

## THE THEORY AND PRACTICE OF DISPUTE RESOLUTION IN THE DIGITAL AGE

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**ABSTRACT:** *The phenomenon known as online dispute resolution relates, to put it simply, to resolving disputes on the Internet. It is happening in many forms and forums across Canada, the United States, Europe and other countries. Today's ODR mechanisms are said to be early harbingers of the future global dispute resolution landscape in the Digital Age.<sup>1</sup> The term ODR refers to an array of dispute resolution procedures. Some are fully automated, others, although they take place exclusively online, involve a human neutral. A large group of processes that are included in ODR use digital technologies to lesser degrees. Thus, online dispute resolution is not a monolithic concept – for this reason, some authors argue that it is more accurate not to speak of ODR, but rather of ODR techniques<sup>2</sup>, or even of “a plethora of online dispute resolution services”<sup>3</sup> devoted to the expeditious and speedy resolution of disputes. The term ODR is used for mechanisms as different as dispute prevention (education, outreach, rating and feedback programs), ombudsman programs, blind bidding, automated negotiation, early neutral evaluation and assessment, mediation/conciliation, mediation-arbitration (binding and/or non-binding), arbitration, expert determination, “executive tribunals” or “virtual juries”. Based largely on traditional (offline) alternative dispute resolution<sup>4</sup> procedures, such as mediation or arbitration, and various hybrids thereof, ODR is sometimes equivalently labelled as e-ADR.<sup>5</sup> The synergy of alternative dispute resolution and information and communication technology via the Internet is considered a dominant feature of ODR as canvassed in legal literature.*

**KEYWORDS:** ODR, Digital Age, Advantages, Disadvantages,

<sup>1</sup> Many authors have suggested that the spectrum of dispute resolution mechanisms will soon encompass a full range of “virtual” options made possible by the current revolution in information technology – see for instance: Thomas J. Stipanowich, “Contract and Conflict Management” (2001) Wis. L. Rev. 831.

<sup>2</sup> Julia Hörnle, “Online Dispute Resolution – The Emperor’s New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration”, online: <<http://www.bileta.ac.uk/02papers/Hörnle.html>> [Hörnle].

<sup>3</sup> Leon E. Trakman, “From the Medieval Law Merchant to E-Merchant Law” (2003) 53 U. Toronto L.J. 265 at 284.

<sup>4</sup> The main forms of alternative dispute resolution (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. Some authors exclude arbitration from ADR though, emphasizing amicable (conciliatory) nature of ADR, as opposed to adjudicative procedures, such as litigation or arbitration.

<sup>5</sup> As indicated by Schiavetta, “whilst the terms ODR and e-ADR have been and can be used synonymously it is more accurate to make a distinction” – Susan Schiavetta, “The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the Case Law of the European Court of Human Rights” 2004 (1) The Journal of Information, Law and Technology (JILT) [Schiavetta]. Some other authors have argued that because ADR systems almost always integrate some form of ICT (from using the telephone, fax machine or word processor, to sending information on meeting times via e-mail or posting payment forms online), we face an ADR/ODR continuum rather than a set of distinguishable categories of dispute resolution mechanisms

Whether a distinction should be made between proceedings exclusively conducted online (represented on the right side of the chart) and proceedings “only” supported by different elements of ICT technology is disputable. According to Hörnle, there is no such clear-cut distinction and ODR remains “a matter of degree” – it must be localized on a broad spectrum of dispute resolution mechanisms, with at the one end proceedings using hardly any online technology and at the other end proceedings heavily relying on online technology (Hörnle, *supra* note 7). Rule has argued that in the future the distinction between ADR and ODR will become even more blurry, as the technological solutions are refined and practitioners become more aware of ODR techniques it will become more integrated – Colin Rule, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass, San Francisco, September 2002) at 301 [Rule].

## What is ODR?

The phenomenon known as online dispute resolution relates, to put it simply, to resolving disputes on the Internet. It is happening in many forms and forums across Canada, the United States, Europe and other countries. Today's ODR mechanisms are said to be early harbingers of the future global dispute resolution landscape in the Digital Age.<sup>6</sup>

The term ODR refers to an array of dispute resolution procedures. Some are fully automated, others, although they take place exclusively online, involve a human neutral. A large group of processes that are included in ODR use digital technologies to lesser degrees. Thus, online dispute resolution is not a monolithic concept – for this reason, some authors argue that it is more accurate not to speak of ODR, but rather of ODR techniques<sup>7</sup>, or even of “a plethora of online dispute resolution services”<sup>8</sup> devoted to the expeditious and speedy resolution of disputes. The term ODR is used for mechanisms as different as dispute prevention (education, outreach, rating and feedback programs), ombudsman programs, blind bidding, automated negotiation, early neutral evaluation and assessment, mediation/conciliation, mediation-arbitration (binding and/or non-binding), arbitration, expert determination, “executive tribunals” or “virtual juries”. Based largely on traditional (offline) alternative dispute resolution<sup>9</sup> procedures, such as mediation or arbitration, and various hybrids thereof, ODR is sometimes equivalently labelled as e-ADR.<sup>10</sup> The synergy of alternative dispute resolution and information and communication technology via the Internet is considered a dominant feature of ODR as canvassed in legal literature.

