

ONLINE DISPUTE RESOLUTION

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*Colm Brannigan**

¶29,000 INTRODUCTION

In today’s world of long-distance communication and e-commerce, many negotiations are conducted through the Internet rather than on a face-to-face basis. It is commonly assumed that trust is harder to establish and maintain in the former environment, but a recent study suggests that, with patience, parties can learn to trust one another, even online.¹

Online Dispute Resolution (“ODR”) is dispute resolution that “takes advantage of the Internet, a resource that extends what we can do, where we can do it, and when we can do it”.² ODR is not just an online version of Alternative Dispute Resolution (“ADR”). Whether called online ADR, eADR, iADR, virtual

* Colm Brannigan, M.A., LL.M. (ADR), C. Med., is a commercial and technology mediator and arbitrator, and the principal of Mediate.ca in Brampton, Ontario. In addition to writing on ADR topics, Colm has participated in numerous professional development programs and is a member of several professional organizations including the ADR Institutes of Canada and Ontario, the Ontario Bar Association — ADR Section, and the American Bar Association Section of Dispute Resolution. Colm is co-chair of the ADR Institute of Ontario’s Technology and IP Section and a mediation roster member of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center.

ADR, cyber mediation, or cyber arbitration, ODR has many unique aspects, from both a technological and a process perspective. This chapter provides an overview of ODR, which is still a relatively new process in the ADR continuum, given that articles on this topic first appeared in law journals in 1996.

Language and communication are central to any dispute resolution process. ODR is the application of communication and Internet technology to ADR and more. ODR technologies can also be applied to “offline” disputes to make the process more effective for the disputants. Both “pure” and hybrid processes are being used today in a variety of settings to bring best practices from both online and offline worlds to dispute resolution.

There are significant obstacles to the development of a coherent “legal” system for resolving conflicts and disputes in cyberspace. Complex legal issues involving jurisdiction and conflict of laws abound. In addition, many online disputes involve relatively low-value transactions where, even if the legal issues could be resolved easily, the costs involved in litigation are out of proportion to any results that might be achieved. In those cases, ODR provides options and solutions for online disputants that are not available elsewhere.

Among the reasons disputants adopt “conventional” ADR instead of traditional litigation processes are: perceived lower cost; confidentiality; greater speed; flexibility of process; a process that is less adversarial, more informal, and solution-oriented rather than blame-oriented; fewer jurisdictional problems;³ and the potential for “win-win” solutions through integrative negotiation. ODR also possesses these advantages and more.

Changes in technology have made accessibility to the Internet far less expensive and the Internet itself more user-friendly. This makes the concept of ODR more likely to be accepted, especially by those who now use ADR, and by others, to whom ODR provides the only practical means of dispute resolution for disputes that arise in cyberspace.

ODR processes are possible because dispute resolution is an information-intensive and communication-intensive activity. ADR cannot avoid being transformed by information technology.⁴ Dispute resolution online is not an electronic mirror of

what exists offline; it possesses alternative resources and options.⁵

The technological change brought about by the Internet is a complex mix of “technical feasibility, infrastructure, commercial viability and political, social and psychological adaptation”,⁶ which has the potential to bring about many novel types of disputes. ODR is not an alternative process to other forms of dispute resolution in the online environment, as it is often the only process available to disputants. It is this characteristic that sets it apart from ADR in the offline world.⁷

¶29,050 THE INTERNET

Until fairly recently, the degree of technical skill and expertise required to operate computer communications equipment was far beyond the capabilities of the non-specialist. Today, even extremely sophisticated information technology is easily accessible to non-specialist users.

The Internet is the global connection of interconnected computer networks. The World Wide Web was designed to facilitate access to information. The Web is only a part of the Internet, but its name has become so popular that many new users believe that the Web is the Internet. From a technical standpoint, the Web is only an information presentation system, but its power and impact goes far beyond any other mass communication technology to date.⁸

The Internet has experienced exponential growth. In 1994, there were an estimated 15 million users online. The latest statistics available show that, as of September 2007, an estimated 1.2 billion people worldwide have Internet access. This is approximately 19 per cent of the world’s population, and the greatest increase is taking place in developing countries. Between 2000 and 2007, Internet usage increased by 245 per cent! Over 61 per cent of Canadians use the Internet at home, and 82 per cent of these users have high-speed connections.⁹

