

Online Dispute Resolution*

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I. Introduction

The end of the twentieth century will have been the stage for a première that might come to be considered a high point in the history of dispute resolution. In January 2000, for the first time ever, parties located in the four corners of the earth resolved international legal disputes completely online. They did not meet, but exchanged documents, comments and evidence under the vigilant “eye” of an arbitrator appointed by an institution that was itself located in a different country. We are of course referring to domain name disputes arbitrated under the aegis of the dispute resolution policy and rules¹ of the Internet Corporation for Assigned Names and Numbers (ICANN), and administered by eResolution. The latter was the first organization to offer a completely online resolution service for domain name disputes. The innovative and original nature of this approach to law cannot be overemphasized. In March 2000, another organization, SquareTrade², launched a pilot project offering online mediation services for disputes among users of eBay³ auction services. The SquareTrade system has resolved over one million disputes so far⁴. Today, using the Internet to settle or at least to assist in settling disputes seems like a natural path that might still raise a few questions but generate little hesitation. It was not always this way.

One of the very first experiments in this area, the CyberTribunal project by the *Centre de recherche en droit public* (CRDP) at the University of Montréal, initially generated a great deal of scepticism in the international legal community. The project was launched in 1996 to offer consumers completely online mediation and arbitration services to resolve disputes between them and online sellers. At the time, most lawyers could not imagine how technology could be used to conduct either legal (such as arbitration of domain name disputes) or para-legal proceedings (such as mediation) without the physical presence of the parties. Their presence seemed necessary at all steps in the proceedings. In the legal imagination, the behavioural grammar of disputes required that the parties or their

1 See <http://www.icann.org/udrp/> (last visited on February 1, 2005).

2 SquareTrade, <http://www.squaretrade.com> (last visited on February 1, 2005).

3 eBay, <http://www.ebay.com> (last visited February 1, 2005).

4 See <http://www.squaretrade.com/> Click on “About us” (last visited on February 1, 2005).

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lawyers see each other. We will come back to this. Such reticence and doubt clearly did not stop the initiators of the project⁵.

The university framework was well suited to conducting experiments and testing whether there were good reasons for the reservations. The CyberTribunal project also fit in with the CRDP's research on information technology law. Indeed, research in that area is what gave rise to the idea of a cybertribunal. Work on information technology law, Electronic Data Interchange (EDI) to electronic commerce, rapidly led to the idea of computer-assisted dispute resolution mechanisms. The Internet gives rise to profound questions concerning jurisdiction, applicable law and means for enforcing obligations. How can greater legal certainty be provided for transactions involving information on the Internet? The Internet is a locus of interactions that, whether or not they are contractual, all involve the transfer of information. The transactions take the familiar forms of electronic commerce (between businesses or between businesses and consumers), privacy (exchange of information subject to privacy regulations), intellectual property licensing regimes, trademark (domain names), etc. In short, a whole cluster of legal relationships are established through electronic transactions, but there is no certainty as to the legal framework. So, why not use the medium itself to solve the problems it raises? In other words, why not take advantage of the technological capabilities of communication on the network of networks to eliminate the difficulties in identifying a reliable and effective legal framework for such communication? Why not use the Internet to deal with the problems that arise there, particularly with respect to the delocalization of the parties, the distance separating the stakeholders, the intangibility of information and the resolutely international nature of electronic transactions?

The best means of helping to establish an environment of trust on the Internet had to be found, for trust is the cornerstone of increased legal certainty. It seemed that legal risk could be reduced only if recourse were possible and sanctions enforceable when parties fail to fulfil obligations generated by an electronic transaction. There being no recourse and, consequently, no sanction would undoubtedly be the height of legal uncertainty. If it proved impossible for law to reform situations detrimental

5 Namely, professors Karim Benyekhlef, co-author of this book, and Pierre Trudel, Centre de recherche en droit public, <http://www.crdp.umontreal.ca> (last visited on February 1, 2005).

to the legal interests of Internet users, there was a strong risk that they would desert cyberspace.

CyberTribunal was based on the following postulates :

- With the spread of various information transactions on the Internet, conflicts will arise that traditional national law will not be able to handle owing to the a-territorial nature of cyberspace;
- In the open environment of cyberspace, no authority can claim to have a monopoly over establishing or enforcing rules. Parties are often able to move elsewhere to escape rules that do not suit them;
- Mediation and arbitration processes, as well as other dispute resolution methods, at least partially help to establish frameworks and processes through which rules may be applied in cyberspace;
- Appropriate dispute prevention and resolution mechanisms, based not on government regulations but on other mechanisms designed to ensure effectiveness, are a necessary component of the framework for transactions in cyberspace.

The postulates were confirmed over time. They justified the strategic choices made in the CyberTribunal project. It became clear that the best means of offering recourse to Internet users lay in alternative dispute resolution (ADR), particularly in mediation and arbitration. These flexible, a-national means were embodied in a software program that followed very simple rules : user-friendliness and transparency of rules. Users were able to employ the interface on their own to institute mediation or arbitration proceedings. Help balloons and hypertext links allowed them to employ the mechanisms to their full advantage. This took care of user-friendliness. For the rules to be transparent, users had to be able to navigate in the system and resolve disputes without having to refer to mediation and arbitration rules. The rules were therefore integrated into the system and interface to make them easier to understand and use. The CyberTribunal experiment, which ended in December 1999, proved conclusive because it successfully resolved a number of disputes through mediation. The initial hypothesis, which was that it is possible to use electronic environments to resolve disputes, was verified empirically. However, we have to acknowledge that CyberTribunal was a limited exercise owing to its experimental nature and the university context, which both imposed certain constraints and prohibited broader deployment. The validity of the concept was demonstrated, but it still had to

be adopted by the legal community if it was to be used in a more formal legal context.

Disputes over domain names, which generally pit a trademark holder against a domain name owner, provided a life-size testing ground. The dispute resolution policy and rules adopted by ICANN in October 1999 apply to all domain name owners. Implementation and enforcement of the rules and policy raise no problems because ICANN has control over all of the registrars (the companies in charge of registering names in the top-level generic suffix domains such as “.com”, “.net” and “.org”). Since domain names give rise to real disputes and ICANN has a formal dispute resolution framework, it was possible to take cyberjustice beyond the experimental stage.

On January 1, 2000, eResolution was accredited by ICANN under the policy, and thus became a certified body able to hear domain name disputes. It was the fruit of collaboration between North American university researchers to prevent the World Intellectual Property Organization (WIPO) from gaining exclusive control over the domain-name dispute resolution process. WIPO, which had written the Final Report of the First WIPO Internet Domain Name Process⁶ at the request of the American government, was entertaining dreams of a monopoly over the dispute resolution process, and had decided to put its brand new Arbitration and Mediation Center to good use, though its activities had been rather limited up to that point. Professors Michael Froomkin (University of Miami), David Post (Temple University), Ethan Katsh and Janet Rifkin (University of Massachusetts) and Karim Benyekhlef (University of Montréal) therefore decided to join forces in July 1999 to ensure competition with respect to the domain name dispute resolution process⁷. In association with this group of university researchers, the CyberTribunal experimental system was employed by a private company, in which the authors of the present work participated, to build a software module integrating ICANN's policy. As an accredited body, and thanks to its network of arbitrators, eResolution contributed to the online resolution of over 500 cases from around 60 countries in two years of

6 World Intellectual Property Organization, “The Management of Internet Names and Adresses: Intellectual Property Issues - Final report of the WIPO Internet Domain Name Process”, April 30, 1999, available at : <http://arbiter.wipo.int/processes/process1/report/pdf/report.pdf> (last visited on February 1, 2005).

7 Also see the website run by professors Froomkin and Post: <http://www.icannwatch.org/> (last visited on February 1, 2005).

operation. This proved that the communication technologies offered by the Internet could help to resolve transborder disputes.

In the eyes of many, the CyberTribunal experiment and eResolution experiments with electronic dispute resolution mechanisms confirmed the feasibility and utility of employing information and communications technologies to establish an atmosphere of trust on the Internet. Indeed, this was so clear that at the end of 2000 and beginning of 2001, a multitude of websites sprang up claiming to offer online dispute resolution services. The buoyant stockmarket at the time partially explains the surprising surge in the number of such services, though unfortunately they too often lacked credibility. Indeed, this glut forces us to define what is really meant by “online dispute resolution (ODR)”. Cyberjustice is another concept that has to be defined. What do these terms really cover? It is important to distinguish between initiatives that are part of the innovative current and those that are more or less shams. We will come back to this often in the present work. For now, suffice it to say that there are three features characteristic of cyberjustice: first, a software application that automates certain functions, models the relevant procedural framework (rules concerning domain names, for example) and offers an interface from which all the steps of a procedure can be performed and all evidence stored, transmitted and managed; second, permanent online technical support; and third, a network of neutral third parties recognized for their expertise in the relevant area. These essential features are used in online negotiation, mediation, conciliation and arbitration. Other features are of course added when the government decides to invest in cyberjustice by offering e-filing and case management systems.

The ECODIR (Electronic Consumer Dispute Resolution) project, sponsored by the European Commission, was also the result of work by the University of Montréal’s *Centre de recherche en droit public* (CRDP). ECODIR was a consortium of European (Université de Namur, CNRS and the University College Dublin) and Canadian (CRDP and eResolution) partners, the goal of which was to offer an electronic platform to European consumers so that they could resolve disputes with cybersellers. A negotiation and mediation platform was made available to the parties in October 2001. This was a first in Europe.

Perhaps this brief summary of cyberjustice’s first years fails to portray the sudden acceleration and passage from almost total scepticism to virtually unlimited faith, from confirmed reticence to wholehearted endorsement. Of

course, questions remain, but they will be answered by the development of cyberjustice on both the domestic and international levels. In particular, there is the question of the consumer's ability to take advantage of arbitration. However, it is surprising to see the rapid acceptance of the principle of remote dispute resolution by almost all of the major stakeholders in cyberspace. As we will see, governments, international organizations, business associations and consumers' advocates now fully acknowledge the need to use ODR to establish an environment of trust on the Internet and facilitate the exercise of parties' rights in electronic transactions.

The reservations that are expressed most often, and which still remain in the minds of many lawyers, are related to the physical presence of the parties during the proceedings. In the case of domain name disputes, for example, the proceedings took place in the parties' absence. The parties met neither each other nor the arbitrator in person. Obviously, they could contact each other by email, fax or even telephone, if required. However, communication passed first through a website reserved for the case and which the parties, arbitrator and case administrator could access using a password. The parties could use the site to file complaints and responses, contact each other, the arbitrator and the case administrator, upload evidence, suggest settlements, manage their respective files, etc. Conducting the proceedings in the parties' absence is not, contrary to what one might think, an essential feature of cyberjustice. They can meet, if required. This does not detract from cyberjustice because putting even part of a procedure online saves an enormous amount of time and money. Yet, why is physical presence a recurring theme among those who seem to fear the establishment of cyberjustice? Beyond immediate and contingent arguments, such as the importance of cross-examination in the common law, a plausible explanation lies in the deep ritualization of the legal process in general. If the parties are absent, there is a loss of theatricality, and this troubles some lawyers. Law remains today "one of the most ritualized functions of social life"⁸. One need only visit a courtroom or read a judgment to find a very special and often repetitive style.

The claims to rationality made by members of the legal profession do nothing to eliminate the ritual features of law. Ritualization is at the very

8 Claude Gauvard and Robert Jacob, "Le rite, la justice et l'historien" in Claude Gauvard and Robert Jacob (Eds.), *Les rites de la justice*, Paris: Le Léopard d'Or, 1999, p. 9.

heart of the institution; it is an integral part of it and often provides a justification for the judicial act itself. Thus, “the act of judging requires its own space”⁹. Justice must be conducted in a consecrated location, which plays an important role in the staging of justice. The Western legal tradition has its roots in medieval justice, which sought peace, not truth¹⁰, and since churches carry peace, it was not unusual for justice to be rendered in such sacred places¹¹. This better explains the legal liturgy that even today demands a specific spatial configuration so that the actors can speak the law and carry it out with greater authority. Through its sacramental nature, the location therefore actively participates in reconciling the parties and resolving their dispute¹². Since rituals also play the role of social glue in that they are “remarkable machines for producing social unity”¹³, they require a public forum where a large audience can “see” justice in action and thereby contribute to the authority of the judgment. Dispute resolution takes on a public dimension so that the actions of justice can be made visible to the community¹⁴. “Seeing” justice supposes a virtually physical link between those who seek it, those who render it and those who observe. Yet, justice is often represented as a woman with her eyes blindfolded¹⁵ because the “judge’s regard is only an appearance; he or she does not express a subjective consciousness”¹⁶ but rather a collective mind¹⁷. Judges must therefore have dual personalities because they have to forget themselves as subjects and base their judgments on their mind’s eye¹⁸. The other actors on the legal stage must “see” justice in action in accordance with the principle that justice must not only be done but also be seen to be done. Consequently,

9 Antoine Garapon, “L’archéologie du jugement moderne”, in Claude Gauvard and Robert Jacob (Eds.), *Les rites de la justice: gestes et rituels judiciaires au Moyen Âge*, Paris: Le Léopard d’Or, 1999, p. 230. See also by the same author: Antoine Garapon, *Bien juger: Essai sur le rituel judiciaire*, Paris: Editions Odile Jacob, 1997 (hereinafter “Garapon-Essai”) [our translation].

10 Harold Joseph Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge (Mass.): Harvard University Press, 1983.

11 Nicolas Offenstadt, “Intercation et régulation des conflits. Les gestes de l’arbitrage et de la conciliation au Moyen Age (XIII^e-XV^e siècles)”, in Claude Gauvard and Robert Jacob (Eds.), *Les rites de la justice*, Paris: Le Léopard d’Or, 1999, p. 206.

12 *Id.*, p. 211.

13 C. Gauvard and R. Jacob, *Supra*, Note 8, p. 7 [our translation].

14 N. Offenstadt, *Supra*, Note 11, p. 228.

15 A. Garapon, *Supra*, Note 9, p. 234. See also Garapon-Essai, *Supra*, Note 9, p. 29.

16 *Id.*, p. 232 [our translation].

17 *Id.*, p. 232.

18 *Id.*, p. 233.

the argument is that ADR mechanisms cannot escape ritualization because their purpose, particularly that of mediation, is primarily to reconcile the parties, and the behavioural grammar of reconciliation requires a physical meeting¹⁹. Here again, the symbolism of physical contact controls reconciliation and peace²⁰. Do not justice and peace embrace each other²¹?

Such quasi-atavistic rituals still live on in the legal imagination, and even the most modern rituals undeniably have their roots in the medieval ideas that founded justice in the western world. This probably partially explains the attachment to forms and formalities, which are, all things considered, often devoid of any practical rationality but operate so deeply in the collective psyche that they appear unavoidable and necessary. Thus, the relation between form and norm appear “essential to the experience of justice”²². Technology leads to a disenchantment with and trivialization of ritual. Yet, ritual, particularly through its symbolic aspect, contributes to the social order. The challenge for cyberjustice is thus to re-invent appropriate rituals that are, of course, based on those of the past, or at least to adapt rituals to new technology so that the concurrence and therefore authority that they cast on the thing they adorn appear consubstantial with the exercise of justice. Cyberjustice cannot be exempt from rituals that assure continuity with the more traditional rituals of law. As Paul Ricoeur writes, “performing a ritual means doing something with power”²³. It is this power, impregnated with ritual, that ensures the authority of law.

This book has a number of goals. The first is to demystify cyberjustice. What does it really mean? What does it presuppose? We will have to explain exactly what information and communication technologies bring to the administration of justice. We will try to describe the nuts and bolts of online dispute resolution. This will lead us to the most accurate description possible of the experiments conducted in this area, particularly those with the greatest credibility. Indeed, there are many areas in which cyberjustice can be used, but so far few have received concrete, sustained attention. Such attention could usefully be turned to the strong potential of ODR, which merits

19 *Id.*, p. 236.

20 N. Offenstadt, *Supra*, Note 11, p. 217.

21 “*Pax et Iustitia osculatae sunt*”, *id.*, p. 201.

22 Garapon-Essai, *Supra*, Note 9, p. 43.

23 Paul Ricoeur, “Parole et symbole”, in Jacques E. Ménard (Ed.), *Le symbole*, Faculté de Théologie catholique, Palais universitaire, 1975, p. 155, cited in Garapon-Essai, *Supra*, Note 9, p. 24 [our translation].

investigation. The strictly legal aspects of the phenomenon should also be discussed. How can state law, a perfect example of public power, be reconciled with cyberjustice, which sometimes takes the path of private forces? What are the legal obstacles to deploying ODR? Finally, the reader is invited to learn about the first *sui generis* online arbitration system : the domain name dispute resolution application developed by eResolution. This initiation should complete the demystification of cyberjustice.

Traditional civil and commercial law is becoming less accessible because often it is too expensive and imposes unreasonable time frames. On the Internet, a wide range of products and services are available to consumers and companies, but there is no truly adequate legal certainty. In both cases, recourse to information and communications technologies must provide remedies for these problems. Cyberjustice certainly does not dream of dematerializing all aspects of legal proceedings. However, it can increase access to justice and ensure greater legal certainty on the Internet by reducing the cost and time required to settle disputes. Of course, the legal community's *ethos* remains to be changed so that it can be adapted to new practices. Given the rapid transformations in public and private stakeholders' views on ODR in recent years, there is good reason to think that lawyers, though they are still hesitant, will adapt their practices relatively quickly. The principle of cyberjustice has been established, and it is difficult to imagine taking a step backward. The many shortcomings of justice in Europe and North America today should be partially alleviated by electronic mechanisms that take much of the administrative and procedural work off the hands of judges and lawyers so that they can spend more time judging and arguing cases, which are after all their primary tasks.

II. Modernization of justice

In recent years, justice has become a veritable industry. The skyrocketing volume of litigation can be explained partly by population growth, increased trade and more crime, as well as by greater regulation of human relations.

These factors make it easy to see why the number of disputes before the courts continues to grow. These new realities translate not only into an increase in the number of disputes but also into longer case processing times in courts and a proportional increase in the cost of ensuring proper administration. The situation is such that some organizations, such as the United States Chamber of Commerce's Institute for Legal Reform²⁴, have adopted a mandate to try to control the burgeoning growth in litigation. In the United States alone, over 10 million new cases are brought before the courts each year²⁵. In France, over 2 200 000 decisions were rendered in civil and commercial matters²⁶ and over 116 000 cases were heard by French administrative tribunals in 1999²⁷. In the United States, the costs related to the administration of justice are estimated at over US\$200 billion²⁸. The resulting congestion in the courts and growing costs have to be dealt with, and there seem to be two solutions available.

The first solution involves ADR. More and more stakeholders are realizing that there is a wide range of alternatives to the courts when it comes to solving conflicts efficiently, and that some of them even complement court proceedings. As Nabil Antaki notes, the apparent monopoly of state courts is now a thing of the past :

Today, we are far from the time when legal recourse was considered the only way to guarantee rights and provide sufficient certainty and predictability. At that time, alternative methods were viewed with

24 US Chamber Institute for Legal Reform, <http://www.legalreformnow.com/> (last visited on February 1, 2005).

25 The most pessimistic believe instead that a case is brought every two seconds. See US Chamber Institute for Legal Reform, "America's Class Action Crisis", source: <http://www.legalreformnow.com/> (last visited February 1, 2005 ; article no longer available online).

26 Nicolas Bonnal, "Les institutions judiciaires" in Pierre Truche, (Ed.) *Justice et institutions judiciaires*, Paris: La documentation française, 2001, p. 45.

27 Conseil d'Etat, "Rapport Public 2001", Études et Documents du Conseil d'Etat, Paris: La documentation française, 2001, p. 17-18.

28 Colin Rule, *Online Dispute Resolution For Business*, San Francisco, Jossey-Bass, 2002.

*suspicion. It was claimed that they offered cheap justice and were unhealthy competition for the public legal system. This concept is outmoded. Several years ago we entered an era when a diversity of forums and procedures and a wide range of notions of law and justice are allowed [...] The new forms of justice are now just as recognized and legitimate as traditional justice.*²⁹

In all areas of economic activity, there has been a major upswing in the use of ADR, such as negotiation, mediation and arbitration. In 1997, Cornell University, in collaboration with the Foundation for Prevention and Early Resolution of Conflict (PERC), published a study³⁰ noting the growing recourse to ADR as a way to significantly reduce litigation costs. The researchers also predicted that the use of ADR would grow considerably in the years to come³¹.

Today, more and more organizations are being established to study, promote and raise awareness of the advantages of using ADR³². In Europe, a number of organizations recommend the resolution of commercial disputes by mediation and arbitration. These institutions include, in particular, the *Centre de Médiation et d'Arbitrage de Paris* (CMAP)³³, an association created by the Paris Chamber of Commerce and Industry in partnership with the *Tribunal de Commerce de Paris*, the *Association française d'Arbitrage*, the *Barreau de Paris*, the *Comité National Français de la Chambre de Commerce Internationale* and the *Conseil supérieur de l'Ordre des Experts-Comptables*. In 2001, in collaboration with Belgian³⁴, English³⁵, Dutch³⁶ and

29 Nabil Antaki, "Perspectives nord-américaines en médiation", in Service de la Formation Permanente, Barreau du Québec, *Développements récents en médiation*, Cowansville: Editions Yvon Blais, 1995, p. 171 [our translation].

30 David Lipsky and Ron Seeber, "The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations", New York: Cornell/PERC Institute on Conflict Resolution, 1998.

31 *Id.*

32 There are many organizations in the world that share this mission. Among the most well known are the International Court of Arbitration of the International Chamber of Commerce (ICC), established in 1919 and the American Arbitration Association (AAA), founded in 1926.

33 Centre de Médiation et d'Arbitrage de Paris, <http://www.mediationetarbitrage.com/> (last visited on February 1, 2005).

34 Brussels Business Mediation Centre, http://www.ccib.be/site/fr/maison_des_entreprises/ (last visited on February 1, 2005).

35 Centre for Effective Dispute Resolution (CEDR), <http://www.cedr.co.uk/> (last visited on February 1, 2005).

Italian³⁷ mediation centres, CMAP published a report on areas where mediation is used in Europe³⁸. The report inspired the European Commission's 2002 Green Paper on alternative dispute resolution in civil and commercial law³⁹.

In the United States, in order to promote the use of negotiation, mediation and arbitration by the legal community, the CPR Institute for Dispute Resolution⁴⁰ developed a pledge for companies that commits them to using ADR before taking the traditional legal path. Currently, over 4 000 organizations have pledged to do so, including AT&T, Daimler Chrysler, General Motors, IBM, Microsoft, PricewaterhouseCoopers and Time Warner⁴¹. Similar pledges also bind over 1 500 law firms⁴² and many corporations in banking⁴³ and insurance⁴⁴.

There thus seems to be a real movement toward ADR and a consensus on the advantages that it has over a judicial system that is becoming less and less accessible owing to growing costs and delays. The advantages of alternative mechanisms are numerous : they decongest the courts and reduce the cost to society of administering justice while providing the parties with substantial savings in time and money because of the flexibility of the procedures. Indeed, that flexibility gives the parties greater control over the process⁴⁵.

36 Netherlands Mediation Institute (NMI), <http://www.nmi-mediation.nl/> (last visited on February 1, 2005).

37 UnionCamere, <http://www.unioncamere.it/> (last visited February 1, 2005).

38 Centre de Médiation et d'Arbitrage de Paris, "État des lieux de la médiation en Europe", 2001, available at : <http://www.mediationetarbitrage.com/pdf/Etat%20des%20lieux%20Grotius.pdf> (last visited on February 1, 2005).

39 European Union, "Green Paper on Alternative Dispute Resolution in Civil and Commercial Law", COM(2002) 196 Final, available at : http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf (last visited on February 1, 2005).

40 CPR Institute for Dispute Resolution, www.cpradr.org (last visited February 1, 2005).

41 See the "CPR Corporate ADR Pledge", *Id.*

42 See the "CPR Law Firm Pledge", *Id.*

43 See the "CPR Banking Industry Dispute Resolution Commitment", *Id.*

44 See the "CPR Insurance Industry Dispute Resolution Commitment" and the "CPR Inter-Insurer dispute resolution commitment for disputes relating to the September 11", 2001 disaster, *Id.*

45 As Schiffer notes: "All ADR methods are based upon the parties themselves controlling the timing of the resolution process. ADR is not subject to the burdens of bureaucracy [...] If litigation is commenced the court proceedings will take several

Moreover, with the emergence of new technologies, alternative mechanisms are bound to become even faster, cheaper and more efficient, thereby widening the gap between so-called private justice and the judicial system. Though long confined to the physical world, negotiation, mediation and arbitration must now demonstrate the flexibility, malleability, speed, facility and low cost that have always justified their existence and made them a success. In other words, it now seems primordial to adapt these much-touted institutions to electronic environments so that they can maintain all of the qualities that have made them the preferred means of resolving international trade disputes. Indeed, electronic environments are especially fertile ground for these types of ADR. In addition to the advantages they offer in terms of speed and reduced cost, the malleability and flexibility of ADR mechanisms lend themselves very well to handling phenomena such as delocalization of the parties, internationalization of transactions and circulation of information in electronic environments. ODR adds efficiency by enabling the parties to find a solution to their conflict employing, by assumption, the same medium that they used to carry out the transaction. Since they also do not have to travel, they save much time and money.

In cases where recourse to the courts cannot be avoided⁴⁶, a second solution, namely, automation of various stages of the judicial process, makes it possible to increase the efficiency and speed of dispute management by the courts. As early as 1992, Henry Perrit noted that government use of new information technologies would increase the efficiency of the process, citizen participation and procedural guarantees⁴⁷. Thus, using an electronic network, it is possible to facilitate the electronic management of cases before the courts so that all involved in the proceedings can communicate with one

years and the company will incur major additional expenses in legal and experts' fees without any assurance of successful recovery". Richard A. Schiffer, "The Use of alternative dispute resolution in resolving disputes involving EDI", in Ian Walden (Ed.), *EDI and the Law*, London: Blenheim Online Publications, 1989, 179, 181.

46 "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 or criminal cases. Small claims benefit more from the low costs of ODR than large claims". Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer, Vincent Bonnet, "Online Dispute Resolution: The State of the Art and the Issues", E-Com Research Project of the University of Geneva, Geneva, 2001, available at : <http://www.online-adr.org/reports/TheBlueBook-2001.pdf> (last visited on February 1, 2005).

47 Henry H. Perrit Jr., "The Electronic Agency and the Traditional Paradigms of Administrative Law", (1992) 44 *Administrative Law Review*, 79-105.

another, exchange information, consult files, make decisions and notify the others of those decisions, etc.

In light of the above, we will now give a brief presentation of the various disputes in both the physical world and cyberspace that could be handled better if resolution procedures were partly automated. This is of course only an overview, but it should allow us to grasp all the potential of Internet technologies for dispute resolution.

A. Areas of application

In business, disputes are unfortunately inevitable. Clearly, economic development depends on the availability of effective dispute resolution mechanisms. Indeed, the presence of clear rules and a well-defined, predictable legal framework are important factors for the growth of business no matter the area. Access to dispute resolution mechanisms is part of the road to legal certainty, which also leads to clarity and predictability. Electronic commerce certainly seems to be an area where the need for ODR is most urgent⁴⁸. The delocalization of the parties, international nature of transactions, and difficulty in identifying competent fora explain the necessity of providing flexible online mechanisms that are adapted to electronic environments so as to meet the need for legal certainty.

In the offline world, ODR could be used in the private sector. As we will see, economic activities generates a large number of disputes that are often difficult to manage because of the small amounts of money involved. Technology could certainly facilitate effective processing and resolution of this type of dispute but, naturally, ODR would not presuppose the elimination of more traditional means of resolution.

However, we should first describe some of the technological initiatives taken in the judicial sector, properly speaking. Indeed, it is clear that the judicial system has also undergone many technological changes. Here too,

48 “Access to justice is in turn a strong promoter of e-confidence. Many e-commerce managers, for instance, state that an effective dispute resolution system is a marketing tool, a part of good customer service. ODR, in this sense, is meant to establish customer trust in e-commerce. [...] An appropriate dispute resolution system helps to build trust and confidence in a commercial activity.” Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer, Vincent Bonnet, *Supra*, Note 46.

Internet technologies have been used to facilitate the process of putting various steps of the judicial process online.

(1) The public sector

In this section, we will study how some tribunals and government agencies are trying to use integrated justice information systems (IJISs) to find solutions to difficulties in managing disputes. To begin with, a distinction must be made between the way technology is used in IJISs and ODR. In the former case, information and communication technologies are used to create applications based on classical judicial processes and the various administrative steps related to the judicial system, and to put them online. In ODR, technologies are used to create software that reproduces negotiation, mediation, conciliation, arbitration and any other form of ADR (for example, evaluation by a neutral expert), and put them online. In both cases, the goal is to improve dispute management by reducing the cost and time required.

Armed with this distinction, let us look briefly at IJIS initiatives.

Increasingly, courts of justice, administrative tribunals and government agencies⁴⁹ are finding that prohibitive costs and an overload of cases pending have significantly limited access to justice. By integrating electronic forms into the management of civil and administrative proceedings, organizations can remedy these problems by speeding up the whole process, making file management more efficient and reducing the cost to the parties.

Implementing IJISs will certainly be the biggest undertaking in the North American legal community in the next few years. It should be noted that in both Canada and the United States, the judicial system is unified, in the sense that there is no judicial category based on substantive law. Thus, the same tribunal can be seized with civil, criminal, administrative, tax and constitutional cases. This kind of judicial system probably lends itself to greater electronic integration, notably because of the caseload.

49 According to a study by the Gartner Group, in the United States, local and national government expenditures related to government electronic management initiatives will go from \$1.9 billion US in 2001 to \$6.5 billion in 2005. See Bluecrane, "Winning Sectors In The Public Sector Market", ITAA Webcast, October 30, 2001, source: <http://www.itaa.org> (last visited on February 1, 2005 ; study no longer available online).

