for enforcement under the NYC if an e-award is characterized as a foreign award, which is normally the case when an award is sought enforcement in a different State. It has been seen that the NYC is capable of encompassing e-arbitration agreements and e-awards. Thus, there is nothing to suggest that the Convention does not categorically apply to e-awards.

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91 <http://eu.adr.eu/arbitration_platform/overview/index.php>, last accessed on 3 November 2011.

92 It is worth noting that Article 12(a) of the ADR Rules state that the decision is final. However, the term 'finality' is used in this regard to refer to absence of further appeal under the ADR Rules; it does not exclude subsequent court proceedings or arbitration if agreed by the parties. <http://eu.adr.eu/html/en/adr/adr_rules/eu%20adr%20rules.pdf>, last accessed 3 November 2011.

93 See § 4(k) of the UDRP Policy. <www.icann.org/en/dndr/udrp/policy.htm#4>, last accessed 3 November 2011. According to § 4(k), if an administrative panel decides that the domain name registration should be cancelled or transferred and the Registrar receives official documentation that a lawsuit has been commenced against the complainant in a Mutual Jurisdiction within ten (10) business days after the notification of the decision it will not implement the Administrative Panel's decision. No further action will be taken until the Panel receives (i) satisfactory evidence of a resolution between the parties; (ii) satisfactory evidence that the lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing the lawsuit or stating that the domain name holder does not have the right to continue to use the domain name.

94 See for example ZipCourt.com and net-arb.com.

Nevertheless, in order to qualify for enforcement and/or recognition under the NYC, an e-award is generally expected to meet the conditions for recognition and/or enforcement enshrined in Article V of the Convention.[95] Whilst such conditions equally apply to traditional and e-arbitration and it is not intended to provide an overview or analysis of such diverse conditions in this chapter, three brief comments in relation there to merit a mention in the context of e-arbitration.

First, in order to qualify for enforcement and/or recognition and e-award must be final and binding. Thus, non-binding awards may not be subject to the NYC as previously mentioned.

Secondly, an e-award must comply with due process requirements as a manifestation of procedural public policy principles. Due process issues in relation to e-arbitration have been discussed herein above under e-proceedings. Nevertheless, it is worth reiterating that each party must be afforded equal and reasonable opportunity to present its case, and in an electronic environment the use of ICTs may impact a party's ability to present its case. On such account, e-awards may be considered in contravention of the forum's public policy if a party was prevented or restricted from presenting its case owing to some technical difficulties beyond that party's control.[96] In any event, it should be clear that the party invoking the due process/public policy defence should clearly demonstrate how its rights to present its case have been adversely affected, taking into consideration their voluntary decision to join e-proceedings. It is submitted that there is no direct correlation between the electronic nature of an award and its violation of public policy and due process requirements.

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95 Article V of the NYC states: '1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.'

96 For a detailed analysis of this issue and examples of such technical difficulties, see Schultz (2006), pp. 119-122.

Thirdly, an e-award is equally expected to deal with matters that are capable of being electronically arbitrated. In essence, arbitrability does not generally differ in case of e-arbitration and traditional offline arbitration. However, with the proliferation of e-arbitration services, some States may opt for excluding certain arbitrable disputes from the scope of arbitrability in e-proceedings. Accordingly, it remains necessary to consider the prevailing overriding mandatory norms of the *lex loci arbitri* and the *lex loci executionis* to avert challenging and/or refusal of enforcement of e-awards.

5 E-ARBITRATION INITIATIVES AND PROJECTS

As mentioned earlier, the e-arbitration landscape has changed over the past decade; several providers have ceased operations, others have emerged, and the e-arbitration arena is in a constant state of flux owing to diverse variables and circumstances. That is why it is often perceived that the regulatory framework that governs the institution of traditional offline arbitration is lagging behind with respect to e-arbitration. This may be partly due to the fact that traditional offline arbitration providers and institutions are not generally offering fully fledged e-arbitration schemes. Thus, it may be possible that some new market entrants have assumed such role, as e-arbitration providers, without having sufficient knowledge and experience in administering arbitral proceedings or developing successful and comprehensive e-arbitration rules.

In the following few pages, the author shall shed light on few e-arbitration initiatives and projects. This overview is neither intended to be comprehensive nor inclusive of all providers but is purely intended for didactic purposes so that readers can follow recent developments in e-arbitration providers.

That said, the following e-arbitration providers have been selected for a number of reasons: (a) novelty; (b) unconventionality; (c) diversity; and (d) actual offering of e-arbitration services.[97]

Well established arbitral institutions offering traditional arbitration, namely the AAA and ICC, are excluded for three reasons: (a) their quasi e-arbitration framework and/or platforms have been well addressed in diverse scholarly writings; (b) their e-arbitration services have been briefly addressed herein above; and (c) their e-arbitration services are not necessarily offered as a stand alone unrelated service but is generally integrated in, and utilized for the purpose of, their traditional offline arbitral proceedings.[98]

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97 Some providers do not offer a fully fledged e-arbitration service, but simply provide a resourceful directory of professional who may serve as arbitrators. See for example, the Global Arbitration Mediation Association (GAMA). GAMA is located in Georgia, USA and serves as a compilation of e-directories and not an ADR forum or institution. GAMA serves as an information resource for parties and ADR professionals. See <http://gama.com>, last accessed 3 November 2011.

98 Whilst the above reasons do not apply to CIETAC Online Dispute Resolution Centre

Whilst the above reasons do not generally apply to CIETAC Online Dispute Resolution Centre, which is quite innovative, new, and serves as a separate track ODR provider, with dedicated online arbitration rules, reference has been made herein above to the most notable features of the online arbitration rules of the CIETAC ODR Centre, and it suffices to say, at this juncture, that CIETAC's ODR Centre seems a truly promising ODR and e-arbitration initiative. It is hoped that similar well established arbitral institutions across the globe would follow CIETAC's ODR initiative by establishing a stand alone e-arbitration procedure.

In light of the above, we shall provide herein below a succinct overview of the following e-arbitration providers: (a) Virtual Courthouse;[99] (b) Internet Arbitration;[100] (c) eCourt;[101] (d) ADR.eu;[102] and (e) ZipCourt.[103]

5.1 *Virtual Courthouse*

The Virtual Courthouse.com is a US ODR initiative physically located in Annapolis, Maryland. It is an Internet-based service that enables parties to submit disputed claims, responses and supporting material in digital form for resolution by e-mediation, e-arbitration, or e-neutral evaluation.[104]

With respect to e-arbitration, the process seems primarily tailored to small claims and quite uncomplicated. The Virtual Courthouse.com website does not offer much information or statistics on successfully arbitrated cases and does not seem to offer a set of directly visible arbitration rules. The Virtual Courthouse.com equally offers face-to-face arbitration; however, it is stated that the fees for such face-to-face process shall be at the third party's neutral applicable hourly rate.[105]

Whilst it seems evident that a neutral is expected to render a documents' only e-decision, the website does not offer much information until a user is registered, but it seems possible to use video conferencing software if required, as IOCOM visimeet video conferencing is listed as an alliance partner.[106]

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99 <http://virtualcourthouse.com>, last accessed 3 November 2011.

100 <http://www.net-arb.com>, last accessed 3 November 2011.

101 <http://www.ecourt.co.uk>, last accessed 3 November 2011.

102 <http://www.adr.eu>, last accessed 3 November 2011.

103 <http://www.zipcourt.com>, last accessed 3 November 2011.

104 <https://www.virtualcourthouse.com/index.cfm>, last accessed 3 November 2011.

105 <https://www.virtualcourthouse.com/index.cfm/category/3/pricing.cfm>, last accessed 3 November 2011.

106 IOCOM offers Visimeet, as a cloud hosted service, which allows any user with internet connectivity to participate in full multipoint collaboration video conferencing without requiring any enterprise to own or administer expensive hardware to facilitate such meetings. Any individual can simply sign up for the Visimeet service and optionally purchase a subscription based on their individual requirements. Alternately, a group facilitator may purchase a block of licenses to use the service and likewise provision these accounts to team members as desired. See <www.insors.com/features.php>, last accessed 3 November 2011.

5.2 *Internet Arbitration*

Net-ARB is another US based e-arbitration provider located in Georgia. It was founded in 2005 with an aim to provide a fast and affordable ODR service through email. net-ARB offers e-arbitration, and it is stated that no payment will be charged until the respondent(s) agree(s) to arbitrate the dispute. It is further stated that the hearing procedures, all testimonies and evidence are made online through emails.

Net-ARB operates a detailed website and does offer e-arbitration services for diverse disputes, whether personal or business disputes. However, net-ARB's focus seem to be on small claims disputes and e-commerce disputes, as they do offer relatively low value packages for resolution of such disputes.[107] They equally offer a 'Consumer Confidence Program ('CCP') Seal of Trust', which enables businesses to agree to pre-dispute net-ARB dispute resolution clauses.

Net-ARB is quite unique in offering what might be referred to as e-*amiable compositeur* services, or equity based arbitration. net-ARB's provides a set of guidelines for arbitrators when resolving disputes: (a) application of general principles of equity and common law; (b) utilization of common sense analysis of circumstances and context; and (c) the usage of personal experience and expertise. In essence, net-ARB states that equity will prevail over any legal principles that may lead to an opposite result.[108]

It is also stated that arbitrators must immediately decline to decide a case and request re-assignment in case of conflict of interest, existence of bias, and loss of neutrality.[109] Whilst such principles are amongst the fundamental pillars of arbitration, it is questionable that such request is expected to come from the arbitrator(s) in question. Any challenge as to the arbitrator's impartiality and independence is normally expected to come from the aggrieved party unless the concerned arbitrator declines to serve as soon as he/she becomes aware of situations that give justifiable doubts as to his/her impartiality and independence.

With respect to the e-award, net-ARB offers binding arbitral awards. However, the parties are free to agree, at any time prior to the conclusion of a hearing, that an e-award shall not be binding, or it shall be semi-binding with respect to one of the parties.[110]

With respect to enforcement of e-awards, net-ARB states that the award must be turned into a judgment, where the court issues a *feri facias* (a judicial writ ordering the sheriff to satisfy the judgment from the debtor's property). The winning party may receive a sworn affidavit of arbitration including the terms of the arbitration agreement and the amount of the e-award.[111]

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107 See <www.net-arb.com/what_will_arbitration_cost.php>, last accessed 3 November 2011.

108 Net-ARB states that their arbitrators have the power to 'do equity' even when a legal technicality might require the opposite result. <www.net-arb.com/FAQ.php#Rules>, last accessed 3 November 2011.

109 *Ibid.*

110 *Ibid.*

111 *Ibid.*

Finally, with respect to confidentiality and case information, the terms of use of net-ARB's services state that net-ARB will generally maintain the confidentiality of all information and evidence, surrendering such only if ordered to do so by a court of competent jurisdiction or in order to defend against slanderous or libelous statements.[112] Moreover, net-ARB arbitrators will resist testifying if a case that has been arbitrated goes to court for any reason except as necessary to authenticate an award for the purposes of confirming that award in a court of competent jurisdiction.[113] Furthermore, net-ARB pledges that it will not share or use evidence from one case to support claims in a new or additional case regarding the same matters or involving the same parties.[114]

5.3 *ECourt*

ECourt is a UK based ODR provider located in London. eCourt offers e-mediation and e-arbitration services. It offers two main e-arbitration packages: (i) *Standard Package* and (ii) *Premium Package.*[115]

The 'Standard Package', which is considered an e-arbitration scheme, is obviously some sort of 'neutral evaluation' and not arbitration. eCourt provides for a four-step evaluation under the Standard Package: (1) selecting the number of words needed, (2) submitting the case notes of a party, (3) making payment,[116] and (4) eCourt returning an assessment entitled 'Verdict'.[117] It is stated that when only one party submits its case note and background information, eCourt will deliver an independent opinion on the facts and evidence submitted.[118]

The Premium Package is subject to a six-step evaluation: (1) choice of assessors by claimant or by eCourt upon claimant's request,[119] (2) selecting the number of words needed, (3) choosing a third party representative (required), (4) submitting case notes, (5) making payment,[120] and (6) eCourt returning the so-called verdict.

By comparing both packages, it is obvious that the 'Premium Package' offers greater choice and flexibility, by allowing a party to choose an 'assessor' and a representative.

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112 <www.net-arb.com/arbitration_agreement.php>, last accessed 3 November 2011.

113 *Ibid.*

114 *Ibid.*

115 <www.ecourt.co.uk/howitworks.php>, last accessed 3 November 2011.

116 The current advertised costs are £25 per 250 words. *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 eCourt whilst considering such packages 'arbitration' schemes, the arbitrators are referred to as assessors, which confirms the understanding that such e-processes are neutral evaluations or independent opinions and not arbitration *strictu sensu*. The eCourt defines an 'assessor' as: 'Someone, like an eCourt Assessor, who gives an impartial viewpoint to deliver in independent fair minded verdict to settle a dispute.' <http://ecourt.co.uk/glossary.php>, last accessed 3 November 2011.

120 The cost is £25 per 250 words per chosen 'assessor', with a minimum of two assessors.

However, payment and fees in either are calculated on the basis of word count, which is quite anomalous and dependent on each party's preference to provide a full or succinct overview of the issues in dispute. Moreover, if one party has budgetary constraints, an arbitrator or 'assessor' may not be able to fairly decide the case if the least number of words is provided. This is quite challenging and may give rise to justifiable doubts as to parties' equality and ability to present their case, as either or both party(ies) rights may be impaired because of fee calculations.

With respect to process duration, eCourt states that a simple arbitration case should take less than seven working days and more complicated case may take up to (28) days.[121]

Concerning the nature and finality of such 'verdicts', eCourt submits that all verdicts are independent awards based solely on logic and a sense of fair play, according to the merit of the case submitted.[122] On such account, similar to 'Virtual Courthouse', eCourt verdicts seem to be equity based and not legally oriented. Moreover, eCourt explicitly state that it does not seek to take away the right of any individual to seek redress in the courts, which means that the 'verdict' or e-award is not final and binding unless such final and binding nature is agreed amongst the parties.[123]

5.4 *ADR.eu*

ADR.eu is an ODR service of the Czech Arbitration Court and is based in Prague. It helps brand and trade mark owners, domain name registrants, and registration companies all over the world to resolve disputes online. ADR.eu is the only ADR provider for (.eu) domain name disputes.[124]

In January 2009, ADR.eu launched a unique UDRP service for generic Top Level Domains such as .com, .net, .org, .biz, .info, .mobi and .tel which features e-filing and class complaints. ADR.EU administers also disputes related to .co.nl domains, according to the ICANN's UDRP Policy and Rules. These disputes are decided by UDRP Panelists.

The Czech Arbitration Court has established an e-arbitration platform and rules dedicated to arbitrating domain name disputes.[125] If proceedings are commenced in an e-format, all communications will take place on the e-platform and via e-mails.[126]

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121 <http://ecourt.co.uk/glossary.php>, last accessed 3 November 2011.

122 <www.ecourt.co.uk/rules.php>, last accessed 3 November 2011.

123 *Ibid.*

124 <www.adr.eu>, last accessed 3 November 2011.

125 <www.adr.eu/arbitration_platform/udrp_supplemental_rules.php>, last accessed 3 November 2011.

126 It is worth noting that complainant is given three options on the preferred method of communication: (a) electronic form; (b) hard copy form (registered postal or courier service); or (c) facsimile form. In all three forms communications will take place on the e-platform, but if a complainant opts for a facsimile or hard copy form, this shall be in addition to the e-platform communication.

The proceedings usually take two-third months until a decision is rendered, and decisions are generally published in full unless the Panel decides that the decision or some parts of it shall not be published. However, the portion of any decision determining that a complaint has been brought in bad faith must always be published. Any other documents filed with a complaint will be accessible to the other Party, to the Panel, and to the Czech Arbitration Court but will not be published.[127]

It is also worth noting that the online platform allows for a complainant or respondent to be represented in a given dispute by only one representative. Therefore, if a party has multiple representatives, it must select one person to be its 'official' representative for the purposes of the particular administrative proceeding. The representative then serves as the sole contact person for purposes of that administrative proceeding.[128]

Finally, whilst it is perceived that the decision of the administrative panel is not subject to appeal within the scope of the administrative proceedings, it should be noted, as previously mentioned, that such e-proceedings prevent neither the complainant nor the domain name holder from submitting the dispute to a court of competent jurisdiction for independent resolution before the administrative proceeding is commenced or after it is concluded, which clearly impacts the binding nature of the proceedings.[129]

5.5 *ZipCourt*

ZipCourt is yet another US based e-arbitration provider established in February 2011, and operates next to Stanford University in Palo Alto, California. ZipCourt launched its online courtroom service on 12 October 2011, enables clients to select between two different tracks of e-arbitration: (i) Arbitrator's Discretion and (ii) Baseball Arbitration.[130]

If parties select 'Arbitrator's Discretion', the arbitrator impartially reviews the dispute and determines a final resolution in accordance with local law, and which likely mirrors the result that would have been reached in a local courtroom. This final resolution is independent of, but gives consideration towards, the parties' own recommendations. However, if the parties select 'Baseball Arbitration', each party submits a recommended resolution, and the arbitrator chooses the one which is the most fair and correct. 'Night baseball arbitration', being a derivative of 'baseball arbitration', is used for complex disputes and entails conducting a factual analysis of the parties' final proposals. The arbitrator will then select which proposal is closest to his/her own independent analysis.[131]

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127 <www.adr.eu/adr/help/index.php#12>, last accessed 3 November 2011.
128 *Ibid.*
129 *Ibid.*
130 <www.zipcourt.com>, last accessed 3 November 2011.
131 <www.zipcourt.com/Services>, last accessed 3 November 2011.

With respect to the scope of ZipCourt's e-arbitration service, ZipCourt will not resolve child custody, employment discrimination, home foreclosures, and other related cases.[132] In most cases, a case can be commenced, reviewed, and decided within a month. However, the length may also depend on the complexity of the dispute.

ZipCourt explicitly states that its e-arbitration processes result in an 'arbitration award' capable of being enforced outside the US in accordance with the NYC.[133] However, ZipCourt, understandably, does not guarantee enforceability of the e-award but appears to be the only e-arbitration provider, which explicitly refers to the UNCITRAL Working Group III on ODR and states that their processes are in compliance with international standards.[134]

Finally, ZipCourt does not seem to be a purely equity based process, but it is rather stated that the arbitrator renders his/her e-award in accordance with the applicable local law.[135] However, ZipCourt does not seem to have developed a specific set of e-arbitration rules that govern the proceedings. Fees for the proceedings are determined in accordance with the dispute complexity, and there are three levels of complexity, namely (a) 'disagreement', which involves a low level of complexity; (b) 'dispute', which involves a medium degree of complexity; and (c) 'complex dispute', which involves a high level of complexity.[136]

6 CONCLUSION: THE FUTURE OF E-ARBITRATION

Throughout this chapter, the author has provided an overview of the diverse phases of e-arbitration and attempted to shed light on some of the intricacies and challenges thereof. The current ICT regulatory framework and global policies do not hamper the development of e-arbitration, which is indeed lagging behind when compared to offline traditional arbitration.

Throughout the chapter, it has been seen that not many e-arbitration providers exist and many have even ceased to operate. This may be due to: (a) the fact that arbitration is a formal dispute resolution process that requires strict adherence to certain procedural safeguards and norms, which is not readily easy to implement online and is quite challenging depending on the technologies employed by the providers; (b) the fact that non-traditional e-arbitration providers are generally small or medium sized, localized, and not necessarily familiar or experienced in administering or conducting arbitral proceedings; and/or (c)

132 <www.zipcourt.com/Global-FAQs>, last accessed 3 November 2011.

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 *Ibid.* As currently charged, the fee for a 'disagreement' is 399 USD per party, the fee for a 'dispute' is 1,999 USD per party, and the fee for a 'complex dispute' is 14,900 USD per party.

the true success of e-mediation, which is a more informal and party controlled process that is not subject to procedural constraints or legal norms.

The *status quo* of the e-arbitration landscape confirms that there exists two distinct groups of e-arbitration providers, namely (a) small and medium sized newcomers and (b) traditional arbitration institutions and providers.

It seems evident that traditional providers have generally developed e-platforms to support and revolutionize their traditional arbitral proceedings. The advantage of developing and offering e-arbitration through traditional arbitration institutions and providers is that they are well versed and experienced in developing arbitration rules and administering arbitral proceedings. However, the first and persisting challenge for such entities is to truly consider the potential of offering e-arbitration as a separate track dispute resolution process that is distinct from their traditional offline arbitral proceedings. The CIETAC has realized such potential and developed their CIETAC Online Dispute Resolution Centre and exclusive e-arbitration rules.

The second challenge for traditional arbitration providers is technology and the proper integration thereof in arbitral proceedings to facilitate its transformation into e-arbitral proceedings that are truly distinct from traditional offline proceedings. Such challenge is not exclusive to integration and implementation of state-of-the-art technologies but also extends to include user friendliness, system compatibility, trustworthiness, and security. Accordingly, it remains to be seen how the utilized and implemented technologies will facilitate and support the proper conduct of successful e-proceedings.

On a different note, small and medium sized newcomers are generally tech-oriented providers that offer e-arbitration or specialized tracks thereof. However, they are generally localized and not necessarily familiar with traditional international arbitration norms and rules.

That said, it seems that if traditional arbitration providers are interested and committed to developing their e-arbitration platforms with appealing state-of-the-art technologies, they would be more successful in administering and developing international e-arbitration.

Taking into consideration the *status quo* of e-arbitration, the proliferation and globalization thereof requires due implementation of international standards and their adaptation to local conditions, whenever necessary. This process of integrating the global and the local is often referred to as 'glocalization'. On such account, it is submitted that glocalizing e-arbitration will help boost its proliferation and success to assume its position amongst the most prevailing ODR processes.

Having scrutinized the diverse challenges relating to e-arbitration agreements, e-proceedings, and e-awards, it is manifest that there exist no legal barriers or obstacles to successful implementation of e-arbitration and its integration in the existing global and regional regulatory framework. It has been seen that traditional conceptions remain in a

constant state of flux and are increasingly challenged due to the progressive advancement in ICTs and their integration in arbitration.

In light of the above mentioned, it is submitted that the success of e-arbitration and its prospects require the existence of certain nourishing and enabling environment, which necessitates the following: (a) global and local legal recognition of electronic documentation and signatures; (b) development of a set of minimum technical standards for the utilization of ICTs to ensure security, confidentiality, integrity, authentication, and interoperability; (c) accreditation of ODR and e-arbitration providers and/or developing a set of regulatory and procedural norms that guarantee availability of quality proceedings; and (d) international support for ODR processes, especially e-arbitration services.

In this context, regional and international initiatives would be indeed beneficial for the development of e-arbitration. On such account, two initiatives merit a brief mention: (a) the US to the Organization of American States ('OAS') as a regional ODR initiative; and (b) the UNCITRAL international ODR initiative.

6.1 *US Proposal for the Organization of American States ('OAS')*

Recognizing and acknowledging the need for an adequate ODR system and efficient redress schemes for e-commerce disputes, the USA submitted a proposal to the OAS regarding the creation of a regional ODR system. The proposal, submitted by the United States in 2010, focuses on building a practical framework for consumer protection, which, *inter alia*, includes an OAS-ODR initiative for electronic resolution of cross border low value-high volume e-commerce consumer disputes designed to promote consumer confidence in e-commerce by providing quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions.[137]

The ODR process proposed is divided into three phases: (i) the initiation/negotiation phase, (ii) the e-arbitration phase, and (iii) the award. During the first phase of the procedure, the Buyer and Vendor are provided an opportunity to exchange information and proposals, and negotiate a binding e-settlement. However, if the parties fail to settle their dispute, the second phase is triggered and a qualified ODR neutral is appointed to mediate and, if necessary, arbitrate the case and issue a binding e-award. This process is intended to be a documents only proceedings, and the e-award is expected to be rendered within twenty days of the arbitrator's appointment. If an e-award is rendered,[138] the process moves

137 C. Rule, V. Rogers, & L. Del Duca, 'Designing a Global Consumer Online Dispute Resolution (ODR) System For Cross-Border Small Value-High Volume Claims – OAS Developments', 42(3) *Uniform Commercial Code Law Journal* (2010), pp. 221-264.

138 An e-award may include monetary compensation, return of a product or service, and/or replacement of a product or service. The award will be final and binding and vendors, who have seven days to comply (unless

to the third phase, where relevant local organizations take the necessary measures to ensure that the losing party complies with the award.[139]

The proposed process, which is exclusive to e-commence cross border consumer disputes, therefore includes an e-arbitration component and involves several stakeholders who are necessary for the cross border implementation of the processes, namely: the consumer and the vendor, the neutral/arbitrator, the ODR provider, the national consumer authorities, and the central administrator.[140]

By and large, whilst the US-OAS proposal remains an unbinding initiative, it represents a clear example of a regional ODR initiative directed at resolving consumer disputes through a multi-tiered interconnected process that includes an e-arbitration component if amicable settlement fails. This proposal marks a new era for ODR, as it aims at developing and implementing an inclusive supranational system whose feasibility and implementability shall be tested in the near future.

6.2 *The UNCITRAL ODR Working Group*

On a more global level, the role of the UNCITRAL may not be overlooked, as it plays a great role in harmonizing and approximating national policies. To this effect, the recent initiative and establishment of an UNCITRAL Working Group on ODR seems indispensable to the development of the ODR field at large and e-arbitration in particular.

The year 2010 marked a new era for ODR, as the global recognition thereof, through the establishment of a dedicated UNCITRAL ODR Working Group, confirms the distinctiveness of the ODR field and processes. The first meeting of the UNCITRAL ODR Working Group took place on 13-18 December 2010 in Vienna.

In relation to e-arbitration, it was specifically stated during the first meeting of the Working Group that:

> [...] further work could be undertaken to determine whether specific rules were needed to facilitate the increased use of online dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and

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the award indicates otherwise), are expected to indicate that they have consented to the e-award being enforced in any court with appropriate jurisdiction. *Ibid.*, p. 238.

139 For detailed discussion of the diverse phases, *ibid*, p. 236 *et seq.*

140 The central administrator manages the process for all regional OAS member state participants, and provides a single secure database for storing the documents and other information related to the resolution of claims. The central administrator also maintains a public list of eligible vendors who have agreed to be listed on the home page and have claims processed/arbitrated against them. *Ibid*, p. 240.

> conciliation might be made available to both commercial parties and consumers. It was widely felt that the use of electronic commerce tended to blur the distinction between consumers and commercial parties. It was also recalled that in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations.[141]

During the Working Group second meeting held in May 2011 in New York, the Group considered the absence of international standards on ODR and the need to address disputes arising from the low value transactions in B2B and B2C transactions in developed and developing countries. Such consideration led to an attempted formulation of draft procedural rules to be used as a model by ODR providers.[142]

The draft procedural rules, which are currently under review, scrutiny, and consideration have three main characteristics: (i) they provide for multi-tiered processes, which include negotiation, facilitation, and binding arbitration phases; (ii) taking into consideration the perception that e-commerce disputes are generally low value disputes, it is expected that, unless otherwise decided by the parties, disputes will be handled by a sole neutral who is selected by the ODR provider; and (iii) it is expected that the proceedings would be a documents only based process.

These draft procedural rules elaborate and emphasize the requirement for a rapid, effective and relatively inexpensive dispute resolution processes that can be globally implemented.[143] Amongst the essential issues that are currently being considered by the Working Group and which will form the basis for future work on e-arbitration are the following:[144] (i) ascertaining ODR stakeholders, and the requirements and mandate of each stakeholder (such as ODR providers, neutrals, and parties); (ii) the level(s) at which ODR processes, including e-arbitration, should function: local, regional, and/or global; (iii) funding and location of ODR providers; (iv) enforceability of e-awards under the NYC; (v) e-arbitration agreements and consumer disputes; (vi) authentication and certification of e-awards; (vii) the development of self compliance schemes and measures; and (viii)

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141 UNCITRAL Secretariat, *Annotated Agenda,A/CN.9/WG.III/WP.106*, 23rd Session, 23-27 May 2011, New York, para.5. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/809/69/PDF/V1180969.pdf>, last accessed 3 November 2011.

142 *Ibid.*, para. 9 and 10.

143 UNCITRAL Secretariat, *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules,A/CN.9/WG.III/WP.109*, 24th Session, 14-18 November 2011, Vienna. Available at <www.uncitral.org/pdf/english/workinggroups/wg_3/wp_109_e.pdf>, last accessed 3 November 2011.

144 UNCITRAL Secretariat, *Online dispute resolution for cross-border electroniccommerce transactions: issues for consideration in the conception of a global ODR framework,A/CN.9/WG.III/WP.110*, 24th Session, 14-18 November 2011, Vienna. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/859/64/PDF/V1185964.pdf>, last accessed 3 November 2011.

applicable law issues in e-arbitration and whether equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions should be applied in deciding cases.

By and large, it is obvious that the Working Group is still considering all options and approaches, and it is likely that discussions would continue in relation to the above hot topics, especially the applicability of the draft procedural rules to B2B, B2C, and C2C disputes as well as the governance of the NYC in relation to recognition and enforcement of e-awards.

In a nutshell, it is unequivocal that the edifice of e-arbitration is far from complete, and much work lies ahead prior to the existence of a distinct, well established, and efficient e-arbitration system at national, regional, and global levels.

19 ODR IN NORTH AMERICA*

Arthur Pearlstein, Bryan Hanson and Noam Ebner

This chapter, offering a regional perspective, involves a daunting challenge, that is providing an all-inclusive survey and analysis of ODR in North America despite the inherent diversity and prevailing multitude of norms and practices. As Melissa Conley Tyler wrote in the first comprehensive mapping of ODR, "most of the early activity in ODR took place in North America".[1] As a result, all of the perspectives listed above have roots, examples and lessons grounded in the North American experience even though ODR is intrinsically borderless and geographically unconstrained. Accordingly, whilst one can comment on how North American based entities might apply or offer ODR, the services involved might be utilized by a Malaysian importer (accessing the web in an airport in Australia) and a distillery in Scotland, assisted by a Belgian mediator. That, of course, is even before one considers that due to the way Internet technology works, communication between these far-flung parties might be broken up and routed through a dozen different countries before arriving at their destination.

These challenges might be easier to acknowledge than overcome. Our primary focus in this chapter is providing a comprehensive picture of the *status quo* of ODR in North America from the perspective of North America-based service providers, institutions and governments. Our review of service providers and institutions shall be exclusive to US and Canada, as the chapter on ODR in Latin America addresses initiatives in Mexico and Central America.

In the following pages, we shall commence by mapping out the state of ODR private market services. Subsequently, we look at the federal government and its potential roles as a major provider, and user, of ODR services. Thereafter, we shall address ODR professionals and providers, looking at organizational and structural themes as well as the nature of the services they provide. The US and Canada not only spear-headed the offering of ODR services; North American institutions were also the first to set up research institutes in this area of dispute resolution, as well as to incorporate it into academic curricula, as

* The authors would like to thank Anita Galajda for her assistance in identifying and charting active service providers as well as for assisting with other parts of the text. They would also like to express their appreciation to all those people who shared their time and knowledge with them throughout the research and writing periods, including: Frank Fowlie (ICANN Ombudsman and proud British Columbian), Susanna Jani, Colleen Getz, Ernest Thiessen, Colin Rule, Ethan Katsh, Dan Rainey, Graham Ross, Michael Wolf, Ben Ziegler, Julie Macfarlane and Ellen Zweibel.

1 M. Conley Tyler, "115 and Counting: The State of ODR 2004", *Proceedings of the Third Annual Forum on Online Dispute Resolution*, International Conflict Centre, University of Melbourne, 2004, p. 3.

we shall discuss. Finally, we shall shed light on the prospects of the existing combination of practice, research and institutionalization in order to try and determine which trends might provide a trajectory for ODR in North America over the coming few years.[2]

1 ODR SERVICES IN THE PRIVATE SECTOR

The landscape of private sector organizations, governmental agencies, companies and individuals offering ODR services in North America has continued to shift since the extensive map of ODR providers across the world was presented in Melissa Conley Tyler's 2005 article *115 and Counting: The State of ODR 2004*. In this section, the current landscape of ODR services in North America is explored by addressing the following issues: (a) Who is offering ODR? (b) What processes are being offered? (c) What platforms and communication methods are being used? and (d) What organizational frameworks do providers adopt?

Conley Tyler[3] reported that by 2004, 57 ODR service providers had launched in North America. Her report indicated considerable flux: She reported that quite a few of these were inactive at the time of writing, and that on the other hand a significant number were new additions (as compared to an earlier mapping effort she had conducted), indicating a wave of entrepreneurship and a rise in overall activity. Six years later, the current map of ODR services in the US and Canada has changed substantially. Building on the 2004 map, we incorporate much of the methodology section of Conley Tyler's article in constructing our own strategy for mapping the field, and expand on it in several important ways.[4] However, it is worth noting that, owing to the rapid change in data and information,

2 Colin Rule has stated that one of the problems with any technology-related book is "trying not to look silly after two or three years". See C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, San Francisco, Jossey-Bass 2002.

3 Conley Tyler (2004).

4 The adopted methodology is as follows: (1) the 57 sites identified by Conley Tyler's 2005 study were reviewed. We paid a site visit to each, including the sites she had listed as inactive at the time of her writing. (2) An assessment of activity was conducted on the basis of a three-stage examination: (a) service providers whose reported domain names no longer belonged to the service provider or no longer related to ODR (based on the site's content) were deemed inactive; (b) sites showing clear, *dated* signs of activity in December 2010 were deemed active; and (c) sites that still existed (indicating that the domain name has probably not yet been purchased by some other entity), but which did not show any such signs of activity were contacted by email, asking if their services were still available and explaining the reason for our inquiry. This email was sent to any e-mail addresses available on the site, and was often posted into and sent though another "contact us" automated field as well. Lack of response led to a label of "inactive". (3) Conducting an extensive search of sites beyond the previously identified 57 sites. This search included: (a) checking out service providers included on lists of ODR-related sites which may have been updated since the previous mapping; (b) reviewing the 2009 and 2010 Cyberweek sites, for mention of service providers; (c) reviewing the programs/websites of the 2009, 2010, and 2011 International Forums on ODR, and the 2010 Colloquium on ODR and Consumers; and (d) conducting Google-searches (first 100 results) for: "ODR", "online dispute

the survey undertaken may not be treated as all-inclusive or exhaustive; it can *exemplify* ODR in North America, and at best *represent* it in an informative manner.

For present purposes, it is submitted that only instances in which parties actually conducted some significant part of an ADR process, including interaction with one another or with a human/electronic neutral, online were included, as these processes reflect proper use of ODR. This approach led to setting aside two types of professional services. The first type includes organizations offering administrative software or services aiming to assist professionals offering ADR or ODR services.[5] The second type includes organizations utilizing technology to a limited degree at some stages (usually the filing stage) of a predominantly face-to-face process.[6]

It is a safe bet that as technology is increasingly integrated into the day-to-day practices of ADR professionals, examples will proliferate and distinctions between what might be considered "full ODR", "semi-ODR" or "ADR support" will blur and lose importance.

Unless there was an element involving a familiar form of ODR, we also did not include online commerce trustmarks, or services allowing parties to file complaints against online vendors or other businesses. Such was the case with the TRUSTe seal, and the Better Business Bureau (while this last largely tends towards face-to-face interventions, we have heard of cases where BBB "hotlines" or individual representatives have conducted telephone mediations supported by email for document exchange).

Finally, we only included service providers oriented toward the resolution of existing disputes. We did not include organizations and platforms providing automated negotiation services or the like in non-dispute contexts. In other words, we focused on the dispute resolvers, not the deal-makers.[7]

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resolution", "online mediation", and "online arbitration". (4) Finally, an "extensive supplementary searches and expert consultations" were conducted to determine other unknown sites.

5 Examples of this might be case or document management software offered by <mediate.com> and LibertyADR.

6 Examples might include JAMS' e-JAMS system, or "online case filing" offered by the AAA, FINRA and other organizations. On the other hand, organizations offering even some convening at-a-distance on top of such systems were included in our list. An example of this is Resolution System's (<settleonline.com>) incorporation of telephone participation in addition to online filing and document management.

7 Examples of deal-making services might be an e-HRM firm that offers its clients a negotiation support system to handle their salary negotiations. Another might be a sourcing company offering its clients a platform through which they can not only locate multiple suppliers, but also make contact and negotiate with them. A platform allowing buyers and sellers of real estate to contact each other and make offers and counteroffers would also fall into this category. While we feel that such services might ultimately hold great promise for ODR development they are not, as yet, usually treated as ODR. See N. Ebner, "Negotiating via E-Mail", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, World Scientific Publishing, Singapore 2011.

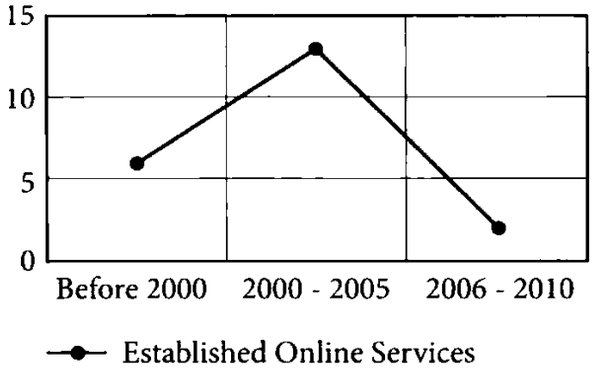
1.1 ODR Service Providers in North America

In addition to the above mentioned (57) providers already identified by Conley Tyler we identified another 13, bringing an estimate of the service providers who have operated in North America to 70.[8] Altogether, we identified 27 service providers currently active.[9]

1.1.1 Longevity and Constant Initiative

As in any industry, we see ebb and flow of ODR service providers. The great majority of providers launched in ODR's early days are no longer active. One way to demonstrate this is to note that of the (57) service providers identified by Conley Tyler as having been launched by 2004 in North America, only 14 still active. Not all of the other service providers have disappeared, but some of them are no longer providing ODR services, as defined herein. Longevity appears to be a challenge to ODR service providers, and this is certainly true of the first wave of innovators who had to figure out how to package and market ODR as well as face the bursting of the dot.com bubble. As Figure 14 shows, we found only six active providers who were established before 2000.

Figure 14 Established Online Service



Conley Tyler's article left readers with a sensation that new players were constantly getting in the game. Has this trend shifted? Figure 14 would seem to indicate that it has, with only

8 This number is not precise, for two reasons: First, as noted, there may be some differences between Conley Tyler's criteria for inclusion on the list and our own; some of her 57 providers did not make our cut, even though they are still active, perhaps others who are now inactive would have similarly been disqualified. Whether this is because we applied different criteria (and would not have included them in the first place), or because the services they offered at the time of her review were different than those offered 7 years later, cannot be established. Second, there are probably providers who established their services and subsequently shut them down during the uninvestigated period between 2005 and 2010 and were therefore not included in either of these two studies. However, as the first issue might lower the total number of providers, and the second might increase it, we feel that the numbers discussed in this Chapter are appropriate figures for portraying ODR in North America.

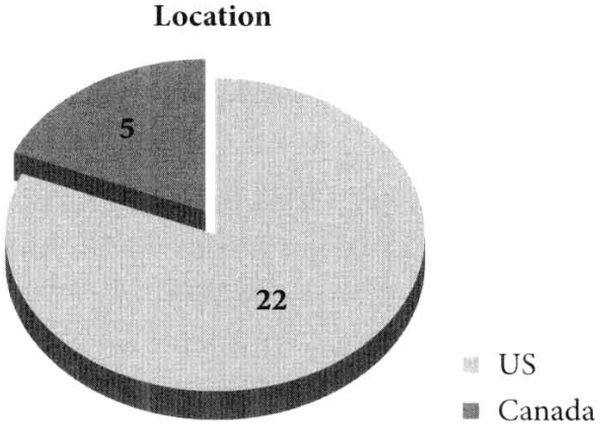
9 A full list of these service providers is provided herein below as Appendix A.

a couple of new services established over the past five years. However, we suggest that new players are getting involved – but in different organizational structures and business models, as discussed below.[10]

1.1.2 Geographical Dispersion

The review of the active service providers enabled us to map them geographically. A majority of the service providers are located in the US, as shown in Figure 15, with only five providers based in Canada.

Figure 15 Service-Provider Locations in North America

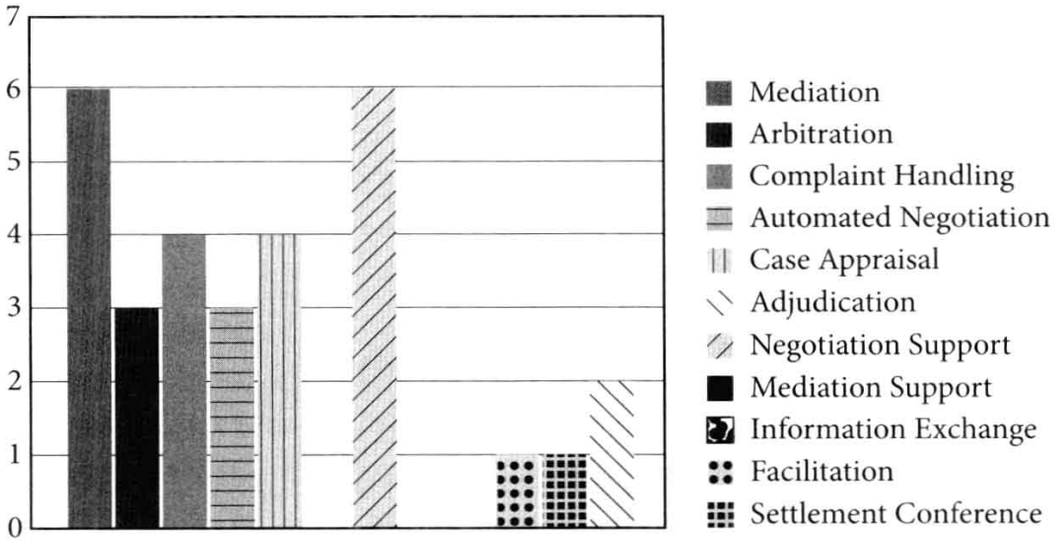


1.1.3 ODR Processes Offered

It is no easy task to try and map the range of ODR processes being offered. Many websites discuss ODR generically, or are vague about the specific processes being offered. We found service providers offering mediation, arbitration, complaint handling, automated and assisted negotiation, case appraisal, adjudication, negotiation support, mediation support, information exchange, facilitation, early neutral evaluation and settlement conference. A visual layout of these processes and their prevalence can be seen in Figure 16.

