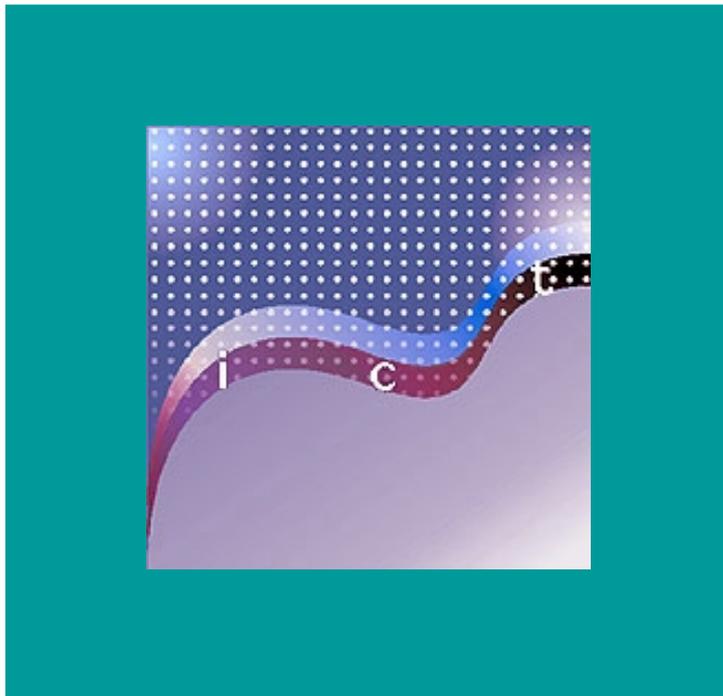


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Chapter 7: Online dispute resolution: E-commerce and beyond



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Chapter 7

ONLINE DISPUTE RESOLUTION: E-COMMERCE AND BEYOND

A. Introduction

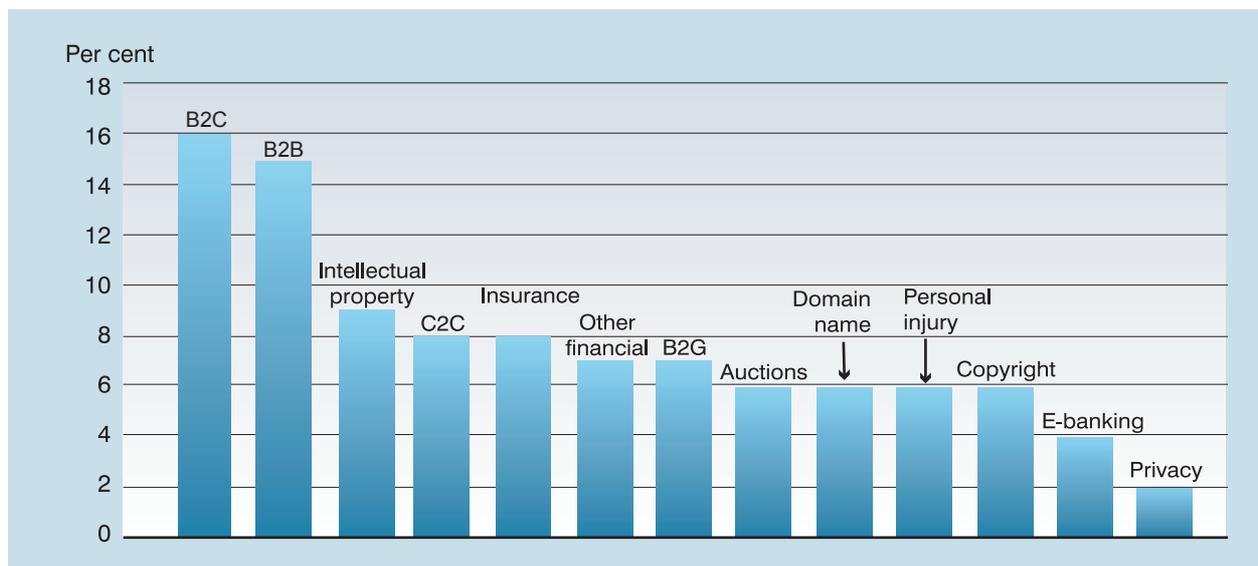
One of the main challenges facing e-commerce is how to resolve cross-border disputes in the electronic business environment. Distances between parties, linguistic and cultural differences, difficulties determining the applicable law, and competent jurisdiction and enforcement of judgments are among the main obstacles that could significantly increase the cost of doing business online. Given that traditional dispute settlement mechanisms may not provide effective redress in e-commerce transactions, there is a need to consider alternative dispute resolution (ADR) mechanisms that would provide speedy, low-cost redress for claims arising from online interactions. Most if not all of the same laws and principles that apply to ADR in

the brick-and-mortar regime will also apply to e-commerce disputes. When ADR takes place using computer-mediated communications in the online environment, it is often referred to as online dispute resolution (ODR). Both e-disputes and bricks-and-mortar disputes can be resolved using ODR. Using data extracted from a questionnaire administered by UNCTAD, chart 7.1 illustrates the wide range of type of services offered by ODR providers.

The main forms of ADR are arbitration, mediation and negotiation, processes that are effective in settling disputes out of court and in a manner that is less formal than litigation in court. During the past two decades, use of ADR has expanded greatly. Indeed, ADR processes are used much more often for commercial disputes than litigation in court.

Chart 7.1

Types of services offered by ODR providers



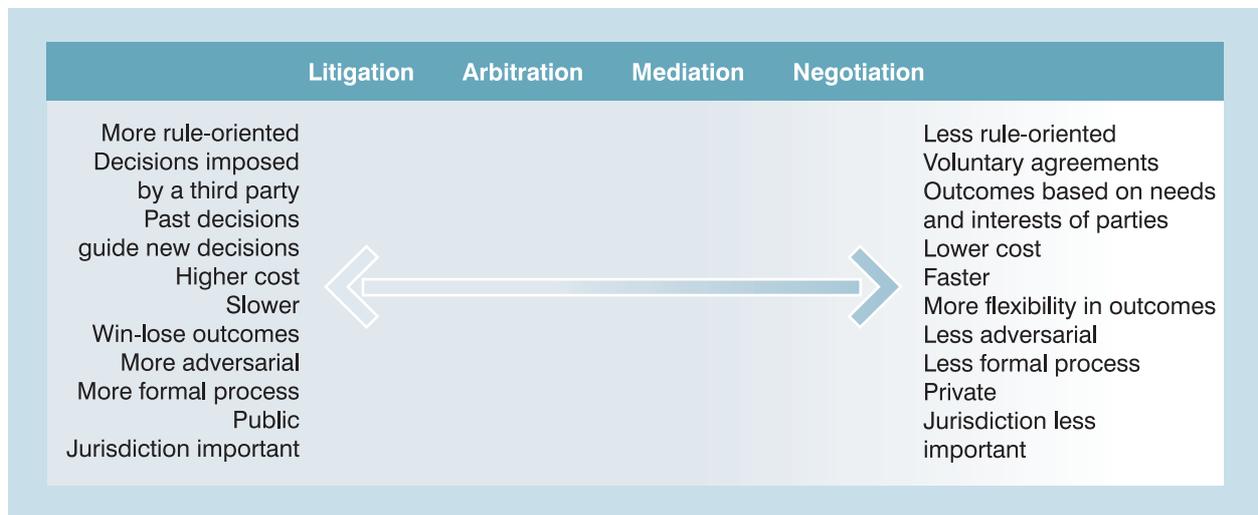
Source: UNCTAD questionnaire.

Following are the chief characteristics of the three principal methods of ADR:

- **Arbitration** - Traditional arbitration involves a neutral third party who makes a decision that is binding on the parties. The authority of the arbitrator comes from a dispute resolution clause in a contract that the parties have agreed to.
- **Mediation** - Mediation involves a neutral third party, but the mediator has no authority to issue binding decisions. Mediators work with the parties to fashion an agreement that is acceptable to the disputants.
- **Negotiation** - In negotiation, there is no third party present. The parties try to resolve the problem by themselves. When unsuccessful, negotiation may be a preliminary step to arbitration or mediation.
- Some of the differences between the various forms of ADR are illustrated in chart 7.2.

Chart 7.2

The dispute resolution continuum



Perhaps the most significant difference between litigation and the three primary forms of ADR is that, whereas participation in litigation more directly assumes that participation can be compelled by the state, participation in ADR and ODR occurs only if the parties have agreed, either voluntarily or through stipulation in a contract, to find a solution to the problem. Litigation, by definition, will not be an option when, for any reason, a court is not available or accessible. When access to courts is difficult because of the parties' location or for some other reason, ODR may be the only possible means of resolving a dispute. Thus, ADR/ODR may take place in any country, in any language and with arbitrators/mediators of any nationality. Arbitration/mediation is faster and less expensive than litigation in the courts, and hearings are not public.

Decisions made by arbitrators generally need a method of enforcement. The 1958 New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ allows courts in any country that has signed the convention to enforce an arbitral award. For this to happen, certain formalities must be followed. Problems may arise if any of the following questions cannot be answered in the affirmative.

- Does an arbitration agreement formed by electronic means satisfy the formal requirements of the New York Convention?
- Can electronic means be used to conduct the arbitration proceedings? If so, where is the seat of arbitration?
- Can the arbitrators deliberate by electronic means, rather than in person?
- Can an award issued in electronic form be considered to be in "writing"?