In Canada and the United States, there are many initiatives involving automation, in the broad sense, of justice. The initiatives can be grouped into two main areas : case flow management and case management systems. However, IJISs, as their proponents define them, cover both areas. In 1999, the National Criminal Justice Association (NCJA) in the United States proposed the following definition of IJISs :

As it is used in this document, the term “integrated justice system” encompasses interagency, interdisciplinary and intergovernmental information systems that access, collect, use, and disseminate critical information at key decision points throughout the justice process, including building or enhancing capacities to automatically query regional statewide and national databases and to report key transactions regarding people and cases to local, regional, statewide and national systems. Generally, the term is employed in describing justice information systems that eliminate duplicate data entry, provide access to information that is not otherwise available, and ensure the timely sharing of critical information.⁵⁰

The definition proposed by the NCJA gives the term very broad scope. Essentially, it covers all actors in the judicial process : government agencies, police forces, correctional services, parole boards, local, provincial and state agencies, courts, bailiffs, judges, lawyers, etc. The purpose is to facilitate the construction of an electronic network that would allow all stakeholders to communicate with one another, exchange information, consult files and render and notify decisions; in short, it facilitates the electronic management of the chain of information in court cases.

The route taken by a police report in Canadian law illustrates the chain of information. A police officer writes an investigative report concerning an offence and sends it to the Crown prosecutor. The prosecutor uses the report to decide whether charges will be laid. When the accused appears in court, the investigative report is used to decide whether he or she will be released during the proceedings or whether a psychiatric examination is required. The same document is also used by an officer of the Department of the Solicitor-General to prepare a presentence report, if applicable, and by the judge when determining the sentence. If the accused is found guilty, the investigative report is used to determine to which category of detention centre or

50 National Criminal Justice Association, “Justice Information Privacy Guidelines—Developing, Drafting and Assessing Privacy Policy for Justice Information Systems”, September 2002, available at : <http://www.ncja.org/pdf/privacyguideline.pdf> (last visited on February 1, 2005).

penitentiary he or she should be sent. Finally, the parole board eventually studies the same investigative report. It is clear that networking all of the stakeholders can facilitate the transmission of information.

The term also covers case management systems. The term *e-filing* is also sometimes used, but it does not cover all of the functionalities presupposed by a case management system. In a way, e-filing is a subset of such a system, which can be defined as the automation and networking of judicial procedures, in the proper sense of the word. Thus, information is also put on the network, but the systems mainly facilitate the management of procedures (applications, requests, statements, etc.) and interaction among stakeholders in a case. The goals are of course to speed up the process and reduce costs. However, it is also possible to contemplate remote appearance, remote examination of requests and preliminary and interlocutory applications without the physical presence of those who submitted them, electronic notification of procedures or even of certain decisions (procedure management), and management of court cases, rolls, hearings, evidence, the court calendar, digital recordings, internal resources and execution of the financial aspects (deposit, bail, etc.).

E-filing systems allow documents to be sent through protected lines of communication. Parties involved in judicial proceedings use e-filing to exchange documents, such as answers to examination, complementary answers and discovery. They are different from the preceding systems in that their purpose is not to manage all of the factors related to a court case, such as rolls and hearings. Unlike case management systems, e-filing systems do not cover case management. They are only one part of a larger whole that makes up court management. This distinction is probably doomed to disappear, but we mention it here because e-filing was the first system set up in many American courts. It made it possible for parties to file online applications and exhibits that were already in digital form. E-filing systems are now integrated into and merged with more ambitious case management systems that are themselves part of IJISs.

In Canada, the federal government is in the process of setting up the Canadian Public Safety Information Network (CPSIN), which will serve “as the basis for a modern, national information network linking the various sources of information to the criminal justice practitioners”⁵¹. It should be

51 Solicitor General of Canada, Steering Committee on Integrated Justice Information, “Integrated Justice Information Action Plan 1999–2004”, Ottawa, March 31, 1999

noted that the network targets stakeholders in the criminal sector only. This is because of constitutional considerations, since the federal courts have exclusive jurisdiction over criminal law and procedure whereas the provinces have jurisdiction over property and civil law, and the administration of justice.

Thus, in Quebec⁵², the provincial government set up its own IJIS for data pertaining to civil, youth and criminal cases. Here, criminal cases are included because, while criminal law and procedure fall under federal jurisdiction, administration of justice is the responsibility of the provinces. This means that there is a risk of some duplication.

In the United States, the situation is even more complex and the risk of duplication is even greater owing to the country's constitutional structure and the large number of stakeholders (the federal administration plus 50 state authorities). There is, however, an initiative similar to Canada's, which is designed to integrate and centralize criminal justice information activities. It is the Global Criminal Justice Information Network Initiative (GLOBAL), which should gain greater importance following the events of September 11, 2001⁵³.

At the federal level, the authority responsible for automating and networking the courts is the Judicial Conference Committee. Thus, judges themselves determine the forms of electronic access to judicial information (case management). That judges should have such autonomy is not surprising if we bear in mind that, in the United States, administration is part of what makes up judicial independence (for federal judges). The primary technological tool created by the Judicial Conference Committee is the index of cases entitled "Public Access to Court Electronic Records" (PACER)⁵⁴.

and "Integrated Justice Information Progress Report 2001", Ottawa, June 2001, available at : http://www.sgc.gc.ca/publications/iji-ijj/IJI-Action-Plan_f.pdf (last visited on February 1, 2005).

52 See Justice Québec, "Étude d'opportunité sur les systèmes intégrés de justice", March 2000, available at : <http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/siij-rap.pdf> (last visited on February 1, 2005).

53 See Office of Justice Programs, "Justice Information Sharing Initiative : A White Paper Prepared for the Attorney General's Advisory Committee of United States Attorneys", October 2004, available at : http://www.it.ojp.gov/documents/Infoshare_102004_PlusAcronymGlossary.pdf (last visited on February 1, 2005).

54 "The courts plan to provide public access to electronic files, both at the courthouse and beyond the courthouse, through the Internet. The primary method to obtain

Federal courts are also in the process of deploying a Case Management/Electronic Case Files system (CM/ECF). It should enable parties involved in proceedings under federal jurisdiction to use electronic networks to institute an action, produce evidence, file preliminary and interlocutory applications, file documents, exchange information with the judge presiding and the other party, etc. This system is already fairly well established in bankruptcy courts, and more than forty district courts have also implemented it⁵⁵.

(2) The private sector

The private sector is not foreign to cyberjustice technologies. Indeed, it should be noted that it was in a largely privatized context, that of domain names (Internet addresses), that cyberjustice was deployed for the first time. Owing to its characteristically flexible standards, the private sector is fertile ground for experimenting with and implementing ODR mechanisms. Indeed, in a number of areas, private sector activities generate many conflicts that, owing to cost considerations, are often not settled in the classical judicial system. Many stakeholders in the private sector use ADR.

Likewise, traditional mediation and arbitration organizations could be called upon to manage a large number of disputes arising in cyberspace or resulting from information transactions. The often international nature of such transactions naturally puts such organizations in a position to administer

access will be through Public Access to Court Electronic Records (or 'PACER'), which is a web-based system that will contain both the dockets (a list of the documents filed in the case) and the actual case file documents. Individuals who seek a particular document or case file will need to open a PACER account and obtain a login and password. After obtaining these, an individual may access case files – whether those files were created by imaging paper files or through CM/ECF [Case Management/Electronic Case Files]- over the Internet. Public access through PACER will involve a fee of \$0.07 per page of a case file document or docket viewed, downloaded or printed. This compares favourably to the current \$.50 per page photocopy charge. Electronic case files also will be available at public computer terminals at courthouses free of charge". Judicial Conference Committee on Court Administration and Case Management, "Report on Privacy and Public Access to Electronic Case Files", September 2001. Also see the Public Access to Court Electronic Records (PACER) Service Center, <http://pacer.psc.uscourts.gov/> (last visited on February 1, 2005).

55 PACER Service Center, "Local CM/ECF Court Information", available at : <http://pacer.psc.uscourts.gov/announcements/general/ecfnews.html> (last visited on February 1, 2005).

these cases. However, they must still adapt their cost structure and approach to dispute management.

In all cases, it seems clear that the private sector would benefit by automating negotiation, mediation, conciliation and arbitration procedures. The transition to electronic environments in dispute resolution should facilitate the handling of disputes by making it less expensive, faster and therefore more effective.

(a) Traditional mediation and arbitration organizations

Today, arbitration and mediation are increasingly used to settle disputes, so traditional mediation and arbitration organizations manage a growing number of national and international disputes every year. Over time, these organizations have developed unparalleled expertise in dealing with the disputes submitted to them. However, they increasingly acknowledge that it has become necessary to put mediation and arbitration procedures online in order to speed up the dispute resolution process, reduce costs and thereby become more efficient in handling cases, the number of which continues to grow each year. It should also be noted that today international arbitration is still reserved for big business, which is of course because until very recently international trade was mainly the domain of a few large companies. Today, with globalization and the development of electronic commerce, small and medium-sized enterprises are becoming significant players in international trade⁵⁶. Thus, they need to be able to take advantage of ADR, which requires adapting its cost structure, in particular, to the financial means of small and medium-sized enterprises. This can be done by putting dispute resolution procedures online, which would significantly reduce the cost of representation and travel, and thereby make mediation and arbitration services more accessible to small and medium-sized enterprises.

In 1999, there were nearly 300 traditional ADR organizations in the European Community⁵⁷. Moreover, despite the fact that statistics on this phenomenon are scant, it is a reasonable estimate that there are currently around 1 500 mediation and arbitration organizations in the United States.

56 Fabien Gélinais, "Arbitration and the Challenge of Globalization", (2000) 17 *Arbitration international* 117.

57 UNIONCAMARE, *Chambers of Commerce in The European Union and Alternative Resolution of Commercial Disputes*, Rome: MediaCamere, 1999.

These organizations handle a large number of cases every year. The American Arbitration Association (AAA)⁵⁸, which is the largest mediation and arbitration organization in the United States, handled over 218 000 cases in 2001⁵⁹. Judicial Arbitration and Mediation Services (JAMS) manages an average of over 10,000 cases annually. The number of cases recently tripled because of an increase in class actions⁶⁰. Within the AAA, the International Centre for Dispute Resolution (ICDR) administered 649 international arbitration requests in 2001, involving claims worth a total of over US\$10 billion⁶¹.

Moreover, in 2003, the International Court of Arbitration of the International Chamber of Commerce (ICC) handled 580 arbitration applications concerning international trade disputes⁶². Over 50 % of the cases involved more than US\$1 million.

The numbers all indicate a trend toward increasingly frequent use of ADR. The flow will certainly become a flood if recourse to ODR spreads.

58 American Arbitration Association, <http://www.adr.org/> (last visited on February 1, 2005).

59 American Arbitration Association, "2001 President's Letter and Financial Statements", available at : <http://www.adr.org/si.asp?id=1746> (last visited on February 1, 2005).

60 Judicial Arbitration and Mediation Services, "Corporate Fact Sheet", available at : http://www.jamsadr.com/images/PDF/corporate_fact_sheet.pdf (last visited on February 1, 2005).

61 "Over \$10 billion in claims and counterclaims were filed, and 43 % of the cases involved claims over \$1 million or were for undisclosed amounts, which are typically among the very largest claims". International Centre for Dispute Resolution, "ICDR Becomes World's Largest International Commercial Arbitration Institution", Press Release, May 16, 2002, available at : <http://www.adr.org/sp.asp?id=21977> (last visited on February 1, 2005).

62 International Arbitration Court, "Facts and figures on ICC arbitration in 2003", available at : http://www.iccwbo.org/court/english/right_topics/stat_2003.asp (last visited on February 1, 2005).

(b) Labour disputes

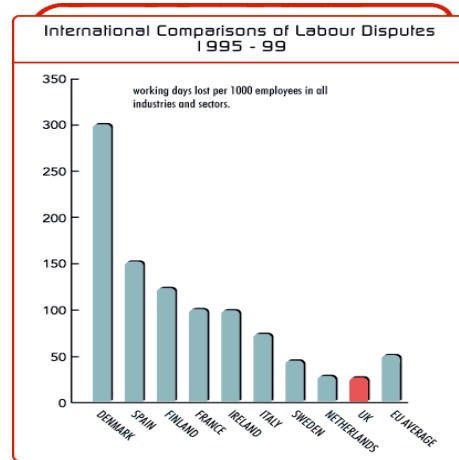
Disputes between employers and employees or unions are inevitable. In Canada, approximately 7 500 grievances go to arbitration each year⁶³. In 1998, the United States Federal Mediation and Conciliation Service (FMCS) recorded 53 978 mediation requests concerning labour relations disputes⁶⁴. It should be noted that this accounts for only a small portion of the real number of grievances because, more often than not, they are resolved in private and not heard in public. It should also be noted that in unionized companies in North America, disputes between employers and employees are managed and resolved on the basis of collective agreements. A collective agreement normally provides that, in compliance with the law, disputes, which are called “grievances”, must be resolved by an arbitrator appointed by both parties. The grievance procedure is usually entirely private and excludes, in principle, any intervention by the courts, except in cases of gross abuse or excess of jurisdiction⁶⁵. The procedure begins with informal negotiations between the parties, and this is often sufficient to settle the dispute.

The following table illustrates the number of days lost per 1 000 employees from 1995 to 1999 because of labour disputes in various European countries, all industries and economic sectors combined :

63 Note that this figure does not take into account the significant number of procedures preceding a grievance, which could account for nearly 80 % of the total number of disputes.

64 Federal Mediation and Conciliation Service, “1998 Annual Report”, source: <http://www.fmcs.gov> (last visited on February 1, 2005 ; report no longer available online).

65 “Les tribunaux supérieurs interviendront en cas d’absence de compétence matérielle de l’arbitre, ou si ce dernier contrevient aux règles de la justice naturelle, ou encore s’il erre dans l’interprétation d’une loi constitutionnelle ou quasi constitutionnelle comme c’est le cas pour les Chartes”. Robert P. Gagnon, “L’arbitrage des griefs” in Barreau du Québec, *Droit du travail*, Montréal: Editions Yvon Blais, 2000, p. 177, 194. See also David Phillip Jones and Anne S. De Villars, *Principles of Administrative Law*, Scarborough: Carswell, 1984, pp. 119-125.



Source : Office of National Statistics⁶⁶

Here again, the numbers show how many disputes there are in the workplace. Because of the dangers that such disputes (whether they are individual or collective) present for social cohesion and economic growth, mechanisms have to be established to facilitate representation, consultation, participation, co-operation, conciliation, negotiation and, finally, arbitration of grievances. It is in the best interest of all to resolve this type of dispute as quickly as possible. ODR can facilitate and accelerate the resolution process.

Disputes can take many forms within a single company. In particular, they can concern relations between employees (harassment, abuse of authority, etc.), employee-employer relations (appraisals, promotions, labour law issues) and interdepartmental relations.

(c) The financial sector

In this section, the term “financial sector” covers banking, securities and insurance.

Given the diversity of their activities and services, stakeholders in banking have to manage a certain number of disputes. Aside from the potential labour disputes with employees that we covered above in general terms, disputes can arise in two main areas : personal and commercial banking.

⁶⁶ Office of National Statistics, source: http://www.invest.uk.com/investing/key_facts.cfm?action=showFact&factID=14 (last visited on February 1, 2005).

Studies and reports on the banking sector show that 75-94 % of the disputes and claims handled in banking involve individuals⁶⁷. The services concerned include banking and insurance (personal accounts, credit cards, insurance products, telephone and online banking, personal loans, mortgages, etc.) as well as investment (discount trading, financial and investment advice, etc.).

Stakeholders in banking also offer a range of commercial services that can give rise to disputes. These services include banking and insurance services (corporate payment cards, corporate account services, commercial insurance products, acquisition cards (debit cards), interbank services, international transactions, etc.) and investment services, including brokerage and advice.

Banking requires effective mechanisms to resolve the disputes that it generates. This need is acknowledged by all stakeholders in the banking community. As early as 1995, many Canadian banks tried to meet this need by establishing ombudsmen to handle complaints that could not be resolved through their usual processes. In 2001, 1 519 complaints were brought before the various ombudsmen⁶⁸.

In 1996, the Canadian Bankers Association (CBA)⁶⁹ created another body before which consumers and small enterprises can appeal decisions rendered by the banks' internal ombudsmen : the Canadian Banking Ombudsman (CBO)⁷⁰. Currently, 12 Canadian banks are participating in the program. Note that the CBO's services are provided to complainants free of charge since the participating banks fund the scheme. According to its 1999 Annual Report, the CBO recorded 1,083 inquiries and complaints from individuals

67 For example, according to a study conducted by the Luxembourg Commission de Surveillance du Secteur Financier, an organization with the mission of carrying out prudential supervision of lending institutions, other professionals in the financial sector, group investment organizations, pension funds, stock exchanges, payment systems and securities transaction systems, 132 of the 140 applications for mediation in 2001 were filed by individuals. See Commission de Surveillance du Secteur Financier du Luxembourg, Rapport Annuel 2001, Chapter 7, "Les réclamations de la clientèle", available at : http://www.cssf.lu/fr/publications/presentation_docs.html?theme_num=5&cat_num=7 (last visited on February 1, 2005).

68 Canadian Banking Ombudsman, 2001 Annual Report, available at : http://www.obsi.ca/obsi/pages_english/annrep_2001.php3 (last visited on February 1, 2005).

69 Canadian Bankers Association, <http://www.cba.ca> (last visited on February 1, 2005).

70 Canadian Banking Ombudsman, <http://www.obsi.ca> (last visited on February 1, 2005). Note that the name of this organization has changed in 2002 for Ombudsman for Banking Services and Investments.

and small enterprises. The following year, this number had increased to 1 179. In the United Kingdom, the Financial Ombudsman Service handled over 6 150 complaints in 2001 in the banking sector alone. This was a 15 % increase in volume over the preceding year⁷¹.

Like banking, security brokerage could also benefit from ODR. In the United States, the New York Stock Exchange (NYSE) and the National Association of Stock Dealers (NASD) have both established procedures based on arbitration. In 1997, the two groups managed 8 % and 90 %, respectively, of all arbitration in the securities sector⁷², in other words, 5,997 cases. Between 2000 and 2002, the NASD received over 20 000 arbitration applications and over 2 200 requests for mediation⁷³. In the United Kingdom in 2001, the Financial Ombudsman Service administered over 18 633 applications in the securities sector, which was a 43 % increase, year over year⁷⁴. In short, the figures show that the number of disputes continues to grow, but the mechanisms for handling and resolving disputes are not changing or adapting to take the increase into account. Automation of the procedures for resolving these types of conflict is clearly one possible solution.

In the insurance industry, the number of claims is also growing every year⁷⁵, and in every area (life, property and civil liability). This makes it difficult for insurers to process claims effectively and in a timely manner.

71 Financial Ombudsman Service, “Resolving Banking-Related Disputes”, 2001, available at : <http://www.financial-ombudsman.org.uk/publications/assessment-guide/first-annual-report/resolving-banking-related-disputes.htm> (last visited February 1, 2005).

72 United States Securities and Exchange Commission, Office of the Inspector General, “Oversight of Self-Regulatory Organization Arbitration”, 1999, available at : <http://www.sec.gov/about/oig/oigauditlist.htm - 1999> (last visited on February 1, 2005).

73 National Association of Stock Dealers, “Dispute Resolution Statistics”, available at : http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=516&ssSourceNodeId=12 (last visited on February 1, 2005).

74 Financial Ombudsman Service, “Resolving Investment-Related Disputes”, 2001, available at : <http://www.financial-ombudsman.org.uk/first-annual-report/resolving-investment-related-disputes.htm> (last visited on February 1, 2005).

75 The 20 largest insurance companies in the United States spent US\$34 billion to manage the claims in 1998. See the comments by Anthony Barsamian, Federal Trade Commission and Department of Commerce, “Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions”, June 6–7 2000, available at : <http://www.ftc.gov/bcp/altdisresolution/> (last visited on February 1, 2005).

In 1997, there were over 3 300 insurance companies in the United States in the life, health and property insurance sectors alone⁷⁶. The companies handle a large volume of inquiries and claims each year, and would certainly benefit from automation of their procedures. This is also echoed in Europe, where JURIDICA⁷⁷, a French legal aid insurance company that belongs to the AXA Group, receives 100 000 telephone calls and manages over 20 000 cases annually. In the United Kingdom, the Financial Ombudsman Service handled over 6 500 insurance cases in 2001⁷⁸.

There are other areas in the private sector where ODR could be used to manage the growing number of disputes more simply, economically and quickly. Aside from some very special cases, parties have no interest in bringing disputes before the courts because of the disproportionate cost of doing so, compared with the amount of money at stake. Yet, clients need be able to argue their points of view without incurring costs that are unreasonable given the nature of the claim or having to wait an excessively long time. ODR is therefore needed to make up for the shortcomings of a judicial system that is increasingly complex and difficult to manage.

(3) Cyberspace

On information highways, the number of situations resulting in disputes between web users, access providers, service suppliers and businesses in general is large and constantly growing. For example, a consumer and a seller offering products on the Internet may disagree about their respective responsibilities. A chat room participant may say something that injures the reputation of another. Disputes can also arise when software bought through a website does not work on the purchaser's computer and the cyberseller refuses to co-operate. Many such examples can be given.

In this section, we will limit our study to two types of conflicts occurring in cyberspace. First, we will discuss disputes concerning intellectual property, specifically domain names. This is undoubtedly the area of litigation with

76 National Association of Insurance Commissioners (NAIC), <http://www.naic.org> (last visited on February 1, 2005)

77 JURIDICA, <http://www.juridica.ch/> (last visited on February 1, 2005).

78 Financial Ombudsman Service, "Resolving Insurance-Related Disputes", available at : <http://www.financial-ombudsman.org.uk/first-annual-report/resolving-insurance-related-disputes.htm> (last visited on February 1, 2005).

the highest visibility in cyberspace. Second, we will look at disputes specific to online trade.

(a) Domain names

A number of factors can explain the speculative nature of the market for domain names, such as the low cost of registering a domain name, compared with the investment in time and money required to establish a trademark in the physical world. This, along with the relative rarity of domain names, contributed to the growth of the Internet but also the highly publicized controversy surrounding its system for assigning addresses.

However, it seems that the “first come first served” registration policy of the vast majority of domain name registrars is at the root of the notorious friction between domain name owners and trademark holders. The policy allows a domain name incorporating a trademark to be held by an entity other than the trademark owner.

In order to get a better picture of what is at stake in this Internet address system, we have to begin by defining the concept of “domain name”. Then we will describe the history of the infrastructure established to resolve related disputes effectively.

On the Internet, every domain name is associated with an IP address⁷⁹, which makes it possible to identify the location of the computer hosting the corresponding website on the Internet. The domain-name system allows the holder to be identified in a more personalized and user-friendly way, using an alphanumeric system. The domain name is neither more nor less than a mnemonic version of the numerical address.

The domain name system has a hierarchical structure. At the summit are the top-level domain names corresponding to the last part, or suffix, of a web address, for example, “.com” or “.fr” (for France). Top-level domain names are either generic (gTLD) or geographical (ccTLD), depending on whether they designate an area of commercial activity (.com) or a country (.fr).

79 “IP” means “Internet Protocol”, which is a number made up of a series of four numbers (octets), for example, 132.204.133.38.

The second level refers to the main distinctive element of the domain name. It is made up of an alphanumerical set that most often has a meaning, for example, [www.A SPECIFIC COMPANY.com](http://www.ASPECIFICCOMPANY.com).

The bottom level is the identifier for the communications protocol, for example, “www” (World Wide Web) indicates that the address in question leads to a web page.

Initially used only to identify players in a scientific, university and governmental network, by 1995 the domain name system was already 97 % commercial, according to registration applications⁸⁰. It was at that time that Network Solutions Inc. (NSI), a private United States company providing technical services to the National Science Foundation, was mandated to govern domain name registration in a largely independent manner. In September 1995, in exchange for a commitment (now revoked) to pay a percentage of the revenues into a special public fund, NSI received permission from its favourite client, the National Science Foundation, to bill holders directly for each registration⁸¹. As mentioned above, there is no need to prove that one owns a trademark or intellectual property in order to obtain a domain name. Registration is on a first-come, first-served basis.

De facto, this enables anyone to register a domain name corresponding to a protected trademark or service mark, and to make unlimited international use of it. Trademark holders generally have no recourse except through a maze of prohibitively expensive transborder procedures. This is a little annoying when the registration holder is in good faith, but much more so when the holder is not, in other words, when the domain name was registered with the sole purpose of selling it at a profit to the holder of the

80 This concerns the domains .com, .net and .org. See National Science Foundation, Office of Legislative and Public Affairs, “NSF and Domain Names Fact Sheet”, available at : http://www.nsf.gov/od/lpa/news/03/fsnsf_internet.htm (last visited on February 1, 2005).

81 The fund in question is the Internet Intellectual Infrastructure Fund, which was created to compensate government investment in maintaining and improving the “intellectual infrastructure of the Internet”. Contributions were maintained until April 1, 1998. See National Science Foundation, Office of Legislative and Public Affairs, “NSF and NSI End Internet Intellectual Infrastructure Fund Portion of Domain Name Registration Fees”, source: <http://www.nsf.gov/index.jsp> (last visited on February 1, 2005 ; article no longer available online).

corresponding trademark. This later came to be known as “cyber-squatting”⁸².

In November 1996, wishing to counteract this phenomenon and aware of the considerable legal risk to which it was exposed, NSI set up a dispute resolution policy through its contract of adhesion. The policy simply provides for suspension of registration (by litigation or agreement) of any domain name that a third party can show corresponds to a trademark owned by the third party and registered before the domain name⁸³. This policy, which was established a little hastily with the primary goal of protecting the registrar from any claims, has significant defects⁸⁴.

For example, it in no way addresses the problem raised in cases where the registration holder can also lay claim to a right to the domain name. Of course, there can be a number of rights and therefore several holders of the same trademark or name. The courts, to which the parties are forced to turn in spite of themselves, are rarely known for their speed. The resulting delays, far from being reduced in this type of case by recourse to a number of jurisdictions, naturally have major economic consequences. Note that so long as the dispute is not resolved, no party can use the domain name in question.

The freeze on registration of the domain name and on its subsequent use, coupled with the justice system’s often prohibitive delays and fees, gave some people the idea of treating the situation like a hostage taking and demanding a “ransom” for freeing (or unfreezing) the domain name in question. This practice, namely, that of invoking a protective mechanism in bad faith in order to try to remove a domain name from its holder, was later christened “Reverse Domain Name Hijacking”. We will come back to this.

82 In 1994, the journalist Joshua Quittner exposed this major weakness by registering “McDonalds.com”. He openly boasted of his exploit in the American press.

83 Up until late 2002, this policy, which is no longer in effect, could be read in its entirety on the site of the Faculty of Law, New York University. Source: <http://www.nyls.edu> (last visited on February 1, 2005; the “Network Solution’s Domain Name Dispute Resolution Policy, 3rd Revision” is no longer available online).

84 Concerning this policy’s weaknesses, see Carl Oppedahl, “Remedies in Domain Name Lawsuits: How is a Domain Name like a Cow?”, (1997) 15 *Marshall J. Computer & Info. L.* 437.

At the time, Internet addresses were governed by the Internet Assigned Numbers Authority (IANA), which belongs to the Information Science Institute at the University of California. In 1996, the IANA, in collaboration with a non-governmental organization (The Internet Society) set up an Internet Ad Hoc Committee (IAHC) to make changes to a domain name system that had proven unable to keep up with unbridled commercialization. In February 1997, the IAHC published a document entitled the *Generic Top Level Domain Memorandum of Understanding*⁸⁵ (*gTLD-MoU*), which took stock of the conflicts between existing trademark protection systems and the address system as it was operated. The purpose of this initiative was to remedy weaknesses by creating a dispute resolution system for domain names using mediation, optional arbitration and a so-called “administrative” procedure based on ad hoc Administrative Domain Name Challenge Panels. The system, which was designed and implemented at the request and with the help of the World Intellectual Property Organization (WIPO), was meant to provide an effective and affordable means of resolving disputes without replacing or overriding the competency of national courts, or users’ rights to have recourse to them.

For a number of reasons largely independent of the proposed dispute resolution system, the *gTLD-MoU* has not been as successful as anticipated; it was very quickly rejected by an American government that was concerned with keeping a distance from governance of the system even though it recognized the weaknesses of a privatized system⁸⁶. A new process was therefore initiated in early 1998 by the National Telecommunications and Information Agency (NTIA), which falls under the United States Department of Commerce. The process was designed to put an end to NSI’s monopoly over the registration of unreserved domain names with generic top-level suffixes (gTLDs), e.g., .com, .net and org⁸⁷. This led to the October 1998 formation of the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit organization that essentially takes over IANA’s responsibilities.

85 Internet Ad Hoc Committee & Internet Society, “Generic Top Level Domain Memorandum of Understanding”, available at: <http://www.gtld-mou.org/gTLD-MoU.html> (last visited on February 1, 2005).

86 United States Department of Commerce, National Telecommunications and Information Administration, “Management of Internet Names and Addresses-Docket Number: 980212036-8146-02”, available at: http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm (last visited on February 1, 2005).

87 *Id.*

ICANN's mandate is to co-ordinate the technological administration of the Internet. While discussion of this mandate is outside the scope of this study, note that it has three main foci : the domain name system, IP addresses (numerical address system) and communications protocols. The NTIA has also mandated WIPO to develop a domain name dispute resolution system for ICANN.

Basing its approach on the initial recommendations in the *gTLD-MoU*, which it had helped to write, WIPO launched an international consultation process. Member states, inter-governmental organizations, professional associations and Internet stakeholders were consulted over a nine-month period. A final report was filed on April 30, 1999 : the Final Report of the WIPO Internet Domain Name Process (the WIPO Final Report), in which WIPO suggested that ICANN set up a uniform policy for processing domain name disputes⁸⁸. Following a second consultation period and some amendments, the Uniform Domain Name Dispute Resolution Policy (the Policy) was adopted by ICANN on August 26, 1999⁸⁹. The Policy was later completed by the October 24, 1999 adoption of the Rules for Uniform Domain Name Dispute Resolution Policy⁹⁰ (the Rules), which set out the procedural details of the system as a whole (the UDRP procedure). These documents assign the task of resolving disputes concerning domain-name registration to dispute resolution institutions certified by ICANN⁹¹, namely :

- WIPO, certified on December 1, 1999;
- The National Arbitration Forum (NAF), certified on December 23, 1999;
- eResolution, certified on January 1, 2000, but ceased resolving domain name disputes on November 30, 2001;
- The CPR Institute for Dispute Resolution, certified on May 22, 2000;
- The Asian Domain Name Dispute Resolution Centre (ADNDRC), certified on December 3, 2001, but handling domain name disputes since February 28, 2002.

88 World Intellectual Property Organization, *supra*, note 6.

89 Uniform Domain Name Dispute Resolution Policy, available at : <http://www.icann.org/udrp/-udrp> (last visited on February 1, 2005).

