UNIVERSITÉ DE GENÈVE

Online Dispute Resolution: The State of the Art and the Issues

December 2001

Faculty of Law

Centre Universitaire Informatique

Online Dispute Resolution: The State of the Art and the Issues

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2001
University of Geneva

Title:	**ONLINE DISPUTE RESOLUTION: THE STATE OF THE ART AND THE ISSUES**
Project:	E-Com Research Project of the University of Geneva, conducted by Prof. GABRIELLE KAUFMANN-KOHLER, Law School, and Prof. JÜRGEN HARMS, Informatics Center, both of the University of Geneva. This interdisciplinary research project is funded by the SWISS NATIONAL RESEARCH FUND.
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Supervision:	Prof. GABRIELLE KAUFMANN-KOHLER
Issue Date:	December 2001.
Status:	Final. This report is based on a site survey completed in October 2001; it does not take into account any changes made to the surveyed sites thereafter.
No. Pages:	102
Location:	http://www.online-adr.org
Distribution:	Unrestricted.
Keywords:	Online dispute resolution, ODR, alternative dispute resolution, arbitration, negotiation, mediation, electronic commerce, e-commerce, contracts, cyberspace, Internet, World Wide Web, interdisciplinary, law and computer science.
Citation Mode:	This publication may be cited as: T. SCHULTZ, G. KAUFMANN-KOHLER, D. LANGER, V. BONNET, *Online Dispute Resolution: The State of the Art and the Issues*, E-Com Research Project of the University of Geneva, Geneva, 2001, http://www.online-adr.org.

FOREWORD

This report is the *first milestone* of a research project conducted by the Private International Law Department of the Geneva University Law School and the *Centre universitaire informatique* of the *Faculté des sciences* of the same university. The project is financed by a grant of the Swiss National Research Fund.

The *project aims* at evaluating both legally and technologically the first experiments in online dispute resolution and to formulate, on this basis, recommendations for the improvement of dispute settlement mechanisms using information technology. It involves, first, a review of the existing practice, second an identification of the problem areas, and third, the formulation of possible solutions to the problems so identified.

This report is primarily the reflection of the first step. It was first issued in draft form with a list of tentative issues to provide a basis for the debates at an expert colloquium held on 16 November 2001 in Geneva. The purpose of the colloquium was to assist in the final identification of the issues on which further investigation was needed. The discussion indeed confirmed and expanded such issues. The result is restated in the conclusions of this version of the report. The continuation of the research will now involve elaborating answers which are both legally and technologically viable. Such continuation work will generate a final report with practice guidelines accompanied by a scientific commentary.

The *scope of the research* and its practicalities may deserve some comments.

- The research does not address dispute resolution in isolation, but attempts to also cover contract conclusion, performance, and enforcement (of which dispute resolution is part). Indeed, these aspects are all relevant in one way or another to the dispute resolution process;
- Further, the research implies an interaction between the lawyers and the scientists, whereby the former have the lead;
- Moreover, the approach adopted is voluntarily global. It encompasses all forms of ADR methods found on the net. It covers all types of transactions and all categories of contract partners. With respect to the applicable law, it will use as broad a comparative view as feasible.

Geneva, December 2001 Gabrielle KAUFMANN-KOHLER

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INTRODUCTION

Cyberspace is a metaphor of a space. It refers to a space resulting out of the connections between a vast number of computers and other computer tools. Cyberspace has no dimension, no borders and no territories. In cyberspace, time is often considered an unnecessary burden that has to be kept to a minimum. Almost all legal systems, however, have been developed in a context of – and are currently based on – spatiotemporal stability. Regulating the Internet, including solving disputes arising on the Net, thus implies facing new fundamental challenges.

As cyberspace is an environment characterized by interconnections and dematerialization[1], it makes sense to resolve dispute by an interconnected and dematerialized tool. This tool is *online dispute resolution*: procedures in which the parties do no longer travel to meet in courtrooms or in front of arbitrators or mediators. The parties stay behind the computers, communicate by electronic means, and try to resolve their dispute by an agreement reached online, or by submitting their dispute to an online arbitral tribunal or a cybercourt. The first such experience dates back to May 8, 1996, when a joint venture of academics and business lawyers rendered a decision after having communicated with the parties exclusively by electronic means[2]. Since then, ODR initiatives have flourished and half a hundred institutions currently offer such services. Seeking to assess the state of the art of online dispute resolution, we have carried out a survey of forty-nine ODR providers, which ended in late October of 2001.

The existing ODR procedures are based either on a *sui generis* form of dispute resolution that focuses on the needs of Internet users, or on the dispute resolution forms already developed by the Alternative Dispute Resolution (ADR) movement, thereby transposing offline

[1] P. TRUDEL, *La Lex electronica*, in *Le droit saisi par la mondialisation*, Ch.-A. Morand (ed.), Brussels, Bruylant and Ed. University of Brussels, Basle, Helbing & Lichtenhahn, 2001, pp. 221-268.

[2] The institution was the Virtual Magistrate, which was a joint project of the Cyberspace Law Institute, the American Arbitration Association, the National Center for Automated Information Research and the Villanova Center for Information Law and Policy. The case was *Tierney and Email America*, docket No. 96-0001. The defendant had placed an advertisement on a website belonging to AOL, offering to sell millions of email addresses for bulk mailings. After four days, the Virtual Magistrate rendered a decision stating that the advertisement was a harmful or offensive activity, according to AOL's Terms of Service Agreement, Internet custom and practice and customer complaints. AOL, which was not one of the parties, complied with the award and removed the advertisement.
This was also the Virtual Magistrate's last decision, the project having been abandoned meanwhile. A description of the decision can be found at http://www.interesting-people.org/archive/3076.html. See also S. DONAHEY, *Dispute Resolution in Cyberspace*, in *Journal of International Arbitration*, 15, 1998, p. 163.

experiences[3]. Having reviewed most existing ODR systems, we decided to present and assess them in the light of the forms, rules and requirements developed for ADR.

The main forms of ADR are negotiation, mediation and arbitration. These categories are also present in ODR. However, as the environment is different, the architecture of the institutions is different, and the procedural rules vary, sometimes slightly, sometimes widely. Consequently, the first chapter is dedicated to a survey of the similarities and differences between ODR and ADR.

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. Some parties are not equipped with the required computer tools. As a consequence, the second chapter sets forth the general characteristics of ODR mechanisms, with respect to the fields of law, the parties, and additional services that are provided by ODR institutions.

Electronic communication is probably the first major difference between offline dispute resolution and ODR. As this report is part of an interdisciplinary research project combining a legal and a computer science approach, the third chapter presents a technical and legal survey of the electronic means used for communicating during online proceedings.

A number of other legal questions have recurrently been discussed in recent literature. We chose to examine those which we found central and which are compatible with an empirical research of current ODR practices. The issues which will therefore be addressed in chapter four are the dispute resolution clauses, the management of the processes (as regards independence, fees, duration and effectiveness) and of the ODR providers (as regards financing, for instance).

Finally, as dispute resolution in cyberspace is part of the global regulation of cyberspace, ODR interacts with the applicable guidelines, principles and codes of conduct. We chose therefore to present, in chapter five, the main sources of regulation of e-commerce.

[3] Alternative dispute resolution is “alternative” to judicial dispute resolution, and therefore usually to state procedures. Online dispute resolution is generally also a non-state procedure. But a judicial organ of the USA recently announced that a state cybercourt may be instituted for cases involving technology and high-tech businesses, see *Michigan Considers a Cybercourt*, in *NY Times*, February 2nd, 2001, which was accessible in March at http://www.nytimes.com/2001/02/22/technology/22CYBE.html.

CHAPTER I

ADR AND ODR: SIMILARITIES AND DIFFERENCES

A very broad range of dispute-related services are offered online. A quick survey of pertinent literature reveals that the term ODR (sometimes eADR) is used for mechanisms as different as dispute prevention (education, outreach, rating and feedback programs), ombudsman programs, conflict management, assisted negotiation, early neutral evaluation and assessment, mediation/conciliation, mediation-arbitration (binding and/or non-binding), arbitration, expert determination, "executive tribunals" and consumer programs (private, trade groups, quasi-governmental and governmental)[4]. Consequently, a first distinction is to be drawn between, on the one hand, actual dispute resolution, which covers procedures intending directly to resolve conflicts and, on the other hand, services that should rather be considered as satellite functions, seeking to prevent disputes or to facilitate or improve their resolution, without actually resolving them. For a better understanding of the reality of current online dispute resolution, we separately analyzed its field of activity and the types of parties involved, as it seems extremely unlikely that ODR will ever encompass all kinds of disputes.

Accordingly, when reviewing the different types of existing dispute resolution services, we based our analysis on four major aspects: the proper type of dispute resolution, the field in which ODR-providing institutions are active, the parties possibly aimed at and the existence of accessory functions.

The types of dispute resolution mechanisms currently offered online by active institutions basically amount to the standard categories of offline ADR, i.e. negotiation, mediation and arbitration. Of course, they all have new distinctive features, ensuing from the specific needs and possibilities of an electronic environment. The analysis of the proper type of dispute resolution and the particular features they show is important as it may affect all further research.

[4] See for instance the definition of the scope of a survey in progress by the ABA Task Force on ECommerce and Alternative Dispute Resolution (ADR), http://www.law.washington.edu/ABA-eADR/surveys/_GeneralSurvey.htm), and A. VAHRENWALD, *Out-of-Court Dispute Settlement Systems for E-Commerce*, *Report on Legal Issues*, Part III, *Types of Out-of-Court Dispute Settlement*, Ispra, 2000, http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_FORUM0000000000000FF0.

Part I-1 Negotiation

Although the negotiation services offered by ODR-institutions are often simply referred to as "assisted negotiation", we think it useful to distinguish "automated negotiation" from "assisted negotiation", because of the differences in decision-making power these mechanisms imply.

Section I-1.1 Automated negotiation[5]

In automated negotiation, usually a claimant contacts an institution and presents its request. The automated negotiation provider then contacts the other party, which can accept or refuse to submit to the jurisdiction of the institution (as long as they are not already bound by previous agreements, such as membership, trustmark or certification[6]). The parties then enter a "blind bidding" procedure, in which each of them, in turn, offers or demands a certain amount of money (although some institutions allow non-monetary terms[7]). The proposed figures are confidential, they are neither made public nor communicated to the other party[8]. When the amounts of the offer and the demand are sufficiently close, the case is settled for the arithmetic mean of the two figures. The proposed amount are usually considered close enough for a settlement when the difference figures 30%, but some mechanisms require 10%, or even 5%[9]. The number of bids allowed for each party varies between three[10] (which is usual) and unlimited[11]. There is also a time limit for the parties to reach an agreement, which ranges from 15 days[12] to 90 days[13] or even 12 months[14]. The scope of automated negotiation is limited to "*what* is owed" (the question usually amounts to "how much money is owed" but, as we said,

[5] The institutions and programs offering automated negotiation which we surveyed are: 1-2-3 Settle.Com, AllSettle.Com, ClickNsettle.com, Cybersettle, Intersettle, MARS, NewCourtCity, ResolveItNow.com, SettlementOnline, SettleOnline, SettleSmart, The Claim Room, U.S. Settle, WebMediate, and WeCanSettle.

[6] For an example of certification entailing agreements which give jurisdiction to an institution providing automated negotiation, see MARS.

[7] The procedural rules of SettleSmart for instance consider the possibility of "Additional Settlement Criteria". The idea is that one party adds any criteria it whishes to the monetary proposals of settlement, and it then simply becomes a supplemental condition of agreement. This possibility is however exceptional for an automated negotiation mechanism, SettleSmart being the sole institution that we found that offers this possibility. Automated negotiation usually concerns only the question of "how much money is owed".

[8] One institution provides however automated negotiation without 'blind bidding', the submissions of offers and demands being communicated to the other party. This system otherwise operates exactly like the other automated negotiation mechanisms. The institution is The Claim Room.

[9] This is the condition for a settlement at MARS.

[10] For instance, Cybersettle and SettleSmart.

[11] See for instance MARS, ClickNsettle.com, SettleOnline or ResoveitNow.com.

[12] MARS. But it is not clear whether it is really 15 days or rather 30 days, because the information found on their website is contradictory.

[13] SettleOnline.

[14] ResolveItNow.com

non-monetary terms are sometimes possible). The question of "*whether* something is owed" is excluded by the very nature of the system. The procedure of automated negotiation comes in fact very close to a strategy used in mediation, called the "negotiating funnel", which consists of a series of private discussions, *i.e.* solely between the mediator and one of the parties. This strategy is used only at the very end of a mediation, after trust has been established between the parties and the mediator, reality injected in their differing opinions (which means that the major hurdles of negotiation have been overcome) and the question of "whether something is owed" resolved[15].

A typical description of automated negotiation is the one of MARS:

> "1) The Claimant, an Individual or Business, requests a SuperSettle Negotiation and provides MARS with information about the Respondent, an Individual or Business, what the claim is about and the amount of the claim. If the Claimant is unwilling to Negotiate and accept less than the Actual or Initial amount of the claim, the SuperSettle ADR Program can not be used.
>
> 2) MARS will contact the Respondent and will explain the Claimant's request and if he/she is willing to participate. If the Respondent is willing to participate, the process will move forward. If not, the Claimant can pursue a full negotiation, mediation, arbitration and, if necessary, litigation.
>
> 3) If the Claimant and Respondent agree that the outcome of SuperSettle Negotiation will be binding, a series of Claimant Requests and Respondent Offers are carried out until the Respondent's last offer is within 10% (5% for Business to Business claims) of the Claimant's last request and the matter is settled, as demonstrated in the following illustration."

Section I-1.2 Assisted negotiation[16]

In assisted negotiation, ODR institutions provide only a secure site and possibly a storage means and other facilities of this nature[17], but no actual negotiation service. This dispute resolution mechanism is less popular among ODR institutions than automated negotiation, presumably because this system does not take advantage of all technological possibilities[18]. In assisted negotiation, the parties have to reach an agreement without any external entity having the capacity to decide for them, not even a computer, as it is the case in automated negotiation. The main service of assisted negotiation systems for dispute resolution, as the institution does not have the capacity to decide, is to provide software for setting up the

[15] A. BEVAN, *Alternative Dispute Resolution*, London, Sweet & Maxwell, 1992, p. 23.
[16] The institutions and programs offering assisted negotiation which we surveyed are: ClaimChoice.com, ECODIR, iLevel, Online Resolution, the Resolution Forum, SquareTrade, The Claim Room, TRUSTe, and Web Trader.
[17] WebMediate, for instance, calls its negotiation (and mediation) platform a "threaded message board system", see http://www.webmediate.com.
[18] It is interesting to note that American Arbitration Association recently announced a new ECommerce protocol, and that their advertisement relies, among others, on a "commitment to technology". The AAA announced the protocol in a press release on January 4th, 2001, see: http://www.adr.org/about/whatsnew/20000103aa.html.

communication[19], assistance in developing agendas, engaging in productive discussions, identifying and assessing potential solution, and writing agreements[20]. Some institutions also provide trustmarks or certification programs as a means for leading the parties towards negotiation[21].

Typical descriptions of assisted negotiation are SquareTrade's:

> "Once each party is aware of the issues, they first try to reach an agreement using SquareTrade's Direct Negotiation tool. This initial phase of the service is a communications tool that is completely automated, all web-based and is currently free of charge to all users. Using SquareTrade's secure Case Page, the parties try to reach an agreement by communicating directly with each other. Approximately 60% of cases are resolved at this stage.
>
> SquareTrade does not review case records during Direct Negotiation. All communications are between the parties only."

and Online Resolution:

> "Using the specially developed software, you and the other parties have an opportunity to tell your stories, to express your thoughts, feelings and concerns, to provide each other with information essential to the resolution of the conflict, to think clearly and creatively about the best way to solve the problem, and to present your desired outcomes."

Compared among each other, automated negotiation has probably more benefits than assisted negotiation, since non-monetary terms are not excluded in the former and the latter is characterized by an absence of decision-making power. An exception should however be made for cases in which the question is "whether something is owed", as this point can in principle not be inquired by a system of offers and demands put in figures.

Section I-1.3 Comparison between online and offline negotiation

After this first review, it seems obvious that the major advantage of negotiation through electronic means is simplicity. The procedure requires almost nothing from the parties but good-will and an Internet connection. There is no need for travelling or agreeing on a neutral place for the negotiation to take place, because there is actually no need for a meeting, neither in space nor in time. It suffices to either leave messages on a communication software platform

[19] This would be an electronic communication platform, as iLevel does.
[20] Those are the proposed services of Online Resolution (http://www.onlineresolution.com/on-whatis.cfm).
[21] Internet Neutral, for instance, provides certification as sole tool of assisted negotiation. This certification entails an agreement from the merchant site that it will enter a negotiation in the event of a dispute related to its site. The negotiation is then conducted through a telephone conference, see http://www.internetneutral.com/ terms.htm.

(assisted negotiation) or to put a figure to a demand or an offer (automated negotiation). The simplicity advantage also brings cost savings and convenience, especially since the parties need not be connected at the same time, unlike in real-time conferencing. This very advantage is at the same time the major drawback of these systems: they are inadequate for more complex negotiations. This is in part due to the fact that they lack an important human touch. In face to face meetings, observation of body language, hints gathered during coffee breaks, and generally non-verbal perception may play a major role in understanding one partner's interests, objectives, needs, and thus greatly enhance settlement prospects.

Part I-2 Mediation[22]

Some authors call mediation a form of assisted negotiation[23]. We distinguished the two because most websites do and because, in online proceedings, mediation is based on the activity of the third neutral, the mediator, while assisted negotiation is based on technological tools, such as software. The activity of the neutral is the main characteristic of mediation: it is a procedure during which a third party helps the disputants come to an agreement to resolve their conflict. While the mediator, having no decision-making power, never imposes a solution, the degree of his intervention can vary significantly, ranging globally from "purist" mediation, where the mediator intervenes as little as possible, to "muscle" mediation, where the neutral tries to force an agreement on the parties[24].

On one side of the spectrum, one finds a form of mediation, called "facilitative", which specifically requires the mediator not to express an opinion or to recommend a solution, being simply a catalyst to the communication[25]. The strategy used in this form of mediation can be described as "orchestration", as it seeks to assist the parties in discovering themselves a

[22] The institutions and programs offering mediation which we surveyed are: 1-2-3 Settle.Com, Cybercourt (planned), e-Mediator, ECODIR, eResolution, IntelliCOURT, Internet Neutral, IRIS, MARS, ODR.NL (planned), Online Resolution, Online Ombuds Office, NewCourtCity, OnlineDisputes. (planned), NovaForum.com, the Resolution Forum, SettleTheCase, SquareTrade, WebAssured.com, Web Dispute Resolutions, WEBDispute.com (planned), WebMediate.

[23] A. DUVAL SMITH, *Problems in Conflict Management in Virtual Communities*, in *Communities in Cyberspace*, P. Kollock and M. Smith (eds.), Routeledge Press, 1998 and A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 34. See for example also the website of Mediate.com, which does not provide online resolution, but offers articles on mediation: http://www.mediate.com/about/index.cfm.

[24] A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 21, 23.

[25] Ibidem, p. 15-16.

solution that meets their mutual interests[26]. This is typically the kind of procedure Online Resolution and 1-2-3 Settle.Com have chosen[27].

On the other side of the spectrum, one finds "evaluative" mediation, where the neutral gives opinions on law, facts and evidence. The strategy used is "deal-making", the mediator figures out a solution mutually acceptable to the parties and then tries to persuade them to adopt it[28]. This is for instance the much more flexible and active approach adopted by WebMediate, where the mediator can act in any lawful manner agreed to by the parties (of course, he still does not have the authority to impose a settlement)[29]. In between these two extremes one finds proceedings of the like of SquareTrade's, in which the mediator seeks to intervene as little as the parties agree to: he intervenes only if the parties are not successful in negotiating fully by themselves, and, if he intervenes, he for instance proposes a solution only if the parties request it[30].

The main common bottom line of these procedures is the aim to facilitate the communication between the parties and the mediator and between the parties themselves[31]. Such communication can be improved, or sometimes impaired, by the technological tools involved (such as Internet relay chats, emails, tele- and videoconferencing). Communication and its varying modes are the core elements, which shape the different stages of mediation.

Offline mediation is usually organized along three major steps, or "sessions': the opening joint session, where all parties, attorneys, the mediator, and maybe experts and psychologists are present. During this session, the parties present their views on facts and law and the mediator summarizes the issues. Thereafter comes a series of private sessions, also called caucuses, in which the mediator sequentially discusses in private with each of the parties.

[26] A. DUVAL SMITH, *Problems in Conflict Management in Virtual Communities*, op. cit.
[27] OnlineMediators presents its mediation procedure as follows: "the mediator does not make decisions for you, nor recommend solutions. In mediation, you make your own decisions" (http://www.onlineresolution.com/om-whatis.cfm). It is edifying that 1-2-3 Settle.Com offers a service that was called "mediation" in February and "facilitated negotiation" in April, although the procedure was not substantially amended (see: http://www.123settle.com/Services/mediation_details.htm).
[28] A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 15-16 and A. DUVAL SMITH, *Problems in Conflict Management in Virtual Communities*, op. cit.
[29] "The WebMediator [...] will attempt to help [the parties] reach a satisfactory resolution of their dispute in any manner that [he] believes to be appropriate. [He] is authorized to communicate jointly or separately with the parties and to make recommendations for settlement." The mediator can also propose automated negotiation, arbitration or expert advice. (See par 9. of the WebMediation Procedures and Rules, http://www.webmediate.com/terms.html#med).
[30] See http://www.squaretrade.com/learnmore/odr_090600.jsp.
[31] "The Mediator helps you and the other party communicate clearly", OnlineMediators (OnlineResolution): http://www.onlineresolution.com/om-whatis.cfm.

This stage is considered the "engine room" of the whole procedure[32]. At last comes a closing joint session, during which the parties communicate with each other again and then either verify the terms of the settlement reached or, at least, the progress they have made.

These offline sessions are of interest for online mediation mechanisms because they influence the architecture of online mediation websites. In offline mediation, a balance exists between formal steps and informal stages, the mediator and the parties making use of joint sessions, periods of caucus and even coffee breaks. A variety of communication methods are used during the resolution process and they differ according to the formality of the session, the state of mind of the parties and the balance of powers. Communication is thus fine tuned to achieve its best results. Some corresponding possibilities must be offered online: ODR providers should have common discussion rooms and private communication facilities and provide technological tools able to support communication with the highest possible amount of subtleties[33].

In online mediation, real space is replaced by virtual space, i.e. cyberspace[34]. A priori at least, this is the only fundamental difference between offline and online mediation, with the result that all other aspects should remain unchanged, subject of course to adjustments to technology. However, our review showed that in many cases the experiences of offline mediation were not fully considered and integrated into the architecture of online proceedings. For instance, quite surprisingly, only one online mediation provider applies standards developed by large institutions for offline mediation[35]. Moreover, instead of being organized according to the three types of sessions in both common and private rooms discussed above for offline mediation, online procedures are sometimes simplified to the extreme, communication possibilities offered by new technological tools not being adequately used. Real-time discussion is rather seldom offered and common and private communication rooms are not always available[36].

[32] A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 19.
[33] See below, Chapter III.
[34] Having lost three of its four dimensions, the definition of cyberspace as "space" is, of course, not very congruent, and it should not be properly called so, as G. KAUFMANN-KOHLER argued in *Internet: mondialisation de la communication - mondialisation de la résolution des litiges*?, in *Internet : Which court decides? Which law applies?*, K. Boele-Woelki et C. Kessedjian (ed.), The Hague, Kluwer Law International, 1999, pp. 89-141. But cyberspace still is a platform for communication, and that is all that is of interest for us here.
[35] The institution is OnlineMediators (Online Resolution, http://www.onlineresolution.com/om-standards.cfm), which applies the "Standards of Mediation Practice Jointly Defined by the American Bar Association (ABA), the Society of Professionals in Dispute Resolution (SPIDR) and the American Arbitration Association (AAA)".
[36] See below, Chapter III.

A typical description of a well-developed mediation procedure is Mediate-Net's[37]:

> "Online mediation starts out like a traditional mediation in the sense that a mediator acceptable to both parties is assigned to the case. The mediator will communicate with both parties by email to determine the issues to be decided by the mediation and to reach an agreement on the methods of communication. Unlike a traditional mediation, there is no first "meeting" of all of the parties online, unless the parties agree to begin the mediation with an "online" chat session which enables all of the parties to communicate with each other in real time.
>
> In addition to email, the mediator and the parties have access to a variety of electronic communication tools including electronic conferencing, online chat with the capacity for private conversations, videoconferencing when the parties have access to the required equipment, and, as well as the use of the telephone if the parties agree that telephone communication is necessary. We will also arrange a "face-to-face" meeting if the parties want to mediate "face-to-face" in a traditional setting, if practical. [...]
>
> Phase I involves an initial online communication which gives all the parties a chance to learn more about the various phases of the mediation process. The mediator answers questions about the ground rules of the mediation and procedures available governing the mediator's effort to settle the dispute. [...] The mediator also emphasizes that all compromises made in the interest of negotiation are confidential and that such information is inadmissible and not discoverable for any purpose in litigation among the parties. [...]
>
> Phase II involves familiarizing the mediator with the facts of the dispute. Each party prepares a submission which may include supporting information such as financial information, reports, and documents. [...]
>
> Phase III involves presenting the settlement terms and assessing the initial reactions of the parties by the mediator to her proposal. The proposal is communicated to the parties by email. The mediator separately explains to each party in writing both the proposed settlement terms and the confidential reasons underlying her proposal. [...] During this phase, each side does not know of the reaction of the other party to the mediator's proposed terms. This procedure gives the parties an opportunity to reach in confidence the proposed settlement and the rationale which the mediator hopes will bring the dispute to an immediate conclusion.
>
> Phase IV may involve "shuttle diplomacy" and is the final phase of the mediation process. "Shuttle diplomacy", of course, takes place if the mediator's "best" settlement terms proves to be unacceptable to either party. If settlement is reached, the mediator drafts a written settlement agreement reflecting all of the settlement terms. This document is circulated among the parties, and sent to the parties" attorneys for review, after which it is formally executed."

As mediation seeks to satisfy each party's interests rather than to adjudicate fair and legitimate rights[38], the procedure is governed by few rules: substantive state law applies only insofar as some types of agreements are prohibited, and no rule of evidence controls the process[39]. One rule, however, is of prime importance to make the process effective: mediation

[37] Mediate-Net, which closed since our review because it was meant to be an experiment, handled family law disputes and conflicts opposing consumers to health care services. It was supported by a grant from the *National Center on Automated Information Retrieval* (NCAIR) and held by the University of Maryland.

[38] For instance R. S. GRANAT, *Creating An Environment for Mediating Disputes On the Internet*, A Working Paper for the NCAIR Conference on Online Dispute Resolution, Washington, DC, May 22, 1996, http://mantle.sbs.umass.edu/vmag/disres.html and A. DUVAL SMITH, *Problems in Conflict Management in Virtual Communities*, op. cit.

[39] P. R. FISCHER, *All You Need To Know About Mediation But Didn't Know To Ask – A Parachute for Parties in Litigation!*, http://www.mediate.com/articles/fisher2.cfm.

is without prejudice and confidential[40]. The agreement to mediate usually includes a provision holding that the mediator is not to be called to give evidence or produce documents in court or arbitration[41]. This rule is necessary to establish trust in order to get communication and negotiation going[42].

Part I-3 Arbitration[43]

While the gist of mediation is to take the parties to a common ground of mutually acceptable solutions, to reconcile their interests and often to maintain or rebuild a relationship that is threatened by the conflict, justice provided by way of arbitration is more straightforward. It relies on the determination of rights and obligations. Whereas mediation seeks to improve communication between the parties and therefore requires sophisticated tools of communication, arbitration adjudicates rights and therefore has different requisites for the quality of its justice.

If an online dispute resolution institution intends to offer true arbitration services resulting in decisions which carry the weight of a judgment[44], a number of conditions have to be met[45]. The notion of arbitration is, however, not clear cut. JARROSSON has devoted his doctoral thesis to defining arbitration[46]. He points out that, historically, the delimitation between arbitration and neighbor notions has not only never been easy, if even possible, but it has also been changing over time. In the past, arbitration has endorsed the different roles of

[40] Online Resolution "Online Mediation is confidential, only you, the mediator and the other party know what's happening" (http://www.onlineresolution.com/om-whatis.cfm)

[41] For instance par. 11.2 of the WebMediation Procedures and Rules: "Neither the WebMediator nor WebMediate (including its agents and employees) may be called to testify or compelled to provide documents or information regarding any WebMediation in any adversary proceeding, judicial forum, or alternative dispute resolution proceeding." (http://www.webmediate.com/terms.html#med).

[42] A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 31. The issue of confidentiality will be further analyzed below, in Part III-2.

[43] The institutions and programs offering arbitration which we surveyed are: 1-2-3 Settle.Com, Cyberarbitration, Cybercourt (planned), eResolution, FordJourney, IntelliCOURT, iCourthouse, MARS, NovaForum.com, ODR.NL (planned), Online Resolution, the Resolution Forum, SettleTheCase, SquareTrade, the Virtual Magistrate, WebAssured.com, Web Dispute Resolutions, WEBDispute.com, WebMediate and Word&Bond.