The field of out-of-court dispute resolution has grown and flourished alongside the rapid advance of technology for almost thirty years. Yet, a successful relationship between ADR

<sup>6</sup> Many authors have suggested that the spectrum of dispute resolution mechanisms will soon encompass a full range of “virtual” options made possible by the current revolution in information technology – see for instance: Thomas J. Stipanowich, “Contract and Conflict Management” (2001) Wis. L. Rev. 831.

<sup>7</sup> Julia Hörnle, “Online Dispute Resolution – The Emperor’s New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration”, online: <<http://www.bileta.ac.uk/02papers/Hörnle.html>> [Hörnle].

<sup>8</sup> Leon E. Trakman, “From the Medieval Law Merchant to E-Merchant Law” (2003) 53 U. Toronto L.J. 265 at 284.

<sup>9</sup> The main forms of alternative dispute resolution (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. Some authors exclude arbitration from ADR though, emphasizing amicable (conciliatory) nature of ADR, as opposed to adjudicative procedures, such as litigation or arbitration.

<sup>10</sup> As indicated by Schiavetta, “whilst the terms ODR and e-ADR have been and can be used synonymously it is more accurate to make a distinction” – Susan Schiavetta, “The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the Case Law of the European Court of Human Rights” 2004 (1) The Journal of Information, Law and Technology (JILT) [Schiavetta]. Some other authors have argued that because ADR systems almost always integrate some form of ICT (from using the telephone, fax machine or word processor, to sending information on meeting times via e-mail or posting payment forms online), we face an ADR/ODR continuum rather than a set of distinguishable categories of dispute resolution mechanisms

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and technology could not have happened without the appearance of the commercial Internet and World Wide Web a decade ago. Since then, one of the main challenges facing the global network is how to resolve a growing number of cross-border disputes in the electronic environment. Diverse legal and non-legal obstacles such as physical, linguistic and cultural distances between parties, juridical difficulties concerning the applicable law, competent jurisdiction and enforcement of judgments make traditional methods of dispute resolution ineffective in the online environment. It has been argued that these deficiencies may significantly hamper further development of the Internet and electronic commerce. Although not free from similar and other concerns, ODR is being depicted as the potentially optimal method to resolve disputes arising on the Internet.

At the commonsense level, as several authors argue, if the Internet gives rise to some disputes, it seems appropriate to employ the same medium to deal with them.<sup>11</sup> Given that parties physically located far from each other can easily “meet” and communicate in cyberspace, they can both cause and resolve a dispute in cyberspace. In addition, ODR can be more effective than traditional methods in terms of time, convenience and financial resources involved in dispute resolution procedure.<sup>12</sup> Thus, in Katsh and Rifkin’s view, online dispute resolution is “a response” to the dispute and other activities that are appearing online, and also “a user” of resources becoming available in cyberspace. Its nature, therefore, reflects various qualities and features of the online environment<sup>13</sup>.

ODR has qualities acquired from the online environment, but it also has traits acquired from ADR. ODR has the same potential advantages over litigation of greater efficiency, greater party control and lower costs.<sup>14</sup> It is fair to say that ODR grows directly out of the history of offline ADR – as observed by Rule – “in its earliest incarnations” online dispute resolution procedures were unchanged ADR procedures conducted online.<sup>15</sup> The first three pilot projects launched to develop workable dispute resolution techniques online (the Virtual Magistrate, the Online Ombuds Office and the Maryland Mediation Project) were based on arbitration, mediation and complaint assistance techniques.<sup>16</sup> For that reason, in the opinion of some authors, the ODR phenomenon relates simply to using the Internet to provide ADR, whether as an adjunct to face-to-face services or in substitution of them.<sup>17</sup> Consequently, they define ODR as “ADR that takes place using computer-mediated communications in the online environment”.<sup>18</sup> They also indicate that most laws and principles that apply to ADR in the brick-and-mortar regime will also apply to e-commerce and other Internet disputes. Yet, although ODR is an “offspring of ADR”<sup>19</sup>, it must be pointed out that with the development

<sup>11</sup> Hörnle wrote that it is “logical” to use the same medium for the resolution of disputes arisen in online settings – Hörnle, *supra* note 7

<sup>12</sup> ODR is particularly convenient and efficient where the parties are located at a distance, as distance communication obviates the need for travelling. Part II explains the advantages of ODR in more detail.

<sup>13</sup> Katsh and Rifkin, *supra* note **Error! Bookmark not defined.** at 19.

<sup>14</sup> Hörnle pointed out that the introduction of high technology increases these advantages of ADR over litigation – Hörnle, *supra* note 7.

<sup>15</sup> Rule, *supra* note 10 at 13.

<sup>16</sup> Schiavetta, *supra* note 10.

<sup>17</sup> Anne-Marie G. Hammond, “The Effectiveness of Online Dispute Resolution”, thesis completed for Royal Roads University MA (Conflict Analysis and Management), available from author hammond00@earthlink.net or in the National Library of Canada.