90 Rules for Uniform Domain Name Dispute Resolution Policy, *id*.

91 See Internet Corporation for Assigned Names and Numbers, "Approved Providers for Uniform Domain-Name Dispute-Resolution Policy", *id*.

The first award was rendered on January 19, 2000 by United States counsel Scott Donahey for WIPO in *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*⁹².

The UDRP procedure encompasses everything required for effective implementation of an ODR system⁹³. First and foremost, it is an evidence-based procedure that does not involve hearings. At a time when videoconferencing is still a novelty, a document-based system provides the ideal opportunity to test an online system for managing dispute resolution processes. Second, the UDRP procedure has the rare dual advantage of relatively simple subject matter but very broad international deployment. On one hand, potential results are limited to the cancellation or transfer of a domain name registration because the often more complex issues relating to evidence and assessment of damages have been set aside from the beginning. On the other hand, the international nature of a large proportion of the cases makes it possible to do field studies of problems specific to international proceedings, such as those pertaining to language and applicable standards. Finally, as mentioned above, the procedure's self-enforcing nature eliminates all problems related to implementing and executing decisions.

The only dispute resolution provider that has taken advantage of the opportunity to transform the UDRP procedure into a veritable online process was eResolution. As we will see in the second part of this book, the technology set up by this service provider enabled the parties, decision-makers and case administrators to do online what others did on paper. This included registering cases, filing complaints, filing responses, uploading and consulting exhibits and evidence, exchanging correspondence and conveying decisions. Parties could upload non-digital documents at their convenience using the fax-server made available to them. Decision-makers could consult and take action on all of their cases remotely. All exchanges took place in a secure environment that required a user name and password for access and where information and documents were organized and arranged in

92 *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, (WIPO D99-0001), available at : <http://arbitr.wipo.int/domains/decisions/html/1999/d1999-0001.html> (last visited on February 1, 2005).

93 Though it contains certain limited accommodations for using electronic means of communication, the latest version of the procedure is not specifically designed to be conducted electronically.

accordance with the parties' specific needs. Overall, the system received very good reviews from users⁹⁴.

Seeing the usefulness of such a system, two of the three other UDRP dispute resolution service providers, namely WIPO and NAF, devoted some effort to promoting the use of electronic means in their procedures. This essentially amounted to facilitated use of email and the possibility for the parties to complete HTML forms. It is interesting to note that in the cases handled by eResolution using a real online process, the respondent rate of participation in UDRP procedures was systematically and significantly higher⁹⁵. One of the reasons given for this statistical difference is that the online system makes it easier to prepare and submit a response⁹⁶. Whether or not this is the case, it is certain that use of electronic means of communication and remote records management in the UDRP procedure will only increase.

Overall, the dispute resolution mechanism established by ICANN is proving very popular and, from the point of view of trademark holders, highly effective. Since the system was introduced, over 4 000 cases involving over 7 000 domain names have been processed using the UDRP procedure, and the flow is not even beginning to diminish⁹⁷. This is because 2002 marked the deployment of seven new suffixes that were approved by the ICANN board on November 16, 2000. When it conducted its second consultation process on Internet domain names and the new suffixes were mentioned⁹⁸,

94 As mentioned above, eResolution ceased domain name-related activities on November 30, 2001.

95 Scott Donahey, "The UDRP-Fundamentally Fair, But Far From Perfect", 2001, available at : http://brownwelsh.com/Archive/Donahey_UDRP.pdf (last visited on February 1, 2005).

96 *Id.*

97 "The statistical data available from ICANN and other sources show that the UDRP is used very frequently in practice. Since the first decision handed down by a WIPO Panel in December 1999, more than 4 000 cases involving over 7 000 domain names have been handled, and there is no sign of major decline. To the contrary, it is expected that the figures will rise again in proportion to further ccTLDs joining the system and, even more important, in connection with the roll-out of new generic TLDs like .biz, .info, etc." Annette Kur, "UDRP—A Study by the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law", Max-Planck-Institute, Munich, 2002, available at : <http://www.intellecprop.mpg.de/Online-Publikationen/2002/UDRP-study-final-02.pdf> (last visited on February 1, 2005).

98 .aero (for the aeronautics industry), .biz (for businesses), .coop (for co-operatives), .info (for various activities), .museum (for museums), .name (for domain names)

WIPO recommended the adoption of the UDRP procedure for all domains with unreserved generic top-level suffixes (gTLDs), and for all country code top-level domains (ccTLD)⁹⁹ corresponding to countries and territories. On March 25, 2002, the European Union approved the establishment of a top-level domain “.eu”, which will probably be subject to a dispute resolution procedure based on the UDRP procedure¹⁰⁰. We will devote a whole chapter to the operation of the procedure in the second part of this book.

(b) Electronic commerce

The lack of trust in electronic markets in particular, and in the Internet in general, is one of the greatest obstacles to the growth of electronic commerce¹⁰¹. From a legal point of view, there are many risks related to online business.

Delocalization and internationalization of relations, the lack of consistently applied legal regulations in cyberspace, difficulties in having decisions executed in foreign jurisdictions, the slow pace of legal systems, the cost of court proceedings, and the inability of traditional courts to deal effectively with conflicts arising out of Internet use cause many companies to hesitate before venturing into electronic commerce. Indeed, why take the risk of entering a commercial space where effective recourse is non-existent if a problem arises?

based on surnames) et .pro (for professionals). See <http://www.icann.org/tlds/> (last visited on February 1, 2005).

99 World Intellectual Property Organization, “The Recognition of Rights and the Use of Names in the Internet Domain Name System—Report of the Second WIPO Internet Domain Name Process”, September 3, 2001, para. 167, available at : <http://arbiter.wipo.int/processes/process2/report/html/report.html> (last visited on February 1, 2005). Note that the UDRP procedure already applies to no less than 22 ccTLDs (*idem.*, para. 22).

100 Reuters, “EU Agrees to Create .eu Internet Domain”, March 26, 2002, source: <http://www.reuters.com> (last visited on February 1, 2005 ; article no longer available online). Also see: Commission Regulation of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration, OJ No. L 162/40 of 30/04/2004, available at : <http://www.odr.info/archives.php?id=A2004051> (last visited on February 1, 2005).

101 See especially Richard Browne, “Ignorance, Distrust Hamper e-Procurement”, Line 56, March 5, 2001, available at : <http://www.line56.com/articles/default.asp?ArticleID=2232> (last visited on February 1, 2005).

Electronic commerce is international in theory, and rapidly becoming so in reality. Domestic law and national courts are increasingly perceived as external to the realities of international trade. The growing recourse to international arbitration and a-national legal principles is incontestable proof of this. At the same time, the “immanent” normative systems are considered insufficient because they are incomplete and sometimes too generic. Today, as economic stakeholders search for law and justice that is equitable and adapted to their activities, they have no choice but to turn to mechanisms that utilize and challenge the freedom to contract.

Business-to-business (B2B) trade

If we are to believe the fantastic figures put forth by many consulting firms, electronic commerce will soon be the source of an impressive number of contractual agreements and, therefore, potential conflicts¹⁰². Indeed, it is difficult to see how such an astronomical number of transactions could be free of misunderstanding. Some degree of legal security must therefore be provided, and this involves a number of components, particularly mechanisms for identifying persons, signing documents, and establishing the integrity and non-repudiation of documents¹⁰³. Over and above these components, it seems logical to offer those who sign electronic contracts the possibility of recourse in the same medium when disputes arise. Establishing ODR mechanisms can calm the fears linked with the emergence of disputes in transborder exchanges¹⁰⁴ and thereby contribute to the development of

102 “Commerce over the Internet is expected to reach as much as 7.64 trillion EUR in 2004, worldwide, having reached 214 billion EUR in 2000”. Avril D. Haines, “The impact of the Internet on the Judgments Project: Thoughts for the Future”, The Hague Conference on Private International Law, The Hague, February 2002, para. .2, available at: http://hcch.e-vision.nl/upload/wop/gen_pd17e.pdf (last visited on February 1, 2005). Also see: Demir Barlas, “E-commerce is back”, Line 56, February 2002, available at: <http://line56.com/articles/default.asp?ArticleID=3434> (last visited on February 1, 2005).

103 On these topics, see in particular Serge Parisien and Pierre Trudel, *L'identification et la certification dans le commerce électronique (Droit, sécurité, audit et technologies)*, Cowansville: Editions Yvon Blais, 1996.

104 “A global alternative dispute resolution system is necessary to encourage cross-border electronic commerce”. Carly Fiorina, CEO, Hewlett-Packard, Global Business Dialogue on e-Commerce Conference, Miami, September 26, 2000, source: <http://www.gbde.org> (last visited on February 1, 2005; article no longer available online).

electronic commerce by giving stakeholders complete peace of mind in a well-defined legal framework.

However, before even attempting to define the legal framework, it is important to identify some of the components of B2B trade. The notion covers a number of distinct situations, each of which has the potential to generate different conflicts.

First, on a purely terminological level, it seems more appropriate to examine B2B or electronic business (ebusiness), which has a much broader scope than electronic commerce (ecommerce). Tim Richardson defines ebusiness as follows :

*Electronic business transactions involving money are “eCommerce” activities. However, there is much more to eBusiness than selling products : what about marketing, procurement, and customer education? Even to sell on-line successfully, much more is required than merely having a website that accepts credit cards. We need to have a web site that people want to visit, accurate catalogue information and good logistics. The term “eBusiness” was introduced as a deliberate attempt to say to people : “Your first understanding of eCommerce was too narrow. To be successful, we need to think more broadly”.*¹⁰⁵

Thus, we will begin with a brief discussion of electronic data interchange (EDI), followed by a few comments on electronic procurement (procurement). We will complete this section with a study of virtual marketplaces.

First, note that EDI technology, which some authors call a precursor of ebusiness¹⁰⁶, is not really a form of ebusiness because it does not depend on the Internet. EDI “permits the direct transfer of specific data between computers in the form of structured messages complying with a predefined set of syntactic rules”¹⁰⁷. The transfers instead employ a value added

105 Tim Richardson, “What is eBusiness?”, 2002, source: <http://www.tim-richardson.net> (last visited on February 1, 2005 ; article no longer available online).

106 Phillipe Nieuwbourg and Hubert d’Hondt, *Places de Marché sur Internet : Nouvelles règles pour le commerce du XXI^{ème} siècle*, France: BNTP, 2000, p. 167.

107 Vallier Lapierre, *Pour un commerce électronique entre entreprises gagnantes*, St-Hyacinthe: Isabelle Quentin, 2001, p. 87 [our translation]. See also Karim Benyekhlef and Vincent Gautrais, “Contrat-type d’échange de documents informatisés (EDI) par le biais des ‘réseaux ouverts’”, available at: <http://www.lexum.umontreal.ca/fr/texte/contrat98.html> (last visited on February 1, 2005).

network (VAN). EDI's effectiveness depends on the use of predetermined messages and protocols¹⁰⁸.

A VAN ensures the security of EDI transactions because it is private¹⁰⁹ and direct. This is why some companies still refuse to use the Internet for EDI transactions¹¹⁰. The Internet cannot provide the same level of security as a VAN to which only the partners have access.

Eprocurement enables users who are registered with a company to look for buyers or sellers of goods and services using Internet tools, such as an extranet or virtual marketplaces¹¹¹. What distinguishes an eprocurement site from virtual marketplaces, which we will look at below, is that the former is controlled by one or more purchasers and not by a "neutral" third party. Unlike virtual marketplaces, eprocurement sites also involve a limited number of sellers and/or buyers. Thus, they are considered private systems.

Virtual marketplaces are one of the most prominent forms of ebusiness¹¹². Generally, they consist of a portal devoted to a specific sector of activity that links buyers and suppliers electronically to facilitate commercial exchanges between them. It is a three-way relation between buyers, sellers and a "neutral" third party operating the market place. The infrastructure is referred to as the "butterfly model"¹¹³, as the following diagram illustrates :

108 Office québécois de la langue française, *Le grand dictionnaire terminologique*, <http://www.granddictionnaire.com/> (last visited on February 1, 2005). In North America, the protocol is ANSI X12, and in Europe EDIFACT/ONU.

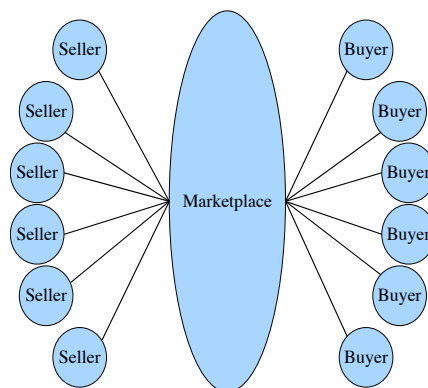
109 It is usually managed by a third party. See: V. Lapierre, *Op.cit.*, Note 108, p. 89.

110 Web EDI makes it possible for "partners equipped with only a microcomputer and a modem or Numeris card to carry out electronic exchanges using the EDI platforms of the other partners. Electronic input forms accessible from a simple Web navigator thus allow small partners to enter information manually into the information system of the community leader (administrator or business)" [our translation]. PricewaterhouseCoopers, "Le commerce électronique interentreprises - Son impact dans le secteur automobile", report written for the Direction Générale de l'Industrie, des Technologies de l'Information et des Postes (DIGITIP), 2001, available at : <http://www.telecom.gouv.fr/documents/autom/automobile.pdf> (last visited on February 1, 2005).

111 *Id.*

112 These are often referred to by other names, such as cybermarkets, electronic marketplaces, online marketplaces, etc.

113 Commission of the European Communities, "Commission staff working paper on B2B Internet trading platforms: Opportunities and barriers for SME's – a first



Source : "Commission staff working paper on B2B Internet trading platforms : Opportunities and barriers for SMEs – a first assessment"

The model enables businesses to make major savings by significantly reducing the cost of production and supply.

Virtual marketplaces can be vertical or horizontal. A marketplace is called vertical when it serves a specific sector of the economy. For example, the Covisint market¹¹⁴ is vertical; it is a joint initiative of the American automobile giants Ford, Daimler Chrysler and General Motors that has been joined by a number of other car makers, such as the French companies, Renault S.A. and Peugeot, and the Japanese company Nissan. At present, over 11 500 client companies use the portal.

In contrast, horizontal marketplaces involve a number of sectors. An example of this is the *Oracle Exchange* initiative¹¹⁵, which offers catalogues of office supplies, computer equipment, industrial supplies, etc.

Virtual marketplaces can also be divided into four other categories. First, there are marketplaces where goods and services are exchanged rather than bought and sold; these are essentially cases of electronic barter¹¹⁶.

assessment", Brussels, 11.11.2002, SEC(2002) 1217, available at : <http://europa.eu.int/comm/enterprise/ict/policy/b2b/sec2002-1217en.pdf> (last visited on February 1, 2005).

114 Covisint, <http://www.covisint.com/> (last visited on February 1, 2005).

115 Oracle Exchange Marketplace, <http://www.oracle.com> (last visited on February 1, 2005).

116 An example is Barter It Online, www.barteritonline.com (last visited on February 1, 2005).

Second, there are marketplaces that reproduce the dynamics of the stock market in that the price of goods and services fluctuates according to bids by buyers and sellers¹¹⁷.

Third, there are auction sites, the largest of which is certainly eBay. On a site operated by a third party, a seller posts an item for sale under certain conditions (price, deadline, etc.). Interested buyers have only to bid on it¹¹⁸.

Finally, fourth, there are catalogue sites, which offer a wide range of products from a number of suppliers and sophisticated search engines for consulting the catalogue¹¹⁹.

During the 1999-2001 ebusiness boom, the number of virtual marketplaces grew rapidly. In 1999-2000, the number of marketplaces shot up from 332 to over 1 000 worldwide¹²⁰. During the same period, the number of European marketplaces quadrupled, going from 54 in 1999 to 230 in 2000¹²¹.

Currently, a conservative estimate¹²² is that there are nearly 1 000 virtual marketplaces in Europe and North America. Geographically, they are distributed as follows¹²³ :

117 An example is Broker Forum, www.brokerforum.com (last visited February 1, 2005).

118 eBay, <http://www.ebay.com> (last visited on February 1, 2005).

119 For a list of sites offering this kind of service, see Source Guides, <http://www.sourceguides.com/> (last visited on February 1, 2005).

120 Commission of the European Communities, *supra*, note 113, p. 10.

121 *Id.*

122 As the authors of the study Note, "These numbers have to be treated with some caution, though. The number of active e-marketplaces is difficult to assess, mainly for three reasons: First of all, many e-marketplaces changed their business model in 2001 and became software companies, portals or service providers for private e-marketplaces. They might keep their e-marketplace as a showcase, although it is no longer their core source of revenue. Secondly, due to the still ongoing economic slowdown many dot.coms ceased to exist and many traditional players closed down loss-making subsidiaries. This process is not yet finished and cannot always be identified accurately, as web sites might remain alive even months after they effectively ceased to be operational. Both effects lead to an exaggeration of the number of active e-marketplaces. On the other hand, e-marketplaces are industry-specific and are typically only announced within the industry, especially if they are smaller. This leads to the effect that e-marketplace directories typically do not have information about all e-marketplaces existing. Overall, the first two effects probably

Source	North America	Europe	Total
Berlecon ¹²⁴	669	381	1 050
eMarketServices ¹²⁵	497	496	993

While the notion of B2B electronic commerce is broad and covers a number of different models, lack of trust is clearly obstacle in all sectors¹²⁶. It is widely acknowledged that the establishment of ODR mechanisms can help to create the atmosphere of trust required for the development of electronic trade. In Europe, a recent Commission working document explains this as follows :

Alternative Dispute Resolution Systems, preferably on-line, can help to promote trust by ensuring quick and effective resolution of disputes. Although free choice of jurisdiction for cross border disputes is legally permitted for B2B on-line transactions, court litigation is often costly and time consuming. Alternatives to court litigation, such as arbitration and mediation schemes, are well established in the area of B2B disputes. Their main advantage is that, in general, they are faster, more flexible and less costly than court proceedings. Therefore the voluntary acceptance by business to submit disputes to arbitration or mediation mechanisms has the

dominate currently, so that the number of active B2B e-marketplaces has to be put somewhat lower and will decrease further – at least for a while.” *Id.*, p. 11.

123 *Id.*, Appendix 1.

124 These are the figures as at April 26, 2002. Source: http://www.berlecon.de/output/en/studien_alle.php?we_objectID=18 (last visited on February 1, 2005 ; report no longer available online). Also see: e-Business W@tch, “The European e-Business Report”, September 2004, available at : <http://www.berlecon.de/studien/downloads/200409EBusinessReport.pdf> (last visited on February 1, 2005).

125 These are the figures at August 19, 2002. Source: www.emarketservices.com (last visited on February 1, 2005 ; report no longer available online).

126 “The Eurostat e-commerce survey confirms that the lack of trust is one of the most important barriers to the take up of e-commerce. In particular, enterprises cited that the most important barriers for e-purchasing are uncertainties about contracts, delivery and guarantees (23 %) and uncertainties about payments (21 %). For on-line selling, the perceived lack of trust on the side of the customer ranks as second most important barrier, as regards payments (20 %) and contract terms of delivery and guarantees (17 %)” , Commission of the European Communities, *Supra*, Note 113, p. 20.

*potential to remove uncertainties and to enhance business trust in electronic transactions.*¹²⁷

Moreover, as Schiffer notes, ADR also helps to maintain business relations. While he uses an example involving EDI, this feature applies to all areas of electronic commerce.

*In a competitive environment the continuation of the supplier-customer relationship and the maintenance of good will is vital. This is true whether the relationship is built upon the supply of goods or services. An EDI supplier of goods will wish to continue his relationship with the customer because he will want to be able to successfully offer to the customer new EDI products as they are developed. An EDI customer will want an EDI supplier to whom he can comfortably turn when looking to buy new products. A similar situation applies to the provision of EDI-related services. Very few EDI users will be able to do without an ongoing service relationship and to hold this relationship the parties must be able to resolve their difficulties in a prompt and mutually satisfactory manner. Through ADR this can be achieved.*¹²⁸

B2B electronic commerce has a number of facets, but there is one constant : the growing number of transactions is likely to also lead to an increase in disputes. Therefore, electronic solutions for resolving disputes should be developed to meet the specific needs of each type of electronic marketplace. In other words, ODR mechanisms have to be tailored to the characteristics of the marketplace in question so that the proposed means of dispute resolution match the commercial practices. This will increase the effectiveness of the ODR mechanisms deployed in each market.

Electronic commerce between businesses and consumers (B2C)

With the emergence of virtual marketplaces, the dynamics of transactions between consumers and sellers has undergone a dramatic change. For the consumer, electronic commerce makes it possible to deal with any seller on the planet no matter what the time of day or location. While the advantages of this new way of doing business are clear, the change also gives rise to problems for the consumer. Online, consumers no longer meet the persons with whom they are dealing and cannot assess the quality of products before buying them. At best, they have to make decisions based on summary

127 *Id.*, p. 21.

128 R. Schiffer, *supra*, note 46, p. 179.

descriptions and pictures. The reduced ability to compare naturally translates into a loss of confidence. Furthermore, with respect to competent jurisdiction issues in transborder transactions, the distance separating the parties and differences in language and culture quickly make it clear that consumer recourse to national courts is not a viable, or even desirable, solution.

Yet in cyberspace, as in the physical world, consumers cannot avoid disputes. According to a study conducted in 2001 by Consumers International, an association of 263 consumer protection organizations operating in 119 countries, buying in cyberspace remains perilous for consumers. The researchers noted that “all too often things can go wrong when consumers shop on the net. This is of particular concern when consumers lose out financially (for example, paying for goods that never arrive, or not receiving a refund for returned goods)”¹²⁹. In order to reduce risk, the study “urges governments and business to establish proper alternative dispute resolution in accordance with the policy recommendations in *Disputes in Cyberspace*”¹³⁰. Thus, establishing effective means for resolving disputes between consumers and cybersellers is one of the keys to success for B2C electronic commerce¹³¹. Indeed, there is a consensus among a number of governments, international agencies, non-profit organizations and economic stakeholders concerning the need to establish ODR mechanisms to increase the level of consumer confidence in cyberspace transactions. As Consumers International puts it :

The lack of effective consumer redress when the parties are in different countries is a major barrier to consumer confidence in dealing with all but the most well-known and trusted brands. All parties (businesses, consumers, and governments) recognize that, in order to facilitate the continued growth of electronic commerce, consumer confidence and trust in it must be improved, and that in order to improve consumer confidence,

129 Consumers International, Office for Developed and Transition Economies, “Should I buy? Shopping online 2001: An international comparative study of electronic commerce”, available at : http://www.consumersinternational.org/document_store/Doc33.pdf (last visited on February 1, 2005).

130 *Id.*

131 As Louise Sylvan, Chair of Consumers International, notes: “Low cost, easily accessible, and effective dispute resolution services are a critical element in any strategy to increase consumer trust and confidence in electronic commerce”, Consumers International, “Consumer Redress In E-Commerce In Need Of Attention”, 2001, available at : <http://www.consumersinternational.org/search/newssearch.asp?newsID=23®ionid=135&langid=1> (last visited on February 1, 2005)

*the problem of consumer redress in the event of crossborder disputes must be resolved.*¹³²

We will come back to this consensus in greater detail when we discuss the guidelines developed by stakeholders to ensure effective deployment of ADR for disputes occurring online. For now, we will simply note that all of the main stakeholders acknowledge that establishing ODR is primordial to ensuring that consumers can enter into contracts in cyberspace with complete peace of mind. As Orna Rabinovich-Einy notes : “Offering links to reputable external ODR services will, in time, become an industry standard among major commercial websites as a means of assuring customer satisfaction and confidence”¹³³.

B. Forms of alternative dispute resolution (ADR)

Courts of justice everywhere in the world are facing growing problems when trying to meet the needs of the market. ADR solutions to these problems, whether they are initiated privately or publicly, have a common goal : to solve disputes simply, quickly, efficiently and at a cost proportional to the stakes. Note also that using online or traditional ADR provides the parties to a conflict with greater guarantees of confidentiality. As we have seen, more and more stakeholders avoid referring disputes to the courts and favour the use of ADR.

In the new economy, where more and more transactions are completed in cyberspace, ADR seems natural. The rapidity with which transactions are performed (one of the many advantages of electronic commerce) also requires that disputes should be resolved with the same speed. We cannot assume that those operating in cyberspace will have the patience to wait for what can sometimes add up to several years to resolve disputes by traditional means.

132 Consumers International, Office for Developed and Transition Economies, “Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-Border Disputes”, p. 6, available at : http://www.consumersinternational.org/document_store/Doc517.pdf (last visited on February 1, 2005). A number of guidelines have been developed to ensure the effectiveness and accessibility of such mechanisms. We will come back to this in the section on deploying alternative dispute resolution methods in cyberspace.

133 Orna Rabinovich-Einy, “Going Public : Diminishing Privacy in Dispute Resolution in the Internet Age”, August 2001. Unpublished report quoted in C. Rule, *Supra*, Note 29, p. 100.

In this part, we will examine the three main forms of ADR : (1) negotiation, (2) mediation and (3) arbitration. Then we will see that (4) automating the procedures makes it easier to combine all three forms of ADR.

(1) Negotiation

In its simplest form, negotiation involves an exchange of views and proposals when a dispute opposes parties who wish to settle out of court. Unlike mediation or arbitration, negotiation does not involve the intervention of a third party. Finding a mutually acceptable solution to the dispute lies entirely in the hands of the parties. The negotiation process is confidential and completely voluntary; generally, the parties can withdraw at any point.

There are a number of reasons why negotiation is becoming more important in the age of electronic commerce. First, negotiation between parties is facilitated by the rapid means of communication that are now available. If the parties do not have to travel to hold a “last chance meeting” to try to come to an agreement, it is much more likely that the meeting will take place. Second, the phenomenon that is generally known as the “trust deficit” with respect to legal problems in transborder trade increases the parties’ interest in finding solutions that avoid recourse to law and legal processes. Third, the technological tools now available to the parties to a dispute open the way to a new range of “assisted” negotiation tools without having to seek the intervention of a third party. Finally, integrated ODR programs now make it possible to add a negotiation stage, which used to be completely informal, before the mediation or arbitration process begins. We will briefly examine assisted negotiation tools, which could breathe new life into negotiation as a way of resolving disputes.

Formerly confined to an exchange of correspondence or one or more meetings between the parties, it is now easier for direct negotiation to include tools that facilitate the identification of basis for agreement. The most common example is that of blind bidding tools, which are numerous in the United States. They enable the parties to engage in a series of simultaneous “blind” bids after first agreeing on a zone of agreement that both find satisfactory. The software tool in question records the parameters of the settlement desired by the parties (if the difference between the two simultaneous bids is US\$1 000 or less, for example, the settlement is the median of the two bids), and then records the successive bids until the preset parameters are reached. Finally, it generates the text of an agreement to

which the parties agreed ahead of time. Obviously, the tool is useful only for resolving disputes over an amount where the claim is not contested in any other way, for example, it is used widely in insurance disputes¹³⁴. Blind bidding is a good illustration of the potential that technological tools have to add a “third party” aspect to negotiation (in this case, an intelligent inbox for bids by each party) to facilitate the meeting of minds. Another example is that of the dynamic table of bids and counterbids offered by the ECODIR system. ECODIR’s negotiation software sorts the parties’ legally relevant correspondence so that bids and counterbids can lead to an agreement as quickly as possible. Here again, the software environment plays a structuring role to promote the meeting of minds. There is reason to believe that these applications will only keep getting better, thereby increasing the prominence of assisted negotiation as a key means of resolving disputes.

(2) Mediation

Mediation can be defined as a process by which two people agree to submit their dispute to a neutral third party, the mediator, who uses various methods and techniques to try to guide the parties toward an out-of-court settlement. Managing the mediation process can also be collegial, in other words, performed by a number of individuals.

While it is impossible to force a recalcitrant co-contractor to put real effort into mediation, it is widely accepted that including an optional mediation clause in a contract is still useful. Given the power relations often involved in negotiations to resolve a dispute, a mediation clause allows one party to suggest mediation without having the suggestion interpreted as an admission that the legal arguments for its position are weak. The mediation clause can also have a restrictive effect when it is a prior condition that must be met in order to have recourse to a court of law or arbitration. The classical example of such a mediation clause is one that bases the restriction on a prior condition that is especially easy for a court to establish : compliance with a deadline. This type of contractual mechanism makes the dispute inadmissible to the courts or arbitration before the expiry of a cooling off period during which contractual provisions commit the parties to using mediation. This type of mechanism is widespread in instruments providing for private dispute resolution among states and investors, such as those of the International Centre for Settlement of Investment Disputes (ICSID), and

134 See for example Cybersettle, <http://www.cybersettle.com/> (last visited on February 1, 2005). These tools are explored in greater detail in Part II.

in legal instruments required by the World Bank in some of the infrastructure contracts that it finances¹³⁵. It can also be seen in a growing number of commercial contracts¹³⁶. As noted above, mediation can also be part of a multi-step process beginning with negotiation and flowing through mediation to arbitration, as required.

However, mediation's major advantage over more formal mechanisms is undoubtedly that it offers the parties the possibility of exploring solutions that a purely judicial approach would prohibit. Unlike a judge's or arbitrator's analysis, which focuses on the past and is confined to the parties' rights, the mediator looks at a much broader set of factors, and takes into account the interests at stake at the time of the dispute and the solution's impact on the future. For example, a judge has to grant reimbursement of the price paid for a defective product if the plaintiff has a right to it. A mediator, who takes the parties' rights into account but is not confined to examining rights alone, is free to explore a more advantageous alternative solution for the parties, for example, replacement of the defective product by one of greater value to the plaintiff but less costly to the respondent than reimbursement.

It is important to note that the mediator does not have the power to impose or render a decision. After comparing the parties' points of view, identifying with them their points of agreement and disagreement, and taking into account the interests of each side, the mediator can suggest a solution but not impose it. In general, a mediator orients and structures the discussions and tries to optimize communication so as to enable the parties to come to a satisfactory solution on their own. In most cases, the mediator is free to hear the parties together or separately. Separate, i.e., caucus, meetings usually increase the chances that mediation will be successful because the parties then convey information that they would not dare to reveal to the other party, thereby enabling the mediator to find possible middle ground that the

135 The model contracts that are required are often those of the International Federation of Consulting Engineers (FIDIC), which provide for recourse to arbitration after a certain period designed to promote negotiation or mediation. These model contracts also prescribe recourse to a dispute review board, but we do not have the space to discuss this here.