One of the major factors propelling the development of ODR is e-commerce, both business-to-business (“B2B”) and business-to-consumer (“B2C”). In the United States, online sales are

expected to reach \$250 billion in 2007, which is an increase of almost 19 per cent over 2006.¹⁰ In Canada, online sales in 2006 were almost \$50 billion, which represented the fifth consecutive year of double-digit growth, but that is still only 1 per cent of total B2C retail sales.¹¹

E-commerce requires an effective system of dispute resolution in order to build and maintain consumer confidence in an environment where the traditional institutions that inspire trust are absent. Both private and public sector institutions are moving online. Between 2001 and 2005, a number of assessments comparing various countries' e-government progress were conducted by the World Economic Forum, the United Nations, the Economist Intelligence Unit, the Conference Board of Canada, and Accenture. In 2005, the latest year for which data is available, Accenture ranked Canada first for the fifth year in a row as having the most sophisticated e-government in the world.¹² Despite this, ODR has not developed to the degree expected in Canada.

¶29,100 ONLINE DISPUTE RESOLUTION: AN OVERVIEW

As one of the most perceptive and thoughtful writers about ODR has commented, "in essence, legal dispute resolution is a complex and highly sophisticated form of information management and processing. For this reason, it lends itself to the use of sophisticated information technology."¹³

ODR has developed because it provides technology to meet the need for dispute resolution in cyberspace. The nature of cyberspace, where events happen "nowhere" and "everywhere", has created serious legal difficulties.¹⁴

Many existing commercial and consumer laws are inadequate to address the needs of e-commerce.¹⁵ New laws such as the 2006 *Consumer Protection Act* in Ontario have components of ODR in their dispute resolution/complaint procedures.

ADR focuses on moving dispute resolution away from litigation and court-based decision-making. ODR, by designating cyberspace as a location for dispute resolution, extends this pro-

cess by adapting traditional offline ADR processes such as negotiation, mediation, and arbitration. An example of an extremely successful hybrid ODR process that uses the telephone as its primary communication technology is the dispute resolution process of the Financial Services Commission of Ontario in connection with automobile insurance statutory benefits.¹⁶ If the process is conducted exclusively by telephone, it is not generally considered to be ODR, although since many similar communication issues arise in this type of process as in “pure” ODR, perhaps it should be.

ODR has developed and utilized specific technologies for automated negotiation and online support of various processes.¹⁷ The earliest ODR initiatives occurred in the mid 1990s.¹⁸ Since 1999, commercial online dispute resolution services have been offered, with most ODR providers being based in the United States. The number of ODR providers worldwide has steadily increased, so that today, it is estimated that at least 115 exist.¹⁹

While ODR is an alternative to offline methods of dispute resolution, it is more than just electronic ADR. ODR is a multidisciplinary enterprise that provides secure and confidential dispute resolution processes.²⁰ It allows for the implementation of effective and efficient dispute resolution procedures that reflect the online commercial reality of the 21st Century.

In theory, all disputes that are appropriate for ADR are also suitable for ODR.²¹ In practice, that seems to hold true. Disputes in which ODR is used range from consumer disputes through Internet domain name disputes to commercial and insurance matters.

¶29,120 Negotiation

ODR provides both fully automated and assisted forms of negotiation. Most of the automated procedures are quite similar to each other, and are designed primarily for financial claims.²² Each party submits its position electronically to a mathematical logarithm for resolution. The parties make blind bids, which are not disclosed, on an ongoing basis. Once the parties are within a certain range, settlement automatically takes place for the median amount.

Automated negotiation covers many areas of disputes, including personal injury, divorce, uncollected judgments, and real estate, with the most frequent use being in the area of insurance.²³

Users of the various systems range from consumers through insurance companies and governments. Most service providers restrict their services to commercial matters arising out of e-commerce.²⁴

A Canadian company operating in this field is Smartsettle, based in Vancouver. According to its Web site, Smartsettle offers significant advantages to negotiators because conventional negotiations suffer from three serious problems: they are often adversarial; time is wasted with a tedious negotiation dance; and value is left on the table. Smartsettle uses sophisticated optimization algorithms to help participants choose a fair and efficient solution. It offers faster settlement in a scalable process at less than half the cost of litigation.²⁵

Business-to-consumer (“B2C”) forms of ODR are often linked to a trustmark or seal.²⁶ Under this type of program, vendors agree to participate in the dispute resolution process offered by an ODR provider as a part of the trustmark program, which may also include a Code of Conduct.