Despite these potential problems, there is little doubt that online arbitration will be used more and more widely as time passes.²

ODR has a bigger role to play in business-to-consumer (B2C) e-commerce than in business-to-business (B2B) e-commerce because, while an arbitration clause can be enforced among merchants (in B2B contracts), it may not be binding on the consumer (in B2C contracts). It should be noted that in most European jurisdictions, an arbitration clause contained in standard contract terms and binding the consumer to submit a dispute to arbitration is likely to be viewed as unfair. For this reason, a standard arbitration clause cannot be enforced against a consumer. Thus, the arbitration clause may be binding on the business but optional for the consumer. However, if the consumer so wishes, he or she can choose to go to arbitration.

By contrast, in the United States, consumer arbitration clauses are usually enforceable. The US courts will refuse to enforce a binding arbitration clause against a consumer only where it would be unconscionable to do so.³ This would be the case if enforcing the arbitration clause deprived the consumer of access to a forum to vindicate his or her rights. The US courts have held in several decisions that an arbitration agreement in a consumer contract that forces the consumer to incur excessive arbitration fees is unconscionable. Since arbitration requires the intervention of a qualified and experienced human decision maker, but consumer claims are mostly of small value, excessive fees may be unavoidable. For this reason, arbitration may not be the first choice for small- and medium-value consumer disputes.

Agreements reached as a result of mediation generally do not require a legal infrastructure to enforce them. This is because the agreements are consensual and provide both parties at least part of what they originally wanted. Mediation is thought to be the primary ADR/ODR method for small-value consumer disputes. There are a number of reasons for this primacy of online mediation.

- The process is flexible; the mediator essentially uses his or her skill to help the parties to communicate and reach their own solution. This high degree of party control means that the parties are likely to feel comfortable with the online procedure.
- The fact that participation is voluntary means that the parties are more willing to participate, as they are not thereby compromising their position.

- Redress is not limited to monetary awards and could include, for example, a substantial discount on a future purchase or something similar.

ODR, like ADR, can take the form of any dispute resolution process, and the first choice that must be made in responding to any dispute or in designing a system is which process to use. As will be discussed below, for ODR to work, the parties must agree (or have agreed earlier contractually) on a particular process. The second important question is whether the whole dispute resolution process or only a part of it will be online. ODR can be a stand-alone system in which parties never meet face to face, or it can be used to enhance processes that include at least some face-to-face meetings.

E-commerce is an arena that has already demonstrated both a need for new dispute resolution approaches and the fact that new approaches are possible. Just as offline business is supported by an infrastructure that provides dispute resolution options when disputes occur, the online environment is building an infrastructure with an array of dispute resolution options that take into account the special qualities of cross-border transactions, in which much of the exchange is electronic in nature. ODR, as it is increasingly being called, was not in the minds of early e-commerce entrepreneurs, but during the last six to seven years the inevitability of disputes and the need for ODR processes has become increasingly clear. Recently, ODR has been acquiring new functionalities demonstrating its potential in an expanding range of situations.

ODR brings the resources of the network to the task of resolving conflict. These network resources have three novel elements:

1. Human expertise delivered from anywhere
2. Computer processing power delivered from anywhere
3. Delivery of human expertise and technological power at electronic speed

Dispute resolution is an ancient and fundamental activity not only of society at large but of institutions within society. Dispute resolution processes are present in state-based legal systems and in groups of all kinds and sizes, from small families to global economic enterprises. What can vary greatly are the methods and processes used to pursue the goal of resolving conflict. There are many different tools for

dispute resolution, and the needs of the parties and the group or community involved determine which of the available tools best fit the particular situation.

The Internet, by being both disruptive and facilitative, is the source of the problem and also the source of the solution. All the numerous and novel ways of interacting online in commercially productive ways allow disputes to occur, thus heightening the need for dispute resolution systems that can assist disputants who may be at a great distance from one another. At the same time, dispute resolution is an informational activity in which persons and groups need to identify common interests, share information, assess priorities, and evaluate areas of agreement. As technology improves, therefore, and as people engage in increasingly complex informational activities online, ODR processes can be expected to become more sophisticated as well.

The disputes that are traceable to the Internet may be more visible and are generally more publicized than the solutions made possible by the Internet. Part of the reason for this is that new systems are often built and implemented without anticipating the need to respond to disputes and conflicts that might arise. Fortunately, this is not always true, and notable achievements in the area of dispute resolution have already occurred and will be discussed in the following sections.

While the need for and value of ODR have become clear very quickly, the technological capabilities needed for broader use of ODR are expanding more slowly. Disputes occur inevitably and often quite quickly as new kinds of transactions and interactions emerge online. Dispute resolution processes, however, must be designed and constructed. Dispute resolution for complex disputes will also be more challenging than dispute resolution for simpler conflicts. One can already point to significant successes in applying ODR to relatively simple e-commerce disputes, and tools are being developed for use in more complex private and public disputes.

This chapter looks at the history of ODR, its nature and use in different contexts, and what role it can perform in fostering the trusting relationships that are necessary for e-commerce to grow in developing countries. In addition, it considers the growth and adoption of ODR in new environments such as government and other arenas where there is a need for new tools to respond to more complex multi-party disputes. The last part of the chapter focuses on the challenges involved in implementing ODR in devel-

oping countries. That section draws on data obtained through a questionnaire that UNCTAD secretariat circulated to ODR service providers. The questionnaire elicited 24 replies, including from all the major ODR providers.

B. A history of ODR

The history of ODR can be divided into three main time periods: pre-1995, 1995 to 1999 and post-1999.

1. Before 1995

During this period, disputes arose and dispute resolution was applied informally. Until 1992, the Internet was largely a US-centered network, and commercial activity was banned from it under that country's National Science Foundation's acceptable use policy (Kesan and Shah 2001). The Internet was used mainly by those in academic institutions for sending email and participating in listservs and, in the case of those with some technical expertise, for exchanging files. "Flaming" and violations of "netiquette"⁴ were common, and some famous disputes occurred during this time involving individuals participating in role-playing games.⁵ Various online mechanisms were used to deal with these conflicts, but there were no organized dispute resolution institutions devoted specifically to ODR. Indeed, the term had not yet been invented.

When the ban on commercial activity was removed, disputes related to commerce began to surface. In April 1994, for example, the first commercial spam occurred when two lawyers tried to recruit clients to participate in an immigration scam.⁶

2. From 1995– to 1999

The idea for ODR emerged out of a recognition that disputes would multiply as the range of online activities grew. The origins of ODR, therefore, are traceable to a very simple insight – that the more transactions there are, the more disputes there will be. In addition, as new entities began to appear in cyberspace, it was not clear what their legal liability would or should be. Thus, as Internet service providers (ISPs) began to provide subscribers with connectivity and storage, questions arose about whether the ISPs should be liable for subscribers' actions. What rights and responsibilities did ISPs have when subscribers,

for example, used their accounts to distribute copyrighted software? Did the ISPs have to check accounts to see if any illegal activity was occurring? Under what circumstances could ISPs terminate subscriptions? Out of these concerns developed an early online arbitration project called the Virtual Magistrate.⁷

As companies began exploring the Internet's commercial opportunities, interest also grew in domain names. As the number of domain name registrations increased, disputes also arose between trademark owners and domain name holders. In general, the more the Internet was used for any purpose, the more disputes arose. For example, use of the Internet for the distribution of pornography led not only to legislation and court cases but to disputes on college campuses about freedom of expression and access. Similarly, as the number of websites grew, disputes arose not only about domain names but about the legality of linking, and about various other intellectual property issues related to the use and copying of information.

During this period, recognition grew that the Internet needed some focused online institutions to address problems that were arising with increasing frequency. Various experimental projects, largely university-based and foundation-funded, were designed to allow those involved in a dispute to obtain expertise from a distance.⁸ For example, in the first case mediated by the Online Ombuds Office, an online mediation project at the University of Massachusetts, an online mediator helped an individual website owner resolve a problem with a local newspaper claiming copyright infringement.⁹

3. From 1999 to the present

The last four years have been a period of significant activity and notable achievement for ODR. During this period, ODR has become accepted as a needed process in the online environment, and capabilities have been demonstrated that can be employed with traditional kinds of disputes originating offline. The key question concerning ODR now involves the cost of building and implementing systems, not viability or value. Costs have probably slowed the rate of growth in the deployment of ODR, but the number of firms offering some form of ODR continues to grow. As a result, the promise, potential and future value of ODR remain high.

As an ODR industry has begun to emerge, there has been growing recognition by both governmental and commercial interests that online resources can be a solution for many problems that originate in the online environment. Unlike five or six years ago, it is now accepted that it is appropriate – indeed, desirable – that ODR be the process of first choice for disputes generated in online activities. It is also recognized that technologies that work for online disputes can be used efficiently for offline disputes.

Table 7.1 contains a list of ODR companies and providers in March 2003. While some ODR providers have gone out of business, other companies and projects have taken their place. For example, three years earlier there were 24 ODR companies, of which 11 had gone out of business by March 2003. In addition, most major ADR organizations, such as the American Arbitration Association and the International Chamber of Commerce, have started or are planning to start using ODR.

