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Disputes in the Digital era
The evolution of dispute resolution and the model ODR system

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Abstract

The subject of the thesis is Online Dispute Resolution (ODR) and the aim of the thesis is to propose a model ODR system based on the experience of the dispute resolution movement. ODR is not an isolated phenomenon of recent times but a result of the evolution of disputes and dispute resolution. Initially, disputes occurred between parties with geographical proximity and for which traditional courts were the principal way of resolution. However, as people started to travel further distances and communicate from afar, disputes evolved as they increased in number, became more complex and increasingly cross border. Dispute resolution evolved in parallel and Alternative Dispute Resolution (ADR) was employed. However, disputes evolved once more when the world entered into the digital era. Not only disputes became yet again increasingly cross-border, but new disputes appeared that arose solely in cyberspace. In order to satisfy the requirements of the digital era, dispute resolution brought forth the concept of ODR. ODR arose from the combination of ADR and the Information and Communication Technology (ICT) of the digital era. Alternative means of dispute resolution were transferred to the virtual world and gave birth to Online Dispute Resolution. ADR and ODR are

examined extensively, and the examination includes their concepts, their origin, the main forms of negotiation, mediation and arbitration and their online equivalents, as well as their advantages and drawbacks.

The thesis illustrates the evolution of disputes and dispute resolution from the “analog” era, when dispute resolution was face to face, to the “digital” era, when disputes are resolved in cyberspace. It demonstrates that ODR is a necessity of the digital era but also that it has the potential to be a revolutionary, effective and successful way to resolve disputes; a way that will be the future of dispute resolution. Based on the experience accumulated by examining the evolution of dispute resolution and based on the conclusions drawn, the thesis formulates a proposal for the ODR system. The thesis describes the ODR system, from its three step process and the necessity of online arbitration, to the ODR network, the regulation of the ODR system, the technological architecture of ODR providers, their funding, as well as the necessary steps of creating awareness and trust so that ODR fulfils its fullest potential.

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List of abbreviations and acronyms

AAA	American Arbitration Association
ABA	American Bar Association
ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
AOL	America Online
BBB	Better Business Bureau
BIOA	British and Irish Ombudsman Association
CERD	Centre for Effective Dispute Resolution
CLI	Cyberspace Law Institute
CRDP	Centre de recherché en droit public
CIETAC	China International Economic and Trade Arbitration Commission
ECC-Net	European Consumer Centre Network
ECODIR	Electronic Consumer Dispute Resolution
EDI	Electronic Data Interchange
FAA	Federal Arbitration Act
GUIDEC	General Usage for International Digitally Ensured Commerce
HTTP	Hyper Text Transfer Protocol
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICDR	International Center for Dispute Resolution
ICSID	International Centre for the

	Settlement of Investment disputes
ICT	Information and Communications Technology
IM	Instant Messaging
ISPs	Internet Service Providers
JAMS	Judicial Arbitration and Mediation Services
LCIA	London Court of International Arbitration
NAF	National Arbitration Forum
NCAIR	National Center for Automated Information Research
ODR	Online Dispute Resolution
OECD	Organization for Economic Co-operation and Development
OOO	Online Ombuds Office
PKI	Public Key Infrastructure
SSL	Secure Socket Layer
TACD	Trans-Atlantic Consumer Dialogue
UCITA	Uniform Computer Information Transactions Act
UDRP	Uniform Domain Name Dispute Resolution Policy
UETA	Uniform Electronic Transactions Act
UNCITRAL	United Nations Commission on International Trade Law
VMP	Virtual Magistrate Project
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Introduction

Disputes existed as long as humans. Disputes are the result of the inevitable conflict between humans, the result of the struggle between parties with colliding interests or goals.[1] Disputes arise in every environment from the family to a commercial environment,[2] to any online community. There's no way to prevent disputes from arising. But as long as there were disputes people always found ways to resolve them. Although there have always been extra-judicial ways of dispute resolution, from a very early on point in human coexistence, the primary way to resolve disputes has been resolution through the courts. This solution was more than reasonable in the past because disputes were fewer in number and used to arise mostly inside the boundaries of small societies, the members of which were situated in regional proximity. However, as time passed, humanity evolved and the way people came into contact and communicated changed radically; consequently disputes evolved

[1] "The basic premise of conflict was always the same: an expressed struggle between at least two interdependent parties who perceive scarce resources, incompatible goals and interference from the other party in achieving their goals" See KATSH Ethan, Dispute Resolution in Cyberspace, *Connecticut Law Review*, vol. 28, 2006, p. 953.

[2] "Disputes are a fact of life in business. In fact, businesspeople often benefit from conflict, as it can result in energy, motivation, productivity, and creativity. The challenge lies in managing conflict so that it doesn't impede progress, or worse, destroy the capacity to achieve business goals". See RULE Colin, *Online Dispute Resolution For Business: B2B, E-commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (John Wiley & Sons) 2002, p. 1.

in parallel. People started to travel longer distances, interact with other people of very different cultures and disputes started to involve much more complex than every day issues.