136 A good illustration of the various clauses that are possible in this context is the range suggested by the International Chamber of Commerce, which recently adopted a new ADR procedure. See: http://www.iccwbo.org/index_adr.asp (last visited on February 1, 2005).

parties might not have suspected was there if left to their own devices. Caucus meetings are very sensitive undertakings and require some reserve on the part of the mediator because the basis for agreement has to be woven out of confidential information. However, in cases where the dispute resolution system allows the mediator to become an arbitrator if mediation fails, it is very inadvisable for the mediator (who may also be called a conciliator) to meet with the parties separately. Under the law of many countries, such a process would contravene the principles of fair hearing, and could nullify any arbitration award on the grounds that it violates public order¹³⁷. The principle of fair hearing is entrenched worldwide, and prevents an individual invested with judicial functions from hearing one party without allowing the other party to respond to the representations. The perspective of compulsory execution therefore brings us to the question of the legal nature of the agreement that is generally the goal of mediation.

Once the process is completed, the mediator generally has to write a report on the success or failure of the mediation. In case of failure, the parties are basically back where they started, though they are better informed about each other's positions. In case of success, the transactional agreement is universally acknowledged, at least as a contract binding the parties and opening the way to ordinary recourse in case of violation. However, the contract has a special status in some civil law countries, where it is considered a transaction, i.e., a special contract the purpose of which is to resolve a dispute. The special status is translated by a virtually automatic recognition that transforms the transaction into a judgment for all intents and purposes. Yet, transactional agreements are far from having this status everywhere, and despite recent efforts by the United Nations Commission on International Trade Law (UNCITRAL), there is still no universal regime for compulsory execution of international transactional agreements.

137 The award is subject to judicial review of the arbitration procedure if cancellation proceedings are instituted under national law or in a country where compulsory execution is sought under the enforcement procedure set out, generally, in compliance with the criteria in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

UNCITRAL's Model Law on International Commercial Conciliation¹³⁸ suggested four solutions designed to make agreements between parties compulsory and executory.

The first solution simply set out the principle of the executory nature of the agreement, and left it up to the legislators of each jurisdiction incorporating the law to define the conditions of execution. The second solution was the least effective because it in no way distinguished the transactional agreement from the contract at the origin of the dispute resolved by the agreement, and applied the principles of the general regime for contract execution to the transactional agreement. The second solution did not authorize compulsory execution unless the person seeking execution has represented his or her rights before a judge, which is the very process that mediation was supposed to avoid. The third possibility advanced within the framework of the efforts that led to the model law was to submit the agreement, in cases that lend themselves to such an approach, to an arbitral tribunal required to render an arbitration award that was described as containing "agreed terms". This solution is based on Article 30 of the 1985 UNCITRAL Model Law on International Commercial Arbitration¹³⁹, which provides that :

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

The fourth and last solution suggested in the model law was to consider the agreement itself as an arbitral award for the purpose of recognizing its enforceability¹⁴⁰, which is close to the civil law regime for transactions, but goes further by trying to give the transactional agreement the benefit of the well-established international regime of arbitral awards. This would have

138 The draft guide for incorporating the law into national legislation is available at : <http://www.uncitral.org/english/texts/arbitration/ml-conc-e.pdf> (last visited on February 1, 2005).

139 *UNCITRAL Model Law on International Commercial Arbitration*, available at : <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm> (last visited on February 1, 2005).

140 See articles 30, 35 and 36 of the *UNCITRAL Model Law on International Commercial Arbitration*.

made it possible to simplify and accelerate the execution of such agreements and impose mediation as a key means of resolving international disputes. However, the final wording of the model law is unfortunately much weaker with respect to execution. The draft provisions concerning enforcement are so reduced in the final text that they are mere shadows of the broad ambitions that initially inspired the work that went into having the model law adopted. Article 14, which is the only one that concerns enforcement in the final version adopted in June 2002, reads as follows :

Article 14. Enforceability of settlement agreements

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable... [the enacting state may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].

When it applies the procedure for enforcing settlement agreements, the enacting state can consider the possibility of a compulsory procedure.

The discussion that led to this formulation shows a flagrant lack of consensus on the notion of an enforceable act. The model law does little more than perpetuate a degree of confusion and maintain national solutions to a problem that is in grave need of international remedies. It remains to be seen how many countries will adopt a system for recognizing settlement agreements. In the meantime, the dispute resolution mechanism that is most easily enforced at the international level undoubtedly remains arbitration in law as set out in the New York Convention.

(3) Arbitration

Arbitration is a process in which a dispute is submitted to an independent, private tribunal that renders a decision after having allowed the parties to make the necessary representations and present relevant pieces of evidence to support their points of view. As in the case of mediation, arbitration is sometimes very advantageous for parties that are in conflict but nonetheless wish to pursue their contractual relationship and maintain the confidentiality of the proceedings. It should be noted that arbitration is generally more flexible and much less formal than court proceedings, but results in a decision that is as binding as a judgment and for which enforcement is greatly facilitated internationally.

Parties can provide for recourse to arbitration right when they sign the contract that unites them. This is done through an arbitration clause such that

all disputes arising out of their contractual relationship are subject to arbitration in accordance with the conditions set out in the clause or in legislation. Of course, it is also possible to provide for recourse to arbitration after the contract is signed using an adjunct, in other words, an additional legal instrument modifying the initial contract. Finally, the parties can also initiate the arbitration process after a dispute has arisen by signing an arbitral compromise, but this rarely occurs because it is generally difficult to come to an agreement after a dispute has occurred, even when what is at issue is how to resolve the dispute. In each of these cases, it will no longer be possible to bring the dispute before the courts, except if there is a criminal offence involved, for example. An arbitration agreement involves renouncing the right to regular recourse before the courts.

The renunciation is binding if the arbitration in question is ad hoc or institutional. In ad hoc arbitration, the procedure is in principle expedited directly by the arbitrator or arbitrators outside of any institutional framework. The primary disadvantage of ad hoc arbitration is that if a disagreement or obstacle arises with respect to the establishment of the arbitral tribunal, the parties have no recourse aside from the courts of the country where the tribunal is located (if the country can be clearly identified). In such cases, the national court acts as a judge supporting the arbitral procedure and intervenes upon request in accordance with the modalities and time frames set out in the rules regulating that procedure. In the case of an international transaction, recourse to a court most often contradicts the parties' desire to avoid "national" procedures and actors in order to maintain neutrality, confidentiality and efficiency. The best way to avoid intervention by the courts as much as possible is to employ institutional arbitration, which provides a framework that can establish an arbitral tribunal and activate the process despite any disagreements or problems that arise. Thus, the institution can appoint arbitrators, make decisions on disqualification, see to the smooth operation of the procedure and the meeting of deadlines, set arbitrator compensation (which is a very tricky undertaking when the parties deal directly with the arbitrator without going through an institution) and set parameters for the award, as required and in accordance with pre-established conditions. Online arbitration is most often institutional, but could also take ad hoc forms in cases where the arbitral tribunal uses an Application Service Provider (ASP) document management system but controls the procedure itself.

The arbitrator, who is invested with authority through the parties' consent, hears the parties' claims in compliance with established rules of procedure¹⁴¹ and, after deliberation, renders a decision, known as an arbitration award, that is binding on the parties and can be enforced in all countries that have signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)¹⁴². The Convention provides the backdrop for all normative initiatives in arbitration, and requires the courts of the some 125 signatory states to acknowledge written arbitration agreements, declare themselves incompetent to hear disputes that are subject to arbitration clauses, and enforce awards in accordance with criteria set out in its provisions. The advantages of arbitration for international transactions are largely due to this multilateral treaty, which has no equal with respect to ensuring the exclusive jurisdiction of national tribunals and obtaining enforcement abroad of resulting judicial decisions. As the primary means of managing international trade disputes and as a model for private justice, international commercial arbitration also owes its success to accelerated modernization and harmonization of national legislation on arbitration, which are fruit of the success of the UNCITRAL Model Law on International Commercial Arbitration (1985)¹⁴³.

141 In the case of institutional arbitration, the rules of procedure are generally set out in the institution's arbitration rules, which become applicable when the provisions of the contract between the parties refer to the institution in question. For example, the model clause of the leading international arbitration organization, the International Court of Arbitration of the International Chamber of Commerce, is as follows: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules". See: http://www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt (last visited on February 1, 2005).

142 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at: <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm> (last visited on February 1, 2005).

143 Legislative texts inspired by the UNCITRAL Model Law on International Commercial Arbitration have been adopted in the following countries and territories: Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Greece, Guatemala, the Hong Kong Special Administrative Region, Hungary, India, the Islamic Republic of Iran, Ireland, Kenya, Lithuania, the Macao Special Administrative Region, Madagascar, Malta, Mexico, Nigeria, New Zealand, Oman, Peru, the Russian Federation, Singapore, Sri Lanka, Tunisia, the Ukraine, the United Kingdom of Great Britain and Northern Ireland (Scotland), the United States of America (California, Connecticut, Oregon and Texas) and Zimbabwe. Note that the

The New York Convention commits the states in question to recognizing and enforcing foreign arbitral awards in accordance with a regime that essentially restricts their legal authority to the protection of public order, in other words, protection of the core values that would justify state intervention in the most liberalized system. This is precisely the model that we believe could be established for transborder administration of justice in areas that cannot be classified as purely commercial. It is a model of justice that takes into account the need for countries to withdraw in order to achieve greater efficiency and tailor the process more to the circumstances and needs of trade while providing some control over collective principles and values that, initially, do not seem to lend themselves to regulation by private initiative and market forces alone.

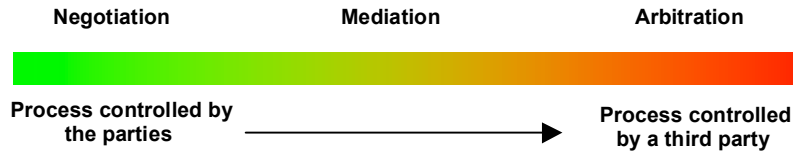
Further development of the international commercial arbitration model of transborder private justice seems probable over the long term, but remains today a prospect for the future. In this book, we will restrict our discussion of the legal aspects of ADR to showing how arbitration for consumer disputes is limited by national public order legislation that remains to be harmonized at the international level.

(4) Combination of procedures

As we have already seen, negotiation, mediation and arbitration mechanisms can be combined. It is easy to design a system that begins by providing the parties with an online negotiation tool so that they can resolve their dispute without the intervention of a third party. If that does not prove successful, the parties can then get a third party to help them resolve the dispute; this is the mediation stage. If that too fails, the parties can submit the dispute to an arbitrator with the power to adjudicate the dispute and render a binding award.

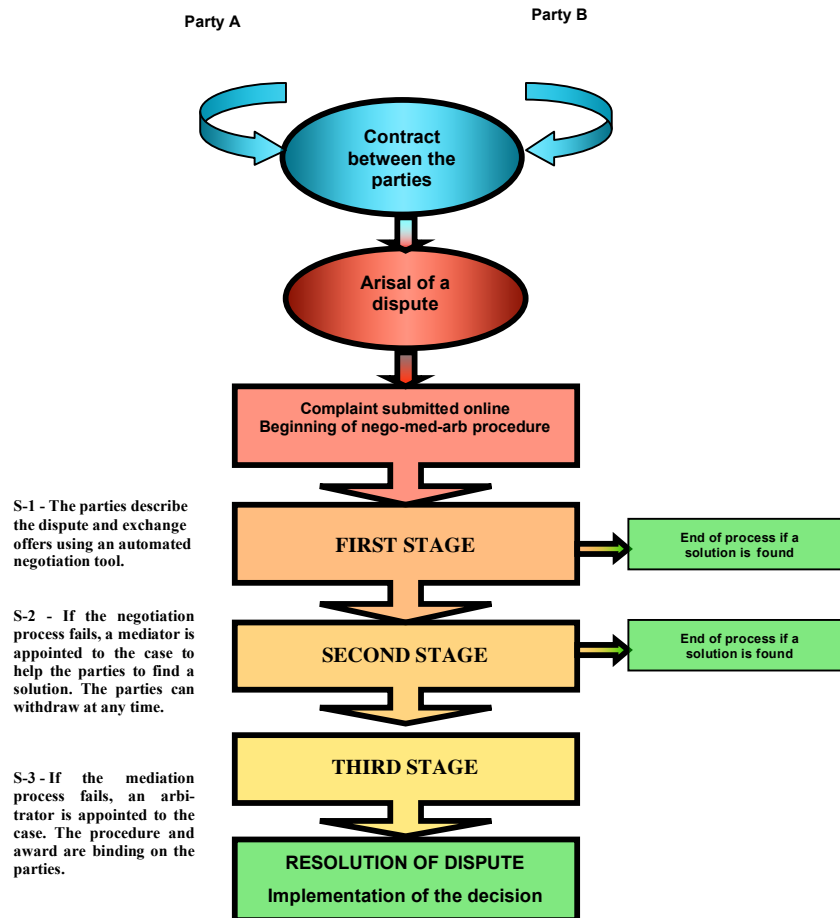
The following diagram illustrates the parties' degree of control over resolution of the dispute, depending on which method is used :

UNCITRAL's work is a very special source of normative creation that will not be discussed here.



The further they move away from negotiation, the less the parties control the dispute resolution process. In the negotiation stage, the parties have complete control over resolution of the dispute. In the mediation stage, a third party is introduced into the process, and even though the mediator does not have the power to impose a solution, his or her suggestions can become compulsory if the parties agree to them. Finally, in the arbitration stage, a third party imposes a solution that can be binding on the parties.

Illustration of an online dispute resolution process combining negotiation, mediation and arbitration



This type of stage-based process is at the foundation of the ECODIR (Electronic CONsumer DISpute Resolution) system to which we will return in greater detail. Its flexibility is very useful in international disputes involving consumers because it makes it possible to use the full range of out-of-court dispute resolution methods while taking advantage of arbitration where permitted. Where arbitration of consumer disputes is prohibited or subject to strict conditions, the arbitrator's award can be treated simply as a final recommendation that is not binding on the parties, or binding only on the seller. Thus, nothing stands in the way of deploying such a process internationally, even if the result could have a different legal status depending on where the consumer lives. The issue of status naturally brings us to the legal issues raised by transborder electronic commerce and possible solutions.

C. Legal issues

Clearly, the legal framework for relationships established over the Internet raises major problems that are exacerbated by distance and uncertainty, and continue to present obstacles to the development of transborder electronic commerce. Initially, it might seem that the difficulties could largely be solved through the establishment of dispute resolution mechanisms tailored to transborder electronic transactions. In this context, using information technologies seems perfectly natural. Since by hypothesis such disputes have their source in transactions conducted in electronic environments, it seems logical to use the same environments to resolve the conflicts and ensure that the parties' legal and economic interests are protected. As has already been proven by current practices, recourse to ADR appears to be a particularly promising avenue when deployed online. This is a major development in mediation and arbitration, but it would be wrong to overlook the fact that such mechanisms have been set up in a veritable legal minefield requiring a high degree of caution. The legal issues in question involve competent forum, applicable law and, in corollary, the ability to choose.

(1) Competent forum and applicable law

Among current topics in the small world of cyberspace law, competent forum and applicable law are certainly the most controversial. This is understandable because these two issues form the premises of any legal analysis of the phenomenon we are studying here. Thus, when copyright is infringed or there is a failure to meet contractual obligations in cyberspace, the first step in a sound legal process is to ask where valid recourse can be

sought, and the second is to identify the applicable law if a foreign element is involved, which is generally the case in cyberspace¹⁴⁴.

Of course, private international law is the first option in this kind of situation. There are competent forum and applicable law provisions in the statutes of all states¹⁴⁵. There are therefore local rules that can provide answers to these questions, and quite a few international agreements also provide partial solutions. Private international law is a sophisticated construct with theoretical foundations that seem rather complex for resolving disputes resulting from electronic transactions involving consumers. Yet there is no doubt that one of the purposes of private international law, as deployed in national legislation, is to apply to information transactions involving a foreign element. The time is now past when it was possible to claim that cyberspace is a special place where national laws do not apply¹⁴⁶. However, the assertion that classical legal solutions do indeed apply does not attenuate the much-repeated difficulties related to delocalization and fluidity, in other words, to the fact that information on the Internet cannot be seized. In addition, public order considerations must be incorporated into the analysis because consumers are involved in what has become a worldwide market.

The best way of describing the problem that the impossibility of seizing information on the Internet poses with respect to identifying competent

144 Private international law is a set of rules governing cases where there is a foreign element. See Gérald Goldstein and Ethel Groffier, *Droit international privé* (Volume I), Cowansville, Editions Yvon Blais: 1998, p. 4.

145 “Traditionnellement en droit international privé, on distingue les questions de droit applicable et celles concernant la compétence des tribunaux. Il arrive, bien entendu, que le critère de rattachement utilisé pour la règle de conflit de lois et pour la règle de compétence juridictionnelle soit le même. Toutefois, il n’en va pas toujours ainsi et les raisons qui militent pour la distinction des deux séries de règles demeurent encore pertinentes aujourd’hui” [Our translation: “Traditionally in private international law, a distinction is made between applicable law and court jurisdiction issues. Of course, sometimes the same criteria of appurtenance are used as the rule to decide between conflicting laws and to decide which court has jurisdiction. However, this is not always the case and the reasons in favour of distinguishing between two series of rules still remain relevant today.”]: Catherine Kessedjian, “Aspects juridiques du e-trading: règlement des différends et droit applicable”, in Luc Thevenoz and Christian Bouet, Eds., *Journée 2000 de droit bancaire et financier*, Bern, Editions Staempfli: 2001, p. 68.

146 See in particular David R. Johnson and David G. Post, “Law and Borders — The Rise of Law in Cyberspace”, (1996) 48 *Stanford L.R.* 1367.

forum and applicable law is perhaps to suggest solutions. First, consider a signal broadcast into cyberspace and beyond by a seller website. In the typical case of a transborder retail trade relation, the seller is located in the signal's "forum state" and the buyer in the "target state", in other words, the state where the website's signal is received. Ever since electronic commerce began, national laws have wavered and oscillated between two diametrically opposed solutions to the problem of competent jurisdiction and applicable law. We will call these solutions the "forum state system" and the "target state system". The forum state system assigns competency to the forum state's courts and applies the forum state's legislation in all disputes arising out of Internet transactions. The target state system assigns competency to the target state's courts and applies the target state's law in all such disputes. It should be noted that the two archetypes are used for descriptive purposes here and do not portray the real law of any nation. However, the archetypes do provide a relatively good picture of the polarization of international discussions that in Europe have resulted in the adoption of the Brussels Regulation, which we will look at later, and the Hague Conference on Private International Law's attempts to harmonize regimes through the Judgment Convention, which we will come back to briefly. The point of the Judgment Convention is to maximize consistency among the various solutions offered by the private international law of the jurisdictions in question. No multilateral instrument currently provides a truly international solution.

As described in a recent text for the Permanent Bureau of the Hague Conference, the forum state system is generally supported by the business community, which places the emphasis on the "risk of having to protect against proceedings in a wide range of jurisdictions without being able to restrict the field of such claims to a given jurisdiction because an Internet site is published worldwide and it is virtually impossible to identify the consumer's location with certainty"¹⁴⁷. In contrast, the target state system is preferred by consumer advocates because it tends to provide "consumers with more extensive protection by allowing buyers to institute proceedings in their own countries and therefore, probably, take advantage of their own laws, which give consumers protection similar to that they would have if they made a retail purchase at a store in their neighbourhood"¹⁴⁸. What the text quoted here does not say is that the debate's polarization between the

147 A. Haines, *Supra*, Note 102, par. 8 [our translation].

148 *Id.*, par. 8 [our translation].

business and consumer advocate communities reflects a more political divide between the United States and Europe.

The debate surrounding recourse for consumers wishing to exercise their rights against cybersellers located abroad has far to go before reaching a degree of maturity that would allow us to present the essential components in detail. Admittedly, great confusion reigns in this area; we will simply make a few observations on trends.

(a) In the United States

In order to understand the situation in the United States with respect to competent jurisdiction and applicable law, we first have to look at the case law and remember that the federal structure of the United States legal system raises problems at the national level that in most other countries are found only with respect to truly international transactions. The regime developed by United States courts to handle domestic interjurisdictional disputes is naturally pertinent when disputes involving other countries are in question. To our knowledge, the case law does not contain examples specifically and directly concerning disputes involving consumers and cybersellers. This is not surprising, given the small amounts of money involved in such disputes and the high cost of legal proceedings in the United States. However, there is case law concerning jurisdiction over the Internet which, until proof to the contrary, we can presume is applicable to consumer cases. Note that many of the decisions actually concern domain name disputes¹⁴⁹ and illustrate the tension between forum and target state legislation.

Case law on domain name disputes has formed the basis for a test to distinguish between active and passive sites. The test was first set out in the *Zippo*¹⁵⁰ decision, in 1997. Until then, some case law considered that accessibility of a website from a given country was sufficient to entail the competence of that country's court¹⁵¹. This approach was of course criticized for giving jurisdiction over *all* websites to courts in *every* country where consumers can access the sites. In short, the Web would be subject to *all* the

149 Michael Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction", (2001) 16 *Berkeley Tech Law Journal*, 1345.

150 *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997).

151 See, for example, *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D.Conn.1996). In Canada, see *Alteen v. Informix Corp.*, [1998] N.J. n. 122 1997 n. C.B. 349 (Newfoundland S.C.-Trial Division).

courts on the planet Earth, which is a particularly thorny problem with respect to liability in tort. Assigning jurisdiction only on the basis of whether the website could be consulted carried the risk of impeding the development of seller websites, and it also highlighted, in a rather embarrassing manner, a degree of judicial ignorance of technological developments and consequences.

In *Zippo*, the District Court of Pennsylvania moved away from this approach by favouring an examination of the specific activities of the website in question¹⁵². This strategy drew much attention from commentators, and was routinely followed by the courts for around two years. However, while this test was very attractive because it both broke with an approach that was completely inappropriate for electronic environments and took current technology into account, it already no longer fits the medium it was designed to domesticate. A major study on the topic, which was based almost exclusively on United States case law, explains that the approach in *Zippo*, while alluring, was stated in a technological environment that has since undergone much change. The distinction between active and passive sites has already been ravaged by time, or rather by technological progress¹⁵³. Indeed, this is especially because what is in question is actually a

152 “With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site, which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” *Zippo, supra*, note 150, p. 1124.

153 “...it is important to note that the standards for what constitutes an active or passive Web site are constantly shifting. When the test was developed in 1997, an active Web site might have featured little more than an email link and some basic

spectrum of passive and active sites. Between the two extremes, there is a nebulous area : “First, most websites are neither completely passive nor completely active. Instead, they fall into an intermediary category that requires the court to weigh the evidence in order to decide whether the site is more active than passive, or vice versa”¹⁵⁴. The *Zippo* approach is therefore no longer the consensus. Current trends increasingly favour an analysis that focuses less on the features of the site in question, and more on its effects and impact in the target jurisdiction¹⁵⁵.

Of course, if the new approach is adopted, it will not make things any easier for cybersellers because it does not provide the foreseeability and predictability that they so value. It has even been recommended to seller sites that they should aim only at states where they plan to offer their products and services¹⁵⁶. This is called “targeting”. As we will see later, it has been justly noted “that this approach is not convenient because it forces operators to choose in advance the countries where they want to do business, and therefore to not take full advantage of the web’s potential”¹⁵⁷ and so “targeting is in direct contradiction with the very essence of the web”¹⁵⁸. It also appears that the technological means for targeting are not yet infallible¹⁵⁹. Plainly, it is difficult to predict what tomorrow holds in this respect and, in any case, we hope that in the future United States courts will take international developments into account.

correspondence functionality. Today sites with that level of interactivity would likely be viewed as passive, since the entire spectrum of passive versus active has shifted upward together with improved technology. In fact, it can be credibly argued that sites must constantly re-evaluate their position on the passive versus active spectrum as Web technology changes.” M. Geist, *Supra*, Note 149.

154 *Id.*, p. 34.

155 *Id.*, pp. 26-27. See in particular, *Mattel Inc. v. Adventure Apparel*, 2001 WL 286728 (S.D.N.Y 2001), and *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (2000).

156 *Id.*, p. 36. See also the American Bar Association Report, “Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet”, July 2000, source: <http://www.abanet.org> (last visited on February 1, 2005 ; report no longer available online).

157 C. Kessedjian, *Supra*, Note 145, p. 71 [our translation].

158 *Id.*, p. 6. [our translation].

159 The technology is the subject of an in-depth expert analysis in Yahoo François Wallon, Vinton Cerf and Ben Laurie, UEJF and *Licra v. Yahoo! Inc. and Yahoo France*, available at : <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited on February 1, 2005).

(b) In Europe

Generally, the legal situation in Europe with respect to jurisdiction has the indisputable advantage of some clarity, and gives a major role to the target country in both contract law and tort. The Council Regulation of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Regulation)¹⁶⁰ essentially restates the solutions set out in the Brussels Convention on the same issues. In contract law, the place of execution of the obligation that forms the basis of the claim is decisive¹⁶¹. When goods are in question, the place of execution is the delivery location; when services are at issue, the place of execution is the location where they are provided¹⁶². In delictual or quasi-delictual cases, the location where the injurious event occurred or could occur is decisive¹⁶³. With respect to applicable law, the Rome Convention on the Law Applicable to Contractual Obligations provides that the contract is governed by the law of the country with which it is most closely linked¹⁶⁴. For these purposes, “it shall be presumed that the contract is most closely connected with the country where the party who is to affect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence”¹⁶⁵. In the typical case of the sale of a product, the law of the forum state would apply.

However, in the end, these regulations are not very relevant because, as the legal instruments cited note, they are regulations of private international law that, while they do have the advantage of being harmonized at the international level, are applicable to contracts only in cases where the parties have not agreed on the competent court and applicable law. They supplement the parties’ will. What we are especially interested in here are situations where the parties establish contractual relations over the Internet and can therefore by hypothesis easily come to an agreement on the competent court and applicable law. For sellers conducting transborder business on the Internet, the solution to the problem of competent court and

160 *Council Regulation (EC) No 44/2001 of 22 December 2000*, JO No L 12/1 of 16/01/2001.

161 *Id.*, Article 5(1).

162 *Id.*

163 *Id.*, Article 5(3).

164 *Rome Convention on the Law Applicable to Contractual Obligations June 19, 1980*, JO No L 266 of 09/10/1980 (80/934/CEE), article 4(1).

165 *Id.*, Article 4(2).

applicable law is therefore fairly clear. It consists in paying special attention to these problems when the contract is being written and including choice of forum and choice of applicable law clauses. In cases where the parties want to completely avoid recourse to courts of law, the choice of forum clause can be replaced by an arbitration clause, which has the effect of renouncing the right to recourse to the courts and a commitment to instead submit all disputes to arbitration. An arbitration clause is much more effective than a choice of forum clause because when the forum chosen is outside the European Union, courts often set it aside, sometimes unpredictably.

Things become singularly complicated when one of the parties to a contract entered into over the Internet is a consumer. The rules of private international law that guide the search for a competent court and applicable law are then no longer supplementary but imperative. Given globalization of trade, the European position, which has a major impact on the form taken by consumer regulations and practices worldwide, is to not provide for any significant accommodation for consumer rights as they have been largely harmonized throughout the Union. However, as we will see, the Europeans also encourage the development and implementation of extra-judicial methods for resolving disputes in order to encourage the development of electronic commerce.

The primary difficulty with implementing new recourse for consumers therefore comes essentially from the omnipresence of public order considerations and imperative regulations that states consider components of core values, the protection of which will always justify intervention. In transborder consumption in dematerialized environments, the question of competent forum and applicable law thus amounts to the abilities to choose the forum and law, and to use arbitration, both of which are strictly governed under European law.

(2) Ability to choose the forum and law, and to use arbitration in consumer cases

In consumer affairs, which are now international, the debate surrounding limits on the ability to choose the forum and law has become polarized, as has the debate over forum and target state principles. Consumer advocates and business associations hold positions at opposite ends of the former continuum, and Europe and the United States are on opposite extremes of the latter. In short, business circles hope that sellers will be able to include clauses on the forum and law in transborder cyberconsumer contracts, arguing that any restriction on that ability will impede the development of

electronic commerce. Consumer advocates, however, argue that imposing a foreign court or law through choice of forum clauses in contracts of adhesion would be in practice equivalent to negating the rights of the consumer.

First, before there even was an Internet, the Rome Convention provided in substance that "...a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence"¹⁶⁶. The application of this to consumer contracts signed in a remote manner using telecommunications such as the Internet was confirmed by the 1997 Directive on the protection of consumers in respect of distance contracts¹⁶⁷. This seems to mean that, with respect to Internet transactions, consumers are protected by the law of their own countries, no matter where the seller is located, what representations were made to the seller, or the general conditions on the transaction.

With respect to forum, the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁶⁸ reiterates the arguments of the Brussels Convention on consumption¹⁶⁹ by allowing consumers to choose the court of their domicile or that of the member state where the seller is domiciled, and prohibiting the latter from seizing a jurisdiction other than that of the member state where the consumer is domiciled¹⁷⁰. The Regulation prohibits choice of forum clauses that, prior to any dispute, derogate from the above-mentioned provision in any way, aside from permitting the consumer to seize additional jurisdictions¹⁷¹. This applies particularly when the contract in question is signed with "...a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that

166 *Id.*, Article 5.

167 *European Parliament and Council Directive 97/7/EC*, OJ No L 144 of 04/06/1997.

168 *Council Regulation (EC) No. 44/2001 of 22 December 2000*, *supra*, Note 160

169 *Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, OJ No L 299 of 31/12/1972 (72/454/CEE), sections 3 & 4.

170 *Council Regulation (EC) No. 44/2001 of 22 December 2000*, *supra*, note 160, Article 16.

171 *Id.*, Article 17. The prohibition does not apply to clauses "...entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State".

Member State or to several States including that Member State, and the contract falls within the scope of such activities”¹⁷².

European authorities are aware that this regime could act as an obstacle to the development of electronic commerce. Thus, the Council issued a statement asking the Commission to prepare a report in which “especial attention should be paid to the application of the provisions of the Regulation relating to consumers and small and medium-sized undertakings, in particular with respect to electronic commerce” and therefore asked the Commission to, “where appropriate, propose amendments to the Regulation before the expiry of the period referred to in Article 73 of the Regulation”. In this case, in any event, the Commission plans to “pursue current initiatives on alternative consumer dispute settlement schemes...it will take stock of the situation and review the relevant provisions of the regulation”¹⁷³.