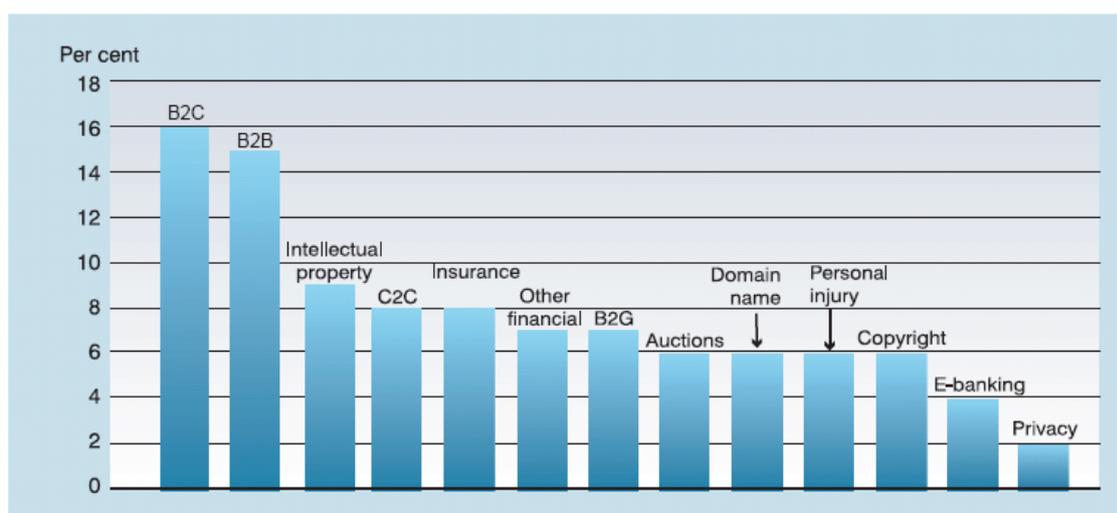
<sup>18</sup> United Nations Conference on Trade and Development, “E-Commerce And Development Report 2003 (Internet edition prepared by the UNCTAD secretariat): Chapter 7: Online dispute resolution: E-commerce and beyond”, online: <<http://www.unctad.org>> [UNCTAD].

<sup>19</sup> Hörnle, *supra* note 7.

of online technology “a new dimension has been added to the dispute resolution industry.”<sup>20</sup> Some ODR procedures, like automated negotiation<sup>21</sup> or facilitated negotiation<sup>22</sup>, do not have exact offline equivalents. At this point, the conclusion reached by Hörnle seems accurate: “In one sense, ODR is simply about the use of new tools – information management tools and communication tools – for dispute resolution. But it is equally true that these tools change the methods by which disputes are being solved. ODR introduces a new paradigm of dispute resolution.”<sup>23</sup>

The growing consensus believes that online dispute resolution can be useful for two types of disputes: those that arise from online interactions and those that arise offline.<sup>24</sup> Initially, the focus of ODR stakeholders 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. The chart below illustrates the wide range of fields in which different services have been offered by ODR providers.

**Types of services offered by ODR providers<sup>25</sup>**



<sup>20</sup> Schiavetta, *supra* note 10.

<sup>21</sup> With automated negotiation the disputants use a software programme to settle their monetary dispute. Firstly they enter settlement figures and once the amounts come within certain proximity of each other, say twenty per cent, the claim is settled midpoint.

<sup>22</sup> The disputants are provided with a web platform and ICT tools for the purpose of facilitating a resolution.

<sup>23</sup> Hörnle, *supra* note 7. The relation between two fields, which ODR has grown out of, i.e. online (ICT) technology and alternative dispute resolution movement, is far more complex than it could appear *prima facie*. ADR and ICT technology certainly share some common themes: they involve processes of information exchange and communication, and they both are attributed with resistance to government. See: Thomas Schultz, *An Essay on the Role of Government for ODR*, (2003) August ADROnline Monthly.

<sup>24</sup> Joseph W. Goodman, “The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation” (2003) Duke L. & Tech. Rev. 4 [Goodman].

<sup>25</sup> UNCTAD, *supra* note 18

## The theoretical framework

Despite the fact that first online dispute resolution projects were set up a decade ago, ODR is still in its infancy. No theory – as a systematically organized set of principles offered to explain a particular phenomenon<sup>26</sup> – has been created for ODR so far. Few authors have written on the theory of online dispute resolution: in the cutting edge book by Katsh and Rifkin, the section entitled “The Theory of ODR” does not even fill two pages.<sup>27</sup>

This lack of theoretical reflection on online dispute resolution results mainly from the fact that ODR is still a novelty which has not managed to attract popular attention yet. As of June 1, 2005, altogether only 138 articles in the LexisNexis database contained the term “online dispute resolution,” and many of them only did so in a single sentence or a footnote reference. Another important reason is that ODR represents the gamut of dispute resolution possibilities which are difficult to measure and classify by any coherent set of criteria and principles. As noted by Rule, ODR may both involve automated negotiation processes administered by a computer, or it can provide world-class experts to administer arbitration procedures remotely, for example. “ODR systems can be legalistic and precedent-based, like the courts, or flexible exception-handling mechanisms to act as an extension to customer service efforts. ODR can be a multimillion dollar customer relationship management system or a \$ 75 website set up to aid a mediator with administration of a small case. Any use of technology to complement, support, or administer a dispute resolution process falls into the world of ODR”.<sup>28</sup>

This richness of the online dispute resolution phenomenon, inherited from ADR albeit growing, implies that ODR could be classified into different “traditional” groups of dispute resolution procedures. While some ODR mechanisms are “procedures of agreement” (for example online mediation), others belong to “procedures of advice” (e.g. tools supporting negotiation) or “procedures of decision” (e.g. online arbitration).<sup>29</sup> Sometimes the ODR neutral plays a facilitative, non-judgemental role, and other times they have “absolute decision-making authority.”<sup>30</sup> ODR can take place both on an *ad hoc* basis, as well on the basis of advanced agreement, dispute resolution program and – arguably, also in the future – legislation or government mandate.<sup>31</sup> While some ODR processes enable integrative (cooperative) problem solving in which parties can work together to generate new value for both sides (“expand the pie”)<sup>32</sup>, others – such as automated blind bidding – are designed for merely splitting a difference.<sup>33</sup> Finally, in cyberspace, like in real space, when seeking to resolve a conflict, parties can rely both on their interests as well as rights or power. As observed by Bordone, encouraging people to approach dispute resolution from an interest-based rather than a rights- or power- based perspective is not always easy, either offline or online.<sup>34</sup>

<sup>26</sup> See: Merriam-Webster Dictionary, online: <<http://webster.com>>.