The inability of traditional courts to resolve these disputes brought attention to the already existing methods of extra-judicial dispute resolution as an alternative to the courts. As humanity evolved even further by minimizing distances and facilitating global communication, the need for alternative dispute resolution grew even more. During the last quarter of the 20th century the interest in alternative dispute resolution grew drastically and several methods of ADR were increasingly used to resolve all kind of disputes, with more representative among them negotiation, mediation and arbitration. Although ADR was not perfect and problems arose, however, the considerable advantages outweighed any potential difficulties. ADR methods allowed for considerable time and cost savings, confidentiality and flexibility in the process and turned the focus of the resolution towards a conciliatory function.

With the advent of technology and the appearance of the internet, the way of communication and with it the nature of disputes evolved once more. The world entered the digital era as information started to be stored, transmitted and shared, communication started to be possible through a computer screen and a whole virtual world was created in parallel with the real

world. The vast technological development and the rapid dissemination of information influenced the nature of disputes as is evident particularly in commercial disputes, where Information and Communication Technology[3] allow for an overwhelming flow of information which enables parties to perform, rather easily, limitless transactions around the world.[4] The internet has developed into a tool that facilitates global transaction, instantly, with the push of a button. Unfortunately, in the cyber world, as easily as in the real world, these interactions can result to disputes, over matters as diverse as to items of privacy, service quality, defamation and intellectual properties.

The ability to communicate with someone who might be situated on the other end of world by pushing a single button, created new kinds of disputes but also changed the nature of the old ones. Traditional disputes became increasingly cross-border, and new disputes arose, this time borderless, as the virtual world knows no boundaries. Disputes increased in number as anyone could be much easier involved in a dispute simply by accessing the internet. New disputes of lesser value arose, for which no available path of resolution existed.[5] Traditional forms of

[3] Hereafter will be referred as ICT.

[4] DOMENICI Kathy, *Mediation: Empowerment in Conflict Management Prospect*, (Height: Waveland Press, Inc.), 2006, p. 18.

[5] Disputes arising from e-commerce i.e. transactions over the Internet and m-commerce i.e. transactions through the use of a mobile device.

dispute resolution were unequipped and inadequate to address and resolve these disputes. The need for a system capable to adapt to the new ways of communication for the resolution of disputes became increasingly apparent during the past two decades and seemed to suggest that the most suitable approach would be found in the means of alternative dispute resolution.[6] As disputes evolved so did dispute resolution. Alternative means of dispute resolution were transferred to the digital era, to the virtual world and gave birth to Online Dispute Resolution.[7]

ODR arose from the combination of ADR and ICT tools. Technology was added as the fourth party to complement the traditional three side model of the parties involved in the dispute and the third neutral party. The ADR methods gave birth to corresponding ODR methods with most representative amongst them, online negotiation, online mediation and online arbitration. Many ODR initiatives were born the past two decades, from the Virtual Magistrate to EBay and PayPal, which are counting millions of resolved disputes. ODR presented many and highly important advantages allowing for considerable time and cost savings, providing flexibility in the process and increased convenience for the disputants. Unfortunately, besides the invaluable advantages, ODR presented several drawbacks

[6] BENYEKHLEF Karim and GELINAS Fabien, Online Dispute Resolution, *Lex Electronica*, vol. 10, No. 2, 2005, p. 11.
[7] Hereafter will be referred as ODR.

such as the unfamiliarity of users with the new ICT tools, the lack of human interaction and face to face contact, concerns relating to authenticity, data security and confidentiality but most importantly drawbacks involving the enforcement of decisions. However, as is evident by the use of the term “drawbacks”, these problems are not without a possible solution. The long experience of the ADR movement as well as the relatively short but still enlightening experience of the ODR movement provide the necessary knowledge for the structuring of an ODR system that takes advantage of the invaluable benefits of ODR and at the same time overcomes all the potential drawbacks. This research project aims to do exactly that.

The thesis is divided into two main parts and each of these is further divided into two halves and each half into its relevant chapters, sections and paragraphs. The first part of the thesis provides an extensive research to both ADR and ODR. It demonstrates the evolution of disputes and the appearance of ODR as an unavoidable result of that evolution. The first half of the first part is dedicated to ADR in, what is called for presentation purposes, the analog era. It breaks down ADR from its definition and its evolution during the ages, to its most representative techniques that became the stepping stone for ODR, its invaluable advantages, most of which were “inherited” by ODR, to finally its most concerning inefficiencies that paved

the way for ODR. The second half of the first part is dedicated to ODR, from the definition and the identification of technology's impact, to the short history of ODR and the most influential initiatives, to finally the invaluable advantages of ODR that assure of its successful future and the unavoidable drawbacks that any ODR system must combat.