Table 7.1
ODR providers as of March 2003

ADRonline	Australia	www.adronline.com.au
American Arbitration Association Web File	United States	www.adr.org
Arbitraje y Mediación (AryME)	Spain	www.aryme.com
Asian Domain Name Dispute Resolution Centre	China	www.adndrc.org
Bankers Repository Corporation	United States	www.thebrc.com
Camera Arbitrale di Milano	Italy	www.camera-arbitrale.com
Chartered Institute of Arbitrators	United Kingdom	www.arbitrators.org
Cibertribunal Peruano	Peru	www.cibertribunalperuano.org

Table 7.1 (continued)

ClickNsettle	United States	www.clicknsettle.com
Consumers Association of Iceland	Iceland	www.ns.is
CPR Institute for Dispute Resolution	United States	www.cpradr.org
Cyberlaws.net	India	www.cyberarbitration.com
Cybersettle	United States	www.cybersettle.com
Dispute Manager	Singapore	www.disputemanager.com
e@dr	Singapore	www.e-adr.org.sg
Electronic Consumer Dispute Resolution	Ireland	www.ecodir.org
e-Mediator	United Kingdom	www.consensusmediation.co.uk
Eneutral	United States	www.eneutral.com
e-Settle.co.uk	United Kingdom	www.e-settle.co.uk
FSM	Germany	www.fsm.de
Global Arbitration Mediation Association	United States	www.gama.com
Icourthouse	United States	www.i-courthouse.com
Internet Ombudsman	Austria	www.internetombudsmannen.se
InternetNeutral	United States	www.internetneutral.com
Intersettle	United Kingdom	www.intersettle.co.uk
IRIS MEdiation	France	www.iris.sgdg.org/mediation
Mediation Arbitration Resolution Services	United States	www.resolvemydispute.com
National Arbitration Forum	United States	www.arbitration-forum.com
Nova Forum	Canada	www.novaforum.com
Online Public Disputes	United States	www.publicdisputes.org
Online Resolution	United States	www.onlineresolution.com
Private Judge	United States	www.privatejudge.com
Resolution Canada	Canada	www.resolutioncanada.ca
Resolution Forum Inc.	United States	www.resolutionforum.org
Settlement Online	United States	www.settlementonline.com
SettleSmart	United States	www.settlesmart.com
SmartSettle	United States	www.smartsettle.com
SquareTrade	United States	www.squaretrade.com
The Claim Room	United Kingdom	www.theclaimroom.com
USSettle.com	United States	www.ussettle.com
WebAssured	United States	www.webassured.com
WEBdispute	United States	www.webdispute.com
WebMediate	United States	www.webmediate.com
WeCanSettle	United Kingdom	www.wecansettle.com
Word&Bond	United Kingdom	www.wordandbond.com
World Intellectual Property Organization	Switzerland	www.wipo.int

The focus of ODR at the beginning of the period in question was largely on consumer disputes resulting from e-commerce transactions. This continues to be an important area for ODR, but it has been joined by a growing number of disputing contexts. Most importantly, it has become clear that ODR is a resource that can be used in both online and offline disputes.

ODR, during the last few years, has become accepted as being both viable and valuable for many disputes

for which no other means of dispute resolution are feasible. This has helped sustain the growth of ODR even in a difficult entrepreneurial environment. Yet, as the following discussion about the nature of ODR will show, there is a side of ODR that has been largely untapped. The value of ODR in using the network to deliver the dispute resolution skills of a third party has been demonstrated. What will take longer to develop are applications that enhance dispute resolution by exploiting and delivering technological capabilities embodied in machines at remote locations.

C. Choosing an ODR process for online disputes: The examples of eBay and ICANN

The two most widely known and widely used dispute resolution venues concerning cyberspace-related disputes are the online auction site eBay and the domain name dispute resolution process designed by the Internet Corporation for Assigned Names and Numbers (ICANN). Since March 2000, SquareTrade.com has handled over 300,000 disputes, mostly related to eBay transactions, through wholly online processes of negotiation and mediation. Over 7,000 domain name disputes between trademark owners and domain name holders have been resolved through ICANN's Uniform Dispute Resolution Policy, a non-binding arbitration process (see ICANN 2002).

1. eBay: Assisted negotiation, then mediation

eBay is an online auction site with over 61 million registered users where over 12 million items are offered for sale each day. eBay makes it possible for sellers anywhere to sell to buyers who may be located anywhere. eBay itself is not a party to any transaction and, in general, assumes no responsibility for problems that arise between buyers and sellers. eBay's earliest challenge was not to find people willing to put items up for auction or even to find buyers interested in the items listed. It was, rather, how to design a site where interested buyers would trust sellers enough to make payment and then wait for delivery. In other commercial contexts, brand names may build trust and, obviously, face-to-face transactions allow for immediate exchange of goods and money. eBay needed a system in which potential buyers would be confident in dealing with unknown sellers. Any such system would encourage purchases by indicating to potential buyers that they were dealing with someone with whom they were unlikely to have a dispute.

eBay created a feedback rating system in which any party to a transaction could post an assessment of how smoothly the transaction had been completed. While sellers might not have been well known, the rating system enabled participants to acquire a reputation concerning how they handled transactions and responded to problems. In 1999, eBay decided that having a dispute resolution process might further enhance trust. It therefore authorized the Center for Information Technology and Dispute Resolution¹⁰ at the University of Massachusetts to conduct a pilot

project to test the viability and value of a dispute resolution process that would allow parties who could not resolve a particular problem to receive expert assistance from a mediator.¹¹

Any arbitral process requires a procedure for enforcing the decision of the arbitrator. With arbitration, there is a clear result and ruling at the end. In a context like eBay, the only realistic enforcer would have been eBay, which could have indicated that any loser who did not do what the arbitrator ordered would lose his or her eBay account. This was not a role that eBay desired to play and, therefore, it viewed mediation as a much more attractive process.

With mediation, the mediator helps the parties come to an agreement. There are no declared winners and losers, just an agreement at the end (or, if the process is unsuccessful, no agreement). Reaching an agreement signifies that there is something that each party wants and is receiving. The goal in mediation is a "win-win" outcome, one where the agreement will not need to be enforced because the parties find it in their interest to voluntarily do what they have promised to do.

Several months after the completion of the University of Massachusetts pilot project, eBay selected SquareTrade.com, an Internet start-up, as its preferred dispute resolution provider. SquareTrade's approach to ODR built on the University of Massachusetts approach but differed from it in two ways, each of which represented an important advance in ODR. First, SquareTrade added a technology-supported negotiation process in which parties could try to resolve the dispute themselves before requesting a mediator. Second, SquareTrade employed the Web rather than email as the means for communicating and working with the disputants.

On eBay, when a problem with a transaction surfaces (e.g. when an item does not arrive or arrives broken), buyers attempt to contact sellers and negotiate a solution. SquareTrade's dispute resolution process, therefore, is typically invoked only after an initial negotiation via email or telephone has been attempted and has failed.

SquareTrade is accessible from a link on eBay's Services page. SquareTrade employs a website, rather than email, as the main tool for negotiation and has the parties try the Web-based negotiation before requesting mediation and the assistance of a human third party. The advantage of Web-based negotiation over email exchanges is that the process is not simply com-

munication but what might be called “communication plus” or “communication added”. The site provides a more structured set of exchanges between the parties than is possible with email. It provides forms that the parties fill out, and these forms clarify and highlight both what is dividing the parties and what solutions are desired. While parties do have an opportunity to describe concerns in their own words, the forms and the form summaries that parties receive inevitably reduce the amount of free-text complaining and demanding that occurs, a result that appears to have the effect of lowering the amount of anger and hostility between the parties.

Negotiation, by definition, occurs between the disputants, with no third party present. Using the Web in the SquareTrade manner adds a novel element to traditional negotiation, a kind of “virtual presence”. The

site, particularly the forms that are employed, frames the communication and provides some of the value that might otherwise be provided by a mediator. There are no algorithms at work that analyze responses, and thus this is only a first step toward a more sophisticated online negotiation process, something similar to SmartSettle (see the discussion later in this chapter). The more technology works with the parties in negotiation, however, the less clear the classic distinction between negotiation and mediation will be.

When Web-based negotiation fails, SquareTrade provides a human mediator for a fee of \$20. The Web interface is still used, but the conversation is facilitated by a neutral third party. Table 7.2 provides a summary of what SquareTrade tells users about mediation.

Table 7.2
What is mediation?

<p>What mediation IS:</p> <ul style="list-style-type: none"> • It is a voluntary process in which the parties work with a mediator (a neutral and impartial person) to find a mutually acceptable solution to the problem. • It works when both parties participate and are willing to compromise. • It can be very effective in resolving disputes and misunderstanding if both parties participate in the process and are willing to compromise and look for creative solution options. <p>What the mediator DOES</p> <ul style="list-style-type: none"> • The mediator communicates with the parties to understand both of their interests, perspectives and preferred solutions, and tries to help the parties understand each other's interests and perspectives on the issues. • The mediator's role is to help the parties diffuse the emotions that are often part of any dispute, focus on the issues that they can work together to solve, and, if possible, build an agreement that works for both parties. 	<ul style="list-style-type: none"> • The mediator will make a recommended resolution to the parties only <i>if they both</i> agree to have the mediator do so. <p>What mediation IS NOT:</p> <ul style="list-style-type: none"> • Mediation is not a court proceeding. • Mediation is not arbitration. • Mediation is not a process that should make you nervous or uncomfortable! The mediation process is designed to give both parties equal roles and responsibilities. <p>What the mediator DOES NOT DO</p> <ul style="list-style-type: none"> • The mediator does not make a decision. • The mediator will <i>not</i> decide if one party is right or wrong. • The mediator will not review the information or evidence that the parties send to him/her and decide whether either party has proven their case. • The mediator does not act as a judge. • The mediator does not act as an arbitrator.
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Source: SquareTrade.com 2003.

2. ODR and arbitration: ICANN and domain name disputes

While domain names, such as eBay.com, make it easy for humans to remember Web addresses, they become a matter of concern to trademark owners when the domain name is similar or identical to a trademark. In 1999, ICANN adopted its Uniform Dispute Resolution Policy, a topic that is the subject of extended treatment in UNCTAD's *E-Commerce and Development Report 2002* (UNCTAD 2002). Both the approach ICANN chose, a modified arbitration process, and the systems that have implemented this approach represent another choice in moving dispute resolution online.