The ODR provider licenses the participant to use a “trustmark” on its Web site. This trustmark tells the purchaser that the seller has agreed to a dispute resolution process. ODR services offered by trustmarks are generally limited to mediation. Some providers offer services to various categories of parties, while others are limited to consumer transactions with or without trustmark programs.²⁷

¶29,140 Arbitration

Online arbitration is available for many kinds of online and offline disputes. It is commonly utilized in disputes arising from online activity and commercial matters with both consumers and businesses. Approximately 50 per cent of ODR providers offer arbitration services. The American Arbitration Association (“AAA”) provides arbitration services under various institu-

tional rules, and its supplementary procedures for online arbitration permit the arbitration proceedings to be conducted online. While the use of ODR by the AAA occurs only in a small percentage of cases, it has seen recent growth. In 2006, 3,000 of the 160,000 cases handled by the AAA were on a digital basis.²⁸

This is very significant, as arbitration is the most formal and “law like” of ADR processes, and not surprisingly, online arbitration maintains this level of formality. Due process is a fundamental requirement of all arbitral processes, as it is the equivalent of a private court. The challenges to online arbitration are “more in the realm of law than technology”.²⁹ But they can be overcome, as shown by the AAA experience.

¶29,150 **ADR Institute of Canada National Arbitration Rules** The National Arbitration Rules of the ADR Institute of Canada provide both for electronic communication, and that part or all of the arbitration may be conducted by telephone, e-mail, Internet, or electronic communication if the parties agree.³⁰

¶29,160 **British Columbia International Commercial Arbitration Centre** While allowing documents to be delivered by a variety of means, including facsimile or other means of telecommunication that provide a record of delivery, the Rules of the British Columbia International Commercial Arbitration Centre for both domestic and international arbitration have not been revised in some time and do not provide for an online process.

¶29, 170 **The ICANN Uniform Dispute Resolution Policy** The Internet Corporation for Assigned Names and Numbers (“ICANN”) is the non-profit organization that administers the Internet domain name system. Its Uniform Dispute Resolution Policy (“UDRP”) is the area in which online arbitration is most frequently used, as it is a mandated process as part of the assignment of domain names.³¹ There are still only four approved providers for UDRP disputes.³²

¶29,180 **The Canadian Internet Registration Authority Domain Name Dispute Resolution Policy** The Canadian Internet Registration Authority (“CIRA”) is responsible for the administration of over 921,000 dot.ca domain names.³³ CIRA has

the Canadian Domain Name Dispute Resolution Policy (“CDRP”), which outlines the nature of its dispute resolution process and requirements for those wishing to initiate a proceeding under the policy. The CDRP rules set out the procedures required to initiate and respond to a proceeding. This is a completely Web-based process and there is no provision for an in-person hearing, “including any hearing by teleconference, videoconference, or Web conference, unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the Proceeding”. To date, there have been fewer than 100 decisions under the CDRP.

¶29,190 **Other Arbitration Providers** Both the International Chamber of Commerce International Court of Arbitration, based in Paris, and The London Court of International Arbitration provide arbitration services under various rules including their own, but do not at the moment have specific ODR rules.

The World Intellectual Property Organization (“WIPO”) Arbitration and Mediation Center offers arbitration and mediation for international commercial disputes focusing on technology and intellectual property disputes, including domain name disputes. There is provision for parties to use an online process under the WIPO arbitration rules.

The Hong-Kong International Arbitration Centre offers international arbitration, and its rules for electronic transactions were drafted specifically for the resolution of e-commerce disputes.

¶29,200 Mediation

Online mediation is the most frequently used ODR process. Unlike the formality of arbitration, there are few, if any, legal or process restrictions on mediation. The quality of resolution provided by online mediation in obtaining integrative results is generally better than online negotiation because of the intervention of the mediator. At the same time, it is far less intrusive and legalistic than arbitration, which may account for the extension of mediation into a large cross-section of disputes.