[44] The implications of characterizing a procedure as arbitration are, briefly, that awards are binding like a judgment, therefore enforceable in law and possibly being the ground for a formal notice to pay. If it is not an arbitral award, the decision could not be more than binding like a contract, which would require a judgment in order to be enforceable. Moreover, once the case was brought before an arbitral tribunal, courts would refer the parties to it if they tried to bring the matter before them before the end of the arbitration. Moreover, a subsequent appeal to a court would usually be limited to public policy if the decision is an award. Finally, an arbitral award precludes other actions based on the same grounds than those submitted to the arbitral tribunal.

[45] The most comprehensive presentation and discussion of online arbitration is A. VAHRENWALD, *Out-of-Court Dispute Settlement Systems for E-Commerce*, *Report on Legal Issues*, Part IV, *Arbitration*, Ispra, 2000, http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_FORUM0000000000000FF9.

mediation, expertise, and what is nowadays called arbitration[47]. At the present time, arbitration is sociologically considered the privatized equivalent of a court of law[48]. Unsurprisingly the essence of the notion is the same legally and sociologically: as VAN DEN BERG affirms, "the gist of the notion of arbitration as regulated by most laws on arbitration is that it is conceived as a substitute for court litigation"[49]; or as JARROSSON unambiguously puts it, "the functions of the arbitrator and the judge are exactly the same. Only the origin differs"[50]. Most procedural safeguards that are imposed on arbitration proceedings derive from this epistemological position. Arbitration can be defined along the main feature of the third neutral as a judge, with the addition of specific features deriving from the privatization of the process.

For present purposes, it is necessary to single out the issues relating to the concept of arbitration which may be problematic for online dispute resolution mechanisms. The observation of modern arbitration reveals that it is the complex, legalistic and institutionalized development of "two or more parties, faced with a dispute that they cannot resolve for themselves, agreeing that one or more *private individuals* will resolve it for them [...] by a *binding decision*"[51]. Further, the concept is generally understood as "the resolution of a dispute between two or more parties by a third person (arbitrator) who derives his power from an *agreement* (arbitration agreement) *of the parties*, and whose *decision* is *binding* upon them"[52], or, as JARROSSON states, "regarding arbitration, the requirements are a third (the arbitrator), a dispute and, finally, a judicial mission entrusted to the third by the parties"[53]. Although there

[46] C. JARROSSON, *La notion d'arbitrage*, Paris, L.G.D.J, 1987. See also C. JARROSSON, *Les frontières de l'arbitrage*, in *Rev. Arb.*, 1, 2001, pp. 5-41.
[47] See also C. JARROSSON, *Les frontières de l'arbitrage*, *op. cit.*, pp. 8-11.
[48] The intricacy between arbitration (in the sense currently given to it) and courts is deeply rooted in our legal culture: a quick glance at legal history and anthropology makes it easy to visualize two traders, in dispute over some goods delivered, turning to a trusted third to settle their dispute by a neutral determination. Later on, courts would be established by the state, but still the practice continues as the parties want their cases to be decided with less formality and expense than is involved in a recourse to courts: private dispute resolution by adjudication has always existed and its interactions with state justice has always been a central issue. See P. FOUCHARD, *L'arbitrage commercial international*, Paris, Dalloz, 1965, pp. 1, 30, 31, W.S. HOLDSWORTH, *A History of English Law*, London, Sweet & Maxwell, 1964, Vol. XIV, p. 187, and M.J. MUSTILL, *Arbitration: History and Background*, in *Journal of International Arbitration*, 6, 1989, p. 43.
[49] A. VAN DEN BERG, *The New York Convention of 1958*, op. cit., p. 44.
[50] C. JARROSSON, *La notion d'arbitrage*, *op. cit.*, p. 101.
[51] A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, 3rd ed., London, Sweet & Maxwell, 1999, p. 3-4, emphasis is ours.
[52] A. VAN DEN BERG, *The New York Convention of 1958*, op. cit., p. 44, emphasis is ours. The author, analyzing the definition of what must be understood by an arbitral award under the New York Convention, comes to the conclusion that such a definition is not given by the Convention and that it is thus appropriate to distill the notion from the conceptions of arbitration in the national legal systems.
[53] C. JARROSSON, *Les frontières de l'arbitrage*, *op. cit.*, p. 19. See also the definition of A. BUCHER and P.-Y. TSCHANZ, *International Commercial Arbitration in Switzerland*, Basle and Frankfurt on the Main, Helbing & Lichtenhahn, 1989, p. 26: "arbitration is the process by which a third party, whose jurisdiction rests on an agreement between the disputing parties, resolves a legal dispute by making an enforceable decision".

are many ways of articulating the features that arise from this observation[54], there seems to be broad consensus on the fundamental requirements. For our analysis, we chose to look at the approach of REDFERN and HUNTER and add an aspect stressed by KAUFMANN-KOHLER when analyzing a process on the confines of arbitration. The former conduct their analysis along four fundamental features: the agreement to arbitrate; the choice of the arbitrators; the decision of the arbitral tribunal; and the enforcement of the decision. The requirement added by KAUFMANN-KOHLER is the compliance with fundamental procedural rules.

If the agreement to arbitrate, expressed in the arbitration clause, is an important issue in the field of arbitration, it is because consent is the fundament to any form of justice. Social contract is the consent to the power of the state, therefore to its law, and to its justice[55]. As arbitration is a form of privatized justice, the main function of the agreement to arbitrate is to show that the parties have consented to their dispute being resolved by this process. The classical theory holds that the jurisdiction of an arbitral tribunal must derive from the consent of the parties in terms which make it clear that the process constitutes arbitration[56], and thus that without the agreement of the parties there can be no valid arbitration[57]. In the online environment, this requirement raises issues such as visibility, accessibility, and incorporation of the arbitration clause.

The same paradigm also acknowledges the case where the jurisdiction of an arbitral tribunal is conferred by (the indirect democratic consent of) a court order or a statute[58]. However, a more descriptive analysis shows that, in certain cases, it does not matter that the consent is forced, turning *de facto* arbitration based on consent into compulsory arbitration. Even though the parties had no choice but to assent to arbitration in order to participate in a given activity, the agreement is still valid and the procedure is nevertheless characterized as

[54] The notion of arbitration seems to be one of these notions that are very hard to grasp by abstract concepts, as the Swiss Supreme Court has for instance said that "borderline situations can be difficult so classify and it may well be that a general formula satisfactorily dealing with all situations cannot be found". This citation is by M. PATOCCHI, *The 1958 New York Convention. The Swiss Practice*, in *The New York Convention of 1958*, ASA Special Series, n° 9, August 1996, pp. 152-153, the case referred to is RO (Official Reporter) 117 Ia 365. As a consequence of the ambiguous nature of the notion, the definition presented below may lack from time to time some congruence. This is especially so because the definition seeks primarily to be applicable to ODR.

[55] Socrates already stated firmly, shortly before being sentenced to death, that he had consented to the laws of Athens by "voting with his feet".

[56] On the importance placed on the consensual nature of the concept of arbitration, see for instance M.J. MUSTILL and S.C. BOYD, *The law and practice of commercial arbitration in England*, London, Butterworth, 1982.

[57] For instance A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, 3rd ed., London, Sweet & Maxwell, 1999, p. 6, 7.

[58] M. J. MUSTILL and S. C. BOYD, *The law and practice of commercial arbitration in England*, op. cit. *Contra* C. Jarrosson, *Les frontières de l'arbitrage, op. cit.*, p. 20, who sees arbitration based on a delegation of judicial power by the state as "forced arbitration", and considers it as not legally arbitration, but rather a process pertaining to special jurisdiction.

arbitration[59]. The trend is that arbitration is becoming the most common method for the resolution of international conflicts. It carries in its wake a new category of arbitration where consent to jurisdiction is forced[60]. At a first glance, this may seem shocking. On a closer look, it is doubtful whether this form of arbitration is really without consent, as it may rather be that it is a different type of consent, a type close to the one conferring jurisdiction to courts. Indeed, there, persons can still "vote with their feet", i.e. move out of the territory, respectively the field of jurisdiction. It is also true, and this is of more interest to us here, that a fifth fundamental feature of arbitration emerges internationally in statutes and court decisions: the observance of certain fundamental procedural guarantees, moderating the weight of the freedom to consent: "compulsory arbitration can only be justified if the process imposed by one party on the other is fair, which implies the respect of due process rights"[61]. In any event, the jurisdiction of an arbitral tribunal must be based on either an agreement, a court order or a statute or treaty, for obvious reasons of legal certainty[62].

Among the procedural safeguards that reduce the importance of the weakening consent, one finds the requirement of the impartial appointment of the arbitrators (as opposed to the impartial attitude and conduct of the proceedings, which takes place later in the process, and will be discussed below in order to give a systematic explanation of the way we analyzed the online dispute resolution institutions). It is generally acknowledged that the arbitrators must be individuals and may be chosen by the parties. The latter can either directly appoint the arbitrators or they can refer to an appointing authority, such as the ICC Court of arbitration, that will make the selection[63]. Although the parties are free to agree on the qualifications that the arbitrators must have, their freedom of choice is limited, as BUCHER notes, by a requirement of

[59] See for instance the English case on Formula 1 arbitration *Walkinshaw* v. *Diniz* (Unreported decision, High Court of Justice – Commercial Court (19 May 1999) 1999 Folio No. 522, Thomas J.), in which the High Court deemed it irrelevant that the parties (like all Formula 1 teams and drivers) had no choice but to agree to adhesion contracts conferring jurisdiction to an arbitral tribunal or do without participation in the Formula 1 Championship. See the commentary of this case in G. KAUFMANN-KOHLER and H. PETER, *Formula One Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution*, in *Arbitration International*, 17, 2, 2001, p. 173-210.

[60] G. KAUFMANN-KOHLER and H. PETER, *Formula One Racing and Arbitration*, op. cit. 186, the author citing as examples the areas of sports, consumer transactions, and investment arbitration based on treaties or national statutes. The author goes further and puts forward that "it may be more accurate and intellectually honest to simply admit that arbitration without consent exists", p. 186. Although this is quite convincing, we will cling to the dogma of consent, and turn later towards the safeguards that are meant to compensate the substantive weakening of consent.

[61] G. KAUFMANN-KOHLER and H. PETER, *Formula One Racing and Arbitration*, *op. cit.*, p. 189.

[62] See Part IV-1, below.

[63] For a more detailed inventory and a discussion of the different methods of appointing an arbitral tribunal, see e.g. REDFERN and HUNTER. The methods they list are: by agreement of the parties; by a trade of other association; by a professional institution; by an arbitral institution; by a "list system'; by existing arbitrators and by national courts, A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, *op. cit.*, pp. 195-204.

independence[64]. The impartial appointment conveys directly the requirement of independence, as "impartiality is an attitude or state of mind, while independence refers to an objective situation, *i.e.* the absence of circumstances external to the case and which might influence an arbitrator's judgment"[65]. An arbitrator, to be impartially appointed, must therefore be selected in a way that excludes the influence of this kind of external circumstances[66].

The main concern about independence in online dispute resolution is the existence of lists. The list issue has in particular been discussed in the field of sports[67] and of the chambers of commerce of Eastern Europe[68]. It covers five sub-issues:

First, is the list mandatory? If the list is open, if it is meant simply as a proposal to the parties which are not bound by it, the list has no consequence on the nature of the mechanism.

Second, who constitutes the list? If the constitution of the list is controlled or substantially influenced, directly or indirectly, by one of the parties, the remaining problems are almost pre-empted, as choosing a dispute resolver in a group of non-independent panelists can hardly end up with an independent arbitrator.

Third, are there other external circumstances that prevent the arbitrators from being independent? If the panelists must have a special skill, or a particular experience, this may, in certain cases, restrict the list to persons who had or have contacts with one of the parties or personal interests in the outcome of the dispute.

[64] A. BUCHER and P.-Y. TSCHANZ, *International Commercial Arbitration in Switzerland*, Basle and Frankfurt on the Main, Helbing & Lichtenhahn, 1989, p. 67.

[65] Ibidem, p. 69. The author further affirms that "[...] independence from the parties is generally considered to be equivalent to impartiality".

[66] Though we affirm that "he *must* be", we will not discuss here in depth the legal consequences of lack of independence. The important point that has to be presented however is that, according to the nature of arbitration, it can be concluded that a dispute resolution mechanism providing panelists which are not independent is actually not arbitration, as the "the arbitrator has to be a real third, that is a person which could not be representative of one of the parties. It is in this sense that precedents have stated that "the independence of the arbitrator derives from the essence of its judicial function'", C. JARROSSON, *Les frontières de l'arbitrage*, *op. cit.*, pp. 19-20. In this same sense, consider the "great emphasis" placed by the English High Court, while analyzing the arbitral or non-arbitral nature of a dispute resolution mechanism, on the impartial appointment of the arbitrators in the unpublished case discussed in G. KAUFMANN-KOHLER and H. PETER, *Formula One Racing and Arbitration*, *op. cit.*, p. 16. For independence as a constituting element of arbitration, see also the Swiss Supreme Court case *G.* v. *Fédération Équestre Internationale*, 15 March 1993, RO (Official Reporter) 119 II 271, discussed in the same article. On the other hand, in Switzerland at least, lack of independence is also a ground for just setting aside the award (see A. BUCHER and P.-Y. TSCHANZ, *International Commercial Arbitration in Switzerland*, *op. cit.*, p. 68, and the Swiss Private International Law Statute of December 18, 1987, holding at its article 190(2)(a) that an award can be set aside if the arbitrator has been incorrectly appointed).

[67] See G. KAUFMANN-KOHLER, *Art et arbitrage : quels enseignements tirer de la résolution des litiges sportifs?*, in *Resolution methods for art-related disputes*, Q. Byrne-Sutton and F. Geisinger-Mariéthoz (ed.), Zurich, Schulthess Polygraphischer Verlag, 1999, pp. 128-129. See also the Swiss Supreme Court case G. v. Fédération Équestre Internationale, 15 March 1993, RO (Official Reporter) 119 II 271; discussed in G. KAUFMANN-KOHLER and H.

Fourth, who chooses the actual dispute resolver from the list for a given dispute? It is, for instance, not acceptable that one of the parties chooses unilaterally the single or all three arbitrators.

Fifth, how many potential arbitrators are listed? If the list is long, e.g. over a hundred persons, this may lessen the indication of possible lack of independence arising from the answers to the previous questions. Of course, a general assessment of the procedure regarding the list has to be made[69].

We have stated above that arbitration is sociologically and legally considered the privatized equivalent of a court action and that the mission entrusted to the third neutral is of a judicial nature. A direct inference of this point is that, as REDFERN and HUNTER say, "the *procedures* that must be followed in order to arrive at a binding decision by way of arbitration may be described as judicial"[70]. Adjudication obviously delimits arbitration from mediation and negotiation, but it also distinguishes procedures akin to arbitration from what may be called arbitration proper. A true arbitrator therefore must have decision-making power, he must be able to impose awards. *Imposing* awards does not only mean unilaterally deciding on the outcome of the case at hand, but also having the power to make *binding* decisions. For an award to be binding, it must be enforceable and the decision-making power of the arbitrator must be exclusive of that of courts[71]. A non-exclusive proceeding would therefore not be arbitration proper[72].

Another implication of the judicial nature of the arbitral process on the constitutive elements of arbitration is the requirement that substantive rights are at issue: for a procedure to qualify as arbitration, it has to determine a matter that has legal consequences, that determines rights and obligations of the parties[73]. Finally, if an arbitrator must act judicially, it entails impartiality during the proceedings on his part: as REDFERN and HUNTER state, an arbitral tribunal is bound to "act fairly and impartially as between the parties, giving each party a

PETER, *Formula One Racing and Arbitration*, *op. cit.*, and J. PAULSSON, *Arbitration of International Sports Disputes*, Arb. Int'l 1993, p. 359.

[68] See A. BUCHER and P.-Y. TSCHANZ, *International Commercial Arbitration in Switzerland*, *op. cit.*, p. 68.

[69] On the importance of independence and expertise, see Section IV-2.4, below.

[70] A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, *op. cit.*, p. 10.

[71] If it is not exclusive, for instance if the parties contractually excluded *lis pendens* and excluded that the judge refers them to arbitration, if the parties thus accepted to run parallel proceedings, these parallel proceedings are very likely to be, on the one hand, a purely contractual procedure, the success of which would make the other procedure useless, and, on the other hand, a real litigation process that constitutes a back up solution to the contractual procedure.

[72] The issue is discussed as regards ICANN's UDRP, see Section IV-2.4 *in fine*, below.

[73] For a discussion of the nature of arbitration and its relation to the existence of substantive rights at issue, see H. MOTULSKY, *Écrits*, T. II: *Études et notes sur l'arbitrage*, Paris, Dalloz, 1974, n° 14, p. 21: "if this mission consists of deciding on the merits of a legal claim, [...] it is arbitration".

reasonable opportunity of putting his case and dealing with that of his opponent"[74]. We will revert to this requirement when addressing fundamental procedural rules.

Further to the features just discussed, it is the *effect* of an award that appears to carry the most weight when evaluating the arbitral process. The decision of an arbitral tribunal is binding and enforceable by operation of law: "it is only if the parties intend a decision to be binding like a judgment that it constitutes an award and the process an arbitration"[75]; if the decision is binding only like a contract, it is a procedure akin to arbitration, for instance an expert determination (*expertise-arbitrage*)[76]. An ODR provider may of course wish to provide "arbitration" binding only like a contract[77].

The last element in the definition of arbitration is the compliance with fundamental procedural rules. This is particularly sensitive with online dispute resolution, as one of the fundamental advantages of electronic communication is speed. Speed implies simplified procedures, less formalism and, therefore, a possible jeopardy to due process.

The same question comes up in sports arbitration where time constraints can be extreme. It was discussed recently by Justice Thomas of the English High Court[78], in a case involving arbitration in Formula one racing[79]. The question there was actually how much one can expedite an arbitration without jeopardizing due process. When reviewing whether the process at hand was arbitration, Justice Thomas emphasized the parties' procedural rights, especially their opportunity to be heard and impartiality.

The opportunity to be heard was said to include three components. First, a proper opportunity to present one's case. For the ODR dispute resolver, this will mean granting the

[74] A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, *op. cit.*, p. 10, quoting the English Arbitration Act of 1996, and adding that "the obligation is of general application", referring to the UNCITRAL Model Law, art. 18.

[75] See G. KAUFMANN-KOHLER and H. PETER, *Formula One Racing and Arbitration*, op. cit., p. 185, with extensive references.

[76] On this matter see C. JARROSSON, *Les frontières de l'arbitrage*, *op. cit.*, p. 25. A number of national legal systems offer such contractual arbitration: *Schiedsgutachten*, in Austria and Germany (as opposed to *Schiedsgerichtbarkeit* which is arbitration proper), *bindend advies* in Indonesia and the Netherlands (as opposed to *arbitrage*), valuation or appraisal in England and the United States (as opposed to *arbitration*), and *arbitrato irrituale* in Italy (as opposed to *arbitration*). See A. VAN DEN BERG, *The New York Convention of 1958*, op. cit., p. 44. As a rule, these procedures are not adversarial and the third neutral renders a decision on the basis of his or her expert knowledge and experience, A. VAN DEN BERG, *The New York Convention of 1958*, op. cit., p. 44.

[77] A reason for this is that it might be hoped that the parties feel more comfortable with this kind of legal effects, and that they would consequently more easily accept to confer jurisdiction to such an institution; it may also be that some national laws impose such conditions on a dispute resolution mechanism to constitute proper arbitration that it would not be feasible online. See Section IV-2.4, below.

[78] *Walkinshaw* v. *Diniz*, Unreported decision, High Court of Justice – Commercial Court (19 May 1999) 1999 Folio No. 522, Thomas J, *Arbitration International*, Vol. 17, No. 2, 2001, pp. 193-210.

parties sufficient time to present their arguments. The second component was the existence of proper and proportionate means for the receipt of evidence. For ODR systems, this has implications in connection with the general configuration of the communication scheme[80], the type of evidence allowed, including the possibility of expert evidence and the production of documents, as well as the time allowed for the production of evidence. As a third component, the court focused on the summary nature of the proceedings, in particular on the limited availability of hearings. This may also have a bearing on ODR mechanisms with very limited communications.

Impartiality in the conduct of the proceedings was said to entail an obligation of equal treatment of the parties. In the context of ODR, this may raise a concern with respect to ex parte communications (between the dispute resolver and one party only)[81].

A brief and clear description of an online arbitration process is provided by Online Resolution:

> "Online Arbitration is similar to traditional arbitration, except that all communications take place online. The Online Arbitrator appointed for your case will be an experienced professional, who knows the subject area of your dispute.
>
> The Arbitrator "convenes" the arbitration, manages the process efficiently, maintains confidentiality, and issues a decision based on the evidence presented. The Online Arbitrator coordinates and schedules the presentation of data, makes rulings on admissibility of evidence, keeps the process moving forward, and renders a decision promptly after the conclusion of the hearing. Of course, in the online setting, all communications, including the presentation of evidence, is supplied in electronic form-text, image, audio, or video. Participants in Online Arbitration agree in advance to abide by the Arbitrator's decision, and that the award may be filed in any appropriate court".

Part I-4 UDRP

The Uniform Dispute Resolution Policy (UDRP) establishes a procedure for the online resolution of disputes which concern domain names. It has been laid down by the Internet Corporation for Assigned Names and Numbers (ICANN), which is a private, California-based, non-profit corporation managing Internet domain names and Internet Protocol (IP) addresses.

The UDRP proposes a non-national authority for the resolution of domain name disputes, which avoids the competition and conflicts that arise from the coexistence of a variety of national courts and rules. It operates on reduced costs, because otherwise many cases of

[79] It was also extensively commented on in G. KAUFMANN-KOHLER and H. PETER, *Formula One Racing and Arbitration*, op. cit.
[80] See Part III-1, below.

cybersquatting would remain unchallenged as cybersquatting is inexpensive and many legitimate registrants would not expend the costs of court proceedings. The UDRP is, however, meant to be applied only to very egregious types of cybersquatting, because of the sensitivity of replacing national laws[82].

The actual dispute resolution under the UDRP is operated by four ICANN-approved providers[83]. Their caseload and the effectiveness of their decisions are such, that the UDRP is currently one of the most important texts in the field of ODR.

The procedure established by the UDRP does not, however, match any of the previously defined forms of alternative dispute resolution. It is clearly neither negotiation nor mediation, but it is also unlike arbitration. It cannot be arbitration for many reasons, the most important being that its decisions are not binding and the procedure is not exclusive of proceedings before courts[84]. The UDRP is therefore analyzed separately in the relevant sections below[85].

[81] See Section IV-2.1, below.
[82] For more details, see M. MUELLER, *Rough Justice, An Analysis of ICANN's Uniform Dispute Resolution Policy*, November 2000, http://dcc.syr.edu/report.htm, p. 4.
[83] This point is extensively addressed below.
[84] See the section *Results: binding character and enforcement*.
[85] See Section II-1.5, below. See also the description of the WIPO proceedings, applying the UDRP rules, by T. SCHULTZ, available on request from http://www.online-adr.org.

CHAPTER II

GENERAL CHARACTERISTICS OF ODR MECHANISMS

Following the general presentation of the different types of online dispute resolution mechanisms, we will now turn more concretely to the survey conducted. In order to depict the state of the art, it is necessary to first describe the current fields of activity of ODR or the types of disputes resolved by ODR. In parallel, we will set out the categories of parties to such dispute resolution and the types of relationships that are handled, such as those occurring in B2B marketplaces, on auctions sites or in administration-to-citizen cases, and those that take place in either a domestic or a transnational context. Many online dispute resolution providers offer not only actual dispute resolution, but also other related choices, such as trustmark programs, legal counseling, recommendations, evaluations or prior complaint assistance. Because they serve the same goal and are representative of a diversification trend which characterizes contemporary dispute resolution, these related services will be included in the review.

Part II-1 Dispute resolution: fields and parties

The next sections will focus, for each kind of dispute resolution mechanism, on the following questions: how many institutions provide the kind of dispute resolution in question? How many cases do they solve? Are the procedures rather harmonized or rather heterogeneous? What types of disputes do they handle? Which areas of law are concerned? What are the categories of parties to such dispute resolution[86]?

[86] The controversial issue of defining the term 'consumer' will not be addressed here, as the scope of this report is limited to the presentation of the state of the art of online dispute resolution. An overview of this issue, discussed with reference to EC law, can be found in A. VAHRENWALD, *Out-of-Court Dispute Settlement Systems for E-Commerce, Report on Legal Issues*, Part I, *The Parties to the Dispute*, Ispra, 2000, pp. 12-15, http://www.vahrenwald.com/doc/part1.pdf.

A prior comment on the geographical compounds of the ODR services: no institution offering online dispute resolution limited its services territorially, except for one, which has historical reasons for such limitation[87].

Section II-1.1 Automated negotiation

a) Occurrence

We investigated fifteen institutions that provide automated negotiation. The procedures are all very similar, which probably indicates that the mechanism is close to maturity.

b) For which disputes?

Most of the existing systems of automated negotiation restrict their services to monetary disputes. If non-monetary terms are admissible at one institution, it is only as secondary terms, the main issue of the negotiation still being financial[88]. This is understandable as this form of dispute resolution, most of the time limited to the simple bilateral submission of figures to a logarithm, is *a priori* restricted to cases were the sole question is how much money is due. It is however rather unlikely that this limitation is really imposed by the very nature of the mechanism, as a system could also be designed to settle automatically when both parties agree to a list of non-monetary criteria, although this may decrease user-friendliness.

The fields of activity encompassed are extremely broad, ranging for instance from personal injury and divorce to uncollected judgments and real estate[89], and one institution does

[87] The institution is BBBOnline which limits its services to the USA, because the local Better Business Bureaus plays an important role in the dispute resolution process, at least in the form at the time of the survey, which is standard negotiation with the menace of publishing the complaint by its "oversight body" (no negotiation, mediation, arbitration at the time).

[88] The institution is SettleSmart, the non-monetary terms are called "Additional Settlement Criteria" and can encompass any desired condition.

[89] - ClickNsettle.com provides dispute resolution for all types of monetary disputes, and names the examples of construction, commercial, employment, intellectual property, matrimonial, no-fault, personal injury, product liability and professional liability.
- Cybersettle settles disputes in matters of insurance, personal injury, property damage and "other disputes".
- NewCourtCity affirms that automated negotiation is "Ideal for settling disputes such as small claims, uncollected judgments, collections, e-commerce, buyer / seller, insurance claims, child support, alimony, personal injury, contract, etc..".
- SettleSmart offers automated negotiation for all kinds of financial disputes.
- U.S. Settle is active in financial disputes involving corporations, insurance companies, self-insureds, municipalities, government agencies, claimants and attorneys.
- WebMediate accepts all kinds of business-to-business disputes save those related to family law and business-to-consumer insurance disputes.

not even explicit the types of disputes that are accepted[90]. The most often recurring type, though, is insurance disputes[91].

c) For which parties?

The categories of parties using automated negotiation are also very diverse, from insurance companies and consumers to law firms and governmental agencies; the parties that face each other most often are insurance companies and their clients[92]. Practically no distinctions are made between business-to-consumer, business-to-business, consumer-to-consumer (or peer-to-peer), and administration-to-citizen relationships, except in one case where the services are restrict to B2C relationships[93]. The other institutions provide automated negotiation to almost all kinds of parties[94].

Section II-1.2 Assisted negotiation

a) Occurrence

Assisted negotiation is not as present online as automated negotiation, less as a result of the actual number of institutions providing it than of the number of cases solved. The amount of cases solved is, however, difficult to assess, as very few institutions provide statistics. The providers which do provide statistics sometimes do not list more than thirty-odd disputes, except iLevel and SquareTrade, which report having handled thousands of disputes[95]. As there are some strong incentives to advertise with the amount of cases solved (it induces trust), it is likely that those which do not show figures are rather unsuccessful.

[90] This is MARS (Mediation Arbitration Resolution Services), although the institution declares that its users are generally insurance companies, law firms, businesses, governmental agencies and consumers.
[91] AllSettle.Com's automated negotiation is for instance limited to insurance claims, as is WebMediate's program for business-to-consumer disputes.
[92] AllSettle.Com offers automated negotiation exclusively for insurance companies and insurance claimants and ClaimChoice.com provides this service for accident victims in their relationships with their insurance companies. Lastly, SettleOnline's clientele is said to be comprised primarily of insurance companies, law firms and corporations.
[93] This is BBBOnline, which is a network of consumer organizations.
[94] 1-2-3 Settle.Com and Cybersettle do not show any restriction. ClickNSettle.com states that it accepts all kinds of parties, but that "the system is geared toward business clients" and that 10% of the cases involve consumers. MARS provide dispute resolution through various programs to, globally, consumers; businesses; insurance companies; law firms; and governmental agencies. NewCourtCity offers its services for business-to-business, business-to-consumer and consumer-to-consumer relationships.
[95] See Appendix.

b) For which disputes?