The second part of the research is a necessary subsequent to the first. It portrays how the ODR system must be structured to take full advantage of the lessons learned from the ADR and the ODR experience, in order to maximize the advantages and minimize the potential drawbacks. The ODR system proposed in this thesis tackles one by one all the drawbacks faced by ODR. The first half of the second part is dedicated to the ODR process, which must include all of the representative methods of dispute resolution, mainly online negotiation, online mediation and online arbitration in a multi-step process that aims to resolve disputes as soon as possible and progresses to each step after the failure of the previous one. Online arbitration, in particular, must be the final step of the process, since only online arbitration can overcome one of the greatest drawbacks of ODR, which is the enforceability of ODR outcomes. However, online arbitration itself presents drawbacks related to the online arbitration agreement, the online arbitration procedure and the

online arbitration award. The ODR system proposed in the thesis demonstrates the appropriate solutions.

The second half of the second part is dedicated to the structure of the ODR system. In particular, it portrays the ODR network as a global and international network of cooperation at a national level between states and at a supranational level under the auspices of an international organization with great legitimacy and global presence. The international organization coordinates the various ODR initiatives around the globe, accredits ODR providers through the clearinghouses and in cooperation with state authorities and regulates ODR through guidelines that propose minimum regulatory standards and ensure the safeguarding of basic principles for ODR so that the ODR system provides an effective and fair way to resolve disputes. Furthermore, the second half examines the ODR system at the level of the provider and in particular answers all the relevant questions regarding the funding of ODR, i.e. how ODR providers should be funded, as well as questions regarding technological considerations, i.e. what ICT tools should ODR providers employ. Finally, even though the considerable advantages of ODR as well as the impressive success of several ODR initiatives should have made the use of ODR a common phenomenon, however, ODR is still not widely used. One of the reasons behind this occurrence is the lack of awareness as well

as the lack of trust regarding ODR. The last section of the second part describes all the necessary steps that must be taken to raise awareness and increase the confidence in ODR, so that finally ODR will reach its fullest potential.

Part 1

From the Analog to the Digital Era

The first part of this research project provides the theoretical foundation for ODR. It describes the evolution in dispute resolution that created the need for a faster and more efficient way to resolve disputes. This need led to the appearance of ADR in the past and the appearance of ODR in recent times. The reader will be taken thought a comprehensive analysis of ODR and of the evolution in dispute resolution that gave birth to ODR.

The first half examines dispute resolution in what is referred here, for explanatory purposes, as the analog era, before the use of ICT tools, when dispute resolution was performed face to face (traditional ADR). The first half is essential, not only to present a more comprehensive portrait of ODR, but also because of the commonalities between ADR and ODR. ADR combined with the technological advances of recent times (Information and communication technology) is the core of most platforms used to resolve disputes by many Online Dispute Resolution systems.[8]

[8] MUECKE Nial, STRANIERI Andrew and C. MILLER Charlynn, Re-consider: The Integration of Online Dispute Resolution and Decision Support Systems, in POBLET Marta, *Expanding the*

ODR initially was developed as such combination and evolved to a constantly developing form of dispute resolution that uses technology as an integral part of the process.[9] Therefore, it is only natural that in order to understand ODR and draw secure conclusions the best way is to begin with the tools and techniques of ADR and from that point examine these techniques when combined with ICT tools and transferred to the online environment.[10]

The second half examines dispute resolution during the ongoing today digital era (ODR). The main weight of the first part will rest on ODR and the principal surrounding questions. The second half illustrates that the appearance of ODR was a result and a necessity of the digital era and the changes it brought to the ways of interaction and communication. From there it proceeds to an in depth examination of ODR, its definition, several key real world examples of ODR and finally the advantages that advocate the importance of ODR and the few drawbacks that must be overcome.

Horizons of ODR, Proceedings of the 5th International Workshop on Online Dispute Resolution (ODR Workshop '08), Firenze: Italy), 2008, p. 1.

[9] WAHAB Mohamed S. Abdel, KATSH Ethan & RAINEY Daniel, Online Dispute Resolution: Theory and Practice - A Treatise on Technology and Dispute Resolution, (Eleven International Publishing), 2012, p. 23.

[10] RULE Colin, *op. cit.*, pp. 35, 36.