Many ODR providers offer mediation for any dispute that is “amenable [to] mediation”. This ranges from e-commerce disputes to employment, insurance, and personal injury matters, but not family law. This is a significant difference from ADR, which does include family law. The preferred parties from an ODR provider perspective are those involved in commercial disputes.³⁴

While assisted negotiations are almost always conducted fully online, mediation procedures vary, and include:

- **Shuttle diplomacy models**, where the mediator goes from one private discussion with a party to another one with the other party. Some ODR providers’ rules only allow sequential communication with the mediator by e-mail where a party sends a message to the mediator, who comments on it and forwards it to the other party. Some other rules are less strict but limit the number of rounds of replies. None appears to prevent direct communication between the parties.³⁵
- **“Triangular” models**, where there are two different procedures. Some require the parties to leave messages in a common discussion room without real-time communication. Others provide a “chat-room” where the parties and the mediator communicate as a group in real time. Neither of these formats allow for individual meetings or caucuses, which are often considered the most important part of the offline mediation models, especially in commercial matters.³⁶
- **Common and private communication models**, which combine aspects of the above models. Some go so far as to allow experts, witnesses, and lawyers to participate in the common communication.³⁷

Modes of communication used in ODR include e-mail, fax, telephone, and Web-based communication including chat, instant messaging, online conferencing, Web-posting, and videoconferencing. The significant increases in the quality of video technology over the last five years, combined with greater availability of broadband or high-speed Internet access, will no doubt lead to its growing importance in ODR.

Mediation, online or offline, is a confidential and without-prejudice process. These conditions are required to facilitate open communication and disclosure of information so that the parties can come to a resolution that is sustainable and that meets, in most models, their interests as well as their needs.

In ODR models, service providers have various ways of implementing mediation:

- The sessions are always private and confidential. Outsiders are not allowed to attend, nor to access the “record” of the mediation. Despite its importance, some providers do not address the issues of confidentiality on their Web site.
- Only a few providers specifically state that, if the parties seek legal recourse after mediation, the mediators cannot be called on to disclose information.
- One provider specifies that “once a settlement is reached between the parties, all documents cease to be legally privileged”.
- Case results are not published, although aggregate data is sometimes available for research or marketing purposes.³⁸

The protection of electronic communications from accidental disclosure is not covered by general statements regarding confidentiality, nor is there a specific policy on this important issue on any ODR provider Web site.

In considering why certain types of online dispute resolution systems are in place and others are not, the following overview is helpful:

- **Single issue versus multi-issue disputes** — Software to assist in reaching agreement when there is only one issue such as money is already successfully in place. One of the remaining challenges is to be able to deal with multiple parties and where resolution depends upon identifying interests, assigning priorities, and making compromises, such as in mediation.
- **Single transaction versus relationship** — eBay disputes involve a single transaction with little likelihood of a

future relationship. There are often several different issues that need to be dealt with in auction-related disputes, but any agreement reached is executed almost immediately. In eBay mediation, there is no perceived need to have written agreements because there is no need for a process to monitor future performance.

- **Arbitration versus mediation** — There is a system in place in which thousands of disputes involving domain names and claims of trademark infringement are being arbitrated online — the ICANN UDRP. SquareTrade and others are putting Web-based mediation systems in place, but mediation systems involve more complex interactions and require more investment than online arbitration systems.³⁹

¶29,240 Additional Services

A variety of additional services in the following categories are also provided by some ODR providers: legal assistance; dispute prevention; evaluation; recommendation; complaint assistance; drafting of dispute resolution clauses; publication of complaints; training; and information.⁴⁰ Of these, dispute prevention and training will become much more prominent in the future.⁴¹

¶29,270 BENEFITS OF ODR

The benefits of ODR include most of the same categories as for offline ADR. Generally, these include: accessibility and convenience; speedy resolution of disputes; potential for creative integrative resolutions and flexible outcomes; fairness; low cost; full airing of grievances; a process that is less confrontational than the equivalent offline process; a legitimacy to online users in an online process;⁴² and reduced strain on the legal system, as some of the online disputes are actually amenable to traditional methods of dispute resolution.⁴³

Some other benefits are the following:

1. ODR offers a significant advantage by enabling dispute resolution over large geographic areas where parties cannot meet face-to-face except with significant costs.