Most dispute resolution providers restrict their services to commercial issues (which is not equivalent to B2B), and often more specifically to e-commerce related matters. Some other institutions offer it for all kinds of disputes[96]. Furthermore, many providers limit their assisted negotiation to disputes involving consumers[97].

This form of online dispute resolution is also often linked to a trustmark or a seal program, usually in one of the two following ways: the first scenario is that the ODR provider contacts the licensee and tries to bring him to negotiate. The licensee is for instance requested to reply to a claim under the terms of the trustmark (the trustmark being for instance removed if the merchant does not comply with the terms)[98]. The second scenario is that the merchant must indicate on its site the option to submit a case to a given ODR provider[99]. However, the number of disputes solved of each kind is not available. As in automated negotiation, insurance matters are sometimes the preferred or exclusive field of some providers[100].

c) For which parties?

Some ODR providers offer assisted negotiation to various categories of parties[101], while others limit their services to transactions involving consumers[102], or to relationships between consumers and the licensees of trustmark programs[103]. No assisted negotiation program is available for administration-to-citizen conflicts.

[96] Online Resolution and the Resolution Forum do not make any restriction as regards the types of conflicts.

[97] - ECODIR offers assisted negotiation for business-to-consumer and consumer-to-consumer on-line transactions. The fields that are excluded are disputes related to illicit content, corporal damages, family issues, financial services, taxation issues and intellectual property issues.
- iLevel deals with all kinds off commercial complaints, both online and offline, but only in business-to-consumer matters.

[98] This is the case of TRUSTe, which provides assisted negotiation for privacy issues, excluding however the claims in which the consumer seeks only some form of monetary damages, or in which the consumer is only alleging fraud or legal infractions.

[99] This is the case of SquareTrade, which offers dispute resolution for online auctions. SquareTrade, which provides both a trustmark program and online dispute resolution, is proposed for conflicts that arose subsequently to an activity on the trustmarked site

[100] ClaimChoice.com offers assisted negotiation for claimants injured in auto or premises accidents who refer to their insurance company.

[101] For instance SquareTrade, which provided assisted negotiation for business-to-business, business-to-consumer and consumer-to-consumer relationships.

[102] This is iLevel.

[103] The scope of the assisted negotiation here is to try to guarantee the customer of a certified online merchant that he will respond to a complaint, that he will accept to negotiate with the customer. Such dispute resolution providers were TRUSTe or Web Trader.

d) Remarks

This moderate success is probably due to the more complex nature of the system, which requires actual communication between the parties. On the other hand, there is no *a priori* reason that it should be limited to some fields or types of disputes, except of course where it is legally forbidden to settle out of court. This way of resolving a conflict actually provides a less rough or more subtle justice than the automated form and applies to a broader area, as it can more easily encompass non-monetary claims or solutions. As it is a more open environment than automated negotiation, the types of parties which are likely to be willing to participate in such a process are slightly different. For instance, and the issue is the same for mediation, assisted negotiation may not be suitable when the power balance is not even. It is indeed unlikely that a sole plaintiff, even if legally aided, accepts to negotiate with a powerful government agency. Plaintiffs in these cases would want the protection afforded by a court proceeding, or better a class action, and maybe arbitration[104]. The question of the balance of powers may explain why no assisted negotiation program was available for administration-to-citizen conflicts.

It may be assumed that the fact that assisted negotiation is primarily used for e-commerce related conflicts derives from the fact that commercial disputes are less emotional than issues of personal injury, divorce and even property damage. Being less emotional, it might be that they are more likely to succeed in an open negotiation (as opposed to 'blind bidding'). Moreover, the fact that assisted negotiation is available specifically for consumers is most likely due to the reality that complaint assistance and assisted negotiation are very similar[105].

Section II-1.3 Mediation

a) Occurrence

The most common form of ODR is mediation, with over 20 institutions providing it. However, mediation relies extensively on its confidential aspect, one consequence being that

[104] A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 40.
[105] TRUSTe, for instance, is sometimes described as providing complaint assistance and sometimes as offering assisted negotiation.

mediation institutions are difficult to assess regarding their caseload, which is almost never published. The few institutions that provide such figures culminate at a few hundred cases solved, which is quite a success, but still a large number less than the records shown by institutions providing negotiation. It is likely, however, that this form of dispute resolution is actually more often put into practice than assisted negotiation, because it involves a third neutral, which almost certainly increases trust in the process[106].

b) For which disputes?

As for assisted negotiation, there is almost no *a priori* field that is excluded from this form of dispute resolution. Legal restrictions to the use of mediation are very sporadic, as most cases can be settled, and indeed are, out of court. These restrictions are much more common with arbitration, as will be pointed out below. The quality of justice is globally much better than in negotiation, because of the intervention of the third party, while it is less intrusive than arbitration and only binding like a contract. All these features are often advantages for ODR customers of any field[107], and they may explain the extension of mediation to a large variety of types of disputes.

Many institutions offer mediation for any kind of dispute, that is, as one institution states, for "any dispute that is amenable to mediation"[108]. Examples range from e-commerce transactions and medical claims to employment matters, personal injuries and verbal abuse on the web. When there are limitations, they often concern specifically family law issues[109], though disputes arising from commercial online activities are sometimes the only amenable disputes[110]. One institution experimented online mediation specifically in non-contractual fields[111].

[106] On the relation between trust and mediation, see the remarks at the end of the section.
[107] See Section IV-2.4, below.
[108] This is the case of 1-2-3 Settle.Com, e-Mediator, Online Resolution, MARS, NovaForum.com, ODR.NL (E-Mediation), Online Resolution, OnlineDisputes, the Resolution Forum,
[109] For instance WebMediate, which otherwise offers mediation for all kinds of business-to-business conflicts and business-to-consumer insurance disputes, or ECODIR, which provides mediation for the same disputes as assisted negotiation. Only one provider, Mediate-net offered online mediation with specific examples of family disputes, and it closed a while ago. It is now inactive and the domain name for sell. It was a research and demonstration project of the Maryland School of Law. Mediate-net provided mediation for family disputes and conflicts opposing consumers to health care services.
[110] - eResolution provides mediation solutions for e-business disputes,
- Cybercourt plans to accept all kinds of online disputes, but mainly e-banking, e-insurance, ISP, Electronic Data Processing, and online sales,
- Internet Neutral offers dispute resolution for all kinds of online commercial disputes,
- NewCourtCity considers financial disputes, whether they originated online and offline,

c) For which parties?

Consistently, although mediation was sometimes available for all kinds of parties[112], the preferred parties were those involved in commercial relationships (which is not equivalent to B2B)[113]. The institutions with special restrictions limited their services to private parties for one provider[114], and to parties or clients of web businesses who have designated the institution as their dispute resolution provider for another[115].

d) Remarks

The main challenge in conducting online mediation is probably the communication process: parties have to vent. Therefore, highly developed technology and software is needed. New elements that are specific to online communication are currently explored, such as the importance of the screen, which, according to KATSH and RIFKIN, "can enhance convenience, build trust, and raise expectations that the process will provide value"[116].

Section II-1.4 Arbitration

a) Occurrence

Out of the 49 institutions that provide ODR, 20 offer arbitration services. But very few institutions provide statistics on cases filed or resolved, which may lead to think that the

- Online Ombuds Office offers mediation for all kinds of disputes arising from online activity,
- SquareTrade provides mediation for the same disputes as it provides assisted negotiation for,
- Web Dispute Resolutions accepts disputes arising from any commercial or consumer transactions.

[111] This was IRIS, which offered mediation services for intellectual property (comprising domain names) and privacy violations, and for insult and website property claims. It achieved a caseload of over sixty cases.

[112] The institutions that provided mediation without restrictions are 1-2-3 Settle.Com, Cybercourt, e-Mediator, ODR.NL, OnlineDisputes.

[113] For instance, BBBOnline, MARS, NewCourtCity and SquareTrade provided mediation for the same parties as they provided negotiation for (cited above, those institutions accepted only either businesses or consumers), ECODIR, NovaForum.com and Web Trader for business-to-business and business-to-consumer relationships, WebAssured.com for relationships.

[114] This was IRIS, this is explained by the goal of the institution, which is promote individual and public liberties on the Internet.

[115] eResolution, in its association with the Paris Chamber of Commerce and Industry's Center of Mediation and Arbitration.

[116] E. KATSH and J. RIFKIN, *Online Dispute Resolution, Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass, 2001, p. 137.

caseload is not significant. This indication is confirmed by those statistics which are effectively presented[117].

b) For which disputes?

Some institutions provide arbitration services for all kinds of disputes and in any field[118]. Where services are restricted to some fields, the types of disputes handled are often conflicts arising out of online activity[119] and commercial disputes[120]. One institution just mentions "civil disputes"[121], and another one lists family disputes[122].

c) For which parties?

Online arbitration is usually available for relationships involving businesses or consumers[123]. It is very seldom that the services are restricted to business-to-consumer disputes[124] and rather unusual that C2C conflicts are excluded[125]. Two providers include disputes with government agencies in their lists of examples[126], and two others limit their services to the scope of a trustmark program[127]. One venture does not limit its services at all[128].

[117] iCourthouse has handled 350 cases, which is apparently the most successful institution. NovaForum.com has a total of 200 cases submitted to mediation or arbitration, Online Resolution has 30 in assisted negotiation, mediation and arbitration altogether, and Web Dispute Resolution only a handful when adding mediation and arbitration.
[118] This was the case of 1-2-3 Settle.Com (where examples on the filing form were Automobile; Personal Injury; Breach of Contract; Insurance Dispute; Family Dispute; Wrongful Death); Cyberarbitration; MARS; and NovaForum.com (although examples ranged from employment matters to commercial claims).
[119] - FordJourney handles only disputes related to the online purchase of a Ford car on the Ford's website.
- The Virtual Magistrate accepts only disputes that arose from on-line activity, and cites as examples spamming; defamation; inappropriate messages; requesting the removal of a message or a posted web page; contract or property or tort disputes regarding on-line issues; the way a user was treated or referred to on-line.
- WebMediate provides arbitration for all kinds of B2B disputes (it admits all disputes but those related to family law) and B2C insurance disputes.
- eResolution offers dispute resolution solutions for e-business conflicts.
[120] This is Web Dispute Resolutions, which considers any disputes arising from any commercial or consumer transactions; WEBDispute.com, which accepts to handle all kinds of commercial dispute arising from online transactions; and WebMediate, cited immediately above. Word&Bond accepts all kinds of disputes expect those that arise out of injury, illness or death.
[121] It is iCourthouse.
[122] It is the already cited 1-2-3 Settle.Com.
[123] For instance, Cyberarbitration, Cybercourt, eResolution accept business-to-business, business-to-consumer and consumer-to-consumer disputes.
[124] BBBOnline and FordJourney are such providers.
[125] The institutions that do so are NovaForum.com and Web Dispute Resolutions.
[126] Those are MARS (for the precise list, see above under automated negotiation) and ODR.NL, which cite as examples businesses, private individuals and government organizations.
[127] These are WebAssured.com and Word&Bond.
[128] 1-2-3 Settle.Com provides arbitration for all types of parties.

d) Remarks

Arbitration is the form of alternative dispute resolution that applies legal rules with the highest density, and therefore it is the mechanism that provides the most formal justice. Offline, it tends to become the usual procedure for resolving international disputes. As it is the private equivalent of a court and its awards are binding like judgments, arbitration is submitted to comparatively strict rules for it to have its desired effects. Online arbitration providers must thus ascertain that their mechanisms conform to such rules: the challenges to online arbitration "lie more in the realm of law than technology"[129].

Section II-1.5 ICANN's Uniform Dispute Resolution Policy

a) Occurrence

The scarcity of reports on actual caseload leads one to believe that the actual online dispute resolution activity is still quite limited, except in the domain name area, specifically in connection with the application of the Uniform Dispute Resolution Policy (UDRP). The four institutions approved by ICANN (i.e. the World Intellectual Property Organization, eResolution, the National Arbitration Forum and the CPR Institute for Dispute Resolution) processed over four thousand cases in less than two years[130]. In addition, some institutions, like IRIS, also offer dispute resolution for domain name matters, but they do not apply the UDRP: IRIS, for instance, seeks to resolve these cases by means of mediation[131]. As no statistics are published, their caseload is probably minimal.

[129] E. KATSH and J. RIFKIN, *Online Dispute Resolution*, op. cit., p. 138.
[130] On June 27th, 2001, statistics showed a caseload of, respectively:
- 2605 for WIPO (2569 gTLD cases and 36 ccTLD cases at the end of May 2001, see http://arbiter.wipo.int/domains/statistics/results.html and http://arbiter.wipo.int/domains/statistics/results-cctlds.html),
- about 300 for eResolution (http://www.eresolution.ca/services/dnd/decisions.htm),
- 1265 for the National Arbitration Forum (see http://www.arb-forum.com/domains/domain-decisions.asp > search without entry) and
- 25 for CPR (see http://www.cpradr.org/ICANN_Cases.htm).
[131] IRIS handled 31 "IP or trademark violation claims" by means of mediation.

b) Remarks

There are many reasons for the success of the UDRP. Some of them are specific to the UDRP, ICANN or the institutions applying it. Others are linked to the technical feasibility of online dispute resolution.

The first reason is certainly the historical and political participation of WIPO in the preparation the UDRP[132]. It may be that ECODIR, if it is developed further than its current project framework, will have a large success, as it is a project promoted by the EU. Institutions that are, or have been, linked to political bodies may just have a more thorough understanding of the practical difficulties and the real political intentions.

The second reason is certainly the overall transparency of the procedure (decisions are available online immediately, in full text and with the names of the parties and the panelists). This characteristic of the procedure is particularly important nowadays, as one of the main problems of e-commerce is the confidence of the users.

The third reason is the fact that it is self-executing: two-odd months after filing, the case is closed (subject to a party bringing court proceedings) and there is no risk of foreign authorities blocking the outcome.

The fourth reason is the fact that the URDP clause is imposed on every registrant. Accordingly, the owner of a trademark can force the registrant to undergo the procedure, which is undoubtedly a strong factor of success.

The fifth reason is the fact that the subject of domain names is publicity-sensitive: when Julia Roberts, Bruce Springsteen or Sting are parties to a decision that is reported in full text, the process definitely attracts attention.

The sixth and last reason is an all-electronic interaction: communication has to be electronic under the Policy and this forces persons to get acquainted with this media, which in turn uncovers its facilitative character.

[132] See the appendix on WIPO.

Note that the dispute resolution mechanism that was brought to life by the UDRP may even extend to other fields, as eResolution seemingly plans to provide dispute resolution for Keywords[133], using a procedure close to ICANN's.

Part II-2 Additional services provided

ODR institutions often provide a large variety of additional services besides negotiation, mediation or arbitration. The most important of those facilities have therefore been reviewed, mainly when they were proposed by institutions offering also actual dispute resolution services. The survey also extends to services that are the sole activity available from a given website.

These services can be classified in the following categories: legal assistance; dispute prevention and management; evaluation; recommendation; complaint assistance; dispute resolution clauses; publication of complaints; trustmarks or seals; consumer information; training in ADR and ODR; legal literature; and portals. The following paragraphs present the state of the art in respect of these services.

- *Legal assistance* is support in search for counsel, by a list of attorneys posted on the web or by way of contacts with ODR personnel. It is proposed in a few cases[134].

- *Dispute prevention* includes, for instance, checks of employees prior to employment, the use of standard business contracts and forms, and training of employees and employers. If disputes nevertheless arise, the institution provides *dispute management*, in the form of a program for communication improvement between employees end employers[135]. Other "dispute avoidance resources" are restricted to the assistance in drafting dispute resolution clauses[136]. All of those programs are proposed mainly in employment disputes.

[133] Keywords, developed by RealNames, is a new addressing system, which replaces URLs by memorable words. For instance, instead of http://www.unige.ch, the Internet address of the University of Geneva, if the Keyword was registered, would be just "University of Geneva", without http, www or .ch.
[134] The institutions that offered such a service were e-Mediator, NewCourtCity, IRIS and ClaimChoice.com.
[135] This is the example of NewCourtCity. Its dispute-related policy is based on three major steps, each being further divided into different possibilities. The three major steps are Dispute Prevention (NewCourtCity proposes "employment, e-commerce and contract clauses for all personal and business agreements" and "Pre-Employment Background Screening"), Dispute Management (apparently only for employment disputes) and then Dispute Resolution (automated negotiation and mediation, for all types of disputes).
[136] This was NovaForum.com.

- *Evaluation* can either be expert evaluation or a procedure to test the merits of a case. It was available on a few sites in both forms. *Expert evaluation* does not require the cooperation of the opponent. An independent expert examines the legal and technical issues and then assesses the merits and the value of the claim[137]. The parties can even afterwards declare the results to be fact-binding[138] or entirely binding. It is sometimes also possible to publish the claim if the other party is not cooperative[139]. The second form is *reality testing* by "mock trials", which can be conducted either privately, with retired judges for instance, or with juries[140]. This system can be declared to be binding by the parties[141].

- *Recommendation*, which is simply a mediation tool that is specifically labeled, is provided by one dispute resolution program[142]. If the parties do not reach an agreement through mediation, the institution renders a motivated recommendation. Such a recommendation is not binding, unless the parties have entered into a prior agreement to this effect. The parties can then either accept or decline the recommendation.

- *Complaint assistance* is a form of assisted negotiation often provided in seal or trustmark programs. Some trustmarks require the certified merchant sites to provide consumers with simple and effective means to submit their concerns directly to the certified website. If the certified site does not reply satisfactorily, the ODR institution steps in to settle the dispute[143]. Other trustmark institutions play the role of intermediary, forwarding complaints to certified sites[144] or calling on them to take action[145]. Some institutions also recommend appropriate ways for the customers to deal with the merchant sites[146].

- *Assistance in drafting dispute resolution clauses* is provided by some institutions, for negotiation[147], mediation[148] or arbitration[149].

[137] Offline, expert evaluation is what independent expert claim adjusters do. They are commonly used by insurance companies to investigate and evaluate claims and then advise on how the case should be settled.
[138] This is the program offered by Online Resolution.
[139] Making the outcome entirely binding (of course, it would be only binding like a contract) and publicizing the claim is possible at iCourthouse.
[140] This service is proposed by 1-2-3 Settle.Com and clickNsettle.com, were deliberations can even be video taped for subsequent analysis by the parties.
[141] When made binding, this system comes close to arbitration.
[142] The program is ECODIR.
[143] This is exactly the procedure set up by TRUSTe and Web Trader.
[144] BBBOnline and WebAssured.com play such a role.
[145] iLevel does so.
[146] The Online Ombuds Office adopted this system.
[147] NewCourtCity provides standard agreement, business contracts and forms with a clause for automated negotiation and mediation.
[148] Internet Neutral, for instance, has developed a standard mandatory mediation clause that can be inserted into commercial contracts.

- The *publication of complaints* is another tool used in seal or trustmark programs; it has several variations. One of the variations is the program requiring the licensees to invite their consumers to post comments about their experience with the merchants on special forums[150]. Another variation is the publication by the ODR institution of either the results of a negotiation between consumer and business, or the lack of response of the business[151].

- *Trustmarks or seals* use a rather broad variety of tools. These tools can be the obligation to establish internal procedures for the handling of conflicts[152], the contractual compulsion to abide by the online dispute resolution system and to be bound by its outcome[153], or simply declarations of good intentions[154]. These tools are often incorporated into a code of conduct. Occasionally, the certifying company conducts a background investigation on the customer service of a site[155]. The licensees are usually entitled to display the seal or the trustmark. At one institution, the seal program comprises a limited amount of dispute resolution services for free and discounts on subsequent resolutions[156].

  Globally, trustmarks and seals play an important role in e-commerce and in online dispute resolution. Indeed, one of the current key issues of this new form of commerce being the trust of its users, certification programs such as seals of trustmarks can certainly have a strong influence on the success of a merchant site. They may very well be the chief mechanism for the promotion of self-regulation[157] and consumer confidence in e-commerce[158].

[149] NovaForum.com assists its members in drafting such clauses for customer contracts, which require the customer to engage in mediation or arbitration. WEBDispute.com provides also a mandatory arbitration clause, which is even available for consumer contracts. To the extent that an institution promotes the use of mandatory arbitration clauses in consumer contracts, it interferes with the right of consumers to legal recourse, which is a central principle of consumer protection (see the note of the survey conducted in December 2000 by *Consumers International*, and called *Disputes In Cyberspace*, p. 52, available at http://www.consumersinternational.org/campaigns/electronic/adr_web.pdf).

[150] It is a requisite of the trustmark delivered by Web Trader.

[151] This is what iLevel and iCourthouse do.

[152] See for instance Web Trader or MARS for such a program.

[153] This is almost the wording of the WebAssured.com Code of Practice.

[154] Web Trader has a code of conduct that states that the merchants has to deal with the complaint "quickly and effectively" and Word&Bond provides its trustmark to the merchants who agree to describe what they sell, promise to deliver the goods in time and promise to abide by the award rendered by Word&Bond.

[155] MARS does so.

[156] NovaForum.com offers this seal program. For other seal or trustmark programs, see also OnlineDisputes, SquareTrade and TRUSTe.

[157] A. WIENER, *Regulations and Standards for Online Dispute Resolution. A Primer for Policymakers and Stakeholders*, version as of February 15, 2001, http://www.mediate.com/articles/awiener2.cfm, p. 3.

[158] F. WALTHER, *E-Confidence in E-Commerce durch Alternative Dispute Resolution*, in *Aktuelle Juristische Praxis (AJP)*, 7, 2001, pp. 755-766.

- Sometimes online dispute resolution institutions also simply provide *training and information*, such as general consumer information[159], or links to specific legal literature[160]. One company offers ADR qualification courses and training in ODR techniques[161].

- Finally, some sites are merely *portals to online dispute resolution providers*: they provide links to ODR institutions. The first such site pertains to ICANN's UDRP for domain names[162] and another is planned to refer to B2C ODR systems[163].

[159] WebAssured.com, for instance.
[160] NewCourtCity, for instance, offers legal literature online in about 40 different fields. It is reserved to its members, although membership seems to be free.
[161] This is the Resolution Forum.
[162] The DomainMagistrate played this role.
[163] This is ICC's planned Dispute Resolution Clearinghouse.

CHAPTER III

ISSUES RELATED TO ELECTRONIC COMMUNICATION

Lawyers work mainly with words. These words have to be communicated to other parties, the existence of rights and obligations has to be expressed, arguments have to be uttered, and reality has to be described to meet law. Put simply, resolving disputes requires communication. The capacity of the parties to communicate, among themselves or with third party, may be decisive for the resolution of the dispute. In the offline world, the dispute resolution processes have been developed on the basis of the communication abilities of the majority of the potential parties, i.e. the "standard users" of the systems. In the online world, it may go the other way round: communication means may have to be developed according to the requirements of dispute resolution. Due process in arbitration requires appropriate opportunities for the parties to express arguments, and a realistic probability for the parties to reach an agreement in mediation depends on their opportunity to vent. Negotiation may be less sensitive to sophisticated communication occasions, as the example of automated negotiation shows, but it still requires the availability of appropriate tools. Lack of proper communication may jeopardize due process, it may lead to insufficient quality of justice and it may reduce trust in the dispute resolution process[164]. Moreover, data security is a recurrent concern of Internet users, to the point that their demand is higher regarding the online than the offline world. Finally, dispute resolution by adjudicative means requires evidence, which may necessitate particular electronic communication tools.

Part III-1 Means of communication for quality of justice

One of the characteristics of cyberspace is the worship of speed. In the field of law, however, speed induces mixed feelings. As courts become slower, demands arise for a better access to justice and even for a better quality of justice. One answer is the emergence of new systems of dispute resolution, which are built to be fast. But speed carries its risks too: a mechanism that is too fast might not provide quality justice either, and may be sanctioned for violation of due process. Unfortunately, it is very likely that there is no such thing as a

[164] On the importance regarding trust of communication in online processes, E. KATSH and J. RIFKIN, *Online Dispute Resolution, Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass, 2001, p. 99.

minimum time threshold for a dispute resolution mechanism to be labeled acceptable in the eyes of justice. However, an area more conducive to investigation may be the communication itself. The questions here are: how much communication is needed for an ODR system to render quality justice and what type of communication?

Seeking proper means for evidence and argumentation, as they take balance against the need for speed, is exactly what the English High Court did in the decision referred to above on due process in a fast-track procedure[165]. Analyzing this arbitral process, the High Court emphasized the possibility for the parties to present evidence; more precisely it reflected on the number of meetings that justice required. In ODR, the problem is not so much the number of "meetings" that take place, but what communication goes on during these sessions. For instance, would simple email exchanges be enough? In the High Court decision, the procedure was arbitration, and the issue due process. Of course, these principles are not applicable as such in negotiation or mediation, but the issue of the general quality of justice may just depend of the same analysis of the communication means that are available.

Section III-1.1 In negotiation and mediation

In negotiation and mediation, there is no proper hearing of the parties. However, in both of these dispute resolution processes, the parties have to be able to express themselves. The issue here is not due process, as this principle is not applicable to its full extent, but the general quality of justice. Of course, if the parties decide that exchanging blind bids in a system of automated negotiation is enough communication, there is nothing objectionable about it[166]. Nevertheless, different possibilities of communication can lead to different outcomes in more open environments, like assisted negotiation or mediation. In the latter field, the issue has already been much treated in its offline version. This will therefore be our starting point.

As a mediator once wrote, "in mediation, language is almost all we have to work with"[167]. He continued by arguing that communication in mediation, as any communication, is full of subtleties and that these subtleties can possibly predetermine the possibility of a settlement, for instance by switching the atmosphere from war-like to journey-like. The parties

[165] This decision was discussed in the general section on arbitration, above. It was *Walkinshaw* v. *Diniz*, reported in *Arbitration International*, Vol. 17, No. 2, pp. 193-210, and commented in G. KAUFMANN-KOHLER and H. PETER, *Formula One Racing and Arbitration*, op. cit.

[166] Almost all institutions providing automated negotiation restrict the possible means of communication to web-based communication, more specifically to make bids on a secured website. Then again, some institutions go further and allow emails or phone calls (AllSettle) or even postal mail, email, fax and telephone (U.S. Settle).

[167] J. HAYNES, *Metaphors and Mediation*, Mediate.com, http://mediate.com/articles/metaphor3.cfm.

often go into mediation being shut away in their entrenchment: the defendant for instance can usually not easily be brought to talk about quantum, since he is not liable and quantum is therefore not relevant[168]. The mediator has to "get each party off its 'perch' and towards negotiating"[169]. For this purpose, he must first understand what the parties want, which is not always money[170], and then must build up trust between himself and the parties and between the parties themselves. This activity relies widely on atmosphere and communication nuances. For this purpose, it is often fundamental to observe body language and inflections in tone and voice, because they provide indications on the degree of trust, the willingness to reach an agreement, and the parties' genuine concerns and interests. To be best interpreted, these indications have to be related to cultural and ethnic background, as well as to such factors as age and gender[171].

It follows from these reflections that institutions providing mediation should offer at least[172] both common and private discussion rooms to play with trust and atmosphere, and real-time communication facilities for a maximum of spontaneity. Research has shown that persons with good typing skills and a connection with high data flow can easily dominate chat-room meetings[173]. The preferred real-time communication tool should be videoconferencing or at least teleconferencing. In some specific situations, however, sequential, broken up and relatively slow communication can be a success, as other research revealed that typing and the resulting time lag caused persons to pay more attention to the substantive content of messages, lessened the emotional stress brought up by conflict resolution and made it easier to overcome barriers of socioeconomic differences[174].

Assisted negotiation are almost always conducted only by emails.

Mediation procedures show more variations. The different types of communication can be classified in the following scenarios:

[168] A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 23.
[169] Ibidem,
[170] It could simply be dignity, especially in professional indemnity cases, see A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 44..
[171] R. S. GRANAT, *Creating An Environment for Mediating Disputes On the Internet*, op. cit.
[172] This implies of course that the mechanism seeks to provide something like "full-range" mediation and not "automated mediation", as one institution does (OnlineDisputes).
[173] A. DUVAL SMITH, *Problems in Conflict Management in Virtual Communities*, op. cit.
[174] G. R. SHELL, *Computer-Assisted Negotiation and Mediation: Where We Are and Where We Are Going*, in *Negotiation Journal*, 11, 2, p. 117-121.

- Some proceedings merely implement the *"shuttle diplomacy" strategy*[175], that is the process where the mediator goes from one private discussion with a party, or caucus, to another one with the other party. At some institutions, the rules allow in fact only sequential communication by email with the mediator: a party sends a message to the neutral, who comments on it and forwards it to the other party, and vice versa[176]. The rules of other institutions are less strict about the order of the emails, but limit the number of rounds of replies[177]. However, no institution forbids direct communication between the parties[178].

- Other institutions are limited to *constant 'triangular' discussions*. These procedures are of two sorts. Some require the parties to leave messages in a common discussion room, thus without real-time communication[179]. Others provide solely a chat-room, where the parties and the mediator communicate as a group, in real time[180]. Both of these kinds of procedures lack the possibility of caucuses, considered in offline mediation as forming the "engine room" of the process.

- Finally, some online mediation programs offer *both common and private communication* possibilities[181]. Some of these programs even allow experts, witnesses and attorneys to participate in the common communication[182].