Clearly, the European Union’s target-state position on consumer disputes came under heavy criticism from the business community¹⁷⁴. However, the Directive on electronic commerce¹⁷⁵ gives precedence to the forum-state approach with respect to the regime governing services for the information society : control has to be “at the source of the activity in order to ensure an

172 *Id.*, Article 15. The Commission tried to remove all ambiguity as to the scope of this provision in response to a proposed amendment by the Parliament (Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Legislation in preparation, Document 500PC0689). In the reasons it gave for rejecting the Parliament’s proposal, the Commission wrote: “...the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled”, which is clearly in line with the Council’s statement according to which “...the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor that will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor”.

173 *Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Legislation in preparation, Document 500PC0689.

174 A. Haines, *supra*, note 102, par.12.

175 *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, O.J., E.C. No. L 178 of 17/07/2000, p. 0001-0016.

effective protection of public interest objectives”¹⁷⁶. The Directive therefore seems essential to European balance in the debate over jurisdiction. Yet, it at least seems to leave intact the level of protection otherwise guaranteed to European consumers. According to Article 1(3), the Directive “complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services”. Clarity is sometimes the enemy of consensus!

With respect to the ability to use arbitration, there is no formal status for provisions limiting the ability to choose the jurisdiction in consumer disputes¹⁷⁷. As surprising as it might seem, the possibility of arbitration in consumer law remains to this day clouded in a fog that we have few means of dispersing¹⁷⁸.

When analysing the ability to employ arbitration in consumer disputes, we naturally turn to the Council Directive on unfair terms in consumer contracts¹⁷⁹. It provides for the nullity of unfair clauses and includes an “indicative and non-exhaustive list of the terms which may be regarded as unfair” in a standard contract. Point (q) of the list covers clauses that have the effect of “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions”.

The exact scope of this nebulous provision remains highly uncertain, which at the minimum forces prudent economic stakeholders to give it an interpretation by analogy that is in line with the spirit of the clearer and more restrictive provisions that govern the ability to choose the jurisdiction in

176 *Id.*, *Whereas* no 22.

177 *Council Regulation (EC) No. 44/2001 of 22 December 2000, supra*, note 160, article 1, paragraph 2(b).

178 The law is clear in only a few countries. In Finland, arbitration of consumer disputes is prohibited by the *Consumer Protection Act of 1978*, Chapter 11, section 1(d). In Spain (Article 31 of *Act No. 26/1984*) and Portugal, arbitration of such disputes is statutory. For information on Portugal, see Isabel Mendes Cabecadas, “Le Centre d’Arbitrage des Litiges de Consommation de Lisbonne”, *Revue européenne de droit de la consommation*, 39 (1999) 393.

179 *Council Directive 93/13/EEC of 5 April 1993*, O.J. No L 95 of 21/04/93.

court cases¹⁸⁰. From a purely logical point of view, it is difficult to see why this would be otherwise in arbitral jurisdiction, unless perhaps a careful analysis weighed the practical advantages of arbitration for all the parties. In *Océano*¹⁸¹, the Court of Justice for the European Communities analysed the circumstances surrounding the signature of a choice of forum clause and the consequences of the clause on the equilibrium of the parties' obligations under the Directive. What is remarkable in the decision, in which the choice of forum clause was judged invalid, is that the specific analysis of the case probably would have validated a sufficiently balanced arbitration clause¹⁸². However, given the economic stakes, such a hypothesis does not provide stakeholders with enough reassurance to warrant gambling on arbitration to resolve consumer disputes¹⁸³.

180 “Consumer dispute resolution procedures cannot be designed to replace court procedures. Therefore use of such procedures may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised.” In *Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes*, O.J. No. L 115 of 17/04/1998, known as the “Bonino Recommendation” available at : http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_115/l_11519980417en00310034.pdf (last visited on February 1, 2005).

181 Court of Justice of the European Communities, 27/06/00, *Océano Grupo Editorial v. Rocio Murciano Quintero*, consolidated cases C-240/98 to C-244/98.

182 In the same sense, it could be possible to exclude arbitration of consumer disputes from the “internal” regime using specific provisions on “international” arbitration in effect in some European countries, such as France. Before the directive was adopted, a Paris Court of Appeal decision validated an arbitration clause in a consumer contract concerning “the interests of international trade” on the basis of this argument. (*Revue trimestrielle de droit commercial*, (1995) 401). See in particular Eric Loquin, “L’arbitrage des litiges du droit de la consommation”, in Filali Osman (Ed.), *Vers un Code Européen de la Consommation*, Brussels, Editions Bruylant, 1998, 357, p. 372.

183 As Catherine Kessedjian said, “si une clause de règlement des différends n’est pas, en elle-même, nulle et de nulle effet, dans les rapports entre professionnel et consommateur, elle est sujette à tant de restrictions qu’il est périlleux pour un professionnel d’insérer une telle clause, sauf à ce que celle-ci donne directement compétence au tribunal du domicile ou de la résidence habituelle du consommateur.” [Our translation: While a dispute resolution clause is not in itself null and void, in business to consumer relations it is subject to so many restrictions that it is perilous for a business to insert such a clause unless it gives jurisdiction directly to the court of the state where the consumer is domiciled or habitually resides.] In “Les clauses d’élection de for et d’arbitrage – en l’absence de clause ou en cas d’invalidité de celle-ci, comment se détermine la compétence des tribunaux?” Catherine Kessedjian,

At the other extreme of the above-mentioned debates, United States law has been more flexible in setting up legal conditions that could promote the development of B2C electronic commerce. In the United States, the ability to choose is greater¹⁸⁴ and arbitration clauses that are not unfair are widespread and considered valid¹⁸⁵.

However, detailed analysis of United States law will not take us very far because when what is in question is a planet-wide network and mandatory law, it is generally the smallest or largest denominator that rules. In other words, a seller or business wishing to offer goods or services across the whole network is forced to comply with the mandatory provisions of the state where the consumer is protected to the greatest extent. As Kessedjian points out, it will always be possible for cybersellers to limit their offer of products and services to certain countries using technical means or by refusing to contract¹⁸⁶, but is this desirable?

However, these techniques directly contradict the web's principle of ubiquity and are much more costly than a simple site that can be accessed from anywhere in the world, without differentiation. Here, the legislator is

Speech given at a conference held by the International Chamber of Commerce Institute of World Business Law, October 29, 1998.

184 Read in general Reinhard Schu, "The Applicable Law to Consumer Contracts made over the Internet: Consumer Protection through Private International Law?" in *International Journal of Law and Information Technology*, vol. 5, issue 2, 1997, 192. On how jurisdiction rules work in the United States, see the useful study by the Chicago-Kent College of Law, "An overview of the law of personal (adjudicatory) jurisdiction: the United States perspective", available at: <http://www.kentlaw.edu/cyberlaw/docs/rfc/usview.html> (last visited on February 1, 2005).

185 See, for example, the United States Supreme Court decision in *Green Tree Financial Corp.-Alabama et al. v. Randolph*, (December 11, 2000). More generally, see Mark E. Budnitz, "Developments in Consumer Arbitration Case Law", available at: <http://law.gsu.edu/mbudnitz/arbsumryjune01.pdf> (last visited on February 1, 2005).

186 The technological means mentioned here were studied in depth in the Yahoo case, F. Wallon, V. Cerf and B. Lauries, *supra*, note 159. With respect to refusal to contract, all the cyberseller has to do is ask the consumer to reveal his or her place of domicile or residence, and then decide whether or not to sign the contract. Physical delivery of a product makes it possible to check the consumer's statements, but this is impossible if the merchandise is delivered online. In the latter case, the cyberseller is at the mercy of the consumer's statements, particularly when the service is rendered in a country where there are criminal consequences flowing from conditions that refer to "absolute" responsibility, in other words, responsibility that is independent of the guilty party's intent.

*confronted with a choice that is dictated in part by an economic policy shaped by interests that are too well known to be reviewed here.*¹⁸⁷

Since being able to choose the forum and law, and to commit to arbitration prior to the emergence of a dispute are key conditions for the development of private legal initiatives, there is very little scope for competition between standards.

European authorities are well aware of the problem and have decided to promote the use of extrajudicial mechanisms to resolve consumer disputes, as can be seen from the Directive of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market¹⁸⁸ and the Council resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes¹⁸⁹. Unfortunately, it is difficult to see how a European network will help progress to be made on an international scale. Moreover, the question of the state's role in deploying ADR, such as with respect to binding mechanisms, remains wholly unanswered. On one hand, the idea of a public system of accreditation for consumer dispute resolution centres or mechanisms remains on the agenda despite protests from the private sector; on the other hand, there is still no satisfactory answer to the question of whether use can be made of mechanisms that are *a priori* binding.

On the multilateral level, the Hague Conference on Private International Law has done major work outside of the European Union. The Conference has already presented a preliminary draft of a convention on jurisdiction and foreign judgments in civil and commercial cases¹⁹⁰. In principle, the draft

187 Our translation. French original: "Toutefois, ces techniques vont directement à l'encontre du principe d'ubiquité de la toile et coûtent beaucoup plus cher à mettre en œuvre que l'ouverture d'un simple site pouvant être accessible partout dans le monde, sans différenciation. Le législateur est ici confronté à un choix dicté en partie par une politique économique dont les intérêts en présence sont trop connus pour devoir être rappelés ici." In C. Kessedjian, *supra*, note 145, pp. 89-90.

188 *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, supra*, note 177, article 17.

189 *Council resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes*, O.J. No. C 155 of 06/06/2000.

190 See the June 2001 version available at : <http://www.hcch.net/upload/wop/jdgmpl11.pdf> (last visited on February 1, 2005).

convention covers electronic commerce, even though there seem to be great differences between member countries on the issue of competent forum¹⁹¹, as well as other disagreements over the views expressed in the document¹⁹². It indeed seems that the Conference of the Hague is embroiled in the above-mentioned debate over the principle of consumer protection, according to which consumers should be able to bring cybersellers before the court of the former's state (often with the consequence of application of the law of the consumer's state). As we noted above, this is a principle of public order. The United States is among the countries that are opposed to including in the Convention a provision consecrating the automatic application of the target-country principle whenever one of the parties is a consumer¹⁹³.

(3) A non-judicial avenue?

Given the legal problems and normative uncertainty discussed above, the only remaining avenue for speedy development of new international dispute

191 “It has become apparent from both the Geneva roundtable and the Ottawa meetings that the additional difficulties which e-commerce poses, as far as determining globally acceptable grounds of jurisdiction is concerned, relate mostly to jurisdiction in disputes for which the parties have not taken the precaution of making a choice of court that is valid for the purposes of the Convention (sometimes referred to as ‘jurisdiction by default’).”, The Hague Conference on Private International Law, Permanent Bureau, “Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference”, Preliminary Document No. 16 of February 2002 for the attention of Commission I (General Affairs and Policy of the Conference) of the XIXth Diplomatic Session – April 2002, available at: http://hcch.e-vision.nl/upload/wop/gen_pd16e.pdf (last visited on February 1st, 2005). Also see: Hague Conference on Private International Law, Permanent Bureau, “Preliminary Draft Convention on Exclusive Choice of Court Agreement: Draft Report”. Preliminary Document No. 26 of December 2004 drawn up for the attention of the Twentieth Diplomatic Session of Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, available at: http://www.cptech.org/ecom/jurisdiction/jdgm_pd26e.pdf (last visited on February 1, 2005).

192 *Id.*, p. 5.

193 Interestingly, a number of jurisdictions outside Europe take the European approach to the ability to choose the jurisdiction and arbitration in consumer matters. This is the case in Quebec: *Consumer Protection Act*, 61 R.S.Q. c. P-40.1, sections 261-62; *Civil Code of Québec*, Q.S., 1991, c.64, articles 3117 and 3149. See Vincent Gautrais, Karim Benyekhlef and Pierre Trudel, “Les limites apprivoisées de l’arbitrage cybernétique: l’analyse de ces questions à travers l’exemple du *Cybertribunal*”, (1999) 33 *R.J.T.* 537, pp. 558 and ss.

resolution mechanisms must exclude any contractual system that is *a priori* binding on consumers¹⁹⁴. While it is often possible to oblige consumers to avail themselves of a specific court or require them to commit to a specific mechanism (such as arbitration) after disputes arise, the question that remains is whether this possibility is not purely theoretical in most cases.

We have to acknowledge that identifying the competent forum and applicable law is a very complex exercise when it comes to the Internet and electronic commerce. It is so complex that the many zealous international bodies working on the issue have so far been unable to come up with solutions that are universally endorsed. However, in the end, whether the solution is based on an interpretation of existing rules or the adoption of supplementary regulations, will we not still find ourselves with the problem of practical application? Let's see what is involved.

Suppose that we have solved all the problems with identifying the competent court and applicable law. Who will believe that a consumer will institute an action before a court, whether it is local or *a fortiori* foreign, for a \$250 electronic transaction that has gone wrong? The same applies when a small or medium-sized enterprise that has entered into a transaction over the Internet with a foreign party now believes, for whatever reason, that it has been cheated. The amounts of money at stake, coupled with the cost and time of judicial recourse, will make short work of the jurist's wishful thinking.

The same goes for arbitration. Suppose that a consumer has validly committed to arbitration through, for example, an arbitration agreement signed after the dispute arose. Suppose also that the consumer obtains a valid arbitral award after online arbitration in which the costs have been kept to a strict minimum. Suppose, finally, that the New York Convention on the

194 Mechanisms that bind the consumer after a dispute has arisen seem possible. Interestingly, the Bonino Recommendation (*supra*, note 180) concerns procedures that "no matter what they are called, lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution", clearly admitting that "the decisions taken by out-of-court bodies may be binding on the parties". This could be a reference to statutory arbitration, such as in Spain and Portugal, or, more plausibly, to an arbitration agreement signed after a dispute has arisen. For an example of an *a posteriori* arbitration mechanism in which the consumer does not commit to arbitration (and thereby renounce recourse before the courts) until after a dispute has arisen, see the Canadian Motor Vehicle Arbitration Plan at : <http://www.camvap.ca> (last visited on February 1, 2005).

Recognition and Enforcement of Foreign Arbitral Awards makes it possible to execute the award in the cyberseller's country. Once again, the consumer is forced to commit means, for example, to retain the services of a lawyer in the country of execution, that necessarily exceed the value of the initial transaction. In the vast majority of cases, the investment will be disproportionate to the resulting award, which is generally quite uncertain.

Given the now widely acknowledged imbalance between the cost of judicial proceedings, even when they are designed for small disputes, the cost of executing a judicial decision or arbitral award, and the small amounts at stake in consumer disputes¹⁹⁵, it would seem that the way is clear for a focus on deploying non-binding (at least for the consumer) extra-judicial dispute resolution mechanisms offered and delivered online.

The organization, funding and effectiveness of such mechanisms are left to a certain extent to creative and self-regulatory market forces, which have been relatively weak given the above-mentioned constraints. In addition to the slow pace of legislative change and the normative confusion that could last for some time, the state's role in deploying these mechanisms still seems uncertain. Part of its role is to engage in international consultation to promote the emergence of guidelines for resolving consumer disputes¹⁹⁶. As we will see in greater detail, it is an open question whether the laws of the market left to themselves can develop a market for private justice in line with the principles of fundamental justice that the state wishes to protect. In international commercial arbitration not involving consumer issues, the state continues to play a limited but fundamental protective role that could very well be applied elsewhere because it maintains some of the state's traditional role as defender of public order while ensuring maximum flexibility.

195 See in particular: Commission of the European Communities, "Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market", COM(93) 576 final of 16 November 1993.

196 See in particular: Federal Trade Commission, Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions, Summary of Public Workshop, June 6-7, 2000, available at : <http://www.ftc.gov/bcp/altdisresolution/> (last visited on February 1, 2005). As a point of departure for Europe, see the Bonino Recommendation, *supra*, note 180. See also concerning the notion of "clearing house", the Council resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, *supra*, note 189.

For our purposes here, note that deploying mechanisms that are not binding on consumers at any point in the contractual relation can both overcome legal reservations and target customer satisfaction. The only question that remains unanswered is whether the benefits of such mechanisms in terms of increased consumer confidence are sufficient, in pure market terms, to ensure their funding and stability. Outside of consumer issues, such as in transborder electronic commerce between businesses, appropriate dispute resolution is governed by the well-established system of international commercial arbitration. It remains to be seen whether there are real obstacles to conducting arbitration in an electronic environment.

(4) Formalities of classical arbitration and the electronic environment

On the face of it, the legal infrastructure that forms the basis for international arbitration can handle the change to electronic communications fairly easily. Therefore, we need not spend too much time on the technological issues involved in the change, which we will cover by looking briefly at each stage of an arbitral process.

(a) Writings

The first key issue concerns the validity of an arbitration agreement concluded using electronic means. The problem lies in the formalities sometimes imposed by national and international texts on the validity or evidence of an arbitration agreement or clause. The law of a number of countries requires a writing in order for the legal effect of an arbitration agreement to be acknowledged. At the international level, the New York Convention also seems to require a written document for recognition of an arbitration agreement. What does this mean for the validity of an arbitration agreement signed online? Clearly, states will adapt their formal rules to the new requirements of electronic commerce more or less easily and at different speeds. In many countries, adaptation will require legislation, and therefore involve the delays characteristic of that approach. In other countries, it is likely that the courts will continue to take the initiative by interpreting texts flexibly so that the notion of a writing includes dematerialized texts¹⁹⁷. Flexible interpretation of the New York Convention

197 See for example: *Lieschke, Jackson & Simon v. Realnetworks Inc.*, US District Court, Northern District of Illinois, East Div., 11 May 2000, Base *Westlaw* No. 631341. For

is recommended so that dematerialized texts can be included as writings without having to send that international agreement, which has become virtually universal, back to the drawing board¹⁹⁸.

(b) Service of documents

The second issue concerns service of documents. Once again, this is a relatively minor obstacle to digitizing arbitration proceedings. With the agreement of the parties, there is no problem in serving documents electronically. It is true that email evidence of transmission and receipt, like electronic signature, is an issue that has yet to be resolved in a satisfactory manner. However, the tools of protected internal messaging, which are now available from reliable ODR centres, solve the problem very well. The same applies to problems with the confidentiality of exchanges.

(c) Hearings

The third issue concerns hearings. Here, a distinction can be made between the location of hearings, including those at which testimonial and documentary evidence is taken, and the location of arbitration. Video conferencing is already used frequently in international arbitration, not only for preliminary meetings, but also to take testimonial evidence and hear oral arguments. Thanks to the Internet, it has become widespread and reduced costs dramatically. In this case, the human factor is the obstacle, and it should not be taken lightly because an atmosphere of trust is often established at in-person meetings. However, it remains that a key component of arbitration involves the exchange of mail and documents among the parties and the arbitrator. This can be done electronically. We should also not forget that an arbitral award can be rendered based on evidence, without any hearings, if the circumstances are appropriate and the parties are in agreement. With all due respect for some arbitrators who have great confidence in the beneficial effect of their contribution and presence, evidence-based arbitration nonetheless often seems to satisfy the parties, and after all, though we sometimes tend to forget, they are the primary

an interesting review of the issue, see: Olivier Cachard, (2002) *Revue de l'arbitrage* n° 1, p. 193.

198 See: United Nations Commission on International Trade Law, Working Group II (Arbitration and Conciliation), "Note by the Secretariat", 22 September 2000, A/CN.9/WG.II/WP.110.

stakeholders. What is really needed is a balance between the means invested in the procedure and what is at stake.

Management of written evidence is also relevant here. In most legal environments, the parties have free access to the evidence, and digitization is not a problem unless the authenticity of the documents is challenged, which is generally quite rare. With respect to procedure, note that the current trend is to establish a fictional location for arbitral proceedings such that neither the parties nor the arbitrators are required to travel. Obviously, this greatly facilitates the legal supervision of completely dematerialized proceedings. It also enables the parties to simply include a clause in their contract that establishes a fictional location for arbitration. The location might have certain legal consequences, but in principle neither they nor the arbitrators will ever have to go there to resolve the dispute.

(d) Awards

Establishment of the award is also an aspect of the procedure that could be an obstacle to online arbitration. At a sufficiently high level of analysis, this problem can be solved largely in the same way as the problems with arbitration and negotiation clauses.

A number of states have legislation requiring that the award be in the form of a writing. Similarly, while the New York Convention does not explicitly require that the award be rendered in written form, it nonetheless refers to an “original” and to an “authentic copy” with respect to enforcement and recognition by the courts. Finally, one more difficulty has to be mentioned : the award has to be signed. As in the case of the arbitration agreement, we hope that harmonization of technical standards and flexible interpretation of existing texts will suffice to quickly persuade stakeholders of the enforceability of dematerialized awards. Indeed, online arbitration has not waited for this¹⁹⁹.

199 The accommodations required by prudence are very modest: the parties simply have to be sent a paper copy duly signed by the arbitrators of an award already delivered online.

(e) Validity of electronic signature

Traditionally, the parties' signatures indicate their will to enter into a contractual relationship. Until recently, the signature was handwritten. In recent years, however, many different techniques have been developed to recreate in digital form the functions seen as distinctive of handwritten signatures.

A number of countries have already recognized electronic signature as a technological solution to problems with identifying stakeholders on the Internet²⁰⁰. On December 13, 1999, the European Parliament and Council adopted the Directive on a Community framework for electronic signatures, which establishes all of the elements required to ensure that the new approach will be recognized in law²⁰¹. The Directive provides that legal systems cannot set aside an electronic signature solely because it is electronic. If the signature and the electronic certificate issued by a certification service (whose job it is to confirm the identity of the author and the integrity of the document) meet a certain number of specifications, the electronic signature will be considered to have the same value as a handwritten signature. In principle, member states were to adopt the legislation, regulations and administrative provisions, and comply with the Directive by July 19, 2001.

On July 5, 2001, the United Nations Commission on International Trade Law (UNCITRAL) adopted a model law on electronic signatures. Article 6(1) of the law provides that :

Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in light of all the circumstances, including any relevant agreement.

Note that a test of the signature's reliability is found in the third paragraph of the same article, according to which an electronic signature will be considered reliable if it meets the following conditions :

200 The countries include Germany, Italy, France, some US states and, in Canada, the province of Quebec.

201 *European Parliament and Council Directive 1999/93/CE of 13 December 1999 on a Community framework for electronic signatures*, E.C.O.J. No L 13 19/01/2000.

- The signature creation data are, within the context in which they are used, linked to the signatory and no other person;
- The signature creation data were, at the time of signing, under the control of the signatory and of no other person;
- Any alteration to the electronic signature, made after the time of signing, is detectable; and
- Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable²⁰².

We hope UNCITRAL's initiative will be successful, but in any case, the issue of electronic signature does not seem likely to be a serious obstacle to the development of arbitration by electronic means.

D. The deployment of ADR in cyberspace

(1) Guidelines

Given the growing need for an effective regulatory framework, a number of organizations and governments have developed recommendations and guidelines designed to be taken into account in the establishment of ODR. The Organization for Economic Co-operation and Development (OECD) was among the first to recognize the importance of international standards in the governance of transborder electronic commerce transactions. In 1997, the OECD was already pointing out the need for greater co-ordination in this area, not only among governments but also in the private sector²⁰³.

Soon afterwards, the European Union and the United States issued a joint statement encouraging greater dialogue between the public and private spheres in order to establish a sufficiently predictable legal and commercial

202 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Signatures*, July 5, 2001, article 6(3).

203 Organisation for Economic Co-operation and Development, "Business-to-Consumer Electronic Commerce Survey of Status and Issues", 1997, available at: [http://www.oalis.oecd.org/olis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/07cb19e0e874b0af802565e700470e4c/\\$FILE/04E81341.DOC](http://www.oalis.oecd.org/olis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/07cb19e0e874b0af802565e700470e4c/$FILE/04E81341.DOC) (last visited on February 1, 2005).

framework for the Internet²⁰⁴. At the same time, they acknowledged the role of governments in protecting the public interest, particularly with respect to consumer protection, and the role of self-regulatory mechanisms such as codes of conduct and other guidelines.

The OECD was already involved in collaborative work between the public and private spheres in 1998. In 1999, this resulted in the adoption of its Guidelines for Consumer Protection in the Context of Electronic Commerce²⁰⁵. The Guidelines provide that “consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden” and that “businesses, consumer representatives and governments should work together to... develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms”²⁰⁶. The OECD’s Guidelines were then adopted by the G8 in the Okinawa charter on the global information society²⁰⁷, which says that extra-judicial dispute resolution mechanisms are a way of solving problems related to consumer recourse in cyberspace and that the “private sector plays a leading role in the development of information and communications networks in the information society... [b]ut it is up to governments to create a predictable, transparent and non-discriminatory policy and regulatory environment necessary for the information society”²⁰⁸. The European Union and the United States renewed their support for the OECD’s guidelines at the 2000 Summit²⁰⁹. The joint statement issued at that time explicitly recognized the advantages of ADR, particularly when the service was provided online, and

204 “Statement of the European Union and the United States on Building Consumer Confidence in e-Commerce and the Role of Alternative Dispute Resolution”, December 5, 1997, available at: http://europa.eu.int/comm/external_relations/us/summit12_00/e_commerce.htm (last visited on February 1, 2005).

205 Organization for Economic Co-operation and Development, *Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce*, available at: <http://www1.oecd.org/publications/e-book/9300023E.PDF> (last visited on February 1, 2005).

206 *Id.*, article VI B.

207 Adopted at the 2000 Kyushu-Okinawa Summit. Documents available at: <http://usembassy.state.gov/islamabad/wwwhpr56.html> (last visited on February 1, 2005).

208 *Id.*, article 7.

209 “Statement of the European Union and the United States on Building Consumer Confidence in e-Commerce and the Role of Alternative Dispute Resolution”, *supra*, note 204.

acknowledged the importance of promoting the development of such mechanisms²¹⁰. A series of basic principles for the effective and equitable deployment of ADR was also acknowledged : impartiality, accessibility, low cost or free of charge for consumers, transparency and speed²¹¹.

At the same time, at the end of 2000, the Hague Conference on Private International Law, International Chamber of Commerce and OECD convoked the key stakeholders in forms of ADR to the Hague for an international co-operation meeting. The meeting revealed that a consensus was emerging in favour of maintaining the following principles in the deployment of ADR for consumers : independence, impartiality, accessibility, transparency, rapidity and services free of charge or low cost for consumers²¹². Two other criteria were also hotly debated at the meeting : the voluntary nature of the procedure and the binding nature of the award. No consensus was achieved on the two latter criteria simply because they flow directly from the interface between ADR and the complex, multi-faceted legal framework of consumer protection that we have reviewed.

In the meantime, a number of stakeholders have published principles, guidelines and recommendations for the deployment of ODR. The following table summarizes the key international initiatives by various public and private stakeholders. They show the emergence of an international consensus that is quite remarkable, given that the subject matter is only a few years old.

210 *Id.*

211 *Id.*

212 The conference report, entitled "Building Trust in the Online Environment: Business to Consumer Dispute Resolution", is available at : [http://www.olis.oecd.org/olis/2001/doc.nsf/43bb6130e5e86e5fc12569fa005d004c/c1256985004c66e3c1256a33005b80a1/\\$FILE/JT00106356.DOC](http://www.olis.oecd.org/olis/2001/doc.nsf/43bb6130e5e86e5fc12569fa005d004c/c1256985004c66e3c1256a33005b80a1/$FILE/JT00106356.DOC) (last visited on February 1, 2005).

	Stakeholders	Independence	Impartiality	Accessibility	Transparency	Low Cost	Speed
International Organizations	OECD Consensus ²¹³	X	X	X	X	X	X
	EU ²¹⁴	X	X	X	X	X	X
States	United States ²¹⁵	X	X	X	X	X	X
	Canada ²¹⁶			X	X	X	X
	New Zealand ²¹⁷	X		X			
	Australia ²¹⁸	X		X			

213 *Id.* See also: Anne Carblanc, “Privacy Protection and Redress in the Online Environment: Fostering Effective Alternative Dispute Resolution”, 22nd International Conference on Privacy and Personal Data Protection, Venice, September 28–30, 2000.

214 Bonino Recommendation, *supra*, note 180 and *Commission recommendation of 4 April 2001 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (2001/310/CE)*, available at: http://europa.eu.int/comm/consumers/redress/out_of_court/adr/acce_just12_en.pdf (last visited on February 1, 2005). Also see: Commission of the European Communities, “Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters”. Brussels: 22.10.2004, COM(2004) 718 Final, available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0718en01.pdf (last visited on February 1, 2005) and European Code of Conduct for Mediators, available at: http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_code_conduct_en.pdf (last visited on February 1, 2005).

215 Federal Trade Commission, *supra*, note 196.

216 Working Group on Electronic Commerce and Consumers, “Principles of Consumer Protection for Electronic Commerce and Supporting Documentation”, 1999, available at: <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01185e.html> (last visited on February 1, 2005). Also see: Federal, Provincial and Territorial Ministers responsible for Consumer Affairs, “Canadian Code of Practice for Consumer Protection in Electronic Commerce”, January 2004, available at: [http://cmcweb.ca/epic/internet/cmc.nsf/vwapj/EcommPrinciples2003_en.pdf/\\$FILE/EcommPrinciples2003_en.pdf](http://cmcweb.ca/epic/internet/cmc.nsf/vwapj/EcommPrinciples2003_en.pdf/$FILE/EcommPrinciples2003_en.pdf) (last visited on February 1, 2005).

217 Ministry of Consumer Affairs, “New Zealand Model Code for Consumer Protection in Electronic Commerce”, October 2000, available at: <http://www.consumeraffairs.govt.nz/policyandlaw/discussionpapers/model-code.html> (last visited on February 1, 2005).

218 Australian Department of Treasury, “Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business”, May 2000, available at: <http://www.ecommerce.treasury.gov.au/publications/BuildingConsumerSovereigntyI>

	Stakeholders	Independence	Impartiality	Accessibility	Transparency	Low Cost	Speed
Private Organizations	GBDe ²¹⁹		X	X	X	X	X
	CCI, BIAC, AGB ²²⁰		X	X	X	X	
	TACD ²²¹	X		X	X	X	X
	ABA ²²²		X	X	X	X	
	Consumers International ²²³	X	X	X	X	X	X

The most recent such initiative is by the American Bar Association (ABA). While it is the work of an American association, specifically of a working group composed uniquely of United States citizens, the initiative is nonetheless based on a very broad international consultation and therefore has to be taken seriously. In August 2002, the ABA published its recommendations on best practices for ODR service providers²²⁴.