A domain name can be registered by anyone, and the cost is nominal. Those in charge of registering domain names could have avoided some conflict by making registrants aware that they might encounter problems if they registered a word that was trademarked. The US Patent and Trademark Office maintains a Web site enabling free searches of the US trademark database.¹² Such searches have generally not been done at registration, however, and, even today, anyone who wishes to register a trademarked word can do so. Whatever problems might arise will have to be faced later.

After ICANN took over management of the domain name system, it implemented a process for resolving domain name disputes. The Uniform Dispute Resolution Policy (UDRP) (see ICANN 2002) provides trademark holders with a process that is faster and less expensive than litigation. However, use of the UDRP is not mandatory, nor is the resulting arbitration binding. Trademark holders can still go to court instead of using the UDRP, and the party that loses the arbitration can go to court after the decision is handed down. Court cases, however, are relatively few compared to the number of disputes handled through the UDRP.

The factors affecting the outcome of a UDRP case are evident in the decision tree in chart 7.3. Approximately 7,000 cases have been decided using the UDRP. The large majority of UDRP cases are processed by two providers, the World Intellectual Property Forum and the National Arbitration Forum. The processes employed are interesting in a number of ways.

First, UDRP dispute resolution occurs without face-to-face meetings and, except in rare instances, without telephone communication. It is, in short, dispute res-

olution at a distance. However, the process used by the current dispute resolution providers involves limited use of the Internet. A now-bankrupt dispute resolution provider, eResolution.com, did use a completely online system, but it stopped handling cases in 2001. The two main providers, the World Intellectual Property Organization (WIPO) and the National Arbitration Forum (NAF), have online systems that could be used and probably will be used in the future. Currently, online filings are occurring with increasing frequency, and email is sometimes used. Unlike in the eBay mediations, however, the Web is not employed, and any added value that could be provided by Web-based processes is not yet present.

Second, the UDRP is not classic arbitration in that the decisions are not binding or enforceable in court. UDRP arbitrators are referred to as *panelists*, since the word *arbitrator* denotes someone who can make a binding decision enforceable in court. UDRP panelists are empowered by terms in the contract agreed to when a domain name is registered. The decisions of arbitrators are enforced by making necessary changes in the domain name registry. This is an efficient although somewhat unorthodox process, and not without controversy.¹³

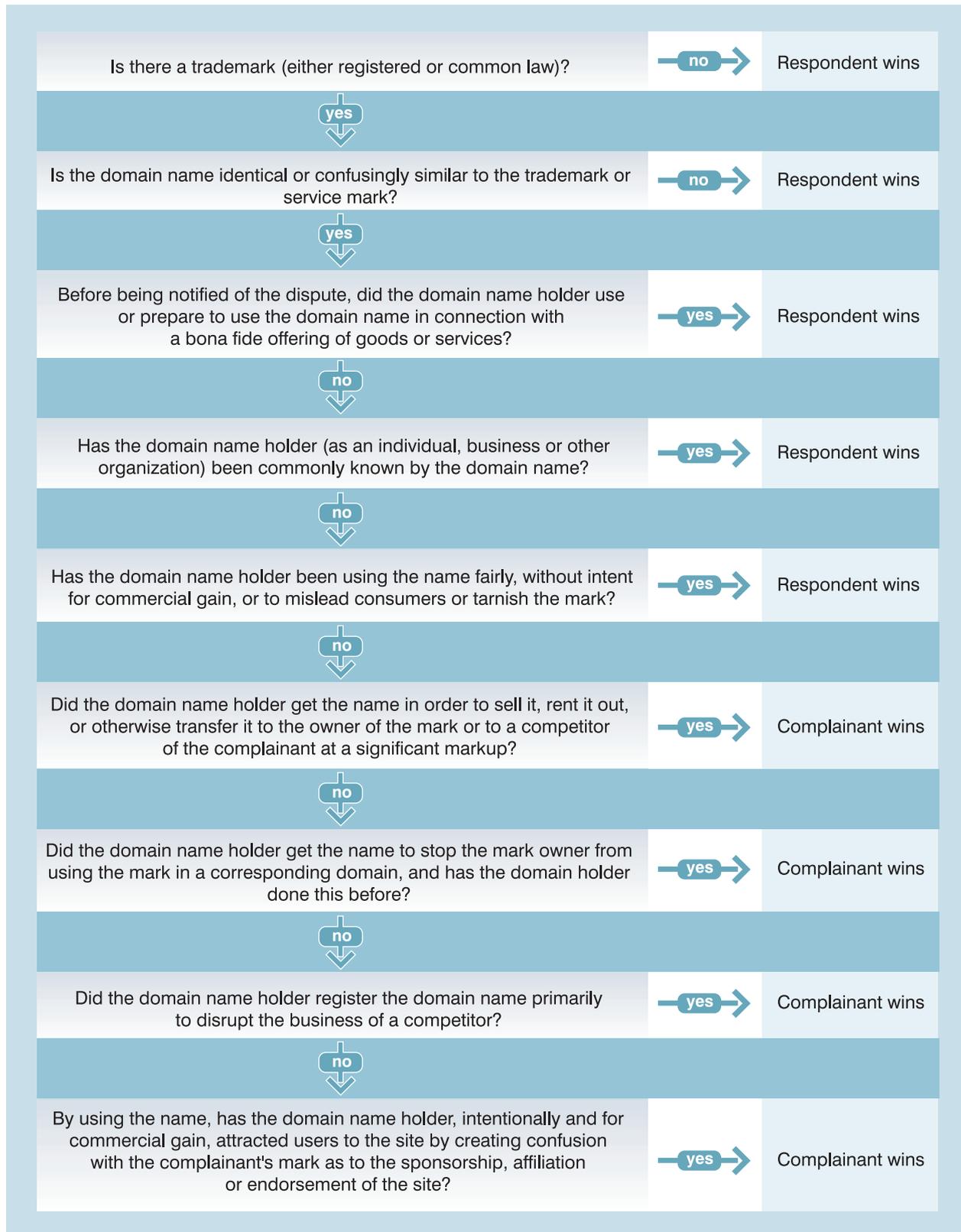
D. ODR for offline disputes: Enhancing ADR and unbundling ODR

The SquareTrade and ICANN processes involve no face-to-face meetings; they are conducted wholly at a distance. The need for ODR with no physical meetings is most obvious in cases that arise online and situations when, because of distance, it is not feasible to meet face to face or go to court. It is not surprising that ODR was first directed at such disputes.

ODR is growing in use not only because there is growth in online activities and online disputes but because ODR can also be employed for traditional offline disputes. SquareTrade, for example, now resolves real estate disputes between home buyers and sellers. When the power of the computer is added to the basic transmission qualities of the network, the result is an array of dispute resolution processes that can be used in any dispute, whether it arises, or is handled, online or offline. Any dispute resolution process can be viewed as a series of informational components. For a wholly online process, all the components must be available in electronic form. For a process that includes face-to-face meetings, the medi-

Chart 7.3

The ICANN Uniform Dispute Resolution Policy decision tree



Source: 2003 Center for Information Technology and Dispute Resolution.

ator must determine the manner in which technology can be used to enhance the process and move the parties towards agreement.

1. Two examples

A simple example: Automated blind bidding processes

Blind bidding systems allow parties to a dispute to submit settlement offers to a computer. If the offers are within a certain range (often 30 per cent) of each other, the parties agree to split the difference. What is attractive about blind bidding is that if no settlement is reached, the offers are never revealed to the other party. This is intended to encourage parties to be more truthful about what their “bottom line” might be.

Blind bidding can be looked at as a negotiation tool, a technique that, if used offline and without a computer, would be cumbersome. The efficiency of blind bidding is that the computer transmits and receives information, processes it, and determines what information can be made public and what should remain private. If the offers are within the 30 per cent range, the parties are informed that there is a settlement. If not, no information about the offer is revealed to the parties.

Thus far, blind bidding has been used mainly in claims against insurance companies. Such claims are generally settled at some point through negotiation, but the process that has been used traditionally, involving personal injury lawyers and insurance claim adjusters, can be lengthy and inefficient. The parties and their representatives may play phone tag and posture in ways that often take up time. There certainly could be a human third party who accepted offers similarly to how the computer does it, and this is occasionally done, but never as efficiently as in the blind bidding systems.

Blind bidding systems may be efficient and simple to use, but they are also extremely limited, since they only work with disputes where a single variable is contested. This variable must also be one that uses numbers, so that the machine can make the necessary calculations. The insurance context is a perfect first arena for blind bidding, since differences often focus exclusively on money and the existing system is both expensive and inefficient.

There are a growing number of blind bidding companies, most notably Cybersettle.com and Clicknset-

tle.com. The technology underlying blind bidding is not very complex, and there may be differences in certain details among the different systems. Some systems may require representation by counsel and others not, some may allow unlimited bids and others not, some may allow bids in ranges and other not. It is possible for companies to differentiate themselves from other blind bidding systems, but all are built on the same basic conception.

The future of blind bidding will inevitably broaden beyond insurance company disputes. In many mediations or arbitrations, there may be many differences to start with but only a monetary issue at the end. Blind bidding technology could be helpful in such situations. In other situations, it might be desirable to offer blind bidding as an option before beginning a longer process. Blind bidding is a tool that can be injected into any phase of a dispute resolution process. OnlineResolution.com, for example, offers blind bidding as a standard feature in its Resolution Room process, considering it one of many possible tools that a mediator might employ.

Blind bidding was the first of what are likely to be many applications that use not only the communications capabilities of a network but the processing capabilities of the computers connected by the network. Like early ODR efforts, most such efforts even today use the network to enable parties at a distance to take advantage of a human mediator who is also at a distance. Thus, the network is a means for delivering human expertise. This alone is an impressive achievement, and the various ways in which human expertise is being delivered have persuaded skeptics that ODR is an important approach to conflict resolution. As the processing power of the computer is combined with human expertise, even more impressive results can be expected.