The channels used to implement their communication are the following: emails; telephone calls or teleconferencing; web-based real-time conferencing or message posting; videoconferencing; fax; voice mail. Postal mail and even hand delivery are rare, they are mentioned on one website[183]. Often, the range of available communication methods are not really clear, probably because of a general feeling that such programs have to remain flexible.

[175] A. BEVAN, *Alternative Dispute Resolution*, op. cit., p. 23, and the entry *Alternative (law/justice)*, by A.-J. ARNAUD and J.-P. BONAFÉ-SCHMITT, in *Dictionnaire encyclopédique de sociologie et de théorie du droit*, A.-J. Arnaud (ed.), Paris, LGDJ, p. 14.
[176] e-Mediator holds such a proceeding: "After a message has been sent the sender should not send another message (except to clarify a point) until a response to the first one has been returned".
[177] MARS allows, as only communication in the mediation procedure, three rounds of replies by email.
[178] The parties could always at least exchange emails with copies to the mediator.
[179] Online Resolution's rules hold the following "Check and respond to messages in the Resolution Room at least daily, or on a schedule agreeable to the parties and the mediator".
[180] It is the case at Cybercourt.
[181] 1-2-3 Settle.Com offered confidential and "open" email correspondence, and the Resolution Forum allowed generally "public" and private communication.
[182] NewCourtCity seems to provide separate communication channels for these three types of contributors.
[183] These two forms of communication, which will not be further presented, were mentioned at 1-2-3 Settle.Com.

For this reason, the descriptions below may sometimes not be absolutely accurate, but rather reflecting globally the state of the art.

- *Email communication* is available at almost every institution, although some of them prefer to limit the means to web-posting[184] or different types of conferencing[185], once in addition to facsimile[186]. Some programs actually restrict communication to emails[187].

- *Telephone calls or teleconferencing* is available at a reasonable number of institutions[188], but it is of course never an exclusive means of communication, or else the mechanism would not qualify as ODR.

- Web-based communication takes the forms of *real-time chat*[189], *instant messaging*, *online conferencing system*[190] or *web-posting*[191].

- *Videoconferencing*, which is much debated[192], is often proposed[193].

- *Fax* is only available in three programs[194].

- *Voice mail* is accepted by one institution[195].

Section III-1.2 In arbitration

Due process is a fundamental requirement of arbitration. A process that does not grant due process either is no arbitration at all or at the least will lead to an award subject to annulment. A full review of due process in ODR would exceed the scope of this paper. It is thus proposed to concentrate on the production of evidence and argumentation. If the relevant

[184] At iCourthouse, all communications are web-based. Note that personally identifying information such as names or racial, ethnic, or religious identifying information are banned from the site.
[185] MARS offered web-based communication and teleconferencing as well as videoconferencing.
[186] Web Dispute Resolutions proposed videoconferencing, telephone and fax.
[187] At iLevel, most of the resolution process occurs by email, and Online Resolution offers only mediation by emails.
[188] The programs which offered this tool were those of 1-2-3 Settle.Com, e-Mediator, eResolution, MARS and Web Dispute Resolutions.
[189] Chat rooms were available at Cybercourt, eResolution, Internet Neutral, NewCourtCity, Online Ombuds Office
[190] Online conferencing was the tool mentioned by NovaForum.com and the Resolution Forum
[191] Information about some programs were limited to “web-based communication”. The relevant institutions were 1-2-3 Settle.Com; iCourthouse; MARS; OnlineDisputes; and SettleOnline.
[192] The argued disadvantages are the often poor quality of the images, the costs, and the insufficient control of what goes on beyond the screen. In part at least, time will take care of these drawbacks.
[193] The institutions that accepted videoconferencing were Cybercourt; e-Mediator; Internet Neutral; MARS; NovaForum.com; and Web Dispute Resolutions.
[194] NovaForum.com, OnlineDisputes, and Web Dispute Resolutions.
[195] This was OnlineDisputes.

evidence and arguments cannot be adduced by appropriate means, the process may run the risk of not being characterized as arbitration or not withstanding judicial review.

The categories of communication tools available in arbitration are almost the same as in mediation, that is emails; telephone calls or teleconferencing; web-based communication; videoconferencing; fax; and, for arbitration, in-person hearings.

- *Emails* are accepted everywhere; two institutions provide arbitration exclusively through emails[196]. Briefs like documents, evidence and arguments can always be submitted by emails.

- The *telephone* as a communication tool is quite often available[197].

- *Web-based communication* is available for the submission of briefs[198] or as online conferencing[199].

- *Videoconferencing* is offered in a few programs[200].

- *Fax* is rarely provided[201].

- Three procedures still offer *in-person hearings*[202].

Part III-2 Confidentiality and publication of results

As KATSH argues when comparing ADR and ODR, every such process can be expected to produce more satisfactory results when each party is assured that the information gathered during the proceeding will not be further communicated, unless permission is given to do so. On the other hand, the publication of the results of ODR proceedings seem to be essential for inducing trust in ODR. If one cannot know what results these proceedings produce, one would find it very hard to assess and thus trust them. Thus ODR providers should strike a balance and find solutions that accommodate these two conflicting needs.

[196] These are IntelliCOURT and the Virtual Magistrate.
[197] The institutions allowing it were for instance MARS; Web Dispute Resolutions; WEBDispute.com; and WebMediate.
[198] 1-2-3 Settle.Com.
[199] MARS and NovaForum.com.
[200] At, for instance, MARS, NovaForum.com, and Web Dispute Resolutions.
[201] NovaForum.com and Word&Bond.
[202] FordJourney (FordJourney allows all kinds of communications), WEBDispute.com, and WebMediate.

Moreover, offline ADR takes place in physical spaces, and the parties can therefore, from the context alone, assume some confidentiality, which is not the case online: online documents are copied more often and deletion can hardly be proven[203]. Confidence in electronic communication still remains to be built up. Therefore, ODR institutions should at least provide clear provisions on confidentiality.

Section III-2.1 In automated negotiation

- Almost all institutions that provide automated negotiation operate on the basis of *blind bidding*: each party expresses an offer or a demand in figures, and these figures are not revealed to any individual, nor to the other party nor to any other person.

- Only one provider works differently: it *displays the offers and demands* on a website accessible to both parties[204].

- The institutions that provide automated negotiation usually state that *the submitted figures are confidential and that they will not be revealed to anybody*, no matter if the case settles or not[205].

- One provider, however, "*reserves the right to publish outcomes in the future*"[206].

- Another institution provides, on special request, "*bidding statistics* available for management analysis and for bidding guidance"[207].

Section III-2.2 In assisted negotiation

- Institutions which provide assisted negotiation usually have a privacy policy stating that *all information gathered during the proceedings is kept confidential*[208].

- However, some negotiation providers *post information about disputes that were brought before them on their repository site*. The posting occurs in two situations: first, if a B2C

[203] E. KATSH, *The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace*, A Working Paper for the NCAIR Conference on ODR, Washington, DC, May 22, 1996, http://mantle.sbs.umass.edu/vmag/disres.html.
[204] The institution that allows the parties to see their opponents figures is The Claim Room.
[205] 1-2-3 Settle.Com, ClickNsettle.com, NewCourtCity expressly state that "case results are not published"
[206] The institution that reserves this right is AllSettle.Com.
[207] The Claim Room provides these statistics.
[208] Claim Choice, Online Resolution, The Resolution Forum, for instance, states that "All information is kept confidential and case results are not published", and SquareTrade affirms that it "does not publish the results of the case, given the strict confidentiality of the process".

dispute does not settle[209] and, second, if a trustmark has been revoked because of infringements by the merchant[210].

- One institution provides a clause in its trustmark program that requires the merchant to *post comments of customers on its website*[211].

- One negotiation provider handles the gathered information in principle confidentially, with the exception that these *information are transmitted to the mediator*, who steps in if the negotiation phase fails[212].

Section III-2.3 In mediation

Mediation is almost always confidential and without prejudice. There is an intrinsic need for this: in order to achieve satisfactory results, mediation has to take place in a context in which the parties and attorneys can communicate openly, without fear that these statements may be used against them outside of the mediation. The possibility to discuss facts and issues openly is necessary to come to solutions and settlement. In practice, this means that the agreement to mediate usually includes specific provisions that the mediator is not allowed to give evidence or produce documents or other information in court or in an arbitration[213]. In online mediation, confidentiality is implemented in the following ways:

- The *proceedings proper are always private and confidential*: outsiders are never allowed to attend the sessions, nor do they have a right of access to the record of the proceedings. Some institutions do not, however, address the issue of confidentiality on their website[214].

- Only few providers state that, if the parties seek legal recourse after having undertaken mediation, *the mediators cannot be called upon to divulge any information disclosed during the mediation*[215].

[209] At iLevel, "All communications are held confidential until both sides have had at least two opportunities to reconcile. Failing a reconciliation, and with the member's [the member is the customer] authorization, all information gathered is posted to the community repository and made available to the public. Any member of the public has access to this detailed case information, which is searchable by vendor name, phrase, and type of transaction, and which includes copies of email correspondence between iLevel, the complainant, and the vendor."
[210] TRUSTe: "From time to time (at least twice/year), TRUSTe posts statistical reports on its operations, as well as summary reports (including the name of the licensee) of cases deemed worthy of reporting – e.g. those which resulted in revocation of the TRUSTe seal.".
[211] At Web Trader, the licensees must agree to invite their consumers to post comments about their experience with the merchants on special forums.
[212] The information is transmitted to the mediator at ECODIR.
[213] A. BEVAN, *Alternative Dispute Resolution*, London, Sweet & Maxwell, 1992, p. 31.

- One mediation provider specifies that "*once a settlement is reached between the parties, all documents cease to be legally privileged*"[216].

- *Case results are never published as such*. However, information related to the proceedings are sometimes used as aggregate data (the information do not reveal the identity of the parties or enable a dispute to be identified) for research or the publication of reports concerning the activity of a given provider[217].

Section III-2.4 In arbitration

In arbitration, the parties usually expect confidentiality. Nonetheless, as PAULSSON and RAWDING affirm, "a general obligation of confidentiality cannot be said to exist de *lege lata* in international arbitration", with the consequence that "arbitration rules should be drafted so as to create an explicit positive duty on the parts of participants in arbitrations"[218]. The issue of confidentiality has to be divided into at least three aspects: the privacy of the proceedings proper, the confidentiality prior to the award (the two questions of which we consider to be the most relevant here being: can documents disclosed in proceedings before an arbitral tribunal be considered by another arbitral tribunal? Are the parties allowed to publicize the mere existence of the dispute?), and the confidentiality after the award (the publication of the award, or other elements in the record).

The privacy of the proceedings proper is almost always provided. Outsiders are practically never allowed to attend the hearings, nor do they have a right of access to the record of the proceedings. In online arbitration, the practice is that:

- The *proceedings are confidential and private* according to all providers. The issue is never circumstantially described though; the providers only state that sessions and all information communicated are considered confidential.

The confidentiality prior to the award seems difficult to grant, as it would appear difficult for an arbitral tribunal to justify the refusal to consider documents which have been

[214] Cybercourt, ECODIR, IRIS, ODR.NL, the Resolution Forum, do not specify, on their website, their position regarding confidentiality in mediation.
[215] Only e-Mediator, Internet Neutral, Online Resolution, and WebMediate address the issue.
[216] e-Mediator specifies this clause.
[217] MARS, the Online Ombuds Office, OnlineDisputes, WebMediate reserve the right to publish anonymous statistics.

disclosed in proceedings before another tribunal[219] and there seems to be no explicit provision that prohibits a party from publicizing the mere existence of an arbitration[220]. In online arbitration, the state of practice is that:

- No provider addresses the issue of *information disclosed in prior proceedings.*
- No provider expressly states *whether the existence of pending arbitrations are revealed to the public*.
- However, no institution publishes *a list of pending arbitrations*.

With respect to the confidentiality after the award, the practice in online arbitration is that:

- A very large majority of the providers *do not publish any part of the awards*.
- Two institutions *publish their awards* (or plan to do so). The first institution plans to provide only summaries of cases, without indication of names or other identifying information regarding the parties[221]. The second provider states that "decisions, complaints, and supporting materials will be posted publicly unless otherwise ordered by the arbitrator"[222].
- Two institutions propose to publish the results of the cases, if the parties agree to do so[223].
- One institution publishes *statistical, aggregate data* (such matters as the frequency of awards for plaintiffs or defendants)[224].

Section III-2.5 In the UDRP

A dispute resolution provider which operates under the UDRP is required to publish all decisions in full text on the Internet, except when a panel decides otherwise, which can occur in

[218] J. PAULSSON and N. RAWDING, *The Trouble with Confidentiality*, in *Arbitration International,* 11, 3, 1995, p. 303.
[219] Ibidem, p. 305.
[220] Ibidem, p. 307.
[221] This limited publication is operated at OnlineDisputes.
[222] All this information is made public at the Virtual Magistrate.
[223] NovaForum.com and WebMediate offer this possibility.
[224] NovaForum.com publishes statistical data.

exceptional circumstances[225]. The publications mention the parties, and are rather extensive (usually 1'500-2000 words).

The issue of confidentiality is not further addressed in the UDRP.

Part III-3 Protection of electronic communication and data

Section III-3.1 Current state of document security

E-commerce replaces paper by electronic documents in order to benefit from the advantages of IT data processing and communication. But despite their obvious advantages, electronic data support and communication procedures also show important shortcomings.

In a dispute brought before an ODR provider, the data exchanged between a merchant and his customer often constitutes the only evidence for the conclusion and performance of the contract (especially payment by credit card, transfer of software and other data). This data must be submitted to the ODR provider[226], but later modifications of electronic information about the sender, the content of the message, the time and date of sending and reception may occur and be difficult to trace. Simple electronic data only constitute weak evidence and may therefore be repudiated by the person that "appears" as the sender of the message.

Unprotected emails and web-based communications are more vulnerable than communications by paper documents. It is nowadays commonplace to state in both legal and computer science communities that electronic messages need to be protected by electronic means, and that electronic communication and the access to the data must be secured, before, during and after the ODR procedure.

Trust in the protection of sensible data is another important issue. ODR providers state that the information collected is treated confidentially, but this does not necessarily imply that such information cannot be transmitted or accessed accidentally.

Section III-3.2 Risk allocation

In principle, it is the sender's responsibility to secure the information he or she sends. If the validity of the message depends on its reception by the addressee, the sender bears the risk

[225] Par. 4(b) of the ICANN Policy and par. 16(b) of the ICANN Rules.
[226] Art. 10 of the EC Directive on electronic commerce, 2000/31/EC. JO CE L 178/1, July 17th 2000.

of late or non-delivery and of interception by third parties[227]. However, if a customer pays by giving his credit card data, the general rules place the burden of proof for his order on the credit card company. Art. 8 of the EC Directive 1997/7/CE on Distance Contracts[228] holds that clauses that put the risk of fraud on consumers are null and void. The credit card companies often transfer to the merchant the risk of fraud by third parties who intercepted the data, applying charge-back clauses[229]. At the same time, they prohibit the credit card holder repudiating orders accompanied by standard information. However, these clauses are often void, because the user of a credit card cannot be held to keep his credit card number and expiration date secret. The use of electronic protection of sensible data is still not common. Small companies have difficulties in implementing the required standards on their sites. Therefore, payment by credit cards creates a risk for the institution paid by such means, for instance online merchants and ODR providers. Moreover, online merchants and ODR providers may be held responsible for unlawful intrusions into their databases.

Section III-3.3 Means of protection for confidential information

During the initial developments of IT communication tools, the primary focus was placed on functional capabilities, while security remained a secondary issue. The focus now starts shifting. In fact, a long list of requirements needs to be met to raise electronic communication tools to the level of trustworthiness of traditional means. Several products and protocols have been developed to address these issues, but they are neither fully satisfactory nor used on a large scale. Since security lacks in the electronic data processing infrastructure, it becomes particularly important to recognize and define responsibilities.

The protection is needed with respect to both the transmission and the storage of the information. Although these two aspects require different means of protection, they are exposed to identical risks, i.e. the risk that unauthorized third parties access the information (in computer science, this is called protecting the *confidentiality* of a message) and alter it (in computer science, this is called protecting the *integrity* of a message).

[227] This principle of reception is drawn from an overall analysis of the rules on the conclusion of contracts, E. BUCHER, *Obligationenrecht*, 2nd edition, Bern 1988, p. 132. The "mail box rule" in English Law doesn't apply, because of the vulnerability of the electronic mail, D. JOHN, *Internet and Electronic Law in the European Union*, Oxford, Hart Publishing, 1999, p. 106.
[228] OJ L 144/19 (4.6.1997).
[229] B. ROGER/H. GERAINT, *Internet commerce and contract law*, in *Legal Studies* 19, 1999, p. 287-315; A. SALAÜN, *Les paiements électroniques au regard de la vente à distance, Droit de l'Informatique et des télécommunications*, in *Computer & Telecommunications Law Review*, 2, 1999, p. 19-31.

The following paragraphs will present the existing means of protection with respect to the risks just mentioned, first with regard to the transmission of the information (respectively the protection of emails and the protection of web-based communications), and then with regard to the storage of the information. The end of this section will set out the state of practice of ODR systems, and then draw a conclusion on global security solutions.

a) Protection of emails

Standard, unencrypted email is considered, and rightly so, to be about as secure as postcards[230]. Standard emails clearly do not meet the requirements of the protection of the confidentiality and integrity of the information.

Emails can be secured by several means (some of which being available free of charge). The most important are S/MIME and digital signatures. They are discussed below.

i) Secure Multipurpose Internet Mail Exchange Protocol (S/MIME)

A software for message protection that has a strong vendor acceptance and has already been deployed on several well accepted email products is the Secure Multipurpose Internet Mail Exchange Protocol (S/MIME[231]). This protocol enables to authenticate the origin of the email, and to ensure the confidentiality and integrity of its contents. If S/MIME is correctly used, the risk of successful repudiation by the apparent sender during litigation is very low, as S/MIME provides the recipient with strong evidence of the origin or contents of a message.

In addition, S/MIME also offers message confirmation services, i.e. it informs the sender that the message was delivered to a recipient (or at least reached some specific point on its path). In other words, S/MIME provides evidence of delivery. However, this requires that the sender and every recipient obtain a certificate, which must be paid for.

[230] See for instance the numerous recommendations of law offices with regards to the drawbacks of emails: T. LAPP, *Fax und Email-Kommunikation*, http://www.dr-lapp.de/faxmail.htm, or M. HORAK, *Das Internet im Zeitalter des eCommerce*, http://www.iprecht.de/Home/Gebiete/Computer/Internet/eCommerce/eVertrag/ body_evertrag.html.

[231] S/MIME (Secure Multi-Purpose Internet Mail Extensions) is a secure method of sending email that uses the Rivest-Shamir-Adleman encryption system. S/MIME is included in the latest versions of the web browsers from Microsoft and Netscape and has also been endorsed by other vendors that make messaging products. RSA has proposed S/MIME as a standard to the Internet Engineering Task Force (IETF). An alternative to S/MIME is PGP/MIME, described in the IETF (Internet Engineering Task Force) standard called Request for Comments 1521, spells out how an electronic message will be organized. S/MIME describes how encryption information and a digital certificate can be included as part of the message body. S/MIME follows the syntax provided in the Public-Key Cryptography Standard format #7.

Others solutions[232] of security enhancement exist, such as Pretty Good Privacy (PGP), a message-protection software which is popular within various niches of the Internet community and available from the Massachusetts Institute of Technology (MIT[233]). It provides the same quality of service as S/MIME. This solution is free of charge since its development has been assimilated to the philosophy of open source[234]. However, PGP has a severe drawback: it is difficult to deploy for use by non-specialists. PGP defines its own non-standardized Public-Key Infrastructure (PKI[235]), based on mutual trust rather than a formally established authority.

ii) Digital Signatures

The risk of repudiation and alteration of a message can also be reduced by digital signatures. These are cryptographic instruments generally attributed by private or public certification authorities (CA), which are trusted third parties, to previously identified persons, called the signature- or key-holders. If the sender uses such a private key to electronically sign a message, the receiver can verify both the origin and the integrity of the message. By using a public counterpart of the private and secret signature, the receiver can check if the private signature actually corresponds to the sender. On request, the CA provides information about the signature/private key used. If the key of the apparent sender has been used in order to create the signature, a dispute resolver is most likely to hold that the message is attributable to the sender/holder of the private key that was used[236].

[232] For more details on S/MIME/ PGP / openPGP - See overview at Internet Mail Consortium – http://www.imc.org/smime-pgpmime.html.

[233] See PGP definition at http://web.mit.edu/network/pgp.html.

[234] "The basic idea behind open source is very simple: When programmers can read, redistribute, and modify the source code for a piece of software, the software evolves. People improve it, people adapt it, people fix bugs. And this can happen at a speed that, if one is used to the slow place of conventional software development, seems astonishing. We in the open source community have learned that this rapid evolutionary process produces better software than the traditional closed model, in which only a very few programmers can see the source and everybody else must blindly use an opaque block of bits."
See http://www.opensource.org/

[235] A PKI enables users of a basically unsecured public network such as the Internet to securely and privately exchange data and money through the use of a public and a private cryptographic key pair that is obtained and shared through a trusted authority. The public key infrastructure provides for a digital certificate that can identify an individual or an organization and directory services that can store and, when necessary, revoke the certificates. Although the components of a PKI are generally understood, a number of different vendor approaches and services are emerging. Meanwhile, an Internet standard for PKI is being worked on.
PKI also allows secure information exchange on the Internet, by using the Public-Key Cryptography Standards (PKCS), which are a set of intervendor standards. They include RSA encryption, password-based encryption, extended certificate syntax, and cryptographic message syntax for S/MIME, RSA's proposed standard for secure email. The standards were developed by RSA Laboratories in cooperation with a consortium that included Apple, Microsoft, DEC, Lotus, Sun, and MIT.

[236] The IETF is currently working on an important project on digital signatures, http://www.ietf.org/html.charters/xmldsig-charter.html. Rules on digital signatures have been issued by UNCITRAL (*UNCITRAL Model Law on Electronic Signatures*, 5.7.2001, available at www.uncitral.org) and the European Union

Digital signatures can also be used to prove the receipt of the message. If the addressee simply replies to the message by signing it electronically, the sender can prove that the original message has been properly received.

In order to document the moment at which a document was sent, the CA can place an electronic time stamp or watermark on the document. If the technology is implemented in the computer of the sender, it must however be ascertained that the sender cannot tamper with the mechanism (black box).

At a technical level, solutions to this problem exist and start being available. However, they require a trusted authority, which in turn requires an established infrastructure.

b) Protection of web-based communications

Specific means of protection have to be used when information (for instance a submission form) is communicated by being posted on a website, instead of being conveyed by email.

The *Hypertext Transfer Protocol (HTTP*[237]*)* has become the generally accepted transmission protocol for online transactions. Several methods for securing web-based communications are used in addition to HTTP, the most frequent being the *Secure Sockets Layer (SSL*[238]*)*. SSL-secured HTTP provides protection of the confidentiality and integrity of the data transmission.

(*EC directive 1999/93/EC on a Common Framework for Electronic Signatures*, OJ 2000, L 13/12, 19.1.2000). German Law, for instance, goes further than the Directive and facilitates the proof of the authenticity of an electronic message. This authenticity may be admitted by the judge if the receiver can prove that the apparent holder's private key has actually been used (par. 292a of the *German Code on Civil Procedure (Zivilprozessordnung, ZPO)*, available at http://www.staat-modern.de/gesetze; read-only version at http://www.bundesanzeiger.de). In Swiss law, the holder of the key will have to bear the damage due to the misuse of his key if he cannot prove that he took the necessary action to keep the key secret (P*roject of the Swiss Federal Council* (government), http://www.ofj.admin.ch/f/index.html > activités & sujets > signature et commerce électronique).

[237] HTTP was developed by both IETF and W3C – See World Wide Web Consortium current project status on HTTP, http://www.w3.org/Protocols/.

[238] The Secure Sockets Layer (SSL) is a commonly-used protocol for managing the security of a message transmission on the Internet. SSL has recently been succeeded by Transport Layer Security (TLS), which is based on SSL. SSL is included as part of both the Microsoft and Netscape browsers and most web server products. Developed by Netscape, SSL also gained the support of Microsoft and other Internet client/server developers as well and became the de facto standard until evolving into Transport Layer Security. The "sockets" part of the term refers to the socket method of passing data back and forth between a client and a server program in a network or between program layers in the same computer. SSL uses the public-and-private key encryption system from RSA, which also includes the use of a digital certificate.
TLS and SSL are an integral part of most web browsers (clients) and web servers. If a website is on a server that supports SSL, SSL can be enabled and specific web pages can be identified as requiring SSL access. Any web server can be enabled by using Netscape's SSL. See http://home.netscape.com/security/techbriefs/ssl.html.

The fact that SSL is used on a website is indicated by a URL beginning with HTTPS, instead of HTTP. In order to indicate a secured site, a specific symbol appears in the status bar at the bottom of the window (e.g. closed lock or a solid key symbol, unless the navigator which is used does not comply with the conventions on indicating secured and non-secured zones).

However, HTTP is not the only protocol used to exchange data. There are alternatives, for instance "*applets*", which have a high potential for securing communications, but are not yet sufficiently deployed. This is particularly true in existing ODR environments[239].

c) Record management and data protection

Record management and data protection occurs locally on each site (as opposed to the network[240]). ODR system providers must protect both their site storage system (database and web server) as well as each individual record and its related data against such risks as intrusions, virus infections, or disk crashes.

Site storage systems can be protected by firewalls[241]. It is however safer to implement the protection at the level of each individual record, instead of protecting the system as a whole.

Virus infections and disk crashes can be prevented by such means as backup policies and intrusion detection systems.

d) State of practice of ODR systems

The survey shows that current ODR systems rarely use secured emails[242], whereas secured websites are rather often used[243]. However, it is globally more efficient to protect the data transmitted than the communication channel: protecting the data transmitted ensures the integrity of the data from origin to storage, regardless of the media used for the communication and processing.

Globally, one can observe that most present solutions offer some kind of security, but do not have an overall conceptual architecture.

[239] Applet software-like miss sites observed even if prototype were studying academically to help in procedure.
[240] A site, in this sense, can be defined as set of network nodes or one computer.
[241] ODR systems are a specific form of IT systems, and have thus to be protected by the same means, for instance firewalls, which are a set of related programs, located at a network gateway server, that protect the resources of a given network from users from other networks. Firewalls protect directly the storage site systems, and indirectly the individual records eResolution mentions a state-of-the-art firewall to protect its data.

e) Conclusion: no global security solution

As was set out above, IT introduces new risks, for instance risks of unauthorized copies of documents. If security means exist as such, they still need to be implemented on the various platforms used in the ODR context. A global solution to these IT risks requires trusted partners, therefore a consensus on the choice of partners and a decision to accept such a system as a common infrastructure. These requirements are not met yet, and ad hoc measures of security still have to be used.

Nonetheless, the theoretical availability of strategies providing high security creates high expectations, with the result that people often demand more security from IT solutions than from traditional offline solutions. For ODR systems, meeting these high expectations would imply certain drawbacks with regard to complexity, costs and user-friendliness.

It thus appears necessary to distinguish between small disputes, with low amounts at stake (which may be the vast majority of cases), and larger disputes, with higher financial stakes (which may be less numerous). The security expectations may be different for those types of disputes. Hence, the security implementation may also vary to adjust to the legitimate needs of a given category of disputes.

Part III-4 Other technical requirements

In addition to the protection of data, the following other properties are essential for ODR systems[244]: communication means; user interface optimization; standardization; and record management and interoperability. They are discussed below.

a) User interface optimization

i) ODR system time response

ODR systems must be efficient from the point of view of the user. Long delays in the communication (also called "sluggish responses") must be avoided. This implies that the

[242] 1-2-3 settle.com proposes explicitly to use confidential email.
[243] For instance FordJourney, Novaforum.com, 1-2-3 Settle.Com, eResolution.
[244] M. WILIKENS, A. VAHRENWALD, P. MORRIS, *Out-of-court dispute settlement systems for e-commerce.- Report of an exploratory study*, Joint Research Center, Ispra – Italy, 20th April 2000.

computer systems and communication facilities must be sufficiently performing. In this respect, ODR providers must watch their system's potential and define upgrade mechanisms[245].

ii) Simplicity of ODR systems

As users must be able to follow the state of the process, ODR systems must provide a quality system and user interface (the feedback on the state of the process must be clear), and must respect standards provided by high-quality conventions for user interactions (the underlying support architecture must correspond to established configurations and standards).

iii) Adaptative systems

A system is considered to be *adaptative* if it can automatically and "intelligently" adjust itself to new conditions of interaction with users. Adaptative systems can take care of "user profiles" and the user's capacities or disabilities to follow a process. The Web consortium addressed this problem by the *Web Accessibility Initiative* of W3C (WAI[246]). Nevertheless, this solution is not sufficiently deployed in e-commerce, and even less in ODR. The major drawback of such a system is a loss of privacy, because the system is aware of the characteristics of the user. This awareness can be used for collecting data on the users, and can of course be misused, for instance for commercial purposes. This problem is one of the worries of the *Privacy and P3P Initiative*[247] of W3C.