[nElectronicCommerceABestPracticeModelForBusiness/context.htm#building](http://www.gbde.org/pdf/recommendations/recommendations01.pdf) (last visited on February 1, 2005).

- 219 Global Business Dialogue on Electronic Commerce, “Consumer Confidence: Alternative Dispute Resolution”, September 14, 2001, available at: <http://www.gbde.org/pdf/recommendations/recommendations01.pdf> (last visited on February 1, 2005).
- 220 International Chamber of Commerce (ICC), Business and Industry Advisory Committee to the OECD (BIAC) and Alliance for Global Business (AGB), “A Global Action Plan for Electronic Commerce Prepared by Business with recommendations for Governments”, October 1999, available at: <http://www.oecd.org/dataoecd/12/22/2091896.pdf> (last visited on February 1, 2005).
- 221 Transatlantic Consumer Dialogue, “Alternative Dispute Resolution in the Context of Electronic Commerce”, February 2000, available at: <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=41> (last visited February 1, 2005).
- 222 American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution, “Addressing Disputes in Electronic Commerce - Final Report and Recommendations”, 2002, available at: <http://www.law.washington.edu/ABA-eADR/documentation/docs/FinalReport102802.pdf> (last visited on February 1, 2005).
- 223 Consumers International, “Disputes in Cyberspace 2001. Update of online dispute resolution for consumers in cross-border disputes”, *supra*, note 132.
- 224 American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution, “Recommended Best Practices by Online Dispute Resolution Providers”, 2002, available at: <http://www.law.washington.edu/ABA-eADR/documentation/docs/BestPracticesFinal102802.pdf> (last visited on February 1, 2005).

The purpose of the recommendations is to inform both ADR service providers and potential users, such as consumers and sellers. The recent recommendations have the advantage that they take a certain distance from the phenomenon in question. In particular, they take into account the fact that the market for ODR is not as strong as long claimed. Consequently, they remain independent with respect to both implementation and sanction. Instead, the recommendations are “flexible” guides for service providers and a point of reference for users. This approach has the advantage of injecting some content into principles on which there is already an international consensus, and presenting users with the relevant issues in the areas where a consensus has not been achieved. As we have seen, the areas where there is no general agreement essentially concern the interface between the proposed mechanism and the range of rights that the consumer has depending on his or her location.

With a commendable degree of realism that takes into account the stage of development of the phenomenon, the recommendations promote a modest list of components that are considered essential for an ADR service provider to disclose :

- Contact and organizational information, including a physical address, an e-mail address and the jurisdiction of incorporation or registration to do business;
- Terms and conditions and disclaimers;
- Explanation of services/ADR processes provided and, for each : applicable rules and procedures, nature, binding character for each party, other legal consequences of the outcome and explanation of further possible avenues of legal action;
- Identification of any legal services (advice, counselling, advocacy) affiliation or activity and identification of the method employed to separate neutral services from legal services and to avoid conflicts of interest;
- Affirmation that the ODR proceedings will meet basic standards of due process, including adequate notice to the parties, and opportunity for the parties to be heard, the right to be represented and to consult legal counsel at any stage of the proceedings and, in the case of arbitration, an objective decision based on the information on record;

- Any prerequisite for accessing the service, such as membership or geographical location or residence;
- Any minimum value for the dispute to be submitted for resolution.²²⁵

The list is provided as a guide to the issues that a more detailed code of conduct could cover. At this stage in the development of the market for ADR, it is clearly too early to be concerned with how the principles will be implemented, other than through the pressure exerted by publication of the above-mentioned principles and guidelines.

The ABA also recommends the creation of an international body that would act as an information centre for consumers and promote ODR so as to increase consumer confidence in electronic commerce. The idea is attractive since our theory is that the lack of trust on the Internet is essentially due to a lack of communication. ODR is no exception to the rule and, like law, depends on effective communication. The idea of a world information centre for ADR is therefore very welcome because the current patchwork of transborder consumer law leaves little hope for the accessibility of relevant information, particularly if the stakeholder is a small or medium-sized enterprise or a consumer²²⁶. For such a project to have any chance of success, however, it will have to secure the support of an organization with greater international legitimacy than the ABA.

225 *Id.*; see “Minimum Basic Disclosures”.

226 The website published by the Consumers International Regional Office for Asia and the Pacific (CIROAP) is very informative, and provides a summary of consumer protection law in 15 countries in the region (Asia-Pacific Consumer Law (APCL)). See: <http://www.consumersinternational.org/HomePage.asp?regionid=154&langid=1> (last visited on February 1, 2005). It has become urgent to take an initiative of this form on the international level. For a fairly broad but static inventory of legal provisions directly concerning ADR with respect to privacy and consumer protection, see the Organization for Economic Co-operation and Development, “Legal provisions related to business-to-consumer alternative dispute resolution in relation to privacy and consumer protection”, DSTI/ICCP/REG/CP(2002)1/FINAL, July 2002, available at : [http://www.oalis.oecd.org/oalis/2002doc.nsf/43bb6130e5e86e5fc12569fa005d004c/0fc99306e60c98bec1256bf900565f0c/\\$FILE/JT00129724.PDF](http://www.oalis.oecd.org/oalis/2002doc.nsf/43bb6130e5e86e5fc12569fa005d004c/0fc99306e60c98bec1256bf900565f0c/$FILE/JT00129724.PDF) (last visited on February 1, 2005).

(2) Funding

While it is widely acknowledged that using ADR is less costly than recourse to traditional judicial apparatus²²⁷, the delivery of such services still involves costs that it should not be underestimated. They fall into three categories : hardware and software infrastructure, secretariat costs related to case administration, and the fees and expenses of mediators and arbitrators.

When choosing the appropriate business model, service providers cannot ignore some of the principles that we have just examined. First, to meet the requirement of accessibility with respect to cost, the proceedings must be in proportion to the amounts at stake, the nature of the dispute and the deadline by which the solution must be found. Today, leaving aside the issue of hardware and software infrastructure, service providers are funded in accordance with one of the three following business models : sharing of costs by both parties, costs paid by only one party, or outside funding. When the costs are shared by the parties, note that the proportion paid by each side can vary from one provider to the next, although it seems that most of those using this business model divide the costs equally between the parties²²⁸. In some cases, the complainant may also be required to pay a fee to register the case. This is logical since when the proceedings are initiated, the respondent is not aware of the complaint and, even when so informed, can choose not to respond. However, this model can present some problems with respect to consumer access to proceedings if the cost is disproportionate to the amount in dispute.

When one of the parties pays all of the costs, the seller or insurer is generally asked to pay for the whole proceedings through annual fees or through a fee

227 Time and money are saved because the parties can participate in the dispute resolution process through their computers. They do not have to travel to meet the opposing party or appear in court.

228 According to a study done by the University of Geneva, the following providers shared the costs equally between the parties: 1-2-3 Settle.Com, ClickNsettle.Com, ClaimChoice.com, ClaimResolver.com, Cyberarbitration, Cybercourt, Cybersettle, e-Mediator, Internet Neutral, Intersettle, IntelliCOURT, MARS, NewCourtCity, NovaForum.com, Online Resolution, The Resolution Forum, ResolveItNow.com, SettlementOnline, SettleOnline, SettleSmart, SettleTheCase, *SquareTrade*, The Claim Room, U.S. Settle, WeCanSettle, WEBDispute.com, Web Dispute Resolution, WebMediate and Word&Bond. See T. Schultz, G. Kaufmann-Kohler, D. Langer, V. Bonnet, *op. cit.*, Note 47. Note that some of the providers surveyed no longer exist.

for processing a set number of cases²²⁹. This raises concerns about the provider's independence and impartiality. Since the process is funded by the business, the consumer could naturally see it as skewed in the seller's favour. The provider could solve this problem by adopting measures to make the process transparent, such as strict procedures for selecting neutral arbitrators and mediators.

Even though some providers offer their services to consumers free of charge²³⁰, it is important to note that nothing prevents ODR providers from asking consumers to pay for some of the costs related to the proceedings. Indeed, every service provider faces a major challenge when determining the costs related to the procedures offered. While trying to keep costs to a minimum, the provider has to reconcile consumer access to procedures with the financial viability of the undertaking.

Of course, the best way to guarantee the provider's independence and impartiality, and reduce the cost to the consumer involves outside sources of funding, which is difficult to imagine over the long term without a significant commitment from the public sector. Such a commitment would be natural in so far as consumer disputes are the only real obstacles for providers when designing business models with a minimum of sustainability. This problem is not the result of a feature of the market but of public interest in protection traditionally guaranteed by the public sector and not by market mechanisms.

Until now, governments have somewhat avoided the issue by relying on self-regulatory mechanisms. The current situation in ODR suggests that we should re-examine the virtues of leaving the market alone to regulate this kind of service delivery. We will not discuss this issue here because a very similar observation can be made concerning all of the products and services belonging to what might be called the "trust market": labels, certification, cyberconsumer insurance, privacy protection software, etc. It is a market

229 *Id.* The following providers favoured this model: AllSettle.Com (the insurer pays the costs), BBBOnline (the sellers pay an annual membership fee), FordJourney (Ford pays for the arbitrator's services), iCourthouse (the law firms pay annual membership fees), OnlineDisputes (annual membership fees), TRUSTe (annual membership fees), WebAssured.com (annual membership fees) and Web Trader (annual membership fees).

230 As in the ECODIR project, for example. A section of this book is devoted to that project.

that has never really taken off. Greater intervention from the public sector seems inevitable, if only to create conditions such that market forces will be able to take over later.

(3) System and exchange security

Most ODR service providers post policies to inform users about what happens to information flowing through their systems. In addition to such privacy protection policies, the security and confidentiality of exchanges can be ensured by setting up a technological infrastructure that incorporates, for example :

- Protocols such as SSL²³¹, S-HTTP²³² and SET²³³ that ensure the confidentiality and authenticity of exchanges by encrypting the data;
- Firewalls that make it possible to screen the flow of information between an internal network and a public network and thereby neutralize attempts to penetrate the internal system from the public network;
- Access to an ODR platform that is protected by a password, and managed and protected by the service provider;
- Internal messaging tools so as to avoid the use of unprotected email, and the Secure Multipurpose Internet Mail Exchange Protocol (S/MIME), which makes it possible to authenticate the origin of every email while ensuring the confidentiality and integrity of its content, thereby making it very difficult for the sender to repudiate it or the addressee or a third party to forge it (electronic signature can also serve the same purposes).

Thus it is important to have tools that will provide both transmission of information and the information itself with appropriate protection. It must

231 The Secure Socket Layer (SSL) protocol defined by Netscape uses the RSA public key algorithm. Its purpose is to ensure the authenticity, confidentiality and integrity of data exchanged.

232 Developed by Enterprise Integration Technologies (EIT), the Secure HyperText Transfer Protocol is designed to ensure secure form transmission on the Web and can therefore be used specifically for online financial transactions involving the use of credit cards.

233 Secure Electronic Transaction (SET) is a protocol designed jointly by Mastercard and Visa that, like the SSL and S-HTTP protocols, ensures a high degree of security for online financial transactions requiring the use of a credit card.

not be possible for a third party to intercept a message addressed to another, or for the parties to change the content of what they exchange.

The issue of the security of systems and exchanges is closely related to the cost of ODR service delivery because incorporating security requirements into a general service offering that is user-friendly and adapted to the specific needs of a segment of the market is impossible without software that is designed and produced specifically for ODR. Such software easily costs millions of dollars and is a big part of the problem in finding a viable business model for resolving consumer disputes. The problem is also compounded by the fact that the number of consumer disputes is in inverse proportion to the amount at stake in each case. Thus, ODR service providers seek ever-increasing automation of procedures, which requires a proportionally heavy investment in software.

(4) The strengths and weaknesses of online service delivery

The deployment of ODR services gave rise to much hope for the future of transborder justice. It essentially involves overcoming the problems that are now generally associated with traditional administration of justice. The value added by online service delivery is naturally assessed in terms of cost, time, flexibility and appropriateness for current trade practices. These advantages, along with confidentiality, are often ascribed to ADR outside of cyberspace. Delivering ADR services online therefore increases the well-known advantages of extra-judicial justice, provided of course that the transition to online delivery is smooth and does not involve any losses.

(a) Low cost and high speed

ODR is faster and less costly than either court proceedings or traditional ADR. Since the parties can adapt the process to meet their specific needs, disputes can be resolved as quickly and economically as the circumstances permit. Moreover, when a decision is executory and binding on the parties, as in the case of an arbitral award, the final nature of the award spares the parties the cost, in terms of time, money and energy, of instituting interminable appeals.

The procedure can also be automated in order to streamline processing for the parties and the arbitrator. The parties can be given access to all the documents required to make progress on the case, such as FAQ (frequently asked questions), rules of procedure, forms (complaint, response, counter-

claim, etc.), deadlines, reminders and steps in the procedure. The automation reflects the requirements of simplicity, user-friendliness and flexibility that have to characterize ODR.

We compared the administrative cost of resolving disputes online with those associated with judicial proceedings and traditional ADR. Parties who chose ODR reaped savings of 35–60 %. When speed was compared, ODR performed even better. It took an average of only four months to resolve a dispute online, but 18-36 months to obtain a decision through the courts or using traditional ADR.

(b) Compatibility with electronic commerce today

In order to be effective, ADR mechanisms have to keep pace and evolve in stride with the markets they serve. Every component of electronic commerce occurs online (meetings, information exchanges, negotiation and final signature). In order to provide effective resolution of the disputes that result from this kind of interaction, it is absolutely imperative that the methods used to manage the process are tailored specifically to the electronic environment. Dispute resolution mechanisms can be incorporated directly into the electronic marketplace. They not only make it possible to resolve disputes at the source, when they arise, but also to reassure the parties and create trust conducive to commercial transactions.

(c) Confidentiality of proceedings

ODR involves no public hearings and every step of the process is private. As Schiffer notes :

*Litigation involves business problems, and public awareness of business problems can cause anxiety among suppliers, customers, shareholders and employees as well as encourage competitors. ADR proceedings are private. Only those invited by the parties may attend and there are no documents open to public scrutiny. Unless the parties jointly decide to publicise the existence of their dispute and its resolution, the public and the press will be completely unaware.*²³⁴

This is a huge advantage in commercial dispute resolution and becomes essential in disputes involving technology or intellectual property.

234 R. Schiffer, *supra*, note 45, p. 180.

(d) Flexibility

ADR allows parties to shape every aspect of the process in which they are involved. They can choose the location of meetings (if applicable), the language(s) used, the applicable rules of procedure and substance, and the person who will make the decision. The parties can also submit their dispute to a jurist with long experience and extensive knowledge in the area in question. This guarantees decisions that are fair, equitable and in perfect harmony with the rules and practices of the market. If the technological infrastructure has the capability, it is also possible for the parties and the neutral third party to add forms of communication more tailored to the circumstances, such as teleconferences, videoconferences, in-person meetings and online discussion groups.

Thus, using an electronic platform to process disputes not only saves the parties time and money, but also offers them a solution that is effective and tailored to the situation. If the parties signed a binding arbitration clause prior to the dispute or agreed to arbitration when the dispute arose, the arbitral award will be final and without appeal. Moreover, it will be binding and executory in all of the countries that have signed the 1958 New York Convention on the Recognition of Foreign Arbitral Awards. Currently, nearly 130 countries are party to the Convention. Arbitration is therefore highly effective, given the multi-jurisdictional nature of disputes related to electronic commerce.

Strengths and Weaknesses of Online Dispute Resolution

Strengths	Weaknesses
<ul style="list-style-type: none"> • Reduced costs • User-friendliness • Speed of communication • Effectiveness of communication (no messages left on an answering machine) • Easy and practical organization • Reduced tension created by in-person meetings • Automatic tracking of dates and documents • Equality of the parties before the computer screen • Use of technological advances to improve the process (e.g., affordable web conferencing, automated translation, automated transcription, real-time chat rooms, assisted negotiation, and facilitated access to relevant databases and decision-making tools). 	<ul style="list-style-type: none"> • Problems with software standardization and compatibility • Loss of physical and visual components of in-person communication • Reduced urgency of coming to an out-of-court settlement • Problems with dealing with consumers with low levels of literacy • Difficulty in establishing guarantees of security and confidentiality • Need to authenticate the parties • Risk of many frivolous complaints • Difficulty in maintaining a balance between cost concerns and the integrity of the process

III. Key initiatives in online dispute resolution (ODR)

Now that we have reviewed the core political, economic and legal issues raised by ODR, we will look at past and present initiatives that have given it life and nurtured it.

A. The precursors

(1) Virtual Magistrate

The fruit of collaboration between the Cyberspace Law Institute (CLI)²³⁵ and the National Center for Automated Information Research (NCAIR), the Virtual Magistrate online arbitration service was launched in March 1996. It was a pilot project on the delivery of a speedy and voluntary online arbitration procedure to resolve disputes involving :

- users of online systems;
- those who claim to be harmed by wrongful messages, postings, or files; and
- system operators.²³⁶

More specifically, the project's mandate was to :

1. *Establish the feasibility of using online dispute resolution for disputes that originate online;*
2. *Provide system operators with informed and neutral judgments on appropriate responses to complaints about allegedly wrongful postings;*
3. *Provide users and others with a rapid, low-cost, and readily accessible remedy for complaints about online postings;*

235 It should be noted that the project leaders, Henri Perritt and David Johnson, are both members of the Cyberspace Law Institute.

236 "The Virtual Magistrate Project will offer arbitration for rapid, interim 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). Arbitration services will be available for computer networks anywhere in the world as long as relevant parties agree to participate". The Virtual Magistrate Project, "Concept Paper", July 24, 1996, available at : <http://vmag.org/docs/concept.html> (last visited on February 1, 2005).

* The authors acknowledge the financial support of the SSHRC.

** Faculty of Law and Centre de Recherche en Droit Public (CRDP), University of Montreal.

*** Faculty of Law and Institute of Comparative Law (ICL), McGill University.

4. Lay the groundwork for a self-sustaining, online dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings);
5. Help to define the reasonable duties of a system operator confronted with a complaint;
6. Explore the possibility of using the Virtual Magistrate Project to resolve other disputes related to computer networks;
7. Develop a formal governing structure for an ongoing Virtual Magistrate operation.²³⁷

Virtual Magistrate's primary objective was to study the resolution of disputes between users and network operators or Internet access providers, and among users themselves. It was designed to examine the prevention of situations in which network operators had to render decisions in cases in which they were stakeholders, thereby making them simultaneously judge and party to the dispute. It was also designed to study disputes between users. Virtual Magistrate's scope therefore did not cover all disputes pertaining to electronic commerce.

The arbitration process was conducted essentially using email. Complainants submitted disputes to Virtual Magistrate by answering a series of questions about the date of the dispute, the parties concerned and the category of dispute. Complainants also had to describe the incident and the solution sought. Next, Virtual Magistrate made a commitment to do all it could to render a decision within 72 hours of receiving the complaint. Complainants were charged a fee of \$10 in order to discourage frivolous action.

Of course, as in the case of proceedings occurring in the physical world, the process was voluntary and based on the parties' consent to submit the dispute to arbitration. A network operator could therefore agree to insert a clause in its contract with the user committing it to submitting any future dispute to Virtual Magistrate, or to obtain the user's consent on an ad hoc basis, if a dispute arose. It was also possible for the network operator to declare itself bound by the conditions that would be set in the award by the Virtual Magistrate arbitrator²³⁸. It should be noted, however, that this mechanism could be called "contractual arbitration", in other words, a mechanism that has some binding effects but cannot produce executory

237 *Id.*

238 The Virtual Magistrate Project, <http://vmag.org/> (last visited on February 1, 2005).

effects within the meaning of the legislation and treaties on recognition and execution of arbitral awards²³⁹.

Virtual Magistrate's scope was limited to disputes generated by messages and files with illegal content, such as counterfeit ownership of intellectual property, illegal appropriation of commercial secrets, defamation, fraud, unfair competition, posting of inappropriate (obscene or hate) material and violation of privacy.

Thus, the arbitrator had to decide whether it was reasonable for a network operator to destroy, mask or restrict access to a specific message, file or transmission. In some more extreme cases, Virtual Magistrate had to decide whether the network operator had acted appropriately in refusing specific individuals access to an electronic environment. The issues of billing and financial obligations were not studied in the project. However, it seemed possible to derive the arbitrator's jurisdiction from the parties' consent²⁴⁰.

The arbitrators had to take into account the information available, the code governing the network in question, the contracts binding the parties and the applicable law. Note that they were not required to automatically apply the law of a given jurisdiction. Instead, they had to consider the circumstances of each case, the parties' points of view on the applicable law and appropriate solutions, and what would happen if the dispute were referred to judicial or arbitral tribunals²⁴¹.

Virtual Magistrate's decisions were to be posted on the Internet, specifically through the Villanova Center for Information Law and Policy server. The process itself remained confidential; only the decisions were to be made public.

Virtual Magistrate rendered only one decision. It was not very popular, probably because there were no prior agreements to use the service and its technology was generally fairly primitive since it essentially involved the exchange of non-secure email messages. Virtual Magistrate's scope was also very limited. Disputes submitted to it had to be limited to social relations arising out of use of the Internet, and could not include economic

239 See the in-depth study by Charles Jarrosson, *La notion d'arbitrage*, Paris, LGDJ, 1987.

240 The Virtual Magistrate Project, *supra*, note 238.

241 *Id.*

relationships created through electronic transactions for which arbitration seems to be the most appropriate solution. Indeed, it could be that mediation is a better solution for user disputes over the distribution of offensive or inappropriate messages. The Virtual Magistrate project is nevertheless continuing under the auspices of Chicago–Kent University.

(2) Online Ombuds Office

The Online Ombuds Office project is an initiative of the Center for Information Technology and Dispute Resolution at the University of Massachusetts²⁴². Since 1996, the organization has been offering mediation services for certain disputes arising on the Internet, such as those :

- between members of discussion groups;
- concerning domain names;
- between competitors;
- between Internet access providers and their subscribers;
- concerning intellectual property.

The purpose of the project is to develop mediation services that use the advantages of cyberspace to find better ways to process disputes arising in that environment and spare stakeholders the hassle and cost of judicial proceedings.

More specifically, research has been done on the use of texts and graphics to help the parties in the resolution process that they have chosen. Settlement suggestions are sent to the parties, who use dynamic graphics and other technological tools (that can appear rather playful at first) to assess the nature, source and degree of their disagreement, and pinpoint what they wish to obtain from one another. This is an example of an experiment in using technology to assist decision-making. We will return to this briefly below.

The project is still ongoing and its initiators, Professors Ethan Katsh and Janet Rifkin, are also acting as consultants for the SquareTrade project²⁴³.

242 Center for Information Technology and Dispute Resolution at the University of Massachusetts, <http://www.odr.info> (last visited on February 1, 2005).

243 SquareTrade, *supra*, note 2.

(3) CyberTribunal

CyberTribunal was an experiment launched in September 1996 by the University of Montreal's *Centre de recherche en droit public (CRDP)*²⁴⁴. Its purpose was to explore the feasibility of using alternative mechanisms to resolve disputes arising in electronic environments, and it resulted in a groundbreaking dispute prevention and resolution service employing mediation and arbitration.

CyberTribunal was the product of an institution located in a country with two legal traditions, where jurists are confronted with legal biculturalism to greater or lesser degrees. The dual influence of civil and common law is clearly very important in a field largely inclined to comparison and internationalism. This special aspect of Canadian law is pertinent because, while geographical borders seem to be disappearing, cultural and legal boundaries remain.

CyberTribunal's area of activity was much broader than those of Virtual Magistrate and Online Ombuds Office even though it was limited to disputes arising in electronic environments, particularly the Internet, and did not extend to public order issues. Its services were offered in French and English.

Despite its name, CyberTribunal was not a court. Instead, its purpose was to facilitate dialogue between the parties to a dispute (mediation) and, when necessary, provide administrative and technological assistance in a decision-making process based on the parties' consent (arbitration). Each party to a dispute had to explicitly agree to submit the dispute to CyberTribunal before or after it arose. The CyberTribunal mediators and arbitrators included jurists and non-jurists (mainly lawyers and university professors) specializing in mediation, commercial arbitration and information technology law.

CyberTribunal had electronic equipment that guaranteed the confidentiality of the process for users so that the information concerning each case was accessible only to those concerned. CyberTribunal adopted a conciliatory approach by promoting the use of mediation rather than arbitration. While

244 The project was directed by Professor Karim Benyekhlef with the collaboration of Professor Pierre Trudel; both professors are members of the University of Montreal's *Centre de recherche en droit public*.

the parties were bound by an arbitration clause, this approach allowed them to use mediation first, if they both agreed to it.

CyberTribunal's electronic site had four modules : reception, mediation, arbitration and the Secretariat.

The reception module included a section with general information on CyberTribunal, as well as forms for opening a file. A case was initiated using a request form in which the party recorded key information, such as addresses, the nature and circumstances of the dispute, the purpose of the request and the solution sought. The form was encrypted and sent to the Secretariat, which assigned a mediator who took charge of the case. The mediator then contacted the respondent, explained the nature of the complaint and asked the respondent to participate in the process. Of course, the mediator's task was facilitated when there was a prior agreement between the parties to the effect that any disputes arising between them were to be submitted to mediation or arbitration. Otherwise, the mediator had to persuade the respondent to participate in the exercise.

The mediation module received the parties who had agreed to participate in the process. The mediator communicated with the parties and a secure electronic environment was assigned to them in accordance with the conditions and methods established by the mediator.

The arbitration module operated in an environment incorporating functions similar to those of the mediation module. However, the process was structured by more formal rules that were based freely on the rules of procedure generally used in commercial arbitration, such as the arbitration rules developed by the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC). Since simplicity, user-friendliness, speed and fairness were targeted, it was also possible to accelerate the process with the parties' consent. The rules of procedure were incorporated into the module so that the parties could participate in the arbitration process without having to read all of them. In other words, the process was automated to as to streamline case processing for the parties and the arbitral tribunal. On the site of the case in question (in other words, the central electronic environment for the case where the parties could find all relevant information, such as procedural documents and evidence), the parties could communicate with one another and send documents in a completely secure manner.

The experiment ended in December 1999, when the main architects of the system set up a new project : eResolution, which we mentioned above. CyberTribunal helped to resolve over a hundred disputes. In addition to making unprecedented use of secure environments for electronic exchanges in dispute resolution, the project was the first ODR experiment to combine mediation and arbitration services.

B. Current initiatives

In order to study ADR mechanisms that are currently available on the Internet, we have to establish some informal definitions. This will enable us to concentrate on the few systems of interest with respect to normative models under development.

First, we have to note that almost all of the ODR initiatives that can be found through a quick search of the Internet either have no technology at all for processing disputes online or have no experience in processing real disputes. The initiatives that fall into the first category are often research projects with limited resources or publicity stunts by well-established ADR bodies. Those that fall into the second category are generally young, inexperienced ADR undertakings. It is quite difficult to determine how many such initiatives there are because the numbers fluctuate, sometimes dramatically. Moreover, the superb international “storefronts” that are so easy to establish on the Internet sometimes give false impressions that have nothing to do with reality.

Before we go on to discuss tools that enable or facilitate remote dispute resolution, we should return for a moment to the use of technology to assist decision-making. In recent years, scientific research has made considerable progress in developing expert systems able to apply a given legal rule or a complex network of case law to a multidimensional set of facts. This type of system can of course be valuable for developing mechanisms that use automation to streamline the decision-making process. As we have seen, this in no way replaces the person who renders the decision; it simply provides him or her with help designed to make the decision-making process both more efficient and more consistent. We believe that this type of system needs to be deployed widely, not only in the model context of an arbitral decision ending a dispute following an adversarial process, but also in the context of “bilateral decisions” leading to a transactional agreement after negotiation or mediation. The emergence of dematerialized space has

increased the yet untapped potential of technology use in all of the decision-making processes involved in the administration of public and private law²⁴⁵.

Given the above, we should concentrate on online negotiation, mediation and arbitration mechanisms that use a sound technological infrastructure to automate certain functions, model the relevant process and provide an interface through which all steps of the procedure can be accomplished, documented and archived. Following a brief general overview of the providers of such ODR services, we will focus on a few initiatives, namely the United States company SquareTrade, the ECODIR platform and the domain name dispute resolution tool developed by eResolution.

(1) Assisted negotiation tool providers

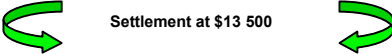
While online negotiation services can vary from one provider to the next, they generally involve and are often limited to a “blind” negotiation process designed to determine the settlement for claims in which the substance is not challenged. In such a process, one party invites the other to negotiate a solution using a provider’s automated negotiation tool. If the other party consents to the process, then both sides agree on a zone of agreement (a set percentage or amount) for a possible settlement. For example, if the difference between two simultaneous offers is less than 20 % or \$3 000, then the settlement will be the mid-point between the two offers. The parties then agree on how they will exchange simultaneous offers, such as the maximum and minimum points of departure and the minimum difference between each offer. Finally, the parties engage in a series of simultaneous offers until the zone of agreement is reached. The software identifies when this has occurred and the parties are then advised of the settlement²⁴⁶. The following table

245 The example of automated blind-bidding systems, which we will discuss in greater detail below, demonstrates that even a rudimentary computer tool can be useful when the stakeholders are no longer required to travel. The usefulness of this type of tool is limited to disputes where what is at stake is liquid, in other words, where only the amount to be paid is at issue. For an inventory of the kinds of services offered, see the recent study by the Centre for International Dispute Resolution: “Research into Online Alternative Dispute Resolution: Exploration Report”, March 21, 2003, available at: [http://www.justice.vic.gov.au/CA256902000FE154/Lookup/OnlineADR/\\$file/Reseach_ADR_Exploration_Report_03.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl79f6/3/hilite](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/OnlineADR/$file/Reseach_ADR_Exploration_Report_03.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl79f6/3/hilite) (last visited on February 1, 2005).

246 Vincent Bonnet, Karime Boudaoud, Michael Gagnebin, Jürgen Harms, Thomas Schultz, “Online Dispute Resolution Systems as Web Services”, CUI - University of

illustrates the blind bidding process in a case where the parties are ready to settle at the mid-point if their respective offers differ by \$3,000 or less :

	Party A	Party B
Offers	\$5,000	\$25,000
	\$8,000	\$19,000
	\$12,000	\$15,000



Settlement at \$13 500

In some cases, the online negotiation process is subject to a specific timeframe or other structuring conditions (for example, in the Cybersettle process, the parties are allowed to submit only three offers each).