<sup>27</sup> Katsh and Rifkin, *supra* note **Error! Bookmark not defined.** at 10-11.

<sup>28</sup> Rule, *supra* note 10 at 44.

<sup>29</sup> On the classification of the procedures of agreement, advice and decision, see: Genevieve A. Chornenki, *The Corporate Counsel Guide to Dispute Resolution* (Canada Law Book Inc., Aurora, 1999) at 7-10 [Chornenki].

<sup>30</sup> Rule, *supra* note 10 at 44.

<sup>31</sup> Chornenki, *supra* note 29 at 11.

<sup>32</sup> Rule, *supra* note 10 at 37

<sup>33</sup> Yet, it seems that in the realm of the Internet even the latter can bring about a mutually satisfying and “win-win” solution, if applied in appropriate circumstances and upon parties’ consent.

<sup>34</sup> Robert Bordone, “Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal” (1998) 3 Harv. Negotiation L. Rev. 175 at 187-189 [Bordone]. See also Rule, *supra* note 10 at 37, suggesting that both in

As illustrated throughout this paper, the ODR phenomenon encompasses a collection of diverse procedures intended to prevent, manage or resolve disputes in the online environment. Fitting them into a coherent theoretical framework suitable for dispute resolution is certainly a difficult task. Nevertheless, given that dispute resolution is commonly viewed as a “series of informational exchanges”<sup>35</sup>, or more specifically as “a complex process of information management, information processing, and communication”<sup>36</sup> – according to several authors – information and communications technology lends itself well to this task.<sup>37</sup> What makes ODR particularly intriguing and new is that some of these informational exchanges occur between human and machine, rather than directly between human and human.<sup>38</sup> Bit by bit, the newest methods of resolving disputes, embodied in the ODR phenomenon, can change the landscape of dispute resolution, along with its theoretical underpinnings. Theoretical reflection on online dispute resolution is still in its infancy. This paper focuses rather on practical, i.e., regulatory aspects of the ODR phenomenon. The following discussion of the advantages and disadvantages of ODR in the context of other dispute resolution mechanisms may be helpful from both theoretical and practical standpoint.

## Disadvantages and Advantages of ODR

### Disadvantages

The most frequently heard concern about ODR has been that online processes and interactions “cannot match the richness of the face-to-face sessions that are at the heart of offline mediation” and other traditional dispute resolution methods.<sup>39</sup> Many authors argue that ODR loses the dynamics of ADR because it takes place at a distance and in front of computer screens, rather than communicating face-to-face. Although online technology helps reduce the physical distance between participants, “an electronic distance”<sup>40</sup> is imposed upon them since they cannot involve direct interpersonal contact. While a wink can be more meaningful than a word<sup>41</sup>, the wink – unlike the word – is not easily transmittable over the Internet. Communications online are not yet able to “express the variable tone, pitch and volume of the participants and cannot transmit personalities or physical cues.”<sup>42</sup> This weakness results in several problems relating to openness of a dialogue, trust, a neutral’s control over the process of dispute resolution, and ultimately its effectiveness.

Those concerns seem particularly clear in relation to online mediation. As noted by D’Zurilla, “there is almost universal agreement that mediation is most effective if the parties to the dispute are physically present before the mediator”<sup>43</sup>, and it is needless to say that this condition cannot be satisfied in the case of online mediation. Mediation is normally based on

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offline and online settings, disputes are frequently framed as “zero-sum, me-versus-you affairs where any gain enjoyed by one party comes at the expense of the other party”.

<sup>35</sup> Ethan Katsh, “Online Dispute Resolution: Some Lessons from the E-Commerce Revolution” (2001) 28 N. Ky. L. Rev. 810 at 817 [*Katsh, Online Dispute Resolution*].

<sup>36</sup> Julia Hörnle, “Online Dispute Resolution” in John Tackaberry and Arthur Marriott, *Bernstein’s Handbook of Arbitration and Dispute Resolution Practice*, Volume 1 (Sweet & Maxwell, London: 2003) at 783 [*Hörnle, Online Dispute Resolution*].

<sup>37</sup> *ibid.* at 783.

<sup>38</sup> As observed by Katsh, “what makes the design of online processes difficult is that the range of requests permitted to the human by the system must be flexible and broad enough to satisfy the needs of the human. At the same time, however, any possible request must be anticipated so that a suitable and appropriate array of responses is programmed into the machine” – Katsh, *Online Dispute Resolution*, *supra* note 35 at 817.

<sup>39</sup> Katsh, *Bringing*, *supra* note **Error! Bookmark not defined.** at 282.

<sup>40</sup> Eisen, *supra* note **Error! Bookmark not defined.** at 1310.

<sup>41</sup> Katsh, *Online Dispute Resolution*, *supra* note 35 at 816.