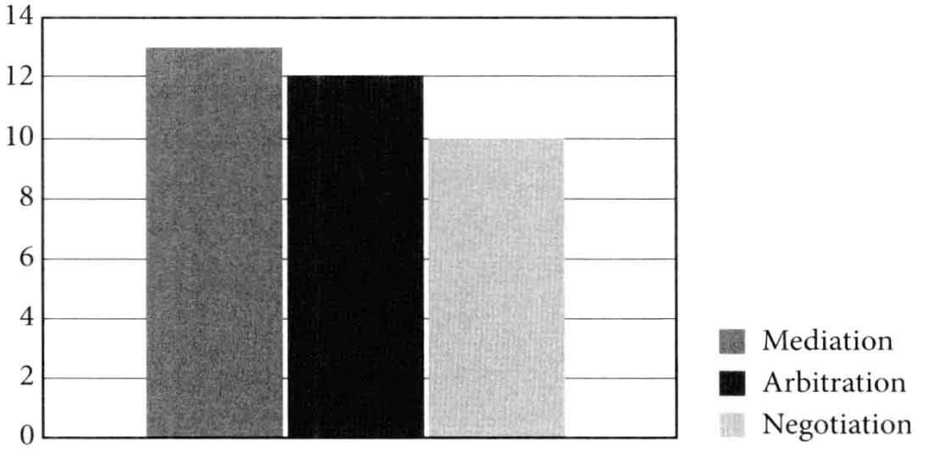
10 We also note that this chart is missing data: First, some service providers did not provide information on their establishment date on their websites. Second, this chart only lists active service providers' date of establishment. There may have been a number of service providers established after Conley Tyler's efforts and abandoned before our own, which are not reflected in these numbers.

Figure 16 Types and Prevalence of ODR Processes Being Offered



The breakdown in Figure 16 may tend to mislead. It is helpful as a tool for understanding how service providers tend to present themselves to the market and for understanding certain contexts of ODR (for example, to realize that four of the sites surveyed employ ODR in the context of complaint handling). However, we found that use of these terms by service providers did not always synch with the way they are usually used in the ADR field. Some service providers use hybrid names, brand names or trademark process names to jazz up a traditional ADR process. Others describe their process without using the label that would be given in traditional ADR. For the purposes of better identifying what is being offered, we made an effort to understand the essence of each service being offered, and broke down what we found into three broader categories: negotiation (assisted or automated negotiation, or negotiation support systems, all *sans* human third party intervention), mediation (with a human third party utilizing the technology as a fourth party), and arbitration (whether binding arbitration or non-binding, case appraisal-type processes). Many service providers, of course, offer more than one of these services. Our findings are displayed in Figure 17.

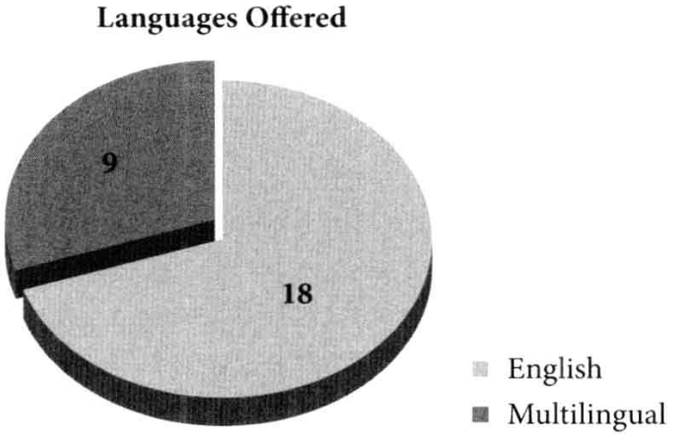
Figure 17 Categories and Prevalence of ODR Processes Being Offered



1.1.4 Multilanguage Services

It is interesting to note that many service providers do not see multilanguage services as something important or remarkable. Only a third of the service providers reviewed indicated on their sites that they offered their services in languages other than English, as Figure 18 demonstrates.

Figure 18 Language Offering of ODR-Process Service Providers



This might indicate that North American service providers are aiming their efforts primarily at the North American market. In Canada, of course, most of the websites have English and French sides, and even if not clearly advertised, probably offer services in both languages. However, the predominance of the English-language services in general is notable.

1.1.5 Explored, but Uncharted

In conducting our review, we noted several other interesting issues which resisted charting due to vagueness or a lack of uniformity in the way service providers inform their customers

about them, or because they require case-specific attention. We will briefly discuss three such issues: technology used by service providers, process cost and process timeframe.

1.1.5.1 Technology Used for Communication

While the issue of technological platforms and media used by service providers is of great interest, it is difficult to present a precise picture of the state of the art. A detailed analysis of this issue would involve conducting a test through every service provider – something far beyond the scope of our research which was mostly limited to exploring the way providers depicted their services on their websites. Some websites said little about the technology involved, others made sweeping statements (*e.g.*, "Through email, phone, fax, videoconferencing and other communication methods, we will...") which do not provide a real picture of how a process is conducted. Others provide only vague details (*e.g.*, "Our state-of-the-art technology will allow you to submit your claim and discuss your issues with the mediator and the other party..."). By contrast, many providers are very clear about communication methods (*e.g.*, "Private discussions between the Mediator and each party individually are held in an online chat-room environment." or "During the hearing phase, all of your testimony and evidence is given by email"). It is not clear why some service providers chose to be vague; this might be to avoid overwhelming potential customers with technological specifications or daunting thresholds; on the other hand, it may indicate a desire to disguise the fact that the actual technology used is not so cutting-edge.

Despite difficulty in mapping this out precisely, several trends were very obvious.

First, as of 2011 the age of video clearly has *not* arrived for ODR in North America. Excellent broadband infrastructure, and high level of user hardware and skills notwithstanding, the state-of-the-art of ODR communication media does not generally include use of video. Most of the service providers who have advertised use of video conferencing have by now either removed these references from their websites, or have become inactive (*e.g.*, the now defunct MARS, which advertised its unique video conferencing platform). ODR providers using video (such as the National Mediation Board, which uses video for arbitration and mediation) are the exception rather than the norm.

Second, text, whether synchronous or asynchronous, is by far the preferred ODR communication medium. Most service providers offer parties the ability to conduct text communication through their web platforms, while others prefer utilizing email for communication, document transfer, etc.

We also explored service providers' use of telephone conversations as a primary or supporting mode of communication. We found that quite a few did indeed offer this opportunity (although, they did not always advertise this prominently on their website's front page).

Finally, to get a sense for how the field is portraying itself, we noted that quite a few service providers advertise something new and unique in their communication platform

or in the technology used for dispute resolution (utilizing terms such as "unique", "patented" or "patent-pending", "dedicated", "custom-tailored") whereas we are only aware of a few systems that might authentically be called groundbreaking or notably original.

1.1.5.2 Cost

Some service providers do not provide information about their fees. Sometimes, this is done by saying it depends on the appointed neutrals rate (*e.g.*, Virtual Courthouse). Others ask to be contacted with questions regarding price (*e.g.*, Cybersettle). Others provide information in a way that is not likely to be familiar to an average disputant looking to resolve a claim (*e.g.*, SmartSettle, which is aimed at repeat players who must purchase software. The costs are comprised of the software licensing fee, optional additional facilitation and technical support services at a price, case filing fees and a bonus for successful, beneficial resolution).

On the other hand, some providers offered very clear pictures of their costs. In these cases, flat fees seem to be the norm: Resolution Canada, for example, offering domain name dispute resolution, provides a chart depicting the costs as a function of the number of disputed domain names, and the number of panelists desired. Similarly, Net-Arb asks USD 299 for a single arbitrator and USD 599 for a panel decision. The Sports Dispute Resolution Center also works according to a flat fee of USD 250 per claim. The AAA charges USD 50 for its online mediation service handling claims of under USD 10,000. Settle Today charges USD 99 per case. Filing a case for jury decision at i-Courthouse is free.[11]

1.1.5.2 Process Timeframe

Most service providers note that speedy resolution is a benefit of their ODR process. However, most are (wisely) cautious about pinning down a time frame. Often this is left vague, or explained as an outcome of the speed with which parties pursue the case.

Other service providers provide a careful projection of a time frame, such as the AAA's online mediation program which informs customers that "Issues usually are resolved within a 30-day time period". Others offer at least the hope of a more speedy resolution, such as The Virtual Courthouse, which states that "Most cases are resolved in less than 30 days. As the parties become familiar with the processes, the time is often under 7 days, sometimes a matter of hours". This is backed up by their committing not to cause unnecessary delay on the service provider's end, or as they aspire: "A neutral decision is filed

11 We note that individual practitioners offering mediation online, as discussed below, are generally forthcoming about their fees, and these are generally structured in a way that reflect the practitioner's face-to-face fee structure, with clients usually being charged by the hour or by the session. This is not always the case, though, as exemplified by <http://settlebyemail.com> offering to mediate disputes for a flat fee of USD 100.

usually in under 24 hours after the case presentation is complete." Settle Today also promises 24 hour resolution.

1.2 New Trend: Individual Practitioners

Another chapter of this book (Ebner, chapter 17) has suggested that the future might hold a shifting of the organizational structure and branding practices of the online mediation practitioner. As this change already seems to be underway in North America, it merits a brief mention herein below.

Early ODR practice and literature has tended to focus on "service providers" and not on individual practitioners. There are many reasons for this, including the need to invest capital in designing and maintaining a technological platform, the sense of legitimacy accompanying an "internet company" as opposed to an individual offering services, and the large case-volume orientation of early vendors, which necessitated an organizational framework of a central business employing or maintaining a roster of individual practitioners.

As a result, in the early days of ODR, there were few, if any, individual practitioners offering their services to the public. Of course, an individual practitioner may have been a sole operator of an e-mediation service providing site, but this is hard to assess. To rely on the data we have at our disposal, none of the early books on ODR describe trailblazing individual practitioners, and in Conley Tyler's 2004 survey, we could not identify a single individual practitioner portraying themselves as such.

As noted, a new trend may be on the horizon, as some individual ODR practitioners are offering their services without trying to wrap themselves in a larger organizational blanket. The desire to gain an edge in a competitive market, the increasing adeptness and comfort of the general population with online activity, and the increasing availability of low-to-no cost platforms for communication all point to this trend taking hold across ODR in general.

In order to gain a sense of whether this trend is underway in North America we reviewed our previous search efforts, and identified 9 sites of individual practitioners (including small partnerships of 2-3 mediators) taking their practice online. All these practitioners offer mediation services, with two offering negotiation services as well. A list of these small-scale practices is provided in Appendix B. We did not find individuals offering online arbitration services.

While this is purely conjecture, we would suggest that these practitioners may only be the tip of the iceberg of ADR (including arbitration) professionals conducting hybrid and wholly online processes alongside their existing, face-to-face practice – to say nothing of

those who would be happy to do so if the opportunity arose – without advertising themselves as offering online or ODR services.

2 GOVERNMENT INITIATIVES IN ODR

As mentioned elsewhere in this book,[12] the potential for the use of ODR in government is virtually limitless. In the US, the federal government has only begun to explore the depths of the possibilities. Across the federal government, ODR commonly exists more in the promise than in the execution. As of early 2011, an exhaustive search of Google's search platform for the US government reveals very few active applications of ODR, at least as far as what agencies are reporting on their websites.

By far the agency to have most extensively examined and successfully experimented with the promise of ODR has been the National Mediation Board (NMB), leveraging the National Science Foundation (NSF) grant to the University of Massachusetts at Amherst with NMB as a partner. Dan Rainey, who spearheaded NMB's share of the effort, has become a leading advocate of applications of ODR in the federal government. The Federal Mediation and Conciliation Service (FMCS) was itself an early adopter of a form of ODR with its "Technology Assisted Group Solutions" (TAGS) program. TAGS was, perhaps, ahead of its time in that its use originally required the transport and set-up of hundreds of pounds of equipment and wiring of multiple computer stations for use in facilitated sessions with labor and management negotiators. More recently, FMCS has set up TAGS electronic conference centers in several locations around the US and also has developed collaborative meeting tools and virtual conferencing using facilitate.com collaboration software.

One of the largest new frontiers for ODR in government may be found in the National Archives and Records Administration's (NARA) new Office of Government Information Services (OGIS). OGIS has been created to help mediate disputes over Freedom of Information Act (FOIA) requests and is part of a larger emphasis on "open government". OGIS is focusing on dispute prevention and resolution in connection with FOIA and has committed to use of ODR in a systematic way.

More broadly, the federal government is actively exploring ODR and quasi-ODR processes for use by agencies that tend to have very high-volume caseloads. The US Congress has directed the Administrative Conference of the United States (ACUS) to develop rec-

12 See Chapter 12.

ommendations for improvements to Federal administrative processes and ACUS is taking a lead in exploring how agencies can use technology to resolve disputes more efficiently.[13]

The US Commerce Department's Commercial Service has taken some steps to promote the use of ADR generally and more specifically ODR for disputes between buyers and sellers in the context of US exports overseas.[14]

It should be noted that in the US, there are currently no court-annexed ODR programs. One intriguing application of ODR was Michigan's Cyber Courthouse, a fully online courthouse system, which was enacted by law in 2002 but which never got off the ground due to lack of funding.

In Canada, an interesting initiative for court connected ODR is CyberJustice's program involving ODR in small claims courts in Quebec.[15]

2.1 ODR Education

ODR is starting to catch on as a topic of study worthy of its own space in the curriculum of legal, business and dispute resolution programs.[16] In academia, most of the programs offering ODR courses are in the US, making this issue worthy of a section in this chapter.

The first university course on ODR was offered, not surprisingly, by The University of Massachusetts at Amherst. It was an undergraduate course in the department of Legal Studies. The first course on ODR offered at the graduate level (and, the first course offered in the framework of a JD program) was at Hamline University Law School. Other graduate programs offer courses on ODR at Southern Methodist University, the University of Maryland at Baltimore and California State University at Dominguez Hills. The Werner Institute at Creighton University School of Law was the first program to make ODR a mandatory course in a degree program. Viewing online activity as a fundamental element of *any* ADR practice, the Werner Institute has included a course on ODR as part of the core curriculum in the online-based instance of its master's degree in negotiation and dispute resolution.

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13 In late 2010, ACUS and OGIS jointly sponsored a workshop on "Technology in the Management of High-Volume Caseloads". Agencies involved included those working with disability claims, immigration review, and medical records access.

14 The US Department of State has convened an ODR study group with special attention to ongoing work of the UNCITRAL to develop legal approaches to ODR for resolving both B2B and B2C disputes. This is in addition to the USA's own ODR initiative pending in the Organization of American States (OAS), including a draft model law/cooperative framework for electronic resolution of cross-border e-commerce consumer disputes.

15 See Chapter 14.

16 See D. Rainey, *Teaching Online Dispute Resolution: Results form a Survey of Students*, 2010, available at <www.mediate.com/articles/raineyD1.cfm>, last accessed 26 April 2011.

Of course, ODR-related topics are incorporated in curricula in many other frameworks. Computer science programs offer courses on computer mediated communication (CMC) and other topics are covered in programs on communications and business. Many law schools offer courses dealing with "Law and Technology" or "Internet Law", many of which, depending on their teachers' inclinations, are partially related to ODR topics or include units on ODR. Courses on negotiation and ADR sometimes also include units on ODR, or on ODR-related topics such as online negotiation.[17]

Outside of academia, education directed at practitioner training and accreditation is scarce. In the past, the University of Massachusetts at Amherst offered its ODR course not only to undergraduate students, but in a separate format for professionals interested in continuing education.[18] Current examples include courses and trainings offered by the Northern Virginia Mediation Service (NVMS),[19] the InternetBar.org Institute[20] and private practitioners.[21]

2.2 *ODR Research Centers and Initiatives*

There are many research centers in North America whose span of interests touch on ODR-related topics, amongst which are the following centers, which deal most directly with ODR's core topics.

2.2.1 The National Center for Technology and Dispute Resolution (<www.odr.info/projects.php>)

Established in 1997 at the University of Massachusetts at Amherst, NCTDR is the central research institute focusing directly on ODR. NCTDR has been a partner to most of the major events and initiatives in the ODR field, including the International Forums and yearly Cyberweek conferences. NCTDR is currently engaged in a wide range of projects involving practice and research, including the use of ODR by US Army ombudsman units, the federal government, institutions dealing with electronic medical records and small claims courts.

NCTDR maintains ODR.info, the main e-portal for information, resources and news on ODR.

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17 N. Ebner *et al.*, "You've Got Agreement: Negoti@ting Via Email", in C. Honeyman, J. Coben & G. De Palo (eds.), *Rethinking Negotiation Teaching: Innovations for Context and Culture*, St. Paul, MN, DRI Press 2009.

18 CITDR, 2008. Courses. Available at <www.odr.info/courses.php>, last accessed 15 January 2011.

19 Rainey, supra note 16.

20 InternetBar.org (2011). Online Dispute Resolution 101. Available at <http://iboinstitute.org/course/category.php?id=3>, last accessed 15 January 2011.

21 J. Melamed, Online Case Management / Communication, 2011. Available at <www.internetmediator.com/pg1.cfm>, last accessed 15 January 2011.

2.2.2 The Center for Research in Public Law (CRDP) (<www.crdp.umontreal.ca>)

Established at the University of Montreal in 1962, this institute was one of the first to conduct programmatic research in ODR, beginning with the Cybertribunal project. Elements of that early ODR project evolved into an ODR service provider, e-Resolution, which provided commercial e-mediation and e-arbitration of domain-name disputes until 2001. The software developed through these two projects then served as the basis for the platform used by ECODIR, the European Commission -backed ODR pilot initiative. The most recent initiative, undertaken in partnership with McGill University, is the CyberJustice Laboratory (see detailed description below). This project aims to develop different software solutions to the many problems currently plaguing the justice system. This research facility, a virtual courtroom to which it is attached, and a transportable courtroom housed at McGill University, will be used to develop and test software modules for facilitating online dispute resolution, virtualizing court files, managing court dockets in a more effective manner, and helping judges write decisions.

2.2.3 The InterNeg Research Center (<http://interneg.concordia.ca/index.php?id=home>)

The InterNeg Research Centre was established in May 2005 Concordia University; with its mission to promote research in the art, science and engineering of negotiation to advance the incorporation of technology into negotiation processes while still focusing on constructing human-centered methods, models and systems. InterNeg has conducted experiments with e-negotiation, has developed the Invite e-negotiation platform, and conducts research regarding negotiation processes conducted online and/or assisted by software.

3 ODR PROFESSIONAL ORGANIZATIONS

While an early initiative considered setting up an organization called CIDR (the Coalition of Internet Dispute Resolvers), professionals working in ODR preferred organizing within existing frameworks to setting up independent bodies. In addition to practitioners associating with one of the research centers described above, they have formed two frameworks within the two largest dispute resolution organizations in the US: The Association for Conflict Resolution's online section (<www.mediate.com/acrodr/>), and the American Bar Association's Dispute Resolution Section, which includes ODR as a special practice area (<www.abanet.org/dch/committee.cfm?com=DR021600>). Another professional organization dealing with ODR-related issues is the Internet Bar Organization (<http://internetbar.org/>).

3.1 *Comments on ODR in Canada and in the United States*

Having provided a thematic view of ODR in North America, we now focus on ODR in the context of the US and of Canada. As we have noted, much of the well-recorded history and development of ODR is synonymous with ODR in the US. ODR development in Canada, by comparison, has not been so well- publicized or documented. Therefore, we limit ourselves to relatively brief comments on the US and provide a more detailed discussion of ODR development in Canada, including descriptions of several programs and projects currently advancing use of ODR in that country.

3.1.1 ODR in the US

Much of ODR's early development was based in the US for several reasons: (a) the early development of US-based internet, for defense and research projects; (b) the deeply-set roots and early adoption of ADR processes in the US; (c) the competitive and innovative nature of the US ADR market; (d) the high-quality ICT infrastructure; (e) the tech savvy, increasingly wired population; and (f) US corporate culture, demanding instant accessibility of people and information.

We have noted that the spread of ODR service providers in the US may have slowed down over the past few years. Indeed, one gets the sense that the market has paused to some extent while experimentation with new models takes place. One direction of exploration seeks to copy the most successful ODR implementation, eBay, by means of identifying or framing occurrences of similar disputes, in mass volume, in regulated or organized contexts.[22] The best example of this trend might turn out to be the move towards governmental applications of ODR, although this remains to be seen. Other instances, closer to the eBay context, might be mechanisms put into place by credit card issuers to resolve chargeback disputes. Another path of application may take the opposite direction, as small-scale practitioners attempt to encourage use of ADR and increase their own market share by offering ADR services at-a-distance.

22 eBay is the largest-scaled ODR presence in the North America. It has been implementing dispute resolution schemes since 2003. Until 2008, SquareTrade, another US-based company, was providing dispute resolution schemes for eBay, but solely with respect to disputes regarding feedback given between buyers and sellers in the eBay marketplace. However, eBay regularly handled all other types of disputes through in-house processes that combined automated processes and human intervention. Upon the acquisition of PayPal, eBay's ODR programs based on the latter's experience were extended to PayPal's operations as well, eBay currently handles roughly 60 million disputes per year through its dispute resolution system. The most common disputes are: (a) *Unpaid items*; (ii) *Item not received / not as described*; (iii) *Feedback rating disputes*; and (iv) *eBay motors feedback disputes*, which are outsourced to a US-based company, NetNeutrals, for a staged process involving assisted negotiation and a form of arbitration dubbed "feedback review". Overall numbers indicate that less than ten percent of all disputes are touched in any way by humans. This information is based on Interviews with Colin Rule, Director of Online Dispute Resolution, eBay and PayPal, 2 February 2011 and 10 March 2011.

Three things are certain: First, that there is a great deal of room for innovation in ODR in the American context. In addition to suggesting new ways to employ ODR in existing structures, there are a great many "open spaces" in which ODR can develop. Indeed, the internet itself will become "an even greater site of change by virtue of its existence as an enormous open space in which privately ordered dispute resolution will dominate over traditional litigation" in the US.[23] New concepts for online marketplaces, any of which could be the next eBay, will need new concepts for dispute resolution. Social networking sites open up a range of opportunities – both as a tool for dispute resolution and as a venue for disputes needing a resolution element. As existing communities move online (*e.g.*, school websites becoming a meeting place after school hours) and new communities form online, new roles on ordering, regulating and monitoring these communities evolve, and some roles involve dispute resolution. These opportunities are not limited to the US, but are likely to emerge there first based on past experience and on developing trends in online activity.

Second, is that to service these open spaces, there now exists a cadre of experienced practitioners and systems designers, as well as tried-and-tested technological platforms. No longer do individual enthusiasts need to invent the wheel for each individual context, site or market.[24]

Third, it is certain that there is no shortage of enthusiasm for figuring out how to best approach these open spaces. Beyond our observations of people already in the ODR field, our work with students across the country approaching projects for class or developing their own roads into ADR practice shows us that the technological barrier is no longer as frightening as it once was, and that the new generation of practitioners sees the internet as an exciting extension of their own traditional resources for practice.

3.1.2 ODR in Canada

Canada has an impressive history in alternative dispute resolution (ADR). There are many member organizations, educational initiatives, mediation centers, and individual practitioners throughout the country. This serves as a strong foundation on which to integrate ODR elements into ADR practices, in addition to new development. However, this factor favoring advancement of ODR in Canada is dwarfed by the factor of simple geography. Canada is a country with its population far-flung across vast territory, with approximately 33 million people spread out across over 3.5 million square miles. Territory-wise, it is the second largest country in the world, larger than the US. However, population-wise, it

23 A. Pearlstein, "Meet the New Lawyer: How Settlement is Transforming the Practice of Law", *Cardozo J.Conflict Resol.* (2008) 10.

24 One good example of this would be Colin Rule's new start-up Modria.com, which emphasizes using approaches and platforms developed for the large-volume caseloads encountered at eBay and PayPal in other dispute contexts.

places thirty-sixth, with a tenth of the population of the US. The distances involved in convening people, and in connecting people with institutions such as courts and government offices, are prohibitive in many ways. This creates a setting that is well positioned to achieve vast benefits from the integration of ODR principles into the resolution of disputes across many contexts.

Canada has been home to ODR initiatives since the mid-to-late 1990s, and is increasingly becoming home to a lively ODR scene. While relatively low on active service providers (see Figure 15, above), innovative practice initiatives and research are being led by practitioners and academics across Canada. Some of these have already been mentioned in previous sections of this chapter regarding service providers and research centers. In this section, we will touch on a few central elements of ODR in Canada.

3.1.2.1 SmartSettle

Smartsettle is a series of negotiation support systems developed by Canadian company iCan Solutions, Inc. Led by Ernest Thiessen, the Smartsettle team has developed systems aimed not only at helping parties exchange offers or identify middle ground, but at allowing them to identify opportunities for creating and gaining value that so often goes unnoticed in many traditional negotiations. Parties inform the platform of their real preferences and priorities, beyond what they are willing to share with the opposite party. In the event that parties reach agreement on their own, the platform can conduct an analysis of the agreement to see if it maximizes each party's gains, and offer the parties *improved* solutions which are at least as good as the one they reached on their own – and usually better. Parties can, of course, reject these offers and stay with their own solution; however, the advantages of the computer-optimized solution are usually very obvious to both parties. Smartsettle's original product, Smartsettle Infinity, was developed for multi-issue disputes. Recently, their new product, Smartsettle One, was launched; this product offers an original form of blind-bidding for parties in single-issue negotiations, which incorporates optional second-level ODR processes, in the form of intervention-at-a-distance by a human arbitrator if agreement is not reached by the parties.[25]

3.1.2.2 The Sports Dispute Resolution Center of Canada (SDRCC)

The Sports Dispute Resolution Center of Canada (SDRCC), the body tasked with handling mediation and arbitration of all sports-related disputes with athletes who belong to, or participate in, a Sport Canada related organization, has long facilitated dispute resolution processes at a distance via telephone and email communications. The SDRCC is now rolling out an online case management program to assist the parties involved throughout

25 For more on Smartsettle's negotiation support systems, see E. Thiessen *et al.*, chapter 16 in this book.

the entire mediation or arbitration process. This program, developed in-house, is ready for release in its English version, with the French version in final testing.

There are multiple facets to the SDRCC case management and dispute resolution program: Participants can view cases they are involved in, view documents pertaining to the case submitted by parties or by neutrals, and find general information aiming to assist or educate the parties, mediator, or arbitrator. The program also includes a calendar (which can synch with a user's web-based calendar) which lists events and sends out event reminders to all parties.

In conjunction with the case management process, the SDRCC provides a fairly innovative process combining phone conferences with a web-based service for facilitation by the mediator or arbitrator. The platform allows parties to call in via a toll free number. The mediator can track who has called in via a web-based platform, and can call in other witnesses or related parties by typing their number into the program. Caucuses or private meetings can be convened by simply dragging the phone number into another room. The SDRCC system is a good example of tailoring technology to suit a particular organization's entire dispute resolution process.

3.1.2.3 The Distance Family Mediation Project

An important initiative regarding the feasibility of integrating ODR principles into the context of family mediation was piloted by the British Columbia Mediator Roster Society, between May 2009 and February 2010. This pilot project, funded by the Law Foundation of BC, set forth as the goal:

> "...to explore the feasibility of providing British Colombians, living in remote, non-urban areas with access to competent, qualified mediators through the use of information and communication technologies."[26]

All in all, 31 cases were mediated and 23 of them concluded with agreement. It is important to note that whereas all the mediators participating in the project, after participating in training and conducting role-play, initially saw the most potential in using platforms with multiplatform videoconferencing (*i.e.*, more than one person are shown on the screen at once) which allowed for document sharing and editing, this high-tech environment was not the one in which the mediation processes ended up being carried out. In practice, mainly due to parties' access to, and comfort with, technology, most of the work was done through telephone, teleconference and e-mail (in fact, web conferencing was only utilized in one case) - and parties and mediators both expressed high satisfaction rates with the

26 C. Getz., *Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project*, Victoria, BC, British Columbia Mediator Roster Society 2010.

media.[27] This holds promise not only for the potential for success of ODR in the context of family mediation, but also for the potential success of ODR even when circumstances or resources dictate relatively low-tech contexts.

3.1.2.4 Cyberjustice

We have already noted the CyberJustice Laboratory at the University of Montreal's Centre de Recherche en Droit Public (CRDP). For more information on this initiative, the reader is advised to consult the chapter on ODR and Courts.[28] If there is any question remaining in our minds after having reviewed ODR in Canada, including interviewing many of the actors in the field, it is why is there not more ODR in Canada, and why does the field seem to be developing slowly? Given the obvious need for ODR, the positive experience Canada has enjoyed in developing comparable systems such as e-government and distance learning, and the wealth of knowledge and enthusiasm demonstrated by the examples we have mentioned – why do we not encounter more service providers, and more government initiative? Our own explorations and our conversations with Canadians involved in ODR have provided suggestions but no clear answers.[29]

Finally, if there was one clear theme running through our interviews with people involved in the ODR field in Canada, it was one of optimism. The spate of current projects, combined with the boost in energy and attention Canada's ODR field has received as a result of the recent conferences hosted in Canada, has them anticipating a well-developed ODR field in the near future.

4 ANTICIPATING THE FUTURE: ODR IN NORTH AMERICA

The corporate culture in North America, not unlike that in other parts of the developed world, has rapidly transformed itself through emphasis on and mechanisms for rapid communication and collaboration. Greater use of multiple IT capabilities, including real time and non-real time communications, have made it possible to find people in virtually any location, on almost any kind of device, placing an ever-greater premium on responsiveness.

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27 *Id.*

28 See Chapter 14.

29 These suggestions revolve around: (i) the relatively low comfort level with technology experienced by many practitioners; (ii) the quality of internet access in outlying areas; and (iii) the fact that some of the institutional and practitioner energy is aimed at court automation initiatives, which could ultimately integrate ODR schemes. However, as noted by our colleagues, this does not prevent low-tech ODR methods such as hybrid email/phone mediation. It was suggested that the success of The Distance Family Mediation Project was likely to encourage similar projects on the individual and organizational level.

At the same time, businesses are also making increasing use of team collaborative tools such as shared applications, online white-boarding, and virtual group workspaces, enabling geographically dispersed employees to work together more effectively. Likewise, companies that fail to make use of blogs, social networks, podcasts, wikis, tweets, and other such tools are becoming the exception to the rule. Many of these approaches involve a blurring of the line between corporate and popular culture.

In North America, most large enterprises involve geographically dispersed teams that heavily depend on the ability to work effectively on the fly: faster, better decision-making, more robust communications, more efficient work flow. In the same way, these large enterprises must also wire themselves for conflict resolution. They need to become at once creative and aggressive in application of technological tools for dispute resolution just as they are for enhancing their productivity in other ways. Which is to say: such enterprises are natural environments for the increasing utilization of ODR.

Corporate trends are just one indicator of what lies ahead for ODR in North America. Trends in government culture and practice seem to lead in the same direction. Canada has regularly ranked first in the world in the development and quality of its e-government services.[30] The US, usually placing second in these rankings, has seen substantial commitment and investment in the executive branch aimed at increasing the visibility, effect and efficiency of e-government programs. Other programs may involve greater use of ODR as an unintended, but positive consequence. The fast-changing government and private-sector dynamic in the healthcare context is likely, for example, to entail ODR systems being implemented in issues pertaining to medical records. At the same time, the accelerating growth of online education at all levels is not only leading to an expansion of infrastructure, but to more people becoming accustomed to conducting meaningful activities online. The efforts in the education context will continue to involve activity in government, non-profit, and for-profit sectors, mirroring to a degree the landscape of ODR.

This leads to one last supporting indicator: the average North American user. It is obvious that people are increasingly moving elements of their lives online. This has important implications for ODR: as people become used to shopping, dating and studying online, they grow more comfortable with handling issues of transactional security, interpersonal trust and safety and generally with pursuing relational engagement online. All of these traditional barriers to ODR may simply melt away as a result of people simply "getting used to it". Factor in the number of North Americans sharing their lives on Facebook or MySpace, or inhabiting virtual worlds, and you reach the conclusion that the line between the online and the offline may be disappearing. ODR cannot help but continue its growth in this context.

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30 E. Chabrow, *Canada is Still No. 1 in E-Government Rankings*; World Bank, *E-Government Experience in the US and Canada: How Relevant is it to Developing Countries?* 2004.

With business, government and personal/cultural trends all pointing in the same directions, the next few years are likely to be exciting for ODR in North America. Beyond the trends we have mentioned, and the developments we have anticipated, we are dreaming of the unforeseeable aspect of ODR (and of the technological avalanche carrying it along in general): future developments usually turn out to be even more interesting than current predictions. We are especially looking forward to that.

APPENDIX A

Table 5 Service Providers in North America

Service providers identified by Conley Tyler (2005) and still active		
American Arbitration Association	<www.adr.org>	US
Better Business Bureau Online	<www.bbbonline.org>	US
Cybersettle	<www.cybersettle.com>	US
Family Mediation Canada	<www.fmc.ca>	CAN
Federal Mediation and Conciliation Service	<www.fmcs.gov>	US
iCourthouse	<www.i-courthouse.com>	US
National Arbitration Forum	<www.arbitration-forum.com>	US
PayPal	<www.paypal.com>	US
Resolution Canada	<www.resolutioncanada.ca>	CAN
Settle Online	<www.settleonline.com>	US
SettleTheCase	<www.settlethecase.com	US
SmartSettle	<www.smartsettle.com>	US
TRUSTe	<www.truste.com>	US
WebAssured	>www.webassured.com>	US
New Finds		
Settle Today	<www.settletoday.com>	US
Electronic Courthouse	<www.electroniccourthouse.com>	CAN
National Mediation Board	<www.nmb.gov>	US
Onlinearbitration.net	<www.onlinearbitration.net>	US
Fair Outcomes	<www.appellex.com>	US
Virtual Courthouse	<www.virtualcourthouse.com>	US
net-ARBitration Works	<www.net-arb.com>	US
Juripax	<www.juripax.com>	US

Chamber Settle	<www.cybersettle.us>	CAN
Netneutrals	<www.netneutrals.com>	US
eBay Resolution Center	<www.resolutioncenter.ebay.com>	US
Sports dispute resolution center of Canada	<www.crdsc-sdrcc.ca>	CAN
Fiserv	<www.fiserv.com>	US

APPENDIX B

Table 6 Individual Practitioners Offering Online Mediation in North America

<www.butlermediation.com>	US
<www.onlinemediationworks.com>	US
<www.settlebyemail.com> (same provider)	
<www.gsaxbymediation.com>	CAN
<www.mediatingattorney.com>	US
<www.mediation-solutions.us>	US
<www.themediationline.com>	US
<www.mediationinitiatives.com>	US
<www.genesismediation.com>	US
<www.bostonchasemediationgroup.com>	US

20 ODR IN EUROPE

Marta Poblet and Graham Ross

1 INTRODUCTION

A decade has passed since the first online dispute resolution initiatives were launched in Europe. Undoubtedly, the European contribution to the initial phase of ODR deployments has been significant: of the forty-six ODR sites reported by Conley Tyler in 2003, twenty were based in European countries.[1] As with any new technology, the boom of ODR services in Europe over the past decade has nevertheless been accompanied by some delay in achieving its full potential, possibly as a result of an of underestimation by its original pioneers of the marketing effort and investment required to attract adequate numbers of early adopters. While ODR services rose to thirty-eight sites in 2004, some of them were no longer, even at that time, providing services.[2] In addition, it has to be borne in mind that a review of the list shows that many were well established, and still continuing, ADR organizations or business associations who were at that time simply engaged in initiatives to examine the future that technology could offer rather than launching a committed and specific ODR service. Since 2004, Europe has, notwithstanding, continued to be not only at the forefront of ODR development and usage but also a leading centre for ODR research and discussion. At present, the current state of the art of ODR in Europe constitutes an opportunity to instill realism into the enthusiastic forecasts whilst still making significant progress with making ODR services the default systems to resolve online disputes as well as colonizing off-line domains. This paper offers an overview of the present situation of ODR in Europe and discusses effective development of ODR deployments to handle online, offline, national and cross-border disputes in Europe. To do so, we proceed by first defining the scope of ODR and reviewing existing services. We then continue by analyzing the major challenges faced by ODR in Europe and finally conclude by suggesting some future scenarios.

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1 M. Conley Tyler, "Seventy-six and Counting: An Analysis of ODR Sites", in E. Katsh & D. Choi (eds.), *Online Dispute Resolution: Technology as the "Fourth Party"*, Proceedings of the UNECE Second Forum on Online Dispute Resolution. UNECE. Center for Information Technology and Dispute Resolution, University of Massachusetts, 2003. Available at <www.odr.info/unece2003/pdf/Tyler.pdf>.

2 M. Conley Tyler, "115 and Counting: The State of ODR 200", in M. Conley Tyler, E. Katsh & D. Choi. (eds.), *Proceedings of the Third Annual Forum on Online Dispute Resolution*, Melbourne, Australia, 5-6 July 2004. Available at <www.odr.info/unforum2004/ConleyTyler.htm>.

2 DEFINING THE SCOPE OF ODR

Since Katsh and Rifkin first referred to technology as the "Fourth Party" in ODR schemes there have been successive proposals on how to define the scope of ODR.[3] That same year, a research team at the University Geneva published a first report as part of a small colloquium of experts ("ODR: Where Are We And Where Are We Going?") which put on the table the main technical and legal issues raised by the emerging ODR services that proliferated in a market where e-commerce transactions were gaining a significant volume.[4] These and other documents proposed different definitions of ODR.[5] Schultz, for example, raised the question of whether the term ODR was synonymous to the online provision of traditional ADR procedures or a sui generis method of dispute resolution.[6] Other issues were also addressed: would it be the case that to qualify the service as ODR would require all phases of the process to be online, or would a combination of online and offline phases suffice? (*Ibid.*); did ODR have to deal with disputes generated online or could it also include those that originate outside the domain?; are the different terms that have been used throughout this decade – Internet Dispute Resolution (iDR), Electronic Dispute Resolution (eDR) electronic ADR (eADR), online ADR (oADR) – interchangeable? These questions remain open to discussion.

In this chapter we adopt a flexible notion of Online Dispute Resolution (ODR) in which a dispute resolution service may qualify as ODR if it fulfills at least one of the two following conditions: (i) online technology providing assistance to the different parties – *e.g.*, disputing parties, mediator, adjudicator, arbitrator, facilitator, etc. – throughout the process; or (ii) the subject matter is defined by being either a grievance, complaint or dispute. In this

3 See E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001.

4 T. Schultz, G. Kaufmann-Kohler, D. Langer & V. Bonnet, "Online Dispute Resolution: The State of the Art and the Issues", E-Com Research Project of the University of Geneva, Geneva 2001.

5 *E.g.* Consumers International, "Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-border Disputes", Consumers International Office for Developed and Transition Economies. Available at: <www.consumersinternational.org>; T. Schultz, "Online Dispute Resolution: an Overview and Selected Issues", United Nations Economic Commission for European Forum on Online Dispute Resolution, Geneva, 6-7 June 2002. Available at <http://ssrn.com/abstract=898821>; T. Schultz, V. Bonnet, K. Boudaoud, G. Kaufmann-Kohler, J. Harms & D. Langer, "Electronic Communication Issues Related to Online Dispute Resolution Systems", Proceedings of the Eleventh International World Wide Web Conference – Alternate Track CFP: Web Engineering, Honolulu, Hawaii, 7-11 May, 2002. Available at <www2002.org/globaltrack.html>; A.G. Hammond, "How Do You Write 'Yes'?: A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly*, (2003) Vol. 20(3), pp. 261-286; Conley Tyler (2003), Conley Tyler (2004); V. Bonnet, K. Boudaoud, M. Gagnebin, J. Harms & T. Schultz, "Online Dispute Resolution Systems as Web Services", *ICFAI Journal of Alternative Dispute Resolution*, (2004) Vol. 3. Available at <http://ssrn.com/abstract=899107>; A.R. Lodder & J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology*, Cambridge, Cambridge University Press 2010.

6 Schultz (2002).

perspective, therefore, a pure forum (not necessarily an ODR specific technology) can qualify as ODR if it meets condition number ii, but if it is dealing with a subject that is neither a grievance, nor a complaint or a dispute, then it should not be considered as ODR. These basic conditions notwithstanding, there are different degrees of sophistication of ODR services, ranging from those integrating basic technologies (*i.e.* email, chat, voice IP, etc.) to those which have developed, or have taken a license of, ODR-specific software.

3 ODR IN EUROPE: THE NORMATIVE BACKGROUND

An important background context to ODR in Europe is that the European Commission has over recent years taken steps to actively encourage the use of ADR for the settlement of cross-border disputes. For some years now the European Commission has acknowledged the necessity of an adequate legal framework in which ADR programs can thrive. In this regard, the protection of European consumers constituted one of the main priorities of the legislative work. As early as 1993, the Green Paper on Consumer Access to Justice in the Internal Market,[7] aiming at safeguarding the effectiveness of the legal framework providing consumer protection, already noted the proliferation of ADR services in European Countries dealing with consumer disputes, and notably arbitration schemes. These considerations led the Commission to adopt the "Action plan on consumer access to justice and the settlement of consumer disputes in the internal market", which represented a clear step in favor of the use of ADR.[8] This communication affirmed that "consumer access to justice" was being achieved with a variety of instruments, but it also concluded that this access did not always imply access to the courts and that it was possible to consider the available alternatives.

Similarly, the Commission Recommendation of 30 March 1998 on the out-of-court settlement of consumer disputes[9] sought to find a standard among the different types of ADR that the Member States had created over the years, laying down the principles applicable to out-of-court procedures for the settlement of consumer disputes. The Recommendation noted, for instance, the difference between the Scandinavian preference for an ombudsman and Spain's consumer arbitration scheme with a third-party arbitrator. This Recommendation was followed in 2001 by another Commission Recommendation on the principles

7 Commission's Green Paper, 16 November 1993, on access of consumers to justice and the settlement of consumer disputes in the single market – COM(93) 576 Final, p. 76.

8 Communication by the Commission on 14 February 1996, COM(96) 13 Final, "Action plan on consumer access to justice and the settlement of consumer disputes in the internal market".

9 Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, COM(1998) 198 Final, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=1998&nu_doc=198>.

for out-of-court bodies involved in the consensual resolution of consumer disputes.[10] This second Recommendation applies to procedures that involve an attempt to bring the parties together to convince them to find a solution by common consent (an aspect not being covered by the former Recommendation).