Blind bidding is not only a tool that can be used in negotiation but a process that raises the question of what else networked machines can do to assist parties involved in a dispute. Blind bidding is such a simple tool that, if viewed as simply a merging of a calculator with a network, it can easily be taken for granted. Computers, however, are much more than calculators, and systems can be built that will be able to process and evaluate qualitative information.

A more complex example: SmartSettle

SmartSettle,¹⁴ originally called OneAccord, involves much more sophisticated negotiation software than the blind bidding systems. SmartSettle is intended for

use in disputes that are simple or complex, single-issue or multi-issue, two-party or multi-party, comprised of quantitative and/or qualitative issues, of short or long duration, or involving interdependent factors and issues. SmartSettle will never be as easy to use as blind bidding, and common and relatively simple disputes may not require it. However, it demonstrates how networked computers can be used to offer disputants solutions that may not have been apparent to them.

SmartSettle has disputants move through several stages, each of which clarifies what is at issue in the dispute, how strongly the parties feel about the different issues, and what ranges of outcomes might be acceptable. This information is placed on a “single negotiating form” that parties use to fashion proposals and, ideally, reach agreement. In the early phases, SmartSettle provides a structure for issue clarification and assessment that by itself can help parties reach consensus. Most novel about SmartSettle, however, is that it can take any tentative agreement and suggest alternative approaches that may give both sides more than they were willing to accept in a settlement.

Blind bidding involves only one issue, and that issue is quantifiable. SmartSettle may involve many issues, and at the beginning the parties must assign values to the different interests and demands. Once the interests have been identified and prioritized, they are combined into packages or groups, and negotiation can occur that permits adding to or removing from the package or changing its nature. What is novel about SmartSettle is that the computer can not only store the users’ information and transmit it electronically but also suggest combinations attractive to them and that they may not have thought of themselves.

2. Technology as the “fourth party”

Email negotiations involve simply humans at two ends of a network, thus allowing quick communication among parties who might otherwise not have been able to communicate at all. Such negotiation with almost no overhead may remain the most common method for online negotiation. What the Web permits, and what blind bidding, SmartSettle and even SquareTrade demonstrate, is that there is value in adding computer-processing capabilities to the humans at the ends of the network.

The reason for adding computers to the mix is that there are things computers can do better and/or

quicker than humans. Blind bidding is a simple example of this. Mediators and arbitrators are called “third-party neutrals”, and a recent book (Katsh and Rifkin 2001) has suggested that technology be considered a “fourth party”, something that influences the process of communication and negotiation and adds value to the third-party roles of mediators and arbitrators. This “fourth party” need not replace the third party, but it can displace it, in the sense that the third party will increasingly be working with an electronic ally or assistant alongside.

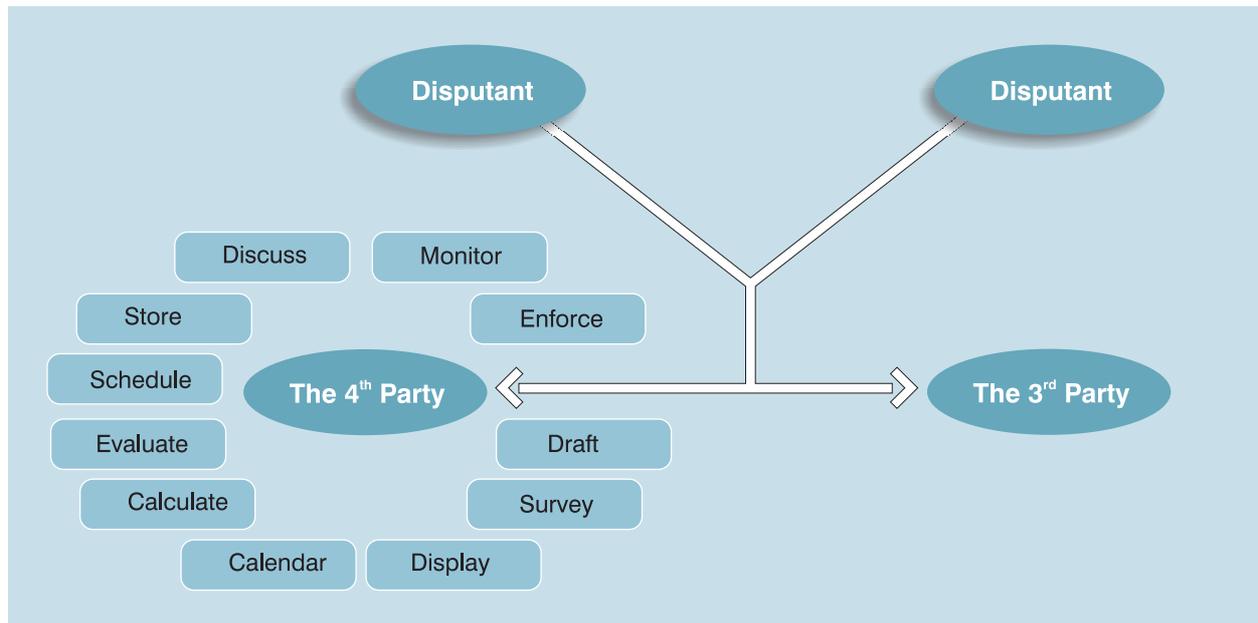
The “fourth party” is a metaphor for applications that enhance the process and thus do more than simply deliver the expertise of the human third party across the network. The metaphor views the network as a “communications network plus more”. Systems are gradually being built that will help us understand how computers can enhance human involvement.

Chart 7.4 suggests that there are many informational activities that computers can assist with that are important elements in what mediators and arbitrators do. The activities in chart 7.4 are common, but until now, only been when the parties were physically together have these activities been performed with any degree of efficiency. For example, scheduling meetings with several parties can be done fairly quickly when all are in the same room and looking at calendars, but scheduling using paper or the telephone becomes cumbersome as the number of participants grows. A mediator meeting face-to-face with a few parties can survey opinions and may even be able to evaluate whether consensus exists by looking at facial expressions. When the parties are not together, however, ascertaining how parties feel grows difficult as the number of parties involved increases.

Chart 7.4 also provides some insight into why it is generally easier to design arbitration systems online than mediation systems. Mediation requires more frequent interaction among the parties and a more finely tuned system that will enable the mediator to assess emotions, interests and values. Any ODR system will consist of a series of linked and coordinated informational tasks. Arbitration systems will ordinarily require fewer elements in the chain and a more straightforward arrangement.

The three traditional ADR processes of arbitration, mediation and negotiation represent three different information management systems. In the past, however, they all used face-to-face exchanges, a form of exchange that is both rich and efficient. In face-to-

Chart 7.4
The “fourth party”



face meetings, not only is information being transmitted but the truth and sincerity of the parties are being evaluated, trust is increasing or decreasing, and “bottom lines” are being reassessed as offers and counter-offers are made.

Organizing and managing information are commonplace uses of computers, and many of the tasks in chart 7.4 are straightforward information management tasks, which largely add efficiency to the dispute resolution process. US-based lawyer Randall Butler has recognized that the more complex the dispute, the greater the need for assistance from a “fourth party”. Butler mediates class action suits, which can involve hundreds of plaintiffs represented by many lawyers. He has pointed out that “mediation has become the preferred alternative for resolving most lawsuits. With the right leadership, mediation is generally faster, more effective and less expensive, stressful and intrusive. But the effectiveness of traditional mediation is inversely proportionate to the number of parties to the lawsuit.”¹⁵ ButlerMediation.com provides a website that allows a highly systematized process of exchanging information, freeing lawyers to participate when convenient and from any place that is convenient.

Information processing often involves linking several informational tasks. Thus, blind bidding is a system that involves communicating, calculating, evaluating and applying a rule to the results of the calculation.

Similarly, SmartSettle takes data that have been entered and, using more sophisticated algorithms, evaluates and then responds to offers. The “fourth party” approach assumes that, while face-to-face encounters provide a very rich and flexible opportunity for communication, they are not perfect. The “fourth party” will grow more and more useful, and the network will become more and more valuable in dispute resolution, as people gain experience in using information management and information-processing tools. Electronic documents will also start acquiring intelligence. Such “smart” documents will be able to send communications when particular events occur and also to gather information that is needed by participants.

Thus far ODR has been used most often in simple e-commerce disputes and domain name disputes. These disputes are simple in the sense that they usually involve only two parties and a relatively small set of issues. In such circumstances, all that may be needed is a means to communicate from afar. In the domain name disputes, for example, neither information management nor information processing are used, because the dispute providers do most of the information management, and the processing or decision making is done by the arbitrator.

SquareTrade’s breakthrough of being able to process very large numbers of disputes is traceable to efficient information management and organization and the

displaying of information on the screen very effectively for the disputants. Thus, an important difference between email negotiation and SquareTrade's Web-based negotiation is that SquareTrade provides a much higher level of information management than routinely occurs with email. The purpose is not to evaluate positions and recommend solutions but to clarify issues and present information on screen in a way that may highlight areas of agreement and difference. What the software does is therefore very similar to what a mediator does: it keeps the parties talking to each other in a respectful way until the contours of a solution appear.

The network provides new capabilities for monitoring performance and enforcing the terms of an agreement. Monitoring performance has never been a very efficient process. If a check has not arrived, for example, should one call the other party? Or should one have a mediator or third party do it? How can one be certain that a check has arrived? In recent years, many have become accustomed to using the FedEx site to determine where a package is and whether it has been delivered. This is not merely a convenience provided by FedEx but a use of information to build confidence and prevent disputes. Obviously, the complexity of monitoring tools will have to be appropriate to the complexity of the performance required. Certainly, however, a "legal watchman" or early warning system of non-performance will be quite useful.