2. In e-commerce disputes, ODR may be the only feasible resolution option available to the parties.
3. Participants in ODR processes can access expertise that would not be available locally, which has tremendous potential benefits for people in areas where skilled or specialized dispute resolution assistance is not available.
4. Electronic data storage and retrieval means that all relevant information can be made available for the disputants. Discussions can be recorded, and it is easy to generate and confirm an agreement from the ongoing dialogue between the parties.
5. Online communication can be asynchronous or synchronous. Newer technology such as instant messaging allows for both types of communication. Asynchronous communication has 24-hour availability, which is of great value where time differences make synchronous telephone contact difficult. Asynchronous methods give parties time to reflect and allows for explanation of their positions. It permits parties to be at their “thoughtful best, rather than their immediate often worst”.⁴⁴ Evidence shows that typing and the resulting time lag may cause disputants to pay more attention to the substantive content of their messages, which may lessen the emotional stress of conflict resolution.
6. The lack of visual cues in ODR may be an advantage in some situations where it enables parties to focus more on substantive issues and avoid negative emotions.
7. Every new communication medium provides advantages to some people and disadvantages others. Traditional ADR mechanisms are not neutral. They advantage people who are physically attractive, articulate, well-educated, or who are members of a dominant ethnic, racial, or gender group. Online communication disrupts some of these hierarchies by freeing the parties from limitations based on physical appearance and various status cues. ODR may make it easier to overcome socio-economic differences and to change ingrained conflict dynamics, including dominance and intimidation.
8. ODR minimizes jurisdictional issues. It can provide a neutral forum when selecting a meeting place proves difficult. It can

also be good for security where one party wants to keep their location secret; for example, where parties have a history of domestic violence.

9. ODR creates a good learning environment for parties to learn rational communication skills.

¶29,290 CHALLENGES FACING ODR

The many challenges facing ODR include: obtaining the consent of the parties; confirming the identity of the parties; due process and procedural fairness;⁴⁵ a perceived lack of consumer choice and power; a lack of human interaction; uneven access to computer resources (“the digital divide”);⁴⁶ asymmetry of computer expertise;⁴⁷ “the faceless mediator”;⁴⁸ disparity between the parties; infrastructure costs; breaks in communication (how do you know if a participant has withdrawn from the mediation?);⁴⁹ regulating speech by keeping discussions focused;⁵⁰ moderating speech involving fundamental legal or value conflicts;⁵¹ and enforcement of agreements.⁵²

Most of the perceived disadvantages of ODR result from its reduced communication cues. Many online communication tools such as e-mail and computer bulletin boards are text-based and do not offer visual and paralinguistic cues. As noted above, greater use of videoconferencing and video and audio streaming, together with electronic whiteboards, will add further depth to ODR.

One of ODR’s strengths in online communication, its asynchronicity, may also cause frustration where one party is not available online when the other is. If not well managed, excessive time between communications can have a negative intensifying effect where parties become less likely to achieve resolution.

The full capacity of ODR is not likely to be utilized by those who are uncomfortable or unfamiliar with the technology. ODR requires mediators to possess both process skills and technological skills. ODR has the potential to flood the other party with information that must be managed by a skilled neutral or by the design of the ADR process itself.

While cultural differences need to be managed in every ADR process, ODR may magnify the issue because disputants can be in different locations around the world.

The costs of ODR platforms were initially very high in terms of the technology and training needs. Today, the costs are dropping fast, as with almost all hardware. Web technology and equipment that would have cost over \$20,000 a couple of years ago is now under \$1,000.

There are still serious issues with respect to the protection of electronic communications and risk allocation. Unencrypted e-mail is not secure, and further protection is required to ensure confidentiality and integrity of messages.

Issues surrounding the discovery of electronic records in subsequent legal proceedings, while also significant offline, become more significant in an online process as there is a more complete record. In offline mediation, mediators often limit note taking or destroy notes at the conclusion of mediation.⁵³

¶29,300 Communication Competence

The challenge to mediators in ODR is to manage online information and interactions and, simultaneously, to develop the trust of the users of the ODR space.⁵⁴ ODR is not only a digital communication channel; it has the additional element of information processing tools.⁵⁵ In order to expand the use of ODR, simplicity of technological functioning through standardization and interoperability is required. It has been stated that:

The major challenge to online mediation is to overcome resistance based on inexperience . . . there is an unexamined assumption that physical presence, face-to-face dispute resolution, is superior to dispute resolution mediated by other communication channels . . . there is a perception that there is no paradigm to guide mediators in the uncharted realm of cyberspace. Neither perception is necessarily true.⁵⁶

A useful definition of communication competence in ADR that also applies to ODR is “the knowledge of appropriate communication patterns in a given situation and the ability to use the knowledge”.⁵⁷ There are four important components to this definition:

1. First, knowing how certain symbols are routinely interpreted is culturally determined. If the mediator and the disputants are from different cultures that use very different modes of communication, accurate interpretation is quite difficult. An interesting issue

is whether the difference between on and off-line communication can be viewed as cultural differences?