In a similar vein, two important ADR normative initiatives have crystallized in the last few years as regards civil and commercial matters:[11] the establishment of the European Small Claims Procedure[12] and the adoption of the Directive on Mediation in Civil and Commercial Matters.[13] As regards the Regulation, its aim is to simplify, speed up and reduce the litigation costs of small claims that do not exceed € 2,000 in cross-border cases. Importantly for ODR, Article 8 of the Regulation states that "The court or tribunal may hold an oral hearing through video conference or other communication technology if the technical means are available". Secondly, in 2008, the European Directive on Mediation in Civil and Commercial Matters (Directive 2008/52/EC) was issued to facilitate access to mediation in cross-border civil or commercial disputes. It requires Member States to ensure that mediation training and provision is positively encouraged and that agreements resulting from mediation can be rendered enforceable. An important element is that the Directive requires that, when parties engage in mediation, any limitation period within which legal proceedings would ordinarily, under the laws of a Member State, have to be issued will be suspended to avoid parties not agreeing to mediation purely in order to preserve their legal remedies. Both these provisions provide an environment more conducive to the development and adoption of ODR solutions and services in cross-border disputes.

As for the transposition of the Mediation Directive, it is worth mentioning here that the Spanish Government is still working with a draft Bill which requires all civil and commercial disputes under € 300 be handled by electronic means "unless some of the parties cannot use them" (Article 29). This exception (otherwise reasonable in terms of access to the mediation process), coupled with the exclusion of consumer disputes from the scope of

10 Commission Recommendation on 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer dispute, <shttp://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf>.

11 This work was preceded by the 2002 EC Green Paper on alternative dispute resolution in civil and commercial law initiating a broad-based consultation, <http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf>.

12 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2007&nu_doc=861>.

13 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, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>.

the law, may nevertheless notably reduce the real impact of applying ODR technologies to mediation.

In the UK a new Civil Procedure Rule (Part 78) was put in place in April 2011 to implement the Directive. Part 78.24 enables parties to disputes coming within the scope of the Directive, and who have settled the matter by mediation, to obtain a Mediation Settlement Enforcement Order, which will enable the terms of the agreement to be enforced through the courts. An Order will only be made if applied for either by both parties or by one party presenting evidence of explicit consent of the other to making such an application. Since only mediations in disputes covered by the Directive have the benefit of this provision, and as all such disputes will be cross-border, which are more appropriate for being conducted online, this Rule effectively supports and encourages ODR itself.

4 ODR IN EUROPE: THE EARLY AND RECENT STORY

4.1 Institutional Initiatives

Europe was the birthplace of the International Forum on ODR which began in 2002 with its first Forum at the Palais des Nations in Geneva. This had resulted from discussions between Daewon Choi of the United Nations Economic and Social Commission for Europe (UNECE) and Professor Ethan Katsh of the University of Massachusetts, and founder of the main ODR space on the web, <www.odr.info>. The Forum, referenced elsewhere in this book, also held its second Forum in Geneva in 2003. Although it no longer is associated with its institutional host, UNECE, this initial launch has resulted in the Forum becoming the main annual gathering point for all involved in the development of ODR. The Forum returned briefly to Europe in 2007, when it was held in Liverpool, and will return once again to Europe in 2012 when it is to be held in Prague. Professor Richard Susskind, IT Adviser to successive Lords Chief Justice in England and Wales since 1998 and a prolific and highly respected writer on the application of technology to the practice of law[14] gave a keynote speech at the Liverpool Forum in which he said "ODR has the potential to fundamentally change the way litigators function and to become mainstream".[15] He advised that progress would require not just the continuing activities of ODR advocates, practitioners, developers and commentators but, importantly, action by those in positions of influence

14 See *e.g.*, R. Susskind, *Transforming The Law*, Oxford, Oxford University Press 2000. R. Susskind, *The Future of Law*, Oxford, Oxford University Press 2006; R. Susskind *The End of Lawyers?Rethinking the Nature of Legal Services*, Oxford, Oxford University Press, 2008.

15 As stated in a keynote speech given on the 20 April 2007 at the 5th International Forum on Online Dispute Resolution held at the University of Liverpool.

who may have a more traditional approach and who do not readily see technology as an obvious contributor to the delivery of justice. Bringing those people "on board", through focusing on how technology can help meet the wider needs of justice systems to cope with growing demand was key to future uptake.

Another major initiative has been the formation of the European Extra-Judicial Network (EEJ-Net). This was set up by the European Commission on the 16 October 2001, with the aim "[t]o establish a network of national bodies for the extra-judicial settlement of disputes in order to resolve cross-border consumer disputes quickly and effectively, making use of the new means of communication, particularly the Internet". EEJ-Net comprised primarily, of the Trading Standards agencies (local government run consumer services) and retail and utility industry associations throughout Europe. The rationale of the initiative is that in order for the European Commission to operate a true single market, consumers should have similar redress no matter from which member country they purchase the goods and services. Currently the different legal jurisdictions present a heavy barrier for consumers purchasing across borders and thus the need to focus on extra-judicial solutions. Whilst ODR itself was not the declared subject, it inevitably encompasses all of the processes discussed at the EEJ-Net meetings. There has over the years been much development of what is referred to as "clearing houses" which essentially are services set up within particular industries and service groups to handle consumer complaints/disputes. All of these have over the years notified themselves to the EEJ Net.

The network became part of a wider network, the European Consumer Centres network (ECC-Net), with a broader remit covering information provision to the public on law and regulation in cross-border shopping as well as advice on ADR. One specific ODR activity that the ECC centres in Ireland and the UK engaged in was The Internet Ombudsman project with TheMediationRoom[16] for consumers with complaints concerning products or services provided through the Internet.

Whilst EEJ-Net initiatives focused on consumer disputes, a significant development, with wider impact, took place in Vienna on the 29 and 30 March 2010, when the United Nations Commission on International Trade Law (UNCITRAL), in collaboration with Pace Institute of International Commercial Law, and Penn State Dickinson School of Law, hosted a Colloquium entitled "A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)". In an unfortunate clash of dates, those were the very same days that the Centre for Legal Informatics at the Faculty of Law at the University of Vienna hosted the

16 See <www.theinternetombudsman.com>.

annual conference of BILETA 2010 with the title of "Globalisation, Internet and the Law".[17] This event focused on the ways in which law and technology can contribute to a better legal system in the era of globalisation and included a presentation by Graham Ross specifically on ODR.

The outcome of the UNCITRAL Colloquium was that a proposal from the Pace Institute of International Commercial Law was presented to the 43rd session of UNCITRAL held in New York, from 29 June – 9 July 2010 and which resulted in the unanimous decision of UNCITRAL to form a Working Group on ODR.[18] The Working Group held its first meeting in Vienna on the 13th to the 17th December 2010. In yet another clash of dates, the first Working Group meeting in Vienna in December 2010 coincided with an ODR Workshop held on the 15 December 2010 at the University of Liverpool as part of 2010 Conference of Jurix (the Foundation for Legal Knowledge Based Systems) itself a forum for research in the field of Law and Computer Science.[19]

Finally, it is worth mentioning work done on ODR within the CEN framework. CEN is the Brussels based organisation that produces standards for products and services that are adopted by all EU member countries. Throughout 2008, a CEN Workshop committee met to produce recommended standards for ODR for adoption through a CEN Workshop Agreement. The CWA was published in 2009. The following paraphrases the Foreword to explain the intention:

> The objective of the CWA is to maintain the processes of ODR and offline dispute resolution in as close a synergy as may be practicable and to encourage and facilitate their future evolution in parallel to the maximum practicable extent. While these tools are becoming more and more important at international level for the out-of-court settlement of disputes, it is important to promote them in a proper way, using clear, simple and homogeneous rules on a pan-European basis. Without these rules, the heterogeneous procedures of the various ODR systems would create confusion among potential users. Moreover, ODR systems offer different user interfaces, and are unable to exchange information each other, preventing potential users from using their features within a multilanguage and cross-country business environments. This problem

17 See <www.univie.ac.at/RI/BILETA2010>.

18 See <www.cisg.law.pace.edu/cisg/ODR/Institute_ODR_paper.pdf>.

19 See <http://idt.uab.es/workshops/ODR2010>.

> represents a barrier to the development of European e-business both from the consumers and the business perspectives.[20]

The existence of this CWA, and the recognition at CEN of the need to set standards, is further evidence of the significance that technology and ODR is being seen to play in dispute resolution. With the clashes of dates for ODR related events mentioned earlier, if there is one lesson that comes out of the European experience over the first ten years of this century, it is the need for some pan-European co-ordination of all those involved in the development of ODR. By way of another relevant example, on the 10 and 11 June 2003 both the EEJ-Net and the CCForm projects (see next section) held important meetings on the subject in the same city, Brussels.

4.2 Publicly Funded Research Projects

The European contribution to ODR has been significantly assisted through European Commission funding support in one form or another. The e-Arbitration-t project[21] was a multi-partner collaborative project to develop the regulatory structure and the dynamic and intelligent infrastructure needed to allow simple and efficient distributed processes in electronic out-of-court dispute settlement systems.[22] More specifically a model was designed as an online arbitration service for disputes involving small to medium sized businesses. Public funding by the European Commission was significant (€ 860,000). However, the platform was never completed and the project disbanded at an advanced stage.

Similar vicissitudes affected the CC Form project. This project was funded under the EU's Information Society Technology program (IST-2001-38248) to support online customer complaint management. The project was set up to consider the foundation of a central European customer complaint portal, on which any consumer could, on one website, register a complaint against any party, and about any problem, and in any official EU language. All ODR and dispute handling services could register and the site would inform complainants and signpost solutions. The general view was that on completion of the online form by a complainant, the provider of the service complained of would be encouraged to participate in online dispute resolution on the basis this would significantly increase consumer confidence. The project was a collaboration of various partners led by

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20 CEN, Workshop Agreement on Standardisation of Online Dispute Resolution Tools). CWA 16026, November 2009. Available at <ftp://cenftp1.cenorm.be/PUBLIC/CWAs/STAND-ODR/CWA16026_STANDODR.pdf>.

21 See <www.e-arbitration-t.com>.

22 See <http://cordis.europa.eu/fetch?CALLER=PROJ_ICT&ACTION=D&CAT=PROJ&RCN=54082>.

FEDMA (The Federation of European Direct and Interactive Marketing). CCForm held its final workshop in Brussels in June 2003. Whilst an ontology was developed for customer complaint handling[23] it is not clear why no central website as the destination for all complainants as planned was put into place, but a contributory factor may have been the untimely death in a road accident of the project team leader, Peter Scoggins, shortly before the final conference.

Another initiative in Europe that received public funding was ECODIR. This initiative was a commissioned research project[24] of the Faculties of Law at the University of Namur, Belgium, the University of Montreal, Canada, and, latterly, University College Dublin, Ireland in the pilot phase, supported by the European Commission and the Irish Department of Enterprise, Trade and Employment. ECODIR is restricted to disputes in relation to online consumer transactions. It involves a three-step process of inter-party negotiation followed by mediation and then, if the mediation does not itself succeed, a non-binding recommendation of a solution is provided by the allocated mediator. In providing the recommendation, the mediator offers a solution based on the facts as presented by the parties, the rights and obligations of the parties in law and the principle of good faith. If the parties accept the recommendation, it may then be formalized in a settlement. It has handled to date 200 cases most with a value no more than € 350. ECODIR's formal pilot project commenced in 2001 and ended in June 2003, although the organisers have since kept the service active. Ecodir Ltd, an Irish Registered Company, is responsible for organising and managing the commercial operation of ECODIR. It is co-ordinated by the Faculty of Law at University College Dublin under the leadership of Professor Brian Hutchinson. "The ECODIR pilot project has shown that a real need exists for a low-cost mechanism for the resolution of low-value cross-border disputes."[25]

The Mediation Room[26] carried out a 25 case pilot funded by the Ministry of Justice in England in which two mediators employed by the court used a dedicated online mediation platform to undertake a selection of cases that were awaiting final hearing in the Small Claims Court. The Court handles cases with a value of no more than GBP 5,000. The parties are offered free mediation from mediators employed by the court. The platform replicates face to face mediation by providing discussion areas for open discussion between all parties and private discussion between each party and the mediator.

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23 See <www.jarrar.info/CContology/index.htm>.

24 See <www.ecodir.org>.

25 Caplin (2003).

26 See <www.themediationroom.com>.

Finally, another recently EU funded initiative is the eMCOD project with the stated aim of broadening access to justice through the use of ODR.[27] With this aim in mind, eMCOD is building an open source software module to enable providers and users of ODR to measure comparatively, and make transparent, the user experience, the costs and the quality of the dispute resolution processes within the context of universal norms of accessible justice. Participating providers will receive feedback of user experience and benchmarking data that it is anticipated will help direct further advances in ODR. A pilot will be launched in five EU countries (UK, Poland, Bulgaria, the Netherlands and Spain) and a Handbook published. The project partners are TISCO (the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems), the Institute of Advanced Legal Studies, The Mediation Room.com, the Bulgarian Institute for Legal Development, the Autonomous University of Barcelona, the Research Centre for Legal and Economic Issues of Electronic Communications (CBKE) of the Faculty of Law at the University of Wroclaw, and the University of Haifa.

4.3 Private Initiatives

The new millennium saw the launch of the first UK based ODR services: InterSettle, e-Settle and We Can Settle, all in 2000. They were all blind bidding sites using privately developed software. They were all also founded by lawyers. InterSettle was run by Scottish solicitor, Stephen Moore, backed by eight of Scotland's leading litigation practices; We Can Settle was set up and run by two English solicitors, Anne Irving and Graham Ross; and e-Settle was set up by a consortium of barristers and solicitors who had secured significant investment funding of GBP 1.3 million.[28] All three services quickly found themselves in real case mode with separate pilots for insurance companies in respect of road traffic accident cases. The co-author's experience in We Can Settle was that it was difficult attracting the support of claimant lawyers to participate in a novel game-like service at the request of the insurer. This was an issue not so much of trust in the "Fourth Party" but of trust in the insurer and the motive for making the request. The claimant lawyers were being asked to move out of their comfort zone into a form of negotiation with which they were totally unfamiliar. Many may have questioned their professional competence to do so. As a result, none of the pilots succeeded in changing practices. Following the US company, Cybersettle Inc, obtaining UK patent rights to their version of blind bidding, (29 January 2003) and issuing "cease and desist" letters, all three companies closed down their operations. None of the three exist today, although The Mediation Room did develop, but has not marketed, its own blind bidding engine.

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27 See <www.emcod.net>.

28 See A. Gould, "Blind Bidding Site On Trial", *Post Magazine*, 14 December 2000.

This early history of blind bidding in the UK contributes generally to the controversial issue of patents in software. The argument runs that whilst, on the one hand, patents encourage investment to better facilitate creative development in software, on the negative side, in restricting rights to one rights holder and its own commercial policies, they prevent wider development. None of the three UK companies would have relished extensive litigation with Cybersettle, itself then owned by a major insurer and thus feared to have a "deep pocket" so far as litigation was concerned. Cybersettle itself faced professional and cultural barriers current for any development in the legal arena that threatened to reduce legal cost through its impact, by speeding up the time to conclusion, on chargeable hours (unlike in the USA where claimant costs are more often based on the amount of the compensation awarded than time spent). The impact of such barriers became apparent subsequently when Cybersettle made two separate attempts to expand into the UK market, both of which resulted in failure. They initially set up a UK company in 2002, and promoted the service in the insurance industry press but, despite success in the USA, it failed to take a hold in the UK. In 2004, they entered into a marketing partnership with a UK firm of solicitors, Steeles,[29] but this terminated the following year. In 2007, Cybersettle announced, at the 5th International Forum on ODR held in Liverpool, a new European initiative being a strategic alliance with the Ireland based International Centre for Dispute Resolution (ICDR) of the American Arbitration Association. A year later at the 7th International Forum held in Victoria, British Columbia, Charles Brofman, CEO of Cybersettle Inc, gave a presentation announcing an ODR project that the Cybersettle/ICDR collaboration had launched in Italy for the GE Oil and Gas Company. This was an online med-arb process (a period of online mediation and, if that failed, an arbitral award would be made and declared on the online file) for disputes with suppliers in the oil and gas industry. A panel of Italian engineers was created to provide the arbitrators. In 2010 use of the system became included as a term of purchase in contracts by GE Oil and Gas.[30]

In 2008, one of the leading providers of ODR in Europe, Juripax,[31] was asked by the Dutch Legal Aid Board to create an Internet application for online mediation in divorce cases. The aim of the research project was to verify whether online mediation is a good way to settle divorce cases. In total, twelve mediators were involved in the research project, all trained in the use of online mediation and the Juripax technology. A total of 126 parties filled out the evaluation questionnaire, comprising 56 couples and 14 individual respondents. Reactions to the project show significant gender differences. Women indicated, more than men that they would use an online tool again in the future. The data also showed

29 See <www.lawgazette.co.uk/news/steeles-targets-pi>.

30 A presentation is available at <www.pace.edu/lawschool/files/iicl/odr/McIlwrath.ppt>.

31 See <www.juripax.com>.

that the online tool provided women with a (better) sense of "justice" by giving them a voice and answers to important questions. Juripax, founded in 2003, provides an online platform for asynchronous discussion and has offices in the United States, Germany and the Netherlands. In 2011, it announced a pay-as-you-go service whereby mediators can take out a license for individual cases as well as an enterprise edition for organisations working with large numbers of cases.

5 THE CURRENT EUROPEAN LANDSCAPE

A broader overview of European ODR service providers can be extracted from research undertaken by the ODR group within the framework of the White Book on Mediation in Catalonia.[32] Desktop research of ODR websites was combined with interviews and electronic mail communications with experts on the field. The results are synthesized in Table 7 below.

The table summarizes the basic features of some of the main EU ODR providers.[33] As shown in the table, meditation is the most frequent service being offered online. In a few cases, services provide recommendations, arbitration, assisted mediation, and early neutral evaluation. Similarly, in some other cases there are ODR services providing ancillary services such as lists of mediators, training, or trustmarks. As regards functionalities, it is usual for these EU ODR services to have automated flows and, to some degree, structured forms, automated messages alerting on the different ODR steps, and confidential registers of cases. Almost unanimously, all ODR in the table rely on asynchronous communication between all parties, while some of them also include synchronous methods (*i.e.* videoconference or chat). As for the service models provided, the table also distinguishes: (i) basic ODR, using state-of-the-art Internet tools; (ii) ODR services using proprietary technology; (iii) ODR services that also sell their software licences and (iv) ODR services that provide software on demand (SAAS).

It needs to be noted that this research excluded internal complaint management systems for aggrieved customers that were not including ADR mechanisms or, while having one, only provided a form to initiate the complaint, domain name dispute resolution systems, and online courts (also known as cybercourts).

32 Poblet *et al.* (2010).

33 The original table reports roughly 40 ODR services from all over the world. See M. Poblet, P. Noriega, J. Suquet, S. Gabarró & J. Redorta, "Tecnologías para la mediación en línea, estado del arte, usos y propuestas", in P. Casanovas, J. Magre, Mª.E. Lauroba (eds.), *Libro Blanco de la Mediación en Catalunya*, Departament de Justícia, Generalitat de Catalunya, Barcelona 2010, pp. 943-1008.

The table does not show either ODR websites providing services for domain name disputes, present in a large number of European countries. However, this constitutes a relevant ODR domain that should deserve specific research. To mention just one case, the Czech Arbitration Court was appointed in 2005 to provide a resolution service for .eu domain name disputes.[34] Rather than just applying a form exchange type service, with forms sent by post or attached to emails, adr.eu created an online arbitration platform able to handle disputes in all EU languages except Maltese.[35]

Similarly, the table does not report Negotiation Support Systems (NSS) that are closely related to some EU ODR services Relying on previous research, Kersten and Lai state that "a negotiation support system (NSS) is a software system which implements models and procedures, has communication and coordination facilities, and is designed to support two or more parties and/or a third party in their negotiation activities".[36]

In this regard, two relevant cases can be quoted. One consists of the jointly developed Family_Winner and AssetDivider NSS tools.[37] Family_Winner and AssetDivider assist mediators in helping parties to better identify settlement packages more likely to be acceptable to both parties in family cases. At the outset the mediator, in discussion with the parties, identifies the set of issues to be included in a settlement, such as maintenance financial settlement and property division. It can also extend to cover child access arrangements and other issues. In the next phase, the parties are asked to allocate 100 points over the issues. They are asked to allocate more points to the issues that are more important to them. In this way the process helps the parties to focus on what it is that they themselves really want rather than seeking to deprive the other party of what they want and, as such, it encourages a less confrontational negotiation. As the number of points is finite, it also forces the parties to consider making trade-offs rather than just arguing for as much as they can obtain and in this way it more accurately assesses their priorities. The system then works through stages allocating one issue at a time to whoever awarded it the more points. After each stage the remaining points are we reallocated on a formula intended to create a fair balance in the overall settlement between the interests of both parties. So, for example, if one party loses an issue of importance to them, *i.e.*, one to which they allocated a significant number of points, then the remaining points are incremented at the

34 See <www.adr.eu/>.

35 Under Article 22, pararagpah 13 of the Commission Regulation ((EC) No 874/2004) the arbitration rulings are binding on the parties unless any party issues legal proceedings on the matter within thirty days of the issue of the ruling. Cases take about three to four months to complete.

36 Kersten & Lai (2007), p. 555.

37 FamilyWinner and AssetDivider were developed by John Zeleznikow of the School of Management and Information Systems at Victoria University, Melbourne, Australia and Dr Emilia Bellucci of the School of Information Systems at Deakin University, Melbourne, Australia.

higher rate than for their opponents. They may also receive a higher allocation if they win an issue that is not of great importance to either of the parties but which they won on a low scoring basis. The system goes through all the items in the sequence in a series of rounds. AssetDivider is a later version which applies actual monetary values to some of the items where appropriate. Although developed in Australia, these tools are mentioned here because they have recently been brought into the European context by a collaboration between its inventors, Professor John Zeleznikow and Dr Emilia Bellucci and The Mediation Room. Following two meetings with the Ministry of Justice, the Mediation Room have been requested to set up a pilot of AssetDivider for family cases in England. Interest at the Ministry has coincided with the recent decision of the UK coalition government to bring to an end the Legal Aid funding of representation in litigation in most family cases and the introduction of a form of compulsory consideration of mediation.

A second example of NSS is Negoisst that is currently being developed at the University of Hohenheim (Germany).[38] The main purpose of Negoisst is "to provide optimal support for negotiators in complex, multi-attributive, bilateral negotiations", making it clear that the main objective is "not to automate negotiation tasks but to optimise them with regard to different qualitative and quantitative goals like traceability, unambiguousness, comprehensibility or mutual utility".[39]

38 See <www.wi1.uni-hohenheim.de/negoisst.html>.

39 *Id.*

Table 7 European ODR Service Providers

Product	Aegi Solutions	Agència Catalana de Consum	Concilia Online	Confianza Online	Conciliazione On-Line	Der Internet Ombudsmann	ECODIR	eMediation.NL	Juripax	Mediar Online	Allegro	Mediation Room	Risolvi Online
Provider	Centre de Médiation et Arbitrage de Paris	Agència Catalana de Consum	Camera di Commercio di Firenze	ASCEM, AUTOCONTROL i Red.es	Camera di Commercio di Ancona	Der Internet Ombudsmann	International consortium	Emediation & Rooijvink Advocatenkantoor	Juripax	Individuals and legal persons	Allegro	Mediation Room	Camera Arbitrale di Milano
Country	France	Catalonia	Italy	Spain	Italy	Austria	Europe	Netherlands	Netherlands	Spain-Argentina	Poland	UK	Italy
Web	www.mediationetarbitrage.com	https://www.consumcat.net	http://www.conciliaonline.net/conciliaia/	http://www.confianzaonline.es	http://conciliazione.camcom.it/index.php	http://www.ombudsmann.at/udsmann.at/	http://www.ecodir.org	http://www.emediation.nl/	www.juripax.com	http://www.mediaronline.com	http://allegro.onet.pl	www.themediationroom.com	http://www.risolvionline.com/
Domain	G	G (B2C)	G	G	e-T (B2B, B2C)	e-T (B2C, C2C)	e-T (B2C)	G	G	G	e-T (B2C, C2C)	G	e-T (B2B, B2C, C2C)
ODR Mechanisms													
Assisted negotiation							X				X		
Automated negotiation													
Mediation		X	X	X	X	X	X	X	X			X	X
Arbitration				X									
Adjudication				X									
Recommendation	X						X						
Early neutral evaluation	X												
Other services													
Mediators' list										X		X	X
Trustmark				X									
Training										X		X	
Other									Premediatio				
Functionalities													
Automated workflow			X				X		X	X	X	X	X
Registry of cases	X		X						X	X	X	X	
Structured forms				X	X		X		X	X			X
Automated messages	X		X				X		X	X	X	X	X
Confidential registers	X		X		X	X	X		X	X	X	X	X
Database													
Communication													
Asynchronous	X	X	X	X	X	X	X		X	X	X	X	X
Synchronous		X	X		X			X	X	X		X	
Algorithms													
Optimisation algorithm													
Cross-offers algorithm									X				
Service models													
Basic ODR		X		X		X							
Proprietary technology	X		X		X		X	X			X		X
ODR licence seller									X			X	
SAAS Provider			X							X			

[G: general; e-T: electronic transactions]

Source: Adapted from Poblet *et al.* (2010)

6 CONCLUSIONS

It is safe to conclude from the preceding pages that Europe has played a major role to date in the development of ODR, starting with the emergence of the first entrepreneurial launches – chiefly with private blind biddings sites – and, on the institutional side, with the launch of the International Forum on ODR, the annual event providing a privileged space for the emergence of a heterogeneous, international ODR community.

The EU public funding initiatives have also constituted a major driver for the development of ODR. A case in point is ECODIR, a service which has been in place for a decade now. However, some other projects ended with no conclusive results in terms of prototypes or proofs of concept. In this line, some lessons could be also extracted at this point on how to adequately fill the gap between initial prototypes – raising high expectations – and the effective provision of ODR services to customers.

One minor, but nevertheless helpful lesson that comes out of the European experience over the first ten years of the 21st century is the need for some pan-European co-ordination of all those involved in the development of ODR.

Whilst ODR specific events suffer from an element of "preaching to the converted" rather than spreading the message, the first signs that the message was beginning to have impact beyond the principle advocates was seen in 2008 when, in recognition of the growing awareness and practice of the use of technology in dispute resolution generally, a major three day mediation conference, the European Mediation Conference, included, for the first time, a workshop on online mediation with presentations by Graham Ross of The Mediation Room and Paul Randolph, a UK barrister and mediator. The Conference was hosted by the Scottish Mediation Network and Mediation Northern Ireland in Belfast to coincide with the 10th anniversary of the signing of the Good Friday Agreement, the event which brought an end to the long standing civil and political unrest of that country.

Collaboration between service providers is also an indicator of advancement beyond the first rounds of innovation in any field, and Europe has seen two examples to date. The Chamber of Arbitration of Milan, a section of the Milan Chamber of Commerce, was an early ODR provider when it commissioned the development of RisolviOnline. In 2010 the Chamber invited The MediationRoom (<www.themediationroom.com>) of the UK, a competing online mediation platform, to build a version of its distance training course in ODR (<www.odrtraining.com>) adapted for its panel of 31 arbitrators. The course comprised a reading section followed by a live role-play conducted on the RisolviOnline platform.

On the negative side, the impact of the Cybersettle patent led to the early termination of the first entrepreneurial developments. Whilst blind bidding has not to date yet found favour with personal injury lawyers in Europe, one cannot say the patent itself delayed ODR development. A forthcoming change in the UK will likely be of significance. Whilst the precise details are not yet clear and some of the proposals will meet severe challenge from the legal profession, the UK government, confirmed by an announcement on the 29 March 2011,[40] that lawyers will in future be able to charge a fee based on an agreed percentage of the damages awarded rather than have their fees assessed by the time spent on a case. Giving an opportunity to remove a direct correlation between the length of time to settlement and the size of the claimant lawyers fee could dismantle one of the barriers to participation in any system that speeds up settlement. The same announcement also included a committment to introduce online technology into the dispute resolution process as well as including the UK in the growing number of European countries who have introduced a form of compulsory mediation. Requiring any form of ADR within the judicial process must itself help increase the demand for, and awareness of, technology assisted ADR. It is believed, for the reasons set out in this paper, that not only has Europe made a substantial contribution in the past to ODR, but will continue to do so at an increasing pace in the future.

40 See <www.justice.gov.uk/news/newsrelease290311a.htm>.

21 The Promise and Reality of Online Dispute Resolution in Australia

Tania Sourdin and Chinthaka Liyanage

1 Introduction

It is clear that Online Dispute Resolution (ODR) has grown significantly in response to local and international factors within Australia over the past decade. This growth is partly attributable to a healthy Alternative Dispute Resolution (ADR) environment within Australia. The use of ADR in Australia is widespread and all Courts and Tribunals now have the power to mandatorily refer disputes to ADR processes. In addition, many disputants are required to use ADR processes before commencing Court or Tribunal proceedings so there is also a healthy pre court ADR environment. A robust e-environment has also assisted to expand the reach of ODR and this will expand further as the national broadband plan becomes fully operational.[1] As with other jurisdictions, at times the growth in ODR has been in response to non domestic factors such as a growth in cross border transactions and general borderless online consumer activity.

One of the most significant domestic changes in Australia is linked to the Web 2.0 approach where government and others are adapting policy and processes on an unprecedented scale to take advantage of new technologies and better connectivity. Although these processes may not support full stand alone ODR environments (at least initially), they do enable supportive environments to be constructed. In addition, many Australian ADR environments now use Facebook, Twitter and YouTube to engage with business, consumers and stakeholders about dispute resolution and to support dispute avoidance and self managed negotiation strategies.[2]

However, the rate of growth of ODR has not been as fast as some may have predicted in the early 2000s in Australia. At that time, it was predicted that ODR would be taken up and used by a significant proportion of the Australian population by the end of the decade. After conducting a survey in 2003, Conley Tyler and Bretherton concluded that: "There is demand for online ADR among more than 70% of potential users"[3] and it did not seem

1 <www.dbcde.gov.au/broadband/national_broadband_network>, last accessed 30 May 2011.

2 <http://gov2.net.au/blog/2009/12/31/guest-post-the-victorian-department-of-justice-and-web-2-0/#more-1750>, last accessed 30 May 2011.

3 <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1250&context=adr>, last accessed 30 May 2011.

unrealistic to assume that this would translate into significant growth in ODR. Despite this early optimism, it is fair to say that exponential growth rates have not been achieved in the ODR field and that only gradual, although significant, ODR initiatives have been undertaken within Australia. It is also clear that as broadband speed and internet infiltration has increased so have the options and processes available within the ODR environment within Australia.

Some of the early opportunities for ODR were discussed by NADRAC (a leading government ADR agency in 2002) and this chapter charts not only the growth in actual ODR but also the growth in ODR research and evaluation within Australia:

> Information technology provides opportunities to facilitate communication and so assist in prevention and management of disputes ... to provide information to parties and to complement, or substitute for, traditional face to face interventions.[4]

Within Australia and in this chapter, ODR has been used to refer to dispute resolution processes conducted with the assistance of communications and information technology, particularly the internet.[5] ODR can include facilitative processes such as online mediation, advisory processes such as online case appraisal and determinative processes such as online arbitration or adjudication. Using the NADRAC definition, it also includes processes conducted through a computer program or other artificial intelligence that do not involve a "human" practitioner.

2 GROWING ODR SPECIFIC SCHOLARSHIP

It is evident that there are considerable amount of literature and academic leadership regarding several aspects of ODR in Australia. In this respect, Australian researchers have paid attention to different aspects of issues connected with ODR.[6] These include legal

4 National Alternative Dispute Resolution Advisory Council (NADRAC), Dispute Resolution and Information Technology Principles for Good Practice (Draft.) 2002, p. 2, <http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~Principles+on+Technology+and+ADR.doc.pdf/$file/Principles+on+Technology+and+ADR.doc.pdf>, last accessed 11 June 2011.

5 M. Conley-Tyler and D. Bretherton, "Seventy-Six and Counting: An Analysis of ODR Sites", Report of Research Conducted for the Department of Justice, Victoria, Australia 2003, <http://www.odr.info/unece2003/pdf/Tyler.pdf>, last accessed 30 May 2011.

6 E. Clark and G. Cho, "Law and Technology: What Does the Future Hold for ADR?", *Journal of the Institute of Arbitrators and Mediators Australia*, (2001) Vol. 20, No. 3, pp. 1-25, <www.iama.org.au/pdf/jlv20n03.pdf>, last accessed 11 June 2011.

issues,[7] accreditation issues,[8] effectiveness of non litigation-based redress methods,[9] technological issues connected with ODR,[10] online dispute resolution and family disputes,[11] ODR and the government sponsored courts,[12] building client confidence in ODR,[13] issues associated with the enforceability of online arbitration agreements in the commercial arbitration context,[14] development of negotiation support systems[15] and barriers to ODR.[16]

In addition, Australia is fortunate to have much experimental work in the field of AI that has been sponsored and promoted by Australia's primary University funding body – the Australian Research Council. This important work has not only led to the "building" of AI systems in the ODR environment but has also led to the testing, research and extension of these systems and has been pioneered by Zeleznikow.

As far as government's contribution to the development of ODR is concerned, there are several government-sponsored national bodies which are involved in the development of ODR. For example, they include the Australian Law Reform Commission (ALRC), and dispute resolution organizations.[17] As noted previously, some aspects of ODR have been addressed in several reports of National Alternative Dispute Resolution Advisory Committee (NADRAC). For example, the *On-line ADR Background Paper* in 2001[18] and the *Resolve*

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7 E. Wentworth, "Online Dispute Resolution: Global Issues and Australian Standards", *Journal of the Institute of Arbitrators and Mediators Australia*, (2002) Vol. 21, No. 2, pp. 21-37, <www.iama.org.au/publications.htm>, last accessed 30 May 2011.

8 M. Conley-Tyler and J. Bornstein, *Accreditation of Online Dispute Resolution Practitioners*, Paper, <http://www.mediate.com/odrresources/docs/ODR%20Accreditation.doc>, last accessed 30 May 2011.

9 D. Gawith, "Non Litigation-Based Redress for International Consumer Transactions is Not Cost Effective – A Case for Reform?", *MacquarieJournal of Business Law*, (2006) Vol. 3, pp. 115-150, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401092>, last accessed 30 May 2011.

10 A.R. Lodder and J. Zeleznikow, "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model", *Harvard Negotiation Law Review*, (2005) Vol. 10, pp. 287-337, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008802>, last accessed 12 June 2011.

11 M. Conley-Tyler and M. McPherson, "Online Dispute Resolution and Family Disputes", *Journal of Family Studies*, (2006) Vol. 12, No. 2, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032743&rec=1&srcabs=934947>, last accessed 30 May 2011.

12 B. Tamberlin, *Online Dispute Resolution and the Courts*, Paper 2005, <http://www.odr.info/unforum2004/tamberlin.htm>, last accessed 11 June 2011.

13 L. Goldacre, "Building Client Confidence in ODR: How Effective is the New Privacy Legislation for Cyberspace?", *ADR Bulletin*, (2002) Vol. 5, No. 7.

14 R. Garnett, "The Enforceability of Online Arbitration Agreements", *Australasian Dispute Resolution Journal*, (2004) Vol. 15, No. 4, pp. 239-247.

15 J. Zeleznikow, *Beyond Interest Based Bargaining – Incorporating Interests and Justice in the Development of Negotiation Support Systems*, 2010, <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADRResearch_SummaryPapersfromADRResearchForum2010>, last accessed 30 May 2011.

16 T. Sourdin, *Alternative Dispute Resolution*, (3rd ed.), Sydney, Thomson Reuters, 2008, pp. 218-225.

17 Telecommunications Industry Ombudsman, <www.tio.com.au/publications/TIO_talk_issues/30/30.6.htm#onlineadr>, last accessed 30 May 2011.

18 NADRAC, On-line ADR, Background Paper, 2001, pp. 14-16, <http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~ADR.rtf/$file/ADR.rtf>, last accessed 11 June 2011.

to Resolve-Embracing ADR to Improve Access to Justice in the Federal Jurisdiction in 2009[19] provide an overview of ODR together with advantages, disadvantages and barriers to the development of ODR. In addition, there are several specific research reports which focus on online ADR.[20]

In terms of empirical research there has been some work conducted. Sourdin's work in regards to digital divide[21] and Conley Tyler's analysis of ODR sites and services[22] are examples that can be mentioned in this respect.[23] However, in general, there is no considerable body of research that has been conducted empirically in Australia in respect of ODR. For example, NADRAC has noted that "The paucity of (especially empirical) data in ADR generally is accentuated when it comes to on-line ADR".[24]

In some important ODR areas there is an almost complete lack of literature or research. For example, in relation to online business to consumer electronic commerce (B2C e-commerce), online consumer arbitration (OCA), and the enforcement of online consumer arbitration awards (OCAA) there is little information or analysis.

Overall, although Australia is slowly but steadily contributing to enrich global ODR literature by addressing various aspects of ODR from both local and global perspective it is clear that Australian literature is quite limited in terms of some aspects of ODR. This is an area of significant potential growth into the future.

3 ODR IN THE GOVERNMENT SECTOR

The development of ODR is recognized not only in international forums but has also been recognized in the domestic Australian governmental arena. In the international sector, the Fourth UN Forum on Online Dispute Resolution Report and Recommendations has influenced ODR approaches at a worldwide level.[25]

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19 NADRAC, "The Resolve to Resolve Embracing ADR to Improve Access to Justice in the Federal Jurisdiction", Report to the Attorney – General 2009, <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_TheResolvetoResolveEmbracingADRtoimproveaccesstojusticeinthefederaljurisdiction>, last accessed 11 June 2011.

20 See NADRAC 2002.

21 See T. Sourdin, *ODR – An Australian Perspective on the Digital Divide*, Paper, 2005, <www.endispute.com.au/wpdl/ODR%20an%20Australian%20Perspective.pdf>, last accessed 30 May 2011.

22 See M. Conley-Tyler, *115 and Counting: The State of ODR*, Paper, 2004 <www.odr.info/unforum2004/ConleyTyler.htm>, last accessed 30 May 2011.

23 See M. Conley-Tyler and D. Bretherton, *Developing an Online Mediation Culture: the Fourth Generation of Online ADR*, Paper, International Conflict Resolution Centre, University of Melbourne, <www.apmec.unisa.edu.au/apmf/2003/papers/tyler.pdf>, last accessed 30 May 2011.

24 NADRAC 2001, p. 3.

25 *E.g.* some of the following recommendations incorporated in the Fourth UN Forum on Online Dispute Resolution Report and Recommendations can be cited:
- Emphasize the importance of governmental support and recognition of ODR systems;
- Promote cooperation and joint projects amongst ODR providers;

In the domestic Australian sector, an "institutional" phase has been recognized as the fourth development stage of ODR.[26] An "institutional" phase includes the increasing engagement of government institutions and this stage can accordingly be distinguished from earlier "hobbyist", "experimental" and "entrepreneurial" phases.[27]

In fact, the engagement of institutions in the "institutional" phase indicates that ODR is increasingly regarded as a promising dispute resolution phenomenon within Australia. In this regard, the government sector in Australia has, at least in some sectors, recognized and has been utilizing ODR as a viable dispute resolution mechanism. For example, the *Alternative Dispute Resolution in Victoria: Supply-Side Research Project* identified institutions that could use and incorporate ODR strategies such as Consumer Affairs Victoria, the Dispute Settlement Centre Victoria, the Victorian Equal Opportunity and Human Rights Commission, and Victorian Civil and Administrative Appeals Tribunal.[28] The report noted that: "The online dispute resolution service uses a step-by-step process that provides consumers with information about a range of possible dispute resolution strategies."[29]

More recently, this has translated into institutional action at state and federal levels and two specific examples of government sites that offer a supported ODR environment (although not fully ODR oriented) are detailed below.

3.1 Dispute Settlement Centre of Victoria (DSCV)

Although not a full online program, the DSCV program indicates how web based material can be used to supplement, support and at times replace more traditional forms of ADR.

In 2010, the DSCV introduced a supported online information package directed at disputants in neighbourhood conflicts.[30] The online information features online videos, web linked resources, and associated material to assist in the direct resolution of disputes and to support the provision of face to face dispute resolution services. One of the underlying rationales behind the development of DSCV Scheme is to settle disputes by using non-adversarial dispute resolution mechanisms such as mediation in order to minimise

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– Support the use of ODR in court litigation in order to reduce any existing case backlog;

M.S.A. Wahab, *The Fourth UN Forum on Online Dispute Resolution Report and Recommendations*, 2006, p. 10, <www.crcica.org.eg/ODR_Report.pdf>, last accessed 11 June 2011.

26 See Conley-Tyler & Bretherton (2003), p. 5; see W. Zhang and J. Zeleznikow, *An Integrative Approach for Developing Online Dispute Resolution*, 2004, <www.iadis.net/dl/final_uploads/200406L013.pdf>, last accessed 30 May 2011.

27 See Conley-Tyler (2004); see Conley-Tyler & McPherson (2006), p. 7.

28 C. Field, Alternative Dispute Resolution in Victoria: Supply-Side Research Project, Research Report (2007), p. 32, <www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_adr_supply_side_research_2007.pdf>, last accessed 11 June 2011.

29 Field, (2007), p. 32.

30 See <http://www.disputes.vic.gov.au/reachingagreement/>, last accessed 30 May 2011.

delay, cost and complexity.[31] This scheme is designed to overcome communication and cultural barriers as well, and the web based material is available in a range of languages and with comment board posting.[32] The types of disputes supported by the DSCV could vary from complex disputes to small disputes.[33] The availability of Interpretation facilities is also an additional benefit to the disputants.[34] In addition to the web based "do it yourself" material, the Department of Justice in Victoria provides a Dispute Resolution Advisory Service available over the phone in terms of advice for the prevention and resolution of disputes.[35] Although this service does not provide a fully online service as yet, it is clear that the online services, and in particular the comprehensive range of videos (that are also available on YouTube), support negotiation and ADR use that can take place using more traditional meetings.

3.2 *Consumer Affairs Victoria (CAV)*

CAV also provides a partial ODR environment. Not only does it provide full support packages for those involved in consumer disputes, it also provides for lodging of complaints in an online environment.[36]

As far as the role of the CAV is concerned, the Goals of Consumer Affairs Victoria are:

- empowering consumers;
- creating a competitive, fair and safe trading environment;
- protecting vulnerable and disadvantaged consumers;
- building our organisational capability.[37]

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31 Various types of such disputes have been listed on the web site of the Department of Justice, Victoria, Australia, Dispute Settlement Centre of Victoria, <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Dispute+Settlement+Centre+of+Victoria+%28About+Us%29>, last accessed 30 May 2011.

