

## The Current State of Play in ODR

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The data used for this presentation are based on findings of the Geneva E-Com/E-Law research project, which analyses dispute resolution systems applicable to electronic commerce. These data have been collected during website visits in 2001 and a series of interviews of representatives of ODR providers in 2002. The results of the website visits have led to an expert colloquium held in Geneva in November 2001. They have been amended and extended on the basis of the discussions of the colloquium and published in a report titled '*Online Dispute Resolution: The State of the Art and the Issues*'. The interviews have not been published but will probably be reproduced in full text in a book on ODR forthcoming late 2003/early 2004, to be written by Professor Gabrielle Kaufmann-Köhler and myself.

Some of these data are not entirely up to date, but I believe them to be accurate enough to provide a reasonably realistic picture of the current state of play in ODR.

I will begin this paper with some musings about the definition of ODR, as such a definition channels the research in this related field. My definition of ODR, as we will see, is rather broad. The argument that will follow from there is that one may want to redefine ODR to be sure not to exclude something a priori from the dispute resolution systems that may be useful for cyberspace activities.

After that, I will review the current state of play of the three major types of ODR systems: online negotiation, online mediation and online arbitration.

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I believe that ODR should be defined as 'a dispute resolution process that operates mainly online'. This looks like a rather

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obvious definition, but actually it is not and its implications may prove to be important.

ODR is usually defined as online ADR, but that may be too simplistic or too narrow. The main form of dispute resolution that the term 'ADR' excludes is courts.

You may think that ODR, just like ADR, was developed precisely because of deficiencies that courts are faced with but that mediation and arbitration are not faced with. But that's not exactly correct. ODR was actually developed because of the clash between the territoriality of common dispute resolution mechanisms and the ubiquity of cyberspace activities such as electronic commerce. The main point of the development of ODR was to move the proceedings online.

Court proceedings can also be moved online. Now there's the problem of sovereignty and jurisdiction. But courts can also have consent-based jurisdiction—thanks to forum selection clauses.

I'm not saying that the kind of disputes that are usually submitted to ODR (mainly e-commerce B2C disputes) should be solved in court, I'm only saying that it might be useful not to exclude online court proceedings as a means to solve disputes arising out of e-commerce transactions. As to costs and delays, there are small claims courts which work very well offline; they should be able to work just as well online.

Back to online ADR. There are a lot of methods for solving disputes out-of-court. This presentation will be based on the three fundamental forms of ADR, that is negotiation, mediation and arbitration—all other forms of ADR are derivatives thereof. This of course is the common law view of ADR, which comprises arbitration. Here again lawyers and policy makers from civil law legal systems too often implicitly consider that ODR simply is online negotiation and online mediation—and derivatives thereof, such as evaluation and recommendation. In the field of offline ADR this clash of legal cultures is also often present, a recent example being the European Commission's hearing on ADR, which was in fact implicitly excluding arbitration.

Here again, I'm only saying that if arbitration is to be excluded from ODR—which I'm convinced would be a bad move—this should be done explicitly, and not implicitly.

There are two forms of online negotiation: a basic form and a sophisticated form.

In the basic form of online negotiation, the parties communicate bilaterally—or multilaterally if there are more than two parties to the dispute—over the Internet to reach a settlement using emails. That's in fact something that you and I do probably quite often—you don't even realize that you are doing online dispute resolution, as you probably don't think that you are doing telephone-mediated dispute resolution when you call some company to argue over some bill they have sent you. Anyway, the parties to such online negotiations don't need us to do that.

But sometimes the parties use or want to use much more sophisticated communication tools—email is actually a very primitive online negotiation software. That's where it becomes interesting, that's where issues begin to be raised and that's where we step in to provide what I call sophisticated online negotiation tools.

The sophisticated form of online negotiation is sometimes called assisted negotiation or mediated negotiation or, better, technologically facilitated negotiation. These terms show the main point about this form of online negotiation: something intervenes—it is information and communication technology (ICT).

'ICT negotiation' can be much more than 'telephone negotiation', as ICT can do much more than simply conveying an act of communication from one party to another. ICT can provide, as Ethan Katsh would say, 'web-based communication models with some built-in intelligence'. Thereby ICT can play the role of a 'fourth party'—defined by Ethan Katsh as a 'collection of resources and tools that displace the third party'.