2. Second, interpretations are situation specific. For example, when a mediator is working in a divorce setting, it is helpful to understand how people respond emotionally to issues surrounding divorce. Emotional responses are likely to vary with the nature of the dispute.
3. Third, is that the mediator needs ready access to a variety of communication tactics that will move the disputants closer to agreement. More specifically, the mediator's role communicatively is to intervene to create a collaborative context that enables the disputants to make accurate interpretations of one another's messages. Accurate information exchange is a prerequisite to creating integrative solutions in disputes.
4. Fourth, is that competence not only depends upon having a working knowledge of communication tactics but also is a function of the timing of a particular intervention.⁵⁸

In addition to these, ODR requires one more competence: the mediator must be competent with the technologies used and the effects of specific technology on communication styles and strategies.

One of the most significant challenges facing ODR is developing software that can handle sophisticated levels of communication but that does not have a lengthy learning curve for users. If the third party or one of the parties cannot use the software effectively, the process will not work at an optimal level.⁵⁹ Mediators are familiar with the term "active listening". Parties and neutrals who negotiate and mediate online must also be "active readers". They must pause and reflect on the possible meanings in a typed message.⁶⁰

Three important differences between computer-mediated communication ("CMC") as used in ODR and offline communication are:

1. CMC makes the process of communication more difficult and the incidence of miscommunication more likely.
2. The nature of social interaction in an online setting has a tendency to increase hostile communications.
3. The cultural context and standards of communication will reduce the significance of these hostile communications.⁶¹

Some offline communication skills will not be very effective in ODR if the mediator cannot "multitask" and manage the technology in addition to the specifics of online communication methods used in a fast-paced environment.⁶²

¶29,320 TECHNOLOGY AS THE FOURTH PARTY

ADR offline involves a triangle — the two parties and the neutral.⁶³ ODR introduces a new element into the process, a fourth party, which is the technology that works with the neutral.⁶⁴ The “fourth party” does not replace the neutral, and is not “co-equal in influence”,⁶⁵ but functions as an “ally, collaborator and partner”.⁶⁶ The fourth party is essentially a more sophisticated version of pen and pencil.

In the last ten years, we have experienced many changes in communications technology:

1. From dial-up connectivity to wired broadband to wireless.
2. From desktop to laptop to PDA to mobile/smart phone.
3. From hard drive storage costing more than \$1/megabyte to storage costing \$.0007/megabyte.
4. From disk storage capacities in megabytes to storage in gigabytes/terabytes.
5. From costly telephony to free (almost) telephony.
6. From reliance on paper money to reliance on money in electronic form.
7. From a World Wide Web focused on accessing and publishing information to a Web employed for processes, e.g. e-commerce, games, gambling, and education.⁶⁷

Appropriate use of technology⁶⁸ in the face of this continuous change is critical to any successful ODR process. One of the biggest challenges in building and running an online dispute resolution process is to balance and integrate the human and the automated dimensions.

The technical requirements for an ODR system are easily fulfilled and include:

- Communication technology which support specific kinds of human interactions such as e-mail, voice communications, and videoconferencing. The technology must allow private communication sessions (caucus). Online chat-rooms and threaded discussion capabilities are also major considerations. The quality and cost of these technologies has decreased significantly in the last five years.
- Computer systems and communication facilities which avoid a “sluggish response” to the user.

- Computer systems which are “simple” to use.
- Adaptive systems which automatically and intelligently adjust to new conditions of interaction.
- Interoperable systems which are compatible with those of the disputants, so that data can be communicated from site to site.⁶⁹

ODR requires creative thinking and sophistication about how software shapes the process and is used by practitioners. Since ODR by its nature depends on the fourth-party technology, it is virtually impossible to directly compare its outcomes with any other system that does not utilize this technology.