Title 1

The Analog era (ADR)

The unreasonably high costs, the unsatisfactory amount of time consumed by the courts, the complexity of litigation procedures and the uncertainty of results (with no "win-win settlement" between the disputants) discouraged and continue to, more and more each passing day, the access to traditional courts.[11].According to Lord Woolf, "there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. The process is too expensive, too slow and too complex. It places many litigants at considerable disadvantages when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system".[12] Alternative Dispute Resolution, referred to also as "Appropriate Dispute Resolution" or "Amicable Dispute resolution" (although the latter term does not usually include arbitration), is a broad term, that is used to describe the use of methods other than litigation to resolve the

[11] HAMID Nor 'Adha Binti Abdul**,** *The Alternative Dispute Resolution (ADR): Malaysian Development And Its State-of-Innovative-Art*, 2010, p. 2 available at http://www.aija.org.au/NAJ%202010/Papers/Hamid%20A.pdf

[12] Lord Woolf, *Access to Justice, Interim Report*, June 1995; *Access to Justice, Final Report*, July 1996 as seen at ZUCKERMAN A. S. Adrian, Lord Woolf's Access to Justice: Plus Ça Change...., Modern *Law Review*, vol. 59, 1996, p. 773.

dispute. The various methods included in ADR cover a broad spectrum that extends from techniques of mutual resolution to third-party-imposed solutions.[13] Some of the most commonly used ADR methods include arbitration, court-annexed arbitration, mediation, negotiation, conciliation, med-Arb, mini-trial, summary jury trial, early neutral evaluation, and judicial settlement conferences.[14] Of course, it would be impractical to expect an in depth examination of all these forms of ADR or their online equivalents for that matter; therefore the thesis will be confined to the most popular and most representative techniques of negotiation, mediation and arbitration. The analysis of these methods takes place in the second chapter of this part. The first chapter identifies ADR as a concept, its characteristics, its appearance and its evolution. Finally, the third chapter evaluates ADR by examining its advantages and disadvantages.

[13] SHAMIR Yona, Alternative Dispute Resolution Approaches and their Application, Report for the joint UNESCO–Green Cross International project entitled "From Potential Conflict to Co-operation Potential (PCCP): Water for Peace", 2003, p. 6.

[14] RESNIK Judith, Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication, *Ohio State Journal on Dispute Resolution*, vol. 10, No. 2, 1995, pp. 217, 218.

Chapter 1

Alternative Dispute Resolution

The first chapter is dedicated to the concept of ADR; in particular the first section sets the foundation by defining ADR. The second section illustrates the evolution of ADR from its conception to more recent times. Finally, the third section relates to ADR of today, demonstrating the growth of ADR in the past several years, from the ADR movement in the 1970's to present day.

Section 1: What is ADR?

Alternative dispute resolution allows the parties in a dispute to resolve their dispute outside the courts; it is an alternative to litigation. Synonyms include extra-judicial and "out-of-court" dispute resolution.[15] ADR offers parties the possibility to resolve their dispute and at the same time avoid the strict regulations of litigation. The alternative nature of

[15] HÖRNLE Julia, *Cross-border Internet Dispute Resolution*, (Cambridge University Press), 2009, p. 48.

ADR implies that it functions as a complement to litigation rather than a substitute. It increases access to justice since it increases the likelihood of disputes being settled that would not be otherwise, because of the complexities, high monetary costs and required time associated with the legal process. Alternative dispute resolution was in the recent years explored primarily as a way to resolve disputes outside the courts and reduce the judicial caseload.

Even though ADR is not a recent phenomenon, however, there was always a tendency for lawyers and academics to consider the courts as the natural and obvious dispute resolvers and to some extend "ignore a rich variety of alternative processes that may result to a more effective dispute resolution".[16] In the past, courts were considered the principal means of dispute resolution. Fortunately, for some time now it has become more and more common to delegate certain disputes to specialized bodies for initial resolution.[17] The past years, alternative ways are used more and more to resolve commercial disputes. Over the last few decades, alternative dispute resolution has grown rapidly, fueled by a desire to create a more efficient way to work out differences. An alternative to the court system has been created by a growing pool of professional

[16] SANDER E. A. Frank, Varieties of Dispute Processing in the Pound Conference: Perspectives on Justice in the Future, 1979, p. 69.
[17] *Ibid.*, p. 82.

dispute resolvers; a system that enables disputing parties to resolve their disagreements much more rapidly and effectively.[18] The parties and their lawyers are increasingly searching to resolve their disputes in a way that allows them to avoid the formal and complex procedures, the deficiencies and costs of the courts and therefore they resort to what we call today alternative dispute resolution. As a result, arbitration, mediation, and other alternative dispute resolution mechanisms are commonly utilized today in such disparate fields as securities regulation, commercial law, employment law, domestic relations, labor law, medical malpractice, construction law, international private law, and many other areas.[19]

The term alternative dispute resolution entails a wide range of dispute resolution procedures the goal of which is to resolve disputes in a way different than litigation.[20] It includes all the methods and processes, alternative to full-scale court, to prevent and resolve conflicts and disputes. This is a term with a very wide definition that covers any form of dispute resolution and "comprises all mechanisms for resolving legal disputes