There are many ways in which the medium's visual capabilities can alert us to problems. Images and numbers can be used to show change in ways that are not possible with print. Increases and decreases can be demonstrated visually through changes in size, shape or color. In the contract context, for example, lack of performance might send a red flag to the attorney for one of the parties. This could be an actual image of a red flag, and the red flag, if ignored, could grow larger over time, something that would be both meaningful and attention-getting. Various new opportunities to use visuals (e.g. images, icons, charts, tables, diagrams, maps, sketches, blueprints, and colorful and animated graphics) will be available for use in dispute resolution processes.

3. Government's role in ODR

Government regulation versus self-regulation in ODR

Governments have been more involved in promoting ODR than in regulating it. In the late 1990s, it

appeared that ODR was developing at an impressive pace without the involvement of government. The easy availability of venture capital allowed ODR companies to appear and grow quite rapidly, and those companies educated business leaders and consumers about the benefits of ODR systems. Many ODR providers and other dispute resolution organizations suggested that government should adopt a hands-off approach and that ODR services would take root on their own.

Europe identified the promise of ODR early, and several efforts encouraged self-regulation among companies. Some observed that government regulatory procedures moved much too slowly to put ODR mechanisms in place in a timely fashion, and that by the time any law promoting or regulating ODR came into effect, the e-commerce environment and technology would likely have changed so much that the law would be irrelevant at best or an obstacle to progress at worst.

When the Government of the United States convened its first conference on ODR in June 2000 at the Federal Trade Commission,¹⁶ it was clear that it, too, was leaning toward industry self-regulation. In the freewheeling spirit of the Internet revolution, self-regulation seemed the logical course.

The first doubts regarding the self-regulation approach were raised by consumer groups, which had a long history of disagreement with corporate interests. Some companies were suggesting that ODR be integrated into their e-commerce systems as a mandatory step: that is, disputants would have to engage in ODR before being permitted to go to court. They also wanted to require payment of filing fees by consumers undertaking such a process. Some consumer groups suggested that this was merely an attempt by corporations to make legal challenges even more costly, time consuming, and complicated to undertake, so as to better insulate corporate interests from class action suits and other legal challenges. Some corporate representatives countered that without clear processes and reasonable filing fees they could be subject to an overwhelming tide of nuisance claims with little or no merit.

Several non-profit organizations convened working groups to examine these questions. In the United States, the American Bar Association's E-Commerce Working Group, the International Chamber of Commerce, the Better Business Bureau and several other prominent organizations all discussed these challenges at length, and many eventually issued standards

for ODR providers that they hoped would help to balance the competing interests of corporations and consumers.

One suggested way to enforce these standards (while at the same time educating the public about the benefits of ODR) was the widespread adoption of trustmarks. Trustmarks were visualized as graphical logos placed on the websites of e-commerce companies or ODR providers ensuring that a certain baseline quality assurance standard had been met. In the case of e-commerce companies, trustmarks could attest to the availability of ODR should a problem arise. In the case of ODR providers, trustmarks would attest to the quality and overall fairness of the dispute resolution system offered. It was envisioned that companies would pay for these trustmarks to encourage customers to do business with them, and that the revenue generated from the trustmarks would fund the operation of the ODR services.

Several other firms (e.g. Verisign and TRUST-e) had already demonstrated the viability of trustmark programs in other areas. A handful of companies (e.g. SquareTrade) and large non-profit organizations (e.g. BBBOnline) had implemented trustmark programs in the ODR arena quite successfully, eventually selling tens of thousands of the seals and generating significant revenue. ODR was frequently packaged as a component in a suite of trust-enhancing packages, including fraud protection, privacy guarantees and transaction feedback information. Some of these trustmark initiatives did achieve impressive penetration in certain market niches (e.g. SquareTrade in the eBay community).

The increasing numbers of ODR providers and the wide variety of trustmark and seal programs led to new problems as consumers quickly became confused about which ODR programs offered what services. It was easy for reputable programs that placed a high priority on fairness to be lost in the maze of ODR providers, some of which had questionable incentives and unbalanced processes. As a reaction to this confusion, several in-depth studies of ODR providers were conducted by government agencies and international organizations concerned with this new state of affairs. The studies often aimed at gathering detailed information about who funded the operations of individual providers, how they chose their panellists, and how they dealt with power and information imbalances between parties in disputes that they handled.

Most recent activity in the self-regulation area has been focused in Europe. Seed money has been pro-

vided for some government ODR projects (e.g. ECODIR) and for research centres (e.g. the JRC in Italy, which pioneered the conversation around creating an ODR XML standard). Government agencies (e.g. the Italian Chamber of Commerce) began to initiate construction of their own ODR platforms. Large non-profits also began experimenting with cooperative ODR systems such as the proposed global ODR Network discussed by the Better Business Bureau, EuroChambres, and the Federation of European Direct Marketing Associations (FEDMA). The International Chamber of Commerce (ICC) forged an innovative partnership with Consumers International (CI) to propose a global clearinghouse for e-commerce disputes. Only ODR providers that abided by strict quality standards developed by the ICC/CI partnership would receive cases, and those that let their standards slip would be taken out of the referral queue.

One force likely to affect future regulatory efforts is the adoption of ODR by government agencies. The most ODR-aware agency in the . Government of the United States, the Federal Mediation and Conciliation Service, is using technology not for e-commerce disputes but for workplace matters, disputes between labour and management, and regulatory negotiation. Eventually e-commerce companies may re-emerge as the innovators and drivers in the development of the ODR field, but, with a few exceptions, the most interesting applications of ODR in the next few years may come from government.

E-government and ODR: From consumer disputes to multi-party public disputes

A major function of government agencies is the resolution of disputes between citizens and government, or between citizens and other citizens. In addition, many government functions, such as rule making, may involve trying to achieve consensus among interested parties, a very familiar dispute resolution goal. While ODR has in the past few years been concerned mostly with the private sector, increasing efforts in the areas of e-government and e-democracy are focusing attention on the value of ODR. As technology is used to further the activities of government and as citizens employ the Internet to bring their views to the attention of government, the experience of ODR becomes very relevant.

During the last few years, governmental activity concerning ODR has been concentrated in two major

areas. Initial interest in ODR by governments arose out of concern for consumers who encountered problems in cross-border e-commerce transactions. As a result, between 1999 and 2003, a variety of conferences were held to discuss the appropriate role for government in this area.¹⁷ More recently, various governments and government agencies have been exploring how ODR can be incorporated into offline and online governmental activities.

Most e-commerce disputes are fairly simple in that they usually concern two parties and a limited set of issues. The same types of problems turn up again and again, usually involving money, transaction terms or delivery problems. Disputes handled by government agencies range from the simple and relatively straightforward to the highly complex. Increasingly, ODR tools have the capacity to be used in complex disputes to facilitate resolution when there are many parties and a large set of issues.

ODR has much to offer in the multi-party context. Technology can help with information flow, making it easier to disseminate announcements, revise proposals and track versions of documents. Tools like threaded discussion applications and online presentation platforms can streamline many activities, making them more satisfying for parties and more efficient.

Complexity in dispute resolution processes often increases exponentially whenever an additional disputant becomes involved. Handling multi-party cases is very work-intensive for the facilitator, as all participants need to feel that they are being heard. As a result, multi-party processes are often many times more complicated and involved exercises than two- or three-party dispute resolution processes. The tools ODR provides to neutral parties may prove most useful in large public cases because there are so many individual communication channels to manage.

There are strong incentives to use dispute resolution, rather than courts, in multi-party situations. Courts may be appropriate when it is necessary to make findings of who is right and who is wrong, but they are not very efficient at sorting out matters where there might be dozens of involved parties. ADR is much more effective in these situations, because mediators can act as conveners and facilitators, working to build consensus behind a particular resolution as opposed to finding fault.

Much of the mediator's time in a multi-party process is spent in a convening role, getting the parties

together, drafting and redrafting documents to build party support, and shuttling communications between the different parties. Often the deliberations in multi-party matters are very technical, requiring sophisticated analysis and extensive research. Many ADR organizations have built an impressive track record of successes during the last three decades, and ODR can enhance such processes.

Public dispute resolution processes can reap many clear benefits by incorporating ODR. Online technology can help with many of the key tasks in such processes, including administrative tasks such as circulating agendas and draft revisions, setting up meeting times and places, and tracking participants' contact information. An inordinate amount of time can be spent on coordinating the process, which is all separate from the actual work of making progress toward resolving the dispute. ODR can help streamline these tasks, freeing facilitators to focus on the substantive issues that need to be addressed.

For many multi-party processes the goal is to generate a document at the end of the process that all of the participants are willing to support. The drafting and redrafting that go into the creation of these documents are often very complex, involving the synthesis of myriad comments from many different participants. Simply keeping track of the suggested changes, much less integrating them into a coherent whole, can be a challenge. Online technology can help organize this drafting process so that the parties can make progress on language without relying on the facilitator to shuttle every proposed wording change around to everyone who might be interested. Because the deliberative process itself is text-based, it is easier to translate the discussion into text that all of the participants are likely to be satisfied with.

ODR also enables parties to make progress between meetings and thereby reduce the number of face-to-face meetings. Much of the time at the beginning of face-to-face meetings is spent reacquainting the participants with each other, reminding them what was covered in the last meeting, and filling in participants who were absent from prior gatherings. Because ODR happens in a more continuous way, the flow of the discussion does not stop for long periods of time. Also, because the discussions are automatically archived, if an individual does need to be reminded of what was discussed previously, he or she can easily access the information. Participants who might have to miss a meeting can consult the online record to see what was discussed.