[245] Accelerating the procedure can also be achieved by synchronizing several procedures involving the same complainant or defendant, for instance by "user case rooms". User case rooms are available for instance at eResolution.com and NovaForum.com.

[246] "The power of the web is in its universality. Access by everyone regardless of disability is an essential aspect": Tim Berners-Lee, W3C Director and inventor of the world wide web, http://www.w3.org/WAI/. See also the web Content Accessibility Guidelines 1.0, which explain how to make a website accessible for people with a variety of disabilities.

[247] The Platform for Privacy Preferences Project (P3P), developed by the World Wide Web Consortium, is emerging as an industry standard providing a simple, automated way for users to gain more control over the use of personal information on websites they visit. At its most basic level, P3P is a standardized set of multiple-choice questions, covering all the major aspects of a website's privacy policies. Taken together, they present a clear snapshot of how a site handles personal information about its users. P3P-enabled websites make this information available in a standard, machine-readable format. P3P-enabled browsers can "read" this snapshot automatically and compare it to the consumer's own set of privacy preferences. P3P enhances user control by putting privacy policies where users can find them, in a form users can understand, and, most importantly, enables users to act on what they see.
See http://www.w3.org/P3P.

In addition, since the procedures must be available to as many parties as possible, ODR system providers must carefully define the required equipment and software: videoconferences may not be available to everyone[248] and time zones may be an obstacle[249].

b) Standardisation

ODR solutions must interact with e-commerce environments covering a large number of areas, provided by various manufacturers and involving communication between a large number of partners. Given these facts, conventions are necessary with respect to:

- the choice of the information to be included;
- the format for the presentation of this information;
- the protocols used for the communication of different kinds of information; and
- the security measures.

Present solutions and prototypes of ODR systems make their own choices and can therefore only be exploited within a very limited framework. For ODR systems to be deployable at a large scale and interacting with many different types of e-commerce applications, it is obvious that standards need to be defined. These standards must be based on an agreement and in collaboration between the users and providers of ODR.

c) Record management and interoperability

Information needs to be stored, for instance as evidence and for purposes of general data management. When such data is communicated from site to site, the issue a standard exchange systems arise: data exchange standards have been implemented, they are so-called *Exchange Markup Languages (XML*[250], and in the ODR context *ODR-XML*). The Joint Research Commissions (JRC[251]) of the European Commissions is currently working on the development of an ODR-XML, the latest step in the process being the launching of *the Demonstrator*. The Demonstrator allows a user to "file a new case with notification mail to the

[248] Mediate-net: "the mediator and the parties have access to a variety of electronic communication tools including electronic conferencing, on-line chat with the capacity for private conversations, videoconferencing when the parties have access to the required equipment".
[249] Time zones are a concern of eResolution.com which provides access to time zone information.
[250] The Extensible Markup Language (XML) is the universal format for structured documents and data on the web; see http://www.w3.org/XML
[251] The role of the Joint Research Center of the EC is to provide scientific support to the EU policy-making process by acting as a *reference center* of science and technology for the EU. See http://www.jrc.org.

respondent (claimant), respond to a case (claimant and respondent), view case(s) (claimant and respondent), and finally export a case in XML"[252]. The Demonstrator thus experiments the interoperability and transferability of cases by using an ODR-XML.

A predecessor of the Demonstrator is *CLAIM*, another initiative of the JRC, which was part of the first XML effort, in 1998: the *World-Wide-Web Consortium (W3C)* proposition, entitled *XFDL (Extensible Forms Description Language[253]).* It experimented electronic records that provide non-repudiation evidences by linking form questions to form answers, thus providing evidence of the context of the agreement. No provider, however, presently uses any such XML possibility.

Part III-5 Conclusion and recommendations

The impact of electronic handling and communication goes beyond management and security: electronic communication may constitute evidence to be submitted to an arbitral tribunal or a court. If, for instance, a dispute arises between a buyer and a seller over the existence or the terms of a contract concluded electronically, one of the parties may have to prove the conclusion of the contract (the reception of the offer or the acceptance by the addressee) and its contents.

If no specific tools were used, the parties may easily argue that an email was forged or that the information on the web page, e.g. about standard terms, has been altered since the conclusion of the contract. A debtor of a merchant may, for example, claim that a third person, who came to know about the contractual relationship over the Internet, created an email address with the name of one of the parties[254], counterfeited its identity and mislead the other party.

Therefore, technological means must be used that rule out any reasonable doubt that data[255] produced as evidence have been altered. This is necessary for two classes of communications: between merchant sites and their users and between the parties and the dispute resolver. Which technological means must thus be available?

[252] To access the Demonstrator, see http://odr.jrc.it.
[253] Extensible Forms Description Language (XFDL) is a use of the Extensible Markup Language (XML) that provides a standard way to define the data fields and layout for a complex business or government form for digital storage and display. See Specification of W3C: http://www.w3.org/TR/NOTE-XFDL.
[254] This is extremely easy: many websites offer free email addresses that are registered under any name the user chooses to provide.
[255] The meaning of data is here the traces of prior communication, prior information flow, relevant to the resolution of the case.

In most countries, a dispute resolver can assess the weight of the evidence and, for instance, evaluate emails by comparing them with other sources of evidence, or by comparing them among themselves: if a series of emails includes each time the original message replied to, a certain factual presumption arises. However, there is a need for special rules on the conclusive force of electronic documents[256].

One possibility for ensuring the non-repudiation and non-alteration of a message is the use of particular software protocols (for instance the S/MIME protocol) or of digital signatures, as set out above. Another solution is to send a copy or reference of every communication that could become litigious to a third neutral, for instance an electronic notary public.

General recommendations to ODR providers could be articulated in the following simple terms:

- ODR providers must recognize the risks implied by the technology they use; they must take the necessary measures to reduce them and have a clear policy regarding the remaining risks. This means that the customer must be informed both about the risks and the possibility to reduce them to an acceptable minimum.

- ODR providers must place particular emphasis on issues specific to dispute resolution such as data integrity and protection, system simplicity and accessibility; they must use technical solutions capable of protecting the sensitive nature of the information being handled.

- ODR providers must ensure the compatibility of their system with both merchants and customers, so that electronic evidence can easily be produced. They must agree on a standard of documents (data, record and data exchange models), for example a standardized protocol. This standard would minimize efforts of handling and conversion of documents between the parties and the ODR systems. In this respect, an integration of solutions used in e-commerce and ODR is likely to be central, even in the near future.

[256] According to art. 9 of the *EC Directive on Electronic Commerce*, the member States must amend the rules that exclude the use of electronic documents by using terms like "writing", "paper document", or "presence of both parties". For exceptions to this rule, see Art. 9 (2).

CHAPTER IV

OTHER ISSUES OF ONLINE DISPUTE RESOLUTION

Part IV-1 Dispute resolution clauses

Currently, all ODR systems are based on consent[257], none is imposed by law. In almost all cases, the consent is expressed by dispute resolution clauses entered into electronically. The clauses can either be post-dispute agreements, a reference to which can be found on ODR websites, or pre-dispute agreements, which are less common and more difficult to identify, as they are placed on merchant sites.

Section IV-1.1 Contents of the dispute resolution clauses[258]

On US-based merchant sites, some pre-dispute online arbitration clauses can be found, in B2B as well as in B2C[259]. In Europe, they are limited by law to B2B contracts[260], unless the clause is only unilaterally binding[261]. However, if all of the ten leading merchant sites for the fourth quarter of 2000[262] provide a dispute resolution clause (choice of court clauses in seven cases, and arbitration clauses in the three others), none of these clauses is bilaterally binding *and* referring specifically to ODR. Four of these top-ten sites have a link to ODR: either the

[257] As regards the importance of consent in arbitration, see I-3 above.

[258] The legal issues raised by online dispute resolution clauses, including in particular admissibility, form, incorporation by reference, will not be discussed here, as this report is limited to an empirical study of the state the art and a discussion of some of the most important issues. These questions have however been analyzed in G. KAUFMANN-KOHLER, *Choice of court and choice of law clauses in electronic contracts*, in *Aspects juridiques du commerce électronique*, V. Jeanneret (ed.), Zurich, Schulthess, 2001, and of the same author, *Arbitration agreements in online business transactions*, in *Law of International Business and Dispute Settlement in the 21st Century*, Liber Amicorum Karl-Heinz Boeckstiegel, R. Briner, L.Y. Fortier, K.P. Berger, J. Bredow (ed.), Cologne 2001, pp. 355-369. One may add that even in the US, ADR clauses in B2C contracts have to pass a reasonableness test. The consumer has the chance to oppose to the enforceability of such clauses arguing that the costs are excessively high and therefore commercially unreasonable, R. P. ALFORD, *The Virtual World and the Arbitration World*, in *Journal of International Arbitration*, 18, 4, 2001, pp. 449-461.

[259] For instance Dell.com; eBay; Esasa; Dovebid, Hellobrain.com, all partners of the seal program of SquareTrade. Such clauses are sometimes required by ODR providers that only accept disputes linked to trustmarked merchant sites, for instance ClickNsettle. In these cases, the merchant sites themselves must unilaterally submit to the ODR body by subscribing to a code of conduct: for instance BBBOnline, SquareTrade, and MARS.

[260] For instance Dovebid.

[261] A unilaterally binding clause is provided by FordJourney, which refers to arbitration by the Chartered Institute of Arbitrators.

[262] According to R. P. ALFORD, *The Virtual World and the Arbitration World*, op. cit., these top ten sites are, in descending order: eBay.com, amazon.com, travelocity.com, expedia.com, dell.com, cdnow.com, etoys.com, buy.com, barnesandnobles.com, jcpenny.com.

arbitration clause simply refers to an institution which provides rules including the possibility of online proceedings[263] or the link to ODR is established through a trustmark or seal program and the clause is only unilaterally binding[264]. In these four cases, ODR is only proposed as an additional tool to resolve the conflict: the parties are not bound to use ODR but they are offered the possibility.

A particular form of clauses is also provided in ODR: binding clauses which lead to a procedure that is not exclusive of parallel proceedings and that is not binding. The type of process these clauses are referring to is sometimes called "non-binding arbitration"[265].

Some ODR sites offer assistance for the conclusion of post-dispute agreements, they help in engaging the other side, either for arbitration[266] or for negotiation and mediation[267].

The absence of binding ODR clauses probably indicates that the current function of ODR is economic, that ODR is considered an additional marketing tool or an external customer service[268]. ODR is not perceived as an equivalent alternative to state justice. For economic reasons, however, ODR is often the only solution to grant a party an access to some kind of justice, especially in international contracts where the claims are relatively small (in both B2B and B2C contracts).

The following information or determinations are also occasionally provided by clauses entered into electronically:

- Some arbitration clauses also *determine the laws* the arbitrators will apply[269].
- The *place of arbitration* is sometimes specified[270].

[263] This is the case of Dell, which refers to the National Arbitration Forum.
[264] This is the case of eBay, eToys and JCPenney. JCPenney and eToys are members of BBBOnline, and eBay is member of SquareTrade, both of these programs providing online dispute resolution.
[265] Art. 4 (k) of the UDRP Rules expressly states that the ADR procedure *does not exclude access to courts*. For this reason, UDRP agreements are not agreements to arbitrate, see Part I-4 above. Sites concerned are, for example, domainmagistrate.com and the domain name providers activeisp.com; 1stdomain.net; awregistry.net; mediafusion.com. See also E. KATSH and J. RIFKIN, *Online Dispute Resolution, Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass, 2001, pp. 108-112. As opposed to this, a very clear statement of the exclusive effect of the agreement to arbitrate is provided by Dovebid: "In the event that a civil or administrative proceeding with respect to any dispute subject under this provision is commenced, any other party to such proceeding shall be entitled to demand arbitration with respect to that dispute and shall be entitled to a permanent stay and injunction against such civil and administrative proceeding". In negotiation and mediation, no information was found on the exclusive character of the clause and the process, but it is an intrinsic characteristic of agreements to negotiate and mediate that the access to court is not restricted, at least after the attempt to settle has failed.
[266] MARS; Squaretrade.com and also 1-2-3Settle.com which is not part of a seal program.
[267] For instance 1-2-3Settle.com and ClickNsettle.
[268] EBay, for instance, has replaced its in-house complaint management procedure by a reference to SquareTrade.
[269] For instance Dell and Esasa. On online choice of law clauses, G. KAUFMANN-KOHLER, *Choice of court and choice of law clauses in electronic contracts*, in *Aspects juridiques du commerce électronique*, V. Jeanneret (ed.), Zurich, Schulthess, 2001.

- *Entry of judgment clauses do appear quite often*. They are sometimes meant to limit and sometimes to extend the access to state justice for purposes of enforcement.

It is striking to note, further, that *the language of the procedure* is almost never specified. ODR sites and merchants seem to implicitly accept that English is the language of the Internet and, thus, of any dispute resolution proceedings. If this is unproblematic in B2B dealings, it may be less so in the B2C context.

Section IV-1.2 Implementation of the dispute resolution agreement

- *Individually negotiated clauses and standard terms* have not been found in the ODR context. On the Internet, individual negotiations only occur in the context of certain B2B transactions, in particular specially protected B2B Internet auctions. Such negotiations are thus confidential. B2C contracts are not negotiated; they are not negotiated offline either. This distinction is important because some legal rules restrict the enforceability of dispute resolution clauses incorporated by reference. Those rules seek to ensure the consent of the party which had no influence on the drafting of the standard terms[271].

- *Explicit consent* to the dispute resolution clause is sometimes requested. Indeed, on some sites the customer is asked to agree specifically to pre-dispute resolution clause[272]. It is certainly no coincidence that one of these sites was set up by US consumer organizations[273] and another is located in the EU[274], two contexts particularly sensitive to consumer protection.

- *Formal requirements* sometimes exist: some ODR providers require a fax[275] or even a written paper agreement[276]. In other cases, the customer must accept the standard terms by a mouse click[277].

[270] Dell.com (Austin, Texas; the law a Federal Judge would apply there with out regard to conflicts of law rules); Ebay.com (San José, California); Esasa.com (Atlanta, Georgia; Dovebid.com (Mateo County). On the place of arbitration, T. J. LANIER, *Where on Earth does Cyberarbitration Occur?: International Review of Arbitral Awards Rendered Online*, in 7 *ILSA J Int'l & Comp L* 1, 2000.
[271] A. BUCHER and P.-Y. TSCHANZ, *International Commercial Arbitration in Switzerland*, Basle and Frankfurt on the Main, Helbing & Lichtenhahn, 1989, p. 51 ff.
[272] With respect to post-dispute agreements, see 1-2-3 Settle.Com; eResolution; and SquareTrade.
[273] It is BBBOnline, which requires affiliated members to let the consumer sign binding arbitration clauses separately.
[274] It is FordJourney. In Germany, for example, consumers have to agree by a separate contract. Agreements to be arbitrated have to be separated from the rest of the contract and to be signed by both parties, § 1035 V of the German Code of Civil Procedure (*Zivilprozessordnung*).
[275] For instance NovaForum.com.
[276] For instance ClickNSettle.com (service for commercial arbitration, rule 6.0).

- *Incorporation by reference*: generally, the dispute resolution clause is placed at the end of the general terms and the client accepts the terms as a whole, without specific reference to the dispute resolution clause[278]. No *specific notice or warning* alerting the client of the existence of the dispute resolution clause has been identified[279]. A window is sometimes displayed on the order page, which the client can *scroll down* to view the standard terms[280]. In one case, the terms appear *in full text on a page* on which the user can start filing his complaint[281]. In several cases the terms appear if the user *clicks on a field* leading to "terms and conditions" or "rules"[282].

Part IV-2 Management of the dispute resolution process

Section IV-2.1 Independence

Independence is important for the quality of justice in ODR, which is in turn central for building up confidence in e-commerce. It is important in mediation, because a mediator who is biased may hoodwink the parties into accepting prejudicial agreements or simply induce distrust. In arbitration, the independence requirement is even stronger, because the parties are bound by the outcome of the process. "Non-binding arbitration", as some institutions call their process, likely entails a degree of independence that is in-between mediation and arbitration.

In online arbitration specifically, the requirement of independence seems to be particularly important, for the following reason: arbitration is usually considered to be based on consent. When the parties do not have a workable alternative to dispute resolution, the substance of the consent becomes weak. To compensate for the deficit in consent, if this is at all admissible, one may rely on especially high standards for the procedural safeguards, including independence.

[277] For instance eBay; FordJourney; SettleSmart; and WebMediate.
[278] For merchant sites, see Dell and FordJourney.
[279] BBBOnline requires the signature to appear immediately below the arbitration clause and to include the affiliate's statement that the consumer will not be bound if he does not sign. But BBBOnline requires already that the clause may be contained only in a separated agreement.
[280] For instance eBay and FordJourney.
[281] It is 1-2-3 Settle.Com. It may be no coincidence that this site only offers automated negotiation and offers only non-binding rough justice.
[282] For instance Esasa; Dell; DomainMagistrate; Dovebid; eResolution.

In the course of the survey, two issues related to independence emerged, to which the following paragraphs will be limited: first, the appointment of the third neutral and, second, "private" or *ex parte* discussions between the arbitrator and one of the parties.

a) The appointment of the third neutral

The appointment of the third neutral is jointly analyzed for mediation and arbitration, as most ODR institutions do not have different rules for the appointment of mediators and arbitrators. Moreover, although the legal requirement of independence may be stronger in arbitration than in mediation, its importance is the same for both processes as regards the confidence it induces. The results of the survey can be summarized as follows:

- First, a large number of ODR institutions *do not provide rules for the appointment* of their mediators and arbitrators[283].

- The second observation is that some institutions keep *lists of the third neutrals assigned to the cases, but do not state how they are assigned and by whom*[284].

- The third observation is that some other institutions state *who assigns the third neutrals*, and sometimes even how they are assigned, but *do not provide information on the potential neutrals*[285].

- The fourth observation is that, among the institutions that provide *information on both the assignment of the third neutrals and the potential neutrals*, the neutrals are either *appointed by the parties*[286] or *by the institution*. When they are appointed by the institution, they are either chosen *randomly*[287], *according to predefined criteria*[288], or in a *discretionary*

[283] The institutions that do not provide rules for the appointment of their third neutrals are: Cyberarbitration, IRIS, MARS, ODR.NL, and the Resolution Forum.
[284] The institutions that state who the potential neutrals are but not how they are assigned, are Internet Neutral, which holds a list of 15 persons, and SquareTrade, which holds a list of 250 ODR officers.
[285] The institutions that state how the neutrals are appointed but not who these neutrals are, are iCourthouse, where the thirds (which are actually jurors) are appointed by the parties, and eResolution, the Online Ombuds, Office Online Resolution, the Virtual Magistrate, and Word&Bond, where the institution assigns the neutrals.
[286] The parties appoint the neutrals at Cybercourt and WebMediate.
[287] 1-2-3 Settle.Com chooses its neutrals randomly.
[288] NovaForum.com appoints its neutrals according to a large list of criteria. WebAssured.com also uses predefined criteria.

manner[289] The list of potential neutrals ranges from *internal staff*[290], to *medium or large lists*[291], and to a reference to *external providers* which themselves hold very large lists[292].

- At one small ODR institution, *one person handles all the cases*, be it mediation or arbitration[293].

b) *Ex parte* communications

In mediation, *ex parte* communications (bilateral, private and direct communications) between the mediator and one of the parties is a helpful dispute resolution tool, and it is often used. It has been analyzed above[294].

In arbitration however, the arbitrator must not engage in any *ex parte* communications with the parties regarding the merits of the case during the course of the proceedings[295]. In online arbitration, *ex parte* communications may be conducted more easily than offline. Thus, in order to guarantee due process and to induce confidence, strict rules on *ex parte* communications have to be adopted by online arbitration providers. Such communications must at least be stored and transmitted to the other party.

- The survey shows that five out of the 20 institutions providing arbitration do not provide a description of their procedural rules[296], and eight of these institutions do provide information on their procedural rules, but do not mention this issue[297].

- Only one online arbitration provider addresses this issue: *it allows* ex parte *communications, but keeps track of all messages,* and subsequently *shares all interactions* with the other party[298].

[289] The program of FordJourney states that: "The appointment of an Arbitrator is under the Institute's exclusive and unfettered control, with the Institute reserving absolute discretion to appoint any Arbitrator it considers appropriately qualified and experienced".
[290] This is what happens at WebAssured.com.
[291] NovaForum.com holds a list of 24 neutrals, WebMediate has a list of 40-odd panelists and e-Mediator offers 50 different mediators.
[292] 1-2-3 Settle.Com refers to the Alternative Resolution Centers, a private business venture offering ADR, and at Cybercourt "parties will choose a mediator/arbitrator from a panel of PriceWaterhouseCoopers lawyers".
[293] The third neutral in question is a retired judge, and the institution is IntelliCOURT.
[294] See *Means of Communication for Quality of Justice*.
[295] A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration*, 3rd ed., London, Sweet & Maxwell, 1999, p. 217, 218.
[296] The five institutions that do not provide procedural rules are 1-2-3 Settle.Com, Cyberarbitration, eResolution, MARS, WebMediate (although WebMediate provides more information to its registered users).
[297] The institutions that do not address this issue are: Cybercourt, FordJourney, IntelliCOURT, NovaForum.com, ODR.NL, Online Resolution, and WebAssured.com, and Word&Bond.

c) Independence in the UDRP

The UDRP is more specific on independence than the other providers.

- The parties can choose a panel of one or three. If neither of them chooses a three-member panel, there will *be a single panelist appointed by the institution from its list of panelists* (par. 6(b) of the UDRP Rules). *If one of the parties chooses the panel of three, each party is required to submit the names of three candidates for consideration for appointment by the institution* (par. 6(d) of the UDRP Rules). In appointing the panelists, the institution will try to respect the order of preference indicated by the parties.

- The *list of panelists is mandatory* for the appointment by the institution *when the panel is constituted by only one panelist. When it is a panel of three, the parties can propose candidates that may – but need not– be drawn from the institution's list* (par. 3(b)(iv), 5(b)(v) and 6(d) of the UDRP Rules).

- *Ex parte communications between a panelist and a party are prohibited* (par. 8 of the ICANN Rules provides that "[n]o Party or anyone acting on its behalf may have any unilateral communication with the Panel").

Section IV-2.2 Fees for the proceedings

Online dispute resolution is convenient for many reasons, among which the time and costs saved by staying behind one's computer screen instead of travelling to meet the other party and the tribunal. The survey confirmed that ODR is indeed less expensive than traditional ADR and court proceedings.

a) Fees for automated negotiation

Automated negotiation is the dispute resolution process with the lowest degree of input from the provider. Once the technological tools necessary for this type of dispute resolution have been acquired, the remaining costs are small. These low costs, together with the cost of amortization of the technology, are passed along to the user of such services. The survey revealed the following:

[298] This institution addressing the issue of communications with only one of the parties is the Virtual Magistrate.

- No institution provides automated negotiation *for free*, not even as the first step of a tiered fall-back system.

The total costs vary significantly, both in regard to the way they are charged and to the total amount:

- Only few institutions charge *a standard fee*, no matter what the amount of the settlement is[299].

- Most institutions charge settlement fees that *depend on the amount of the settlement*. The threshold is usually set at USD 10'000, sometimes at USD 5'000 and/or 20'000[300].

- At some institutions, additional fees are charged *per round of bidding*[301].

- For a successful negotiation that has lasted *three rounds* of bidding and *two weeks*, and that has *settled for USD 10'000*, the total costs for the two parties together would range from USD 150 to 550, the medium cost being 300-odd USD[302].

The costs are generally split between the two parties, although:

- Four institutions charge *only one of the parties*. The insurance company at one institution[303], the filing party at two institutions[304] and the defendant or insurer in injury cases at the third institution[305].

Filing fees are rather uncommon, more precisely:

- Five institutions do not charge any filing fees, they charge only a flat fee for the process306.

[299] NewCourtCity charges USD 50 per party. 1-2-3 Settle.Com charges 100USD per party, AllSettle.Com USD 219 total, U.S. Settle USD 250 per party, The Claim Room USD 300 total, whatever the amount of the settlement.
[300] The settlement fee for amount of less than USD 10'000 is usually around USD 100.
[301] These additional fees per round of bidding range from USD 5 to 20, depending on the institution, the amount of the bid and the day it has been made on (the later, the more expensive). The two institutions that charge these fees are ClickNsettle.com and MARS.
[302] For three rounds, to weeks and three bids, the total costs for both parties altogether would be, in USD: 150 at SettleSmart; 200 at SettleOnline, WebMediate and WeCanSettle; 219 at AllSettle.com; 275 at ClickNsettle.com;, 350 at NewCourtCity; 400 at 1-2-3 Settle.Com; 430 at MARS; 440-odd at The Claim Room; 450 at Cybersettle; and 550 at U.S. Settle.
[303] AllSettle.Com charges only the insurance company.
[304] SettleSmart and The Claim Room charges only the filing party.
[305] WeCanSettle usually splits the costs between the two parties, except in personal injury cases.
[306] NewCourtCity charges USD 50 per party. 1-2-3 Settle.Com charges 100USD per party for the negotiation, AllSettle.Com charges the insurance company a flat fee of USD 219, The Claim Room charges the initiating party GBP 300, at WebMediate, if a settlement is reached through the automated negotiation program, the fee is 5% of all

- One institution *charges the filing party only if the responding party accepts to negotiate*[307].
- Two institutions *charge a filing fee only to the submitting party*[308].
- All other institution charge *a filing fee to both parties*, which is usually *USD 25 per party*[309], although one institution charges USD 75 per party[310].

Finally, one institution does not provide a schedule of its fees[311].

b) Fees for assisted negotiation

Assisted negotiation implies a more important infrastructure than automated negotiation, and is therefore more expensive. The fees can be classified in one of the three following categories:

- The costs of assisted negotiation are *covered by annual membership or trustmark fees*: this is the case at three institutions[312].
- The fees for assisted negotiation are charged *per party and per hour*. This is the case at three institutions. The fees, per party and per hour, range *from USD 50 to 300*[313].
- The fees are a *percentage of the settlement amount*. One institution chose this type of fees, it charges 5% of the gross settlement, with a maximum of USD 5'000[314].

The fees for assisted negotiation are either split equally between the parties or covered by annual fees payable by the merchant.

settlements under USD 5'000 and 2% of all settlements over that threshold (with a maximum of USD 400), and WeCanSettle charges a flat fee that depends on the amount of the settlement.

[307] SettleOnline does not charge anything if the other party does not accept to negotiate. If the other does accept to negotiate, the filing party is charged USD 50 for introducing the case.

[308] ClickNSettle.com charges the submitting party a filing fee of USD 15 and SettleSmart charges USD 20 if the other party does not accept to negotiate, and USD 70 if it does.

[309] USD 25 per party is the filing fee at MARS, NewCourtCity, and U.S. Settle.

[310] Cybersettle charges 75 USD per party.

[311] Intersettle's website does not provide a list of fees.

[312] iLevel offers assisted negotiation as part of its membership services. The amount of the membership services could not be found on the website of the institution. At TRUSTe, assisted negotiation is covered by the annual membership fee, which is tiered according to the company's annual revenues: they range from USD 299 for 0-1 million USD revenue to 6'999 for 75+ million USD revenue. Web Trader also offers assisted negotiation as part of its trustmark scheme (the amount of the fees for the trustmark were not found on its website).

[313] Online Resolution charges USD 50 per party per hour for dispute under USD 10'000, 75 for disputes between 10'000 and 50'000 and 100 for disputes over 50'000. The Resolution Forum charges USD 150 per party and per hour, whatever the amount of the dispute. The Claim Room charges GBP 100 per quarter for both parties (which is about USD 300 per party per hour).

[314] This institution charging per percentage is ClaimChoice.Com.

In addition, two institutions provide assisted negotiation free of charge, one as a first step of a tiered dispute resolution system, and the other in the context of a research project .

c) Fees for mediation

A priori, the main costs that are saved in online mediation compared to offline mediation are travel and conference room expenses. In addition, one may assume that the activity of the mediator is less time-consuming online. Consequently, the fees for online mediation are lower than offline[315].

- Two institutions provide or provided mediation *for free*, both as part of a research program[316].
- Most institutions determine their fees *per hour*. The costs range from USD 50 to 250 per party and per hour[317]. At the institutions which provide both mediation and arbitration, the fee computation and amount is usually the same for both processes.
- Some institutions offer mediation as part of a trustmark program, the fees for the mediation being *covered by the annual trustmark or membership fees*[318].
- One institution charges *a flat fee* for a six-hour mediation, and additional costs for all subsequent hours and for additional services[319]. Another institution charges a flat fee that depends on the time frame and thoroughness of the procedure[320].
- One institution charges different fees depending on *whether the dispute is B2C or B2B*[321].