[18] RULE Colin, *op. cit.*, pp. 2, 3.
[19] STONE V. W. Katherine, Alternative Dispute Resolution, *University of California, Los Angeles School of Law Public Law & Legal Theory Research Paper Series*, Vol. 04, No. 30, 2004, p. 1.
[20] "Strictly speaking the term 'alternative' may be something of a misnomer. Most forms of ADR are used hand in hand with either litigation or arbitration". See CLIFT Rhys, *Introduction to Alternative Dispute Resolution: A Comparison between Arbitration and Mediation*, pp. 4, 5 available at http://www.hilldickinson.com/pdf/A%20Comparison%20between%20Mediation%20and%20Arbitration.pdf

without resorting to litigation".[21] It covers a broad range of methods for resolution, from negotiation, which is the simplest and most direct technique of resolution, to arbitration and mini-trials, which are much closer to litigation, due to the decision-making authority of a third neutral party.[22] Mediation, conciliation as well as some hybrid processes like Med-Arb and the Ombudsman are included in the ADR procedures.[23] The parties to a dispute are free to utilize any of those methods, combine them, or even create new varieties of ADR forms depending on their needs and the nature of the dispute. However, ADR systems usually fall under one of three categories and the procedure is most often negotiation, mediation, or arbitration, because those forms of ADR are the most representative as well as the most successful.[24]

[21] HEUVEL V. D. Esther**,** *Online Dispute Resolution as a Solution to Cross-border E-disputes: An Introduction to ODR*, 1997, p. 5 available at http://www.oecd.org/internet/consumer/1878940.pdf
[22] SHAMIR Yona, *op. cit.*, p. 4.
[23] BROWN J. Henry and MARRIOTT L. Arthur, *ADR Principles and Practice*, (London: Sweet & Maxwell), 1993, p. 19.
[24] See infra at chapter 2.

Section 2: The birth of ADR

One must keep in mind that although a grand historical sweep, combined with the unavoidable economy of space, may lack analytical focus; however, no matter how confined it necessarily must be, it provides a useful and more complete perspective. Therefore it is beneficial to briefly go through the historical developments, in order to establish a deeper understanding of the reasons chaperoning the evolution in dispute resolution. As stated, "the basic premise of conflict was always the same: an expressed struggle between at least two interdependent parties who perceive scarce resources, incompatible goals and interference from the other party in achieving their goals."[25] Therefore, disputes have existed since the early days of civilization and so has the need for their resolution.

Reading about Alternative Dispute Resolution someone could very easily come under the impression that ADR was initially created in the United States of America during the past century. However, ADR is not a modern phenomenon; it existed in many cultures of the world, and existed long before

[25] KATSH Ethan, *op. cit.*, p. 953.

litigation.[26] What is mistakenly considered as the recent birth of ADR actually describes the renewed interest in ADR methods and the formation of a strong movement; its modern rebirth. In reality, "alternative dispute resolution methods have been in use since the early days of civilization".[27] ADR originates from several traditional societies that did not base the resolution of disputes on means of coercion but on the contrary on unanimity. Societies in Europe, Asia and Africa resorted to extrajudicial means to resolve disputes long before they evolved into states with homogenous population. Its roots date back to antiquity, where in most traditional societies such as ancient Greece, China, Japan and Africa, people in order to balance their conflicts and their peaceful coexistence, endeavored means essential for peaceful and amicable resolution of their disputes resorting to extrajudicial forms of dispute resolution.

The first traces of ADR can be found in "1800 BC when the Mari kingdom (in contemporary Syria) used mediation and arbitration in disputes with other kingdoms".[28] A first clear mention of arbitration can be found in Plato's "Laws" (350 B.C.). Also Plutarch had written a clever story about arbitration according to which he helps two parties to resolve a dispute by

[26] FIADJOE Albert, Alternative Dispute Resolution: A Developing World Perspective (London, Sydney, Portland, Oregon: Cavendish Publishing Limited), 2004, pp. 2-6.
[27] SEVERSON M. Margaret and BANKSTON V. Tara, Social Work and the Pursuit of Justice Through Mediation, *Social Work*, vol. 40, no. 5, 2005, pp. 683-689.
[28] BOULLE Laurence, "A History of Alternative Dispute Resolution", *ADR Bulletin*: Vol. 7, No. 7, Art. 3, 2005, pp. 1, 2.

leading them to a remote temple and convincing them to take an oath that they will obey to his arbitral award which was: “Stay here until you conciliate”. In ancient Athens, the arbitrators in private lawsuits tried to make sure that everything was settled by compromise between the conflicting parties by reaching an amicable settlement; and even when they were unable to do so, they always decided more in a spirit of fairness and not strict observance of the law, as Aristotle says in his book ”Athenian Constitution”.[29] A rare and wondrous monument of ADR is an illustration of an arbitration procedure on the shield of Achilles, on which Hephaestus forged a dispute resolution between two men, who for a just solution addressed a third person, the ‘Istora’, i.e. the arbitrator, as graphically described by Homer in the Iliad at the 18th Rhapsody.[30] The practice of settling disputes by arbitration occurred very frequently in ancient classical Greece, where the institution of Amphictyonic was developed, which is considered the first organized institution of arbitration and the ancestor of modern arbitration organizations.