ODR can also facilitate the consensus evaluation process. One of the challenges in multi-party disputes is the degree to which communications between the facilitator and the participants are public. In a large group meeting, it is very difficult for the mediator to speak one –on one with any of the participants, because the group as a whole needs to keep moving forward. If the facilitator wants to evaluate where the group is with regard to reaching agreement on a particular point, online tools make it easier to poll participants, share large quantities of information, and jointly edit documents. The ability to set up subsections of virtual meeting rooms permits spinning off work groups and caucus discussions. These discussions can happen concurrently with the joint discussion so that work group members can continue to participate in the overall dialogue while they work in their smaller group, unlike the procedure common in physical meetings. The facilitator also has the ability to simultaneously monitor multiple conversations and work groups, as he or she has access to all the electronic conversations going on.

Online communication can also open the door to input from people normally excluded from face-to-face deliberative discussions. Often group discussions are dominated by a handful of participants while others, perhaps even the majority, stay silent. Certain individuals are very comfortable with expressing their opinions forcefully in public situations, while others are reluctant to do so. Online communication options often lead to expressions of opinion by a wider range of people and reduce barriers for participants who would not contribute much in a face-to-face meeting. This can enrich the process for all involved, in addition to providing the facilitator with important information.

E. Challenges for the implementation of ODR in developing countries

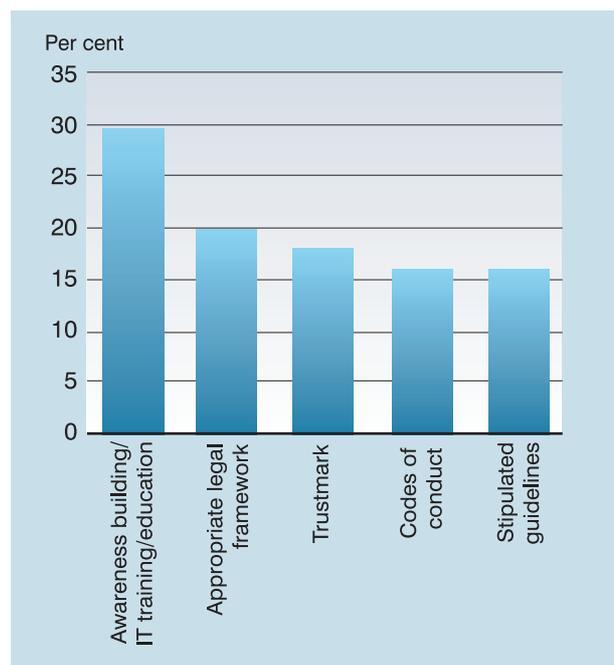
To assess the impact of ODR in developing countries the UNCTAD secretariat circulated a questionnaire to 46 organizations (see chart 7.1's list of ODR providers as of March 2003) offering ODR services around the globe. The secretariat received 24 replies, including responses from all the major ODR providers. The survey confirms the following:

- For developing countries the market for ODR services is either incipient or non-existent. The

vast majority of ODR providers are located in the United States and Europe.

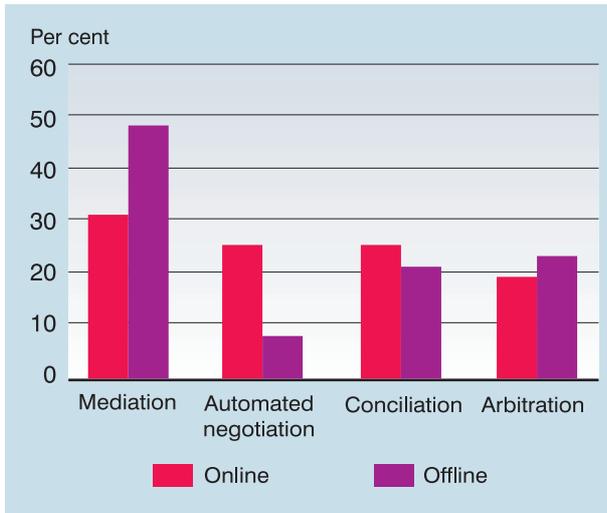
- Awareness building, IT training and education are fundamental to the widespread and effective use of new technologies such as ODR. An appropriate legal framework that facilitates the use of out-of-court schemes, as well as the development of and adherence to trustmarks, codes of conduct and guidelines by e-business in developing countries, constitute the main strategies for promoting ODR in developing countries.
- Mediation, conciliation and automated negotiation are the most popular dispute resolution systems offered online. Arbitration remains more important in traditional offline ADR than it is in ODR.
- A majority of ODR providers (56% of survey respondents) offer a mix of online and offline services, which indicates that traditional ADR providers have begun offering ODR services to complement existing offline ADR mechanisms. The remaining 44 per cent of respondents provide only online services.

Chart 7.5
Means of promoting ODR



Source: UNCTAD questionnaire.

Chart 7.6
Online and offline services

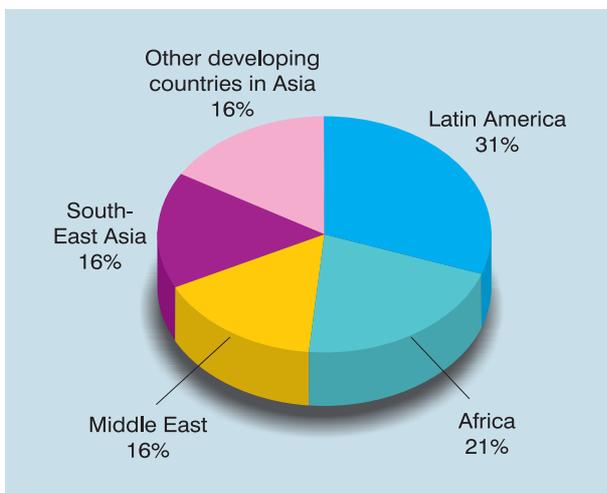


Source: UNCTAD questionnaire.

- Although ODR is not yet much used, the majority of ODR providers offer their services to developing countries.

For ODR to be implemented successfully in developing countries, both technological and legal challenges must be overcome

Chart 7.7
Developing regions where ODR services are offered



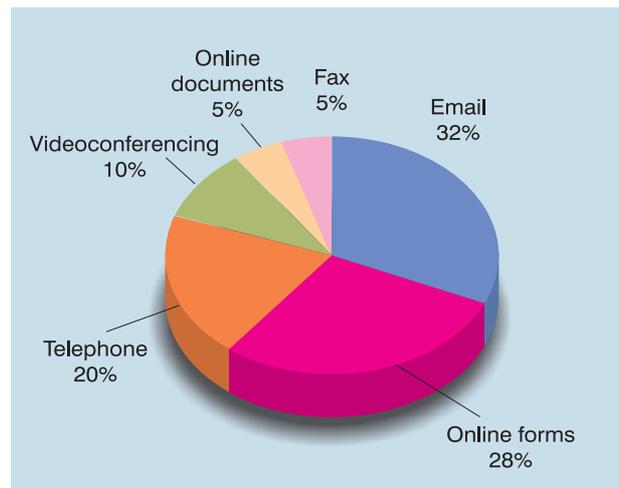
Source: UNCTAD questionnaire.

1. Technology infrastructure

ODR is, by its very nature, dependent on the availability of technology. Without easy access to computers and Internet connections, the ability of parties to utilize ODR tools is extremely limited.

ODR inevitably appeals more to users who are generally experienced in the online environment. It was not surprising that eBay users took advantage of ODR, since all eBay users have some access to and facility with using the Internet. A recent survey of eBay sellers in developing countries (see table 7.3) showed that there are people in almost every developing country who use eBay as a marketplace where they can sell goods at a distance. These vendors already have ODR options available to them to settle disputes, and as the

Chart 7.8
Online dispute resolution tools



Source: UNCTAD questionnaire.

number of transactions increases, use of ODR can be expected to increase as well.

Government initiatives that accelerate citizen access to the Internet, such as e-government projects, also facilitate access to ODR. It may be that some ODR platforms and applications will need to be developed to fit particular contexts in developing countries, but more often what has been developed and tested elsewhere can be imported and adapted to new entrepreneurial environments.

Box 7.1.

Main difficulties faced by developing countries in implementing ODR: A representative snapshot

ODR providers surveyed by UNCTAD highlighted the following concerns:

- In many cases it is still too early for ODR to be implemented in developing countries.
- It is unlikely that people in developing countries will use ODR unless they are clearly directed there by the context of their disputes. This would require the following:
 - The merchant provides a link and agrees to participate if anything goes wrong; or
 - The Government mandates and enforces participation.
- Government support and usage are a must for developing confidence in ODR.
- The cost of setting up an ODR is a major consideration.
- Promotion of ODR in developing countries should be envisaged with the collaboration of experienced ODR providers.
- People do not use online what they do not use offline; ODR services cannot interest those who have not shown an interest in conventional ADR. The biggest challenge is building a long-term self-sustainable business plan.
- Promoting ODR will prove more expensive than the technology itself.
- In many developing countries, businesspeople and lawyers over age 50 do not use computers and do not speak English, thus making it very difficult to conduct ODR. Further education in ICT is required for managers over 50.

Source: UNCTAD questionnaire.

2. Legal challenges

Uncertainty about the legal framework governing e-commerce may inhibit consumers from purchasing products or services over the Internet, and companies from entering into the electronic marketplace. As ODR is primarily conducted in cyberspace, data protection and security are often at the forefront of users' minds. Many developing countries currently lack the required legislative instruments (laws governing e-commerce, data protection and electronic signatures) to provide appropriate online legal protection. The absence of legal infrastructures to support e-commerce and a resulting public lack of trust in online transactions is one element inhibiting the use of the Internet as a business medium in the developing world.