[315] For an insight into the fees for offline mediation, see for instance the fee schedules of the *Centre for Effective Dispute Resolution (CEDR),* http://www.cedrsolve.com/index.php?location=/services/mediation/cost_struct/default.htm and the Mediation and Arbitration Rules of the *Commercial Arbitration and Mediation Center for the Americas (CAMCA),* http://www.adr.org/rules/international/camca_rules.html.
[316] These two free programs are of IRIS and ECODIR.
[317] Per party and per hour, in USD, the fees are: 50 per party per hour for dispute under 10'000, 75 for disputes between 10'000 and 50'000 and 100 for disputes over 50'000 at Online Resolution; 67 at WebMediate; 75 at Web Dispute Resolution; 150 at NewCourtCity; 250 at the Resolution Forum; and 60 to 360 (depending on the magnitude of the claim, 60 being for claims under USD 100) or 250 if other communication tools than email are used, at Internet Neutral; about 130 (GBP 75) for a junior mediator to about 260 (GBP 150) for a senior mediator at e-Mediator Cybercourt states that its fees correspond to what is usually charged for Internet Hotlines, and varies according to the difficulties of the case.
[318] NovaForum.com, the Online Ombuds Office, OnlineDisputes, and WebAssured.com offer online mediation as part of membership services or a trustmark program.
[319] NovaForum.com proposes to charge either USD 2500 per party for a mediation of six hours (each additional hour is charged USD 200 per party) or USD 5000 for the business for the subscription to its seal program.
[320] IntelliCOURT charges USD 80 or 150 per party (depending on the time frame and length of the arguments and the decision) for its whole dispute resolution service (which includes mediation and arbitration).

- One institution defines its costs as a *percentage of the settlement amount*[322].

- One institution *did not indicate its fees yet*[323], and another is extremely vague[324].

Fees for online mediation are usually split equally between the parties, unless the process is provided within a trustmark program or as a membership service.

d) Fees for arbitration

Many institutions that provide arbitration also provide mediation. In these cases, the fee computation is usually the same for the two processes. At a large number of institutions, the process is still in the course of being developed, and costs are therefore not determined yet. The fees for arbitration can be classified in the following categories:

- Most institutions determine their fees *per hour*. The costs range from USD 50 to 250 per party and per hour[325].

- Three institutions provide arbitration for a *flat fee*[326], which ranges from USD 60 to 2500 per party.

- One institution provides arbitration for a *flat fee that depends on the time frame and thoroughness of the procedure*[327].

[321] The fees at MARS are: "Fees for consumer mediation are split equally between the parties, and are scaled to the size of the claim: $50 for claims of $100 to $250; $75 for claims from $251 to $500, $100 for claims between $501 and $1,000; and 15% of the settlement amount (min.$150) for amounts over $1000. Fees for B2B or other mediation are incurred equally by both parties; per party, they include an initial consultation/party contact fee of $150; a 2 hour mediation or arbitration fee of $225; and a one hour arbitration (at time of mediation) fee of $125. Typical mediation or arbitration fees thus amount to $500 for "fast-tracked" services, and $600 for "full" services".

[322] SquareTrade charges 0.5% of the transaction value if over USD 1000, otherwise, it is a flat fee of USD 20. eBay users are however charged a flat fee of USD 15, paid for by eBay.

[323] eResolution is in the course of building up its mediation services and did not indicate its fees. NovaForum.com also charges diverse costs for some additional services, such as customizing the dispute resolution process, translating documents, or videoconferencing.

[324] 1-2-3 Settle.Com states that its fees "start at $300 per party. If the cost will exceed $300, the parties will be notified upon receipt of the initial form and after inquiry to the parties regarding the nature of the evidence and the dispute, if necessary".

[325] Per party and per hour, in USD, the fees are: 50 per party per hour for disputes under 10'000, 75 for disputes between 10'000 and 50'000 and 100 for disputes over 50'000 at Online Resolution; 67 at WebMediate; 75 at Web Dispute Resolutions; 250 at the Resolution Forum

[326] Word&Bond charges GBP 40 to 150, according to the value of the claim (£40 is for disputes below £500 and £150 is for dispute above £5'000). At MARS, the typical mediation or arbitration fees amount to USD 500 for "fast-tracked" services, and USD 600 for "full" services. At WEBDisputes.com, fees vary between USD 200 and USD 1200, depending on the amount in controversy. At NovaForum.com, the same fee applies for the whole resolution, be it only mediation, or med-arb: USD 2500 per party per dispute or The Subscription: Seal and Service: USD 5000 per business per year.

- Two institutions offer arbitration currently *for free*, as part of research projects[328].

- One institution offers arbitration *as part of a trustmark program*. The dispute resolution process itself is free, but there is an annual membership fee[329].

- One institution offers arbitration as a fall-back mechanism of an in-house complaint procedure. The costs of the arbitration are *borne by the merchant*[330].

- Five online arbitration providers *do not give information on the costs* of the process, mainly because they are in the course of building up the process[331].

- One institution gives only a *vague statement*[332] about costs.

Some institutions charge filing fees in addition, but these are minimal compared to the costs just referred to.

e) Fees for dispute resolution under the UDRP

There is one global flat fee, which is defined as follows:

- For a case involving between 1 and 5 domain names to be decided by a single panelist, the fee is USD 1500. For a case to be decided by 3 panelists, the fee is USD 3000.

- For a case involving between 6 and 10 domain names to be decided by a single panelist, the fee is USD 2000, and USD 4000 for a case to be decided by 3 panelists.

- Additional costs can arise "in exceptional circumstances", for example if the panel decides that an in-person hearing is needed.

[327] IntelliCOURT charges USD 45 per party for fast-track arbitration with limited possibilities to produce evidence and arguments, or USD 80 or 150 per party (depending on the time frame and length of the arguments and the decision) for more thorough proceedings and additional optional step of mediation.
[328] ECODIR (when the recommendation phase is made binding) and the Virtual Magistrate provide online arbitration for free.
[329] The institution providing arbitration as part of a trustmark program is WebAssured.com.
[330] At FordJourney, the costs of the arbitrators are paid for by Ford.
[331] The institutions that do not provide information on costs for online arbitration are: Cyberarbitration; Cybercourt; eResolution; ODR.NL; and SquareTrade.
[332] 1-2-3 Settle.Com states that its fees "start at $300 per party. If the cost will exceed $300, the parties will be notified upon receipt of the initial form and after inquiry to the parties regarding the nature of the evidence and the dispute, if necessary".

The fees are to be paid by the complainant. The respondent only shares the fees if he or she chooses a three member panel while the complainant had opted for a single panelist. In this case, the fees are split evenly by the complainant and the respondent[333].

f) Importance of the fees

If one compares the figures set out in this section with the ones applied in commercial arbitration, for instance, the former are obviously much lower. However, in most cases, the comparison is flawed because the disputes resolved online, at least so far, and those involved in traditional arbitration are not comparable in terms of amounts and complexity. In the event of a comparison with international court litigation, it is likely that the conclusion would be similar.

At this stage, where ODR still deals with rather small disputes, the true benefit is not that ODR is *cheaper* than something else. The benefit is that ODR is inexpensive and therefore opens an access to justice which is otherwise unavailable for cost reasons.

Section IV-2.3 Duration of the proceedings

An often claimed advantage of online dispute resolution is speed. The following paragraphs show that ODR is sometimes extremely fast, sometimes not so much. Furthermore, most of the time, no time limit is provided nor is an estimate of the needed time asserted. It is therefore difficult to state how fast ODR really is.

a) In automated negotiation

In automated negotiation, the duration of the proceedings is limited either by a maximum number of submissions of offers or demands or by a maximum time, sometimes by both. These limits vary substantially from one institution to another. Unfortunately, no institution states how long an automated negotiation process usually lasts or how many submissions are usually necessary to resolve a dispute.

- Most providers of automated negotiation *provide a time limit*, which varies between 30 days and 12 months[334].

[333] Par. 4 (g) of the ICANN Policy and par. 5(c) of the ICANN Rules.
[334] The time limits in automated negotiation are: ClickNSettle.com, 60 days; MARS, 30 days; ResolveitNow.com, 12 months; SettleOnline, 90 days; WebMediate, 45 days.

- At some institutions, the *time limits vary depending on the round of bidding at stake*[335].

- Other dispute resolution mechanisms *do not provide a time limit for the dispute resolution*. They simply limit the number of offers and demands[336].

- Some institutions provide *neither a time limit nor a limit of submissions* of offers or demands[337].

b) In assisted negotiation

The institutions that provide assisted negotiation do usually not set a time limit. One provider refers to a review which correlates the types of dispute and the manner in which they are resolved with the duration of the proceedings: the review shows that, in automobile accident claims, disputes are resolved in an average of 90 days when individuals are not assisted by counsel, while they take over a year with counsel[338].

- Some institutions provide a time limit, which varies between 18 and 35 days[339].

c) In mediation

Two types of time limits are provided in mediation proceedings: those that relate to replies and submissions, and those that relate to the conclusion of the transaction. The former are very common in online mediation, the latter are rare. Only the latter are of interest to us, as they set a maximum duration to the procedure.

- Four institutions, of the 20 that the survey encompassed, provide a time limit which sets a *maximum duration to the procedure*. These time limits vary *between four hours and 60 days*[340].

[335] At SettleSmart, parties have 30 days to respond in round 1 and 15 days to respond in rounds 2 and 3, and shorter time periods if the negotiations start close to trial; SettleSmart allows the parties to change these time limits.
[336] The institutions that do not provide a time limit are: 1-2-3 Settle.Com (which accepts three rounds of submissions), Cybersettle (which accepts four rounds of submissions), SettlementOnline (which does not state how many rounds of submissions it accepts),
[337] U.S. Settle allows the parties to reinitiate the process as many times as necessary, at no additional cost. WeCanSettle does not state on its website that it provides either a time limit or a limit of bids.
[338] This is the study of the Insurance Research Council, reported by ClaimChoice.com.
[339] ECODIR considers the negotiation as having failed after 18 calendar days. iLevel states that " in 30 days there will either be a resolution between customer and vendor or a new posting in our database". The mechanism of TRUST provides a series of time limits which put a deadline to the process after 35 days.

- One institution provides an *indicative (as opposed to restrictive) time frame*, in which the case is usually settled[341].

d) In arbitration

Few institutions providing online arbitration set time limits for awards. Those that do fail to mention the consequences of a failure to comply with such limits.

- Among the 20-odd institutions that provide online arbitration, *only five provide a time limit*, which varies between four hours and 30 days[342].

e) Under the UDRP

According to par. 15(b) of the ICANN Rules, in the absence of exceptional circumstances, the panel forwards its decision to the provider *within 14 days of its appointment*. *Within three calendar days* after receiving the decision from the panel, the provider communicates the full text of the decision to each party (par. 16(a) of the ICANN Rules).

According to par. 6 of the ICANN Rules, if neither the complainant nor the defendant has elected a three-member panel, *this appointment is to be made within five days following receipt of the response*, or the time period for the submission thereof (20 days from the commencement of the proceeding, par. 5(a)). *If there are three panelists, it can take 15 days longer*.

[340] - At ECODIR, the procedure switches to a "recommendation phase" if the parties did not reach an agreement within 15 days.
- IntelliCOURT offers different procedures, of which two include a mediation phase; these two procedures have a time frame of either 15-25 or 15-30 days.
- At MARS, the "transaction must take place within 60 days".
- At NovaForum.com, the parties have the choice between mediation, arbitration and med-arb; each of these programs last for a maximum of four hours; if med-arb is chosen, the mediation part lasts usually for two hours.

[341] e-Mediator states that 6 hours are usually enough.

[342] - IntelliCOURT offers three different procedures, of which two include a prior mediation phase; the time frames are 15-25 or 15-30 days.
- FordJourney states that "Under normal circumstances, the Arbitrator will publish his Award within 15 working days of the date of his receipt of all relevant documentation. This period may only be extended if an inspection of the car is necessary".
- At NovaForum.com, "The Resolution Session is one 4-hour session": it is either four hours or mediation or arbitration, or four hours of med-arb (two hours of mediation, two hours of arbitration).
- The program of the Virtual Magistrate states that "The Arbitrator will attempt to reach a decision as quickly as possible or within 72 hours (three business days) of acceptance of a complaint. This is a goal, and it may not be possible to resolve all cases within that time. When necessary or appropriate to maintain fairness, the time limit may be extended by the Arbitrator with or without the agreement of the parties."
- Word&Bond states that "the appointed i-arbitrator [...] will, within 14 days, rule in the case."

An *extension of the time limit* for the decision is however possible under exceptional circumstances (decided by the panel).

The rules *do not provide a consequence for the non-compliance* of the time limit.

The *average duration* is, according to the DomainMagistrate, 45-50 days of the date the institution receives the complaint (absent exceptional circumstances, the panel's decision will be notified to all relevant parties within 17 days of the appointment of the panel).

Section IV-2.4 Result: binding character and enforcement

a) Functional equivalence with offline proceedings

The result of successful automated negotiation, assisted negotiation and mediation is a settlement, i.e. a contract, which has the same binding force as any other contract. Such an agreement is binding like a contract[343]. The enforcement of such a contract follows the same procedures as the enforcement of an 'offline' contract[344].

Arbitral awards are more authoritative. They are binding like court judgments. They are final subject to an action to set aside the award for limited procedural grounds and violation of international public policy. Moreover, they can be enforced by way of procedures similar to the exequatur of judgments, and they carry *res judicata*. Decisions which do not qualify as arbitral awards are either not enforceable or enforceable like contracts, so for instance settlements reached in mediation. Hence, the distinction between "true" arbitration and other mechanisms is important for legal purposes. Generally, one considers that a decision constitutes an award, and the process leading to it an arbitration, if the parties intend it to be binding like a court judgment[345]. In this respect, the online offer is quite diverse. In particular, it often includes so-

[343] Examples of what can be found on the websites concerning the binding effect of settlement are:
- ClickNsettle.com: "before the negotiation begins, the parties sign an agreement to be bound by any settlement reached"
- Cybercourt: "parties agree in advance that any settlement achieved is binding".

[344] A typical example of the binding effect of an automated negotiation program is AllSettle.Com's: "users of the service agree to be legally bound by any settlement reached in their case, but they do not give up any legal recourse".

[345] For Italian law, P. BERNARDINI, *Il diritto dell'arbitrato*, Rome 1998, p. 17; for French law, C. JARROSSON, *La notion d'arbitrage*, Paris 1987, pp. 162ff.; for German law, K. P. BERGER, *Internationale Wirtschaftsschiedsgerichtsbarkeit*, Berlin/New York 1992, pp. 53-54; for Swiss law, F. EHRAT, in *Internationales Privatrecht*, Honsell/Vogt/Schnyder (ed.), Basle/Frankfurt, 1996, p. 1415; in connection with the enforcement under the New York Convention, A. J. VAN DEN BERG, *New York Convention of 1958, Consolidated Commentary* - Cases Reported in Volumes XXII (1997) – XXIV (1999) [of the ICCA Yearbook], No. 108, publication forthcoming. See also Part I-3 above.

called "non-binding arbitration", which according to the test just set out is not an arbitration at all[346].

- Some institutions offer both *binding and so-called non-binding* 'arbitration'[347].
- Other institutions offer *only binding* arbitration; they usually state or imply that their processes are binding like offline arbitration[348].
- Some institutions *do not distinguish* between the binding effect of negotiation or mediation, and arbitration[349].
- Some institutions *do not address the question* of the binding character of their decisions[350].
- One institution renders awards which are unilaterally binding: *binding on the business, but not on the consumer*[351].
- One of the institutions which offers mock trials proposes either binding or non-binding 'verdicts'[352].

[346] For instance ICANN's UDRP-based procedure. A discussion on the importance of non-binding arbitration for the ODR context can be found in E. KATSH and J. RIFKIN, *Online Dispute Resolution, Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass, 2001, p. 108-112. We will come back to this discussion below.

[347] - ECODIR provides a 'recommendation phase', which can be made binding by the parties. If it is made binding, it may constitute either arbitration or an agreement resulting of the last phase of a mediation. ECODIR itself does not provide any determination in this respect.
- IntelliCOURT: "The parties listed below agree to submit their dispute regarding __ (area of dispute) to final and legally binding arbitration" or "The parties listed below agree to submit their dispute regarding __ (area of dispute) to a non-binding arbitration".
- WebMediate: "arbitration can be made binding by prior agreement"
- Web Dispute Resolutions: "arbitration decisions can be made binding by prior agreement by the parties".
- WEBDispute.com: "before an arbitration can take place, both parties must agree to use arbitration as an alternative to potential litigation (exclusive), and must sign an agreement to arbitrate. Parties can then make arbitration binding or non-binding".

[348] - eResolution: "Arbitration is a dispute resolution process allowing parties to obtain a binding decision rendered by a third neutral and impartial third party, the arbitrator. The Arbitration Platform allows the parties to obtain a binding decision rendered by a skilled arbitrator. This dispute resolution process is binding and the decision is legally enforceable".
- Word&Bond "i-awards shall be final and binding on the parties, but may be subject to rights of limited appeal as set under the Arbitration Acts 1996".

[349] - 1-2-3 Settle.Com states for instance that "Any agreement as to whether or not the mediation, the arbitration or the [automated negotiation] is binding or enforceable is solely between the parties utilizing the site. 123Settle.com does not enforce any such agreement and is not a party to any such agreement",
- NovaForum.com: "Through NovaForum's unique "stepped" process, the parties will achieve a final and binding resolution of their dispute. Whether by way of mediation (resulting in a "Settlement" of the parties) or arbitration (resulting in a "Decision" of the Arbitrator), the parties will receive the Report of the Resolution Professional, enforceable like a judgement of the Court."

[350] The Virtual Magistrate is said to be offering non-binding arbitration (according to the survey of CONSUMERS INTERNATIONAL, *Online dispute resolution for consumers in cross-border disputes – an international survey*, by P. LAWSON, December 2000, available at http://www.consumersinternational.org/campaigns/electronic/_adr_web.pdf), but there is no indication on the website.

- One institution offers assistance to the parties for the "enforcement" of its decisions, in the context of a trustmark program, by way of two specific features: on the one hand a clause in the trustmark program that states that "licensees agree to abide by 'arbitral opinions' and to perform whatever restitution is indicated by the dispute resolver", and on the other hand a money-back guarantee that supports the arbitration system[353].

b) Self-execution under the UDRP

The enforcement of UDRP decisions is particular: decisions under the UDRP are self-executing. About two months after filing, the case is closed (subject to a party bringing court proceedings) and the decision enforced by the registrar, who is contractually bound to do so.

The decisions rendered under the UDRP are not binding like arbitral awards for the following reasons:

First, the UDRP is not exclusive of prior and subsequent proceedings in court, according to its par.4 (k). This non-exclusivity was confirmed in *BroadBridge* v. *Hypercd.com*, which allowed parallel proceedings in court[354].

Second, it is clear that a court will not consider the UDRP decision binding upon it. This non-binding character was confirmed in *Weber-Stephen* v. *ArmitageHardware*[355] and *Heathmount* v. *Technodome.com*[356].

[351] FordJourney: "It should be noted that the Service is legally binding only on FordJourney, and the Claimant can reject the Award and proceed through the courts if they are dissatisfied with the outcome".
[352] iCourthouse: "Results are enforceable by agreement between the parties. You can use the following language to make your decision enforceable: "We, the parties to case number --- agree that the verdict rendered by the jury in the iCourthouse case will be binding on us, and will be enforceable as a judgment in a court of appropriate jurisdiction"".
[353] WebAssured.com imposes this clause on its licensees, and, if the merchant doesn't pay, WebAssured.com will.
[354] In the US case of *Broadbridge Media, L.L.C.* v *HyperCD.com*, the district court for the southern district of NY, citing J. GILSON and A.G. LALONDE, *The Anticybersquatting Consumer Protection Act* and the UDRP, ruled that a trademark owner may concurrently commence arbitration proceeding under the UDRP and litigation proceedings under US trademark law, 106 F. Supp. 2d 505; 2000 US Dist. LEXIS 9516.
[355] *Weber-Stephen Products Co. vs. Armitage Hardware and Building Supply, Inc., No. 00 C 1738*, <http://www.ilnd.uscourts.gov/judge/opinions.htm >Aspen>, discussed in P.-E. MOYSE, *La force obligatoire des sentences arbitrales rendues en matière de noms de domaine*, Juriscom.net, 10 October 2000, http://www.juriscom.net/pro/2/ndm20001010.htm. This decision for instance mentions an email inquiry by one of the parties to <domain.disputes@wipo.int> (the WIPO Arbitration and Mediation Centre, the Provider in this case), and their response said that the Panel's determination would be binding on the registrar of the domain name, but that "[t]his decision is not binding upon a court, and a court may give appropriate weight to the Administrative Panel's decision." This court also stated that "neither the ICANN Policy nor its governing rules dictate to courts what weight should be given to a panel's decision".
[356] "ICANN lacks the enforcement power of the court system": United States District Court for the Eastern District of Virginia, Alexandria Division, 2000 U.S. Dist. LEXIS 20316.

Third, a clear majority of the authors who have analyzed the UDRP have reached the same conclusion, i.e. that the process was never meant to be binding[357].

Fourth, WIPO, which is one of the ICANN approved dispute resolvers that apply the UDRP, stated, in an email inquiry by Judge Aspen in *Weber-Stephen v. Armitage Hardware*, that "[t]his decision is not binding upon a court, and a court may give appropriate weight to the Administrative Panel's decision"[358].

The question remains what weight the courts will give to UDRP decisions. They are neither judgment- nor contract-like. But beyond? "But at this time we decline to determine the precise standard by which we would review the panel's decision, and what degree of deference (if any) we would give that decision", declared Judge Aspen in *Weber-Stephen v. Armitage Hardware*[359]. Authors have not taken a position either[360]. In the end result, the answer may present more academic than practical interest. Indeed, the compliance rate with UDRP decisions appears to be extremely high, partly because of its self-enforcing character, whatever the legal nature of the process and decision.

c) Enforcement of results outside the UDRP

As one of the goals of ODR is to avoid litigation, one may expect to find also solutions with regard to the enforcement of ODR results outside the court system. But the ODR providers do not offer such solutions themselves; they admit that, in the end, the winning party may have to go to court and therefore offer assistance in drafting jurisdiction clauses, for instance.

However, some marketplaces and trustmark or seal programs offer escrow accounts[361], or insurance schemes against fraud, non execution and even bad execution[362]. If a dispute

[357] P. LASTENOUSE, *Le Règlement ICANN de résolution uniforme des litiges relatifs aux noms de domaine*, op. cit., V. SLIND-FLOOR, U.S. *Judge says courts may be second-guess domain-name arbiter*, in *National Law Journal*, B6, G. DINWOODIE, *A new copyright order : why national courts should create global norms*, in 149 *U. Pa. L. Rev.* 469, G. DINWOODIE *(National) trademark laws and the (non-national) Domain Name System*, in 21 *U. Pa. J. Int'l Econ. L.* 495, P.-E. MOYSE, *La force obligatoire des sentences arbitrales rendues en matière de noms de domaine*, Juriscom.net, 10 October 2000, http://www.juriscom.net/pro/2/ndm20001010.htm, M. HALPERN and A. K. MEHROTRA, *From International Treaties to Internet Norms: the Evolution of International Trademark Disputes in the Internet Age*, in 21 *U. Pa. J. Int'l Econ. L.* 523, M.J. MATORIN and M. BOUDET, *Domain Name Disputes: Cases illustrate Limitation of ICANN Policy*, 45 B. B. J. 4, A.M. FROOMKIN, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, in 50 *Duke Law Journal* 17 and E.G. THORNBURG, *Going private: Technology, Due Process, and Internet Dispute Resolution*, in 34 *U.C. Davis L. Rev.* 151.

[358] *Weber-Stephen Products Co. vs. Armitage Hardware and Building Supply, Inc., No. 00 C 1738*, <http://www.ilnd.uscourts.gov/judge/opinions.htm >Aspen.

[359] Ibidem.

[360] E.G. THORNBURG, *Going private: Technology, Due Process, and Internet Dispute Resolution*, op. cit., "It is unsettled at this time whether ICANN decisions will be entitled to some degree of deference in any related litigation".

[361] For instance by Escrow.com (http://www.escrow.com).

arises, these intermediaries (excepted credit card companies, which are bound to credit upon simple request by the cardholder[363]), decide themselves whether the request to be paid is justified or not.

Part IV-3 Management of ODR providers

Section IV-3.1 Financing and independence

ODR providers have to be independent, in order to make independent dispute resolution available and to be credible, so as to induce the trust that is still lacking in the online environment. A major measure in this direction is for the ODR providers to secure a source of funding that is independent from vested interests. Any bias linked to financing sources, whether real or perceived, should be avoided.

This is a requirement that is much more difficult to achieve in the B2C context than in B2B relationships, because of the affordability criterion for consumers. In spite of this fact, the following sections do not distinguish between providers which handle B2B disputes and those which handle B2C disputes. The reason is that only very few institutions restrict their services to B2C[364]. Therefore, the providers which handle both B2B and B2C transactions and charge the parties alike are likely to manage more B2B disputes than B2C disputes.

ODR providers can be funded by three sources: bilateral user fees, unilateral user fees or external sources.

Where the parties pay the fees for the proceedings, it remains to be seen whether their payments cover the actual costs of the provider, fees and costs of the neutral included. This information is not readily available, and it will have to be further researched.

[362] For instance Trustedshops.de (http://www.trustedshops.de) or eBay.
[363] Depending on the applicable mandatory law, the customer may even have the unwaivable right to charge back his credit card company if the card has been abused or if the merchant has not executed himself. A charge-back right exists especially in the U.S. and the U.K. Art. 8 of the EC Directive on Distance Contracts only grants the right to charge back in case of fraud.
[364] The institutions that do restrict their services to B2C are: BBBOnline, iLevel, FordJourney, TRUSTe, and Web Trader.

a) Financing by both parties or bilateral user fees

In the bilateral user fee model, both parties pay a part of the charges (usually, each party pays one half). The problem with this model is that the affordability criterion is usually not met in B2C disputes, as the cost for the consumer may be disproportionate compared to the amount at stake. Many providers thus seek supplemental funding from outside sources, such as consumer associations, universities, governments, or various businesses. These sources are often not clearly mentioned and are therefore not listed below.

The survey shows that a very large majority of providers charge both the businesses and the consumers on approximately equal terms[365].

b) Financing by one of the parties or unilateral user fees

In the unilateral user fee model, the business (merchant or insurance company) is charged for the costs, either in the form of an annual membership fee (for instance for a trustmark) or for any given case. The trouble with this model is that ODR systems are voluntary, and if they are financed in large part by one of the parties, an inevitable appearance of bias arises, the services being paid for by the businesses they serve. The risk of partiality can be lessened by strict procedural rules, an adequate selection of independent neutrals, global transparency, and possibly a supervisory body.

The survey shows that a minority of eight providers are financed (almost) exclusively by one of the parties, which is either an online merchant or an insurance company[366].

c) Financing by external sources

In the external source model, a third party pays for the services. This third party can be a university, a governmental or non-governmental organization, including possibly a consumer

[365] The following institutions charge both 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.

[366] The following institutions charge only the businesses: AllSettle.Com (free to insurance claimants, fees to insurance companies), BBBOnline (free to consumers, business member fee), FordJourney (Ford pays the arbitrators), iCourthouse (subscription basis for law firms, free for the parties), OnlineDisputes (membership fees), TRUSTe (membership fees), WebAssured.com (membership fees), and Web Trader (membership fees).

association. Except where an NGO serves specific interests, a case not found here, this model provides the best guarantees for independence and impartiality. The survey shows that:

- Two institutions are financed by governmental structures[367].
- One program (an experimental project) was financed by a non-governmental organization[368].
- Two providers receive funds from universities[369].

d) Unclear funding

On the websites of some institutions, the source of funds is unclear[370].

e) Under the UDRP

The fees for dispute resolution under the UDRP are paid by the plaintiff, unless the defendant chooses a panel of three, in which case the fees are split[371].

There may be an issue of independence under the UDRP. Panelists and providers are known to be pro-claimant or pro-respondent, and claimants of course prefer pro-claimant providers. A recent study shows that "when providers control who decides a case (which they do for all single panel cases), complainants win just over 83% of the time", while they prevail in only 60% of the case decided by a three-member panel[372].

Section IV-3.2 Managing institutions

The information gathered on any dispute resolution website must be assessed taking into account the institution backing it. Although it is often unclear who the initiator of a website

[367] ECODIR is free from September until June 2002. The financing is mainly ensured by a subside from the European Commission, DG Health and Consumer Protection. ODR.NL is run by a governmental organization (the Dutch Electronic Commerce Platform, itself founded in 1998 the Dutch Ministry of Economic Affairs and the Dutch employers Association., but is it not specified if there will be costs for the users.
[368] IRIS itself is a non-governmental organization.
[369] The Virtual Magistrate receives funding from the Chicago-Kent College of Law. Its service is free to users. The Online Ombuds Office is free to users, and funded by the University of Massachusetts and the Hewlett Foundation.
[370] At iLevel it is not clear whether members have to pay or not.
[371] Par. 4 (g) of the ICANN Policy and par. 5(c) of the ICANN Rules.
[372] M. GEIST, *Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, http://aix1.uottawa.ca/~geist/geistudrp.pdf.

is, this survey shows that the ODR providers are managed by the following types of institutions:

- A large majority of ODR providers are managed by *for-profit institutions*, that is, they are either meant to be profit-making themselves or they are a part of a trustmark program, which must be paid for. Only ten providers operate on a not-for-profit basis[373].
- The majority of the providers are either a business organization by themselves or they are one service among others offered by a *business organization*[374].
- The runners-up in the number of ODR providers of one category are the *offline ADR organizations* that have decided to include ODR in their services. There are six of them[375].
- *Universities* operate or are the main institution supporting four providers[376].
- A *consumer organization* is behind only one ODR provider[377].
- Only one *non-governmental organization* runs an ODR provide[378].
- ODR is available at only one *local governmental entity*[379].
- One *national governmental organization* considers ODR[380].
- Only one *international governmental organization* manages a large provider[381].
- Two *non-profit private initiatives* operate ODR systems[382].