The Code Digesto of the ancient Romans, stated that a third person, called ''arbitri'', ''recepti arbitri'' or ''compomissori'', will settle disputes arising. The Confucian school in ancient China, inspired by the moral and political

[29] ARISTOTLE, Athenian Constitution, 53 1-4.

[30] HOMER, Iliad IH’ 478-608 : “[Λαοί δ’ ειν αγορή εθρόοι ένθα δε νείκος … ωρώρει, δύο δ’ άνδρες ενείκεον είνεκα ποινής…. ανδρός αποφθιμνέου ο μεν εύχετο παντ’ αποδούναι …]”

philosophy of Confucius, had fostered intense and admirably in the resolution of disputes with moral persuasion and friendly settlement.[31] From the Zhou period, in accordance with obedience to ceremonial rules, there was an obligation to attempt resolving disputes amicably. Other Asian societies, for example Japan, also used to choose mediation for the resolution of disputes. ADR also exists in less developed societies that have kept a more primitive way of living, like the Bushmen in the Kalahari Desert.[32]

In India already since 500 B.C. arbitration was a feature of Indian life. People submitted their differences voluntarily to the "Panchayats" who resolved the disputes and their decisions were binding. Furthermore, disputes were settled peacefully with the intervention of the "kulas" (family or tribal assemblies), the "srenis" (unions of men with the same job) and the "parishads" (assemblies of educated people who knew the law), before they were brought to the king for a ruling. Much later, in 1889 the first Indian Arbitration Act was passed, which made ADR more

[31] WATSON Adam, *The Evolution of International Society: A Comparative Historical Analysis*, (Taylor & Francis Book L.t.d.), 2006, p. 163.

[32] "The lack of technological refinement belies sophistication in dispute resolution practices which have evolved without courts and a formal state system and are suited to the needs of a collective hunter-gatherer society. The Bushmen's is not an idyllic existence and disputes occur over food, land and mates. Those in conflict bring other members of the tribe together to hear out both sides. Where passions rise, senior tribal members hide the disputants' poisoned hunting arrows to prevent resort to violence. If resolution is not reached in the small group the larger community is brought together where everyone is able to talk through methods that have obvious analogies with mediation, conciliation and peace-making practices in non-traditional societies similar among Hawaiian islanders, the Yoruba of Nigeria and the Abkhazian of the Caucuses." See BOULLE Laurence, op. cit., pp. 1, 2.

systematic and organized, and widely used to resolve disputes in recent years.

Religion always accepted ADR as a way to resolve a dispute. The Christian religion as well as Judaism long ago provided guidance on how to resolve disputes and had established negotiation, mediation and arbitration as main ways of resolution. The dialogue between Abraham and god regarding criteria for the destruction of Sodom and Gomorrah, taken from the torah, is one of the first mentions of a negotiation; furthermore the Ten Commandments and the 613 laws that can be found in the torah, which Moses brought from mount Sinai are one of the first examples of a framework that guided people of that time on how to resolve disputes.[33] According to the Bible, King Solomon in 960 B.C. was the first arbitrator, when he was asked to resolve a dispute about a baby and his rightful mother. When the two women wrote to Solomon to resolve their dispute, he refereed with wisdom and compassion and resolved the dispute by awarding justice.[34] Furthermore, Apostle Paul argued in favour of the use of ADR instead of litigation as a means of resolving disputes between people of their faith. “I say this to shame you. Is it possible that there is nobody among you to be wise enough to judge a dispute between believers? But instead,

[33] LODDER R. Arno and ZELEZNIKOW John, *Enhanced Dispute Resolution through the use of Information Technology*, Cambridge University Press, 2010, p. 1.
[34] The Bible, 1 Kings 3:16-28.

one brother goes to law against another and this is in front of unbelievers. The very fact that you have lawsuits among you means you have been completely defeated already".[35] The concept of arbitration (thakim) was practiced in the Middle East from the early days of Islam and Islamic law early on recognized the legitimacy of arbitration as a peaceful means of resolving disputes both in civil and public law.[36] "Among the intriguing historical illustrations of 'ADR' phenomena is the role of Mohammed in averting war over the reconstruction of Kaaba".[37] People from all religions, such as Jews, Christians, Muslims and Buddhists have practiced ADR for thousands of years.[38]

But even later on throughout history, alternative means of dispute resolution always had a strong presence. For instance, during the middle ages, "whenever an injury was caused by one person against another, the parties were expected to reach an agreement that would restore both parties and the community to a state where all involved healed from injury".[39] Another example of ADR during the middle ages was in West Francia, the use of symbolic contests to resolve land disputes. In the Italian peninsula, several Italian cities became trading centers of the then known civilized world and utilized ADR through the

[35] The Bible, 1 Corinthians 6:6.
[36] WATSON Adam, *op. cit.*, p. 57.
[37] BOULLE Laurence, *op. cit.*, pp. 1, 2.
[38] MOORE W. Christopher, *The Mediation Process: Practical Strategies for Resolving Conflict*, (John Wiley & Sons), 2003, p. 14.
[39] SEVERSON M. Margaret and BANKSTON V. Tara, *op. cit.*, pp. 683-689.

existence of the "fair courts" that were established by commercial traders in order to resolve the disputes that arose during the annual fairs.