¶29,350 BEST PRACTICES

Properly designed ODR systems can enable superior outcomes, higher-quality services, and greater engagement with disputants and should be judged against these established criteria. The ideal ODR process includes online and offline interactions that take advantage of the strengths of each.⁷⁰

An ODR process will not be used, or be successful, unless it is capable of facilitating access and participation, has legitimacy, and offers value to users.⁷¹

Many of the reasons for developing best practices models have originated in terms of building consumer confidence to facilitate the continued growth of e-commerce. The “Canadian Code of Practice for Consumer Protection in Electronic Commerce” supports this reasoning, and states:

Principle 6: Redress

6.3 When a customer and a vendor cannot resolve a complaint, the vendor should offer to refer matters to an appropriate third-party dispute resolution service, use of which shall be at the consumer’s discretion.

6.4 Any dispute resolution service(s) vendors use, in accordance with 6.3, shall;

- (a) be available to be initiated online and irrespective of consumer’s location;
- (b) be easily accessible to consumers (e.g. via a hyperlink from vendor’s Web sites);
- (c) be easy to use;
- (d) be offered at nominal or no cost to consumers;
- (e) be expeditious, with reasonable time limits for each stage of the process;
- (f) be fair (i.e. meet the standard of due process);
- (g) commit vendors to abide by awards when consumers agree to them;

(h) be operated by an independent and impartial body;

(i) be transparent in all aspects of its operations, including services, procedures, governance structure, dispute resolution personnel, and the results of dispute resolutions.

With respect to the last, the dispute resolution service provider shall make public its arbitration case results and detailed statistics on its confidential dispute resolution results covering the number and type of complaints and the proportion resolved in the customer's favour.⁷²

ODR initiatives have come from governments,⁷³ industry,⁷⁴ consumer associations,⁷⁵ and dispute resolution providers.⁷⁶ Suggested best practices for ODR have been developed by various groups including the American Bar Association Task Force on ECommerce and ADR,⁷⁷ Consumers International,⁷⁸ the National Alternative Dispute Resolution Advisory Council (Australia),⁷⁹ and the Working Group on Electronic Commerce and Consumers (Canada).⁸⁰

ODR best practices suggested by these groups include:

- **Independence/impartiality**
- **Transparency**
- **Availability**
- **Affordability**
- **Effectiveness** — shown by: visibility of process; speed and timeliness; competence of neutrals; accessibility/ease of use; the meeting of linguistic/cultural challenges; scalability of application; coordination with other ODR bodies and options; security; and compliance or enforceability.
- **Due process**
- **Voluntary participation**
- **Oversight**

Some guidelines suggest that, “While formal training is not required, they [the service providers] should be familiar with basic legal concepts”.⁸¹

Where ODR is either the sole avenue of access to justice or the most convenient, it should meet some minimum standards or principles such as being free or low cost, independent and impar-

tial, transparent, speedy, and accessible. Whether it should be a binding process is subject to debate.⁸²

Further suggested guidelines for a successful online dispute resolution system include: treating users as partners; aligning practice with policy; ensuring the necessary level of security; and storing information only as long as required to achieve the purpose for which it was collected.⁸³ Destruction of data should be irreversible.⁸⁴

¶29,380 ODR EFFECTIVENESS

Today, there are millions of online transactions, and, as a result, a significant number of disputes. Over 30 million cases a year are handled across eBay and PayPal in more than 16 different languages, which clearly demonstrates the need for online dispute resolution processes in e-commerce.⁸⁵

While ODR makes most sense in cases in which legal costs would exceed what could be recovered, many large organizations, particularly insurance companies and municipalities, are finding that ODR saves them money even in big-money cases because cases can be handled much faster. As an example, another service provider, Cybersettle, focuses on online insurance claims and has dealt with almost 200,000 transactions, with the largest online settlement being \$12,500,000.⁸⁶ It has also recently entered into a contract to provide services to the City of New York.⁸⁷ Cybersettle states that it:

... expedites settlement by eliminating egos and posturing. Both sides get to the "bottom line" quickly and confidentially, knowing that their figures will not be revealed to the opposition. Even if parties do not settle online through Cybersettle, the dispute can settle shortly thereafter through traditional negotiation, or with the assistance of our telephone facilitators because Cybersettle moves parties closer to resolution.⁸⁸

The Ministry of Justice in the United Kingdom will soon be using "The MediationRoom" ODR platform in a small claims court mediation pilot project. Two U.S government agencies, the National Institute of Health and the National Mediation Board have also licensed this technology for dispute resolution in the workplace.⁸⁹

Although often difficult to obtain, published settlement rates for ODR are comparable to ADR settlement rates in general,

ranging from 60 per cent to 85 per cent.⁹⁰ We must also remember that many of these cases would not have been brought to resolution if an ODR process was not available to the disputants.