The following table shows the largest wholly online assisted negotiation providers as of December 14, 2002²⁴⁷ :

Service Provider	Types of Conflict	Cost
AllSettle ²⁴⁸	Insurance	Free for consumers. If there is a settlement, the insurer must pay a lump sum of US\$200.
CyberSettle ²⁴⁹	Insurance Commercial Labour	Only the insurer has to pay US\$75 initially. US\$100-150 per party if there is a settlement (depending on the amount in question).
Settlement Online ²⁵⁰	Insurance Commercial	US\$150 per party if there is a settlement.
WeCanSettle ²⁵¹	Commercial	£25-£150 per party if a settlement is reached (depending on the amount in question).

Geneva, 2002, available at : http://www.hpovua.org/PUBLICATIONS/PROCEEDINGS/9_HPOVUAWS/Paper_4_2.pdf (last visited on February 1, 2005).

247 In its 2001 report, Consumers International listed a dozen providers offering this type of service in August 2001. Since then, many of the providers have ceased or re-oriented their activities. Others, such as Mediation Arbitration Resolution Services (MARS) and ClickNSettle, simply use their websites as Internet storefronts to advertise the services they offer offline. See Consumers International, *Supra*, Note 132. Also see: J.W. Goodman, “The Pros and Cons of Online Dispute Resolution: An assessment of Cybermediation Websites”, 2003, available at : <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html> (last visited on February 1, 2005).

248 AllSettle, <http://www.allsettle.com/> (last visited on February 1, 2005).

249 CyberSettle, <http://www.cybersettle.com/> (last visited on February 1, 2005). On June 24, 2002, Cybersettle announced a partnership with a company offering the same type of services, Settle Online. Available at : <http://www.resolutesystems.com> (last visited on February 1, 2005).

250 SettlementOnline, <http://www.settlementonline.com> (last visited on February 1, 2005; this web site is no longer in activity).

(2) Online mediation, arbitration and hybrid service providers

Online mediation transposes traditional mediation into an electronic environment. The mediator is assigned to the case by the service provider or the parties, and facilitates the emergence of solutions to the dispute. This can involve the mediator listening to the parties together or separately. Throughout the online procedure, communication and document exchanges take place electronically, such as by email (at Internet Neutrals) or using a secure website (such as the ECODIR platform)²⁵². As in traditional mediation, online mediation is completely voluntary, which means that the parties can withdraw from the process at any time.

Online arbitration is also a transposition of traditional arbitration into cyberspace. As in online mediation, both communication and exchanges of documents and evidence are electronic²⁵³. After having heard the claims of the parties in compliance with the rules of procedure established by the provider, the arbitrator deliberates and then delivers an arbitral award that is binding on the parties and enforceable in all of the countries that have signed the New York Convention.

It is difficult to establish the exact number of providers offering this type of service²⁵⁴. and a number of providers do not currently have a sufficiently sophisticated infrastructure to offer mediation or arbitration processes completely online.

251 WeCanSettle, <https://www.wecansettle.com> (last visited on February 1, 2005 ; this web site is no longer in activity).

252 “Online mediation is the online form of traditional mediation. A third neutral person with no decision power tries to convince the parties to reach an agreement. The only difference with offline mediation is that the neutral person and the parties always communicate via the Internet. Although there are many ODR providers which offer online mediation, only few cases are solved by such a process, probably because such a system is technologically difficult to set up, as the parties usually ask for highly developed communication means”. V. Bonnet, K. Boudaoud, M. Gagnebin, J. Harms, T. Schultz, *supra*, note 246.

253 “Online arbitration is similar to traditional arbitration, in the sense that a third party chosen by the parties, or nominated by the institution chosen by the parties, renders a decision on the case after having heard the relevant arguments and seen the appropriate evidence... In online arbitration, the parties usually communicate by emails, web-based communication tools and videoconferences”. *Id.*

254 According to the same study, there are now approximately 25 online arbitration service providers. *Id.*

The following table shows the largest wholly online mediation and/or arbitration service providers in operation as of February 1, 2005:

Service Provider	Services Offered	Types of Conflicts	Cost (Mediation and Arbitration Only)
Consensus Mediation ²⁵⁵	Mediation	Insurance Commercial Labour (stakes under £15,000)	Calculated on a case-by-case basis
ECODIR ²⁵⁶	Negotiation, Mediation, Recommendation	Commercial	Free of charge
Internet Neutrals ²⁵⁷	Mediation	Commercial	US\$250 per party for the first 4 hours and US\$125 for each additional hour Mediation can also be carried out by email. The cost varies from US\$1–6/minute, depending on the amount at stake
Online Resolution ²⁵⁸	Negotiation Mediation Arbitration	Insurance Commercial Labour	Mediation and arbitration : US\$50–100/hour (depending on the amount at stake) Minimum of 2 hours
SquareTrade ²⁵⁹	Negotiation Mediation	Commercial	US\$20 paid only by the party who initiates the procedure if a mediator is assigned to the case

(3) SquareTrade

Founded in 2000, SquareTrade operates almost exclusively in consumer-to-consumer (C2C) electronic commerce. It is a United States company, and offers two levels of dispute resolution services : direct negotiation and mediation. When SquareTrade was launched in March 2000, it was a pilot project, but its partnership with eBay, one of the largest auction sites in cyberspace, quickly brought it a great deal of business. The agreement with eBay was changed into an exclusive contract in August of the same year, and the number of cases submitted to it has been growing steadily since then. To date, over one million disputes have been resolved using the SquareTrade platform.

255 Consensus Mediation, <http://www.e-mediator.co.uk> (last visited on February 1, 2005).

256 ECODIR, <http://www.ecodir.org/> (last visited on February 1, 2005).

257 Internet Neutrals, <http://www.internetneutral.com> (last visited on February 1, 2005).

258 OnlineResolution, <http://www.onlinerresolution.com> (last visited on February 1, 2005).

259 SquareTrade, *supra*, note 2.

In order to submit a dispute arising out of an eBay transaction, the complainant has to create a user account in the SquareTrade system. Next, the very user-friendly procedure encourages an out-of-court settlement at every step.

First, the buyer or seller submits the complaint to SquareTrade by entering all the relevant information on an electronic form. Next, the other party is informed by email that a complaint has been filed against him or her, and he or she is given the option to respond. Note that the other party has no legal obligation and is not bound to answer the complainant's claims. If the party chooses to respond, however, SquareTrade makes the complaint and response forms available on a secure site that can be accessed by a password and user name. At that stage, the parties can try to resolve the dispute out of court using SquareTrade's direct negotiation procedure and technology. SquareTrade's staff plays no part in any stage of the negotiations.

It should be noted that the negotiation process uses electronic forms designed to help the parties identify problems and solutions that could lead to resolution of the dispute.

If the parties are unable to find common ground, they can ask SquareTrade to assign a mediator, which involves paying a modest fee. The mediator helps the parties by suggesting solutions to the dispute in light of their interests and the specific circumstances of the case. The reasoning behind the suggestions is also conveyed to the parties.

If the parties come to an agreement before or after the mediator takes action, the dispute is resolved and the parties are sent a document notifying them of the solution. The agreement can become binding if both parties so agree. However, it remains confidential and is not posted on SquareTrade's public site.

The SquareTrade system has shown that disputes between consumers can be resolved online. It has also shown the usefulness of a structured negotiation system in which the consumer is, in some way, guided by technology. Better yet, SquareTrade continues to show that the simple intervention of a neutral third party, even if it is only a system that sends emails without human intervention, can help parties to resolve disputes. Indeed, according to the company, most of the disputes resolved using the system are settled before a mediator has to be assigned.

The SquareTrade system's simplicity is elegant. However, it sacrifices much of the potential of online ADR because it limits its services to negotiation and mediation. This leaves out the benefits, as well as the problems, of a system that can end with a binding decision.

C. The ECODIR platform

The Electronic CONsumer DISpute Resolution (ECODIR) project is a product of the European Commission's desire to improve European consumers' access to justice. Its primary objective is to develop a dispute resolution tool that is easy for Internet consumers to access, but it is also designed to explore the future of online resolution of disputes between consumers and sellers on the Internet.

(1) Summary of the ECODIR dispute resolution process

The ECODIR project is a joint venture of the *Centre de Recherches Informatique et Droit* (CRID) at the University of Namur, the *Centre National de la Recherche Scientifique* (CNRS), the University of Montreal's *Centre de Recherche en Droit Public* (CRDP), and the University College Dublin Faculty of Law. The dispute resolution process is free of charge and voluntary; the parties can withdraw at any point.

The ECODIR resolution process is intended to apply to any transaction between consumers and sellers on the Internet so that all types of small disputes can be settled in the same environment where they arose easily, quickly and economically.

The system allows sellers and consumers to resolve disputes in three stages (negotiation, mediation and recommendation) as is illustrated more fully below :



Source : www.ecodir.org

The three-stage process is designed to maximize the chances that the parties will come to an agreement quickly. The parties begin by negotiating, but if

they do not manage to settle, a mediator is appointed by the Secretariat to help them so that they can find a solution. The neutral third party who is appointed has the obligation to assist the parties in an independent and impartial manner. The process is confidential and voluntary.

The parties can choose to withdraw at any time and submit the dispute to the courts. The procedure complies with the principles of transparency and the adversarial system. It also meets the highest standards of security and confidentiality.

One of ECODIR's objectives is to develop a dispute resolution tool that is flexible, speedy and accessible to consumers entering into contracts on the Internet. In order to achieve this, the consortium responsible for the project sought the assistance of eResolution. Under the direction of the CRDP, eResolution designed and built a technological platform tailored to meet the specific needs identified by the ECODIR consortium. The first phase of the platform was launched in October 2001.

(2) The stages of the ECODIR procedure



Before accessing the ECODIR dispute resolution platform, users have to create a confidential personal account in which all relevant information (name, addresses, password) must be entered for subsequent visits to the platform, in compliance with Article 3(a) of the ECODIR Rules.

ECODIR

New Account

Access Control Information:

Username:

Email:

Type a password:

Repeat the password:

Type e-mail address:

Type a secret answer:

Personal Information:

First Name:

Last Name:

Organization:

City Address:

ZIP:

Region, State or Province:

Postal or Zip Code:

Country:

Phone:

Cell:

I have read and I accept the [Terms & Conditions](#)

The user has to enter and confirm the information, and then accept the terms and conditions governing use of the platform. If they are not accepted, access will be denied.

ECODIR

New Account to be Confirmed by Email

Your registration has been accepted. Before you can access the system a confirmation procedure must be completed. Shortly, you will receive an email to which you have to respond to complete your registration. Follow the instructions in the email to confirm your registration and to log into the system for the first time. If you need to access the system you will get to your email address and have your email.

In order to authenticate the user's identity, a message is sent automatically to the email address that the user provided in the registration form. The automatic message also contains instructions for the user on how to activate the account and access the dispute resolution platform. The account can be activated simply by clicking on a hyperlink in the email.

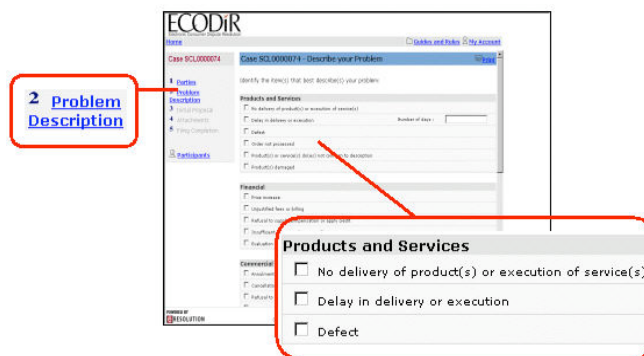


Once the account is activated, the user can access the ECODiR dispute resolution platform, which is based on electronic forms that streamline the process of describing the problem and proposing solutions.

The platform contains the complete procedure, in other words, it automates the ECODiR Rules. However, users can consult the rules at any point in the dispute resolution process by clicking on the appropriate icon.

As mentioned above, the dispute resolution process is divided into three distinct stages : negotiation, mediation and finally recommendation.

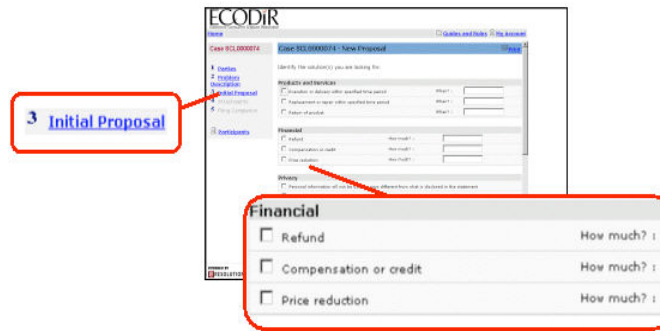
Before beginning the negotiation stage, the first party is asked to provide contact information on both parties (names of key contacts, street addresses, telephone and fax numbers, email addresses, etc.).



Next, in compliance with Article 3(a)(2) of the ECODiR Rules, the first party has to complete the description and proposal forms. This involves first

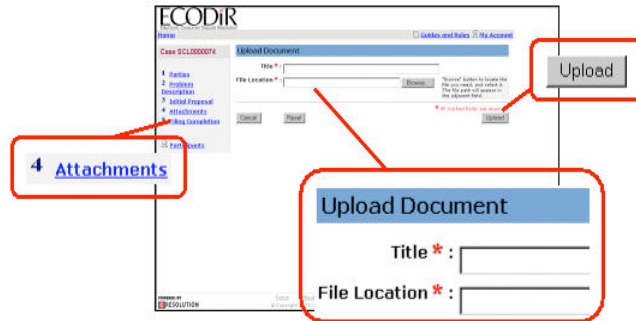
explaining the problem by checking the boxes that most accurately describe the nature of the dispute with the second party. Naturally, the first party can provide additional details in a box provided for that purpose at the end of the form. For example, the details could include the objective of the transaction, reference numbers (invoices, confirmation, etc.), and a description of what has been done to solve the problem. The user can also append any documents supporting the claims using the uploading tool that we will describe in greater detail below.

Note that the user is required to confirm the accuracy of the information entered at each step in the process. This makes it possible to revise the information before submitting it and going on to the next step.



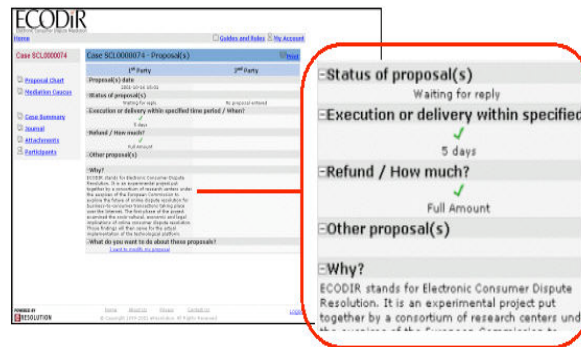
Once the problem has been described, the first party is invited to submit an initial proposal to settle the dispute. This proactive approach greatly increases the chances of a rapid and mutually advantageous settlement. Any proposal accepted by the second party can lead to a settlement that is binding on the parties if they so desire.

The information on this page can be accessed by all of the parties involved in the case, including the mediator if and as soon as one is appointed to the case.



As we mentioned above, the parties can append any relevant document in support of their claims. The tool can upload documents saved in .RTF (*Rich Text Format*), .PDF (*Portable Document Format*), .TXT (*Plain Text*), as well as images in .TIFF (*Tagged Image File Format*), .JPEG (*Joint Photographic Expert Group*) and .GIF (*Graphic Interchange Format*).

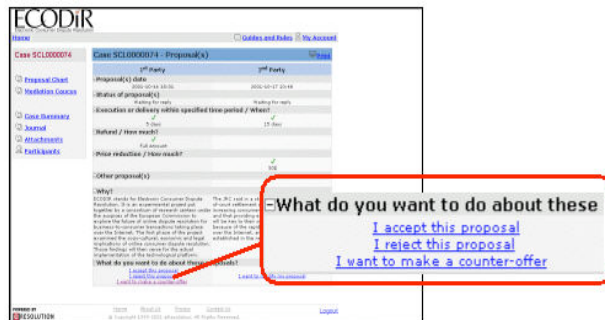
When the upload is complete, the first party can submit the case. It is important to note that at any point before the case is submitted, the first party can change the information entered and the evidence appended.



Next, the first party has to wait for the second party's answer. What appears on screen is the proposal chart, the platform's primary tool for helping parties resolve their disputes.

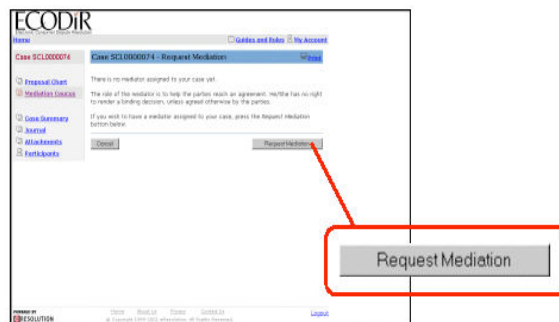
When the first party submits the case to the ECODIR Secretariat, the second party automatically receives an email notification that a complaint has been filed and requesting that the second party create a user account and try to negotiate with the first party. The second party has seven days to answer the

invitation to negotiate with the first party, which requires going through the same process as the first party (creating a user account, activating it, etc.) before being able to access the platform. Note that in accordance with Article 3(a)(4) of the ECODIR Rules, if there is no answer within the time set, the second party is presumed to have refused to negotiate.



If the second party agrees to negotiate, it can give its own version of the facts and accept or reject the first party's proposal, issue a counter-offer based on the first party's proposal or make a new proposal.

When the second party has advanced a proposal and appended the relevant documents (if applicable), the first party is automatically notified by email and asked to look at the second party's proposal.



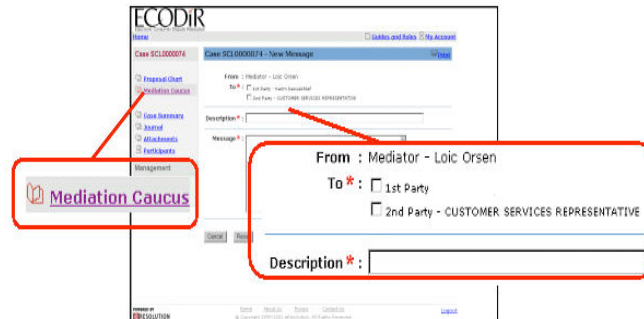
At this stage, the first party has three choices. First, it could accept the second party's proposal, in which case an automatic message will be sent to the latter and the case will be closed, in accordance with Article 3(a)(5) of the ECODIR Rules.

Second, if the first party finds that the second party's proposal is unacceptable, it can continue negotiating and respond to the second party's proposal. Third, if the first party finds the proposal unsatisfactory and considers it futile to continue negotiating with the second party, the first party can request that a mediator be appointed to the case. In every scenario, under Article 3(a)(8) of the ECODIR Rules, the parties have 18 days to try to negotiate a settlement from the time the user account is created by the first party. If there is no settlement or if one of the parties requests mediation, then when the deadline is reached, an automatic message is sent to both parties, inviting them to begin the mediation stage or close the case.

The mediation request is the first point at which the Secretariat takes action. The Secretariat has to contact a mediator, check his or her independence and impartiality with respect to the parties, and finally appoint him or her to the case. In compliance with Article 5 of the ECODIR Rules, the appointment of the mediator must take into account his or her expertise, geographical location and language skills.



Once the mediator is appointed, he or she can access the case at any time to consult the parties' claims, proposals and appended documents.

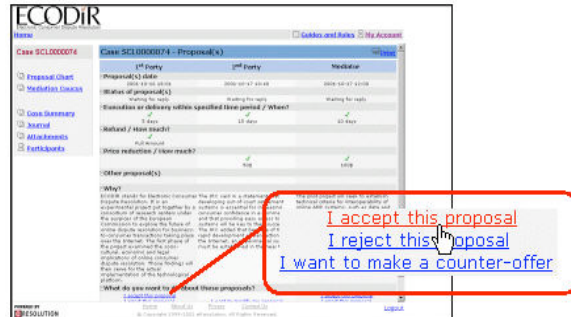


Before making a proposal, the mediator can choose to send a message to the parties and request additional information from them. An internal messaging system allows the parties to exchange confidential information safely because the messages remain in the platform's database and never travel over the Internet outside of secure sessions. The mediator can choose to send a message to either party. Every message sent by one of the parties is also sent to the mediator automatically.

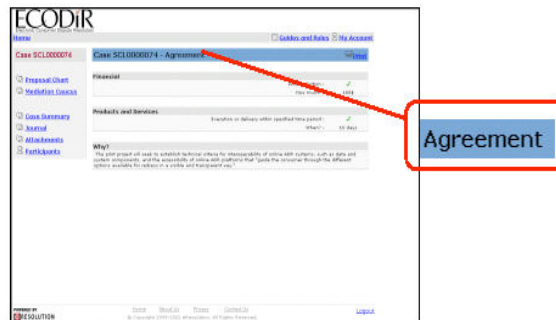
When the mediator considers that he or she has enough information, he or she can propose one or more solutions to the dispute. The mediator is free to base recommendations on the parties' past proposals.

Next, the parties can respond to the proposal by accepting, rejecting or changing it. It is also possible to send messages to the mediator, for example, in order to obtain further information.

Note that if the parties do not come to an agreement within 15 days after mediation begins, the recommendation stage commences. In compliance with Article 3(c)(2) of the ECODiR Rules, the mediator has four days from the beginning of the recommendation stage to send the parties a recommendation with reasons.



The parties then have seven days to accept the mediator’s recommendation or else close the case. If the recommendation is accepted, the dispute is resolved. As in all the other steps in the process, all of the parties to the case (as well as the Secretariat and mediator) are notified by email that the parties have resolved the dispute. Since it is a consensual process, the parties are not bound by the mediator’s recommendation unless, of course, they decide otherwise, which is possible depending on the circumstances.



The Secretariat contacts the parties 30 days after the dispute is resolved to ensure that the agreement has been implemented. If not, the Secretariat asks the parties to explain why.

D. The domain name platform

(1) The dispute resolution process for domain names

The Uniform Domain Name Dispute Resolution Policy (UDRP) procedure allows anyone to claim intellectual property rights against the holder of a domain name registration. The procedure takes place in front of an ad hoc

administrative panel of independent decision-makers appointed specifically to the case by one of the bodies certified by the Internet Corporation for Assigned Names and Numbers (ICANN). It is not the ICANN-certified body but the one- or three-member panel (depending on the case) that rules on the claim.

Given the relative simplicity of the disputes likely to be submitted and the requirements of speed and low cost underlying recourse to *sui generis* justice, the UDRP procedure excludes hearings but provides for an evidence-based process in which the parties are asked to submit their evidence and respective points of view exclusively in writing²⁶⁰. This has the immense advantage of resolving disputes over domain name registration at a fraction of the cost normally associated with judicial proceedings before a state court²⁶¹. It also makes it possible to obtain a decision within 45-60 days of filing a claim, which is unimaginably fast compared to traditional judicial mechanisms.

Another point to be noted is that the procedure eliminates all problems related to implementing and enforcing decisions. The mechanism, which could be considered self-executing, is very simple. A domain name holder is bound by the registration contract with one of the many registrars now certified by ICANN. However, before being certified by ICANN, the registrar had to agree to adopt the URDP and insert the relevant clause in its registration contracts. The registration contracts are membership contracts, which means that the UDRP ends up applying to all unreserved generic top-level domain names (gTLDs)²⁶². In accordance with the Policy, which gives

260 With respect to simplicity, Note that since recourse is limited to the cancellation or transfer of domain name registration, issues pertaining to evidence and assessment of damages are excluded from the beginning.

261 It costs around US\$1250 for a claimant to obtain a decision in a procedure involving a single decision-maker. Advocacy costs, for example, if a lawyer is assigned to the case, are in addition and cannot be reimbursed to the winning party, at least through this procedure.

262 Note that ICANN's monopoly over this type of domain is contested and that generic "top-level" suffix domains have been established in the private sector. See in particular the New Net site at : <http://www.new.net> (last visited on February 1, 2005). ICANN has also created a series of new top-level suffixes: .aero (for the aeronautics industry), .biz (for business activities), .coop (for co-operatives), .info (for various activities related to the media), .museum (for museums), .name (for surnames), and .pro (for professionals). The UDRP procedure's scope is extended in accordance with the contract between the administrator and ICANN. Indeed, most administrators have

recourse to third parties who consider that their intellectual property rights have been violated, the registrar executes decisions by carrying out the cancellation or transfer directly, in compliance with the procedure. The procedure therefore has the advantage of eliminating problems that commonly arise in international trade when judicial decisions must be enforced across borders. Those who engage in international trade usually try to avoid such problems by using arbitration, which is a legal institution that the UDRP procedure writers decided not to employ, though they did find inspiration in some of its features²⁶³.

There are four conditions that have to be met for claimants to be successful. Claimants, who alone have the full burden of proof, must show :

- That they own the rights to the trademark in question;
- That the contested domain name is identical or similar to the trademark;
- That the owner of the domain name has no legitimate interest or right in the contested domain name; and
- That the domain name was registered and is used in bad faith.

With respect to the first condition, in order to use the UDRP procedure, claimants first have to prove that they have a right to the trademark or service mark that is associated with the domain name of which the registration is challenged. Note that if it is a registered trademark, the

established settlement procedures for the new suffix launch phase. The mechanisms, which we will not discuss in detail here, are designed to give copyright holders additional opportunities to exercise their rights when new domain names come on the market. The administrators of domains reserved for certain categories of users have also established special procedures in order to resolve disputes arising out of their restrictions on registration. See: Internet Corporation for Assigned Names and Numbers, "New TLD Program", <http://www.icann.org/tlds/app-index.htm> (last visited on February 1, 2005).

263 Note that the *gTLD-MoU* provided for recourse to arbitration in addition to the "administrative" mechanism: Internet Ad Hoc Committee & Internet Society, *supra*, note 85. Moreover, recourse to arbitration in law for domain name disputes was adopted, with the exclusion of the "administrative" mechanism, by the authority responsible for managing the Hong Kong domain, namely, the Hong Kong Domain Name Registration Company Limited, <http://www.hkdnr.net.hk/> (last visited on February 1, 2005).

certificate can come from any country. If the rights are based on use, the issue is more complex.

Common law trademark cases based on national law covering usage rather than registration have caused much ink to flow because of the resulting decisions under the UDRP procedure. The texts themselves never mention common law trademarks, which has given the false impression that the UDRP procedure applies only in cases where the trademark has been registered. Yet there is nothing in the relevant provisions that excludes common law trademarks²⁶⁴. Thus, it is possible to successfully challenge the registration of a domain name associated with an unregistered trademark if one proves that it is a common law trademark²⁶⁵. It should be noted that while the simple fact of registering a domain name gives the owner no right of property, its use over time can be taken into account as relevant evidence of a common law trademark.

The protection of famous names using the UDRP procedure was based generally on the common law notion of trademark. No matter what the validity of such decisions and given the relevance of the rules of law applicable under the UDRP procedure, it seems that a person who is famous in a civil law country but unknown in a common law country cannot claim trademark rights based on usage because such rights cannot be recognized independently unless we are to believe that the UDRP procedure vests rights that have no other legal foundation.

With respect to geographical names, the decision rendered under the auspices of WIPO in the *Barcelona.com* case has been widely criticized, and with reason²⁶⁶. Indeed, WIPO had to review the issue in its second consultation process precisely because geographical names were excluded

264 *Policy, supra*, note 89, article 4(a)(i): “a trademark or service mark in which the complainant has rights”. Nothing indicates that the right to the trademark or service mark in question has to be based on registration.

265 In Canada, the legislation provides that it is use, not registration, that gives one the right to a trademark.

266 See *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, Case No.D2000-0505 (August 4, 2000), available at: <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0505.html> (last visited on February 1, 2005) and *Kur- und Verkehrsverein St. Moritz v. StMoritz.com*, Case No. D2000-0617 (17 August 2000), available at: <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0617.html> (last visited on February 1, 2005).

from the first consultation, which resulted in the UDRP procedure. The same applies to the use and protection of personal names as such.

The second condition refers to the degree of similarity between the trademark and the domain name. Such confusion is generally considered to exist when the domain name leads users to believe that they will be directed to a web page controlled or sponsored by the owner of the trademark.

Two epiphenomena have to be mentioned in relation to the second condition : domain names that are used as addresses for sites that criticize the trademark holder (e.g., ThisCompanyIsStupid.com) and domain names with deliberate typos designed to direct users to sites they did not want to visit. While the second category of epiphenomenon is generally associated with bad faith, the first often corresponds to freedom of speech, which is recognized as a right or legitimate interest.

Although the contested domain name may be identical or similar to the claimant's trademark, its owner can have a right to use or legitimate interest in using it. The Policy takes care to list examples of circumstances that respondents can claim show their legitimate interest :

- You have used the domain name or a similar name to offer goods or services in good faith, or undertaken major preparations to this effect, before being informed of the dispute;
- You are known by the domain name in question even though you have not acquired the rights to a corresponding trademark; or
- You are making legitimate non-commercial use of the domain name, without intent for commercial gain or to misdirect consumers or tarnish the trademark²⁶⁷.

The way the last example of a “defence” is formulated in the original text is far from clear²⁶⁸, and this has had results that could at best be described as annoying. A fairly reasonable interpretation of the passage suggests that the non-commercial use defence is not valid if the use tarnishes the trademark in question. At first glance, this restricts the scope of freedom of expression as defined and protected in some national legislation. This problem was raised

267 *Policy, supra*, note 89, article 4(c) (paraphrase).

268 “You are making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.” *Id.*, Article 4(c)(iii).

when the Policy was in the final stage of preparation, but ICANN staff simply defined the notion of “tarnishment” as limited to situations in which there is “intent for commercial gain”²⁶⁹. This means that it is perfectly permissible to tarnish a trademark in good faith and legitimately so long as one makes no profit from doing so. Instead of clarifying the provision, the staff suggested taking action to make its interpretation public²⁷⁰. This did not happen, so now a surprisingly large number of critical but apparently non-profit sites have had their Internet addresses transferred at the end of UDRP procedures²⁷¹.

Since the claimant has by hypothesis demonstrated the respondent’s lack of right or legitimate interest, the arbitrator’s analysis normally focuses on the last criterion, that of bad faith.