[373] The only not-for-profit providers are: BBB*Online*, ECODIR, IRIS, FSM, the project of the State of Michigan, the project of ODR.NL, the Online Ombuds Office, the Resolution Forum, TRUSTe, and the Virtual Magistrate.
[374] The following providers are either an independent private business venture, or they are a service offered by a business organization: 1-2-3 Settle.Com, AllSettle.Com, ClaimChoice.com, ClaimResolver.com, ClickNsettle.com, Cyberarbitration, Cybercourt, Cybersettle, eResolution, FordJourney, iCourthouse, iLevel, Internet Neutral, Intersettle, MARS, NewCourtCity, NovaForum.com, OnlineDisputes, ResolveItNow.com, SettlementOnline, SettleSmart, SettleTheCase, SquareTrade, The Claim Room, U.S. Settle, WebAssured.com, WEBDisputes.com, Web Dispute Resolution, WebMediate, WeCanSettle, Web Trader, and Word&Bond.
[375] CPR Institute, e-Mediator, IntelliCOURT, The National Arbitration Forum, Online Resolution, and SettleOnline.
[376] The Online Ombuds Office is a research project of the University of Massachusetts, ECODIR is mainly administered by the University of Namur, The Resolution Forum is run in association with the Center for Legal Responsibility at South College of Law (although its actual participation in the system is not clear), and the Virtual Magistrate is a provider of the Chicago-Kent College of Law.
[377] BBBOnline is led by a consumer organization, The Better Business Bureau.
[378] IRIS is a NGO.
[379] The State of Michigan plans to introduce a cybercourt.
[380] ODR.NL was created by a Dutch ministry.
[381] The WIPO runs an Arbitration and Mediation Center, which provides ODR under the UDRP.
[382] The non-profit private initiatives are FSM and TRUSTe.

CHAPTER V

REGULATING ODR: GUIDELINES, PRINCIPLES AND CODES OF CONDUCT

The two main reasons for promoting ODR are certainly access to justice and e-confidence. As concerns access to justice, it is actually often so that the only feasible dispute resolution system is online dispute resolution. In this sense, ODR has been identified as a fundamental aspect of consumer protection, as litigation and the common forms of alternative dispute resolution do not meet the needs of customers, predominantly because of distances in transborder cases and disproportionate costs[383]. As a result, regulation standards have primarily emerged in a B2C context, where the immediate need appears more acute, although B2B transactions call for standards too. In these cases, ODR is in fact imposed on the parties, because of economic circumstances[384].

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. The political will often concurs in this opinion, as European Commissioner David Byrne, for instance, stated that "we are confronted with what I certainly call the e-confidence barrier"[385]. An appropriate dispute resolution system helps to build trust and confidence in a commercial activity. Tailor-made dispute resolution programs have therefore emerged and guidelines, principles and codes of conduct have been developed.

If it is clear that standards of regulation have to be developed, it is not obvious as to who should draft, implement and enforce them. Should such actions be left to self-regulation by the industry or should they be controlled by the state? Should there be an accreditation body to the ODR providers? The industry has shown a lasting effort to minimize government

[383] G. KAUFMANN-KOHLER, *Choice of Court and Choice of Law Clauses in Electronic Contracts*, in V. Jeanneret (ed.), *Aspects juridiques du commerce électronique*, Zurich, 2000, and, of the same author, *Internet: mondialisation de la résolution des litiges?*, in *Internet - which Court Decides? Which Law Applies?*, K. Boele-Woelki, C. Kessedjian (ed.), The Hague, 1998, pp. 89-142; A. VAHRENWALD, *Out-of-Court Dispute Settlement Systems for E-Commerce, Report on Legal Issues*, Part II, *The Protection of the Recipient*, Ispra, 2000, http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_FORUM0000000000000205.

[384] This is for instance the case in the DNS, where the URDP is, for economic reasons, imposed on many domain name holders.

intervention while promoting consumer confidence by means of self-regulation, for instance by e-commerce policies, guidelines and codes of conduct. Consumer groups conversely advocate government regulation or control, on the basis that consumers must be afforded the same protection on and offline. Governments have diverging opinions: the US Government favors self-regulation[386] while the EU is more inclined to adopt regulations.

In recognition of the growing need of regulation, many organizations and governments have issued recommendations or guidelines that address ODR regulations and standards[387]. All of these texts seek, in one way or another, to achieve a high level of trust and to provide reasonable access to justice. They do so, first, by affirming equivalent consumer protection online and offline and, second, by proposing a predictable dispute resolution framework. These standards have to be analyzed because, first, they constitute a reference for the assessment of the quality of justice of a given ODR provider and, second, they are a framework for reflecting on the general requirements of due process in ODR. They can be classified in the four following categories, according to their source: governments (unilaterally or multilaterally), industry, consumer associations and dispute resolution providers[388].

Part V-1 Government initiatives

Multilateral government initiatives have been issued by the OECD, the EU and G8. National government policies have been enacted for instance by the United States, Canada, Australia, New Zealand and the Netherlands. Globally, their position is to support ODR, and to promote government, industry and consumer cooperation as well as self-regulatory programs such as codes of conduct and trustmarks.

[385] Speech by David Byrne, European Commissioner for Health and Consumer Protection, The e-confidence barrier – New regulatory models - Conference on the e-Economy in Europe – European Parliament, Brussels, 2 March 2001, http://europa.eu.int/comm/dgs/health_consumer/library/speeches/ speech86_en.html.

[386] Indeed, the workshop of the US Federal Trade Commission and the Department of Commerce, held in June 2000, brought to light strong controversies among the participants and consequently caused the Department of Commerce to announce that the government would leave these issues to self-regulation and intervene only if necessary.

[387] For a very brief presentation of the context of the birth of the different initiatives and their content, see R. OTT, *Removing the e-confidence barrier*, in *E-Commerce Law & Policy*, March 2001, p. 12-13.

[388] For such a review and classification, see A. WIENER, *Regulations and Standards for Online Dispute Resolution. A Primer for Policymakers and Stakeholders*, version as of February 15, 2001, http://www.mediate.com/articles/awiener2.cfm, A. CARBLANC, *Privacy Protection and Redress in the Online Environment: Fostering Effective Alternative Dispute Resolution*, 22nd International Conference on Privacy and Personal Data Protection, Venice, 28-30 September 2000, available at http://www.oecd.org/dsti/sti/it/secur/prod/venice_paper.pdf and R. OTT, *Removing the e-confidence barrier*, in *E-Commerce Law and Policy*, March 2001, pp. 12-13.

- CARBLANC of the OECD[389], identified five main categories of issues at stake in ODR.

  First, the socio-economic issue, which focuses on linguistic, cultural, economic and information difference. The resulting recommendations aim at accessibility, low cost to consumers and transparency. Second, the legal issues, "those that contribute to making the ADR process fair and effective for both consumers and businesses", more precisely, impartiality, timeliness, the binding character of ODR decisions, and the applicable substantive principles. Third, the technological issues, which relate to electronic signatures, communication tools, and interoperability of systems. Fourth and fifth, consumer and business education as well as trustmarks are also important subjects.

  On this basis, the OECD, together with the Hague Conference on Private International Law and the ICC, organized the *OECD December ADR Conference*, which took place on December 11-12 of 2000. This conference gave rise to a report, published on April 19 of 2001[390]. Regarding the processes of ODR, the report states that some common elements and some differences have come into focus. The common elements are principles that have emerged among government, industry and consumer groups, i.e. accessibility, low cost to consumers, transparency (that is, providing information about the process), timeliness, addressing culture and language differences, impartiality and qualified ADR officers. The remaining differences relate to the mandatory character of ADR prior to litigation for consumers, the binding character of ODR decisions, and the compliance and enforcement.

- The EU has been active on several fronts, issuing recommendations, developing research centers (like the JRC), and launching test programs. The Commission released two recommendations on the principles for out-of-court resolution bodies, one in December 1998, and one in April 2001, and is currently working on a Green Book on ODR standards to be issued shortly. Both recommendations were meant to guarantee the fairness and effectiveness of these bodies. The scope of the first recommendation was limited to procedures which lead to the settlement of a dispute through the active intervention of a

[389] A. CARBLANC, CEO of the OECD, in her above cited paper.
[390] This 87-page long report is available at http://www.oecd.org/dsti/sti/it/secur/act/online_trust/hague-adr-report.pdf.

third[391], while the second recommendation also extended to procedures merely bringing the parties together in an attempt at finding an amicable solution[392]. The principles contained in the recommendation of 2001 are *impartiality* (those responsible for the procedure shall have no conflict interest and provide information about their impartiality and competencies to the parties), *transparency* (a wide spectrum of information about the procedure has to be provided to the parties), *effectiveness* (the procedure should be easily accessible, of low costs to the consumer, and not requiring legal assistance) and *fairness* (this issue addresses the possibilities for the parties to submit arguments, information and evidence, as well the agreement of the consumer to the suggested solution).

On June 8, 2000, the European Parliament released the Directive on electronic commerce[393]. The latter addresses ADR at its Article 17, where it simply provides that member States must encourage out-of-court schemes.

Through its *Joint Research Commission (JRC)*, the European Commission also runs a project called the e-*Confidence Group*. The project is described as "an initiative for promoting information exchange and discussions about e-Confidence"[394]. The JRC currently conducts an *ODR Standardization Effort*[395], which seeks to "contribute to building a consensus with interested parties on a basic ODR infrastructure which reflects the lowest common denominator between ODR systems". This standardization effort focuses mainly on technical issues, such as the interoperability of the existing systems.

The *e-Confidence Group* also tackled the issue of the *Principles for e-commerce codes of conduct*[396]. It released a set of draft principles and guidelines, the latest version in March

[391] It gave rise to the EEJ-NET (European Extra-Judicial Network) which establishes a more general network of ADR systems notified to the Commission by Member States as applying the core principles contained in the Recommendation of 98. The EEJ-Net, launched by the Commission in May 2000, provides a communication and support structure made up of national contact points (or 'Clearing Houses') established by each Member State. See http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just07_en.html. The EEJ-NET is complemented by the FINNET, which was launched by the European Commission on 1 February 2001 as "an out-of-court complaints network for financial services to help businesses and consumers resolve disputes in the Internal Market fast and efficiently by avoiding, where possible, lengthy and expensive legal action". FINNET has been designed to "facilitate the out-of-court resolution of consumer disputes when the service provider is established in an EU Member State other than that where the consumer lives". It did not issue a recommendation or other guidelines yet. See generally http://europa.eu.int/comm/internal_market/en/ finances/consumer/adr.htm.

[392] Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C(2001) 1016), Official Journal L 109 , 19/04/2001 P. 0056 – 0061. Note that in-house complaint procedures are explicitly excluded from the scope of this recommendation.

[393] 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 ('Directive on electronic commerce'), Official Journal L 178 , 17/07/2000 P. 0001 – 0016.

[394] See http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_FORUM000000000000000D.

[395] See http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_FORUM00000000000000DEB.

[396] See http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_forum0000000000000088.

2001[397]. The draft deals with many different aspects of e-commerce. As regards dispute resolution, the draft states that online merchant have to have in-house procedures, and, if the complaint process fails to give satisfaction, the merchant should agree to submit the case to an out-of-court settlement body.

- The G8 met in July 2000 in Okinawa, Japan. During the summit, it issued the *Okinawa Charter on Global Information Society*[398], which mentions the use of alternative dispute resolution for online consumer protection and asserts that governments are to "create a predictable, transparent and non-discriminatory policy and regulatory environment". The G8 summit of Okinawa gave rise to the *IT Digital Opportunity Taskforce (DOT Force)*[399], which is currently working on a series of issues related to e-commerce. The *DOT Force Draft Report*[400] does not mention ODR in its current version. The issue of ODR was not dealt with at the G8 summit in Genoa, held in July 2001.

- The Federal Trade Commission and the Department of Commerce of the United States organized in June of 2000 a large workshop on ODR. The participants disagreed on the appropriate roles for stakeholders in the area of ODR. Some argued that governments should take the lead in developing a baseline set of principles, because it would ensure that all ODR providers would have at least some qualities in common. Others cautioned against government involvement, arguing that a premature state intervention would inhibit innovation. As the summary of the workshop states, the participants of the workshop generally agreed that ensuring fairness and effectiveness of ODR meant "ensuring impartiality of the program, no or low cost to the consumer, accessibility, transparency and timeliness"[401]. No consensus was however found on the binding character of ODR involving consumers and the development of mandatory consumer procedures. The Commerce Department later declared that the government decided to act only if necessary, meanwhile leaving the regulation to the private sector[402].

[397] The draft contains the following working documents: (1) General principles for generic codes of practice for the sale of goods and services to consumers on the Internet. (2) Specific Guidelines for the interpretation of the general Principles. (3) Guiding principles for 'approval and monitoring' bodies. (4) Options for 'Approval and Monitoring'. The draft is available at http://econfidence.jrc.it/default/page.gx?_app.page=entity.html&_app.action=entity&_entity.object=EC_FORUM0000000000000088&_entity.name=draft2.doc.
[398] http://www.g7.utoronto.ca/g7/summit/2000okinawa/gis.htm
[399] http://www.dotforce.org.
[400] http://www.dotforce.org/reports/DOT_Force_2.0c.doc.
[401] See the Summary of the Workshop at http://www.ftc.gov/bcp/altdisresolution/summary.htm.
[402] According to A. WIENER, *Regulations and Standards for Online Dispute Resolution.* op. cit., p. 4.

- The Canadian *Working Group on Electronic Commerce and Consumers* released in August of 1999 the *Principles of Consumer Protection for Electronic Commerce, A Canadian Framework*[403]. The principles have been drafted by a working group of representatives from Canadian businesses, consumer associations and governments. The principles state that, for the resolution of B2C disputes, merchants should provide internal mechanisms, which should then be followed, if needed, by "fair, timely, effective and affordable means for resolving problems", or, in other words, "accessible, available, affordable and impartial third-party processes for resolving disputes with consumers". The processes are to be developed in collaboration between governments, businesses and consumer groups.

- The Australian Department of Treasury has published, in May 2000, a document called *Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business*[404]. The Model was drafted by the Minister for Financial Services and Regulation, in collaboration with "leading industry and consumer professionals". It is officially based on the OECD Guidelines. The Model has been taken up by the New Zealand Ministry of Consumer Affairs, which released, in October 2000, the *New Zealand Model Code for Consumer Protection in Electronic Commerce*[405]. These two documents are identical with regard to dispute resolution. They state that online merchants should provide an in-house dispute resolution process that operates "within a reasonable time, in a reasonable manner, free of charge to the consumer, without prejudicing the rights of the consumer to seek legal redress". This procedure should then be backed by an external dispute resolution system that is "accessible, independent, fair, accountable, efficient, effective, and without prejudice to judicial redress".

- The Netherlands have released, in November 1999, the *Model Code of Conduct for Electronic Commerce*, which has been drafted by the *Electronic Platform Netherlands* (ECP.NL)[406]. With regard to ODR, the Model Code only states that full information about the availability of dispute resolution processes should be made available to consumers.

[403] Available at http://strategis.ic.gc.ca/SSG/ca01182e.html.
[404] Available at http://www.ecommerce.treasury.gov.au/html/ecommerce.htm.
[405] Available at http://www.consumer-ministry.govt.nz/papers/model_code.doc.
[406] The Model Code is available at http://www.ecp.nl/english/Model3.0ENG.pdf.

Part V-2 Industry initiatives

Industry initiatives have emanated from the ICC, GBDe, the E-Commerce Group, EuroCommerce and the FEDMA. These initiatives generally support ODR, seek to minimize government intervention and favor self-regulation. They have been developing and promoting different sorts of policies or guidelines, in collaboration with governments, universities and consumer organizations.

- The ICC, together with industry organizations, trade associations and other important committees, published *A Global Action Plan for Electronic Commerce*[407], which advocates for minimal government regulation and asserts that self-regulation by the industry is the most effective way to build confidence in e-commerce. Governments should further encourage ODR and leave court recourse as the ultimate solution[408]. The ICC also released a strategy paper called *ICC and business-to-consumer Alternative Dispute Resolution in E-Commerce*[409], which provides recommendations separately to companies involved in e-commerce, to B2C ADR service providers, and to governments and other regulatory bodies. In short, this paper argues that "unless otherwise specified by contract between merchant and consumer, consumers should have the choice between going to court and making use of B2C ADR, including B2C ADR that involves binding arbitration", that the dispute resolvers should be impartial and qualified, that the ADR system should be easily accessible in different languages and at low costs for the consumer, that the system should be transparent (published rules and reports that evaluate decisions taken), granting the right to be heard, and that the decisions should be based on either a code of conduct, other rules or simply equity but should be binding to the extent possible. The document also advocates that governments should intervene only as little as possible, but promote ADR and ODR and allow binding arbitration in B2C disputes if the other principles set forth in the document are respected. The same document also announces the project of the ICC to create a *Dispute Resolution Clearinghouse*, that is a portal for B2C ODR that would provide information on ODR institutions, a standardized intake form, that would develop basic standards and then review the listed institutions for compliance with the standards.

[407] The Global Action Plan was prepared by BIAC, GIIC, ICC, INTUG, WITSA. See its 2nd edition, on October 1999, available at http://www.iccwbo.org/home/electronic_commerce/word_documents/SJAPFIN.doc.
[408] The first Fundamental Principle of the *Global Action Plan* is "1. The development of electronic commerce should be led primarily by the private sector in response to market forces" and the last is "A high level of trust [...] should be pursued by mutual agreement, education, further technological innovations to enhance security and reliability, adoption of adequate dispute resolution mechanisms, and private sector self-regulation". See p. 8.

- The GBDe[410] released in September of 2000 two documents that relate to ODR. The first is called *Alternative Dispute Resolution*[411], and addresses B2C e-commerce[412]. The second deals with consumer confidence and is called *Summary of Recommendations Affecting Consumer Confidence*[413]. The first paper includes recommendations to Internet merchants, to ADR service providers and to governments. To the merchants, the recommendations are the use of in-house dispute handling programs, information about ADR as well as the possibility to submit disputes to ADR. According to the paper, ADR providers should propose impartial and qualified personnel, the dispute resolution process should be accessible, convenient, quick, of low costs to consumers, transparent, and based on either rules or equity, and an adversarial procedure where the parties have the right to be represented by thirds. The paper goes a little further and affirms that "consumers must have the choice between going to law courts and making use of ADR, including binding arbitration"[414]. To the governments, the recommendations include encouraging the use of in-house procedures and ADR; educating and training ADR personnel; refraining from imposing state accreditation systems or mandatory criteria for ADR institutions; allowing ADR systems to function on the basis of equity or codes of conduct; working with other governments and organizations; allowing the use of modern technologies; and keeping procedural and form requirements to a minimum. The paper also states that governments should allow (binding) arbitration in B2C disputes, and that the New York Convention should be adapted. Finally, the paper provides a short list of eight online dispute resolution mechanisms.

- The E-Commerce Group[415] published the *Guidelines for Merchant-to-Consumer Transactions and Commentary*, which address a broad range of issues related to e-commerce, among which dispute resolution. The guidelines state that "fair, timely, and affordable means to settle disputes and obtain redress" should be made available to online

[409] This paper was presented by C. Kuner at the *Forum on the Legal Aspects of ODR*, held in Muenster on June 22 of 2001. The paper was not available from the website of the ICC at the time of the survey.
[410] The GBDe is the Global Business Dialogue on Electronic Commerce, an initiative of the industry that involves 72 companies around the world. Its aim is to ascertain that e-commerce reaches its full economic and social potential. See for further information A. WIENER, *Regulations and Standards for Online Dispute Resolution.* op. cit., p. 10-11.
[411] Available at http://www.gbde.org/ie/2000/adr.doc.
[412] It does not address B2B transactions because they "will follow their own rules with a very high degree of party autonomy, mostly in the form of binding arbitration", p. 3.
[413] Available at http://www.gbde.org/nn/2000/confidence.doc.
[414] See p. 7.
[415] The Electronic Commerce and Consumer Protection Group ("E-Commerce Group") is a coalition of large companies that are involved in B2C e-commerce. The group seeks to promote consumer confidence through

consumers. Accordingly, merchants are encouraged to provide in-house procedures to resolve complaints and "third party dispute resolution programs including online dispute resolution processes". Addressing the issue of due process, the guidelines state that ODR providers should be independent and impartial, transparent, adversarial and effective (which means, above all, that it is understandable for a layman, moderately costly and timely). The merchant sites should be linked to the ODR providers through a seal program, with periodic and random reviews as well as reassessments after user complaints.

- EuroCommerce[416] issued, in April of 2000, a *European Code of Conduct for Online Commercial Relations*[417]. This document covers many issues arising from e-commerce, among which out-of-court settlement of disputes. The paper simply states that online merchants should provide an in-house procedure for handling complaints and subsequent possibilities of out-of-court settlement. The merchant site should provide information on these two procedures, as well as the EuroCommerce complaint form, which is simply a filing form. The paper does not explicitly mention the possibility of *online* dispute resolution.

- FEDMA[418] published a document called the *FEDMA Code on E-Commerce & Interactive Marketing*[419]. The Code contains provisions on a broad spectrum of issues related to B2C e-commerce. Two of these issues are 'consumer redress mechanisms' and 'monitoring and enforcement'. The consumer redress section mainly deals with in-house procedures, with a short note about informing the consumer of any ADR systems to which the consumer can refer a complaint. The section on monitoring and enforcement proposes a seal program run by FEDMA, which globally seeks to supervise merchant sites. As regards dispute resolution, the Code contains no information of interest.

consumer protection by "creating industry best practices and a predictable legal framework". Their guidelines are available at http://www.ecommercegroup.org/guidelines.htm.

[416] EuroCommerce is a lobby group that acts as the trade representation to the EU institutions. See http://www.eurocommerce.be/main.html.

[417] Available at http://www.eurocommerce.be/publications/position_papers/CODEenglFINAL02.PDF.

[418] FEDMA is the Federation of European Direct Marketing, it "has in partnership 12 national Direct Marketing Associations in the European Union, and all those of Switzerland, Hungary, Poland and the Czech and Slovak Republics. See http://www.fedma.org/code/page.cfm?id_page=106.

[419] Available at http://www.fedma.org/img/db/Code_of_Conduct_for_e-commerce.pdf.

Part V-3 Consumer association initiatives

The international associations of consumer organizations active in drafting recommendations for online dispute resolution providers are the European Consumers' Organisation, the TACD[420] and Consumers International[421]. Their position is globally the support of ODR, but only to the extent that the consumer keeps a right of redress in his home country. With respect to the source of the regulation, these associations support voluntary codes of conduct, but only with the backing of government regulation. Their basic claim is that consumers should have at least the same level of protection online as offline.

- The BEUC's[422] most recent work product with respect to e-commerce is the *Comments on the Commission's Communication on E-Commerce and Financial Services*[423]. The comments, rather general in character, shows that BEUC is in favor of ADR for consumer contracts, provided that access to courts remains open. The BEUC globally advocates the equivalence of rights in offline and online procedures.

- The latest important initiative of the TACD is a document called *Alternative Dispute Resolution in the Context of Electronic Commerce*[424], in which the organization acknowledges the importance of online dispute resolution to obtain redress for cross-border complaints. It stresses, however, the necessity of the right for the consumer to resort to his home courts. The content of this recommendation is a first assessment of positive and negative impacts of ODR, and then a series of suggestions that address the resolution of consumer complaints in e-commerce. In brief, these suggestions are that legislation should set the framework and the standards; that ODR systems should be accessible, transparent, optional, free or low-cost to consumers, and independent; that the dispute resolvers should be competent; that the systems should be expeditious, equitable and fair; that the decisions should be binding on the businesses while avenues of recourse have to be left to consumers; and finally that a central clearinghouse should be established where all cases have to be reported and made public. This document was submitted to the European Commission with other recommendations on e-commerce. The EC replied in a document called *TACD*

[420] The TACD is the Transatlantic Consumer Dialogue, an association of 65 consumer organizations that makes recommendations to the EU and the US government.
[421] Consumers International is a large association of consumer organizations, with 260 members in 120 countries.
[422] BEUC is the European Consumers' Organisation, or *Bureau Européen des Unions de Consommateurs*, an association of consumer organizations that lobbies the European Commission and is represented on the e-Confidence Core Group of the EU.
[423] Available at http://www.beuc.org/public/xfiles2000/x2000/x167e.htm.
[424] Available at http://www.tacd.org/db_files/files/files-81-filetag.rtf.

Recommendations on Electronic Commerce and European Commission Services' Responses[425]. In this response, the Commission agreed on the importance of ODR, stressed that "the consumer's adherence to an ADR system should remain voluntary" and otherwise mentioned its current work and projects (which are described above). The TACD also previously issued a recommendation list that is called *Core Consumer Protection Principles in Electronic Commerce*, which stated that methods of redress are to be practical; accessible; affordable; timely; and enforceable without regard to localization.

- Consumers International has conducted, in August 2000, a meanwhile well-known survey of ODR providers called *Disputes in Cyberspace*[426]. The specific recommendations (for B2C relationships) to which the survey has given rise are the establishment of a third party accreditation body to certify ODR providers; the inclusions of ODR clauses in consumer contracts that remain fully voluntary and therefore do not restrict access to courts in any sense; transparency of results by the publication of all decisions (except mediation and other specifically confidential procedures where the publication of statistics would suffice) and of all instances in which businesses did not comply with a decision.

Part V-4 Dispute resolution provider initiatives

Almost every online dispute resolution provider has adopted different sets of rules, ODR still being rapidly evolving in many different direction at a time. However, some large associations of dispute resolution providers have proposed, or are reflecting upon, common policies or codes of conduct. The associations in question are the AAA, the ABA, the CIDR[427], SPIDR[428] and CPR. The global position is the support of ODR, without opposition to government intervention.

[425] The document is available at http://www.tacd.org/misc/cr-ecom2000.rtf.
[426] CONSUMERS INTERNATIONAL, *Online dispute resolution for consumers in cross-border disputes – an international survey*, by P. LAWSON, December 2000.
[427] The CIDR is the Coalition of Internet Dispute Resolvers. It has been founded in June of 2000 by representatives of SPIDR, the ABA, Judicial Arbitration & Mediation Services, Mediate.com and dispute resolution providers. Their aim is to encourage the government and businesses to use ODR.
[428] Society of Professionals in Dispute Resolution (SPIDR) was organized in 1972, growing out of the labor-management mediation and arbitration movement. Its primary functions are to "guard the standards and ethics of the field of dispute resolution and collaborative decision-making; [to] develop the intellectual and professional roots of the field and educate the public about various dispute resolution procedures that were available in order to clarify the expanding role of the conflict resolver; and [to] support its members and provide them with tangible and intangible membership benefits", or, in other words, "SPIDR's intention is to expand the utilization of ADR by private individuals, governmental agencies, and public and private organizations". SPIDR has over 3'600 members. See http://www.spidr.org/abt.htm.

- The guideline of the AAA is called *eCommerce Dispute Management Protocol, Principles for Managing B2B Relationships*. It contains a general statement of a common position, that is the acknowledgment of the importance of fairness, continuity of business, clear policies, as much as of the availability of a range of options and the resources of technology[429].

- The ABA created in early 2001 a Task Force which studies the emergence of standards in ODR for B2B and B2C transactions. The Task Force has investigated the core features of effective ODR and examples of models on which to base guidelines or processes. It came up, in May of 2001, with the *Draft Preliminary Report & Concept Paper*[430]. This first preliminary version tackles the ODR provider trustmark concept, as a means for inducing trust and for centralizing feedback and complaints. As it is a first draft, it does not really provide recommendations, although it shows that the issues for later review are costs; impartiality; confidentiality and security; qualifications and responsibilities of neutrals; accountability and enforcement.

- SPIDR and the CIDR released only a proposal of guidelines for online dispute resolvers that has not been adopted yet by neither of the associations. It is called the *Proposed Guidelines for Online Dispute Resolution*, and it does not address more than the issues of advertising, fees and transparency in the form of statistics[431].

- CPR released an *E-Commerce Initiative* which sets forth contract formation principles and a dispute resolution method. CPR did not yet enunciate any specific standards, guidelines or procedures for ODR.