In England during the 10th century neighbours overcame private differences in accordance with customary law and "there were a number of early examples of consensual jurisdiction, more like modern arbitration, in addition to the property based power of the king and the local lord".[40] By 1224 arbitration was used to resolve commercial disputes.[41] During the fourteenth and fifteenth centuries ADR was fairly common and the lobby of the "Chartered Institute of Arbitrators" in London has several framed arbitration awards from that time, that are very similar to today's awards and according to which, arbitrators resolved disputes relating to land disputes between neighbors, as well as farming rights.[42]

In France, one of the homelands of modern preventive resolution, it is characteristic that the French legislator introduced in 1790, as mandatory in all cases, the previous attempt of the parties to conciliate.[43] After the French Revolution, arbitration was regarded as natural law and the

[40] MANEVY Isabelle, Online *Dispute Resolution: What Future?* 2001, p. 4 available at http://lthoumyre.chez.com/uni/mem/17/odr01.pdf
[41] CARTER T. Albert, *A History of the English Courts*, 7th Ed., (London: Hambledon Press), 1994, pp. 2, 3.
[42] RULE Colin, *op. cit.*, pp. 13, 14.
[43] FERRAND Frederique, La mediation judiciaire, *EXPERTS*, No 41, 1998, p. 8.

Constitution of 1791 declared the constitutional right of citizens to resort to arbitration. Already in the second half of the 19th century there is mediation to resolve disputes concerning employment relationships in England, France, Belgium and Holland.

Even in the United States, with their relatively shorter history, ADR has been in effect for centuries. For instance, "statutes like those enacted in Pennsylvania in 1705 and 1810, provided for arbitration in matters pending in court".[44] Furthermore, George Washington's last testament included an arbitration clause providing that any dispute about the interpretation of its wording should be resolved by a panel of three arbitrators. In 1854 the United States Supreme Court issued a verdict in accordance to which arbitrators were entitled to issue binding decisions and contributed in 1925 to the enactment of the federal arbitration act. At the beginning of the twentieth century, ADR was promoted even further with international arbitration "as the foundation of a new world order and the formulation of many major ADR organizations such as the 'International Court of Arbitration' at the 'International Chamber of Commerce' (1923) and the 'American Arbitration Association' (1926)".[45]

[44] MANEVY Isabelle, *op. cit.*, p. 4.
[45] RULE Colin, *op. cit.*, pp. 13, 14.

Section 3: The 20th Century Rebirth of ADR

Disputes and dispute resolution have changed over the centuries and continued to change during the twentieth century. In the United States, particularly, during the 1960s mediation becomes highly developed with the establishment of community mediation centers in order to resolve environmental disputes, family disputes, and commercial matters.[46] "In the 1970s, jurists began to voice concerns about the rising costs and increasing delays associated with litigation and some envisioned cheaper, faster, less formal and more effective dispute resolution in such alternatives as arbitration and mediation".[47] In response to deficiencies in the official court system, mainly academic scholars advocated the increasing use of ADR and conceptualized ADR, forming what later became known as the modern ADR movement.[48] While there long have been alternative means to resolve disputes other than traditional litigation, perhaps one of the most important milestones for ADR was the 1970's, when in Europe and North America the increase in civil court cases led lawyers and academics to speak of the so called "litigation explosion" and resulted in the modern ADR movement.

[46] *Ibid*., p. 15.
[47] MANEVY Isabelle, *op. cit.*, p. 4.
[48] HÖRNLE Julia, *op. cit.*, p. 48.