32 See note 33.

33 *Id.*

34 Australian Competition & Consumer Commission, Department of Justice, Dispute Settlement Centre of Victoria (DSCV), Description, </www.accc.gov.au/content/index.phtml/itemId/287185/fromItemId/815972/quickLinkId/816515/whichType/org>, last accessed 12 June 2011.

35 Department of Justice Victoria (DJV), Australia, Services Available from the Department of Justice, <www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Find/Services/>, last accessed 30 May 2011.

36 See Consumer Affairs Victoria, Make a complaint, <www.consumer.vic.gov.au/CA256EB5000644CE/page/About+us-Contact+us-Make+a+complaint?OpenDocument&1=0-About+us~&2=060-Contact+us~&3=030-Make+a+complaint~, last accessed 30 May 2011.

37 Consumer Affairs Victoria (CAV), Who we are and what we do, <www.consumer.vic.gov.au/CA256EB5000644CE/page/About+us-Who+we+are+and+what+we+do?OpenDocument&1=0-About+us~&2=010-Who+we+are+and+what+we+do~&3=~>, last accessed 30 May 2011.

In line with these goals, Consumer Affairs Victoria works for the protection of consumer rights. From an online consumer perspective, services such as "shopping over the Internet" and "any current consumer scams and how to avoid them" are provided by the CAV. It has different dispute resolution mechanisms which are primarily facilitative, conducted via both online facilities and offline methods. For example, conciliation is conducted by methods such as "telephone", "email", "letters" and "face-to-face meetings".[38] ADR mechanisms are used for the resolution of disputes between traders and consumers and tenants and landlords.[39]

As with some other schemes, CAV is also using technology to maintain contact with consumers. The 2010 Annual Report noted that:

> In May, Consumer Affairs Victoria launched on Twitter. We now tweet court outcomes, consumer alerts, media releases, advice and tips to help consumers, traders and industry. Twitter enables us to disseminate information quickly and connect with some target markets that were traditionally hard to reach.[40]

4 IMPLICATION FOR COURTS

Within Australia ODR growth in most sectors has been primarily directed at e-commerce and consumer-based schemes that operate as first-tier complaints handling and dispute resolution mechanisms. The growth in these schemes in recent years has been immense and there are now a number of examples of processes that are available to resolve disputes that have arisen as part of an online transaction.[41]

Those within the litigation system have noted that technology changes have the potential to dramatically transform the way in which dispute resolution is carried out.[42] Within the court system, e-callovers,[43] e-filing,[44] videoconferencing and applications[45] are now commonplace in many jurisdictions. Technology courts, virtual courts or cyber courts

38 Consumer Affairs Victoria, Resolve a dispute, <http://www.consumer.vic.gov.au/CA256EB5000644CE/page/About+us-Contact+us-Resolve+a+dispute?OpenDocument&1=0-About+us~&2=060-Contact+us~&3=020-Resolve+a+dispute~>, last accessed 30 May 2011.

39 Consumer Affairs Victoria.

40 Consumers Affairs Victoria, Informed Consumers. "Responsible Traders", Annual Report 2009–2010, p. 40, <http://annualreport.consumer.vic.gov.au/pdf/CAV_AR_web_combined.pdf>, last accessed 11 June 2011.

41 See Department of Justice, Victoria.

42 Australian Law Reform Commission (ALRC), "Review of the Adversarial System of Litigation. Technology – What it Means for Federal Dispute Resolution", *Issues Paper 23*, Canberra, ALRC, 1998.

43 *E.g.* New South Wales Land and Environment Court.

44 *E.g.* Federal Court of Australia.

45 Bail applications are commonly carried out by video in the Supreme Court of New South Wales.

now exist in many jurisdictions[46] and the presence of such initiatives may produce more participatory court processes as well as better communication and document management. Other changes have occurred in the handling, collation and storage of information and in the way that research occurs. The information that is available online increases access to court systems and can assist parties to observe and understand what takes place within the court system.

While many technology and virtual courts do not necessarily support ADR processes, some do and some envision that this will become an increasingly important way to deliver ADR services to the community. The Federal Court of Australia, for example, developed the eCourt forum as early as 2001.[47]

The eCourt forum "is a virtual courtroom that assists in interlocutory matters and allows for directions and other orders to be made online".[48] Referring to the eCourt forum Justice Brian Tamberlin further notes that "It may also be used in mediations, where these are directed by the Court and conducted by one of the registrars".[49] The eCourt enables updated online conversations to take place and protocols have been developed to assist users and the court. The eCourt breadth is outlined more fully in the following section.

4.1 Federal Court of Australia

The e-court concept is not new to ODR. For example, there are the virtual magistrate, e-court concepts in Singapore,[50] small claim courts and virtual court room in Sydney.[51] The Australian Federal eCourt program is an advanced e-court program that is equipped with a range of new technologies. Parties to a dispute are no longer required to go to the court; instead, they can participate in the court proceedings via technology, access e-documents, check the status of a matter (online) and exchange documents and make submissions in a protected and confidential e environment.

As part of the e-court strategy the Court currently provides the following services online:

- *eLodgment* enables any member of the public, whether they be practitioners, law firms, corporate bodies or self represented litigants electronically lodge documents with the

46 See <www.judiciary.gov.hk/en/crt_services/tech_crt.htm>, last accessed 30 May 2011.

47 See <www.fedcourt.gov.au/ecourt/ecourt_slide.html>, last accessed 30 May 2011; see Tamberlin (2005).

48 Tamberlin (2005).

49 *Id.*

50 A similar advanced online court service is offered by the Singaporean Subordinate Courts. S. Schiavetta, Online Dispute Resolution, E-Government and Overcoming the Digital Divide, 20th BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World?, 2005, p. 3. <www.bileta.ac.uk/Document%20Library/1/Online%20Dispute%20Resolution,%20E-Government%20and%20Overcoming%20the%20Digital%20Divide.pdf>, last accessed 30 May 2011.

51 See Sourdin (2008), p. 228.

Federal Court of Australia and the Federal Magistrates Court of Australia. eLodgment may be used to commence an action in either jurisdiction by enabling the lodgment of initiating documents and any supporting documents. Similarly, documents pertaining to existing matters may be lodged via eLodgment as long as the file number is known.

- *Federal Law Search* allows the public to search for information on specific cases.
- *eCourtroom* allows parties and their legal representatives to participate in a virtual courtroom. The virtual courtroom assists in the management of pre-trial matters by allowing directions and other orders to be made online by the relevant docket Judge.
- The Court's *eCase Administration* is a service that may be used by practitioners or parties to communicate with chambers' staff, on case related issues, in a secure environment. Only parties to the matter or their legal representatives will have access to this service and access is restricted to those matters where they are a participant in the proceedings. It is in essence an effective case management tool for both chambers and the participants in the matter.
- The *Commonwealth Courts Portal* is an initiative of the Federal Court of Australia, the Family Court of Australia and Federal Magistrates Court of Australia. It provides web-based services to judicial officers, lawyers, litigants and court staff providing real-time information about cases before the courts. Users can obtain a composite, user friendly view of their cases that provides information about documents filed and scheduled listing events, as well as details of any orders made.[52]

Interestingly, there are some important measures taken for the purpose of networking of courts in Australia that support basic ODR support services. For example, the Commonwealth Court Portal (CCP) networks three courts such as Family Court of Australia, Federal Court of Australia and Federal Magistrates Court of Australia by allowing "free web-based access to information about cases before these courts".[53] CCP is designed to deliver the following services:

- a view of court information designed specifically to suit the users' needs;
- the ability to search for relevant information held by the three courts;
- access for lawyers to case information from the convenience of their own office;
- control and administration of this access by the law firm in which they work;
- secure access to information for self represented litigants, and
- the ability to eFile applications for divorce and family law supplementary documents.[54]

52 Federal Court of Australia, eCourt, <www.fedcourt.gov.au/ecourt/ecourt_slide.html>, last accessed 30 May 2011; see Tamberlin (2005); see Sourdin (2008), pp. 230-231.

53 Family Court of Australia, Commonwealth Courts Portal, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/eservices/CCP/>, last accessed 30 May 2011.

54 Family Court of Australia, Commonwealth Courts Portal.

One of the fundamental objectives of CCP is to increase the efficiency of court proceedings. For example, the Commonwealth Court Portal, which was launched in 2007,[55] exists "to maximise efficiency for the user by establishing a common technological framework".[56] This efficiency is enhanced as CCP provides "a gateway to a broad range of services and information available from all three courts".[57] In line with this objective, CCP recognizes several benefits, for example:

- streamlined and integrated delivery of Commonwealth court services;
- single sign on for multiple services in multiple jurisdictions;
- single sign on for streamlined help desk and administration support;
- improved information management and consistent reporting; and
- improved service delivery through feedback.[58]

It is generally accepted by the Australian courts that there are positive aspects of using eCourts for the resolution of disputes. For example, two major advantages of having electronic courts have been indicated in the Australian case of *Harris Scarfe & ORS v. Ernst & Young & ORS* that: "First and foremost is the reduction in trial time, which I consider is likely to be substantial".[59] The court further stated that "The collective costs of each day that the trial continues [...] will be substantial, and even a minor reduction in the length of the trial will deliver significant cost savings".[60]

In addition, Australian court rules play an important role in supporting the development of eCourt strategy in Australia. For example, the Federal Court Rules made under the *Federal Court of Australia Act 1976* (Cth) support the legal basis for the operation of Federal eCourt in Australia.[61] Other State based Courts have established similar rules.[62]

Although there is a lack of specific legislation which applies across the states and territories of Australia in regards to the eCourt, Court rules are available allowing courts to

55 *Id.*

56 Commonwealth Courts Portal, <www.familycourt.gov.au/wps/wcm/resources/file/eb30d14dadd5a00/DLCCP_0908V1.htm>, last accessed 30 May 2011.

57 Family Court of Australia, Commonwealth Courts Portal.

58 *Id.*

59 *Harris Scarfe & ORS v. Ernst & Young & ORS* (NO 3) [2005] SASC 407, paragraph 19.

60 *Id.*

61 See P. Kellow, "The Federal Court of Australia: Electronic Filing and the eCourt Online Forum", *University of Technology, Sydney Law Review*, (2002) Vol. 4, <www.austlii.edu.au/au/journals/UTSLRev/2002/8.html>, last accessed 12 June 2011.

62 *E.g.* Practice Note No. 1 of 2007, Guidelines for the Use of Technology in any Civil Litigation Matter, <www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/practice+and+procedure/practice+notes+_+statements/supreme+-+practice+note+no.1+of+2007+%28pdf%29>, last accessed 30 May 2011; see "The Family Law Rules 2004" which do envisage electronic filing (for example Rule 24.07). Family Court of Australia, *Family Court Bulletin* (FCB), (2008) No. 3, p. 7, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Bulletin/FCOA_fcb_December_08>, last accessed 27 September 2011.

regulate procedure of court within the existing legal framework.[63] It seems that these rules are flexible enough to develop e-court friendly rules by which courts can conduct proceedings in an electronic form. In this respect, Jackson points out three types of such rules in regards to the use of technology in litigation: practice notes, rules of courts, and the inherent jurisdiction of the Court.[64] Within Australia the existing legal authority in the framework of rulemaking power conferred on courts judges is sufficient for them to play a pivotal role in shaping eCourts in line with the technological innovations.

Arguably, apart from rule making power conferred on judges as discussed, cases such as *Idoport Pty Ltd v. National Australia Bank Limited*,[65] *Harris Scarfe & ORS v. Ernst & Young & ORS*,[66] *Australian Securities and Investments Commission v. Macdonald*[67] and *Richard Crookes Constructions Pty Limited v. F Hannan (Properties) Pty Limited*[68] where online court facilities were adopted can be considered as leading innovations which reflect not only the growth of the electronic courts strategy but also signify the legitimization of the eCourt strategy in Australia.

However, how the e-court reforms will impact on the development of private ODR mechanisms is debatable. It is questionable how far e-courts developments can be integrated into the development of private ODR in Australia for a range of reasons. The positive aspects of eCourt initiatives in terms of time and cost may by relevant to large volume cases, but it is questionable whether similar benefits can be achieved in private ODR cases where small volume or small dollar e-commerce cases are involved. For example, legal perspectives as to the sharing of the cost for electronic court facilities[69] can be problematic as affordability of cost associated with the use of technology during the trial stage may be unrealistic from online consumer perspective. This burden of cost may be exacerbated if the online consumer has to pay for legal fees or fees for legal service. Additionally, the enforcement of final outcomes of the e-courts can also be questionable due to the lack of legal framework for the enforcement of e-judgments delivered by ODR mechanisms.

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63 S. Jackson, "New Challenges for Litigation in the Electronic Age", *Deakin Law Review*, (2007) Vol. 12, No. 1, pp. 89-96; see Kellow (2002).

64 *Id.* "However, even in the absence of a specific authority of this kind in a practice direction or note, there are two potential sources of jurisdiction for the making of such orders: the rules of court, and the inherent jurisdiction of the Court."

65 *Idoport Pty Ltd v. National Australia Bank Limited* [6] [2000] NSWSC 338.

66 *Harris Scarfe & ORS v. Ernst & Young & ORS* (NO 3) [2005] SASC 407.

67 *Australian Securities and Investments Commission v. Macdonald* (No. 2) [2008] NSWSC 1020.

68 *Richard Crookes Constructions Pty Limited v. F Hannan (Properties) Pty limited* [2009] NSWSC 142.

69 See "Variable costs are to be borne by the parties on a 'user pays' basis. These include the costs of supplying PCs, monitors and standard software; the costs of subscribing to a hardcopy transcript, or an electronic transcript, service; the costs of in-court connection to a real time transcript service; the costs of remote access to the electronic courtroom; and the costs of technical support for the individual benefit of a party", *Australian Securities and Investments Commission v. Macdonald* (No. 2) [2008] NSWSC 1020, paragraph 2; see S. Jackson, "Keeping it Simple: Court-Provided Technology Brings the 'Electronic Trial' to the Ordinary Litigant", *Bond Law Review*, (2008) Vol. 20, No. 1.

5 ODR IN THE FAMILY SECTOR

It also seems clear that ODR is extending well beyond the resolution of electronic commerce disputes. This broader expansion is likely as international trends and perspectives continue to have an impact in all areas of law including in family law. Internationally, ODR in the family sector has been perceived as offering significant benefits:

> The Committee Members recognize and honour that Online Dispute Resolution may be used on the entire spectrum of dispute resolution; from problem diagnosis, to promoting bilateral communication between parties, to arbitration and court-like or court processes. The Committee Members also recognize that Online Dispute Resolution may be applied in a wide range of disputes; from interpersonal disputes including consumer to consumer issues or marital separation; to interstate conflict.[70]

Additionally the Canadian report on the Evaluation of the Distance Mediation Project notes that "Information and communication technologies can, indeed, be used to deliver family mediation services in a competent, safe, and appropriate manner".[71] A similar development has occurred in the US where online mediation is conducted in cases where "one parent has moved out of state and/or when there are concerns about past incidences of violence between the parties".[72] These statements indicate the broad areas where ODR could be useful.

In the Australian legal and dispute resolution scenario, the use of ODR mechanisms for the resolution of family disputes has been supported and is likely to develop further due to two factors. First, the development of laws which require most family disputes to be mediated through a family dispute resolution process as a mandatory requirement before resorting to the relevant Court,[73] and second, the increase in the use of technology

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70 Internet Corporation for Assigned Names and Numbers (ICANN), Online Dispute Resolution Standards of Practice, <www.icann.org/ombudsman/odr-standards-of-practice-en.htm>, last accessed 30 May 2011.

71 C. Getz, "Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project", *Report* Prepared for: The British Columbia Mediator Roster Society, (2010) Vol. I, p. vi, <http://dine4good.com/files/dmp.pdf>, last accessed 30 May 2011.

72 S.S. Raines and M.C. Tyler, *From e-Bay to Eternity: Advances in Online Dispute Resolution*, University of Melbourne Legal Studies Research Paper, No. 200, (2007), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955968>, last accessed 30 May 2011.

73 "Changes to the Family Law Act in 1995 (*Family Law Reform Act 1995* (Cth)) saw family mediation enshrined as a "primary dispute resolution" method – in other words, the first port of call before court action was taken. In 2006, the Commonwealth government passed legislation (effective 1 July 2008) to make mediation a mandatory prerequisite for anyone seeking a parenting order with the usual exceptions for people in violent relationships or other situations involving gross power imbalances". E. Wilson-Evered, D. Macfarlane, J. Zeleznikow & M. Thomson, "Towards an Online Family Dispute Resolution Service in Australia", 2010, p. 2, <www.odrandconsumers2010.org/wp-content/uploads/2010/06/3.2-Wilson_Towards_Online-1.pdf>,

in both formal courts and informal (ADR) dispute resolution mechanisms of the family disputes.

More relevant factors that support the use of ODR for the resolution of family disputes are that:

i) the relevant family law-related legislation does not ban the use of online technology for conducting FDR online and in fact it is supported by legislative interpretation, and
ii) if parties to a dispute are in remote locations they are currently supported in accessing FDR via ICTs[74] and developing forms of ODR.[75]

ADR is now well established in the family dispute resolution area within Australia. The *Family Law Act 1975* (Cth)[76] sets out arrangements relating to matters including divorce and matrimonial causes, parental responsibility for children, and financial matters arising out of the breakdown of *de facto* relationships and prescribes specialised arrangements for ADR processes.

In particular, section 60I of the *Family Law Act* (Cth) requires disputants engaged in parenting disputes to *make a genuine effort at resolution* before commencing court proceedings. There are several exceptions to this requirement, set out in subs 60I (9), which are intended to ensure that people will not be required to attend ADR in a limited range

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last accessed 12 June 2011; see "In 2006, the Australian Government introduced a series of changes to the family law system. These included changes to the *Family Law Act 1975* (Cth) through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (*SPR Act* 2006) and changes to the family relationship services system". R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand, L. Qu and the Family Law Evaluation Team, Australian Government Australian Institute of Family Studies, Evaluation of the 2006 family law reforms (2009), p. E1, <www.aifs.gov.au/institute/pubs/fle/>, last accessed 30 May 2011; see "Changes to the dispute resolution provisions of the *Family Law Act 1975* have been phased in since July 2007. These changes mean that where an individual wants to apply to the court for a parenting order they first need to attend family dispute resolution, and obtain a certificate from an accredited family dispute resolution practitioner confirming an attempt at family dispute resolution was made", Australian Government Attorney-General's Department, Family Dispute Resolution, <www.ag.gov.au/fdrproviders>, last accessed 30 May 2011.

74 "FDR services are provided by a range of individuals and organisations, for example, Family Relationship Centres, community organisations, legal aid commissions, and individuals such as lawyers, social workers or psychologists. If you are in a remote area, you may access FDR services, for example, via telephone". An Australian Government initiative, Family Dispute Resolution, <www.familyrelationships.gov.au/BrochuresandPublications/Pages/Family-Dispute-Resolution-Brochure-09.aspx>, last accessed 30 May 2011.

75 "Given the large geographic challenges faced in Australia, this factor alone is driving the use of this system. An ancillary benefit of using these technological systems is that the parties are not brought together in the same room at the same time; in disputes involving family violence, this is a major benefit of this system". D. Bilinsky, ODR and Consumers, Report from the ODR Conference in Buenos Aires (2010), <www.odrandconsumers2010.org/2010/06/03/report-from-the-odr-conference-in-buenos-aires/>, last accessed 12 June 2011.

76 *Family Law Act 1975* (Cth).

of circumstances.[77] They include urgency,[78] inability to participate effectively,[79] family violence or child abuse,[80] and where the order sought is a consent order.[81]

The object of s60I is to ensure that all persons who have a parenting dispute make a genuine effort to resolve that dispute by ADR before applying to a Court.[82]

This environment has lead to a massive increase in ADR use in the family sector and a corresponding increase in interest in respect of ODR. ODR has been used in a variety of ways although perhaps the most simple use involves using online conferencing to replace face to face conferencing.

In this evolving phase of ADR in Australia, the utility of ODR as an effective mechanism of resolution of family disputes has been increased by the impact and spread of technology and broadband width. The increased use of the internet and the spread of computers into family homes naturally supports ODR use in the family setting as issues of cost, time, and flexibility dissipate. It is recognised that the use of ODR for the resolution of family disputes offers several advantages. Conley Tyler and McPherson have indicated the potential application of ODR for the resolution of family disputes:

- facilitating negotiations about property and maintenance issues;
- facilitating negotiations about parenting;
- assisting parties to develop their negotiation strategies;
- providing mediation and other primary dispute resolution services online;
- supporting face-to-face dispute resolution through the use of videoconferencing, teleconferencing and e-mail;
- supporting face-to-face dispute resolution through document drafting and other collaboration tools
- allowing for the exchange of information and the storage of data applicable to the settlement of property and financial interests or in order to manage ongoing parenting arrangements.[83]

In this context it is important to explore how far technology-driven ODR and/or technology has been utilised for the resolution of family disputes in Australia.

The *Family Relationship Services System* includes several technology-driven services. First, "the Family Relationship Advice Line (FRAL)"[84] is a national telephone service giving

77 Explanatory Memorandum, Family Law (Shared Parental Responsibility) Amendment Bill 2006 (Cth), 21.
78 *Family Law Act1975* (Cth), paragraph 60I (9) (d).
79 *Family Law Act1975* (Cth), paragraph 60I (9) (e). This exception contemplates a range of circumstances that could establish inability to participate effectively.
80 *Family Law Act1975* (Cth), paragraph 60I (9) (b).
81 *Family Law Act1975* (Cth), subparagraph 60I (9) (a) (i).
82 Part VII orders include parenting orders and child maintenance orders.
83 Conley-Tyler and McPherson (2006), p. 17.
84 Kaspiew *et al.* (2009), p. 35.

free information and advice on family relationship or separation issues.[85] People who have physical impairment such as deafness, hearing impairments or speech pathology issues can use a National Relay Service which can be accessed via textphone or modem, voice only systems and through computers with an Internet connection.[86] Second, "Family Relationships Online (FRO)"[87] service "provides all families (whether together or separated) with access to information about family relationship issues, ranging from building better relationships to dispute resolution".[88] Moreover, Family Dispute Resolution Conference conducted by the Legal Aid entities have for many years used telephone conferencing facilities to settle family disputes.[89]

Another interesting or noteworthy development is the use of online technology such as the Integrated Multi-agent Online Dispute Resolution Environment for the improvement of negotiation support systems for the resolution of family law disputes.[90]

The development of negotiation support systems for facilitating the mediation process used for the resolution of family disputes can be considered as a technologically driven AI process. These negotiation systems include Split-Up, Family_Winner and AssetDivider:

> In the domain of Australian Family Law, Split-Up provides advice about BATNAs, whilst Family_Winner and AssetDivider employ decision analysis techniques and compensation/trade-off strategies to facilitate resolution of the dispute. Conceivably, Online Family Dispute Resolution Service could consider the provision of advice not only about outcomes and BATNAs, but also about processes and how disputants should act "fairly" and "reasonably" during the mediation.[91]

85 An Australian Government Initiative, The Family Relationship Advice Line, <www.familyrelationships.gov.au/Services/FRAL/Pages/default.aspx>, last accessed 30 May 2011.

86 *Id.*

87 Kaspiew *et al.* (2009), p. E1.

88 An Australian Government Initiative, Services to Support Families, <www.familyrelationships.gov.au/>, last accessed 30 May 2011.

89 Legal Aid New South Wales, Family Dispute Resolution, <www.legalaid.nsw.gov.au/asp/index.asp?pgid=592>, last accessed 30 May 2011.

90 B. Abrahams, E. Bellucci & J. Zeleznikow, *Incorporating Fairness into Development of an Integrated Multi-agent Online Dispute Resolution Environment*, Springer Science+Business Media B.V. 2010, <www.springerlink.com/content/2jl7774266830554/>, last accessed 30 May 2011.

91 Wilson-Evered *et al.* (2010), p. 5.

Interestingly, attention has been given to develop these systems[92] to support the resolution of family disputes.[93] It is also clear that telephone dispute resolution service (FRAL) together with the Australian Government's Broadband Network can lead to greatly increased use of online family dispute resolution in the future.[94]

In addition, the Family Court of Australia has been equipped with modern technology to assist it to support the resolution of family disputes. For example, the eFiling mechanism for divorce through the Commonwealth Courts Portal is an important development that also supports ODR in the family sector.[95] The Commonwealth Court Portal enables litigants, lawyers and law firms to file supplementary documents-related to family law matters.[96] In this respect, a number of users are now engaged or active in this portal:

> Since its launch in June 2008, use of the Commonwealth Courts Portal has doubled due to the inclusion of a federal law search facility.
> At the end of March 2009, 560 law firms had registered for eFiling.
> Approximately 4500 individual users have registered which include practitioners, members of the public, journalists, academics, judicial officers and staff of the courts.[97]

Similar trends can be seen in other jurisdictions, such as the e-justice portal for the member states of the European Union.[98] The Subordinate Courts of Singapore also provides an interesting example to be considered when ODR or OADR is introduced to the mainstream justice system.[99] These technology-driven developments in the Family Court setting in

92 E. Wilson-Evered, T. Casey & S. Aldridge, *Readiness for online mediation: Application of a Modified Unified Theory of User Acceptance of Technology*, Paper, <www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)~Readiness+for+Online+Mediation+-+Wilson+E,+Casey+T+and+Aldridge+S.pdf/$file/Readiness+for+Online+Mediation+-+Wilson+E,+Casey+T+and+Aldridge+S.pdf>, last accessed 30 May 2011.

93 Wilson-Evered *et al.* (2010).

94 *Id.*, p. 10.

95 See Family Court of Australia, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/eservices/efiling/>, last accessed 30 May 2011; see Family Court of Australia, *Family Court Bulletin*, No. 6, 2010, p. 6, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Bulletin/FCOA_fcb_Jul_10>, last accessed 30 May 2011.

96 FCB 2008, p. 6.

97 Family Court of Australia, *Family Court Bulletin*, No. 4, 2009, p. 6, <www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Bulletin/FCOA_fcb_July_09>, last accessed 27 September 2011.

98 European Commission for the Efficiency of Justice, *European Judicial Systems: Edition 2008 (data 2006) Efficiency and Quality of Justice*, Council of Europe Publishing, p. 86, <http://books.google.com/books?id=D9gghA1h3ooC&pg=PA84&dq=E-Justice:+Using+Information+Communication+Technologies+in+the+Court+System&cd=2#v=onepage&q&f=false>, last accessed 7 June 2011.

99 R. French, Perspectives on Court Annexed Alternative Dispute Resolution, Law Council of Australia – Multi-Door Symposium (2009), p. 6, <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf>, last accessed 30 May 2011.

Australia may assist to further reduce the adversarial nature of the court proceedings.[100] However, it could not be said that the use of ODR has been fully embraced in the family dispute resolution system, or in the way envisaged more than a decade ago. Rather, ODR initiatives remain patchy and often conducted on a pilot basis. The benefits of ODR may be more obvious or extensive in Australia given the geographical isolation of many members of the community within the country. In addition, ODR may be particularly useful where there are allegations of violence or of significant power imbalances which may mean that traditional face-to-face forms of ADR are unsuitable.

6 ODR AND THE REGULATORY FRAMEWORK

An appropriate legal framework is recognized as essential in order to develop domestic ODR.[101] Within Australia, there is still an absence of specific legislation and case law that can assist in the ongoing regulation of ODR and e-courts. However, in the current Australian legal context there are some significant e-commerce friendly laws and e-court-related court rules that support the ongoing development of ODR. The Australian Guidelines for Electronic Commerce in 2006[102] (AGEC) also assist to establish an overarching regulatory framework.

6.1 E-Commerce Laws

Instead of having national laws which govern trans-border activities driven by the Internet, there is an e-commerce friendly legal framework to remove some barriers which hinder the development of the e-commerce market in most countries.[103] These e-commerce friendly legislative instruments are designed to facilitate e-commerce activities. In the international context, the UNCITRAL Model Law on Electronic Commerce (1996) and

100 See Kaspiew *et al.* (2009), p. 1.

101 – The necessity for providing the required regulatory framework needed for building a truly efficient Information Society. This entails enacting laws that support online activities including: e-signature and information security laws, privacy and data protection laws, cybercrime laws, intellectual property and consumer protection laws etc...;
– Establish ODR pilot projects, especially in developing countries as a practical step to assess the needs of global and local markets, and sustain an open market economy;
See Wahab (2006), p. 9.

102 Commonwealth of Australia, The Australian Guidelines for Electronic Commerce (AGEC) 2006, <www.treasury.gov.au/documents/1083/PDF/australian_guidelines_for_electronic_commerce.pdf>, last accessed 30 May 2011.

103 Electronic Frontiers Australia, Internet Censorship Laws in Australia, <www.efa.org.au/Issues/Censor/censl.html>, last accessed 30 May 2011; see Parliament of Australia Parliamentary Debates, Australia and the Internet, <www.aph.gov.au/library/intguide/sp/australiainternet.htm>, last accessed 30 May 2011.

the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) can be cited as some promising examples.[104]

In the Australian context, there are several legislative developments that more generally support e commerce and therefore the developing ODR environment. For example, the *Electronic Transactions Act 1999* (Cth) which is mainly focused on providing legal solutions for issues connected with formalities of electronic contracts is a useful legislative example.[105] Patterson, referring to the Act, has succinctly noted "that the Electronic Transactions Act 1999 (Cth) is based on two fundamental principles: 'media neutrality' and 'technology neutrality'".[106] Recently, the *Electronic Transactions Amendment Bill 2010 (Cth)* has now been enacted to amend the *Electronic Transaction Act 1999 (Cth)* in line with the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).[107]

In addition, E-signature law is evolving in the electronic market-driven legal framework.[108] Blythe suggests that the adoption of e-signature law in the world groups into three categories: Prescriptive Law, Hybrid Models, and "Minimalist" Laws.[109] In addition, admissibility of electronic records before the Courts can be considered as a positive step for the development of Australian e-commerce market and dispute resolution mechanism system.[110]

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104 Secretariat, United Nations Commission on International Trade Law Forty-third session New York, Possible future work on online dispute resolution in cross-border electronic commerce transactions, *Note*, (2010), p. 13, <www.odrandconsumers2010.org/wp-content/uploads/2010/06/UN-Commission-Secretariat-Note.pdf>, last accessed 30 May 2011.

105 "Each State and Territory now has its own *Electronics Transactions Act*. They generally mirror the *Commonwealth Electronic Transactions Act* with occasional small differences in definitions and some additional sections." Australian Government Attorney-General's Department, Australia's legal framework on electronic commerce, <www.ag.gov.au/www/agd/agd.nsf/Page/e-commerce_Australiaslegalframeworkforelectronic-commerce>, last accessed 30 May 2011.

106 "The UNCITRAL model law has provided the basis for the *Electronic Transactions Act* 1999 (Cth) and complementary legislation in the States and Territories. This legislation is based on two fundamental principles 'media neutrality', which requires that paper-based commerce and e-commerce should be treated equally and 'technology neutrality' which seeks to ensure that the law does not discriminate between different forms of technology." M. Patterson, *E-Commerce Law*, 2001, p. 17, <www.apec.org.au/docs/paterson.pdf>, last accessed 30 May 2011.

107 See <www.comlaw.gov.au/Details/C2011A00033>, last accessed 27 September 2011; see Attorney-General for Australia, R. McCelland, Electronic Transaction Laws to Be Improved (2010), <www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_7May2010-ElectronicTransactionLawstobeImproved>, last accessed 27 September 2011.

108 See Patterson (2001); see S.E. Blythe, "Digital Signature Law of the United Nations, European Union, United Kingdom and United States: Promotion of Growth in E-Commerce with Enhanced Security", *Richmond Journal of Law & Technology*, (2005) Vol. XI, No. 2, pp. 17-18.

109 Blythe (2005), pp. 17-18.

110 See P.L.G. Brereton, "Evidence in Civil Proceedings: An Australian Perspective on Documentary and Electronic Evidence", Speech to the National Judges College of the Supreme People's Court of The People's Republic of China (2007), <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_brereton0907>, last accessed 12 June 2011.

The importance of these developments is that there is a generally accepted legal framework to improve online business and remove several barriers which exist in the national and international legal arena. These regulatory responses are not static and are evolving to support e-commerce which can include the resolution of disputes which arise from Business to Business, Business to Customer, Customer to Customer, and Customer to Business relationships.[111]

6.2 *Recent Legislative Developments*

The development of online commercial arbitration within Australia is also supported by the recent *International Arbitration Amendment Act 2010* (Cth) (IAAA).[112] One of the amendments involved the removal of an "in writing" requirement of arbitration agreements embedded in the *International Arbitration Act 1974* (Cth), which hindered the formation of online arbitration agreements as a legally valid agreement. The new IAAA which was brought in line with the amendments to the 1985 UNCITRAL Model Law on International Commercial Arbitration in 2006[113] enables contracting parties to make an International arbitration agreement in electronic form as well.[114]

The second legislative development is the enactment of the *Competition and Consumer Act 2010* (Cth) (Formally known as the *Trade Practices Act 1974* (Cth)).[115] The *Competition and Consumer Act 2010* (Cth), has been designed to establish a uniform consumer protection legal framework and includes some language which introduces new provisions in regards to the fairness of contractual clauses.[116] This law applies in both offline and online contexts.[117] In this sense, online consumer arbitration clauses which are incorporated in

111 See Types of E-Commerce Relationships, <www.sqa.org.uk/e-learning/ECIntro01CD/page_01.htm>, last accessed 27 September 2011.

112 *International Arbitration Amendment Act* No. 97 2010 (Cth), <www.austlii.edu.au/au/legis/cth/num_act/iaaa2010356.txt/cgi-bin/download.cgi/download/au/legis/cth/num_act/iaaa2010356.rtf>, last accessed 30 May 2011.

113 1985 – UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>, last accessed 30 May 2011.

114 *International Arbitration Amendment Act* No. 97 2010 (Cth).

115 "On 1 January 2011 the *Trade Practices Act 1974* was renamed the *Competition and Consumer Act 2010*." Australian Competition & Consumer Commission, Welcome to the ACCC, <www.accc.gov.au/content/index.phtml/itemId/142>, last accessed 30 May 2011.

116 M. Shelly and M. Jackson, "Doing Business with Consumers Online: Privacy, Security and the Law", *International Journal of Law and Information Technology*, (2009) Vol. 17, No. 2, pp. 180-188, <http://ijlit.oxfordjournals.org/content/17/2/180.full#fn-38>, last accessed 30 May 2011.

117 "Consumer protection legislation applies equally whether the sale occurs face to face, by telephone or over the Internet." *Id.*, p. 188; see Australian Government Productivity Commission, Review of Australia's Consumer Policy Framework, *Productivity Commission Inquiry Report*, (2008) Vol. 2, No. 45, p. 312, <www.pc.gov.au/__data/assets/pdf_file/0008/79172/consumer2.pdf>, last accessed 30 May 2011.

a B2C e-commerce contractual relationship will also be affected.[118] This new legal scheme has implications in respect of ODR B2C arbitration clauses as the legal validity of an arbitral clause contained in a business to consumer agreement may depend on the fairness of the arbitral clause. For example, the legal validity of mandatory consumer arbitration clauses can be questioned under this law if such clauses are unfair and they are incorporated in standard form contracts.[119] There is a list of situations which can be considered as unfair terms, for example, section 25(k) of *Competition and Consumer Act 2010* (Cth) stipulates that a contractual term is unfair if it "limits, or has the effect of limiting, one party's right to sue another party".[120]

6.3 *The Australian Guidelines for Electronic Commerce*

There are other regulatory frameworks which apply and support the broader ODR environment. For example, Australian Guidelines for Electronic Commerce illustrates the Australian commitment towards the promotion of self-regulation and provide a policy framework which is specifically focused on B2C e-commerce arena.[121] The Australian government conducted a review in 2003[122] and introduced a new model in 2006 as part of the ongoing effort towards reviewing the existing policy framework.[123] The 2006 model applies to the B2C e-commerce policy framework and the B2C electronic commerce platform.[124]

Again, overarching global approaches have also influenced policy approaches in this arena. For example, AGEC can be considered as the fulfilment of the obligations embedded in Guidelines for the Consumer Protection in the Context of Electronic Commerce 1999

118 Redchip lawyers, *New Consumer Protection Legislation*, 2010, Paper, <www.redchip.com.au/news/new-consumer-protection-legislation>, last accessed 30 May 2011.

119 See sections 23, 24 and 25 of Volume 3, Schedule 2, Part 2-3, of the *Competition and Consumer Act 2010* (Cth), <www.austlii.edu.au/au/legis/cth/consol_act/caca2010265.txt>, last accessed 30 May 2011; see Redchip lawyers (2010).

120 *Competition and Consumer Act2010* (Cth).

121 Australian Government, Treasury Department, *Review of Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business* Discussion Paper, Expert Group on Electronic Commerce (2003), <www.ecommerce.treasury.gov.au/bpmreview/content/discussion.asp?NavID=5>, last accessed 12 June 2011.

122 Australian Government, Treasury Department, Discussion Paper, Expert Group on Electronic Commerce (2003).

123 See AGEC 2006.

124 *Id.*; according to the Guideline 7, B2B means "business-to-business electronic commerce" B2C means "business-to-consumer electronic commerce". Guideline 8 articulates that "The Guidelines apply to B2C electronic commerce. However, businesses are encouraged to follow the Guidelines when engaging in B2B electronic commerce." Further, Article 9 states that "The Guidelines do not apply to transactions between individuals both acting in a non-business capacity".

developed by Organisation for Economic Co-operation and Development (OECD).[125] Moreover, it seems that the ODR-related standards are an extension of the ADR-related principles in countries including Australia where these standards are recognized as part of an international effort to regulate ODR.[126] Most importantly, the Australian regulatory approach to electronic consumer protection policies are largely designed in the broader context of e-consumer protection which is linked to national consumer protection laws.[127]

Clearly the broad objective of AGEC is to provide a framework for the development of B2C e-commerce activities. Overall, the rationale behind these guidelines is to enhance consumer confidence in B2C electronic commerce by providing guidance to businesses. There are several objectives which include: fair business practices, accessibility and disability access, advertising and marketing, engaging with minors' "disclosure of a business's identity and location", "disclosure of a contract's terms and conditions", "the implementation of mechanisms for concluding contracts" adopting privacy principles, using and disclosing information about payment, security and authentication mechanisms, the establishment of fair and effective procedures for handling complaints and resolving disputes, and the law and forum for the resolution of contractual disputes.[128]

There are three major features that support ODR that are embedded in the framework of the Australian AGEC and standards developed by NADRAC in terms of the regulation of disputes resolution mechanisms. First, AGEC provides specific guidelines applicable to B2C ecommerce activities including principles applicable to appropriate dispute resolution mechanisms for the resolution of B2C e-commerce disputes.[129]

Second, the preservation of traditional judicial redress is expressly recognized. Both internal and external complaint-handling mechanisms do not override a consumer's right to seek judicial redress. AGEC reflects the underling rationale behind the Australian consumer laws where right of access to court is preserved. However, ODR is also considered and Cortes notes that:

> It posits that justice should be understood as the right to obtain redress through the most suitable mechanism, which for many disputes, such as those arising from e-commerce, may well be ODR, and not as the right to participate in an

125 OECD Guidelines for the Consumer Protection in the Context of Electronic Commerce (1999), <www.oecd.org/document/50/0,3343,fr_2649_34267_1824435_1_1_1_1,00.html>, last accessed 30 May 2011.

126 NADRAC, A Framework for ADR Standards (2001), <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_FrameworkforADRStandards>, last accessed 30 May 2011.

127 The existing the Best Practice Model in Australia has been designed in light of the Commonwealth Consumer Protection Laws - "the Model is underpinned by Commonwealth consumer protection laws". Approaches to Consumer Protection within the APEC Region, Report of the Electronic Commerce Steering Group (2002), p. 8, <www.nacpec.org/docs/Approaches_to_consumer_protection.pdf>, last accessed 30 May 2011.

128 See AGEC 2006.

129 *Id.*; see M. Park, "E-Commerce and ADR: Some Suggestions", *ADR Bulletin*, (2002) Vol. 5, No. 6, Article 4.

> adversarial judicial process. It is necessary to clarify the extent to which courts can require participation in a mediation process or enforce its results.[130]

From the perspective of online consumers, the consumer may use facilitative ADR options (negotiation, mediation and conciliation) or may use courts. Arbitration is not ordinarily considered in this context. However this approach must be considered within the context of the broad external dispute resolution (EDR) system that operates in respect of many disputes within Australia. Initially many external dispute resolution schemes or industry-based schemes were directed at disputes in respect of consumer relationships rather that general business relationships. In the financial sector for example, it has been estimated that more than 250,000 consumers per year rely upon industry based ADR schemes to resolve disputes that they may have with banks, insurance providers and others. Most schemes have also been directed at "resolution" rather than prevention or handling.

These external dispute resolution schemes have been set up in various industries to provide low cost (or free to the consumer), effective and relatively quick means of resolving consumer complaints about products and services. The schemes are often funded by a cooperative of industry members (examples include the Telecommunications Industry Ombudsman, the Financial Ombudsman Service Limited (FOS), and the Credit Ombudsman Service Limited (COSL). and are intended to deal with disputes between business and consumers. Generally, the scope of these schemes is limited in that they do not deal with internal disputes or disputes with contractors, suppliers or other business entities.

Ombudsman schemes such as Telecommunication Industry Ombudsman (TIO) and Financial Ombudsman Service (FOS) play a pivotal role in the resolution of consumer disputes which emerge between consumers and some industries and each make use of some forms of ODR.[131]

The Telecommunication Industry Ombudsman operates under the legal basis of the *Telecommunications (Consumer Protection and Service Standards) Act* 1999 (Cth).[132] The dispute resolution conducted by the TIO is guided by the Benchmarks for Industry-Based Customer Dispute Resolution Schemes which has been introduced by the Australia Gov-

130 P. Cortes, "Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues", *Rutgers Computer and Technology Law Journal*, (2008) Vol. 35, No. 1, pp. 3-4.

131 "Some industries including the telecommunications, financial services, energy, water and insurance industries provide free complaints services through an ombudsman or an independent dispute resolution scheme. Some industries have a national ombudsman (such as the Telecommunications Industry Ombudsman and the Financial Industry Ombudsman) but other industries (such as energy) have an ombudsman or dispute resolution office in each state and territory." Australian Competition and Consumer Commission, How to resolve a problem, <www.accc.gov.au/content/index.phtml/itemId/815327>, last accessed 11 June 2011.