Part V-6 The core principles

ODR is usually either the sole possible access to justice for the parties using it, or it is a much more convenient form thereof. The parties are therefore deemed to accept to compromise some degree of procedural quality in exchange for faster, less expensive and more effective

[429] American Arbitration Association, *eCommerce Dispute Management Protocol. Principles for Managing Business-to-Business Relationships*, http://www.adr.org/rules/guides/ecomm_protocol.html, January 2001.
[430] The Draft Preliminary Report is available at http://www.law.washington.edu/ABA-eADR/drafts/2001.05.21draft.html.
[431] These proposed guidelines were drafted by N. FEMENIA, a CIDR proponent and SPIDR Online Sector member. For the guidelines, see http://webboard.mediate.com/upload/ODR%20guidelines%20and%20survey10-31-00draft.htm. For more information, see A. WIENER, *Regulations and Standards for Online Dispute Resolution. op. cit.*, p. 27.

proceedings. However, all parties to all types of ODR procedures are entitled to a fundamental fair process[432]. The initiatives set forth above show a consensus on the five following principles:

- Free or low cost to the consumer.
- Independence and impartiality.
- Transparency.
- Speed.
- Accessibility to consumers.

Two other aspects, which are closely connected to these five, still give rise to diverging opinions:

- Voluntary basis of process.
- Binding character of decision.

[432] R. P. ALFORD, *The Virtual World and the Arbitration World,* in *Journal of International Arbitration,* 18, 4, 2001, p. 460.

A CONCLUSION IN THE FORM OF ISSUES FOR FURTHER INVESTIGATION

At the stage of this interim report, it is not our purpose to draw definitive conclusions. This section merely sets out the issues that will need to be answered on the basis of the input of later research. The debates at the colloquium held on 16 November 2001 in Geneva contributed towards identifying and weighing the relevance of the issues at stake.

The primary aim of ODR should be to guarantee the *access* to, *quality*, and *effectiveness* of online justice. These components are well reflected in the core principles on which consensus appears achieved (see Part V-I, Section V-I.2 above). For all ODR mechanisms, these components must be implemented both in legal and technological terms (subject to the requirements of low costs and accessibility to the consumers, which need to be adjusted when applied to B2B disputes).

Some aspects of such implementation are unproblematic and we will not further elaborate on them. Others present either legal or technological difficulties, or both. They are identified below and will be the subject of further investigation and research, including among other efforts interviews with ODR providers and case simulations.

The results of such further work will then be reported in a final document to be read in conjunction with the present report. It is anticipated that such final report will contain recommendations on ODR practices for the use of merchant sites and ODR providers, together with a scientific commentary.

In the following paragraphs we will first list issues arising in connection with the access to online justice, then to its quality, and finally to its effectiveness.

a) Access to online justice

There are many issues in this area, which deserve more attention, among which the following are the main ones.

i) Binding v. non-binding mechanisms

The survey of ODR sites shows that, contrary to the position in traditional dispute resolution, the thrust is placed on ODR mechanisms which are not at all, or only unilaterally,

binding on the parties. Speaking of non-binding mechanisms, one must distinguish between situations where resort to the mechanism is optional, at least for one of the parties, and situations where the outcome has no binding force.

So for instance, UDRP outcomes are not binding on the parties. In spite of the decision, the losing party can still bring the issue before a court. But court litigation is seldom used, even though it is available. Why? Most likely because the process fulfils the needs of the users. On the basis of the survey, one may think that the same is true of other processes in other areas. The challenge is to define such areas and to design the adequate processes.

The issue is particularly important because the legal rules applicable to a binding process are more stringent than those governing non-binding procedures.

ii) Validity of the dispute resolution clause

If resort to ODR is meant to be binding, then the dispute resolution clause must be binding too. The binding character or validity of the ODR clause has already been extensively reviewed in legal literature. Despite these reviews, a number of issues deserve further attention.

First, most relevant texts require that the clause be in writing. On the basis of the UNCITRAL Model Law on Electronic Commerce, it is now commonplace to define a writing in the electronic environment as data "accessible for further reference". What does such definition mean in technological terms? What does it imply in terms of durability?

Second, the different sets of legal rules restrict the validity of mandatory dispute resolution clauses in consumer contracts. This is certainly one of the reasons for the wealth of non-binding methods found on the Internet. What are the exact confines of these restrictions? Does the distinction between B2B and B2C make sense in the electronic environment? Will electronic commerce evolve towards communities and marketplaces and may these communities replace traditional B2B and B2C (possibly also C2C) divisions?

A similar question arises in question with the internationality of the contract. Generally, the rules governing international contracts are not the same as those governing domestic contracts. Does this distinction still make sense in the virtual world? Is an electronic contract not simply an electronic contract, be it domestic or international?

Although it is referred to in this context for the sake of convenience, this last question goes beyond the validity of the dispute resolution clause. It also has consequences in terms of the law governing the merits of the contract.

b) Quality of online justice

Let us first start with non-binding mechanisms, then continue with binding methods, to end by addressing issues common to both.

Non-binding mechanisms are subject to less stringent legal requirements. The difficulties here are thus less of a legal nature and more *practical/technological* or even *psychological*. How does one conduct an effective mediation without live contact, without watching body language? Is online mediation by essence restricted to disputes calling for simple "mechanical" answers to the exclusion of more sophisticated problems? What are its limits? How does a screen to screen process compare to face to face encounter? How does one react to a certain screen setup?

If the outcome of ODR is intended to be *binding* upon the parties, then the process must meet more demanding procedural standards, with implications for *due process* primarily. Incidentally, one will note that due process is not absent from non-mandatory ODR. Some measure of due process is also required there and it may be useful to define it in the context of ODR. If we now revert to binding methods, due process implies the independence of the dispute resolver and the parties' right to be heard, i.e. their right to present their case and evidence and due comment on their opponents' case and evidence.

With well drafted rules, an adequate technological setup, and good people – well-trained ODR provider staff and experienced arbitrators – due process can certainly be achieved online. It requires specific *security* measures, especially for purposes of identification of the parties and other participants, such as witnesses or experts. In addition to defining the technological specifications, one must review to what extent the security measures may differ depending on the nature of the dispute or the type of resolution mechanism. For instance, one may venture to say that the parties may expect lower security standards for small cases than for larger ones.

Still in connection with the *evidence for production in ODR*, one obvious advantage of online compared to offline dispute resolution is the possibility to transfer data about the contract conclusion and possibly its online performance from the merchant site to the ODR site. This implies certain technological requirements, to be further specified.

In terms of quality of the process, issues of *confidentiality* also arise. The need for confidentiality of B2B and B2C proceedings may not be the same. Once it is defined, the

necessary measures must be taken to protect the relevant data against access by unauthorized third parties.

Another issue related to quality is the potential of ODR to cope with *complex disputes* in terms of facts and evidence. Traditional arbitration permits a very thorough review of complex matters by way of extensive briefing and often long hearings. It gives the parties the assurance – sometimes unfortunately only the illusion – that their concerns and arguments will be taken into account seriously, an advantage that takes its toll in terms of duration and costs of the proceedings. How much of this can or should be transposed to ODR? Here again, further reflection is necessary to define the limits of the possible uses of ODR.

As a final question in this context, we would like to mention *control*. A plurality of private mechanisms are available. Do they provide with the necessary due process, confidentiality and overall quality which the users are entitled to expect? How is effective control ensured? What are the minimum standards? This leads to the topics of accreditation, trustmarks, certification, including self-certification.

c) The effectiveness of online justice

The quality of justice is not enough. In addition, the result must be effective. One of the main advantages of ODR is that it overcomes the obstacles of litigating in a faraway court, which is expensive and time-consuming. In fact, ODR adapts the dispute resolution technique to the technological means applied to the business activity out of which the dispute arises: the contract is entered into online, and the dispute is resolved online. Now the purpose of the whole exercise would be defeated if the winner ended up with a decision that he must enforce in a faraway court, again at high cost both time- and moneywise.

In other words, an effective ODR system must include some enforcement mechanism. What are these mechanisms? Charge-back arrangements, judgment funds, escrow accounts? How can they be achieved?

And if no self-execution mechanisms are available, then the process must end with an enforceable decision. Under the New York Convention for the enforcement of foreign arbitral awards, an enforceable decision is a written, signed and authenticated document. How are these requirements met for electronic documents? How does one ensure the non-alterability of the decision? How does one serve it on the parties?

In sum, there are many issues for further consideration and the goal set in the foreword is met. The state of the practice has been reviewed in detail and the relevant issues are well identified. Now it remains to come up with workable answers both legally and technologically.

APPENDIX

SURVEYED ODR INSTITUTIONS[433]

1-2-3 Settle.Com, a US-based private business venture owned and operated by attorneys, was created in late 1999. It offers automated negotiation, mediation, arbitration and evaluation. The site does not provide statistics on filed cases. The institution's website is http://www.123settle.com.

AllSettle.Com (formerly SettlementNOW) is a US-based private business venture, created in early 1999 and developed by Internet specialists and insurance claimants. It offers automated negotiation for insurance claims. The website of the institution does not provide caseload statistics. The survey shows that between 100 and 1000 cases had been filed. The institution's website is http://www.allsettle.com..

BBBOnline, the online arm of the Better Business Bureau system, a US-based non-profit industry association created in 1995, seeks globally to promote the relationship between businesses and consumers mainly through self-regulation and education, and more specifically to promote trust and confidence on the Internet through trustmarks. BBB plans to offer automated negotiation, mediation and arbitration (these services are not available online yet). It also runs three trustmark programs: Reliability, Privacy and Children's Privacy. Its effectiveness relies largely on the possibility to tarnish the reputation of trustmarked companies. So far, the online dispute resolution at BBB's has been limited to the online filing of a complaint (which is forwarded to the local Better Business Bureau); it did not provide online dispute resolution proper so far. The institution's website is http://www.bbbonline.com/about/index.asp.

ClaimChoice.com is a US-based private business venture run by a corporation named eLegius, Inc.; it was created in December of 1999. It offers assisted negotiation to accident victims in their relationship with their insurance companies. The homepage of ClaimChoice.com is https://www.claimchoice.com/Public/PublicHomepage.jsp.

ClaimNegotiator is an additional service of ClaimResolver. It consists of online communication tools for negotiators and mediators. ClaimNegotiator does not provide dispute resolution itself, only the technological means for doing so. The website is http://www.claimnegotiator.com/cnhome.nsf/frameset.

ClaimResolver.com is a private business venture that offers automated negotiation. It offers a particularly large variety of possibilities to change the extent of the settlement. Globally, there is only very little information available on the website, which is http://www.claimresolver.com/ecAbout.nsf/mainpage?OpenPage.

[433] The main references for the following list of institutions are: a) the surveys conducted by CONSUMERS INTERNATIONAL in December of 2000, called *Disputes In Cyberspace* (http://www.consumersinternational.org/campaigns/electronic/adr_web.pdf)) and by the OECD in October of 2000, called the *Orientation Document for the Joint Conference of the OECD, HCOPIL and ICC* (http://www.oecd.org/dsti/sti/it/ secur/prod/adr_agenda.pdf), b) the lists of ODR mechanisms established by the *Joint Research Center* of the European Commission (http://dsa-isis.jrc.it/ADR/ links.html) and by the *University of Massachusetts* (http://aaron.sbs.umass.edu/center/onlineadr.htm).

ClickNSettle.com, a private business venture, US-based and created in June 1999, offers automated negotiation. The website of the institution does not provide caseload statistics. According to Consumers International, 2000 cases have been filed[434]. The institution's website is http://www.clicknsettle.com.

The **CPR Institute for Dispute Resolution**, US-based and established in 1979, is an alliance of 500 counsels of corporations and lawyers seeking to promote ADR. It conducts research on new uses of ADR and provides dispute resolution in domain-name issues, applying ICANN's Uniform Dispute Resolution Policy as it is a dispute resolution provider approved since December 1 of 1999 by ICANN[435]. It handled some twenty-odd cases in domain names until October of 2001. The website is http://www.cpradr.org/ICANN_menu.htm.

Cyberarbitration is an Indian-based private business venture offering arbitration. By the aspect of its website, it does not seem to be currently active. The institution's website is http://www.cyberarbitration.com.

Cybercourt is a Germany-based program that was intended to undergo a test phase from March 1 2000 through September 2000. By October 2001, this phase had apparently not begun. It is to be operated by the international consulting and legal firm PriceWaterhouseCoopers. It is planned to offer online mediation and arbitration. The website of the pilot project is http://www.cybercourt.org.

Cybersettle, a North American-based private business venture, was created in June 1998. It recently became the official and exclusive online settlement tool of the Association of Trial Lawyers of America. It offers automated negotiation services, and has already handled tens of thousands of cases. The institution's website is http://www.cybersettle.com.

The **Dispute Resolution Clearinghouse** is a project of the International Chamber of Commerce, which should actively assist the parties to choose the best B2C ODR system for their needs. It could further "allow system providers to access markets and benefit consumers across linguistic and cultural borders by utilizing ICC's international perspective". Concretely, the Clearinghouse would involve the following activities: online information about B2C ODR projects worldwide; assistance to the parties in search of B2C ODR (for instance by forwarding the complaints); developing a standardized online intake form and basic standards for B2C ODR; keep track of consumers satisfactions of B2C ODR institutions; and encourage companies to use B2C ODR. The project did not have a website in October 2001.

The **DomainMagistrate** was launched by Network Solutions, Inc. on January 3rd, 2000, to help users with domain name disputes. The DomainMagistrate is an online assistance center meant to help users involved in domain name registration disputes, merely a "linking site" explaining what domain dispute resolution is, presenting the code of conduct – the Uniform Domain Name Dispute Resolution Policy and Rules – and providing links to dispute resolution providers applying this code of conduct: eResolution, the National Arbitration Forum and the WIPO Arbitration and Mediation Center, i.e. three of the four providers approved by ICANN. The corresponding website is http://www.domainmagistrate.com.

ECODIR (European Consumer Dispute Resolution) is an online dispute resolution program promoted by the European Commission. It has been launched at the end of October and it now provides negotiation, mediation and recommendation for free until June 2002. ECODIR has

[434] CONSUMERS INTERNATIONAL, *Disputes In Cyberspace*, op. cit.

[435] Aside from CPR, ICANN approved three other dispute resolution providers, which all use the Policy as well as their own supplemental rules. They are eResolution, the National Arbitration and the World Intellectual Property Organization. The are presented below.

been developed by a consortium composed of CRID, from the University of Namur (leader of the project); CECOJ, from the CNRS (Paris); CRDP, from the University of Montreal; CITA, from the University of Namur; CEDIB, from the University of Palma de Mallorca; ITM, from the University of Muenster; the University of Liege; the CMAP, Centre de Médiation et d'Arbitrage de Paris, from Paris; the Online Mediators, an American body; Globalsign; and eResolution, which provides the dispute resolution platform. The website of ECODIR is http://www.ecodir.org.

E-Mediation: see ODR.NL

e-Mediator is a pilot project of an offline mediation institutions called Consensus. It is UK-based and was created in February 2000. E-Mediator, as the name says, offers mediation services. From February 2000 through December 2000, the institution managed a caseload of 30 disputes, according to Consumers International[436]. The site does not provide statistics. The website of the institution is http://www.consensus.uk.com/e-mediator.html.

eResolution is the Canadian-based private business venture that has replaced the CyberTribunal. It has been proposing dispute resolution services under ICANN's UDRP for domain names since Fall, 1999. eResolution moreover recently concluded a partnership with the Paris Chamber of Commerce and Industry's Center of Mediation and Arbitration, and on this basis it now offers online mediation and arbitration as well. The private venture also partnered with RealNames Corporation in order to provide dispute resolution (the system is globally designed in the same fashion as the UDRP) for Keyword Web addresses. The caseload of eResolution regarding domain names under the Policy is of about 300 cases. No information of this type is provided for its mediation and arbitration services in association with the Paris Chamber of Commerce. The website of eResolution is http://www.eresolution.ca.

FordJourney is a dispute resolution service provided by the Chartered Institute of Arbitrators, in Ireland, at the request of Ford Motors. It is a fall-back mechanism to the in-house complaint procedure at the FordJourney's Customer Relationship Center. FordJourney provides arbitration for online sales of Ford cars. It does not provide a caseload. The website is https://www.arbitrators.org/fordjourney/INDEX.HTM.

FSM ("Freiwillige Selbstkontrolle Multimedia Diensteanbieter e. V.") is a German company, based in Bonn. Its aim is to "make its contribution toward strengthening the freedoms of service providers and protecting the valid interests of users and the general public, in particular against race discrimination and the glorification of violence, and to act on the basis of self-responsibility in order to strengthen protection for youth". The FSM dispute resolution mechanism works roughly like this: companies agree to abide by the code of conduct of FSM (300 companies have done it so far), which mainly prohibits the public use of illegal material (such as incitement to racial hatred, representation of violence, hardcore pornography) and of material which could "morally harm" youths (such as pornography). Once the facts are established, FSM can notify the company that its behavior is not respectful of the code of conduct and, if the defendant maintains its behavior, sue the company in court. The institution's website is http://www.fsm.de/ueb/index.html.

The **ICC project** of an ODR portal: see the *Dispute Resolution Clearinghouse*.

iCourthouse, a US-based private business venture in operation since November 1999, is meant to be a virtual courthouse, rendering verdicts on the basis of decisions of juries. It functions as a mock-trial forum for reality testing. It offers its services either to the parties, for free (and the parties can agree to make the outcome binding) or to attorneys, on a subscription basis. When

[436] CONSUMERS INTERNATIONAL, *Disputes In Cyberspace*, op. cit.

the parties agree to make the results binding, it might be considered as arbitration, when they do not, it is an evaluation service (with the additional merits of providing the consumers with a means of publishing the complaint). Over 350 cases have been filed with iCourthouse. The institution's website is http://www.i-courthouse.com.

iLevel, a US-based consumer service operational since 1997, offers assisted negotiation. It has handled thousands of disputes to date. The institution's website is http://www.ilevel.com.

IntelliCOURT is a California-based private business venture run by a company providing offline ADR. It was founded in 2000. It offers mediation and arbitration. The website is http://www.intellicourt.com.

Internet Neutral is a US-based private business venture in operation since 1997. It offers online mediation, but has not handled any disputes in its first three years of existence. The institution's website is http://www.internetneutral.com.

Intersettle is a Scotland-based private business venture, launched in November of 2000. It provides automated negotiation. No statistical data are available. The website is http://www.intersettle.co.uk.

IRIS (Imaginons un Réseau Internet Solidaire), a French NGO created in October 1997, seeks to promote individual and public liberties on the Internet, Internet access as part of "the universal service" and the use of the Internet for non-commercial purposes. It proposed mediation as an experiment for disputes involving ISPs, from March 1998 through March 1999 and obtained a caseload of 61 mediations (of which 53 were successful)[437]. The institution's website is: http://www.iris.sgdg.org/mediation.

MARS (Mediation Arbitration Resolution Services), a US-based private business venture operational since October 1999, offers automated negotiation, mediation and arbitration as a double fall-back mechanism. The institution's website is http://www.resolvemydispute.com.

Mediate-Net, which closed during our review because it was meant to be an experiment, handled family law disputes and conflicts opposing consumers to health care services. It was supported by a grant from the *National Center on Automated Information Retrieval* (NCAIR) and held by the University of Maryland. It no longer has an Internet address.

The **State of Michigan** is planning to establish a cybercourt that would handle legal disputes between commercial businesses (for instance trade secrets and interconnection agreements) concerning transactions of at least USD 25'000. It would be a court of law conducted by simultaneous videoconferencing, online windows showing exhibits and instant-messenger programs with real-time written discussions of the legal issues. The cybercourt would operate on a voluntary basis: it would be limited to disputes where neither side demands a jury trial. The legislation and history of the Cybercourt is accessible at http://www.michigancybercourt.net.

The **National Arbitration Forum** is a US-based arbitration institution which provides dispute resolution services under the UDRP. It has been accredited by ICANN on December 23rd of 1999 and has rendered more than 1500 decisions since then. It is thus the second most active institution applying the UDRP, after WIPO[438]. The corresponding website is http://www.arb-

[437] See M. MARZOUKI, IRIS Mediation Experiment, presentation at the ADR Workshop in Brussels, March 21, 2000, http://www.iris.sgdg.org/documents/adr-wshop/index.html).

[438] Aside from the National Arbitration Forum, ICANN approved three other dispute resolution providers – which all use the UDRP and their own supplemental rules –, eResolution (approved January 1st of 2000), WIPO (approved December 1st of 1999) and the CPR Institute for Dispute Resolution (approved May 22nd of 2000). They are presented in this section.

forum.com/domains.

NewCourtCity is a US-based private business venture that was launched in Fall 2000. Its aim is to "allow businesses and individuals to deal with disputes without public exposure or concern about setting adverse legal precedents". It offers automated negotiation and, as a fall-back, mediation. No caseload statistics are published. The institution's website is http://www.newcourtcity.com.

NovaForum.com is a Canadian-based private business venture created in June 2000. It offers mediation and arbitration, as two successive tiers which take place only once the avenues of redress internal to the companies have been exhausted. During the year 2000, NovaForum.com has resolved about a hundred cases, of which 75% by mediation. The institution's website is http://www.novaforum.com.

ODR.NL is a Netherlands-based venture created by the Dutch Electronic Commerce Platform (itself founded in 1998 the Dutch Ministry of Economic Affairs and the Dutch employers Association). It already released a Model Code of Conduct for Electronic Commerce and is currently implementing online dispute resolution projects. The selected forms of online resolution are mediation (E-Mediation, which has a website but is not active yet), *bindend advies* (E-Complaints, which does not even have a website yet) and arbitration (E-Arbitration, which does not have a website yet either). The relevant websites are http://www.ecp.nl/trust/index1.htm and http://www.e-mediation.nl/english.shtml.

OnlineArb: see Online Resolution.

OnlineDisputes, Inc. is a US-based private business venture that plans to offer "automated mediation" and was due to begin in Autumn 2000. Its website is not accessible yet. The address is http://www.onlinedisputes.org.

OnlineMediators: see Online Resolution.

The **Online Ombuds Office** is a US-based non-profit research project created in June of 1996 by the University of Massachusetts at Amherst. It was funded by the National Center for Automated Information Research (NCAIR) and a private foundation (the Hewlett Foundation). It is the "dispute resolution arm" of the Center for Information Technology and Dispute Resolution, University of Massachusetts, which is co-directed by Ethan Katsh and Janet Rifkin. Its experience includes a collaboration with the online auction sites eBay and Up4Sale to mediate disputes arising out of online auctions, during March of 1999, and the creation of Disputes.org, the predecessor of eResolution, for the resolution of domain name disputes. The Online Ombuds Office offers mediation, and has handled over 200 cases since 1996. The institution's website is http://aaron.sbs.umass.edu/center/ombuds/default.htm.

Online Resolution is US-based and was created in January of 2000 by the Mediation Information and Resource Center (MIRC). It is not clear what the governing structure is and if there is a funding base. Online Resolution offers assisted negotiation, mediation and arbitration. It is the only ODR provider that explicitly refers to the rules of the American Bar Association (ABA), Society of Professionals in Dispute Resolution (SPIDR) and American Arbitration Association (AAA). It was filed over 30 cases. The institution's websites are http://www.onlineresolution.com, http://www.onlinearb.com, http://www.onlinemediators.com and http://www.onlinenegotiation.com.

Resolution Forum is a US-based non-profit program created in 1997 by representatives of business, legal and medical communities, in association with the Center for Legal Responsibility at South Texas College of Law. It seeks to make ODR more accessible and affordable to the general public (particularly to persons and organizations of limited means), for instance by providing businesses and institutions with training and guidance about the effective

use of ODR processes. It offers, for this purpose, assisted negotiation, mediation, and arbitration. The institution's website is http://www.resolutionforum.org.

ResolveitNow.com is a private business venture that offers automated negotiation. The institution does not provide statistics. Its website is http://www.resolveitnow.com.

SettlementOnline is private business venture founded in early 1999. It provides automated negotiation and a communication platform for online mediation. It does not provide its caseload. Its website is http://www.settlementonline.com/Index.html.

SettlementNOW: see AllSettle.Com.

SettleOnline is a US-based private business venture operational since June of 1999. It was created by Resolution Systems, Inc., a provider of offline ADR. It offers automated negotiation, and, as a fall-back mechanism, *offline* mediation and *offline* arbitration. Since June of 1999, 2000 cases have been filed. The institution's website is http://www.settleonline.com.

SettleSmart, a private business venture, offers automated negotiation. The institution's website is http://www.settlesmart.com.

SettleTheCase is a program that offers mediation and arbitration; it also plans to offer summary jury. Almost no information can be found on the website of SettleTheCase, but it is probably a private business venture, US-based and created in 2001. Its websites is http://www.settlethecase.com/main.html.

SquareTrade, a US-based private business venture which was created in 1999, provides assisted negotiation, mediation and arbitration, mainly for online marketplaces. It has contracted with online auctions websites (for instance eBay) and B2B and B2C online marketplaces to provide them trustmark-based services, which are mainly the SquareTrade Seal and ODR. SquareTrade is itself a licensee of the TRUSTe Privacy Program. Disputes with SquareTrade can be put before TRUSTe for assisted negotiation. SquareTrade has reported having handled over 40'000 cases in a little over one and a half years[439]. The institution's website are http://www.squaretrade.com and http://www.transecure.org.

The **Claim Room** is a UK-based private business venture that offers automated and assisted negotiation as well as communication tools for mediation (but not mediation services as such). It was founded in early 2001. The corresponding website is http://www.theclaimroom.com.

TRUSTe is an independent, non-profit initiative run by a private business venture. It offers assisted negotiation for disputes involving businesses that are licensed by the TRUSTe trustmark. It is run by individuals with corporate interests. It has approximately 2000 licensees. The institution's website is http://www.truste.org.

U.S. Settle, a private business venture created in April of 1999 by a retired judge and an arbitrator and mediator, offers automated negotiation. The institution's website is http://www.ussettle.com.

The **Virtual Magistrate** is a US-based academic and non-profit institution. It began, in May of 1996 as the first online dispute resolution project and handled, at the time, the first ever online case (it was *Tierney and Email America*). In 1996, it was a joint project of the Cyberspace Law Institute, the American Arbitration Association, the National Center for Automated Information

[439] According to W.K. SLATE, *Online Dispute Prevention and Resolution in eCommerce*, American Arbitration Association IFCAI Conference, Prague, June 22nd 2001. According to R. P. ALFORD, *The Virtual World and the Arbitration World*, in *Journal of International Arbitration*, 18, 4, 2001, p. 457, SquareTrade has reported having handled over 45'000 disputes in less than a year.

Research and the Villanova Center for Information Law and Policy. After this first case, it did not show any further activity until very recently, when it was reactivated by the Chicago-Kent College of Law. The Virtual Magistrate offers non-binding arbitration, but apparently it has not solved any case since *Tierney* in 1996. The institution's website is http://www.vmag.org.

WebAssured.com is a US-based private business venture that offers mediation and arbitration as a tiered system subsequent to automated complaints assistance. The institution's website is http://www.webassured.com.

WEBDispute.com is a US-based private business venture that has been created in March of 2000. It offers arbitration and plans to offer mediation. The institution's website is http://www.webdispute.com.

Web Dispute Resolution, a US-based private business venture created in 1999, offers mediation and arbitration. A handful of cases were filed. The institution's website is http://www.webdisputeresolutions.com.

WebMediate is a US-based private business venture launched in the autumn of 2000. It offers automated negotiation, mediation and arbitration. The corresponding website is http://www.webmediate.com.

WeCanSettle is a UK-based private business venture that was founded in early 2001. It offers automated negotiation, but does not provide information on its caseload. The institution's website is https://www.wecansettle.com.

Web Trader is a UK-based trustmark scheme (with about a thousand licensees) providing assisted negotiation (although the institution calls it complaint assistance) to consumers against licensees of Web Trader. It is one of the two institutions (the other being SquareTrade) providing online dispute resolution that are themselves accredited by a higher-level body (TrustUK), aside those which are accredited by ICANN. The website of the trustmark scheme is http://www.which.net/webtrader.

The **World Intellectual Property Organization** (WIPO) offers, among other services, dispute resolution, through its Arbitration and Mediation Center. One of the tasks of this Center is online dispute resolution in the field of domain names. It is a dispute resolution provider approved since December 1, 1999 by ICANN, therefore applying the UDRP and its own supplemental rules[440]. It currently provides services for the resolution of disputes in the following fields: Generic Top Level Domains: .com, .net, .org and for the following Country Code Top Level Domains: .AC (Ascencion Island) .AG (Antigua and Barbuda) .AS (American Samoa) .BS (Bahamas) .CY (Cyprus) .FJ (Fiji) .GT (Guatemala) .MX (Mexico) .NA (Namibia) .NU (Niue) .PH (Philippines) .PN (Pitcairn Island) .RO (Romania) .SH (St. Helena).TT (Trinidad and Tobago) .TV (Tuvalu) .VE (Venezuela) .WS (Western Samoa). It is currently the most active provider of dispute resolution under the UDRP. The corresponding website is http://arbiter.wipo.int/domains.

Word&Bond is a private business venture that is based in the UK. It has been launched in early 2001. It offers a trustmark program and arbitration. It does not provide information on its caseload. Its website is http://www.wordandbond.com.

[440] Aside from the Center of WIPO, ICANN approved three other dispute resolution providers – which all use these Policy and Rules and their own supplemental rules –, eResolution (approved January 1, 2000), the National Arbitration Forum (approved December 23, 1999) and the CPR Institute for Dispute Resolution (approved May 22, 2000). They are presented above.