<sup>42</sup> Goodman, *supra* note 24.

<sup>43</sup> William T. D’Zurilla, “Alternative Dispute Resolution” (1997) 45 LA. B.J. 352.

an informal, face-to-face discussion between participants. For many of them, especially in family or neighbour disputes, “mediation is about the ‘venting’ of feelings and emotions that they would be unable to express in a more formal setting such as a courtroom. The opportunity to tell one’s version of the case directly to the opposing party and to express accompanying emotions can be cathartic for mediation participants.”<sup>44</sup> Venting feelings, confronting emotions, and empathizing with each other, considered important parts of mediation, must appear difficult when parties communicate via computer screens.

Many authors argue, therefore, that there are large barriers to creating an open dialogue between online mediation participants. As noted by Goodman, it is more difficult to evaluate not only the strength of a party’s feelings, but also their confidence or flexibility on particular issues.<sup>45</sup> In addition, as concerns disputes arising online, “there is typically no prior connection or any personal contact between the parties, they generally do not have an ongoing relationship (in fact, they often know little about one another), nor is there any hope of a future relationship (most often, cyber-disputes involve a “one-shot transaction”).”<sup>46</sup> The lack of an established relationship or personal connection can make it difficult for the online mediator to maintain effective control over the process.<sup>47</sup> The mediator, at least in the beginning, is only “a disembodied voice and cannot use his or her own physical ‘personhood’ to set the parties at ease and create an environment for sustained problem-solving.”<sup>48</sup> The online environment constrains the mediator’s ability to express “serious demeanour, professional presentation, occasional humour, and just plain charisma.”<sup>49</sup> Lacking the physical presence of the disputants, “the mediator has difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes.”<sup>50</sup> Thus, as Eisen concluded, many mediators remain sceptical about ODR and “find it largely impossible to translate their skills to the online setting.”<sup>51</sup>

Certainly, the rich practice of ADR cannot be easily reproduced in the online environment. In addition to this major concern, several other factors are considered disadvantages, or at least obstacles, in the use of ODR. Access to online computers may pose a problem for some individuals, especially those involved in disputes that result from offline transactions.<sup>52</sup> Those who are less familiar with computers may be at a disadvantage as compared to their opponents possessing higher IT skills. On the other hand, it seems that access to information technology is increasing at a relatively rapid rate, and the gap between IT *haves* and *have-nots* is closing.<sup>53</sup> Another significant concern refers to security and confidentiality of online communications. There are different ways of eavesdropping, or surveilling, on the Internet. ODR creates more (electronic and ultimately also physical) records than ADR. One may fear that the other party will simply print out and distribute, for example, e-mail communications without their knowledge and consent. As noted by Katsh, this concern may additionally

<sup>44</sup> Eisen, *supra* note **Error! Bookmark not defined.** at 1323.

<sup>45</sup> Goodman, *supra* note 24.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.* Goodman observed further that in the online environment, especially when using emails, it is more “difficult for the mediator to manage or temper the tone of the interactions without sounding controlling and judgmental”.

<sup>48</sup> Ethan Katsh, Janet Rifkin and Alan Gaitenby, “E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of ‘eBay Law’,” (2000) 15 Ohio St. J. On Disp. Resol. 705 at 714 [*Katsh, Rifkin and Gaitenby*].

<sup>49</sup> Bruce Leonard Beal, “Online Mediation: Has Its Time Come?” (2000) 15 Ohio St. J. On Disp. Resol. 735 at 737 [*Beal*].

<sup>50</sup> Katsh, Rifkin and Gaitenby, *supra* note 48 at 714.

<sup>51</sup> Eisen, *supra* note **Error! Bookmark not defined.** at 1323.

<sup>52</sup> Goodman, *supra* note 24.

<sup>53</sup> Benjamin M. Compaine (ed.), *The digital divide: facing a crisis or creating a myth?* (Cambridge, Mass.: MIT Press, 2001).

hinder the development of open and honest exchanges in ODR.<sup>54</sup> In addition, certain alleged disadvantages of ODR, as presented by some authors, refer to specific ODR processes.<sup>55</sup> For instance, blind binding was criticized as a method appropriate only for very simple disputes. These concerns do not seem valid to the extent that it is clear that “no size fits the all”, and several disadvantages of each traditional method, if inappropriately applied, could be also easily pointed out.

### Advantages

One of the most significant advantages of ODR is that it obviates the need for travelling and substantially reduces cost. There is also a growing consensus that ODR can make dispute resolution more efficient, allowing for better time and cost management, greater flexibility in procedure, and more creative solutions.<sup>56</sup>

Perhaps the most recognized benefit of ODR – as observed by Bordone – is that the disputants do not have to travel lengthy distances.<sup>57</sup> In the offline world of dispute resolution, if the parties want to be directly involved in resolving a given dispute, at least one of them would have to travel, sometimes far and wide. However, ODR enables the parties to directly and actively participate in dispute resolution from the comfort of their offices. There is also no need to transport relevant documents and materials or rent a neutral facility to conduct the proceedings. The Internet provides a neutral forum which denies a one of the parties the potential to exploit the “home court advantage.”<sup>58</sup> Because a neutral does not have to travel either, parties can more easily find good candidates with specific expertise in the area of their dispute. As a result, ODR multiplies the substantial savings provided by ADR as compared with traditional litigation<sup>59</sup> and therefore increases access to justice in today’s society.<sup>60</sup> In fact, as noted by Gibbons, Kennedy and Gibbs, ODR may be the only feasible option in many instances (for example, for individuals involved in international e-commerce disputes for relatively low dollar amounts).<sup>61</sup>

ODR may lead to reduced costs thanks to the expenditure of less time and, in general, more efficient time utilization. ODR mechanisms operate around the clock: many of them are available all day long, every day of the year. Even if other ODR systems are not available

<sup>54</sup> Ethan Katsh, “Dispute Resolution in Cyberspace” (1996) 28 Conn. L. Rev. 953 at 971.