132 Telecommunications Industry Ombudsman, About the TIO, <www.tio.com.au/policies/indexa.htm>, last accessed 30 May 2011.

ernment (The Department of Industry Science and Tourism in 1997).[133] Principles such as accessibility, independence, fairness, Accountability, efficiency and effectiveness are recognised as the benchmarks. In line with these principles, TIO resolves problems about telephone, mobile phone, and Internet services, for the lodgement of complaint. In the process of dispute resolution, diverse methods of communication are used. The most interesting IT-related techniques are online complaint mechanisms; the TIO website allows online complaint forms to be lodged for consumers who have access to the Internet service (calling, faxing, online complaint, posting, contacting via interpreter, TTY machine or National Relay Service or in person).[134]

However, it is not clear as to what types of ODR mechanisms are used and how much information and communication technology is utilised in the process of dispute resolution and enforcement of outcomes of the scheme.[135] In addition, the scope of the jurisdiction is limited to Australia.[136] However, it seems that ADR can be conducted with the use of appropriate IT and it is probable that the development of ODR mechanisms in the telecommunications sector will occur rapidly into the future.[137]

The Financial Ombudsman Service (FOS)[138] was introduced after merging three major industry dispute resolution bodies the Financial Industry Complaints Service (FICS), Banking and Financial Services Ombudsman (BFSO) and Insurance Ombudsman Service (IOS).[139] FOS is considered to be a single national service which has the power to resolve disputes relating to banking, insurance and investment in Australia.[140] As far as the use of

133 Telecommunications Industry Ombudsman, About the TIO.

134 Telecommunications Industry Ombudsman (TIO), Ways to make a complaint to the TIO, <www.tio.com.au/make_a_complaint.htm>, last accessed 11 June 2011; see "Complaints to the TIO can be made online or by phone, fax, email, in writing, via TTY or in person", Telecommunications Industry Ombudsman, About Us, <www.tio.com.au/about_tio.htm>, last accessed 11 June 2011.

135 See Hybrid dispute resolution processes such as education for self advocacy, referral, facilitation, investigation and determinative resolution are used by TIO for the resolution of disputes. Telecommunications Industry Ombudsman, Standard Resolution Methods and Outcomes, <www.tio.com.au/policies/indexb/standard_resolution_methods_and_outcomes.htm>, last accessed 30 May 2011.

136 TIO.

137 R.R. Bruce, R. Macmillan, Debevoise & Plimpton, T. Ellam, H. Intven, T. Miedema & M. Tétrault LLP, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*, Discussion Paper 2004, p. 4, <www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf>, last accessed 11 June 2011.

138 Financial Ombudsman Service, <www.fos.org.au/centric/home_page.jsp>, last accessed 30 May 2011.

139 "The BFSO was merged with the Financial Industry Complaints Service (FICS) and Insurance Ombudsman Service (IOS) to form the national Financial Ombudsman Service (FOS) on 1 July 2008." Australian Competition and Consumer Commission (ACCC), <www.accc.gov.au/content/index.phtml/itemId/287873/fromItemId/815972/quickLinkId/816518/whichType/org>, last accessed 30 May 2011.

140 "The Financial Ombudsman Service (FOS) takes complaints on a wide range of financial services and consolidates a number of financial services ombudsman and dispute resolution schemes to provide a single national service for banking, insurance and investment disputes in Australia." Australian Competition and Consumer Commission (ACCC), <www.accc.gov.au/content/index.phtml/itemId/287873/fromItemId/815972/quickLinkId/816518/whichType/org>, last accessed 30 May 2011.

ODR techniques is concerned consumers are allowed to make a complaint by using an online lodgement facility.[141]

The schemes face some issues as decisions can be made that are binding on industry members but not consumers.[142] However, the vast majority of disputes are resolved by these schemes and when determinations are made they are likely to be complied with (they are binding on members – for example, banks etc).[143]

The processes used in such schemes vary, however they are often focussed on complaints handling and conciliation.

AGEC has a general application to some area of B2C e-commerce activities and it is not designed specifically for ODR. In this sense, the guidelines can be applied to a range of dispute resolution mechanisms that can be defined as ADR or ODR. The application of the AGEC rules to ODR mechanisms is important to consider in this context. There are several important principles operating in these guidelines which ensure fair and effective dispute resolution mechanisms for the resolution of B2C e-commerce disputes. From a broader perspective of the protection of online consumers, it seems that these guidelines recognize three major dispute resolution avenues: internal dispute resolution; external dispute resolution; and right of the consumers to seek redress from courts.[144] Indeed, business are obliged to set up internal complaint-handling mechanisms in compliance with principles such as "within a reasonable time", "in a reasonable way", "free of charge to the consumer"; and "without prejudicing the rights of the consumer to seek legal redress". External dispute resolution mechanisms should be "accessible", "independent", "fair", "accountable", "efficient", "effective" and "without prejudice to judicial redress".[145]

Despite the positive elements of AGEC mentioned above, it is possible that the broader objectives of AGEC may be undermined by the lack of certainty in respect of the definition of appropriate dispute resolution mechanisms for the resolution of B2C e-commerce disputes. Arguably, it provides an imperfect blueprint for the development of a B2C e-commerce friendly dispute resolution mechanism, internationally and nationally. There are some specific issues that may require attention into the future to ensure that the domestic framework responds to ODR effectively. One particular issue is that ODR mechanisms within EDR schemes may not produce precedent and may therefore have the capacity to reduce certainty.

Parties to any dispute resolution mechanism should be able to understand the rights based framework as well as interest based issues and be able to predict the consequences

141 Financial Ombudsman Service, <www.fos.org.au/centric/home_page/resolving_disputes/how_to_lodge_a_dispute.jsp>, last accessed 30 May 2011.

142 NADRAC 2001, p. 22.

143 *Id.*

144 See AGEC 2006.

145 *Id.*

of going through an ADR mechanism. However, the flexible nature of principles and the self-regulatory principles or standards may lead to a lack of consistency and predictability. Even the wording of the guidelines can be misleading and confusing. For example, principles or guidelines that refer to concepts such as "fair, reasonable, disputant friendly and accessible" may have very flexible meanings.

This issue of common data parameters and reporting is also an issue that is currently the subject of Federal government action. Unfortunately much of what happens in the civil justice setting is not known as different courts and agencies collect different information and data. This hampers ODR development because ODR innovation may not be the subject of evaluation or reporting. At the Federal level the government is actively using newer technologies to monitor and evaluate the existing formal and informal dispute resolution system, and defining parameters, objectives, and key performance indicators that will hopefully assist with ODR growth into the future.

As far as the legal situation of AGEC is concerned, the following principles of AGEC highlight the reliance of online consumer protection through existing national laws.

> 11. The Guidelines are not a replacement for consumer protection laws or codes of conduct. Complying with the Guidelines does not exempt a business from compliance with obligations under such laws or codes.
> 12. Every effort has been made to avoid inconsistencies with existing laws. However, if there is an inconsistency, the law has precedence over the Guidelines.
> 13. Some parts of the Guidelines reflect legal requirements. Businesses should not rely on the Guidelines as a definitive statement of these requirements. Also, not all legal requirements relevant to electronic commerce are reflected in the Guidelines.[146]

One reason behind this consumer protection approach is to avoid a regulatory overlap between these guidelines and national consumer protection laws in Australia. In addition, the reality is that few consumer matters are the subject of litigation within Courts. Svantesson and Clarke have noted that "few consumer disputes are suitably handled by the legal system" due to the small value of transactions, complexities and cost.[147] They also observe that "a consumer's right to seek redress is an important incentive to businesses to not try to avoid their responsibilities"[148] and they add that "consumers must always have a realistic avenue for taking legal action against the seller, as the existence of such avenues

146 *Id.*

147 D. Svantesson and R. Clarke, *A best practice model for e-consumer protection*, Bond University Page of Dan Svantesson 2010, Paper, p. 11, <works.bepress.com/dan_svantesson/36>, last accessed 27 September 2011.

148 *Id.*

puts pressure on the e-retailers to not simply ignore consumer complaints".[149] One unanswered question in the current framework that becomes more and more relevant as consumer transactions increase outside the jurisdiction of Australia is how online consumers can take action against powerful and dominant online business interests that are located in other jurisdictions.

In considering the application of these guidelines to the enforcement of OCA, it is suggested that the guidelines are too broad and lack sufficient specificity in terms of addressing the issues connected with online consumer arbitration. For example, in terms of mandatory B2C arbitration clauses and enforcement of online consumer arbitration clause, the guidelines have arguably omitted issues such as business to consumer mandatory arbitration clauses and online consumer arbitration clauses. Instead, regulation of these issues has been left to the private online sector.

Another problem is the lack of appropriate enforcement mechanisms in regards to OCA. There is a lack of an appropriate self-regulatory approach to strengthen the enforcement of online arbitration in general or online consumer arbitration awards in particular. In terms of the issues of enforcement of OCAA in the context of the above guidelines, the lack of provisions of appropriate enforcement mechanisms for the enforcement of OCAA may contradict the objectives of these initiatives. It is unclear why appropriate guidelines were not introduced in the 2006 AGEC in line with the developments taking place in the field of resolution of B2C e-commerce context. Unfortunately, the issue of enforcement of outcome of the dispute resolution mechanisms remains a major issue in respect of the resolution of B2C e-commerce dispute resolution sector. From a dispute resolution perspective, it is evident that the primary focus has been upon the dispute resolution mechanisms rather than the broader and more complex issues of applicable law, jurisdiction and enforcement of final outcomes of dispute resolution providers.

7 CONCLUSION

It is clear that the spread of the use of ODR techniques in Australia has extended into a variety of fields and is likely to extend significantly in future years. With the development of new technologies, the extension of old technologies, an awareness of the benefits of the ODR, and new legal paradigms it is likely that ODR will continue to be viewed and will become viable ADR processes for the prevention, education, facilitation, and resolution of disputes. The ODR-related developments discussed above provide interesting examples which highlight the commitment towards the development of ODR as an effective ADR

149 *Id.*

mechanism in Australia and the potential ODR can offer in terms of resolution of disputes in various sectors.

However, there are some areas where more attention will be required to support the development of ODR. For example; there is a lack of attention towards the integration of private ODR and the eCourt strategies. There is no specific legal framework which deals with issues associated with online dispute resolution in general and online consumer arbitration. Moreover, despite some developments in several areas of ODR it is fair to say that development remains "patchy" and it is questionable whether the ODR related developments have a strong focus on the resolution of business to consumer cross border online disputes. Whilst ODR in Australia is developing and developing quickly, a more strategic framework approach would support this development further. In addition, a greater capacity to recognise, replicate and extend sound innovative ODR experimentation is essential to ensure that promising innovative developments continue to take place in the Australian environment.

22 Online Dispute Resolution in Asia

Zhao Yun, Timothy Sze, Tommy Li and Chittu Nagarajan

Asia is a rich and major continent that has excelled in the utilization of ICTs. Whilst many Asian States merit a mention, this chapter shall focus on China, Japan and India as major ODR players in the Asian continent.

The choice of such three states is not only due to their international standing and weight, but also due to the progressive and accelerated development in the invention and implementation of ICT applications, which certainly impacts the development of ODR schemes.

On such account, the chapter shall be divided into three parts; each part shall be devoted to assess the *status quo* of ODR in one of the three distinguished states, which have three of the highest Internet and mobile phone usage rates in the world.

For example, China has emerged as one of the largest e-commerce giants with more than 457 million Internet users and 277 millions mobile phone Internet users.[1] In Japan, a White Paper entitled "Basic IT Strategy", released in August 2000 by the Ministry of International Trade and Industry (MITI), has revealed Japan's ambition to expand its IT infrastructure in support of not only the development of e-commerce, but the eventual implementation of e-Government initiatives.

1 ODR in China[2]

The history of the Internet application in China is not very long. The first email sent out by Prof. Tianbai Qian on 20 September 1987 signaled the start of the Internet use in China.[3] Since then, China entered the Internet era and made remarkable achievements in the development and application of the modern information technology. Chinese Internet population achieved the highest number in the world within a short period of time. As of June 2011, China has 485 million Internet users.[4]

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1 The 27th Statistical Report on Internet Development in China, CNNIC, December 2010, available at <www.cnnic.cn/dtygg/dtgg/201101/P020110119328960192287.pdf>, last accessed 11 March 2011.

2 This part is prepared by Dr. Yun Zhao, Associate Professor, Faculty of Law, University of Hong Kong.

3 Evolution of Internet in China, available at <www.edu.cn/introduction_1378/20060323/t20060323_4285.shtml>, last accessed 11 January 2011.

4 The 28th Statistical Report on Internet Development in China, CNNIC, July 2011, available at <www.cnnic.cn/research/bgxz/tjbg/201107/P020110721502208383670.pdf>, last accessed 23 September 2011.

The rapid development of the Internet in China has brought about substantial changes to the understanding of dispute resolution in our society. While negotiation, mediation, arbitration and litigation have been most popular mechanisms in China, the application of online schemesto facilitate the dispute resolution process has received unprecedented acceptance.

The scope of the term "online dispute resolution (ODR)" can be quite broad. Firstly, while most dispute resolution procedures can be conducted online, it does not exclude offline communications. In most situations, online and offline communications are simultaneously utilized. Secondly, the term is not a simple equivalence to online alternative dispute resolution. It also includes the adoption of online applications in court procedures. Thus, the term can be more complicated than what we expect.

While it is important to note the increasing use of online facilities in dispute resolution in daily life in China, it seems justified to contextualize our discussion of ODR in China to two promising areas, these are: (a) the Asian Domain Name Dispute Resolution Center (ADNDRC), and (b) the Online Dispute Resolution Center at the China International Economic and Trade Arbitration Commission (CIETAC). In the meantime, we should also mention the efforts made by other entities in the promotion of ODR. Furthermore, it would be important to look into the activities of the Hong Kong International Arbitration Center, with regard to ODR.

1.1 ODR and Domain Names Disputes: The ADNDRC

The successful launch of the Uniform Domain Name Dispute Resolution Policy (UDRP) and its Rules implies the new era for domain name disputes. The ADNDRC is one of the four domain name dispute resolution providers approved by the Internet Corporation for the Assigned Names and Numbers (ICANN). The ADNDRC consists of four offices, namely the Beijing office operated by the CIETAC, the Hong Kong office operated by the HKIAC, the Seoul office operated by the Korean Internet Address Dispute Resolution Committee (KIDRC) and the Kuala Lumpur Office operated by the Kuala Lumpur Regional Center for Arbitration (KLRCA). A fully web-based online domain name dispute resolution system has been developed, which facilitates the handling of domain name dispute cases. The ADNDRC was further approved on 8 November 2004 to be one of the two registrar transfer dispute resolution (TDRP) providers.

1.2 ODR and the CIETAC Online Dispute Resolution Center

Domain name disputes are one major area for online dispute resolution. In November 2000, the China Internet Network Information Center (CNNI) enacted the Chinese-Lan-

guage Domain Name Dispute Resolution Policy (*Trial Implementation*). The CIETAC was appointed as the first dispute resolution service provider. In December 2000, the CEITAC set up Domain Name Dispute Resolution Center (DNDRC) to deal with domain name disputes. The Center is also appointed to be the sole dispute resolution service provider for keywords managed by the CNNIC, whose resolution is subject to the CNNIC Keyword Dispute Resolution Policy issued on 4 August 2001.

The above initiatives were very successful. In view of the development of e-commerce and disputes arising from online transactions, the CIETAC, while retaining the DNDRC, adopted the title of Online Dispute Resolution Center in July 2005 and used the title for external communications since August 2007.

The Ministry of Information Industry enacted the Internet Domain Name Regulations in 2002 and formally set up the domain name dispute resolution system for both the domain name under .cn and in Chinese characters. The CNNIC published in the same year the CNNIC Domain Name Dispute Resolution Policy (CNDRP) and its Rules (CNDRP Rules). This time two bodies were authorized as dispute resolution service provider, the CEITAC Center and the Hong Kong International Arbitration Center (HKIAC).

The CNDRP is quite similar to the UDRP adopted by the ICANN. Article 8 of the CNDRP lists three conditions to support a complaint: (a) the disputed domain name is identical with or confusingly similar to the name or mark in which the complainant has civil rights and interests; (b) the holder of the disputed domain name has no lawful rights or interests in respect of the domain name or the major part of the domain name; and (c) the holder of the disputed domain name has registered or has used the domain name in bad faith.[5]

The CNDRP further provides examples of "bad faith", which include (1) the holder of the disputed domain name i has registered or acquired the domain name for the purpose of selling, leasing or transferring the domain name in any other form to the complainant who is the owner of civil rights and interests relating to the domain name or to a competitor of this complainant, and obtaining unjustified benefits; (2) the holder of the disputeddomain name has, for many times, registered the domain name by using the names or marks in which others have the lawful rights and interests so as to prevent others from using the name or marks in which they have the lawful rights and interests in the form of domain names on the Internet; and (3) the holder of the disputeddomain name has registered or acquired the domain name for the purpose of damaging the reputation of the complainant, disrupting the normal business of the complainant, creating confusion with the name or mark of the complainant or misleading the general public.[6]

5 CNDRP, Article 8.
6 CNDRP, Article 9.

One major deviationfrom the UDRP is that the domain name dispute resolution service providers shall not accept any dispute over a domain name which has been registered for two or more years.[7] Another difference lies in the language of the process; the CNDRP Rules provides that "unless otherwise agreed by the Parties or determined in exceptional cases by the Panel, the language of the domain name dispute resolution proceedings shall be Chinese. The Panel may order that any documents submitted in languages other than Chinese be wholly or partially translated into Chinese."[8] This is drastically different from UDRP, which provides the language to be that of the registration agreement.[9]

On a different note and in view of the rapid development of e-commerce, the CIETAC adopted the Online Arbitration Rules in 2009.[10] This has been one major breakthrough in the promotion of ODR and shows the efforts ofthe CIETAC to increase the speed and ease of its dispute resolution process in the new era of information technology. The Online Arbitration Rules intend to independently, impartially, efficiently and economically resolve, by means of online arbitration, disputes arising from economic and trade transactions of a contractual or non-contractual nature, and shall apply to the resolution of e-commerce disputes and may also be applied to the resolution and other economic and trade disputes upon the agreement of the parties.[11] In addition to online arbitration, the Online Arbitration Rules also provides the possibility of online mediation.[12]

1.3 Other Initiatives

The Guangdong Arbitration Commission ("GAC") established the China Commercial Arbitration website in 2005, and has since then offered online arbitration services to resolve disputes related to e-commerce.[13] The whole arbitration process can be conducted online.

In the context of consumer transactions, some network transaction platforms have successfully launched their mechanisms to deal with consumer complaints. *Taobao*, the largest platform in China, initiated the consumer protection platform, which aims to resolve consumer complaints over product quality, delivery, after-sale maintenance, fraudulent selling conducts within seven days.[14] We should also note the development of

7 CNDRP, Article 2.
8 CNDRP Rules, Article 8.
9 UDRP Rules, Article 11.
10 China International Economic and Trade Arbitration Commission Online Arbitration Rules, adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on 8 January 2009, effective as from 1 May 2009, available at <www.cietac.org/index.cms>.
11 The CIETAC Online Arbitration Rules, Article 1.
12 The CIETAC Online Arbitration Rules, Article 37.
13 <www.ccarb.org>.
14 support.taobao.com/myservice/rights/right_main.htm>.

eBay's flagship consumer shopping services in China. Through the years, *Taobao* has been able to successfully get e-consumers from eBay. One reason could lie in the payment system.

Whilst *Taobao* uses Alipay as their payment platform, eBay uses PayPal. The former charges little to no sales commission to merchants, while the latter adopts a commission-based revenue model.[15] In spite of this, we may still see some potential for PayPal. As the world's largest online payment platform, PayPal maintains high degree of trust and confidence from the consumers. Such trust partly lies in its internal complaint mechanism for consumers. PayPal may further expand its market shares with strategic plans, such as a deal with the government of Chongqing to lift the cap on foreign exchange settlements for small Chinese businesses.[16]

On a different note, some private entities have been able to launch their website for ODR in the past years, such as <www.odr.com.cn>, <www.odrbeijing.com>. However, these efforts proved unsuccessful. Very few disputes were submitted to the above websites for resolution and they closed down afterwards. On the one hand, the consumers are still not so familiar with ODR, and on the other hand, very few rules define the operation and effects of such procedures. Some scholars believe the importance of the government's role in promoting the ODR and suggest that the governmental involvement shall improve the effectiveness and recognition of ODR from the society.[17] As such, the development of ODR in China not only depends on the efforts from private entities, but also relies on Chinese authorities and their determination on the legal reform.

Finally, we should also mention the efforts of the people's courts in China to introduce information technology in the litigation procedures. This is most meaningful to some remote areas, as the combination of online and offline mechanisms can be a cost saving and effective way for the people's court to carry out judicial duties. Nowadays, we can easily confirm that the use of computers, videos and other high-tech products has become more and more popular in the courtrooms in China.

1.4 The HKIACODR Initiative

The HKIAC is an independent non-profit organization in Hong Kong established in 1985 to provide dispute resolution services. In recent years, the HKIAC has pioneered in promoting ODR. Besides the domain name dispute resolution service provider for generic

15 Loretta Chao, PayPal Finds a Niche in China, available at <blogs.wsj.com/digits/2010/05/18/paypal-finds-a-niche-in-china>, last accessed 18 January 2011.

16 Kathrin Hille, *Paypal Plans China Expansion*, available at <www.ft.com/cms/s/0/da64c6a6-134a-11e0-a367-00144feabdc0.html#axzz1BM0cNEtQ>, last accessed 18 January 2011.

17 Zhewei Liu, "Government Intervention: The New Approach to Build Online Dispute Resolution in China", *Internet Law Review*, (2009) pp. 138-139. (刘哲玮：国家介入：我国ODR建设的新思路，网络法律评论).

top level domain names (gTLDs), it also provides services for the following country code top level domain names (ccTLDs): .cn (mainland China); .hk (Hong Kong); .pw (Palau); and .ph (Philippines). The Hong Kong Domain Name Registration Company Limited (HKDNR) adopted the Domain Name Dispute Resolution Policy for .hk domain name disputes. It basically follows the UDRP approach. However, one drastic deviation is that all decisions under this Policy will be final and binding.[18]

The HKIAC was approved by the CNNIC in April 2005 to help resolve the Internet Keyword Disputes under the CNNIC Internet Keyword Dispute Resolution Policy. Furthermore, DotAsia Organization (DotAsia) appointed in 2007 the HKIAC as the global official dispute resolution provider to handle disputes and challenges arising out of the launch of the .asia domain.

It is also worth noting that the HKIAC has adopted the Electronic Transaction Arbitration Rules since 2002. The Rules aim "to help parties and Arbitrators take maximum advantage of the flexible procedures available in arbitration for the resolution of disputes quickly and economically".[19]

1.5 ODR Outlook in China

In light of the above mentioned, it seems obvious that ODR is no longer a stranger toChina. Scholars start to research on ODR, and practitioners start to explore the daily applications of ODR in China.

The CIETAC is at the forefront of the ODR practice in China. Whilst several private entities have taken the initiative to start ODR platforms at the turn of the new century, they were not as successful as expected.

On a different note, whilst some network transaction platforms are able to establish their own internal complaint mechanisms to resolve consumer complaints, such mechanisms primarily aim at dispute avoidance. Thus, they cannot replace appropriate ODR mechanismswhich aim at dispute resolution rather than avoidance.

That said, it is submitted that CIETAC is best equipped to lead the way ahead for future ODR applications in China. Nevertheless, private initiatives may also play a complementary role thatsupplements the role of CIETAC in promoting ODR in China.

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18 Hong Kong Domain Name Registration Company Limited Domain Name Dispute Resolution Policy, effective 27 June 2005, Article 4(i).

19 Hong KongInternationalArbitrationCenter, Electronic Transaction Arbitration Rules, adopted to take effect from 1 January 2002, available at <http://hkiac.org/documents/Arbitration/Arbitration%20Rules/en_ETArbRules.pdf>.

2 ODR IN JAPAN[20]

It is unequivocal that Japan is a world leader in ICTs. Over the past decade, several initiatives and projects have focused on exploring the relationship between ODR and the conduct of B2B and B2C e-commerce transactions.

One of the most successful accomplishments was online application or case filing, such as the online case filing system operated by the Ministry of Justice.

On a different note, there are organizations that provide full dispute resolution services online, such as: the EC network, one of the most popular service providers in Japan, which resolves small claim disputes online via emails. However, ODR is still at its experimental or start-up phase in Japan, most of users or service providers consider ODR as an online consultation tool rather than a reliable forum for dispute resolution, since high-volume disputes remain to be resolved in domestic courts.

There are law firms actively using their websites, chat-room, blogs and/or twitter to answer queries or promote their consulting business, and/or interact with their clients or potential customers.[21]

Table 8 Brief Summary of ODR Organizations in Japan (Representative List)

Organization	Brief Summary
Shirogane Cyber Hall	Founded by a group of lawyers in 2001, use emails to provide online consultation services for e-Commerce, libel or defamation at cyber space. Current status: Ceased any activities.
Dispute Consulting Room for Online Shopping	Started by ECOM. Current status: Ceases operations.
Dispute Supports	This is a dispute resolution supporting organization accepting online case filing accredited by Ministry of Justice, not an ODR service provider.
Law Terrace	Belongs to Legal Aid Centre, accepting email application.
Click Counselor	Provide online consultation to the tenant of real estate.
EC Network	Private run ADR service provider online.

20 ODR in Japan is jointly prepared by Dr. Timothy Sze, China ODR Forum and Mr. Tommy Li, an independent IT expert and project management consultant.

21 *E.g.* 法律オンライン (Law Online), あきない・えーど (Business Aid), 弁護士ドットコム (lawyer.com), こもんべんごしドットコム (bond lawyers.com), フォーゲル総合法律事務所, 大枝法律事務所 (Oeda Law Firm), 北里敏明法律事務所 (Kitazato Toshiaki Law Firm), 梅原ゆかり弁護士 (Unehara Yukari Law Firm), バーチャル顧問 (Virtual Consultant).

2.1 *Government Backed Initiatives*

Believing that governmental support is necessary for the development of ODR, it should be noted that, from organizational and structural perspectives, there are two main ministries that play important roles in domestic legislation involving online transactions of any kind, namely, the Ministry of Public Management, Home Affairs, Post and Telecommunications (MPHPT), and the Ministry of Economy, Trade and Industry (METI).[22]

According to a "research report on the investigation of effective dispute resolution mechanism",[23] it has been recommended that ODR is an effective and appropriate mechanism to facilitate the resolution of e-commerce disputes that could not be resolved via normal legal process, a standard system shall be adopted in order to provide a transparent, predictable and enforceable resolutions to disputants. Further to this report, an e-commerce dispute consultation room has been established in 2000, the mandate of this initiative is to study the effectiveness of various dispute resolution mechanisms (mediation, conciliation, adjudication and arbitration), and training and education of relevant personnel.

In 2001, the "Guidelines on e-commerce related transactions" were promulgated by METI to regulate the market environment of e-commerce and provide a legal framework for online transactions. The guidelines have been revised and improved in June 2004, in response to required regulation of online auctions, the timing of a contractual relationship, and limitation periods for specific online activities.[24]

METI has partnered with the Software Information Center (SOFTIC) of Nippon Foundation Corporation in 2005, and proposed many amendments and updates to existing laws and regulations on the jurisdiction and applicable laws to cross-border e-commerce transactions.[25]

Moreover, METI also commissioned Japan Information Processing Development Corporation to set up a research committee on online transactions and an investigation committee on the legal system of cross-border trades by SOFTIC of Nippon Foundation Corporation. Additionally, there are many other research initiatives by law schools at various universities and NGOs in Japan.

Similarly, the Consumer Agency in its 2011 work plan states that, as to effective resolution of web-based cross-border disputes, the government shall actively communicate and interact with relevant governmental departments, corporations, and NGOs.[26] The

22 Prior to the Japanese government's restructuring of its bureaucracy on 6 January 2001, these two ministries were known respectively as the Ministry of Posts and Telecommunications (MPT), and the Ministry of International Trade and Industry (MITI).

23 See "B2C, C2C Dispute Resolution and Trust Research Report", by TradeSAFE, published on 30 October 2006.

24 <www.caa.go.jp/adjustments/pdf/110117adjustments_2.pdf>.

25 <www.softic.or.jp>.

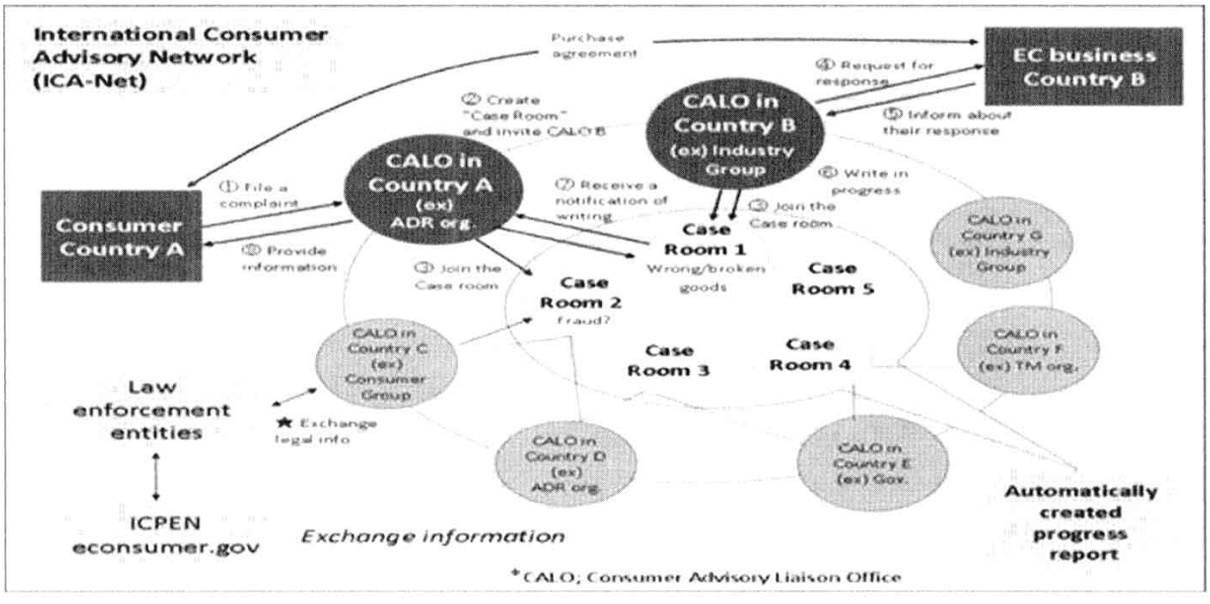
26 <www.fsa.go.jp/singi/singi_trouble/siryou/20050131_sir/03.pdf>.

work plan also provides that Japan shall consider using online platforms more proactively to participate in case investigation and online consultation, and shall resort to Internet networks to facilitate the resolution of cross-border consumer disputes. The Consumer Agency is willing to adapt successful European and American systemstocase filing, claim monitoring, and dispute resolution. The goal of these initiatives is to come up with a reasonable solution to cope the needs for actual operations.[27]

2.2 *International Consumers Advisory Network (ICA-Net)*

ICA-Net is a localized approach to handle cross-border disputes led by Consumer Agency, which mainly serves southern and eastern Asia. Originally proposed by GBDe (Global Business Dialogue on Electric Commerce in November 2007 as a two-year pilot and is currently exploring broader implementation.[28] This is being accomplished through cooperation amongst member States,[29] and amongst complaint handling organizations, enforcement authorities, ADR providers and government agencies.

Figure 19 ICA-Net System Workflow[30]



27 <www.ecnetwork.jp/public/2007kokusaireport.pdf>.

28 The execution of the pilot project was led by Professor Tsuneo Matsumoto of Hitotsubashi University from December 2008 to March 2010.

29 Japan South Korea, Malaysia, the Philippines, Vietnam, Singapore, and Thailand (The United States, Taiwan, and China also participate as observers).

30 METI presentation, Sep 2010, available at <www.odr-room.com/keio/METImodifyMandai.ppt>.

From the above chart, ICA-Net provides a secure environment for multiple parties to collaborate in the resolution of disputes. Case-related materials can be shared and discussed among national consumer advisory liaisons, members assigned to communicate or handle a complaint, and other concerned stakeholders. Communications can be made in case rooms which are open to all concerned parties, or through private communications with the consumer advisory liaisons.

The following table summarizes METI's current applications of ADR for the resolution of B2B and B2C e-commerce disputes in Japan.[31]

Table 9 METI's Current Applications of ADR for the Resolution of B2B and B2C e-Commerce Disputes in Japan

	ADR in B2C	ADR in B2B
Main organization	Japan Consumer Information Center, Consumption life center NACS in various places, Nationwide consumption life consultant society, EC network etc.	Bar association and law firm, etc. in Japanese commercial firm arbitration society and various places
Means of settlement	Advice and mediation	Mediation and arbitration
Cost	Free	Several hundred thousand yen, depends
Online	Almost by email	Hardly
Cross-border support	Only EC network corresponds (EC network participates in demonstration project ICA-Net in ERIA).	Correspondence of part (Japanese commercial firm arbitration society etc.)
Future tasks	Maintenance of organization that can correspond to border transgression dispute that assumes achievement of ICA-Net. Moreover, the ideal way of the defrayal for the border transgression dispute should examine it.	Maintenance of organization that executes low-cost, simple dispute solution corresponding to ODR.

2.3 ODR Room, ADR-OMS

Over the past few years many universities, research institutions and private sector initiatives seeking effective solutions to prevent, manage or resolve online disputes have paid close attention to the validity of ODR and its applications.

31 METI presentation, September 2010.

It is in this context that ODR Room Network plays an important role. ODR Room Network,[32] a technology service provider participates in ICA-Net and EC Network pilot projects.[33]

ADR-OMS (Alternative Dispute Resolution Online Modeling System) uses a unique modeling system to improve dispute resolution processes and the quality of ADR services. ADR-OMS can keep track of a particular Internet incident, encourage and enhance the disputants to settle, use multi-layer network and engine, to house the whole dispute resolution cycle on one platform. The system can cover the flow of whole dispute life cycle and integrate them into a searchable, accessible database, which enables the party to foresee the potential risk and take preemptive action to prevent disputes.

2.4 ODR Outlook in Japan

It is evident from various governmental, public and private ODR related initiatives that we are on the verge of a new era for ODR in Japan. However, as Japan enters the ODR world, several challenges and uncertainties do exist. For example, the complexity of cultural, politics, laws, standards, and languages, do render an interconnected regional system more effective than a global system to resolve cross-border e-commerce dispute. Japanese experience may be well-positioned to help identify domestic and regional requirements to the development of a global ODR regime.

The complexity of ODR applications and schemes and their adaptation to national contexts render ODR an interdisciplinary field that may involve professionals from a myriad of professions such as psychology, artificial intelligence, medical, and business.

In any event, it is submitted that ODR need not be exclusive to online disputes, as it is equally capable of efficiently resolving high volume offline disputes.[34]

3 ODR IN INDIA[35]

Any mention of India brings to mind a variety of strong associations: mysticism, history, culture, the world's largest democracy, the world's second largest population, and a rich patchwork of many languages and religions. Over the last fifteen years India has become

32 <www.odr-room.com>.

33 <www.isid.co.jp/news/pdf/kasaku-onlinesaiban.pdf>.

34 T. Sze, *Online Dispute Resolution: Its Development, Concepts and Theories*, PhD theses on file at National Library of China, Beijing, 2007, pp.83-86, available online in Chinese at <http://res4.nlc.gov.cn/home/search.trs?method=showDetail&channelid=3&id=003640158&searchWord=%28+contributor%3D+%27%E5%88%98%E6%B5%B7%E5%B9%B4%2C%E9%9F%A9%E5%BB%B6%E9%BE%99%E6%8C%87%E5%AF%BC%27++%29>.

35 Prepared by Chittu Nagarajan.

recognized for Yoga, Bollywood, and Cricket – but it has also emerged as the definitive global home for cutting edge information technology.

In the 19th century, the British Raj entered India and began the court system. Disputes in the pre-British Raj were resolved by local elders within a community. Even today these local *panchayats* (councils) exist where people in rural districts go to resolve their issues or disputes. In the present day, the Indian Court system would require more than 320 years to clear all existing backlogged cases. To deal with this, India's judiciary has introduced and is encouraging arbitration, mediation and the *LokAdalats* (People's Court) to assist with the backlog. One of such innovative dispute resolution mechanisms to gain recognition from the United Nations is The Mahatma Gandhi dispute free village scheme which seeks to prevent the occurrence of disputes and to resolve existing disputes at the village level through the participation of the people.

The 21st century is destined to create more disputes. This era belongs to the Internet and Online environment, the ramifications of which are millions of disputes which cannot be disposed by the courts and traditional alternative dispute resolution mechanisms. Technology and continued innovations in resolution processes is essential if we are to be able to respond to these new challenges.

The Internet and the IT revolution has been a boon to India's growth and economy. But while millions of people in India work on the Internet every day, the more significant revolution for hundreds of millions of more people is the mobile phone. India has more than 700 million mobile phone users. People are communicating more and transacting more over their phones, and that is generating disputes. E-governance has also gained momentum in recent years, and is now starting to build a suitable IT infrastructure.

As was previously mentioned, India was never the forerunner in the ODR world. Until 2003, India did not have much representation in the ODR sphere. This is certainly a surprise given India's ICT status and rich dispute resolution culture. However there have been many subtle incursions of ODR into public life over the years. This was inevitable as India was introducing and leveraging technology in many sectors. The e-commerce industry receives and resolves complaints using software tools.

3.1 India's ODR Readiness and Initiatives

One of the early adopters of ODR in this sector was eBay India, which started using online negotiation and mediation to resolve their feedback disputes. eBay India was also a pioneer in launching the Community Court (<www.ebaycourt.com>) where trusted community members help resolve disputes amongst sellers and buyers.

On a different note, the legal outsourcing industry has been growing over the last few years and is believed to have huge potential, as the market is still largely untapped. Debt

recovery outsourcing also has its foot print in India. These organizations rely on technology and software to a great extent.

Some States have started receiving police complaints via email. Public grievance portals and receiving complaints via online or mobile means are now available. An SMS based complaint registry also exists where complaints can be registered via mobile phone. Consumer Complaint websites are mushrooming. The ministry of consumer affairs has its Consumer Online Resource Empowerment (CORE) centre which accepts and resolves complaints end-to-end via a sophisticated online process. An interesting introduction of technology for grievance redress is by the Tamil Nadu Electricity Board which generates a unique ten-digit number for its consumers for redress of grievances. Software tied to SMS technology is used to notify complainants on status of complaints. Rural kiosks will also be leveraged.

When ODR came into existence it was meant to be accessed via the Internet, and seeing how the internet was only accessible via computers, one needed to have a computer to use ODR. If that was still the situation today, the scope for ODR in India would touch only a third of the population. However, now the landscape is different because ODR extends into the mobile technology space. Mobile phones can be used to send and receive money, for health services, for learning and education, for market information services, or for agriculture and rural development services. When we speak of ODR we are now also thinking of how the tools of dispute resolution can be made available via the mobile phone. The ubiquitous mobile phone known for its affordability, accessibility, connectivity, flexible functionality, with no special skills or literacy required for operation has the capability of extending ODR to India's one billion-plus population.

Rural markets are growing with increasing purchasing power. The microfinance industry is huge. The question now is how can we adapt ODR to this emerging, constantly changing market. In a rural setting, the mindset is different. ODR designers should take care to address the unique needs of rural users, who are often inclined towards the emotional side rather than a rational or practical one. Biometrics for thumb impressions, signature verification, document scanning and voice recognition are good. However, "digitized" is still a far cry for the villages who may perceive this as alien and therefore suspicious or intimidating to rural people. Sensitivity to these issues is essential for an effective ODR system design.

3.2 *ODR for India: The 10th International Online Dispute Resolution Conference*

Under the above backdrop, for the very first time, the Tenth International Online Dispute Resolution Conference was held in Chennai, India for three days from 7-9 February 2011.

This was a great opportunity to showcase India's ODR path and for India to learn from the rest of the world. The conference brought together many experts, academics and practitioners in ODR, law, technology and conflict resolution from all around the world. While India was introduced to ODR at the meeting, the key people and players in ODR from across the globe were also introduced to India.

Amongst the topics presented at the conference and which are directly relevant to the development and proliferation of ODR in India are: (a) ODR in India, (b) OnlineDialogue Opportunities in South Asia, (c) Building Legal Standards in the EU for Extra-Judicial ODR Methods: Guidelines for the Growth of Fair and Effective ODR Systems, (d) ODR and ADR: The Blurring of Traditional Boundaries, (e) ODR and Peacemaking, (f) Privacy and ODR, (g) ODR and Government, (h) ODR and Customer support, (i) Community Policing, Micro-justice and ODR, (j) ODR in the Developing World, (k) ODR and Disabilities, (l) Indian Cyberlaw, Outsourcing, and ODR, (m) Global ODR Schemes for B2B, B2C, and C2C Redress, (n) Consumer Resolution and Protection: the Indian Perspective, (o) ODR: Gathering facts through new edge forensic techniques, and(p) Current Case backlog and Mediation, and e-Governance in India.

The conference was a watershed event in the development of ODR, bringing together dispute resolution leaders and key influencers from India. Expert leaders noted: ODR is the use of information and communication technology to help people resolve their problems not only related to eCommerce but any sector that has an online presence. ODR is not the only tool necessary to create trust in transactions, but without it, online trust is impossible to sustain. At the rate that items or and services are being bought and sold over the internet and mobile devices, ODR is becoming vitally important to make readily available to every online consumer.

ODR helps resolve disputes across countries and enables resolution of disputes without anyone meeting face to face. ODR is poised to handle millions more cases than it currently manages. ODR will experience tremendous growth in next couple of years. These are the defining days of this industry.

With the evolution of alternative dispute mechanism (ADR), ODR has shadowed its growth. So in some instances, with the juxtaposition of ADR techniques with ODR, the line seems blurred. In effect, ODR is becoming integral to conflict resolution.

With the sweeping changes brought about by the digital world, the 'O' in ODR may become irrelevant as most dispute resolutions will be online in future. The next generation may call it just dispute resolution.

Online Dispute Resolution in India is in its infancy stage. However, India is moving forward. With the current mobile technology boom in India, it undoubtedly is the next big thing in the ODR space. ODR applications are expanding and the future of ODR is extremely promising even in States like India where culture, language, and policies remain intertwined and challenging.

If there was one takeaway from the gathering that could be considered a unanimous understanding among the participants, it was that the applications for ODR are expanding every day, and that there is no one right approach that works for all application areas.