The Policy also gives examples of circumstances indicating bad faith with respect to domain name registration and use :

- The facts show that the respondent registered or acquired the domain name essentially for the purpose of selling or renting it, or otherwise transferring the registration to the complainant who holds the trademark or to one of the complainant’s competitors in return for valuable consideration exceeding the costs directly related to the domain name;

269 “In view of the comments, one detail of the policy's language should be emphasized. Several commentators indicated that the concept of ‘tarnishment’ in paragraph 4(c)(iii) might be misunderstood by those not familiar with United States law or might otherwise be applied inappropriately to non-commercial uses of parody names and the like. Staff is not convinced this is the case, but in any event wishes to point out that ‘tarnishment’ in paragraph 4(c)(iii) is limited to acts done with intent to commercially gain.” Internet Corporation for Assigned Names and Numbers, “Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy”, 25 October 1999, available at : <http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm> (last visited on February 1, 2005).

270 “Staff intends to take steps to publicize this point.” *Id.*

271 See for example: *Diageo plc v. John Zuccarini*, WIPO case No. D2000-0996 (guinnesssucks et al.); *Standard Chartered PLC v. Purge I.T.*, WIPO case No. D2000-0681 (standardchartered sucks.com) ; *Wal-Mart Stores, Inc. v. Walsucks & Walmarket Puerto Rico*, WIPO case No. D2000-0477 (wal-martsuck et al.). The texts of the discussions are available at : <http://arbiter.wipo.int/domains/decisions/> (last visited on February 1, 2005).

- The respondent registered the domain name in order to prevent the trademark holder in question from using it as a domain name, and makes a practice of such behaviour;
- The respondent registered the domain name essentially in order to disrupt the business of a competitor; or
- The respondent tried to attract, for commercial gain, Internet users to a site it controls by creating a probability of confusion with the claimant's trademark with respect to the source, sponsor, affiliation or approval of the site or a product or service offered there.²⁷²

Note that in general the registration of a number of domain names by the respondent in a UDRP procedure is not considered sufficient to show bad faith. Note also how heavy the burden of proof is and how difficult it is to take evidence under the current procedure. As we have pointed out, in principle, the claimant in a UDRP procedure carries the complete burden of proof. Yet how can the respondent's bad faith be proven if the latter provides no documentation? It is so difficult for the claimant to prove bad faith that arbitrators are encouraged to proceed by inference on the basis of circumstantial proof, which is sometimes very limited or even non-existent. In order to ensure the consistency of decisions and thus also justice, the UDRP procedure needs to be more specific about the criteria and manner by which the claimant can discharge the burden of proof²⁷³.

Before looking in greater detail at the UDRP procedure, we will end this section by discussing the apparent partiality of some providers and the phenomenon that it creates, namely forum shopping, which are two of the largest sources of criticism of the UDRP procedure²⁷⁴. A number of studies,

272 Uniform Domain Name Dispute Resolution Policy, *supra*, note 89, article 4(b) (paraphrase).

273 Perhaps this burden should be reversed under conditions to be determined.

274 As Annette Kur notes, there are others: "Although the introduction of the UDRP has been a success story at least in regard of the number of conflicts which have been submitted for decision by UDRP Panels, the Policy was and remains the subject of concern and controversy. It was feared that the system might be misused by rightholders, in particular big companies, in order to obstruct the selection and use of domain names by small business and private parties, that the Policy was not formulated clearly enough, and that it did not furnish a sufficient 'legal' basis for the settlement of conflicts. On the other hand, it was argued that the policy had too many loopholes to function properly from the point of view of rightholders. It was *inter alia* for the last-mentioned reason that WIPO initiated its second domain name process, in

the first of which was published in November 2000²⁷⁵, have gradually shown that the claimant success rate is considerably higher with some service providers than with others. For example, WIPO and NAF had higher rates of complainant success than eResolution. The difference can be explained by an “open” interpretation of the texts, which was favourable to complainants at WIPO and NAF but closer to the letter and the spirit at eResolution²⁷⁶. Fear of forum shopping and the appearance of partiality were confirmed in August 2001 in an in-depth and widely distributed study by Michael Geist, who showed that a claimant had a 82.2 % chance of winning with WIPO, 82.9 % with NAF but only 63.4 % with eResolution. This was reflected in the respective market shares of the providers : WIPO had 58 %, NAF 34 % and eResolution 7 %²⁷⁷.

The numbers are disturbing in themselves, but the study goes on to show that the WIPO and NAF panellists with the highest proportion of decisions in favour of claimants were on average appointed more often²⁷⁸. For example, according to the study, the six panellists most often appointed by NAF rendered decisions in 53 % of the provider’s cases, with an average of

the course of which the possibility was investigated to amend the policy, e.g. by including more rights than just (registered) trade marks, etc.” A. Kur, *supra*, note 97.

275 Milton Müller, “Rough Justice: An Analysis of ICANN’s Uniform Dispute Resolution Policy”, Syracuse University School of Information Studies, November 2000, available at : <http://dcc.syr.edu/miscarticles/roughjustice.pdf> (last visited on February 1, 2005). The study was the first to show that claimants win much more often with certain suppliers than with others. It concluded that the former suppliers could therefore receive a growing number of cases, giving rise to doubts about the impartiality of the system.

276 *Id.* The number cases processed by the CPR was considered too small to be given a statistical analysis. See: <http://www.cpradr.org/> (last visited on February 1, 2005).

277 “Simply put, complainants win more frequently with WIPO and the NAF than with eResolution. The statistical data, which has remained consistent since the introduction of the UDRP, shows that complainants win 82.2 % of the time with the WIPO, 82.9 % of the time with the NAF, but only 63.4 % of the time with eResolution. Since outcome is what matters most to complainants, they have rewarded WIPO and the NAF with an overwhelming share of the UDRP caseload. Despite the highest fees, neutral rules, and low-key marketing, WIPO commands 58 % of the UDRP caseload, compared with 34 % for the NAF and a paltry 7 % for eResolution”. Michael Geist, “Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP”, August 2001, p. 6, source : <http://aix1.uottawa.ca/~geist/geistudrp.pdf> (last visited on February 1, 2005).

278 *Id.*, p. 8.

94 % of decisions in the claimant's favour²⁷⁹! These data have been confirmed with the passage of time, as can be seen in a new statistical analysis published in February 2002²⁸⁰.

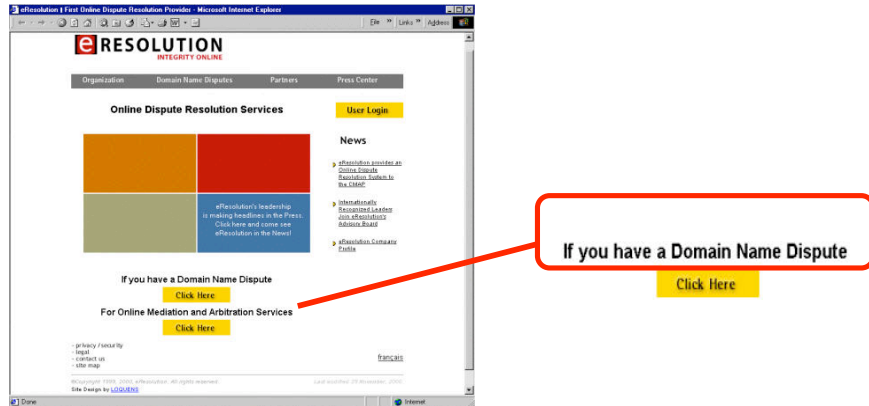
There is no point in dwelling on the problem of prejudice in application of the Policy because in matters of justice the mere appearance of partiality is sufficient to render the process invalid. The numbers speak for themselves; clearly, the system has to be reformed. The arguments in favour of having providers compete with one another have to do with better quality service, market-controlled prices and free choice for all users. The only way to meet these objectives while avoiding the current problem is to involve the claimants and respondents in selecting the provider. This would require a larger number of providers and recourse to a third party (or the random choice of an algorithm) in case of disagreement. Competition would then have the specific and commendable effect of encouraging providers to lean to neither one side nor the other.

(2) The procedure using eResolution's online platform

We will now describe the domain name dispute resolution process offered by eResolution from January 1, 2000 to November 30, 2001.

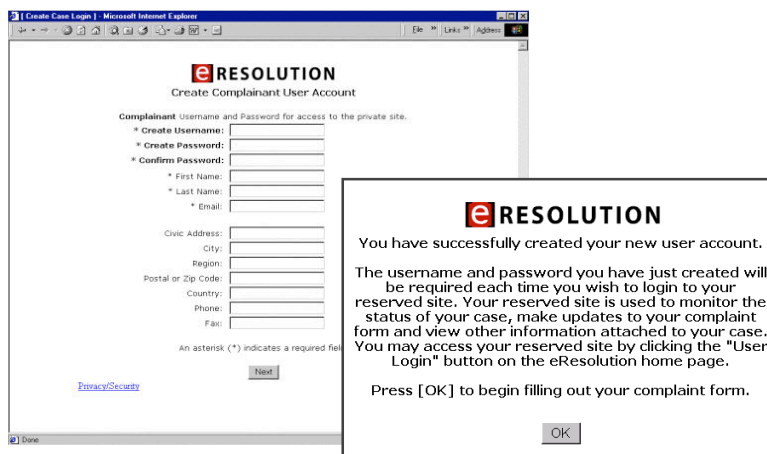
279 *Id.*

280 Michael GEIST, "Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP", source: <http://aix1.uottawa.ca/~geist/fairupdate.pdf> (last visited on February 1, 2005). Some believe that excessive use of statistics misinforms Geist's analysis of the UDRP. See International Trademark Association, "The UDRP by All Accounts Works Effectively — Rebuttal to Analysis and Conclusions of Professor Michael Geist in 'Fair.com?' and 'Fundamentally Fair.com?'" , May 6, 2002, available at : http://www.inta.org/downloads/tap_udrp_2paper2002.pdf (last visited on February 1, 2005). However, Geist's response convincingly refutes the arguments designed to defend the system. See Michael Geist, "A Response to INTA's Rebuttal of Fair.com", source: <http://aix1.uottawa.ca/~geist/geistintaresp.pdf> (last visited on February 1, 2005).



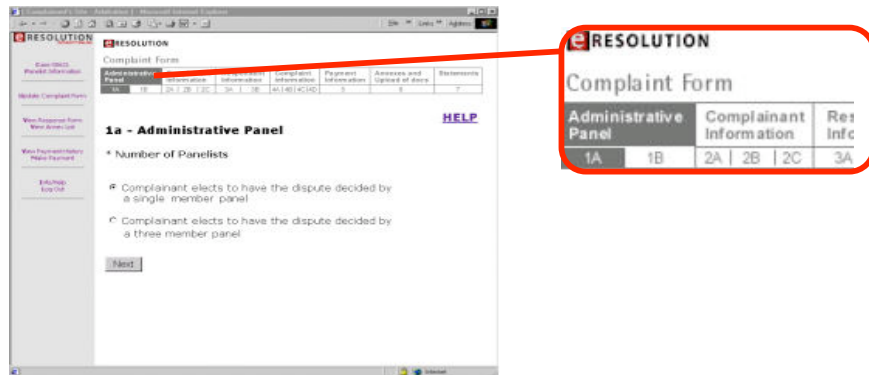
eResolution was one of the organizations accredited by ICANN in January 2000 to offer resolution services for domain name disputes. Even though the company ceased operations in November 2001, it remains today the only one to have offered the whole procedure completely online.

Parties to a dispute could use eResolution's website to find all the information required to follow the resolution process for domain name disputes: the procedure and applicable rules, claim and response forms, deadlines, steps, relevant documents, etc. Only the eResolution Clerk, parties in question and panel members assigned to the case had access at all times to the relevant documents, evidence and information. The information was exchanged electronically in a secure environment. The system met the criteria of simplicity, user-friendliness and flexibility that must be fulfilled by ODR mechanisms.



Before accessing the dispute resolution platform, the parties had to create a user account. The mandatory fields included a user name and password, both of which were needed for any subsequent visits to the platform.

Once that was done, the parties received a message confirming the creation of their respective user accounts and asking them to complete the complaint or response form, as applicable.



The whole procedure was based on an electronic site reserved for the case and pre-established forms. The complainant could go from one part of the form to the next using a navigation bar at the top of the form pages. An automatic save tool made it possible to complete the form over several visits.

All of the elements that had to appear in the complaint in compliance with Article 3 of ICANN's Rules for URDP were incorporated into the form developed by eResolution. Thus, on page 1A of the complaint form, complainants first had to say whether they wished the dispute to be resolved by a single expert or a three-member panel. When a three-member panel was chosen, complainants were required to provide the names and contact information of three candidates to serve on the panel. The candidates in question could be chosen from eResolution's list of experts or from the list of experts of any other organization accredited by ICANN.

The screenshot shows a web browser window with the URL 'Complainant's Site: Arbitration | Microsoft Internet Explorer'. The page title is 'RESOLUTION'. On the left is a navigation menu with links: 'Case 0802: Provide Information', 'Update Complainant Form', 'View Response Form: View Cases List', 'View Payment History: Make Payment', 'Info/Help', and 'Log Out'. The main content area is titled 'Complaint Form' and contains a table with columns: Administrative Panel, Complainant Information, Respondent Information, Complaint Information, Payment Information, Annexes and Upload of docs, and Statements. Below the table is the section '2b - Complainant's Prime Contact or Representative' with a 'HELP' link. The form fields are: Last Name, First Name, Organization, Postal Address (Civic, City, Region (Province, State, Territory, ...), Postal or Zip Code, Country), Email Address, Phone, and Fax. A 'Next' button is at the bottom.

Next, complainants had to provide their names, postal and electronic addresses, and telephone and fax numbers. They also had to enter the name and contact information of any representatives authorized to act on their behalf in the course of the administrative procedure. The Clerk contacted the authorized representative throughout the procedure using a secure site and other forms of communication (email, fax, messenger, etc.), depending on the circumstances.

In the third part of the form, complainants had to provide the name of the domain name holder (the respondent) and other relevant information, such as the respondent's postal and electronic addresses and telephone and fax numbers. eResolution's Clerk used the information to send the complaint form to the respondent.

The screenshot shows the '4c - Grounds on which the complaint is made' section of the complaint form. It includes a 'HELP' link and a 'Consult policy' instruction. There are three main sections for providing grounds: 'Copy or Similarity', 'Illegitimacy', and 'Bad Faith'. Each section has a text area for the complainant to describe the grounds. Red callout boxes provide detailed instructions for each section:

- * Copy or Similarity**: Describe the manner in which the domain name(s) is/are identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
- * Illegitimacy**: Describe why the Respondent(Registrant/Doman-name holder) should be considered as having no rights or legitimate interests in respect to the contested domain name(s);
- * Bad Faith**: Describe why the contested domain name(s) should be considered as having been registered and being used in bad faith;

After they had stated the domain name the registration of which was challenged and where the domain name was registered, claimants were asked to state the grounds on which the complaint was based. Under Article 3(b)(ix) of the Rules for UDRP and in compliance with Article 4(a) of the Policy, complainants first had to establish that they owned the rights to the trademark. They then had to describe how the domain name in question was identical or very similar to the trademark and that this resulted in confusion with the trademark.

In compliance with Article 4(c) of the Policy, complainants then had to explain why the respondent should be considered to have no legitimate right or interest in the domain name.

Finally, complainants had to say why they thought the domain name should be considered to have been registered and used in bad faith. The conditions to be met to prove such a complaint are set out in Article 4(b) of the Policy.

RESOLUTION						
Complaint Form						
Administrative Panel	Complainant Information	Respondent Information	Complaint Information	Payment Information	Annexes and Upload of docs	Statements
1A 1B	2A 2B 2C	3A 3B	4A 4B 4C 4D	5	6	7

[HELP](#)

4d - Related Matters

*** Remedy Sought**
Specify, in accordance with the Policy, the remedy sought:

Cancellation
 Transfer to complainant

Other Proceedings
Identify any other legal proceedings that have been commenced or terminated in connection with or relating to the contested domain name(s):

The requested information can either be: 1) described in the box below; 2) described in a separate detailed statement to be attached to the complaint as an annex. In all cases you must number the paragraphs.

Next, complainants had to choose among the solutions available: cancellation or transfer of registration of the domain name. The complainant also had to note whether any other judicial proceedings concerning the domain name were ongoing or completed.

eRESOLUTION

Complaint Form

Administrative Panel	Complainant Information	Respondent Information	Complaint Information	Payment Information	Annexes and Upload of docs	Statements
1A 1B	2A 2B 2C	3A 3B	4A 4B 4C 4D	5	6	7

5 - Payment Information [HELP](#)

1. You have chosen the Complaint to be conducted in front of a panel of X panelists. **\$XXXXUS**

2. Your preferred means of communication is: Email + eResolution secure site **\$ XXX US**

TOTAL: \$XXXXUS

Payment for proceedings can be made in the following fashion:

1- Secure online payment (VISA only)

You can make the VISA payment by going to the payment page after submitting the Form.

2- Bank transfer

Account name: eResolution

Complainant Account Payment

* Amount:

* Cardholder Name:

* VISA Card Number: (VISA only)

* Expiry Date: (mm/yy)



Cardholder Address:

City:

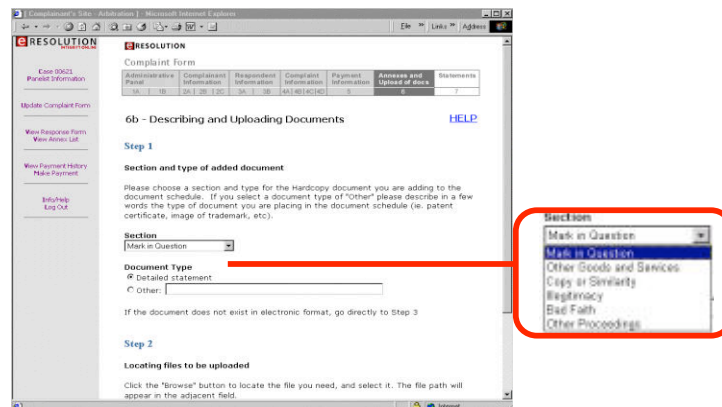
State/Province:

Postal Code:

Country:

A secure online payment tool enabled complainants to pay the fees for the administrative proceedings directly online. The fee varied depending on the number of domain names in question, the size of the panel of experts (one or three members) and the forms of communication chosen (email, secure eResolution site, fax, messenger, etc.).



eRESOLUTION

Complaint form

Administrative Panel	Complainant Information	Respondent Information	Complaint Information	Payment Information	Annexes and Upload of docs	Statements
1A 1B	2A 2B 2C	3A 3B	4A 4B 4C 4D	5	6	7

6b - Describing and Uploading Documents [HELP](#)

Step 1

Section and type of added document

Please choose a section and type for the Hardcopy document you are adding to the document schedule. If you select a document type of "Other" please describe in a few words the type of document you are placing in the document schedule (e.g. patent certificate, image of trademark, etc).

Section

Document Type
 Detailed statement
 Other:

If the document does not exist in electronic format, go directly to Step 3

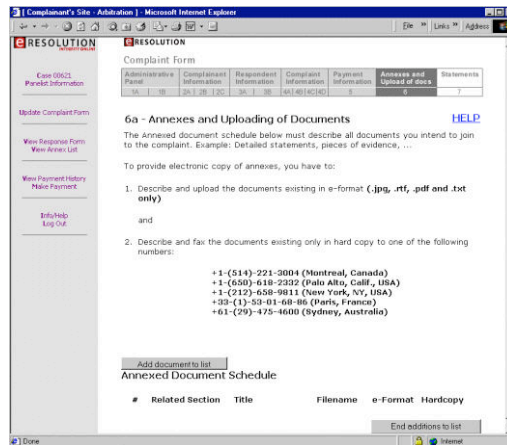
Step 2

Locating files to be uploaded

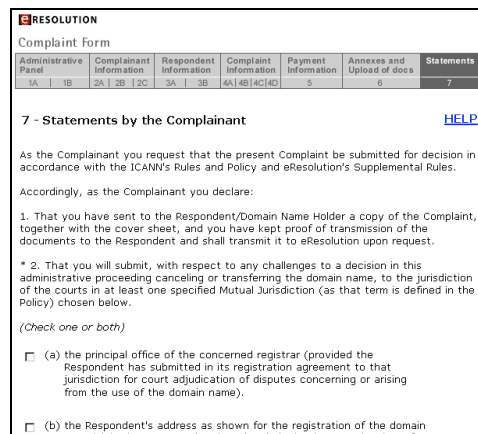
Click the "Browse" button to locate the file you need, and select it. The file path will appear in the adjacent field.

When complainants had finished stating the basis for their complaints, they could append all relevant documents in support of the claims, as required under Article 4(a) of the Policy (identity or similarity of the contested domain name and a trademark held by the complainant, the respondent's lack of legitimate right or interest, and the respondent's registration and use in bad faith). The platform could upload documents saved in .RTF (Rich Text Format), .PDF (Portable Document Format), .TXT (Plain Text), and

images in .TIFF (Tagged Image File Format), .JPEG (Joint Photographic Expert Group) and .GIF (Graphic Interchange Format).



If a required document existed only on paper, eResolution provided the parties with fax numbers where they could send a copy. The Secretariat received the documents in digital form, added them to the list of documents uploaded by the complainant, and made them available on the case's secure site.



Finally, complainants had to choose one of the two specially designated fora (the head office of the domain name registration office or the respondent's address as it appeared in the domain name registration contract and indexed

in the *Whois* database), or both fora, if what was being challenged was an administrative decision to cancel or transfer registration of the domain name.

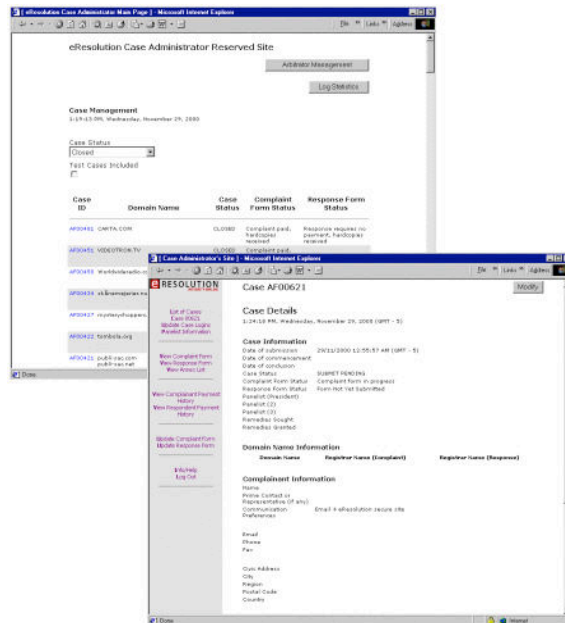
RESOLUTION						
Complaint form						
Administrative Panel	Complainant Information	Respondent Information	Complaint Information	Payment Information	Annexes and Upload of docs	Statements
1A 1B	2A 2B 2C	3A 3B	4A 4B 4C 4D	5	6	7

Missing Information

Please fill out the indicated sections:

Section	Description
2b	Last Name was not entered. First Name was not entered. Organization was not entered. Email Address was not entered. Phone was not entered.
4c	Bad Faith was not entered.
4d	Remedies Sought was not selected.

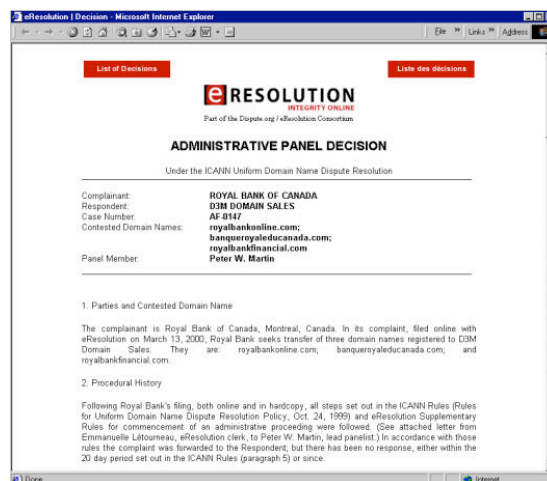
Once the form was completed, complainants could submit their complaints to the eResolution Secretariat. If certain sections of the form had been left blank, a window appeared specifying which fields had to be completed.



When the complaint was received (electronically and on paper, in compliance with Article 3(b) of the Rules for UDRP), eResolution's clerks studied the form to ensure that it was in administrative compliance with the Policy and Rules for UDRP. If it was, then eResolution notified the respondent that a complaint had been filed and that a response was required within 20 days. The respondent had to complete the same steps described above to send the response to the eResolution Clerk.

Once the complaint and response forms had been received, the Clerk had five days to appoint an administrative panel. In order to ensure independence and in compliance with Article 7 of the Rules for UDRP, the expert(s) selected to resolve the dispute had to sign a declaration of independence and impartiality.

At that point, the Secretariat sent a user name and password to the panel so that it could access the whole case. Except under exceptional circumstances, the panel had to render a decision within 14 days of its appointment. The decision had to be in writing, and include reasons, the date it was rendered and the names of the panel member or members.



Within three days of receiving the decision, eResolution loaded it onto its website and sent the address to both parties, the domain name registration office in question and ICANN. It was possible to block implementation of the decision by instituting legal proceedings before a competent court within

10 days of notice of the decision²⁸¹. If the administrative decision was not challenged, it was implemented 10 days after notice had been sent to the parties, registration office and ICANN.

All of the proceedings were configured around the case's private site. Throughout the procedure, eResolution played the role of clerk and secretary of the "court", receiving complaints, collecting evidence and sending the files to the panel. At the end of the proceedings, in other words, 45–60 days after the complaint was filed, eResolution sent the decision to the parties concerned.

E. Technological considerations

ODR software must be designed to make the dispute resolution process faster and more effective than traditional justice. It can take advantage of the potential of the most recent technological advances in order to facilitate case processing for all concerned. Software solutions can be used to transpose the whole proceedings (from the filing of the complaint to the rendering of the final decision) online, or as a means of assisting traditional dispute resolution.

It should be noted that such software solutions can take many different forms depending on the procedural requirements (negotiation, mediation, arbitration) and the context in which they are used (B2B or B2C electronic commerce, domain names, etc.). Thus, it is important to take these variables into account when designing ODR systems.

Such technological platforms can meet very strict procedural requirements yet also be used for more flexible procedures, such as negotiation and mediation. Some system components are unavoidable, but others are not essential though they add value to ODR.

ODR platforms are based on document management systems. A document management system is a set of computer means (equipment, software, methods, processes, etc.) used to manage the complete life cycle of an electronic document (text, image, sound, etc.), from its creation to its destruction and including changes to it, publication, distribution, filing and tracking, so as to optimize access to the document, information it contains

281 Over 60 decisions were challenged. For a list of UDRP decisions challenged in court, see: <http://www.udrplaw.net/UDRPappeals.htm> (last visited on February 1, 2005).

and information it concerns²⁸². The architecture of an ODR platform has three components :

- The user component : the relationship between platform users has to be provided for and defined (for example, is it a simple complainant—respondent relationship or a complex relationship involving a complainant and a respondent with a representative?).
- The documentary component : some systems can allow users to upload documents in specific formats (.rtf and .pdf, for example) and store them temporarily in a personal location before entering them in the file.
- The procedural component : rules of procedure can be incorporated into the platform. It is possible for the parties to engage in two or more procedures at the same time (for example, arbitration and negotiation), and this component can also include a history of the events in the form of a table recording all of the events and actions in the case, their nature, when they occurred, etc.

The components can vary, depending on the context in which the ODR system is deployed.

In addition to its technological architecture, the dispute resolution platform has to contain a library of forms and authentication mechanisms for establishing information, such as the time of a transmission and the identity of the sender. The same authentication tools should be used for documents that the parties upload directly onto the platform to support their claims (invoices, letters, etc.).

Like the exchange of correspondence, the filing of evidence must be done in a secure environment accessed using an encrypted connection. In other words, this type of technological platform has to be designed to ensure maximum adaptability and the highest degree of security. We would simply like to note that it is important to use a combination of mechanisms internal to the platform and electronic commerce technology (SSL protocol, firewall, etc.) to maximize the security of exchanges.

282 Paraphrase of the definition at : www.olf.gouv.qc.ca (last visited on February 1, 2005).

There are two types of technology that can promote and facilitate communication between the parties throughout the dispute resolution process.

Asynchronous communication tools include message systems that are internal to the ODR system. Using such a message system ensures that the content does not travel and that the parties always have to use the platform to access it. The parties are notified by email to consult the platform when a specific event occurs, such as the appointment of a panel member to the case, and they can also be reminded of deadlines.

Videoconferencing, teleconferencing and discussion environments are synchronous tools that can increase the effectiveness and user-friendliness of the dispute resolution process, but they are not necessary. They make it possible to bring some human aspects back to the process while reinforcing the feeling that physical travel is not required²⁸³. However, at present, one of the major obstacles to implementation of videoconferencing and teleconferencing tools is that they require that the user have fairly specialized equipment and knowledge. Imposing such a burden on the user reduces the effectiveness of the dispute resolution mechanism and makes it less user-friendly.

Finally, note that in addition to the reliability requirements, special attention has to be paid to the ergonomics and user-friendliness of the system as described above. It is important to tailor the interfaces to the user (for example, depending on whether the user is inexperienced or expert).

The following list is far from exhaustive, but paints a general picture of the components required for an ODR system to operate smoothly :

- Access to multiple files in the system;
- User-friendly structured navigation;
- Personal space reserved for each user so that documents can be viewed and organized before they are filed;
- Easy access to the library of procedures;
- Multi-format upload filing of digitized documents;

283 “Once parties can see each other and the neutral, some observers have reasoned, little incentive remains to ever bother getting together face to face”. C. Rule, *Supra*, Note 28, p.53.

- Chronological table of events;
- Protected and hierarchized message system;
- Online user guides, checklists, advice and assistance concerning both the procedure and use of the platform itself;
- Process management that is integrated yet can be broken into modules;
- Incorporation of access control lists and the lightweight directory access protocol (LDAP);
- Incorporation of daybook functions (calendar, reminders, to do lists, etc.).

The following functionalities can improve the ODR procedure :

- Integration of fax capabilities (automated inbound and outbound eFax);
- Audio and video teleconferencing;
- Transcription services (24 hour voice-to-text transcription);
- Online payment.

These components are already easily available at the current stage of technological development. We have to wonder why full use is not yet being made of them.

However, when we look at the markets, with respect to both trust on the Internet and the wild race to constantly upgrade computer equipment and software, we inevitably face the problem of standardization, which is important but perhaps yields way in justice to the issue of future-proofness of equipment and methods. Justice has a major edifice to construct in the information age; why would we lay the foundations using anything but the best tools available?