Actually it can even replace the third party in some circumstances, that's why the sophisticated form of online negotiation is sometimes called 'assisted negotiation'. I mean that online negotiation is in fact computer-assisted negotiation: here the negotiation is assisted by a computer, whereas in mediation the negotiation is assisted by a person, a human being.

This potential of ICT shapes online negotiation systems. Such systems that offer only emails as a negotiation tool are likely to become less and less frequent and more and more sophisticated communication tools will be used instead.

Now you may want to see some example of such 'fourth party ICT tools'. In addition to some basic tools such as threaded message board systems, secure sites and storage means, we can observe a development of, for instance, online meeting management devices and software for a) setting up the communication, b) engaging in productive discussions, c) identifying and assessing potential solutions and d) writing agreements.

The most common implementations of these kind of tools are standard agreements that are automatically suggested to the parties when they have agreed on some parts of the disputes or simply when they have clearly defined the contents of their dispute—which is achieved through sophisticated filing forms. Note that this is usually part of a mediator's activity.

Another common implementation of such negotiation tools are generic reminders sent to the parties by the system to check on the status of the dispute. Empirical evidence has shown that such reminders markedly increase the settlement rate. Here again, this is usually done by a mediator.

Some statistics: there are about 20 providers of online negotiation. The most successful is SquareTrade, which has solved approximately 250 000 disputes in three years with a settlement rate of 80 per cent. Most of these providers offer assisted negotiation for B2B, B2C and C2C disputes. Some of them, however, limit their services to B2C and C2C.

To sum this up, the current state of play in ODR can be described in the following terms:

There is a strong development going on in ICT that will increase settlement rates, which are already quite high—around 80 per cent (offline mediation programs often achieve settlement rates of 90 per cent).

Online negotiation is unlikely to work in unlevel playing fields. It is unlikely that a sole claimant, even if legally aided, accepts to negotiate with a powerful company or a government agency. In such cases of power imbalances, claimants are likely to prefer the

protection offered by court proceedings—or maybe by arbitration proceedings. B2C may be such an unlevel playing field.

The main issues in online negotiation are psychological (how must a website be presented in order to induce trust and confidence?) and technical (the automation of tasks that a human being would normally have to carry out), but not legal.

This brings me to a specific form of online negotiation: blind-bidding negotiation. In blind-bidding, the parties submit offers and demands in the form of a settlement bid to a computer, through a secure, password protected web-based communication platform. If the bids come within a given percentage or figure, the computer settles the case for the median amount. If they are not, the parties go on to the next round of bidding.

Blind-bidding is quite well known and a rather simple mechanism. Therefore, I will only say a few words on its pros and cons:

Its main advantages are:

There is no direct communication between the parties. Therefore, there is no ego and no personality that comes in the way of the settlement.

The figures, the bids, are not disclosed to the other party. Therefore, the parties do not compromise their bargaining positions.

Blind-bidding has another advantage, which is at the same time its greatest weakness: its simplicity.

As it is a very simple process, it is easy to make it user-friendly and it is easy and cheap to operate.

As it is so simple a process, it becomes very inflexible and reduces the number of categories of disputes that can be solved through such a process.

As the parties can only bid amounts of money, they must have agreed beforehand on facts and liability—and this is precisely the point at issue in most disputes.

The current state of play in blind-bidding can be summed up in the following terms:

The settlement rate is very low, it is around 40 per cent.

The types of disputes that can be handled by blind-bidding are few—blind bidding really works only for insurance disputes, where facts and liability is often not at issue.

There are about 15 providers of blind bidding. The most successful seems to be Cybersettle, with approximately 100 000 disputes handled (that is 40 000 disputes solved).

The issue in blind bidding is how to use it. It should probably be used either as a mere communication and negotiation tool that can be used during another dispute resolution process when the parties deem it useful or as a first step in a tiered process (for instance blind bidding, then online mediation or online arbitration).

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The concept of online mediation is quite straightforward: as in offline mediation, a third neutral party with no decision-making power intervenes in a negotiation over a dispute between two parties. In other words, it is 'human-assisted negotiation'.

The main difference between online and offline mediation lies in the conduct of the proceedings. The reason for this difference is that communications in online mediation are mainly textual and asynchronous, because good quality videoconferencing systems are not yet easily affordable.

The means of communication that are mainly used in online mediation are emails and web-based communications, that is chat rooms and bulletin boards.

Body language and tone of voice are consequently absent. But that's not necessarily a drawback. Some parties are more at ease when not face to face. The asynchrony of the communications can also be very useful, because the parties can be allowed to retract messages sent in haste, to cool off, and to respond after a moment's thought.