3.2.1 ODR and Government

Online dispute resolution (ODR) can be effectively deployed to resolve citizen-related issues. Several talks at the conference revolved around how governments can play a pivotal role in resolving disputes by adopting a multidisciplinary approach and by avoiding bias. For example, backlogs of judicial cases can be quickly cleared through the ODR route. From commercial online dispute resolution, ODR is now at the doorsteps of government. This seems to be the natural evolutionfor ODR, which is being applied across domains and sectors, at times without conscious knowledge.

In order to reduce the backlogs of the number of cases filed and to control the petitions made by citizens online, it is important for the government to take responsible measures to resolve issues amicably. To do so, the government must take accountability for the action of its citizens and should undertake interdisciplinary research to improve online dialogue skills. It is important for the government to empathize, get a perspective of the problem, and set aside any form of bias while reflecting on the quality of dialogue and resolving disputes.

3.2.2 Inclusive Justice and ODR

Inclusive Justice may be defined as the process of ensuring access to justice at affordable costs in a timely and adequate manner to sections of disadvantaged and low income segments of society. One form of Inclusive Justice is Micro-Justice.

Micro-justice helps consumers establish contact with their opponent and assisting the parties with negotiation and mediation skills. Besides information about formal rights, it informs the citizen systematically about what they can expect as an outcome, and how others solved similar disputes. If the parties do not agree, Micro-justice may also organize a low cost neutral intervention for them. Stabilization of the relationship is made more likely by standard settlement contracts that make the future relationship explicit. Micro-justice dispute resolution consists of a mixture of improvement in communication, facili-

tation of negotiations, organization of incentives for both parties to cooperate with the process, fact-finding, establishment of norms for distributive justice, decisions on issues that split the parties and, coordination of enforcement.

The increasing indispensability of information and communications technology in the developed and developing world represent significant opportunities for access to justice by buyers and sellers including commercial transactions conducted online. Online dispute resolution is gaining new momentum with consumers taking up more to social media platforms such as mobile phones, internet, radio and other form of communication and thus enabling a new tool for the justice system.

The role of ODR as a justice tool is further amplified for the disabled especially those who are visually impaired. The use of technology has empowered those who are visually challenged to overcome the obstacles, for example by using the technology called Screen-Reader. This helps the consumer to navigate across a website with as much ease as a person with vision. Government should take some measures and draw guidelines which would make it easier for these consumers to operate the interface. Accessibility must be integrated into ODR which is cheap and readily available.

3.2.3 ODR and Consumer Protection

It is worth noting that with the proliferation of e-commerce activities, ICPEN has established a mechanism in the USA that will help protect consumers worldwide, which could be beneficial to India.

The goal of this initiative is generating and sharing information and intelligence on consumer protection issues. Owing to the increase in cross-bordertransactions, trade is globalized and hence the happenings in a particular country eventually affect other countries. Under ICPEN there is a program called econsumer.gov, which is a portal developed for consumers to register complaints. econsumer.gov then takes action on the complaint and imposes appropriate penalties against companies who are violating the laws. India is currently ranked at the 6^{th} position with respect to the number of consumer complaints on econsumer.gov.

The website customergov.in registers complaints from citizens of all nationalities (and has a mechanism to resolve them even across borders through a collaborative approach). Although India is not part of this initiative, to which 29 states have subscribed, the complaints originating from India have ranked India amongst the top ten with respect to the number of complaints filed.

3.2.4 ODR, Business, Policy and the Judiciary

With respect to the business arena, Ernst & Young presented, during the conference, their analysis to adress disputes in India and submitted that in the past two years, because of technological intervention, the time for resolving disputes has been reduced by as much as one-tenth in some cases.

Increasingly people are using online communities to make decisions with regard to e-shopping and e-retail. To that effect, eBay India's innovating ODR platform "the Community Court" remains useful, as such kinds of community decisions allow members of the community to ascertain if actions taken by other members are permissible or not.

On the policy front, the Information Technology Secretary to the Tamil Nadu Government, P.W.C. Davidar stated, during the conference, that the Indian Information Technology Act of 2000 recommends that online disputes falling under the purview of the Act should be adjudicated by the IT Secretary of the respective states. Having adjudicated the first ever case in India within the purview of the IT Act, Davidar explained the learning curve he had to go through as there was no precedent to apply.

Similarly, Justice Mohan Mehta, a High Court Judge and a strong advocate of Mediation in India propagated the need for effective alternative dispute resolution mechanism to address the backlog of 24 million cases in Indian courts that would take 320 years to be resolved. Emphasising that the settlement of disputes using law and other modes are aimed at social harmony, Justice Mehtastated, during the conference, that other methods should be explored to resolve disputes. His mediation centre, which takes up cases filed in the Delhi High Court, has been launched as a joint effort of the Delhi government and Delhi High Court. As many as 35,000 cases have been resolved using the mediation centres established by Justice Mehta. Stating that ODR is yet to make a beginning in mediation, he said that there is a need to define areas in which ODR can be applied. One of the main aims should be to build trust and create mechanisms of enforcement if ODR is used.

3.3 India's ODR Outlook: The Future

Online Dispute Resolution is clearly moving into the mainstream, both around the world and in India. Whilst ODR programs remain a work in progress, certain initiatives such as the Tamil Nadu government and Delhi government project demonstrate that the value of dispute resolution is already understood, but that the ways that technology can assist are not yet comprehended. As technology continues to permeate global society, it is very likely

that those benefits will soon be well understood, removing the final barrier to ODR's adoption.

Given the promising future of ODR in India, it remains challenging, to the trajectory of ODR, to distinguish ADR and ODR, which coexist in the same dispute resolution continuum. By and large, it is clear that ODR has a great future in India, and that the coming years will bring exciting innovations as India fully realizes its potential.

23 Online Dispute Resolution in Latin America

Challenges and Opportunities

Gabriela R. Szlak

1 Introduction

How is the Latin American region dealing with disputes in the justice system? What are the prospects for ICT and the development of Digital Economy in the Latin American region? Is the region ready for ODR? What about its readiness for a Global ODR system for cross border e-commerce?

This chapter poses some answers to these questions, suggests some other possibilities, and poses several more questions for further discussion.

First, this chapter offers a brief overview regarding the justice systems in Latin America and the need for reform. Transformation in the region begins with ICT reforms, which aim to forge a more efficient and effective justice system. But this transformation comes hand-in-glove with ADR reforms, which aim to diversify the way in which disputes are addressed, from a competitive model into a cooperative and peaceful approach.

Second, this chapter offers a readiness-for-ODR analysis, in which the regional challenges, opportunities and particularities are pointed out and briefly analyzed. The focus of attention in this section will be ODR for the Digital Economy in Latin America.

While the first and second sections mentioned above provide the context in which ODR is gradually finding its way to emerge, the third section analyzes ODR experiences and regional programs in action, followed by final thoughts regarding a promising future for ODR in Latin America.

2 JUDICIAL SYSTEMS IN LATIN AMERICA: TRANSFORMATION IN PROGRESS

2.1 Some Inefficiencies Exposed

Court litigation is built as a confrontational process in which there are winners and losers. In the majority of cases parties find litigating an unpleasant experience, regardless of the outcome.

In the Latin American region the citizenry presents high levels of dissatisfaction whenever confronted by the justice system. Most people mistrust the system as a whole. The percentage of Latin American citizens said to have some or a lot of trust in the Executive Branch is 39%, while the Judiciary Branch scores only 30%.[1]

A variety of scholars have identified the reasons for this lack of trust:

1. The complexity of the judicial system which is perceived by most citizens as distant and out of reach.
2. High cost of litigating, both in terms of direct costs (like lawyer fees) or indirect costs, (like the cost of opportunity).
3. Slowness of the processes, and the uncertainty regarding the duration of cases.[2]
4. An excess of ritualistic formalism and bureaucratic practices in general, which elevate frustration among the parties during the whole process.
5. Perception of corruption as expressed by citizens regarding the judiciary branches.

For instance, litigating at the National Courts in Buenos Aires, Argentina, involves a lot of paperwork. After filing the case the complaint has to be brought to the assigned court, where in about three to seven working days the written case file folder is created, enabling the court to render the first resolution. This resolution officially opens the case and orders notification to the defendant that an action has been instituted against him/her/it and that a response to the complaint must be made prior to a specified date.

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1 C. Hernández & R. Adelardi, *Perspectivas de uso e impacto de las TIC en la Administración de Justicia en América Latina*, Working Paper – in Spanish, Study Centre for Justice in the Americas (CEJA) and Microsoft (no year informed), p. 7, n. 4. Available online at: <www.cejamericas.org/portal/index.php/es/biblioteca/biblioteca-virtual/doc_download/1776-perspectivas-de-uso-e-impacto-de-las-tic-en-la-administracion-de-justicia-en-america-latina>. For more about Public Opinion statistics in Latin America see: <www.latinobarometro.org>.

2 Regarding duration of cases, the region lacks of accurate statistics in respect of many of its countries. According to CEJA in the XIV Iberoamerican Judicial Summit, among twelve participating countries, none of them could deliver information about the duration of processes for the total instances and subjects. See *id.*, p. 20, n. 8.

In the last few years some judicial systems in the region have been gradually incorporating online services. Now, even though there is information about most case files available online,[3] the existing platforms for Buenos Aires National civil and commercial cases – following the example – do not provide for digitalization of all the case files. It only shows some resolutions rendered by the office of the First Instance Judge. This means that most information not uploaded to the platforms is only available by going to the court personally, standing in a queue, asking for the file and, if available, copying it – generally by hand.

If an auxiliary of the court has to intervene in the case file, such as the Child Protective Services (*Defensor de Menores*), the whole case file will be physically transferred to that office for the auxiliary to analyze it and render an expert opinion. When rendered, the opinion will be incorporated to the case file. The case file will be transferred back to the court where the Judge, by another resolution, will inform to the parties that the case file is back.[4]

This kind of physical movement of the case file means lots of wasted time, unnecessary risks, and inefficiencies. Also, as courts are too overloaded with work and have limited space, a case file may be sometimes "lost" for a while just because it was put in the wrong locker or because it is still at another office. Records about the physical movement of the case file may be mistaken or not accurate, and nobody may know where the case file actually is. In these cases parties need to present a written petition asking for the search of the "lost" case file.

These descriptions illustrate the need for reform. No wonder in the context described above, there is extensive criticism of the system. Professionals frequently request, among other things, streamlined bureaucratic procedures. Judges denounce lack of resources and excessive workload. And citizens suffer from the lack of transparency and perceive the justice system as unintelligible and inefficient.

The backlog of cases and the impossible task of managing those cases in an efficient way given the current design is a problem affecting most of the countries of the Latin American region.

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3 See <www.pjn.gov.ar>.

4 In the National Commercial or Civil Courts in Buenos Aires, at the present, when an expert opinion from the Child Protection Agency is incorporated, parties won't be able to read that expert opinion online. They will need to go personally – it is actually the lawyers or their assistants that do that – to get informed about the expert opinion rendered. In other jurisdictions this has already been reformed properly and hopefully this will be reformed also in these courts as well.

Despite what has been said in this section, it is also true that during the last twenty-five years many justice systems in Latin America have undergone important change, maybe the most significant in all its previous history.

The legal community has witnessed (among other improvements that will be discussed more extensively) "higher levels of training of employees, higher levels of independence, and professionalism within institutions".[5]

It has been said that:

> Since the beginning of the 1980s, governments, judicial leaders, organization of the civil society and a number of external help agencies have committed to make regional efforts for justice institutional reform in Latin America. [...] Change has been introduced in the legal framework, the organization and resources for justice in most of the countries; [...]. In some cases tangible improvements have taken place [...].[6]

The Study Centre for Justice in the Americas (CEJA) indicates that:

> [...] this transformation process, in a traditionally conservative and not innovative enough sector, is in itself a fact of major importance. But what is even more significant is that everything indicates that these changes will not stop.[7]

5 C. Hernández & R. Adelardi, (no year informed), p. 13. Original text in Spanish: "Mejores grados de preparación de los funcionarios y niveles más altos de independencia y profesionalismo en las instituciones".

6 L. Hammergren, *Quince Años de Reforma Judicial en América Latina: Dónde estamos y por qué no hemos progresado más*, in *Reforma Judicial en América Latina: Una tarea inconclusa*, Internacional Law Department, Ed. OAS, (no year informed), available at <www.oas.org/juridico/spanish/adjusti5.htm>. Original text in Spanish: "Desde comienzos de la década de 1980, los gobiernos, los líderes judiciales, las organizaciones de la sociedad civil y una serie de agencias de ayuda externa se han comprometido a realizar esfuerzos regionales para reformar las instituciones del sector de la justicia en Latinoamérica . [...] han introducido cambios en el marco legal, la organización y los recursos presupuestales del sector en la mayor parte de los países; en algunos casos ha generado mejoras tangibles [...]."

7 C. Hernández & R. Adelardi, (no year informed), p. 11. Original text in Spanish: "[...] este proceso de transformaciones, en un sector tradicionalmente conservador y poco innovador, es en sí un hecho de la mayor importancia. Pero más significativo aún es que todo indica que estos cambios no se detendrán."

2.2 *ICT Partnership for Reform*

According to Gamba, in the region "[...] a lot is being developed for ICT to bring efficacy to the administration of Justice".[8]

Even though the challenges are still huge, some countries already offer online forms, online filing for some kind of cases, common areas for the reception of documents, possibilities to send simple petitions to the court by e-mail, e-mail notification, the possibility of online consultation of the status of the cases, jurisprudence searching facilities, etc.:

> The region demonstrates valuable initiatives and forefront applications, even though they are limited to only a few judicial scopes. Some countries are advancing faster than others thanks to best practices, which can be the engine for the necessary reforms for the digitalization of justice in the region.[9]

The same author gives some examples of best practices in the implementation of ICT in the administration of justice in some of the countries of the region, such as Uruguay, where there is a kind of administrative (non judicial) proceeding that uses electronic files. Also, Costa Rica, Peru and some Argentinean jurisdictions have implemented reforms such as electronic notifications. Argentina also has a pilot program for digital filing and case management for Pension Law cases. Brazil has the *Ley de Informatizaçao do Processo Judicial* N° 11.419/2006 (and its modification) that has implemented, among other reforms, electronic citation and electronic petitions to the courts. In addition, Chile has been implementing reforms for the gradual elimination of the physical case file and has improved cases management in general.

In the last decade the impulse for change and implementation of ICT reforms for the administration of Justice has become evident. The benefits of consolidation of ICT reforms in the administration of justice have been pointed out by CEJA expressing that:

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8 J. Gamba, *Panorama del Derecho Informático en América Latina y el Caribe*, Ed. ECLAC/CEPAL-UN, Santiago de Chile 2010. Accesible at <www.eclac.org/id.asp?id=38898>/. Original text in Spanish: "[...] mucho se está desarrollando para que las TIC brinden mayor eficacia a la administración de la Justicia".

9 *Id.*, p. 7. Original text in Spanish: "La Región, en esta esfera, demuestra generalmente iniciativas valiosas y aplicaciones de vanguardia, aunque queden limitadas a algunos sectores judiciales. Algunos países están avanzando mucho más rápidamente respecto a otros y, gracias a sus buenas practicas, pueden ser motor de las reformas necesarias para la informatización de la justicia en la Región." Consult the same work for information about access to cases information as well as for information about the online publications of sentences by the courts in the Latin American Countries, p. 31 *et seq.*

> ICT would bring a positive impact on improving levels of transparency in the operation of the institutions of the justice system, improving access to the justice system by the citizenry, improving efficiency and efficacy in the performance of multiple tasks, enabling and enhancing innovation processes in the delivery of justice and at judicial management, enabling citizenry scrutiny over the justice system, facilitating accountability of the judicial authorities by the citizenry, among other scopes.[10]

2.3 *Alternative Dispute Resolution Methods as Allies for Change*

Reform of the Judicial Systems of the region is not only addressed by ICT changes but also by the implementation of ADR strategies:

> [...] not only through the traditional way of increasing infrastructure and resources of the institutions but by making use of new ways for the resolution of conflicts. Among these new ways, arbitration (mainly institutional) or mediation, being developed within the formal system or in autonomous scenarios can both be mentioned.[11]

ADR methods constitute interesting and suitable options for reducing costs and time, improving outcomes' efficiency, and avoiding the unnecessary escalation of the dispute into the courts of justice.

In the last twenty years or more the use of ADR has been slowly but firmly growing in the region. This can be explained by different causes, most significantly the judicial systems'

10 C. Hernández & R. Adelardi, (no year informed), p. 5. Original text in Spanish: "Las TIC podrían tener un alto impacto en mejorar los niveles de transparencia en la operación de las instituciones del sistema de justicia, en mejorar el acceso de la ciudadanía al sistema de justicia, en aumentar los grados de eficiencia y eficacia en el desempeño de múltiples labores, en posibilitar y potenciar los procesos de innovación en la impartición de justicia y en la gestión judicial, en posibilitar la auditoria ciudadana sobre el sistema de justicia, en facilitar la rendición de cuentas de las autoridades judiciales a la ciudadanía, entre otros ámbitos". Also see: V. Abad, A.F. Ávila, C. Carjuzaa, I. Carrión, G.R. Cosentino, G.C. Garavano, C.G. Gregorio, E.B. Hequera, M.A. Hernández, R. Li Rosi, R. Madueño, O. Martínez Ferreyra, C. M. Salaberry, G.G. Vassallo, N.G. Vecchi, & M.I. de Villafañe, *Jueces y Nuevas Tecnologías: Recomendaciones Acordadas durante el seminario realizado en Puerto Madryn*, Puerto Madryn, 10 September 2004, available at <www.biblio-juridica.org/libros/4/1646/26.pdf>.

11 *Id.*, p. 15. Original text in Spanish: "No sólo a través de la vía tradicional de acrecentar la infraestructura y la dotación de las instituciones del sector, sino echando mano a nuevas vías para la solución de los conflictos. Entre estas nuevas vías se puede mencionar el arbitraje (principalmente el institucional) o la mediación, ya sea que esta última se desarrolle adosada al sistema formal o en escenarios autónomos."

crisis and the practical impossibility of attending efficiently the increasing number of the cases submitted.

Ortega Hernández[12] has considered that, by promoting universal access to justice, states have ended up with a backlog of cases that is impossible to attend efficiently. As a consequence, this has given great impulse to ADR in the region, which is performed outside the courts but within some kind of state framework support.[13]

From a different perspective, others consider that an important impulse for ADR in the region, in particular, for arbitration, came from the expansion of cross border commerce in general:

> Certainly this proliferation of alternative dispute resolution mechanisms (in Latin America) is a function of the remarkable explosion of world trade, commerce and finance of the past twenty years. With economic globalization, the number of international commercial transactions has multiplied, and so have the numbers of international disputes appropriate for submission to ADR procedures of one sort or another.[14]

In this sense, it has been stated that:

> In this world economic globalization, conflicts derived from agreements and contracts between companies are no longer solved by ordinary courts, whatever the nationalities of the companies involved. Considering the general delays of judicial resolutions in every country that we take into consideration and the high costs of the proceedings, the economic world has searched for more suitable solutions for its interests.[15]

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12 R.J. Ortega Hernández, *Resolución Electrónica de Disputas. Perspectiva del Derecho Español*, available online – in Spanish – at <https://www.coloriuris.net/panel/aceptacion.jsp?hash=556dabbdc0a4be5490d9a785aad815ea>.

13 One example of this phenomenon can be found in Argentina's Prejudicial Mediation system for Civil and Commercial disputes, and the Labour Conciliation system, both services provided outside courts but organized by the Ministry of Justice, in the case of Prejudicial Mediation, and by the Ministry of Labour, in the case of the Conciliation system. Similar situations are found in Peru and Chile for special type of cases, as well as other examples found in other countries of the region.

14 Speech by W.D. Rogers, "Inter-American Development Bank Conference on Commercial Alternative Dispute Resolution in the XXI Century", *The Road Ahead for Latin America and the Caribbean*, 26-27 October 2000, Washington D.C., Available at: <www.iadb.org/mif/v2/speeches/rogers.html>.

15 R. García, *Aproximación a los mecanismos de Resolución Alternativa de Conflictos en América Latina*, in *El Otro Derecho*, No. 26-27, ILSA, Colombia, April 2002, p. 157. Original text in Spanish: "En este mundo de economía globalizada, los conflictos derivados de acuerdos y contratos entre empresas ya no se resuelven por los tribunales ordinarios, sea cual sea la nacionalidad de las mismas. Dada la demora general de las res-

ADR is being incorporated with different approaches as an integral part of many of the justice systems of the region, or as complements to it, and the process continues to expand and deepen.

Highton and Álvarez, both referents in the field, said about ADR back in 1998:

> A conflict resolution system is efficient when it counts with numerous institutions and proceedings that allow preventing disputes and solving them, mostly, with the lowest cost possible, starting from the needs and interests of the parties [...].[16]

It is now possible to find in the countries of the region, negotiation, mediation, conciliation, arbitration, and med/arb (combination of mediation and arbitration), as methods available in different settings and contexts and with varying degrees of acceptance and success in each case.[17]

As Highton and Álvarez stated: "[...] the movement does not end there; it is wider and more revolutionary".[18] Certainly, the most innovative and interesting revolution in the field of ADR is Online Dispute Resolution (ODR).

Katsh and Gaitenby eloquently observed that:

> Online dispute resolution shares with mediation, arbitration, negotiation and other processes of alternative dispute resolution a belief that disputes can be resolved out of court. ODR is unique in that it attempts to resolve disputes at

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oluciones judiciales de cualquier país que queramos estudiar y los elevados costos de los procesos, el mundo económico ha buscado fórmulas más adecuadas para sus intereses."

16 E.I. Highton & G.S. Álvarez, *Mediación para resolver conflictos*, Ed. Ad Hoc, Buenos Aires 1998, p. 25. Original text in Spanish: "Un sistema de resolución de conflictos es eficiente cuando cuenta con numerosas instituciones y procedimientos que permiten prevenir las controversias y resolverlas, en su mayor parte, con el menor costo posible, partiendo de las necesidades e intereses de las partes [...]".

17 For more detail on ADR in the Region recommended Arts. for consultation are the following: 1) *The Cost of Disputes in Companies and the Use of ADR methods: Lessons from Nine Latin American Countries*, Ed. Program ADR Network, Multilateral Investing Found, Inter-American Development Bank (in English), January 2006. Accessible at <www.iadb.org/document.cfm?id=1078124>. 2) *Dossier: Resolución Alternativa de Conflictos en América*, in *Sistemas Judiciales* Vol. 2, 2001, pp. 148-170, CEJA and Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP). Accesible at <http://issuu.com/sistemasjudiciales/docs/sistemasjudicales2/7>, general source <http://sistemasjudiciales.org>.

18 E.I. Highton & G.S. Álvarez (1998), p. 27. Original text in Spanish: "[...] el movimiento no termina allí; es más amplio y revolucionario".

> a distance, using the network and technologies connected to the network to facilitate solutions for the parties in dispute.[19]

The future for ODR in Latin America is still uncertain due to the many challenges that still need to be overcome. Some of those challenges will be analyzed in the following sections. Nevertheless, and at the risk of overgeneralization, it might be said that the future is full of promising opportunities for the ODR field in the Latin American region.

3 READINESS FOR ODR IN THE REGION

Regarding the expected evolution of ODR in the developed world, it might be said that:

> [...] from the results of the various experiences among professionals, virtual platforms and public initiatives, [...], it is abundantly clear that many of these mechanisms [referring to ODR] will continue to evolve and permeate into society. Because as it has been reckoned [...] quantitative but also qualitative benefits are emerging from ODR methods.[20]

Still, while ODR has been an object of research for quite some time, and while it has been applied in the developed world for more than a decade now, in the Latin American region the situation is quite different. Only in the last few years the first experiences have emerged. In this sense, for ODR to evolve and permeate into society, regional challenges should be addressed as well.

The opportunities for ODR in the region are promising due to key reforms currently being undertaken in ICT, Cyberlegislation harmonization,[21] and the Digital Economy.

As Mohamed Wahab has stated:

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19 E. Katsh & A. Gaitenby, "Introduction: Technology as the 'Fourth Party'", in *Online Dispute Resolution (ODR): Technology as the "Fourth Party", Papers and Proceedings of the 2003 United Nations Forum on ODR*, Geneve, 30 June-1 July 2003, Ethan Katsh and Daewon Cho (eds.), co-edited by Alan Gaitenby and Colin Rule. Available at <www.odr.info/unece2003>.

20 A.E. Vilalta Nicuesa, *Legal Framework and Harmonization of Online Disputes Resolution Methods*, 2009 International Workshop on ADR/ODRs. Building bridges: legal framework and principles. Universitat Oberta de Catalunya (UOC), Internet Interdisciplinary Institute (IN3), 15 September 2009. Available at: <www.uoc.edu/symposia/adr>.

21 For more information about Cyberlegislation in Latin America see Gamba 2010. Also, in English, see: *Study On Prospects for Harmonizing Cyberlegislation in Latin America*, Ed. UNCTAD-UN, New York-Geneva 2010. Accessible at <www.unctad.org/en/docs/dtlstict20091_en.pdf>.

> Information technology, the Internet, wide area networking techniques, and broadband connections have made it possible for anyone to transmit significant amounts of information across the globe instantaneously, which improves the conditions of the global economy, accelerates the growth of e-commerce, and creates an apposite milieu for the development of Online Dispute Resolution ("ODR").[22]

Thus, ICT and the Digital Economy in Latin America are interesting indicators of the readiness for implementation of ODR services, in particular when considering ODR services for e- and m-commerce disputes, being local or cross border in character.

The region experiences an incorporation of new internet users on a daily basis. At the end of 2010 there were approximately 181 million users, suggesting that the Digital Economy in the region is in constant expansion.

Studies have projected that global e-commerce will continue growing, being Latin America one of the regions that have led e-commerce growth rates (51% of average annual growth between 2003 and 2009).[23] In fact, despite the collapse of many economies, e-commerce B2C grew 39.2% in Latin America in 2009, which represented USD 21.2 billion for Latin America and the Caribbean.[24]

Despite the still comparatively low numbers, the region is increasingly targeted for its great opportunities. Also, ICT has elevated efficiency and thus become a strategic tool for economic growth in the whole region, helping to develop competitiveness and transparency.

The Economic Commission for Latin America and the Caribbean (ECLAC) inform us that:

> Latin American Companies recognize positive changes occurred by the incorporation of ICT, mainly in the level of costumer satisfaction, reduction of costs

22 M.A. Wahab, "The Digital Divide, E-Commerce, and ODR: Constructing the Egyptian Information Society", p. 1 in *Online Dispute Resolution (ODR): Technology as the "Fourth Party", Papers and Proceedings of the 2003 United Nations Forum on ODR*, Geneve, 30 June-1 July 2003, Ethan Katsh and Daewon Cho (eds.), co-edited by Alan Gaitenby and Colin Rule. Available at: <www.odr.info/unece2003>.

23 According to América Economía Intelligence, 2010.

24 *Special Report: E-Commerce in Latin America*, ed. América Economía Intelligence and Visa, 2010, p. 1, available at <http://especiales.americaeconomia.com/2010/comercio_electronico/estudio.php>.

> and increase of income. [...]. The potential for access of small and medium sized companies to new niches and markets is recognized as well.[25]

On the other hand, regarding the larger players:

> Of Latin America's sixty largest retail operators, whose annual sales all exceed US$500 million, 53% already have an online strategy in place. It might not seem much, but it represents a high growth rate if one bears in mind that the overwhelming majority of their e-commerce sites are less than two years old. In fact, many retail operators that do not yet have an online sales strategy told [...] they plan to launch their first e-Commerce site in the coming months.[26]

> Many components which are crucial for Digital Economy development continue growing in spite of the global economic crisis. For example, PC and Broadband penetration grew at a rate of 20% & 15% respectively. At the end of 2009, there were 150 million PC users and 40 million with broadband access in the region.[27]

Even so, the cost of access to broadband is one of the main obstacles to the growth of regional broadband connection penetration. It is expected that solutions will be found to spread broadband connection in the region at a better rate each year. Also, there are policies in progress to provide free Wi-Fi access in public places, as well as in schools. The region has been characterized by a huge proliferation of cybercafé's. These places provide broadband Internet access to a great portion of the population when other broadband connection facilities are unavailable or unaffordable.[28]

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25 W. Peres & M. Hilbert, *La Sociedad de la Información en América Latina y el Caribe Desarrollo de las Tecnologías y Tecnologías para el Desarrollo*, CEPAL/ECLAC-UN, Santiago de Chile, February 2009, p. 277. It is also true that different scholars have been debating about the impact of ICT on economic growth in the Latin American region. The debate still remains open. For more information on this issues, see: Peres & Hilbert (2009), pp. 63-73, also: Chapter X. On the other hand, when it comes to the impact of applying ICT in Government activities and services there is a clear consensus and strong evidence about its benefits in terms of improvement in transparency and efficiency. For more information see: Peres & Hilbert (2009), Chapter IX. Original text in Spanish: "Las empresas latinoamericanas reconocen los cambios positivos provocados por la incorporación de las TIC, principalmente en el nivel de satisfacción del cliente, la reducción de costos y el aumento de ingresos. [...]. También se reconoce su potencial para el acceso de las pequeñas y medianas empresas a nuevos nichos y mercados".

26 *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, ed. América Economía Intelligence and Visa, 2010, p. 2

27 *Special Report: E-Commerce in Latin America*, 2010, p. 1/2. Also total Internet users in 2009 hit 181 million in 2009 in Latin America, according to different sources such as the *Report E-Readiness in Latin America: A Report into Regional Conditions for e-Commerce*, ed. América Economía Intelligence and Visa, p. 4.

28 "In Latin America the most important places for the use of the Internet are those of public access, being the cybercafé's or the community centres such as libraries or other institutions". Original text in Spanish: "En

These growing processes have also been accompanied by the improvement and sophistication of the online offerings and a more educated online consumer base, composed of younger generations and digital immigrants who are becoming more aware of the benefits of new technologies:

> Various studies point out that at an international level the digital divide might be closing and that the developing countries might be going through an unprecedented catching up process in terms of access. [...] It has been sustained that the difference will be smaller as markets become saturated in developed countries.[29]

From the business point of view, Alec Oxenford, founder of the online auction house DeRemate.com (purchased by MercadoLibre.com), and a referent in the region, stated that, "In Latin America we finally reached a critical mass of users so that many business models on the Internet can rapidly produce revenue".[30]

Regarding banking services, like credit cards, there is also still a need to promote the availability of those services to the population of the region:

> At the end of 2009 there were 205 million credit card users in Latin America (representing a penetration of 37%) and 381 million (70%) owned a debit card, not all of which can be used in electronic commerce.[31]

This situation explains partly why in Latin America many people use the Internet as a research channel but, then purchase offline. This phenomenon, called ROPO (Research Online/Purchase Offline), has become common due to several different factors, but mainly

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América Latina, los lugares más importantes para el uso de Internet son los de acceso público, sean los llamados cibercafés o centros comunitarios en bibliotecas u otras instituciones." Peres & Hilbert (2009), p. 58.

29 *Id.*, p. 48. Original text in Spanish: "Varios estudios señalan que a nivel internacional la brecha digital se estaría cerrando y que los países en desarrollo estarían atravesando por un proceso de recuperación (catching up) sin precedente en términos de acceso [...] En particular, se sostiene que la diferencia disminuiría a medida que se saturen los mercados de los países desarrollados". On the other hand, the same study refers to the internal digital divide as a challenge to overcome being the internal digital divide the result of social and economic inequalities pre-existent in the region. Also it points out that access to broadband and connectivity are not sufficient indicators but the quality of the information and communication digitally transmitted should also be considered when analyzing the internal digital divide in Latin America. For more details, see Peres & Hilbert (2009), Chapter II.

30 *Special Report: E-Commerce in Latin America*, 2010, p. 2

31 In comparison, the US had a stock of 576 million credit cards at the end of 2009 (188%) while Spain had 44 million (95%). *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 5. For more information and comparative charts see: Peres & Hilbert, 2009, p. 47.

due to lack of banking services access and a general lack of trust in the Internet as a commerce channel.[32]

Still, from the vendors' point of view, ROPO means that there's a synergy process going on and businesses are acknowledging that for each online sale, there are approximately eight to ten offline sales that were initiated in online research done by consumers before they got into physical stores. This also means that consumers are getting more sophisticated and demanding, and at the same time are more prepared for a different kind of interaction.

Having said all of this, even though the constantly growing numbers of the region are encouraging, Latin America still has huge challenges to overcome in terms of broadband, PC penetration and banking services availability.

The situation for mobile phone penetration is quite different. At the end of 2009, the penetration of mobile phones in the Latin American region stood at 100.7%, far ahead of the US where the figure was 90%.[33]

This might be explained by the development of prepaid mobile phones that do not require a credit card or any other prerequisite. "Prepaid modality facilitates access to users, particularly the poorest, by demanding fewer prerequisites to own a line, even though the cost of the line might not be cheaper."[34]

In any case, this massive and fast technology adoption phenomenon means a significant change to vulnerable populations of the region. As most did not have regular phones available before, mobile devices elevated life quality and provided access to technology and new services.

Still the number of these mobile phones with broadband internet access is still not as high as expected, and most of the projections for the growth of m-commerce in the region are

32 This lack of trust in the Internet as a commerce channel occurs due to security and privacy issues, inefficiencies of the online sites, impossibility to access the web via secured access – like access through a cybercafé connection, etc.

33 Information based on *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 4.

34 Peres & Hilbert (2009), p. 54. Also, see: ----, *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 4, and E. Kaufman, "La Telefonía Móvil y los Servicios Para Ciudades" in *La Innovación ya no es lo que era*, ed. Dunken, Buenos Aires 2007, pp. 83-104. <www.links.org.ar/infoteca/innovacion.pdf>. Original text in Spanish: "La modalidad de prepago facilita el acceso de los usuarios, particularmente de los más pobres, al exigir menos condiciones para abonarse a una línea, aunque su operación no necesariamente tenga un costo menor."

based on the expectation of the growth of cheap broadband connection through mobile devices.[35]

ECLAC has said in this sense that:

> [...] it is expected that the big number of mobile phones in use would imply a greater incidence in that technology in the processing of the volume of information transmitted through digital networks, a phenomenon that has particular importance for Latin America and the Caribbean.[36]

3.1 *The Cross Border E-Commerce Puzzle*

Despite many obstacles, the number of Latin American consumers buying across borders through the Internet has been growing as well. This phenomenon is seen especially in the purchase of goods which are unavailable in the consumer's country.[37]

Paul Gartland, CEO at SkyBox, a logistics company based in Miami, declared to *América Economía Intelligence* that:

> When the iPhone was released in 2007, we received an enormous quantity of orders for the new gadget from Latin America. In 2009, we made 150,000 shipments for products from the US to Latin America – a rise of 18% compared to 2008 and despite the crisis [...].[38]

Still, cross border e-commerce has not reached its full potential, due to logistics and customs problems; online means of payment unavailability; IT interoperability issues; *lack of forum for solving disputes*; and generalized lack of trust from consumers in companies which are

35 For more information on mobile ecommerce in the region, see *E-Readiness in Latin America: A Report into Regional Conditions for E-Commerce*, 2010, p. 4.

36 Peres & Hilbert (2009), p. 53. Original text in Spanish: "[...] es de esperar que el gran número de celulares en funcionamiento implique una mayor incidencia de esa tecnología en el procesamiento del volumen de información que se transmite a través de redes digitales, fenómeno que reviste particular importancia en América Latina y el Caribe."

37 Regarding cross border e-commerce some authors have stated that ICT would mean a loss of local markets to the local companies of the developing countries, displaced by online competitors in the developed world. Others consider that even though the impact of these processes is still not clear, it is expected that cross border e-commerce would lead to better efficiency and competitiveness levels and would also open the global markets to the local companies of the developing world, which is already happening, thus benefiting also them in the process. For more information, see: Peres & Hilbert (2009), pp. Chapter X, in particular, pp. 275-276.

38 *Special Report: E-Commerce in Latin America*, 2010, p. 5

located too far away from the consumer's location. Also, in the future, the region expects to experience higher growth rates in intraregional cross border e-commerce.

Logistics present huge challenges both for cross border e-commerce and for local e-commerce as well. The regular mail in the region is not as efficient as expected presenting an infrastructure problem affecting, except from the Brazilian case, the whole region: bad routes, inefficiencies in terms of services; high costs associated to delivery of products, etc.:

> The countries in this region have inefficient and costly mechanisms for distributing goods. These inefficiencies make it necessary for many companies to set up their own logistics. In the US this practice is unimaginable, where firms like DHL, UPS and FedEx are the stores' best partners.[39]

While the region is facing many challenges, even the shyest projections present a promising future for ICT development and Digital Economy expansion. Online commercial transactions will continue to yield positive results and accelerated annual growth rates.

This scenario brings new puzzles:

> The expansion of traditional computer networks globally, as well as the emergence of mobile commerce, has enabled consumers to purchase goods and services from almost any vendor in the world. But what if something goes wrong? What if the item does not arrive, or what arrives is different than what the buyer expected?[40]

These questions asked by Rule, Rogers & Del Duca, are valid also for Latin America.

In the region's context the kind of problems described, as well as others, will be growing together with the increase in online commercial transactions, both at a local as well as at a cross border level.

Still, the question remains open as to how to address the disputes that will eventually arise, especially when it comes to cross border transactions, bearing in mind that there are no adequate, nor efficient forums available for online users to rely on.

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39 *Id.*, p. 8

40 C. Rule, V. Rogers & L.F. Del Duca, "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value – High Volume Claims – OAS Developments", 6 July, in *Uniform Commercial Code Law Journal*, (2010) Vol. 42, p. 221; Penn State Legal Studies Research Paper No. 24-2010; Stanford Public Law Working Paper No. 1635463. Available at SSRN: <http://ssrn.com/abstract=1635463>.

Under the current conditions:

> [...] possibilities for redress [...] are illusory [...] being the parties involved from different jurisdictions, and being at stake mostly non expensive transactions, traditional solutions available offline are too expensive, complex and of uncertain duration.[41]

These issues must be addressed for the region to keep pace in the growth of e-commerce and promote cross border interchange. Not doing so might mean the loss of consumer trust in the Digital Economy.

As Rule *et al.* have stated:

> [...] The complexities have led to the erosion of consumer confidence for this category of transaction. [...] Consumers need to have a way to obtain redress if they are to have confidence in making online purchases.[42]

But how to determine the applicable law or the jurisdiction in the cases mentioned above? In this sense, it has been said that:

> When the transaction occurs in cyberspace, to determine the applicable law and other jurisdiction issues about the dispute, turns out to be more complicated, and sometimes even impossible.[43]

And also that:

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41 G.R. Szlak, *Global Online Dispute Resolution (ODR) para casos provenientes del eCommerce transfroterizo B2B y B2C*, in Digital Journal *ElDerechoInformatico.com*, Vol. N°5, year 2010. Available at <www.elderechoinformatico.com> (online free registration is required). Original Text in Spanish: "las posibilidades de reparación [...] son ilusorias. [...] encontrándose los actores involucrados en diferentes jurisdicciones, y tratándose generalmente de transacciones de bajo monto, las soluciones tradicionales, disponibles offline, son demasiado onerosas, complejas, y de duración incierta".

42 Rule *et al.*, 2010.

43 M. Tamayo Calíbrese & J. Hanna, "El Comercio Electrónico y los Métodos Alternativos para la Solución de Disputas. Una internsección inevitable", in *Sistemas Judiciales* No. 2, 2001, pp. 56-59, ed. Study Centre for Justice in the Americas (CEJA) and Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP). Accesible at <http://issuu.com/sistemasjudiciales/docs/sistemasjudicales2/7>, general source <http://sistemasjudiciales.org>. Original text in Spanish states: "Cuando la transacción ocurre dentro del ciberespacio, el fijar la ley aplicable y otros temas de jurisdicción, sobre la disputa, se torna mucho más complicado, y hasta tal vez, imposible".

> [...] interaction on the Internet is often of a cross border character, which is why problems derived from the lack of territorial boundaries of the virtual environment, and the lack of regulation, accentuate the problem of determination of the competent tribunals.[44]

Nevertheless, even if the competent judge and the applicable law would be easy to determine in a given case, litigation costs when the parties are located in different jurisdictions is still perceived as a problem not easy to solve, especially when professional fees may exceed the amount of the transaction in dispute.

The situation described above presents great challenges to governments and to legal and technology experts as well.

Solutions proposed point out the need for ODR. As Shultz *et al.* have stated:

> As cyberspace is an environment characterized by interconnections and dematerialization, it makes sense to resolve disputes by an interconnected and dematerialized tool. This tool is online dispute resolution [...].[45]

Traditional legal systems are based on the stability provided by time and space as the regular framework for the legal structure. Using online tools to address disputes that arise online means a radical change. As online interaction is increasingly perceived as more flexible, informal and efficient, ODR has become a promising option for out-of-court dispute resolution.

As has been mentioned before, in the developed countries ODR has been an object of debate and research since the late 1990s. Latin America, even though still behind, cannot afford to stay out of this debate. This is particularly significant due to the fact that the region is consolidating ICT and Digital Economy indicators and is moving towards the deepening of these processes.

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44 R.J. Ortega Hernádez, "Regulación en Internet", in *Alfa Redi: Revista de Derecho Informático*, No. 109, Peru, August, 2007. Available at <www.alfa-redi.org/rdi-articulo.shtml?x=9464>. Original text in Spanish: "(...) es sabido que las relaciones en Internet son muchas veces de carácter transfronterizo, por lo cual los problemas derivados a la desterritorialidad del espacio virtual y la escasa regulación, acentúan los problemas referidos a la escogencia de tribunales competentes en la materia." Also see: R.J. Ortega Hernández & J.M. Lezcano, *El Camino hacia Nuevos Paradigmas en la Resolución de Conflictos*, Paper presented at the 9° ODR World Forum, Buenos Aires 2010.

45 T. Schultz, G. Kaufmann-Kohler, D. Langer & V. Bonnet, *Online Dispute Resolution: The State of the Art and the Issues*, University of Geneva 2001, p. 13, Available at SSRN: <http://ssrn.com/abstract=899079>.

3.2 *Facing the Regional Challenges*

Implementation of ODR Programs at a regional level is not an easy task, but neither an impossible one.

ODR regional initiatives need to set strategic long term goals and to do so through a multi-stakeholder perspective. This will allow the region to address the complexity required for the technological, social, economical, legal and cultural challenges certain to be faced moving forward.[46]

Government cooperation with companies, the scientific community and civil society, both at the national and international level, is needed for ODR to flourish in the region in two specific aspects:

1) The promotion of ICT policies to reduce the internal and international digital divide and to overcome social, economic and cultural challenges.
2) The consolidation of an adequate legal framework for ICT in general that would support ODR development.