To date, there has only been one study on the effectiveness of ODR that focused on online mediation.⁹¹ The overall conclusions reached in the study, after careful review, suggest that,

... with a commitment to process, proper organization and an experienced mediator, neither the nature of the dispute nor its characteristics would change the potential of the online process to achieve a final and mutually acceptable solution where that is the goal of the process.⁹²

In order for ODR to be effective, technology must also be widely accessible, simple, self-explanatory, easy to navigate, and user friendly.⁹³

ODR offers an early dispute resolution mechanism and a speedy, direct, and informal way of entertaining and responding to complaints.⁹⁴ If an ODR process is binding upon the participants, then the process must meet more demanding procedural standards. With carefully drafted procedural rules, an adequate technological infrastructure, and well-trained neutrals, due process can be achieved online.

ODR is not an attempt to duplicate the face-to-face dispute resolution environment, but instead has focused on using the Internet in ways that maximize the available technologies and knowledge sharing.

Family disputes are one area in which ADR has become very well established, especially in North America. Although the dynamics of family dispute resolution would seem to make it unsuitable for online resolution, many of the benefits of online communications may indeed make this an area of rapid growth in ODR. Given the unprecedented mobility of individuals in North America and Europe and the ongoing nature of family disagreements, ODR may provide the tools necessary to fine tune agreements as circumstances change without the necessity of continuing face-to-face mediation.⁹⁵ The lack of empirical data on ODR has hampered its adoption in this area even though there is some support to the view that ODR has transformative potential.⁹⁶

ODR is and will remain a complementary process to ADR.⁹⁷ ODR has moved from the private sector into the public sector, as government agencies and international institutions have come to realize its benefits.⁹⁸ As an example, the Residential Tenancy Branch of the Office of Housing and Construction Standards in British Columbia uses a combination of old and new technologies in its dispute resolution processes.⁹⁹ In Ontario, the Ministry of Government and Consumer Services, Consumer Protection Branch, together with its federal counterpart, uses an online process for consumer complaints called “The Complaint Courier”, which is:

... a powerful tool that transforms the process of filing consumer complaints. The Courier empowers consumers and levels the playing field so that all can be effective, regardless of limitations in their knowledge and time. For example, the Complaint Courier educates consumers on their rights and responsibilities then provides them guidance on how to contact the business and effectively voice a complaint. Its innovative Letter Wizard helps consumers prepare complete and effective letters of complaint simply by filling in a customized template. Its Dialogue Coach can help you communicate with the business by offering guidance and suggestions for pertinent questions, appropriate language and possible rebuttal strategies and can allow you to capture important details of your interaction(s) with the company. Its powerful database automatically channels complaints to the appropriate agency. Thanks to this leading edge technology, consumers save time, construct well documented complaints and no longer need to know which agency to deal with. When all else fails the Courier also provides consumers with information on available alternative dispute resolution.¹⁰⁰

It is through these types of services that consumers will become more familiar with ODR. It is truly an international movement. Conferences sponsored by the United Nations have been held each year since 2001 in various places in the world ranging from Geneva to Cairo, Hong Kong, Melbourne, and Liverpool, and the 2008 Conference will be in Vancouver. Although still some time away, ODR continues to have the potential to become the Primary Dispute Resolution (PDR) system for the world of e-commerce and cyberspace and beyond.¹⁰¹

[The next page is 6931.]

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Cybersettle has been helping New York save money and manage claims in a pilot program since 2004. The expanded use of Cybersettle is designed to help streamline the city’s claims system, get people paid faster and to save millions at the same time.

“During our pilot program”, said Charles Brofman, President and CEO of Cybersettle. “Our innovative technology was incredibly successful at resolving claims against New York

quickly and efficiently, and we're excited to see our program with New York grow and expand." . . .

The program has also been getting positive attention outside the Comptroller's office. It was cited in the June 2006 issue of Independent Budgeting Office (IBO) of New York City's Inside the Budget, as a smart cost-saver. And, the winning pilot results Cybersettle produced for New York City were also cited in BusinessWeek, which called the Comptroller's Office a "Streamlining Pacesetter" for its use of Cybersettle.

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