Online mediation is the most written-about form of ODR, with as many praises as criticisms. Its main advantage is that it is a consensual and non-binding form of dispute resolution. This really

is an asset in a poly-cultural cyberspace where trust and confidence are still lacking so much.

Its greatest criticism, on the other hand, is that mediation is fundamentally a human process of communication. Face to face communications are not easily replicable online, at least not for economically weak, one-shot players—namely consumers. As I said, the absence of face to face communications is not a drawback in all cases, but at least should the communications tools be developed so as to carry as much information as possible.

Statistics, in the field of online mediation are difficult to establish, because mediation is a very confidential process—confidentiality is at the very heart of mediation, because it allows an open discussion between the parties and the mediator. We have found approximately 25 providers of online mediation, but how many cases they actually solve is not clear. We only know that, among the big figures, SquareTrade has solved approximately 50 000 disputes through mediation—which were among the 20 per cent not solved through online negotiation.

The state of play in online mediation is, in sum, the following:

It is the most debated form of ODR, with as many criticisms as praises, all with very good reasons.

The main issue seems to be the communication tools that must be developed or selected for such process

The enforcement of mediation outcomes is also a problem. The winning party may have to go to court to obtain an enforceable decision, because the mediation outcome is only a contract.

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Online arbitration is the most powerful method of ODR. It has the highest potential but it raises the most issues.

Offline, arbitration is often considered to be the most achieved form of ADR, because of its judicial nature, the strict conditions of due process that are applicable, the binding character and enforceability of its awards, and the assistance that courts are legally required to provide in arbitration procedures.

Arbitration from afar has also often been experimented offline, as documents-only arbitration is often used for B2C disputes.

But providing arbitration online raises new issues, because of the electronic form of the communications. In arbitration, the parties give up rights and therefore there are strict conditions set by legislation for the arbitration agreement and the award to be binding. Electronic documents and electronic communications often do not satisfy—or at least do not clearly meet—these conditions in the current state of legislation. There is of course much work being done in this respect—for instance concerning the New York Convention—but this takes time and in the present state of legislation the binding character of online arbitration and the enforceability of arbitration awards is not fully predictable.

One solution to these legal issues may be to imagine new forms of arbitration, that would be non-binding. The UDRP, which is ICANN's dispute resolution policy for domain names, is the most famous example of such non-binding arbitration. It is true that the UDRP is the subject of many criticisms, but most or all of them concern problems that can be solved without changing the gist of the process, which is to provide non-binding arbitration.

Non-binding arbitration is simply a form of arbitration that is not legally binding, but that may have some coercive power, either through technology (that's how the UDRP operates, as ICANN controls the database that converts IP addresses into domain names and vice versa) or through the control of assets that are valuable to the parties. Such assets can be money (which can be controlled through escrow accounts or judgment funds) or reputation (which can be controlled through reputation management systems such as eBay's buyer and seller ranking system).

The statistics of online arbitration show that there are many providers of online arbitration (there are over 25 providers) but that most of them seem to be struggling to get cases. The most successful provider of online binding arbitration seems to be the Chartered Institute of Arbitrators in London, which has solved approximately 100 cases, all in the field of B2C. In non-binding online arbitration, the case loads are not much higher, except of course for the providers that are approved by ICANN and that apply the UDRP (several thousands of cases have been solved under the UDRP) but the UDRP is special in many respects.

The current state of play in online arbitration is the following:

*Schultz: CCform project, 2<sup>nd</sup> meeting, 20 March 2003*

It seems too soon to use online binding arbitration, because the effect of its awards are still quite unpredictable. The legislation must, and will, evolve, but this will take time—certainly years.

Online non-binding arbitration seems to hold many promises, but there too, much development is still necessary. Such development, however, may come sooner than the required legislative amendments for binding arbitration, because the New York Convention, for instance, is such a monument that it will take much effort to gather an international consensus on its amendments. This is too slow, we need a strong development of ODR as quickly as possible.

As some concluding words, I would say that it is clear that ODR has all the potentials that we desire. The various processes must still evolve, of course, but they are already quite sufficiently developed to be able to play a central role in the resolution of disputes arising out of e-commerce transactions. The real current issue in ODR is to bring the parties to ODR, which implies that they must be informed of its existence and availability and to convince them that it is safe and that it provides good quality justice. That could certainly be one of the functions of CCForm.