<sup>55</sup> In this context, Goodman gave an example of fully automated systems that can only be used to resolve specific types of disputes and, even then, can only handle disputes where the amount of the settlement is the only unresolved issue. As he noted, “limiting the final stage of negotiations to determining a dollar figure for compensation seemingly leaves out the possibility for innovative, interest-oriented, out-of-the-box negotiating that is the hallmark of many successful negotiations.” – Goodman, *supra* note 24.

<sup>56</sup> See, for example, Hörnle, Online Dispute Resolution, *supra* 36 note at 786; and Lide, *supra* note **Error! Bookmark not defined.** at 219.

<sup>57</sup> See: Lan Q. Hang, “Online Dispute Resolution Systems: The Future of Cyberspace Law” (2001) 41 Santa Clara L. Rev. 837 at 854 [Hang] and Bordone, *supra* note 34 at 176.

<sup>58</sup> Richard Michael Victorio, “Internet Dispute Resolution (IDR): Bringing ADR into the 21<sup>st</sup> Century” (2001) 1 Pepperdine D.R.J. 279.

<sup>59</sup> For example, with attorney’s fees being a great expense in traditional litigation, parties may be able to save a lot of money in ODR, where hiring an attorney – even more than in ADR – is often unnecessary – George H. Friedman, “Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities” (1997) 19 Hastings Comm. & Ent. L.J. 695 at 712 [Friedman] and Hang, *supra* note 57 at 855.

<sup>60</sup> Teitz suggested that ODR could become an important vehicle for affordable justice for the middle class – Louise Ellen Teitz, “Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution” (2001) 70 Fordham Law Review 985 at 986-91 [Teitz].

<sup>61</sup> Llewellyn Joseph Gibbons, Robin M. Kennedy, and Jon Michael Gibbs, “Frontiers of Law: The Internet and Cyberspace: Cyber-mediation communications Medium Massaging the Message” (2002) 32 N.M.L. Rev. 27 at 42.

upon demand, the turnaround time is still relatively short.<sup>62</sup> Related to availability is the convenience of scheduling.<sup>63</sup> Especially when parties chose to resolve their disputes, partly or entirely, through e-mail or other asynchronous means of communication, then any of them may post and read messages at any time, at their convenience, thereby avoiding the hassles of trying to arrange times and places for meetings.<sup>64</sup>

There are several other benefits that stem from the asynchronous communications available on the Internet. Messages are not transmitted live, but can be written, reviewed, and then sent. Thus, it may be argued that more thoughtful, well-crafted contributions result from the ability of the parties to edit messages prior to sending them: “asynchronous Internet communications have the advantage of being edited in contrast to impulsive responses that often can take place in real time face-to-face mediation discussions.”<sup>65</sup> Experienced neutrals – as explained by Melamed – are well aware of the benefits of asynchrony. “This is a big part of the reason that many mediators meet separately with each party. Mediators want to slow the process down and assist participants to [safely] craft more capable contributions. ... When the Internet is utilized for caucus, the ‘non-caucusing participant’ does not need to sit in the waiting room or library reading Time magazine or growing resentful at being ignored.”<sup>66</sup> As a result, in ODR, the amount of idle time that disputants experience can be reduced, and the neutral can caucus without affecting the flow of the process.<sup>67</sup>

Many other features of ODR, which have been often perceived as its disadvantages, can actually bring about significant benefits. Despite the concerns about confidentiality and security, the fact that records are automatically created for all online communications has consequences for “building feedback and intelligence into the ODR process.”<sup>68</sup> It enables the all parties to recreate “who said what” and under what circumstances. This may serve diverse purposes, from a neutral’s standpoint. Recreation is a useful tool for studying the possibilities for improvement of dispute resolution practices. It seems possible that such a record could allow for a more thoughtful intervention by the neutral who would be able to analyse the parties’ communication more thoroughly in order to identify obstacles to communication, determine where shared interests may lie, and how to build on them to bring about agreement.

Lack of in-person interaction, considered the most significant disadvantage of ODR by many commentators, may also prove to be an advantage in certain circumstances. Lodder and Zeleznikow argued that it can happen for disputes in which the emotional involvement of the parties is so high that it is preferable that they do not see each other.<sup>69</sup> Arguably, the “impersonal” nature of online communications could help the parties to be better able to distinguish between the person and the conflict (as is suggested in principled negotiation<sup>70</sup>).

<sup>62</sup> Hang, *supra* note 57 at 855 and Catherine Kessedjian and Sandra Cahn, “Dispute Resolution On-Line” (1998) 32 Int’l Law. 977 at 977-978.

<sup>63</sup> Friedman, *supra* note 59 at 712.

<sup>64</sup> Hang, *supra* note 57 at 855.

<sup>65</sup> Jim Melamed, “The Internet and Divorce Mediation”, online: <<http://www.mediate.com/articles/melamed9.cfm>> [Melamed].