3.2.1 Promoting ICT Policies

ICT policies at the regional level can serve as catalysers in terms of ODR. Since the 1990s the Latin American and Caribbean governments have been developing and implementing actions directed toward bringing the benefits of ICT to the general public. This process has included different policies, such as the inclusion of ICT programs in schools; the promotion of ICT through social media campaigns; the leverage of the hardware and software industries; and the digitalization of government processes, among others.

Those policies have been deepened and expanded over the years, and, most important; they have been progressive, including the private sector as a crucial partner for the adoption and implementation of ICT:

> In the last years most of the countries defined strategies, plans, policies or digital programs that tended to implement public policies on ICT as means for the construction of the Information Society. At the regional level, numerous global and regional declarations were finally expressed in a strategy for the

46 For general economic, social and environmental indicators for Latin America and the Caribbean, in English, see *Statistical Yearbook for Latin America and the Caribbean*, CEPAL/ECLAC-UN, Santiago de Chile 2010. Accesible at <www.eclac.org/estadisticas/default.asp?idioma=IN>.

> Information Society for Latin America and the Caribbean, which implies a sequence of regional action plans known as eLAC.[47]

eLAC is the biggest joint initiative in terms of a regional agenda for ICT policies. It constitutes a regional tool to achieve the goals set at the World Summit on the Information Society (WSIS) as well as at the Millennium Development Goals (MDGs).

Its purpose is to identify and take into account the specific and urgent needs of the countries of the region, facilitating adoption processes throughout cooperation and interchange of best practices among them.[48]

Regarding regional cooperation efforts:

> The plan also calls for strengthening the mechanisms for shared e-government services, by developing regional cooperation efforts to facilitate the sharing/transfer of technologies, platforms and computer applications and programs, as well as relevant knowledge, skills and best practices. It also proposes the goal of promoting the interoperability of standards based e-government systems in Latin America and the Caribbean, and of continuing to develop a regional program of interoperability and standards for e-government services. The effort is aimed at ensuring that it will be possible to interconnect services within a jurisdiction and between jurisdictions, and draws on recommendations from sources such as the White Book on e-Government Interoperability.[49]

Key breakthroughs have been achieved, and there is a lot more in progress. The *Concilianet/Profeco* case, an ODR provider established as an e-government service by the Mexican government, is an excellent example of ICT policies in action to be examined below.

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47 Peres & Hilbert (2009), pp. 301-302. "En los últimos años la mayoría de los países definieron estrategias, planes, políticas o programas digitales tendientes a poner en práctica políticas públicas sobre las TIC como medios para construir sociedades de la información. En el ámbito regional, numerosas declaraciones regionales y mundiales finalmente se plasmaron en una estrategia sobre la sociedad de la información para América Latina y el Caribe que implica una secuencia de planes de acción regionales conocidos como eLAC."

48 For more information about eLAC 2007 & eLAC 2010 see: <www.eclac.org/socinfo/default.asp?idioma=IN>. See also Peres & Hilbert (2009), Chapters X and XII.

49 *Study On Prospects For Harmonizing Cyberlegislation In Latin America*, ed. UNCTAD- UN, *English Version*, New York and Geneva 2010, p. 48. Also see this Study in order to get information about Cyberlegislation in each of the following eleven Latin American countries: Argentina, Plurinational State of Bolivia, Colombia, Chile, Cuba, Ecuador, México, Paraguay, Peru, Uruguay and The Bolivarian Republic of Venezuela, pp. 10-33.

3.2.2 Promoting an Adequate Legal Framework

The promotion of an adequate legal framework would bring confidence, security and certainty to ICT development in general and to ODR in particular.

Regarding consumer protection in the e-commerce environment, efforts must be exerted to meet the needs of the Digital Economy. Even though some countries have incorporated specific reforms in order to protect consumers in the local online environment, most have not yet addressed the issue of consumer protection when they choose to buy online across borders using the Internet:

> At a global level, governments face the challenge of promoting and facilitating the [...] economic growth based on technologies emerging from networks, and bringing their citizens an effective and transparent protection to the consumer in e-commerce. [...] The OCDE country members initiated, by the end of the 1990s, a revision of their applicable laws as well as their practices in the field of consumer protection, to determine whether changes are required or not in terms of the particular characteristics of e-commerce. Furthermore, the country members have studied the way in which auto-regulation efforts might help bring an effective and fair protection to consumers in this environment.[50]

Regarding the regional legal framework for electronic contracts and e-commerce, different countries have chosen different approaches. Some countries in the region have decided to refer to UNCITRAL Model Law, others have reformed existent laws to meet the needs of the Digital Economy, while another group has opted to dictate new and specific laws to address those issues.

Regarding electronic and digital signatures, the UNCITRAL Model Law on Electronic Signatures (2001) has been also relevant, bearing in mind that many countries of the region refer to it in their legislation.

According to Gamba:

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50 Gamba 2010, pp. 8-9. Original text in Spanish: "A nivel global los gobiernos enfrentan el reto de impulsar y facilitar el [...] crecimiento económico basado en las tecnologías emergentes de redes, y de proporcionar a sus ciudadanos una efectiva y transparente protección al consumidor en el comercio electrónico. [...] Los países miembros de la OCDE han iniciado, a finales de los años 90, la revisión de sus leyes vigentes así como de las prácticas de protección al consumidor, para determinar si se requiere o no realizar cambios en términos de las características particulares del comercio electrónico. Asimismo, los países miembros han estudiado la manera en que los esfuerzos de autorregulación pueden ayudar a proporcionar una protección efectiva y justa a los consumidores en este contexto". Please note that from the region, only Chile and Mexico are OCDE members.

> Almost all (18/23) of the countries of the region that have been analyzed have specific laws dedicated to electronic and digital signatures. In the 23 analyzed cases, 5 do not have a specific norm in the discipline yet (Bolivia, Cuba, El Salvador, Paraguay, Saint Lucia), 4 have [specific norms] prior to [the year] 2000 (Bermuda, Colombia, Puerto Rico, Uruguay), while 14 have [specific norms] dictated in the period 2000-2009 (Argentina, Barbados, Belize, Brazil, Chile, Costa Rica, Ecuador, Cayman Islands, Mexico, Panama, Peru, Trinidad and Tobago, Dominican Republic and Venezuela).[51]

3.2.3 Promoting Research and Development (R&D) for the Cultural Change

Another regional necessity is to promote R&D specifically for ODR. This will facilitate identification of regional needs, for ODR to be able to consolidate in the region.

Kaufman states that "The convergence of society, government and ICT urgently requires the participation of universities, especially in the field of Social Science".[52]

R&D will also help build successful action toward facing the hardest of the challenges, namely *cultural change*:

> [...] ICT increases competitiveness, regardless of which both people and companies tend to adopt and use it in a slower pace than the actual technical progress, due to the uncertainty that [ICT] generates [...].[53]

Last but not least, R&D would also provide tools for accurate statistics in the performance of ODR programs yet to be implemented.

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51 *Id.*, p. 10. Note that Paraguay already approved a Digital Signature Law in late 2010. Original text in Spanish: "La casi totalidad (18/23) de los países de la región que han sido analizados cuentan con normativas específicas dedicadas a la materia de firma electrónica y firma digital. En los 23 casos analizados, 5 resultan no tener todavía una disciplina específica en la materia (Bolivia, Cuba, El Salvador, Paraguay, Saint Lucia), 4 resultan ser anteriores al 2000 (Bermuda, Colombia, Puerto Rico, Uruguay), mientras que 14 han sido realizadas en el período 2000-2009 (Argentina, Barbados, Belize, Brasil, Chile, Costa Rica, Ecuador, Islas Caimán, México, Panamá, Perú, Trinidad y Tobago, Rep. Dominicana y Venezuela)."

52 E. Kaufman, Buenos Aires, 2005, p. 13

53 Peres & Hilbert (2009), Chapter X, in particular p. 304. Original text in Spanish: "[...] las TIC permiten aumentar la competitividad, pese a lo cual su apropiación y utilización por parte de personas físicas y empresas es más lenta que el ritmo del progreso técnico, debido a la incertidumbre que este genera [...]".

3.3 *The "Trust Cocktail"*

The distance between the developed world and the developing world in terms of consumer satisfaction is huge. Still, as will be seen in this chapter, positive changes are arising in the region, together with transparency and competitiveness developments making progress as part of the Digital Economy expansion.

In traditional commerce as well as in e-commerce transactions in the region, still most consumers (depending on the company, the circumstances and the type of item bought) find it quite difficult to do things like returning an item, returning an item and not paying for shipping (even in the cases when the return is due to problems under the business responsibility), making a guarantee effective, getting a refund, etc.

Even when the relevant consumer protection legislation is in favour of the consumer, it is not surprising to find out that companies simply do not comply with the law or they just do it only when threatened with enforcement.

One interesting shift taking place gradually in the region since the proliferation of the Digital Economy is that, when it comes to e-commerce approaches, businesses are addressing disputes with costumers/consumers not as a loss to be *thrown* to the legal department, but rather as an opportunity to build trust and increase sales through the consumer support and the marketing departments.

Maybe this approach has been taking place in the developed world for many years, but for the Latin American region the awareness that solving problems or disputes is an opportunity to build trust and bond with costumers is only now maturing. Together with the expansion of the Digital Economy and the empowerment of consumers, this understanding is growing as part of the awareness that comes along with social networks, reputation and feedback systems, online forums and other similar tools.

As a result, businesses of the region selling products and services online through e-commerce, have become quite aware of the need for efficient mechanisms for the resolution of problems and disputes arising from the online environment.

This new ingredient of consumer empowerment has been also gradually influencing traditional commerce as well, because even when buying products or services offline, still, consumers will use the Internet to comment about those products or services.

In this sense, cultural change is being promoted by Internet interaction, affecting the way business is done and, most importantly, the way disputes are managed in the region.

As an example, a businessman from the region confessed that, even though he had better profit margins when selling through his own e-commerce platform (at his own website), he applied higher standards for customer support for those customers buying his products through a famous market place platform, just because that market place platform had a strong reputation system that he used as a marketing tool.

Marketplaces understand their community capacity building and thus recognize the importance of keeping fair and strong reputation systems. This also makes them aware of the need to count on efficient mechanisms to manage disputes regarding negative feedback in their communities in a fair way, and limit legal responsibility for users' behaviour online.

For all the reasons mentioned above, the field is fertile for ODR to flourish, at least in the private sector in Latin America. Companies have started to welcome proposals for ODR implementation, expecting to combine ODR with other marketing initiatives for building trust in their businesses and in the Digital Economy as a whole. They understand more than any of the other relevant stakeholders the meaning and potential of ODR as a tool for value creation in the costumer experience.

Still, ODR is not seen by companies as a legal or dispute resolution matter, nor as an autonomous issue, but rather as one of the elements of what I will be calling the "trust cocktail", which also refers to auto-regulatory measures, such as codes of conduct, best practices, trustmarks or seals of trust, and feedback or reputation management systems, among others.

This promising and fertile context has inspired the Latin American eCommerce Institute (ILCE) to develop its ODR Regional Program for the Digital Economy in partnership with its eConfianza Trustmark Program.[54]

Both initiatives working together seek to build trust in the online environment; improve the relationship between online consumers and vendors; achieve high levels of transparency and respect for legality online; facilitate redress for consumers while promoting best practices and auto-regulatory frameworks for cross border regional transactions, all of which will help to build trust in the Digital Economy.

54 See <www.econfianza.org>.

4 ODR IN ACTION IN LATIN AMERICA

4.1 *ODR Regional Program for the Digital Economy by the Latin American E-Commerce Institute – ILCE*

ILCE is a non profit organization of regional character. It is organized as a federation of e-commerce chambers and associations.[55] Its mission is to build an open network among these institutions and spark initiatives of each of its organization members and of all of them together as a whole, in order to promote e-commerce and e-business and help to develop the Digital Economy in the Latin American region.

Since its creation, ILCE has promoted many initiatives which have been expressed in activities of each of the institutions of the network.[56]

Regarding ODR, at the end of 2009 ILCE created its ODR Regional Program for the Digital Economy, which is associated with another ILCE initiative called *eConfianza*, which promotes the use of a trustmark, including a reputation system, as well as an auto-regulation framework for e-commerce.

As ILCE's mission is to promote the development of the Digital Economy in Latin America and taking into consideration the context described in the previous sections, this institution decided to assume the challenge of leading and assisting the implementation of ODR ser-

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55 ILCE's network members from Latin America and the Caribbean are: 1) Argentina: Argentinean e-Commerce Chamber – CACE – <www.cace.org.ar> 2) Brazil: Brasileña e-Commerce Chamber – Camara e-Net <www.camara-e.net> 3) Colombia: Colombian e-Commerce Chamber – CCCE- <www.cce.org.> 4) Chile: Santiago's e-Commerce Chamber – CCS – <www.ccs.cl> 5) Ecuador: Ecuadorian Corporation of e-Commerce – CORPECE – <www.corpece.org.ec> 6) Ecuador: Guayaquilean e-Commerce Chamber – CCG- <www.lacamara.org> 7) Mexico: Mexican Association for Internet – AMIPCI – <www.amipci.org.mx> 8) Paraguay: Paraguayan e-Commerce Chamber – CAPACE – <www.capace.org.>py 9) Paraguay: Paraguayan Internet Chamber – CAPADI – <www.capadi.org.py> 10) Peru: Peruvian e-Commerce Chamber – CAPECE – <www.capece.org.pe> 11) Dominican Republic: Dominican e-Commerce Chamber – CADOLEC – <www.cadolec.org.> 12) Venezuela: Venezuelan e-Commerce Chamber – CAVECOM – <www.cavecom-e.org.ve.> ILCE's network members from other regions: 13) Spain: Spanish Association for e-Commerce – AECEM – <www.aecem.org> 14) Portugal: Association of e-Commerce and Internactive Publicity ACEPI <www.acepi.pt>.

56 Other ILCE's initiatives are: Latin American Congresses on e-commerce "eCommerce LATAM", National Conferences"eCommerce Day", Social Network for ebusiness interchange "Comunidad eBusiness", awards for e-commerce"eCommerce Awards", training and e-learning programs on e-commerce and e-business, spreading activities, such as Seminars, Conferences, etc., the "Centre for Studies for the Digital Economy", the online digital TV show on online business "Explorando Negocios.tv", the "Business 2.0 bridging Program" for the interchange of experiences and knowledge between Latin America and Europe, and Latin America and the US, among others. For more information about these and other initiatives from ILCE, see <www.einstituto.org>.

vices regarding disputes arising from e- and m-commerce to meet the needs of online consumers and vendors at a regional level. Also, by specializing in the field, the institution seeks to promote and assist implementation of different ODR services for a variety of different contexts and needs.

4.2 *International Cooperation: What About the Region's Readiness for a Global ODR System?*

Since 2010 ILCE's ODR Regional Program has been collaborating at the international level with a group of experts and institutions advocating for the establishment of an UNCITRAL Working Group for ODR.[57] ILCE has also supported the debate for the approval of a Model Law or similar framework for cross border e- and m-commerce ODR disputes, B2B and B2C.[58]

This cooperation is done in the understanding that a framework as such might facilitate the creation in the future of a global ODR system that would help to handle cross border e-commerce disputes, fairly, adequately and efficiently, both for consumers and for sellers.

In the promotion of multi-stakeholder approaches, ILCE's member organizations are involved in regional frameworks such as Mercosur,[59] in particular the 13th Subgroup on Electronic Commerce. Just to mention the latest examples: During the XXIII Subgroup ordinary session, held in May 2010 in Buenos Aires, Argentina, a presentation on ODR for the Digital Economy was done by the Argentinean eCommerce Chamber (CACE) – member of ILCE – and ILCE. National delegations from Argentina, Brazil, Uruguay and Paraguay, participated and debated about the possibilities offered by ODR. The Brazilian delegation suggested that the organ might be working in a Best Practices document for the use of ODR tools by public institutions of the region. CACE/ILCE's presentation on ODR and the Brazilian suggestion for Best Practices were both incorporated to the final resolution of the meeting.[60]

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57 For information about ILCE's advocacy for the global ODR system see: Note A/CN.9/710, dated 26 May 2010, Buenos Aires Global ODR event organized by ILCE in 2010 <www.einstituto.org/onlinedisputeresolution>, ILCE's participation at the Vancouver 2010 Conference and blog: <www.odrandconsumers2010.org>, among others.

58 It is expected that UNCITRAL's framework will be the basis for the creation of a Global ODR System. For more information about the proposal for a Global ODR System see Del Duca *et al.*, 2010.

59 MERCOSUR is a subregional union of states integrated by Argentina, Brasil, Paraguay and Uruguay, as member states and by Bolivia, Colombia, Chile, Ecuador, Peru and Venezuela as associated states. It was created in March 1991 by the signature of the *Asunción* treaty. <www.mercosur.int>.

60 MERCOSUR /SGT N°13/ Acta N°1/0 XXIII Ordinary Meeting of the Working Subgroup N° 13 "Electronic Commerce". To see CACE/ILCE presentation please see Annex at: <www.mercosur.int/show?contentid=383>.

Finally, existing ODR models should be reshaped and adapted to the region's characteristics if the purpose is to achieve regional adoption of ODR. Also, when defining a future model law or similar framework, the particular characteristics of the Latin American environment should be identified and taken into account.

For example, while the issue of confronting power imbalances between parties might be addressed by promoting the development of ODR providers which comply with quality standards and best practices, or, for instance, by providing adjudicative processes such as arbitration, complemented with chargebacks or refunds through payment systems, in the Latin American region this might be useful but might not be enough for this purpose. Thus, further action and measures, probably focused on motivation through marketing ideas (social networks, reputation systems, etc.) should be proposed and implemented.[61]

The promotion of local and regional ODR services as well as the promotion of an adequate legal framework for the Digital Economy will facilitate the shaping of the change needed in the region toward its involvement in global systems for cross border e-commerce ODR and for other ODR applications as well.

4.3 *The Mexican Case* Profeco/Concilianet: *E-Government and ODR*

In 2008 the Mexican Consumers' Protection Agency[62] created *Concilianet*,[63] an e-government service for consumers which offers online mediation.

Concilianet/Profeco has been recognized in Mexico as one of the best e-government services available. The system is still only available for claims against previously registered companies (18 until the end of 2010). Regarding those companies, consumers can select to proceed through the traditional service offered by *Profeco*, or to file a case through the *Concilianet* online platform.[64] A case filed in the traditional system lasts about 73 days, while in *Concilianet* system the number of days is significantly reduced to 22.

A distinctive feature of *Concilianet* is that is does not specialize in disputes arising from the online environment. It rather offers services regarding conflicts arising also from online and offline transactions, regulated by the Mexican Federal Law for Consumer Protection

61 For more analysis please see section 3.4 of this document.

62 Consumer Protection Agency in Mexico: <www.profeco.gob.mx/>.

63 See <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>.

64 The possibility of filing an online case into Concilianet was made possible in Mexico since a 2004 legal reform of the Mexican Federal Law for Consumer Protection, in Spanish "*Ley Federal de Protección al Consumidor*", Art. No. 99.

(*Ley Federal de Protección al Consumidor*). The innovation is that the mechanism for the mediation offered to the parties is provided online through videoconferencing and the assistance of a *Concilianet* neutral who works online as well.

The whole proceeding is carried on online, from the beginning: filing the case, uploading documents, hearings, and outcome, with *Concilianet* being the first fully-online ODR government provider for consumer disputes in the Latin American region.

If an agreement is reached between the consumer and the company, it is written and signed online with electronic signature.

Concilianet's implementation process started in 2008. For a year and a half the first experiences were with two companies participating: Aeroméxico and Hewlett Packard Mexico. In the next stage three other companies joined *Concilianet*, among them another airline and a company for the provision of natural gas. In 2009 another ten companies joined, reaching in 2010 a total of 18 companies committed to the system.

In 2008 171 cases were handled with 97% agreement rates. Between 2008 and 2010 *Concilianet* has mediated in 1134 cases with a 96% of agreement rate.

4.4 The Peruvian Case: Cibertribunal Peruano[65]

The Peruvian Cybertribunal is an NGO created in November 1999. It is dedicated to two main activities:

1. Conciliation (Mediation) Centre certified by the Peruvian Ministry of Justice since 2001.
2. Dispute Resolution Centre (Arbitration) for disputes of domain names accredited by the ccTLD.pe administrator since 2008.

4.4.1 The *Cibertribunal* as Conciliation (Mediation) Centre – Traditional ADR

The *Cibertribunal* specializes in ICT and cases arising from the use of the Internet. The working areas covered by the centre are: e-commerce, electronic contracts, intellectual property, marketing online, telework, etc.

The conciliation (mediation) services offered by the centre are not online services but rather traditional ADR services in order to comply with the Extrajudicial Conciliation Law

65 See <www.cibertribunalperuano.org>.

of Peru (*Ley de Conciliación Extrajudicial*)[66] which establishes mediation as a previous requirement before resorting to courts and only for specified issues. This law is applicable only in some of the Peruvian jurisdictions and does not provide authorization for online proceedings. Even though the centre is technically and professionally ready for ODR, they do not apply it because they are bound by the above mention law.

In any case, the existence of this centre and its readiness for ODR means that in Peru, ODR for Internet related matters might become a reality in the near future

4.4.2 The *Cibertribunal* as Dispute Resolution Centre – ODR – for Domain Names .pe

In the field of domain names .pe and trademarks' disputes, the service offered by the *Cibertribunal* is ODR, and is the first regional organization to bring ODR services for these kinds of disputes.[67]

There is a lot still to do, especially in terms of spreading the centre's activities and services among relevant stakeholders. The total cases managed until the end of 2010 were 16.

As limited as this number might sound, the work the centre is doing is of great value for the region.

Both the *Cibertribunal Peruano*, and *Concilianet* from Mexico, are local ODR providers offering services along with state recognition.

4.5 *ODRLatinoamerica: Social Network for Conflict Resolution Professionals*

ODRLatinoamerica is a social network, created at the end of 2008. It was created for conflict resolution professionals to be able to exchange knowledge and experience and to learn about the application of ICT to the ADR field.

The network reached 2000 members at the beginning of 2011. Its main success has been the leadership of cultural change, the spreading of ODR and the generation of favourable consensus towards ODR among conflict resolution practitioners and experts in the region.

66 See Law Nr. 26872, 13 November 1997.

67 For more information about the *Cibertribunal Peruano*, see A. Alvarez Calderón, *El Cibertribunal Peruano*, in *REDI*, No. 14 September 1999. Available at <www.alfa-redi.org/rdi-articulo.shtml?x=336>.

During 2010 *ODRLatinoamerica* organized the 9th ODR World Forum 2010 together with the Federal Police University Institute and other international organizations.[68]

This social network has promoted Latin American participation in international ODR forums, such as Cyberweek. In fact in 2008 and 2009 *ODRLatinoamerica* has coordinated a Spanish online event in the framework of the Cyberweek. In 2010, the Spanish participation in Cyberweek deepened by the completion of a complete version in Spanish of Cyberweek co-organized by this organization.[69]

It is expected that this initiative together with others will keep helping and preparing the region for ODR.

5 Final Thoughts

As Cortés states:

> To predict how ODR might develop in the EU over the next few years may be speculative and risky since a forecast on anything involving technology may soon be proven wrong.[70]

This statement is also true for Latin America. Still, the future for ODR implementation in the region seems promising.

Regarding traditional disputes addressed by the judicial systems, efficiency and efficacy is being searched by ICT reforms and ADR assistance. Both elements, ICT and ADR, are of a crucial character for the expansion of ODR. Also, ICT structural reforms in the region, cyber legislation harmonization and Digital Economy expansion, are indicators for the readiness of the region in terms of capacity for ODR successful implementation.

Regarding the justice system, a positive trend might be taking place in the near future.

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68 For more information see <www.odr2010.com.ar>.

69 Cyberweek is a web-based conference focused on the practice of ODR. It has been convened by the National Centre for Technology and Dispute Resolution (NCTDR) annually for the past 13 years. Cyberweek 2010 was co-organized by NCTDR & The Werner Institute for Negotiation and Dispute Resolution at Creighton University School of Law. The Spanish version was coordinated by *Odr Latinoamerica*. To visit Cyberweek 2010 site in Spanish please see <http://cyberweek2010esp.jimdo.com>.

70 P. Cortés, *Building Legal Standards in the EU for ODR Services*, in *2009 International Workshop on ADR/ODRs. Building bridges: legal framework and principles*, Universitat Oberta de Catalunya (UOC), Internet Interdisciplinary Institute (IN3), 15 September 2009. Available at <www.uoc.edu/symposia/adr>.

On the one hand, ICT deployment in the justice system will be preparing the general public and the legal community for new and more efficient ways of handling disputes.

On the other hand, ODR characteristics, and especially when applied to e- and m-commerce, will deepen the process of users involvement in dispute resolution proceedings. This will lead users to expect the same kind of transparency and efficiency when dealing with disputes in the traditional system as well. Accordingly, the user's new protagonist role and maturity might be generating a domino effect for better practices in the field of dispute resolution in general, be it for disputes addressed by the traditional justice system, or for out of court mechanisms.

From a different perspective but along the same line of analysis, Orna Rabinovich-Einy states that, "even where ODR is not employed as a means for resolving conflict, it can inspire change in the design of traditional means for dispute resolution". She believes that while traditional approaches for dispute resolution adopted rigid molds that resist learning improvement, "ODR, in particular due to its automatic recording of rich data on resolution communications in digital format, has the potential for enhancing both accountability and learning".[71]

Regarding disputes arising from the Digital Economy and/or from the online environment in general, ODR solutions seem crucial, both for (a) cases for which there is no other possible or practical solution available, and for (b) cases in which there are available solutions but they are too expensive and/or complex to rely on.

Accordingly, it is expected that with e-commerce growth and maturity in the region the strongest impulse for ODR will come from private sector initiatives, as part of providing solutions for both those types of cases [(a) and (b)]. This solution will be implemented as part of the "trust cocktail" measures to be adopted by companies to strengthen bonds with costumers and build trust in the Digital Economy, thus accelerating e- and m-commerce expansion.

Nevertheless, for ODR implementation to be successful and permeate into society in the long term, multi-stakeholder approaches should be emphasized and preferred to enrich its capabilities and meet the needs of its end users, while offering high level standards and best practices for out of courts resolution of disputes.

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71 O. Rabinovih-Einy, "Enhancing Accountability and Learning in Dispute Resolution Through Technology", in *IDP. Revista de Internet, Derecho y Política*, Universitat Oberta de Catalunya, June 2010, p. 1.

There are some initiatives in action, and it is expected that in the future, and with the deepening and maturity of the region in terms of Digital Economy and ICT, more initiatives will be functioning, not only from the private sector but also from the public sector, as part of e-government services expansion. Still, to enable users to actually take advantage of ODR systems to be implemented, the cultural challenge will play an important role, which is why spreading, training and reaching out activities are crucial for the user's adoption of available services, together with an adequate legal framework for ICT that can bring certainty to online interaction.

Finally, regarding the readiness of the region for the adoption of Global ODR initiatives, the promotion of local and regional ODR services to meet different needs, as has been previously stressed, will help prepare the region for successful involvement in global initiatives.

24 Online Dispute Resolution for Africa

Mohamed S. Abdel Wahab

1 Introduction

Africa is vast and rich continent. It is the world's second-largest and second most populous continent.[1] With approximately more than 2000 spoken languages and around 800 dialects used throughout Africa,[2] the Continent is experiencing an accelerated economic growth, especially in sub-Saharan low and middle income States. The African expected economic growth rate is at about 5.0% for 2010 and 5.5% in 2011.[3]

Such rich diversity, which spans the African continent, has certainly impacted its legal culture, especially the dispute resolution culture. However, owing to the numerous economic and technological challenges experienced by Africa, the incorporation of ICT in dispute resolution schemes has not yet been fully utilized. In fact, ICT implementation in traditional dispute resolution schemes as well as the creation of new forms of technology based processes is still at its inception in the overwhelming majority of States. To the exclusion of South Africa, Egypt, and Tunisia, which often receive the highest African rankings in the Network Readiness Index (NRI) developed by the World Economic Forum,[4] African states are grappling to build their ICT infrastructure and bridging the digital divide.[5] However, it is worth noting that Africa now holds ten places in the top 100 states

1 Africa hosts 54 independent states following the split of Sudan and the creation of the Republic of South Sudan. Africa is the second largest continent after Asia, which hosts around 44 independent states. The African continent covers 6% of the Earth's total surface area and around 20.4% of the total land mass. Its population is estimated at around 1 billion people and accounts for approximately 14.72% of the world's population.

2 In addition to Arabic, which is an imported language spoken Africa since the Arab conquest of North Africa over 1400 years ago, there are five major language families, these are: (1) *Afro-Asiatic*; (2) *Nilo-Saharan*; (3) *Niger-Kordofanian*; (4) *Khoi-San*; and (5) *Austronesian*. See <http://africanlanguages.com>, last accessed 15 June 2011.

3 IMF; World Economic Outlook, Recovery, Risk, and Rebalancing (2010) p. 88. Data available at <www.imf.org/external/pubs/ft/weo/2010/02/pdf/c2.pdf>, last accessed 15 June 2011.

4 According to the 2011 Global Information Technology Report, Tunisia ranked 35th, South Africa ranked 61st, and Egypt ranked 74th on the 2010-2011 NRI. See World Economic Forum; Global Information Technology Report (2010-2011). Data available at <http://reports.weforum.org/global-information-technology-report/>, last accessed 15 June 2011.

5 The term "digital divide" denotes "the gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities. The digital divide reflects various differences among and within countries". See OECD; Understanding the Digital Divide (2001) p. 5. Available at <www.oecd.org/pdf/ M00002000/M00002444.pdf>, last accessed 15 June 2011. For

on the NRI, where the Gambia ranks the 76th, Senegal ranks the 80th, Kenya ranks 81st, Namibia ranks 82nd, Morroco ranks 83rd, Botswana ranks 91st, and Ghana ranks 99th.[6]

Owing to the fact that ODR essentially involves utilizing ICT applications to, directly or indirectly, resolve disputes, it is a prerequisite for ODR to have an efficient techno-legal framework that can support ODR modalities.

Information technology, the Internet, wide area networking techniques, and broadband connections have made it possible for anyone to transmit significant amounts of information across the globe instantaneously, which improves the conditions of the global economy, accelerates the growth of e-commerce, and creates an apposite milieu for the development of ODR. Thus, it seems in order to shed light on the ICT *status quo* in Africa to enable readers to comprehend the challenges to ODR implementation in Africa.

That said, this chapter, which aims at analyzing the use of ODR in Africa, shall first provide a succinct analysis of ICT in African countries, as ICT applications constitute the foundational basis and readiness for the use of ODR in Africa (section 2). Subsequently, reference shall be made to the legal and regulatory matrix of laws and regulations adopted in the techno-leading African countries,[7] as such matrix is indispensable for boosting trust and e-confidence in ODR schemes (section 3). Thereafter, a special note of domain names disputes seems in order as such sector specific disputes are already paving the way for the proper implementation of ODR in Africa (section 4). Finally, the chapter shall conclude by providing a pathway for the future of ODR in Africa including specific references to the most appropriate and appealing sectors for ODR services (section 5).

2 AFRICA'S ICT READINESS: CHALLENGES AND REQUISITES TO ODR

Africa now comprises of fifty-three fully recognized and independent countries. However, such states differ with respect to their ICT capacity and applications. Several factors contribute to such existing ICT variation amongst African states.

In order to pave the way for diffusion of ODR services and schemes, the development of a solid ICT infrastructure is indispensable. In recent years, specifically since the 2003 Geneva World Summit on the Information Society and the 2005 Tunisia World Summit

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a brief survey of some of the international projects and schemes that aim at inducing ICT diffusion and development in LDCs and disadvantaged regions, see M. Wahab, "The Digital Divide, E-Commerce, and ODR: Constructing the Egyptian Information Society", in E. Katsh, D. Choi, A. Gaitenby and C. Rule, *Online Dispute Resolution (ODR):Technology as the "Fourth Party", Papers and Proceedings of the 2003 United Nations Forum on ODR*, p. 9-13. Available at <www.odr.info/unece2003/pdf/wahab.pdf>.

6 See World Economic Forum; Global Information Technology Report (2010-2011). Data available at <http://reports.weforum.org/global-information-technology-report/>, last accessed 15 June 2011.

7 These are currently Tunisia, South Africa, Egypt and Morocco.

on the Information Society,[8] African States began to develop and boost their ICT capabilities. This includes due consideration of several indicators, namely: (1) *Infrastructure indicators* (Personal computers, mainlines and mobiles subscribers, Internet users and 3G Subscribers, broadband usage, number of Internet hosts and security of the Internet servers); (2) *Capacity indicators* (Illiteracy rates, public expenditure on education and International Internet bandwidth); and (3) *Financial indicators* (Gross Domestic Product (GDP), Foreign Direct Investment (FDI) and Public and private investments in telecommunications). Each of these indicators merits a mention herein below.

2.1 *Infrastructure Indicators*

Generally, most countries in Africa saw an average of 10% increase in the number of people who own a personal computer in 2006-2007, and the percentage is increasing at an accelerated pace. Egypt is, by far, the country with the highest number of people owning computers (over three million in 2007). Conversely, the number of personal computers in Sub-Saharan Africa (excluding South Africa and Nigeria) went down from seven million to just a million between 2006 and 2007. However, the North African region maintains the highest number of people owing PCs amongst African States. This is largely due to Egypt, Tunisia, and Morocco.[9]

The number of fixed lines and mobile phone subscribers has gradually increased between 2006 and 2008. The highest rate of increase has been witnessed by Nigeria, which had around thirty-four million in 2006 and jumped to over fifty-three million in 2008. Egypt ranked second; from around 28million in 2006 to over fifty-three million in 2008. The North African region in general has witnessed the highest growth compared to other regions, although the Sub-Saharan region is experiencing growth but at a slightly lower rate. Central and Southern part of Africa witnessed 200% growth. This includes Ethiopia, Kenya, Madagascar, Tanzania and Uganda.[10] Strikingly, both Mauritius and Seychelles have over 1,000 subscribers per 1,000 inhabitants which suggests that many people are subscribed to more than one fixed line and/or mobile phone line.[11]

More specifically, from 2006 to 20008, the number of mobile phone subscribers had significantly increased. Whilst both Kenya and Egypt had much more subscribers, Ethiopia had fewer than one million in 2006 and three million in 2008. The Sub Saharan region saw large increases, basically double the amount of subscribers in 2008 comparing to 2006.[12]

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8 See <www.itu.int/wsis/index.html>, last accessed 15 June 2011.

9 World Bank; Africa Development Indicators (March 2010); data available at <http://databank.worldbank.org/ddp/home.do?Step=12&id=4&CNO=1147>, last accessed 15 June 2011.

10 *Id.*

11 *Id.*

12 *Id.*

There has also been notable growth in some African countries with respect to subscription to 3G applications and services. In 2009, some countries witnessed annual growth of more than 100%. For example, Libya had over 300% growth, Morocco had more than 200%, and South Africa had more than 100%. Egypt only witnessed 83% growth. It is worth highlighting that Tanzania experienced a notable decrease by 22%.[13]

With respect to Internet users, there has been an increase of nearly fifteen million people between 2006 and 2008. Egypt, Morocco, and Nigeria had the highest number of Internet users. The Sub-Saharan developing region had over thirty-five million users in 2008, which means that despite having relatively low number of personally owned PCs, people, in this region, still had adequate access to the Internet. The North African region ranked second with respect to the highest penetration of Internet users, largely due to both Egypt and Morocco.[14]

With respect to broadband access, some countries have witnessed exponential growth such as Mauritius, Mauritania, Egypt, and Tunisia, which had large increases in broadband subscribers between 2006 and 2008.[15] On the other hand, the Sub-Saharan developing region experienced a decrease in this context.[16] The North African region witnessed an increase to nearly 1.5 million in 2008 compared to only 0.8 million in 2006.[17]

Between 2006 and 2008, International Internet bandwidth (bits per person) has increased in Egypt, Cape Verde, and Mauritius. Tunisia, Sudan, Morocco and Seychelles, where they have witnessed massive increase from as little as five bits per person to well over 1,000 bits per person.[18]

With respect to the number of Internet hosts across African countries, this largely differs. Generally, the North African region has developed a high number of Internet hosts in 2010, with mainly Egypt containing over 187,000 hosts and Morocco having over 277,000 hosts.[19] Surprisingly, Tunisia had only 490 hosts in 2010.[20] It is worth mentioning that whilst Egypt has a higher number of PC owners than Morocco, the latter has more Internet hosts. It is also worth noting that whilst Ghana has over 41,000 Internet hosts, Nigeria only had 1,300 hosts in 2010, despite the fact that the latter State has a high Internet penetration rate.[21] Nonetheless, South Africa has, by far, the highest number of Internet hosts throughout the whole of Africa, with over three million servers, despite the fact that South

13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 Central Intelligence Agency; The World Fact book (2010); data available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2184rank.html>, last accessed 15 June 2011.
20 *Id.*
21 *Id.*

Africa, when compared to Egypt and Morocco, had lower Internet penetration rates with only over four million.[22]

With respect to secure Internet servers, which are indispensable for secure e-commerce and ODR applications, the security thereof has been gaining due attention in the majority of African States since 2006. Whilst South Africa hosts the highest number of secure servers, both Nigeria and Tunisia have over 100 secure servers. Egypt, although having the highest number of owned PCs and very high Internet penetration rate as previously mentioned, is still providing fewer secure servers when compared to Tunisia or Nigeria.[23]

2.2 Capacity Indicators

Given the fact that most African states are developing nations, this certainly impacts education and illiteracy rates, which seem to be quite high in some African countries. Despite the high number of Internet users in Egypt, the basic illiteracy rate is 34% of people aged fifteen years and above.[24] Morocco suffers from 44% illiteracy rate.[25] Senegal equally has a high illiteracy rate of 58%, despite the colossal increase in Internet users between 2006 and 2008.[26] The highest illiteracy rates tend to exist in Chad (68%), Burkina Faso and Niger (71%), and Mali with the highest rate in Africa (74%).[27] On the other hand, Zimbabwe has the lowest rate (9%).[28] In all African countries, it seems evident that females are suffering from more illiteracy than males, which makes it interesting to assess the correlation between gender illiteracy and gender Internet usage in these countries.[29]

The percentage of public expenditure on education in general seems low, with Lesotho having the highest (12.4%) and Chad being one of the lowest (1.9%).[30] Both Egypt and Morocco have spent as low as (3.7%) and (5.5%), respectively. Conversely, in the Southern African region, some countries tend to have high expenditure rate such as Botswana (8.1%) and Swaziland (8.3%) even though both experience relatively low Internet usage as well as low Foreign Direct Investment (FDI). In the Northern region, Tunisia seemed to have

22 *Id.*

23 World Bank; Africa Development Indicators (March 2010); data available at <databank.worldbank.org/ddp/home.do?Step=12&id=4&CNO=1147>, last accessed 15 June 2011.

24 Organization for Economic Co-operation and Development; African Economic Outlook; Data & Statistics; Table 18, Basic Education Indicators, Excel spreadsheet (2011); available at <http://www.africaneconomicoutlook.org/en/data-statistics/>, last accessed 9 June 2011.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

spent slightly more than Egypt and Morocco, and this is indeed reflected in the lower levels of illiteracy.[31]

2.3 *Financial Indicators*

According to the latest verified statistical information, the period between 2006 and 2009 shows that the average growth rate of real GDP in Africa is 5% per year except for 2009 where the growth rate was lower than usual owing to the global financial crisis that swept the world in 2008.[32]

Generally, in both 2006 and 2007, 6% of GDP in the whole of Africa was spent on ICT. It is interesting to note that the North African region had spent 5% of their GDP, mainly due to Algeria, Egypt, Tunisia and Morocco. South Africa and Senegal spent 10% and 11%, respectively.[33] The figures provided for 2006 were exactly the same for 2007. Thus, there were no deviations in expenditure in both years.[34]

With respect to FDI, it has witnessed fundamental changes between 2006 and 2009. Whilst some countries have benefited from an increase, others have suffered from a decrease in FDI. Angola had the highest FDI, with 13,101 million USD in 2009.[35] In addition, Algeria, Ghana, Niger and Equatorial Guinea witnessed a strong increase in FDI.[36] On the other hand, Kenya exhibited a mixture of both an increase and decrease between 2006 and 2009, where it was 51 million USD in 2006, 729 million USD in 2007, 96 million USD in 2008, and 141 million in 2009.[37] In 2009, Morocco witnessed a decrease of FDI outflows compared to 2007, dropping from 621 million USD in 2007 to 470 million USD in 2009. Moreover, their FDI inflows in 2009 decreased by almost half from 2487 million USD in

31 *Id.*

32 Organization for Economic Co-operation and Development; African Economic Outlook; Data & Statistics (2011); data available at <www.africaneconomicoutlook.org/en/data-statistics/table-2-real-gdp-growth-rates-2001-2011/>, last accessed 15 June 2011.

33 World Bank; Africa Development Indicators (March 2011); data available at <databank.worldbank.org/ddp/home.do?Step=12&id=4&CNO=1147>, last accessed 15 June 2011.

34 *Id.*

35 Organization for Economic Co-operation and Development; African Economic Outlook; Data & Statistics (2011); data available at <www.africaneconomicoutlook.org/en/data-statistics/table-10-foreign-direct-investment-2003-2008-usd-million/>, last accessed 9 June 2011.

36 Organization for Economic Co-operation and Development; African Economic Outlook; Data & Statistics (2011). From 2006 to 2009, FDI increased from 1795 million USD to 2847 million in Algeria, 636 to 1685 million USD in Ghana, 470 to 1636 million USD in Equatorial Guinea and 51 to 739 million USD in Niger. Data available at <www.africaneconomicoutlook.org/en/data-statistics/table-10-foreign-direct-investment-2003-2008-usd-million/>, last accessed 9 June 2011.

37 Organization for Economic Co-operation and Development; African Economic Outlook; Data & Statistics (2011); data available at <www.africaneconomicoutlook.org/en/data-statistics/table-10-foreign-direct-investment-2003-2008-usd-million/>, last accessed 9 June 2011.