Many developing countries understand that without appropriate legislation, they risk exclusion from the global online marketplace. These countries have found that statutory gaps related to the implementation of new technologies that enable electronic contracting, electronic storage of data and documents, fast processing of information, and so on can even

spill over into the offline world. Thus, the need for an appropriate legal framework that is supportive of and conducive to the practice of e-commerce has been identified as a prerequisite for the growth of e-commerce in general and ODR in particular. In addition to the basic legal infrastructure recognizing the validity of electronic messages and providing equal treatment to users of paper-based documentation and users of computer-based information, it is important that Governments in developing countries become sensitive to the need for laws that have an impact on trust, such as those dealing with e-signatures. Enactment of such laws is leading to more robust trust systems.

Box 7.2 describes the experience of a developing country, Singapore, in creating ODR programmes.

F. Conclusions

Higher levels of e-commerce and entrepreneurship are a goal of almost all Governments. Because ODR can contribute to building trust, it is particularly

Table 7.3
Number of items offered for sale on eBay (by country)

Africa		Asia		North and Central America and the Caribbean	
Algeria	17	Afghanistan	70	Antigua and Barbuda	3
Angola	3	Bahrain	3	Bahamas	163
Benin	3	Bangladesh	74	Barbados	41
Botswana	23	Bhutan	27	Belize	11
Burundi	4	Brunei Darussalam	4	Costa Rica	98
Cameroon	2	Cambodia	4	Dominica	3
Cape Verde	7	China	15 417	Dominican Republic	33
Central African Republic	78	India	2 667	El Salvador	28
Djibouti	43	Indonesia	508	Grenada	29
Egypt	1 226	Jordan	240	Guatemala	11
Gambia	23	Kuwait	61	Haiti	17
Ghana	69	Lao People's Democratic Republic	3	Honduras	37
Kenya	57	Lebanon	427	Jamaica	86
Madagascar	19	Malaysia	5 034	Mexico	2 696
Malawi	42	Maldives	59	Panama	54
Mauritius	13	Mongolia	23	Saint Kitts and Nevis	1
Morocco	15	Myanmar	7	Saint Vincent and the Grenadines	11
Namibia	8	Nepal	92	Trinidad and Tobago	13
Nigeria	4	Oman	15		
Senegal	4	Pakistan	49	South America	
Seychelles	4	Philippines	2 016	Argentina	9 114
Swaziland	20	Qatar	23	Bolivia	72
Uganda	1	Republic of Korea	1 019	Brazil	6 154
United Rep. of Tanzania	6	Saudi Arabia	47	Chile	639
Zimbabwe	23	Singapore	12 809	Colombia	59
		Sri Lanka	61	Ecuador	188
		Syrian Arab Republic	304	Guyana	3
		Taiwan Province of China	101 686	Paraguay	26
		Thailand	15 329	Peru	419
		United Arab Emirates	110	Uruguay	917
		Viet Nam	132	Venezuela	179

Note: The data in this table were obtained by searching for items "by location" using eBay's advanced search tool. Because some sellers enter an incorrect country name in the location field, the numbers for some countries appear larger than they probably are. This table should, therefore, be viewed more as an indication of the level of activity in a particular country than as a collection of numerically accurate statistics.

needed in situations where new relationships are being formed and existing institutions for legal recourse are lacking or inefficient. International arbitration options have always been built into cross-border transactions of high value. ODR creates opportunities for new dispute resolution options in cross-border transactions of lesser value.

The emergence of ODR is closely linked to two trends: the appearance of powerful electronic net-

working capabilities and the broad acceptance of alternatives to litigation for resolving disputes. Cyberspace is an arena of both experimentation and competition. It is not now, and probably never will be, a harmonious place, but it is a place of rapid change and, even today, of extraordinary achievements. The emergence of effective online justice systems will require considerable creativity, but the larger and more active cyberspace becomes, the more likely it is that demand for ODR will grow. It has been written

Box 7.2.

Case study: Singapore

Singapore allows parties to participate in a program called e@dr. E@dr is an electronic dispute resolution process offered by Singapore's Subordinate Courts in partnership with the Ministry of Law, the Singapore Mediation Centre, the Singapore International Arbitration Centre, the Trade Development Board and the Economic Development Board. E@dr is for disputes that arise directly or indirectly out of e-commerce transactions (e.g. the sale of goods and services, intellectual property rights and domain names). The option is available to anyone with an email address and is relatively informal so that legal counsel is not necessarily required.

Singapore has also created the Electronic Court Dispute Resolution International (ECDRI) programme to help parties settle cross-border disputes. ECDRI is a voluntary electronic settlement conference conducted by a Singapore Subordinate Court Judge at the request of the parties. ECDRI is available for complex commercial, e-commerce, intellectual property, banking and insurance cases. Singapore's courts do not charge the parties additional fees to participate in ECDRI. After requesting ECDRI, parties submit relevant documents to the judge. The judge may request the assistance of a non-Singaporean judge at the request of the parties or if the judge considers it appropriate. The non-Singaporean judge will be drawn from a panel including judges from Australia, Europe and/or the United States. If appropriate, the Singaporean judge requests additional information from the parties. The two judges then communicate via email or videoconferencing and report their respective views to the parties. This co-mediation forum provides an additional judicial perspective on a cross-border dispute.

that, even though businessmen want to *do* business rather than argue about it, in the business world disputes cannot be avoided. In the online environment, loss of time often causes loss of opportunities, and people involved in e-commerce will want to resolve problems in the fastest possible way.

Cyberspace is increasingly a place offering its users *processes* as well as *information*. This should not be surprising, since processes are sets of informational transactions and exchanges, something that should be evident from looking at websites for online auctions, stores, casinos, and the like. The emergence and increasing use of ODR indicate that cyberspace is maturing and that human beings have the capabilities to build an array of civic institutions to complement commercial sites. It is in the interaction of civic and commercial institutions – something that is occurring with ODR – that opportunities for building and enhancing trust in the online environment will be found.

The value of ODR extends beyond the number of disputes actually resolved. Acknowledgement by a marketplace that disputes may occur, and the establishment of easily accessible procedures to handle problems, become part of the trust matrix that users will consider in deciding whether to use a site. Convenience and cost may bring potential users to a site, but assessments of trust and of risk will shape their willingness to engage in a transaction.

Early online marketplaces assumed that users would not require anything beyond heightened convenience and lower costs and prices. Today it is apparent that the availability of ODR is an asset that users will consider as they assess risks of participating in a new marketplace or other electronic environment. This is particularly important when the location or identity of the seller is unfamiliar or the item being sold lacks a well-known brand. Countries focused on expanding e-commerce activities should pay particular attention to the issue of dispute resolution.

Although ODR is still in its infancy or non-existent in a majority of developing countries, it has the potential to grow and to provide fair and inexpensive adjudication of disputes arising out of online transactions. Developing countries wishing to promote and facilitate ODR as an alternative to national litigation can consider the following recommendations:

- Treat as a priority education and awareness raising among merchants and consumers regarding the impact and increasing importance of ADR/ODR in resolving commercial disputes. Educational programmes aimed at promoting awareness and knowledge of out-of-court dispute settlement mechanisms in developing countries could play a crucial role in the development of ODR.

- Ensure that national legislation recognizes the validity and enforceability of electronic transactions.
- Ensure that national legislation facilitates the use of out-of-court dispute settlement schemes.
- Consider acceding to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹⁸ which allows the enforcement of foreign arbitral awards.
- Promote voluntary adherence by e-businesses to trustmark and reliability programmes. (It is generally agreed that ADR/ODR services provided in conjunction with a trustmark scheme are more effective, since the threat of expulsion from the scheme and negative publicity for the trustmark's website may compel the supplier to comply with the scheme.)
- Give sufficient attention to cultural and linguistic differences in providing ODR services.

Notes

1. Over 130 countries have signed the convention. For its full text and status, see www.uncitral.org/en-index.htm.
2. An analysis of these issues is contained in Hill (1998).
3. In a case concerning the purchase of a computer and related software products, the arbitration agreement stipulated arbitration before the International Chamber of Commerce (ICC) Court of Arbitration. The ICC advance fee for the claim was \$4,000, of which \$2,000 was non-refundable. The New York Appellate Court held that the arbitration agreement was unenforceable and sent the case back to a lower court to encourage the parties to find an appropriate arbitration procedure for their small claims dispute. See *Brower v. Gateway Inc.*
4. For more on netiquette, see Shea (1997).
5. See, for example, Dibble (1993).
6. See Everett-Church (1999).
7. See <http://www.vmag.org/>
8. See mantle.sbs.umass.edu/vmag/disres.htm.
9. See Center for Information Technology and Dispute Resolution, *Online Ombuds Narrative I: The Web Site Developer and the Newspaper* at www.ombuds.org/narrative1.html.
10. See www.umass.edu/dispute.
11. See Katsh, Rifkin and Gaitenby (2000).
12. See www.uspto.gov.
13. For a critique of the UDRP see UNCTAD (2002), p. 46.
14. See www.smartsettle.com.
15. See www.butlermediation.com.
16. See www.ftc.gov/bcp/altdisresolution.
17. See www.ftc.gov/bcp/icpw/index.htm; www.ftc.gov/bcp/altdisresolution/index.htm; www.oecd.org/dsti/sti/it/secur/act/online_trust/hague-adr-report.pdf, www.gbde.org; www.law.washington.edu/aba-eadr/documentation/docs/FinalReport102802.doc; and www.unece.org.
18. For the convention's full text and its status, see www.uncitral.org/en-index.htm.

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