<sup>66</sup> *ibid.*

<sup>67</sup> Goodman, *supra* note 24.

<sup>68</sup> Katsh and Rifkin, *supra* note **Error! Bookmark not defined.** at 81.

<sup>69</sup> Lodder and Zeleznikow, *supra* note **Error! Bookmark not defined.** at 302: “It can happen when parties have a history of violent conflict, the costs of being in the same room are exorbitant, parties are in different time zones, or parties cannot agree upon a joint meeting time.”

<sup>70</sup> Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (New York, N.Y.: Penguin Books, 1991) at 17-39.

In addition, many participants of “one-shot transactions” do not want to enter into a closer relationship with the other party, or even wish to remain anonymous (hidden under an online “nick name” or other kinds of pseudonyms). As noted by Hang, “anonymity is highly valued over the Internet”, and ODR may preserve anonymity and resolve the dispute at the same time.<sup>71</sup>

It does not mean though that online dispute resolution and, more broadly, Internet communications are inherently emotionless. Quite the opposite, the richness of diverse Weblogs, chat rooms and other forums where Internet users share their views, seek advice or make friends, reveals that more and more people do not mind talking about their lives and feelings, including often fairly intimate secrets, while sitting in front of a computer. Frequent users of online systems get a specific sense of proximity, even though in reality they are separated by geographic distances.<sup>72</sup> Thus, creating an atmosphere in which parties trust a neutral and increasingly also each other, which is considered vital, if not indispensable, for the effectiveness of most out-of-court dispute resolution mechanisms<sup>73</sup>, appears difficult but not impossible in the online settings. It presents a new challenge for dispute resolution professionals. Certainly, trust and understanding necessary to effectively resolve a dispute can be achieved even in the absence of physical presence. The ways to do so must, to some extent, differ from their offline counterparts, as cyberspace is not, and will never be, a ‘mirror image’ of the physical world.

### **Building Future Dispute Resolution Systems Online**

Even in countries with relatively developed ADR practices, litigation still occupies a central place in a dispute resolution system and popular beliefs about dispute resolution. Out-of-court dispute resolution mechanisms are persistently described as “alternative” which clearly suggests that there is a primary model for settling disputes, needless to say, litigation in court. Yet many authors argue that what are considered the alternatives offline might become the primary models of dispute resolution online. As observed by Katsh, especially with those disputes that arise online, “there is even less reason to think that courts will be the choice of first resort.”<sup>74</sup>

Even if courts today are more and more eager to send cases to mediation and arbitration, only one generation ago, “the idea of moving dispute resolution ‘out of court’ encountered concern similar to the concern expressed today about moving dispute resolution to the arena of cyberspace.”<sup>75</sup> Nevertheless, since then the landscape of dispute resolution has profoundly changed, and certainly will keep changing in the future. Many factors that have encouraged the growth of ADR offline will also be factors affecting the further growth of ODR. Traditional courts simply do not have enough ability, and in many cases arguably also authority, to effectively resolve disputes that arise from online activity. As illustrated throughout this paper, the Internet’s global nature undermines the fundamentals of traditional dispute resolution systems, such as the notion that legally significant actions take place in a

<sup>71</sup> Hang, *supra* note 57 at 858.

<sup>72</sup> David K. McGraw, “Sexual Harassment in Cyberspace: The Problem of Unwelcome E-mail” (1995) 21 Rutgers Computer & Tech. L.J. 491. See also Katsh arguing that “cyberspace assumes that the removal of spatial barriers combined with the high level of online interaction creates [sic] a feeling among those electronically connected that they are indeed in the same place even though they are physically separated by great distances.” (Ethan Katsh, “Law in a Digital World: Computer Networks And Cyberspace” (1993) 38 Vill. L. Rev. 403 at 415).

<sup>73</sup> Eisen, *supra* note **Error! Bookmark not defined.** at 1325.

<sup>74</sup> Katsh, Online Dispute Resolution, *supra* note 35 at 813.

<sup>75</sup> Katsh and Rifkin, *supra* note **Error! Bookmark not defined.** at 26.

physical location.<sup>76</sup> It is claimed that the Internet is creating a new, global online society that lives by its own rules, and it is not subject to any one particular jurisdiction.<sup>77</sup> In this context, ODR is considered important part of “the movement to build civic institutions online.”<sup>78</sup> If we take into account to what extent the Internet has already become part of our lives in one decade only, and the ease with which the younger generation uses online tools<sup>79</sup>, we can expect that in the not-too-distant future ODR will surpass offline dispute resolution, and will become a central method of dispute resolution.<sup>80</sup>

There are a few existing or purely theoretical or speculative models of dispute resolution systems in which ODR plays a main role. There is consensus that the first truly global online dispute resolution system, albeit limited to specific cases, was adopted in the late 1990s by the Internet Corporation for Assigned Names and Numbers (ICANN).<sup>81</sup> ICANN is the non-for-profit organization established to administer the Internet domain name system. In this function it has promulgated a dispute resolution procedure, the Uniform Dispute Resolution Policy.<sup>82</sup> This procedure assists the resolution of disputes between a trademark owner and a registrant of a domain name (the UDRP is binding on the registrant of the domain name: it is incorporated into the contract between the registrant and the registrar of the domain names). Many authors have suggested that the development of a global system via ICANN is without historical precedent<sup>83</sup>, and thus UDRP might be recognized as a seed of a fair global justice online scheme. Hörnle, for example, assessed that UDRP is a “successful procedure [that] can serve as a model for ODR of other disputes”<sup>84</sup>. On the other hand, critics have pointed out that ICANN’s success has been accompanied by several problems such as lack of legitimacy, forum shopping, uncontrolled choice of law decisions or inconsistent interpretation.<sup>85</sup>