2008 to 1331 million USD in 2009.[38] Libya had the highest outflow of investments of 5888 million USD in 2008 but sharply decreased to 1165 million USD in 2009.[39] Egypt's outflow of FDI increased from 148 million USD in 2006 to 1920 million USD in 2008, but decreased to 571 million USD in 2009, which equally occurred with respect to Egypt's FDI inflows that decreased from 9495 in 2008 to 6712 in 2009.[40] South Africa had a negative outflow of FDI of 3533 million USD in 2008 which increased in 2009 to 1584 million USD and an important increase of 9009 million USD in 2008 of FDI inflows compared to 5695 million USD in the previous year, followed by an important decrease in 2009 with an FDI inflow of 5696 million USD.[41]

In the context of ICT, investments in telecommunications with private participation in most African countries generally decreased between 2006 and 2007. However, in Cameroon, Ghana, Senegal, and Liberia investments increased by a high proportion.[42] North Africa, witnessed a decrease in ICT investments, and specifically in Tunisia there was a dramatic drop.[43] However the Sub-Saharan region witnessed some important increase in investments, especially in the Niger, Chad, Swaziland, and Malawi.[44]

In light of the above succinct overview of the diverse indicators and factors that determine African States' ICT readiness, it seems plausible to distinguish between three different groups of African States: (1) ICT ready States such as South Africa, Egypt, Morocco and Tunisia; (2) ICT progressing States such as Nigeria, Cameroon, Tanzania, Algeria, Seychelles, and Ghana and (3) ICT potentially progressing States such as Botswana, Malawi, Zambia, Central Africa, Chad, Niger, Guinea, Somalia, Ethiopia, Burkina Faso, Sierra Leone, Ivory Coast, Burundi, and Rwanda.

It is also manifest that the proliferation of ODR in Africa is decelerated by the scarcity of adequate ICT infrastructure and capacity indicators. This seems to be changing in light

38 *Id.*

39 *Id.*

40 *Id.*

41 Organization for Economic Co-operation and Development; African Economic Outlook; Data & Statistics (2011); data available at <www.africaneconomicoutlook.org/en/data-statistics/table-10-foreign-direct-investment-2003-2008-usd-million/>, last accessed 15 June 2011.

42 World Bank; Africa Development Indicators (March 2011). From 2006 to 2007, investment in telecoms with private participation increased in Cameroon from 63 million USD to more than 149 million USD, in Ghana from 215 million to 420 million USD, in Senegal from 212 million to 567 million USD and in Liberia from more than 10 million USD to 17 million USD. Data available at <http://databank.worldbank.org/ddp/home.do?Step=12&id=4&CNO=1147>, last accessed 15 June 2011.

43 World Bank; Africa Development Indicators (March 2011). From 2006 to 2007, Tunisia witnessed a drop of investment in telecoms with private participation from 2343 million USD to 76 million USD. Data available at <http://databank.worldbank.org/ddp/home.do?Step=12&id=4&CNO=1147>, last accessed 15 June 2011.

44 World Bank; Africa Development Indicators (March 2011). From 2006 to 2007, investment in telecoms with private participation increased in Niger from 0 to 110 million USD, in Chad from more than 26 million USD to more than 53 million USD, in Swaziland from 0 to almost 4 million USD and in Malawi from more than 30 million to 37 million USD. Data available at <http://databank.worldbank.org/ddp/home.do?Step=12&id=4&CNO=1147>, last accessed 15 June 2011.

of the relative increase in financial indicators, especially FDI and ICT expenditure. Nevertheless, enhancing ICT infrastructure and developing capacity to offer state-of-the-art ODR services hinge not only on ICT, capacity, and financial readiness, but also on the existence of adequate socio-legal infrastructure that provides compatible regulatory framework that boosts trust and confidence. This would ultimately create cultural readiness for ODR in Africa.

On such account, it seems necessary to provide a brief overview of ODR related legal and regulatory frameworks in some of the ICT ready and progressing African States, which will eventually support fully-fledged ODR schemes.

3 ICT LAWS AND REGULATIONS: BOOSTING E-TRUST AND E-CONFIDENCE

The indispensability of adequate socio-legal and regulatory framework for ODR has been emphasized by UNCTAD, which stated:

> The need for an appropriate legal framework that is supportive of and conducive to the practice of e-commerce has been identified as a prerequisite for the growth of e-commerce in general and ODR in particular.[45]

At the outset, the majority of African and Middle Eastern States are predominantly legislation centric. In other words, the prevailing legal culture in such regions is founded on statutory instruments, which serves a dual purpose, that is: (a) regulating specific sectors, services, and/or activities; and (b) boosting public trust and confidence in such regulated services and activities. That said, the proliferation of ICT applications and services, especially ODR schemes, require the existence of a solid matrix of supporting laws and regulations.[46]

On such account, Africa generally lacks sufficient ICT and ODR oriented legislative instruments, including, but not limited to, the full recognition of electronic data messages and communications, e-commerce, and/or data protection. Nevertheless, some ICT ready and progressing African States, such as Egypt, Tunisia, Morocco, Algeria, and South Africa, have witnessed, over the past few years, a proliferation of several legislative initiatives that support ICT applications and services.

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45 UNCTAD; "E-Commerce and Development Report 2003" (2003); Chapter 7: "Online Dispute Resolution: E-Commerce and Beyond." Data available at <www.unctad.org/en/docs/ecdr2003_en.pdf>, last accessed 15 June 2011.

46 It is worth noting that other regions and countries may principally rely on market practices irrespective of any statutory instruments. This is generally accepted in advanced and highly developed states, where the State generally opts for a non-interventionist approach, due to powerful market forces that efficiently contribute to the development and shaping of the relevant norms and practices.

Prior to embarking on a brief survey of such initiatives, it seems in order to identify the pertinent key legislative instruments that support ICT. These include (A) E-commerce, E-contracting, and Digital Signature, (B) E-evidence (admissibility and evidentiary weight), and (C) Protective Laws (Intellectual Property Rights, Consumer Protection, and Information and Cyber-security regulation).

3.1 *E-Commerce & Digital Signature Laws*

E-commerce allows consumers and businesses to conduct business through electronic means on national, regional, and global levels. Whilst most advanced African countries have adequate e-commerce norms in place, less developed regions and states are increasingly recognizing the importance of an e-commerce legal framework.

In Egypt, the accelerated growth in Internet usage and utilization has prompted the development of B2B and B2C e-commerce and regulation,[47] which has resulted in the enactment of the Digital Signatures Law No. 15 of 2004 (E-Sign Law) and the establishment of the Information Technology Industry Development Agency (ITIDA) in 2004.[48] ITIDA supports the development of ICT in Egypt through the following interdisciplinary initiatives: (i) *Research and Innovation Support*, which aims at supporting the development of mature innovation management systems in Egyptian ICT SMEs that would enable such entities to introduce competitive innovative ICT products and services into the marketplace; leading to a considerable boost to Egypt's national GDP; (ii) *Small and Medium Enterprises*, which are important to the growth of Egypt's ICT sector. Owing to Egypt's tax, custom and financial sector reforms, it has acquired a strong position to provide outstanding incubation management to seed and startup IT companies and boost employment skills through training schemes; (iii) *Enterprise International Certification* through participating in a number of international certification programs to achieve recognition and certification of Egyptian companies and improve their skill base; (iv) *Information Technology Academia Collaboration* (ITAC), which aims at promoting and incentivizing research projects that bring value to IT companies, universities, research centers and the wider technological community in Egypt, and has been designed to link industry research with market needs; (v) *Industry Development* through supporting local Egyptian businesses and increasing their international exports; and (vi) *Community Awareness* through prioritizing the

47 B2C e-commerce sites in Egypt include stock market trading, real property, food delivery, lifestyle products, Egyptian handicrafts, furniture and human-resources industries.

48 ITIDA is the executive IT arm of the Egyptian Ministry of Communications and Information Technology, MCIT. With local and international outreach, ITIDA plays a fundamental role as a one-stop-shop for foreign direct investors seeking to enhance their global offering using Egypt's competitive advantages. ITIDA actively pursues two broad goals: (i) building the capacities of Egypt's ICT sector, and (ii) attracting FDI to boost the ICT sector locally and globally. See <www.itida.gov.eg>, last accessed 9 June 2011.

development of the software industry whilst increasing social awareness of intellectual property issues. As a result of these programs, Egypt's piracy rating has dropped from 69% in 2003 to 59% in 2009 according to the seventh annual BSA and IDC Global Software Piracy Study.[49]

With respect to E-signature services for the public and private sectors, such services were launched on 28 September 2009 together with the inauguration of the Egyptian Root-CA trust center, marking the e-signature authorization system by the ITIDA. ITIDA, as a supervisory body for electronic signature, operates the Egyptian Root Certificate Authority (Root CA) and the E-signature CA Licensing Unit. The Root CA will issue digital certificates to subordinate Certificate Service Providers (CSP) to provide the proper infrastructure for the use of E-signature in Egypt. The Egyptian E-signature CA Licensing Unit has been set up to audit the E-signature service providers companies in Egypt, address complaints, offer technical counseling in collaboration with the Root CA panel, and mediate between disputing parties, forming part of the ICT Industry ombudsman within ITIDA framework. A limited number of Egyptian E-signature Service Providers (ESPs) have been licensed by the E-signature CA Licensing Unit, in order to provide e-signature services, issue digital certificates and corresponding electronic signatures for citizens and private sector companies' clients.[50]

With respect to IPR, the new IPR Law No. 82 of 2002 unifies and supersedes existing intellectual property laws, some of which date back over half a century. It is designed to bring Egypt's legislation into compliance with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The Law covers copyrights, models and industrial designs, patents of invention, utility models, layout designs of integrated circuits, undisclosed information, and trademarks.[51] This Law has contributed to the creation of an environment that encourages creativity and boosts FDI.

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49 See <www.itida.gov.eg/En/OurPrograms/Pages/default.aspx>, last accessed 9 June 2011.

50 To-date, there are four licensed companies: Security & Network Services ("SNS"), Misr for Central Clearing, Depository and Registry ("MCDR"), Egypt Trust, and Advanced Computer Technology ("ACT"). The list of licensed companies and their contact information is available at <www.egypton.com/En/Ourprograms/IndustryInfrastructure/eSignature/Pages/default.aspx>, last accessed 9 June 2011.

51 Although Law No. 82 of 2002 expands the scope of protection so as to include items that have not been protected before such as utility models, topographies of integrated circuits and undisclosed information, yet it does not provide an explicit reference to the protection of ICT applications in the context of IPR except in the context of copyright protection. For example, explicit reference was made in Article (138) to the audio or audio-visual transmission of work, performance, phonogram or the work or performance recording, to the public by wireless means including satellite broadcasting. Moreover, Article (140) states that rights of the authors to their literary and artistic works shall be protected by the law herein, and particularly computer software and databases which are either legible by computer or by any other device. Furthermore, Article (181) provides for penalties by imprisonment for not less than one month and/or a fine of not less than 5,000 Egyptian pounds, and not exceeding 10,000 Egyptian pounds, for publishing a work, phonogram, broadcast or performance protected pursuant to the provisions of the law herein via computers, Internet, information networks, communication networks or any other means, without having prior written permission from the author or holder of the neighbouring right.

Moreover, Egypt has enacted the Telecommunication Law No. 10 of 2003. This Law aims at reorganizing the telecommunications sector, and is based on some fundamental principles, amongst which are: universal access, party autonomy, protection of users, and encouraging investment in the ICT sector. The Law established the National Telecommunications Regulatory Authority (NTRA), which is entrusted with the organization of the telecommunications utility and issuing telecommunications licenses in accordance with the above-mentioned fundamental principles. The Law also provides for severe penalties of imprisonment for a period not less than three months and/or a fine not less than L.E 5,000 and not exceeding L.E. 5,0000 for the publishing, recording, hiding, obstructing, modifying, and/or refraining from sending the contents of a communications message or part of it without having any legal basis for such action. The same penalties apply for divulging information concerning users of communication networks and their communication.[52]

In Morocco, the Moroccan Law No. 53-05 for electronic exchange of legal data was enacted in 30 November 2007.[53] The Law governs the electronic signature legal framework in Morocco and regulates electronic certification and cryptography. The Law modifies and complements Articles (417), (425), (426), (440), and (443) of the Moroccan Civil Code and was adopted a month after the decision of the Professional Group of Moroccan Bank (*Groupement Professionnel des Banques Marocaines*) allowing online payment with Moroccan credit cards.[54]

According to Article (6) of the Moroccan Law, a secure electronic signature is produced by a device for creating electronic signatures attested by a certificate of compliance issued by the National Telecommunications Regulatory Agency (ANRT), designated as the National Authority for Approval and Monitoring of Electronic Certification. Its role is therefore to accredit providers of electronic certification.

The Executive Regulations of the Law were enacted two years later and specifically on 18 June 2009.[55] The Regulations addressed means of encrypting data messages and conditions for electronic certification of providers requesting accreditation. Nevertheless, hitherto, no provider has been accredited. Only some public agencies, through their internal certi-

52 See Article (73) of the Telecommunications Law.

53 *Loi No. 53-05 relative à l'échange électronique de données juridiques*. Available at <http://droitmaroc.wordpress.com/2008/01/29/loi-n%C2%B0-53-05-relative-a-lechange-electronique-de-donnees-juridiques-integrale/>, last accessed 15 June 2011.

54 *Commerce électronique au Maroc* (E-Commerce in Morocco), Online publication, July 2010. Available at <http://ennasri.centerblog.net/5-commerce-electronique-au-maroc>, last accessed 15 June 2011.

55 *Décret n° 2-08-518 du 25 joumada I 1430 pris pour l'application des articles 13, 14, 15, 21 et 23 de la loi n° 53-05 relative à l'échange électronique des données juridiques* (Decree No.2-08-518 of 25 JoumadaI 1430 executing Articles 13, 14, 15, 21 and 23 of Law No. 53-05 for electronic exchange of legal data); Official Bulletin No. 5744; 18 June 2009. Available at <www.cabinetbassamat.com/fileadmin/Codes%20et%20lois/Droit%20de%20l’immatériel/decret%20echange%20electronique%20des%20donnees%20juridiques.pdf>, last accessed 15 June 2011.

fication process, provide electronic signature services. For example, the Moroccan National Social Security Fund (CNSS) has its own certification authority and thus offers employers the opportunity to report and pay payroll taxes over the Internet through its website damancom.ma. In essence, e-government services have preceded e-commerce and B2B transactions in Morocco.[56]

In Tunisia, the Electronic Exchange and Electronic Commerce Law was enacted since 9 August 2000.[57] This Law, which is certainly inspired by the French Law No. 2000-230 of 13 March 2000, deals with electronic signatures and affords e-signatures and e-documents the same evidentiary weight afforded to paper-based documents in so far as the authenticity conditions are fulfilled. In Tunisia, the electronic signatures system uses the public key infrastructure (PKI) system/encryption, which is the same technology utilized under the Egyptian E-Sign Law.[58]

The Executive Regulations of the Tunisian Law have been adopted in 2001 by virtue of the Decree No. 2001-1667 of 17 July 2001, which establishes specifications for undertaking the activity of electronic certification services provider. Moreover, Decree No. 2001-1668 of 2001 has laid down the procedure for obtaining permission to carry out the activity of electronic certification services provider, and Decree No. 2001-2727 of 20 November 2001 sets the conditions and procedures to use cryptography and encryption. Furthermore, two internal order (*Arrêtés*) of the Tunisian Ministry of Communication and Technologies of 19 July 2001 have determined the technical specifications for digital certificates, their reliability and technical characteristics of the device creating electronic signatures.

In Algeria, a legislative amendment of Articles (323 *bis*), (323 *bis* 1) and (327) of Algerian Civil Code has been passed in April 2005, allowing the use of electronic evidence. However, Algeria has not yet adopted a separate and specific legislation on electronic signatures. Two draft laws should have been finalized by the first part of 2010, but no indication has been found showing that those drafts have now been enacted.[59] The first of these draft laws aims at regulating electronic exchanges and includes provisions relating to electronic certificates, electronic signature and cryptography. The second one is related

56 It is also worth noting that Egypt offers a number of e-government services to citizens, businesses, and foreigners through its government portal. See <www.egypt.gov.eg/english/>, last accessed 9 June 2011.

57 *Loi No. 2000-83 du 9 août 2000, relative aux échanges et au commerce éléctronique* (Electronic Exchange and Electronic Commerce Law), 9 August 2000. Available at <www.certification.tn/fileadmin/Documents/loi_2000-83_fr.pdf>, last accessed 15 June 2011.

58 It is worth noting that both Egyptian and Tunisian Laws are not technology neutral but have specifically opted for a PKI system to the exclusion of new technologies such biometrics. This is quite questionable, especially that technology specific laws are generally undesirable owing to the fact that technological applications become antediluvian within a relatively short time span.

59 Anonymous Author, "Algérie: Un projet de loi pour sécuriser Internet (Algeria: draft law to secure Internet)", *Le quotidien d'Oran* (Oran Daily Newspaper), Online Publication, 10 May 2010. Available at <www.city-dz.com/algerie-un-projet-de-loi-pour-securiser-internet/>, last accessed 15 June 2011.

to the protection of personal data and aims at maintaining a strict framework for the protection of Internet users.

On a different note, leaving the North African region to South Africa, it seems evident that e-commerce in increasingly utilized in South-Africa. The Telecommunications Act No. 103 of 1996 has generated a matrix of legislative instruments. The 1996 Act was amended by the Telecommunications Amendment Act No. 12 of 1997, the Independent Communications Authority of South Africa Act No.13 of 2000, and the Telecommunications Amendment Act No. 64 of 2001. In July 2001, the Independent Communications Authority of South Africa (ICASA) was established and merged both the Telecoms Regulator (Telecommunications Regulators Association of Southern Africa) and the Broadcasting Regulator (Independent Broadcasting Authority).

In July 2006, the Electronic Communications Act (ECT) was promulgated in 2002 to regulate and promote electronic communications and transactions, consumer protection, e-government services and e-signatures.[60]

3.2 E-Evidence Regime

Owing to the fact that diverse ODR schemes involve electronic exchange of documents, which may very well be intrinsically electronic in nature and format, the validity and evidentiary weight of e-documents become indispensable. Accordingly, e-evidence denotes the legal value and admissibility of electronic, and electronically exchanged, data.

In technology ready African States, it is incontrovertible that e-documents and e-data are admissible as e-evidence, and are afforded the same evidentiary weight as standard paper based documents. In Egypt, Articles (14) and (15) of the E-Sign Law states that e-signatures and e-documents shall have the same determinative and evidentiary effect that standard paper based signatures, writing, official and unofficial communications have under the Code of Evidence. Moreover, Article (16) of the E-Sign Law states:

> The hardcopy of an official electronic document shall have the same determinative effect vis-à-vis all parties and third parties to the extent that this hardcopy conforms to the original official electronic document and in so far as the official electronic document and the e-signature exist on an electronic instrument or medium.

60 Electronic Communications and Transactions Act, No. 25 of 2002. Available at <www.internet.org.za/ect_act.html>, last accessed 15 June 2011.

Such provision is certainly invaluable as it affords reproduced paper-based documents the same evidentiary weight of an electronic original in so far as the electronic original is stored on an e-medium or instrument.[61]

In Morocco, the above mentioned Moroccan Law No. 53-05 for electronic exchange of legal data of 30 November 2007 and its corresponding decree No. 2-08-518 of 6 May 2009 afford legal recognition to data messages and electronic signatures and confirm the full evidentiary weight of e-documents, signatures, and communications in so far as such electronic formats are technologically compliant to ensure their authenticity, ability to unveil any alteration or change, and undoubted attributablity to their author.[62] Moreover, Article (417-1) of the Moroccan Civil Code, introduced by Moroccan Law No. 53-05 states:

> An electronic document has the same force of a written paper-based document. An electronic document shall be allowed as evidence in the same manner as a written paper-based document, provided that the person that issued it can be properly identified and that the electronic document is reliable.[63]

Furthermore, the Moroccan Press Code, in its new version of 2002, imposes restrictions on publishing information criticizing the monarchy, Islam and the country's integrity, and, more specifically, the Sahara dispute. Article (38) of the Press Code lists all electronic means of disseminating information on the above-mentioned issues, including the Internet. This clearly constitutes an implicit, if not explicit, recognition of the legal value and evidentiary weight of electronic data.

In Tunisia, the Tunisian Law on Electronic Exchange and Electronic Commerce No. 2000-83 of 9 August 2000 recognizes e-documents and e-signatures as previously mentioned. It affords the full legal value and weight to electronic signatures and documents.

In South Africa, the enactment of the Computer Evidence Act in 1983, marked a new era in the admissibility of computer print-out in civil cases if certain technical conditions are fulfilled, which clearly demonstrates South Africa's leading role in ICT applications. However, the practical problems experienced in the implementation of the Computer Evidence Act led the South African Law Commission to recommend abolishing the said

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61 The importance of such principle is evident in the context of all ODR schemes where any printing or reproduction of e-documents (such as e-awards, e-decisions, e-settlements, and e-contracts, and/or e-communications) in paper format would not, automatically, reduce the evidentiary weight of such paper-based document(s), which are simply a reproduction of the original e-document.

62 Anonymous Author, *La signature électronique vaut preuve juridique mais les certificateurs manquent à l'appel* (Great legal value of electronic signature but certificate Authorities are missing), Online publication, 15 April 2010. Available at <www.maroc-biz.com/data_5/even_detail.php?id=193>, last accessed 15 June 2011.

63 See, for example, the Moroccan Supreme Court Judgment No. 730 of 27 June 2007, which considered the fax as "a valid mean to prove that the other party has been advised of the shipment or receipt of the goods if the receipt of the fax is established before the Tribuna". Available at <http://68.168.119.106:8080/CabBassamat/upload/juris/ar/001425.pdf>, last accessed 15 June 2011.

law. Nevertheless, despite the recommendations of the Law Commission no new legislation on e-evidence was enacted until 2002, when the ECT was promulgated. Section (15) of the ECT, inspired by Article (9) of the UNCITRAL Model Law on Electronic Commerce, deals with the law of evidence. The ECT referred to "data messages" rather than electronic information or computer information. Section (15) of ECT provides for the general admissibility of data messages if satisfying the ordinary requirements of South African Law of evidence for the admissibility of documents, these are: authenticity; and ability to be produced and presented in their original form. Once evidence is admitted, the court enjoys discretionary powers to decide on the evidentiary weight afforded thereto.

In South Africa, the ECT creates two statutory presumptions in favor of the correctness of data messages, these are: a presumption in favor of the accuracy of business records;[64] and a presumption in favor of advanced electronic signatures.[65]

3.3 *Protecting Internet Users*

Protection of Internet users or "netizens" is a requisite for the proliferation of e-commerce and the progressive use of ODR. Most advanced African States have enacted specific laws such IPR laws. For example, in Egypt, the IPR Law No. 82 of 2002 replaced a collection of laws dating back to 1939 with a comprehensive and consolidated IPR Code in an attempt to create a milieu of creativity and incentivizing FDI.[66] The four books of the new IPR Code regulate patents, integrated circuit designs, undisclosed information, trademarks, geographical indications, trade statements, industrial designs, copyright and related rights, and plant variety protection. The IPR Code attempts to mirror the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, the Law does not cover personal data protection and information security, which have been drafted in a separate bill, which awaits parliamentary review. Moreover, Egypt has already enacted the Consumer Protection Law No. 67 of 2006, which was promulgated and published on the 20 May 2006.

In Morocco, a corpus of diverse laws exists to regulate IPR. Law No. 17-97 of 15 February 2000 aims at protection of Industrial Property,[67] Law No. 09-08 adopted on

64 Section 15(4) of the ECT.

65 Section 13 of the ECT.

66 Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights, Copyrights and Neighbouring Rights. Available at <www.wipo.int/wipolex/en/text.jsp?file_id=190159>, last accessed 15 June 2011.

67 *Loi No. 17-97 relative à la protection de la propriété industrielle* (Law No. 17-97 related to Industrial property protection), 15 February 2000. Available at <www.enset-media.ac.ma/cpa/Fixe/Loi%20propr%20indust.pdf> (in French), last accessed 15 June 2011.

21 May 2009 regulates personal data protection,[68] and Law No. 08-31 enacted in 2008 provides for consumer protection.

Tunisia has adopted a comprehensive legislation governing IPR, that is the IPR Act adopted in 1994.[69]

Concerning data protection, Tunisia has also enacted Law No. 2004-63 of 27 July 2004 regulates the processing of personal data by requiring prior authorization for processing, consent of the data subject, as well as other standard regulatory provisions governing the accuracy and purpose of such processing as well as liability issues.

Moreover, a Computer Security Act No. 2004-5 was adopted in Tunisia on 3 February 2004 to complete the ICT regulatory matrix. The Law creates cyber-safety measures,[70] and establishes a National Agency of Computer Security to control security of information systems and networks of different public and private organizations.

In South Africa, Intellectual Property Laws cover areas as domain names, traditional knowledge, transfer of technology, patents/copyrights and Trade Marks. The following is a list of some of the Intellectual Property Laws in South Africa: Intellectual Property Rights from Publicly Financed Research and Development Act No. 51 of 2008, Geographical Indications Act No. 32 of 2008, the Trade Marks Act of 1993 as amended in 1997 and 2001, Broadcasting Act No. 4 of 1999, and the Industrial Property Laws Amendment Act of 1997.

Concerning electronic data, the ECT provides principles to be adhered to by subscribers with respect to personal information obtained through electronic means. Similarly to dispositions provided under the Tunisian Law on Data Protection, these principles include: (a) obtaining the express written permission of the data subject for the collection, collation, processing or disclosure of any personal information; (b) only collecting that information necessary for the lawful purposes of the data controller; (c) keeping a record for a period of at least one year after collection of the information of what the information was and the specific purpose for which it was collected; and (d) not disclosing personal information

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68 *Loi No. 09-08 relative à la protection des personnes physiques à l'égard des traitements des données à caractère personnel* (Law No. 09-08 related to personal data protection), 18 June 2009, Official Bulletin No. 5744. Available at <http://droitmarocain.blogspot.com/2009/08/la-loi-n-09-08-relative-la-protection.html> (in French), last accessed 15 June 2011.

69 Tunisia has also enacted more than 25 laws, decrees, and orders governing a myriad of IPR related matters including copyrights (Law No. 2009-33 of 23 June 2009 Amending and Supplementing Law No. 94 36 of 24 February 1994 on Literary and Artistic Property), geographical indications (Law No. 2007-68 of 27 December 2007 on Appellations of Origin, Geographical Indications and Indications of Source for Handicrafts), models and industrial designs (Law No. 2001-21 of February 6 2001 on the Protection of Industrial Designs), patents (Law No. 2000-84 of August 24 2000, on Patents), and trademarks (Law No. 2007-50 of 23 July 2007 Amending and Supplementing Law No. 2006-36 of 17 April 2001 on the Protection of Trademarks and Service Marks).

70 An example of those measures is the "Technical Vulnerability Assessment" which is a form of ethical hacking that aims at unveiling system vulnerabilities, to alert the concerned entity in an attempt to prevent exploitation by hackers and attackers.

to a third party by the data controller unless such disclosure is required or permitted by law or is authorized by the data subject.[71]

Moreover, on 24 October 2010, the Consumer Protection Act (CPA) was passed. The Act also governs electronic transactions. The CPA has been drafted in a manner that averts overriding the provisions of the ECT, and in many instances, it specifically refers to the ECT. In the event of a conflict between the CPA and the ECT, the CPA provides that if circumstances dictate that the provisions of the CPA and the Act cannot be applied jointly, the provision that extends the greater protection to a consumer would ultimately prevail.

In light of the above mentioned, it is evident that both Tunisia and South Africa possess the most advanced ICT regulatory matrix, which ultimately paved the way for the first ODR initiatives in Africa, namely, South Africa's *ZA Dispute Resolution Regulations* (ZADRR) and *OnlineOmbud.*

4 ODR INITIATIVES IN AFRICA

Despite being a developing continent with sufficient barriers to ICT progression and ODR proliferation, Africa managed to spawn a unique dispute resolution culture with a deeply rooted arbitration oriented processes.

Noting that the introduction of ICTs to dispute resolution processes may take a number of forms varying from importing technology as a mere aiding tool to maximum fusion in the sense that IT applications are in effect employed as ODR schemes, it remains necessary to shed light on Africa's few ODR initiatives, which are primarily in the context of domain names disputes and consumer disputes. Territorially, both are located in South Africa, which has pioneered in catering for the Continent's first initiatives that may well qualify as ODR processes.

4.1 South Africa's Domain Name Dispute Resolution Regulations

Domain name disputes are generally associated with cybersquatting, which involves the pre-emptive registration of trademarks by third parties as domain names. Cybersquatters exploit the first-come, first-served nature of the domain name registration system to register names of trademarks, famous people or businesses with which they are not connected.[72]

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71 This regulatory framework is expected to be further enhanced and developed by virtue of a Protection of Personal Information Act, published as a Bill on 14 August 2009, which remains to be enacted. The Protection of Personal Information Act is expected to be applicable to both the private and public sectors and will regulate the manner in which those sectors process personal information.

72 Cybersquatting refers to the *mala fide* registration of a domain name containing another person's brand or trademark in a domain name. Cybersquatting takes two main forms. First, there is "typosquatting" which is the registration of domain names containing variants of popular trademarks. Typosquatters rely on the

Subsequently, cybersquatters often put their domain names up for auction, or offer them for sale directly to the company or person involved, at prices far beyond the cost of registration. Alternatively, they can keep the registration and use the name of the person or business associated with that domain name to illicitly solicit business for their own sites.

Taking into consideration the increasing business value of domain names on the Internet, it appears that disputes between the cybersquatters and businesses or individuals whose names and/or marks have been registered in bad faith have increased at an accelerated pace.

In South Africa, a dispute resolution mechanism specifically tailored and dedicated for the dot ZA domain has been introduced. This mechanism, known as "ZADRR", was adopted 22 November 2006,[73] to provide a dispute resolution process which can be administered online. The entire process could take less than 55 days to complete.[74]

The South African Institute of Intellectual Property Law (SAIIP), established in 1954 and representing some 140 patent attorneys, patent agents and trade mark practitioners in South Africa,[75] applied to the Department of Communications to become an accredited ZADRR dispute resolution provider and its application for accreditation was approved in early 2007. Prior to such accreditation, the only possible action which could be taken against cybersquatters of the dot ZA domain name was to institute court proceedings for trade mark infringement in South Africa.

This new procedure administered by SAIIPL is very similar to the procedure followed by the WIPO in its administration of ICANN's Uniform Dispute Resolution Policy. The procedure was introduced in South Africa on 1 April 2007. The ZADRR permits complainants to file a dispute with a service provider, specifying the reasons why the concerned domain name registration constitutes an abusive or offensive registration. The respondent is offered the opportunity to defend itself against the allegations.

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typographical errors made by users when entering domain names into their web browsers. Some common examples of typosquatting include: (a) the omission of the "dot" in the domain name: wwwsite.com; (b) a common misspelling of the intended site: cite.com; (c) a differently phrased domain name: sites.com; and (d) a different top-level domain: site.org. Secondly, there is "renewal snatching," where cybersquatters rely on the fact that trademark holders often forget to renew or re-register their domain names. If the owner of a domain name does not re-register the domain name prior to expiration, then the domain name can be purchased by anybody, and cybersquatters will snatch up a domain name as it becomes free. See <www.cybersquatting.com>, last accessed 15 June 2011.

73 Electronic Communications and Transactions Act (25/2002): Alternative dispute resolution regulations, Government Gazette No. 29405, 22 November 2006, p. 3. Available at <www.domaindisputes.co.za/downloads/AlternativeDisputeResolutionRegulations.pdf>, last accessed 15 June 2011.

74 Bowman Gilfillan website. Available at <www.bowman.co.za/ZADRR/Index.asp>, last accessed 15 June 2011.

75 South African Institute of Intellectual Property Law, Domain Name. Available at <www.saiipl.org.za/domain-name-faq.htm>, last accessed 15 June 2011.

The dispute resolution service provider appoints one or three adjudicators who will render a decision based the relatively swift documents only procedure taking into account the applicable regulations and past ZADRR precedents.[76] Either party may appeal a decision.

The appeal panel will consider appeals on the basis of a full review of the matter and may also review procedural matters. However, no monetary damages are awarded in the ZADRR procedure, and no injunctive relief is available. The accredited domain name registries, which have agreed to abide by the ZADRR, implement a decision upon the lapse of ten days, unless the decision is appealed. The adjudicators' decisions are binding in the sense that accredited registries are bound to take the necessary steps to enforce a decision, such as transferring the disputed domain name.

4.2 South Africa's Onlineombud

The Onlineombud initiative is another South African ODR initiative targeting consumer disputes. Onlineombud offers an all encompassing range of services in the field of consumer relations and complaint management. Their services include advice on and assistance with implementing the CPA, as well as a dispute resolution service that focuses on restoring relationships to the benefit of all stakeholders: consumers and businesses.[77] Their ODR services are offered under two schemes:[78] (a) online Quick view;[79] and (b) online recommendation.[80] Offline mediation and arbitration are also available if the online scheme ultimately fails.[81]

Onlineombud considers disputes filed by consumers against service providers who may be private individuals, small businesses with a turnover of less than one million SAR, a beneficiary of a trust or estate, credit guarantor, a person who suffered monetary loss

76 The listed number of adjudicators is sixty-six. See <www.domaindisputes.co.za/adjudicators.php>, last accessed 15 June 2011. Past decisions and precedents are published online. Available at <domaindisputes.co.za/decisions.php?tag=6>, last accessed 15 June 2011.

77 See <www.onlineombud.com>, last accessed 15 June 2011.

78 Regarding the procedures and jurisdiction of the Onlineombud processes, see <www.onlineombud.com/procedures.html>, last accessed 15 June 2011.

79 "Quick View" is a process based on the information provided by the parties. It aims at assessing the probabilities and any legal considerations. A suggestion is then made as to how the parties ought to best resolve the complaint. The suggestion is not binding on either party unless they both accept it. See <www.onlineombud.com/complaint_process.html>, last accessed 15 June 2011.

80 "Recommendation" is a phase two process which is only applicable if a resolution is not achieved following the issuing of a Quick View. According to the "Recommendation" process, Onlineombud will gather such further information (investigate) as is necessary to assist in the resolution of the complaint. Onlineombud will then issue a recommendation determining the most appropriate resolution of the complaint. If a recommendation is made against a party that accepts Onlineombud's procedures, and it is accepted by the customer, the recommendation will be contractually binding on the subscriber. See <www.onlineombud.com/complaint_process.html>, last accessed 15 June 2011.

81 See <www.onlineombud.com/complaint_process.html>, last accessed 15 June 2011.

due to the service provider, or a person who failed to resolve a dispute through direct negotiations with the service provider.[82]

Regarding the jurisdiction of the Onlineombud services, they shall not consider the following disputes: (i) disputes of an amount exceeding one million SAR or is part of a larger claim, or if together with another claim that may be filed by the complainant against the service provider would exceed one million SAR unless the other claim is unrelated; (ii) complaints pertaining to acts that occurred more than three years prior to filing with Onlineombud; (iii) complaints pending before any other ombuds procedure, court, or tribunal; and (iv) with respect to matters falling outside the ambit of the National Credit Act No. 34 of 2005 (NCA), complaints relating to the pricing policy of the service provider and complaints pursued by the complainant in an unreasonable or abusive manner.[83]

With respect to the Onlineombud procedures, several principles merit a mention in this context.[84] First, by resorting to such procedures, both the service provider and the consumer or complainant shall not be subject to any prescription during the resolution process.[85] Secondly, any exchanged correspondences, communications, documents or recommendations during the processes are privileged and may not be invoked or submitted in any court action.[86] Thirdly, if a matter that falls within the NCA is resolved by agreement or recommendation, the resolution may be issued in the form of a consent order before the court or NCA tribunal. Fourthly, in order to encourage service provider participation, if the latter did not provide the information requested by Onlineombud in a timely manner, Onlineombud shall assume that the evidence is against the service provider and shall make a recommendation accordingly. Finally, Onlineombud may dismiss a complaint if (i) the complainant misled the Onlineombud, or failed to cooperate or respond to any request for information within a reasonable time; (ii) Onlineombud is unable to resolve the complaint or a dispute cannot be resolved on a balance of probabilities; and (iii) if it appeared that the complaint falls out of the jurisdiction of Onlineombud.

The above mentioned initiatives clearly indicate that whilst South Africa has taken the lead in sector specific disputes, namely domain names and consumer relations, other African States are quite ready and near to ODR implementation. For example, unlike South Africa, other ICT ready States such as Tunisia, Morocco, and Egypt have not yet imple-

82 See <www.onlineombud.com/procedures.html>, last accessed 15 June 2011.

83 *Id.*

84 *Id.*

85 *Id.* This is actually a form of a "tolling agreement" or a "clock-stopper" where both parties have agreed to waive any claim of expiration of a statute of limitations that may arise due to the lapse of time spent on Onlineombud processes. This certainly allows both parties a party additional time to assess and determine the legitimacy and viability of their claims and/or the amount of their damages without the necessity of filing an action. Such waiver is only applicable throughout the period of utilizing Onlineombud processes.

86 This encourages full transparency and ensures that both parties will not be disadvantaged by participating in such processes in utmost good faith.

mented any specific regulation for domain name dispute resolution and there exists no proper authority acting as a dispute resolution provider. However, they are members of international initiatives which open the path for the licensing or accreditation of ODR providers in the context of domain name disputes pertaining to those countries.

Nevertheless, it should be noted that the Uniform Domain Name Dispute Resolution Policy (UDRP), adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on 26 August 1999 and based on recommendations made by the World Intellectual Property Organization (WIPO), provides a mechanism for resolving a domain name dispute regardless of the location of the registrar, the domain name registrant, or the complaining trademark owner. The UDRP permits complainants to file a case with a resolution service provider, specifying, mainly, the domain name in question, the respondent or holder of the domain name, the registrar with whom the domain name was registered and the grounds for the complaint.

Accordingly, requests concerning .TN, .MA or .EG domain name dispute can be addressed to the WIPO Arbitration and Mediation Center where domain name cases filled are normally concluded within two months, using online procedures.[87] Proceedings administered by the WIPO Center have involved parties from over 144 countries across the world, including several others African countries, and can be seen as a first step to be followed towards Online Dispute Resolution.

5 CONCLUSION: THE FUTURE OF ODR IN AFRICA

The above mentioned overview of Africa's ODR potential confirms that, hitherto, Africa is generally outsourcing its ODR systems and schemes to extra-continental providers located in other regions and continents, but extending their services globally to everyone including the African people. In other words, whilst people are increasingly moving their lives online in both African and the Middle East, people are still relying on ODR providers located elsewhere. This has certainly impacted the availability of bespoke ODR services. For example, most available ICT applications, software, and providers do not, understandably, cater for African and Arabic languages and culture. However, with the proliferation of ADR centres throughout Africa, over twenty African States have, usually under a national chamber of commerce, established ADR centres since 1995.

This may imply that African governments may step-in to incentivize and promote ODR by adopting and encouraging pilot ODR projects, especially in the e-government, telecommunications, and IT arenas since it may be argued that they are the most ODR

87 World Intellectual Property Organization, World Intellectual Property Organization Supplemental Rules for Uniform Domain Name Dispute Resolution Policy, In effect as of 14 December 2009, Online publication. Available at <www.wipo.int/amc/en/domains/supplemental/eudrp/#4>, last accessed 15 June 2011.

oriented sectors appropriate for governmental intervention given the regulatory role of African governments.

To that effect, in so far as disputes associated with e-government are concerned, governments may wish to establish and operate, or simply hire an established ODR provider that would cater for such administrative disputes that may arise in a G2C and G2B context.[88] In support of such approach, it is submitted that African and Middle Eastern States are generally comfortable with the State interventionist *modus operandi*. Moreover, the absence of adequate ADR schemes that tackle such administrative and governmental disputes warrant the utilization of ODR schemes that would ultimately offer an efficient system for resolving administrative disputes arising from e-government dealings, especially in light of the general inefficiencies and delays in the African and Middle Eastern judicial system.[89]

That said, and taking into consideration the tidal wave of political unrest in some African States as well as the recurring disputes arising from diverse election processes, ODR may offer novel and efficient schemes to resolve electoral disputes, especially that the failure to resolve election controversies peacefully and in a timely manner can lead to conflict escalation, which would threaten the democratic process and political stability of the State. In such context, ODR can truly offer affordable, geographically and legally available processes that could produce efficient, unprejudiced, and impartial results within a short time frame in many instances. This would ultimately strengthen credibility and guarantee public trust in neutral schemes that produce unbiased results.

On a different note, amongst the new initiatives that may qualify as ODR precursors in Africa, is the "Sierra-Leone Peacetones" project.[90] This project aims at the following: (i) supporting talented and hardworking artists living in remote and developing communities through the use of digital media and e-commerce; (ii) uniting legal, technical, and business expertise to help musicians in frontier countries obtain economic and legal equality; (iii) guiding musicians in learning how to access legal resources and the global market place; (iv) educating diverse communities on how to build their own economic bridges, access available global resources, and resolve their own disputes;[91] and (v) setting up online businesses for artists across the world and promoting them through social networking sites to sell their work online. It is envisaged that a certain percentage of the revenues shall be is invested by artists in their communities in the form of development projects.

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88 G2C denotes "Government to Consumers" and G2B denotes "Government to Business."

89 The well established legal maxim reads "Justice Delayed is Justice Denied". In other words, legal and judicial redress should be timely and swift to avert the grave injustice inflicted as a result of undue delay. Such maxim which is often attributed to William Gladstone, finds its origins not only in general principles of law and justice, but has also been enshrined in the "Magna Carta," where clause 40 reads, "[...] to no one will we refuse or delay, right or justice".

90 See <peacetones.org/peacetones-sierra-leone/>, last accessed 15 June 2011.

91 This is clearly an area where ODR could be most beneficial.

By and large, whilst African States are developing at different degrees given the intertwined matrix of techno-legal, socio-political, and economic infrastructures, ODR is no longer a distant dream, but rather a very much a proximate reality. South Africa has taken the lead with its two ODR initiatives in domain names and consumer disputes, and more States, such as Egypt, Morocco, Tunisia, Nigeria, Sierra-Leone, etc. are expected to follow suit in the near future. However, training, trust, and expertise remain an indispensable necessity for the proliferation of ODR systems in Africa.

Whilst certain techno-legal, socio-political, and economic challenges exist to the development of ODR in Africa, it is submitted that the future of ODR in Africa is not uncertain with respect to ultimate implementation. The uncertainty pertains to those amenable and competing sectors, which could form a strong entry point for ODR in Africa.

In conclusion, it is submitted that the robustness of Africa's lust for adequate and efficient dispute resolution processes shall be, in the near future, fulfilled by ODR schemes, which could be court-annexed or privately driven trusted systems.

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