One of the most interesting examples of theoretical ODR models has been given by Bordone who called for setting up a comprehensive “dispute resolution system for the world of Cyberspace”.<sup>86</sup> The entry point of this system would be a Web page called the Dispute Resolution Referral Center (DRRC), fashioned after a multi-door courthouse or multi-option justice system that was first introduced by Professor Frank Sander in 1976.<sup>87</sup> Under such a model, a disputant entering the DRRC would be referred to a Dispute Diagnostic Specialist

<sup>76</sup> Almaguer and Baggott, *supra* note **Error! Bookmark not defined.** at 712.

<sup>77</sup> Rule, *supra* note 10 at 203

<sup>78</sup> Katsh and Rifkin, *supra* note **Error! Bookmark not defined.** at 19

<sup>79</sup> See David A. Larson, “Online Dispute Resolution: Do You Know Where Your Children Are?” (2003) 19 *Negot. J.* 199 at 199-205 (describing how youth build intimacy and trust through on-line relationships). See also Erik Roelvink, “The Future Has Begun!”, online: <<http://www.emediation.nl/odren.htm>> (“The younger generation is of course raised with the internet. Chatting and email are a part of every day routine for this generation. Conflicts are of all ages. For younger people it will be natural to solve a conflict online”).

<sup>80</sup> Lodder and Zeleznikow, *supra* note **Error! Bookmark not defined.** at 337.

<sup>81</sup> Internet Corporation for Assigned Names and Numbers, online: <<http://www.icann.org/>>.

<sup>82</sup> Uniform Dispute Resolution Policy, online: <<http://www.icann.org/udrp/udrp.htm>>.

<sup>83</sup> Klein, for example, wrote that creation of ICANN has been “the most significant development in the trend to render the Internet governable.” – Hans Klein, “Private Governance for Global Communications: Technology, Contracts, and the Internet” in Sandra Braman, ed., *Emergent Global Information Policy Regime* (Hampshire: Palgrave Macmillan, 2004) 179 at 180.

<sup>84</sup> Hörnle, Online Dispute Resolution, *supra* note 36 at 814.

<sup>85</sup> Elizabeth G. Thornburg, “Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process” (2001) 7 *J. Small & Emerging Bus. L.* 191 at 207-225.

<sup>86</sup> Bordone, *supra* note 34 at 202-203.

<sup>87</sup> Frank E.A. Sander, “Alternative Methods of Dispute Resolution: An Overview” (1985) 37 *Fla. L. Rev.* 1 at 12-13 (describing the multi-door courthouse model as one in which disputants would first present their dispute to a clerk who would then refer it to one of a host of dispute resolution methods ranging from adjudication to mediation to an ombudsman); see also Charles Ruhlin & Harry N. Scheiber, “Umpiring the Multi-Option Justice System” (1996) 80 *Judicature* 58 at 58.

(DDS). The DDS would create a “private chat room” serving as the secure repository for all information related to the dispute. Then, the DDS would gather necessary information, evaluate the nature of the dispute, and recommend to the parties several options which might prove successful in resolving it. Depending on the nature and circumstances of the conflict, these options might include opportunities for unassisted online negotiation, an online mediation, an online arbitration<sup>88</sup>, an assisted negotiation/mediation hybrid using an ombudsman, further fact-finding by an ombudsman, or if the dispute were outside the jurisdiction of the Cyberspace model, references to territorially-based legal agencies. In the model offered by Bordone, the DRRC would be “the mandatory entry point for all online disputes” (yet once the DDS offers his or her recommendations, the disputants would be free to choose whichever process they prefer), all decisions would be logged into a case library “accessible to all residents of Cyberspace”<sup>89</sup>, and finally sanctions would be limited to the online community (they would include, for example, forcing a disputant to post an apology or a correction of some specified sort, forbidding a party from sending or posting messages for a specific amount of time, or “temporarily suspending citizenship rights in Cyberspace”).<sup>90</sup>

In conclusion, one might argue that the models of dispute resolution systems based on ODR have been either seriously flawed or unrealistic. Contrary to some very optimistic predictions made a few years ago, ODR has not revolutionised the conduct of ADR.<sup>91</sup> Thus one may ask the question whether ODR is merely a passing fad with no real impact on the arena of dispute resolution. The answer to this question is certainly negative: there is a clear need for ODR in the online environment.<sup>92</sup> The Internet and ODR is still in a process of institution building, and even if it takes longer than originally assumed, everything is still in place to develop a global ODR system.<sup>93</sup>

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<sup>88</sup> As noted by Bordone, “the arbitration option represents the adjudicative, adversarial model of dispute resolution for the Internet. Since some disputes are appropriately decided by third parties because they are conflicts over rights and power, it is essential that even the most ambitious and evolved interest-based dispute resolution model offer an adjudicative option for resolving disputes” – Bordone, *supra* note 34 at 202-203.

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.* at 206-207.

<sup>91</sup> Hörnle, Online Dispute Resolution, *supra* note 36 at 834.

<sup>92</sup> *ibid.* at 835.

<sup>93</sup> Rule, *supra* note 10 at 34.

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