The ADR movement was the centre of attention at the "Pound Conference on The Causes of Popular Dissatisfaction with the Administration of Justice", which took place in Minneapolis, Minnesota, from the seventh to the ninth of April 1976 and where "US chief Justice Warren Burger encouraged the exploration and use of informal dispute resolution processes".[49] At the same conference, Harvard Law Professor Frank E.A. Sander revolutionized the ADR field by proposing the formation of the "multi-door courthouse", according to which "disputes would be evaluated then directed to the most appropriate process or sequence of processes".[50] Law schools and academics started to develop the theoretical background behind ADR, based on concepts such as negotiation theory, which turned the dispute resolution movement into a defined discipline and allowed for an expansion and professionalization of the field during the next decades.[51] New ADR providers started to increasingly appear and the already existing ones experienced a dramatic raise of their caseload.[52]

The increasing difficulty to ascribe justice, in a worldwide level, due to the large number of cases brought to court, the

[49] LODDER R. Arno and ZELEZNIKOW John, op. cit., p. 1.
[50] JACOBS L. Becky, Often Wrong, never in Doubt: How Anti-arbitration Expectancy Bias may Limit Access to Justice, *Maine Law Review*, vol. 62, 2010, p. 532.
[51] RULE Colin, *op. cit.*, p. 16.
[52] For instance, "the American Arbitration Association, the largest business-to-business dispute resolution service provider in the United States, handled more than 150,000 cases in 1999, while Judicial Arbitration and Mediation Services (JAMS) handled more than 60,000. The Better Business Bureau (BBB) handled more than 450,000 cases in 2000". *Ibid.*, p. 17.

organizational structure of the judicial system, the continuous procedural processes, the long duration of the trial sometimes leading to a denial of justice, the high economic costs which in many cases exceed the value of the subject matter, and the psychological suffering of the parties, made litigation ineffective, thereby leading over the past few years all developed countries to seek remedies and immerge various forms of alternative dispute resolution.[53]

The dissemination in theory and practice of alternative ways to resolve disputes and avoid litigation was in the first place a result of the parties themselves who wished to avoid the formal, complex and often lengthy judicial procedures, the deficiencies, costs and the increased uncertainty, and secondly, a result of the realization that civil justice was and still is in crisis due to excessive caseloads of private disputes overloading the civil courts of all developed countries. For instance, in France the last thirty years have seen a large increase in civil, commercial and labour cases for judgment. The French judicial system responds quite adequately in the first degree, by processing cases within a reasonable period of 6-9 months. In second degree, however, there is a considerable problem with cases in the Court of Appeal taking up to 14 to 16 months with the prospect of continuous increase in time.

[53] HERTZ Ketilbjørn & LOOKOFSKY Joseph, *Transnational Litigation and Commercial Arbitration*, (Juris Publishing Inc.), 2nd Ed., 2004, p. 755.

Italy is facing a very serious problem in the handling of private disputes because of the ever increasing cases. This has resulted in the average duration of a trial to exceed three years in the first instance and for a final decision of the Court of Appeal the parties often wait more than 10 years. Because of this situation many Italian lawyers appeal to the European Court seeking the conviction of the Italian government for breach of Article 6 of the "European Convention on Human Rights", which provides, the right of every person to be tried in the case within a reasonable time. In England, the time required to process a case in the first instance is around three years for the court of London and around four years for cases in courts outside London. The greatest problem is, the extremely high costs which the rich can withstand because of their financial situation and the poor because of the benefit of free legal aid, but for people of the middle classes who do not have the financial ability nor qualify for free legal aid, to appeal to civil justice is almost prohibitive. Finally, in the United States delays in the processing of civil cases are quite large although the duration of the trial is different in each state and often in the courts of the same state.[54] The ineffectiveness of traditional courts, due to the excessive caseload combined with numerous advantages of ADR, shined the spotlight on those methods as an effective alternative.

[54] GENN Hazel, 'Tribunals and. Informal Justice', *Modern Law Review*, vol. 56, 1993, p. 277.

As stated, the modern ADR movement found its roots initially in the United States, which resulted to considerable skepticism from the European side as it was perceived as "a way to Americanize the law".[55] However, over the years alternative resolution has gained strength in contemporary positive law. Especially lately ADR becomes more and more popular in Europe to a point where in the United States the percentages are similar to those of continental Europe. In a survey conducted by the Euro-barometer and published in October 2004, the results showed that 59% of the people were aware of the existence of alternative dispute resolution, while 56% felt ready to resort to ADR, if necessary. Not only that, but furthermore during the past years in the European Union there have been considerable efforts to regulate the development of ADR "particularly in the information society context, in order to improve the trust that consumers and small and medium-sized businesses place in electronic commerce".[56]

Member States and institutions have shown a strong and substantial interest in ADR. Starting from the action plan of the Vienna European Council in December 1998, the conclusions of the Tampere European Council in 1999 and the work on the

[55] MARRIOTT, Arthur, Tell it to the judge…but only if you feel you must, *Arbitration International*, vol.12, 1995, p.13.
[56] COM/2002/0196 final, Green paper on alternative dispute resolution in civil and commercial law, 2002, p. 6.

European Summit in Lisbon in 2000,[57] the Council of Ministers for Justice and Home Affairs in 2000 invited the Commission to present a "Green Paper on alternative dispute resolution in civil and commercial law", excluding Arbitration.[58] In 19.04.2002, the Commission adopted the "Green Paper on alternative dispute resolution in civil and commercial law", which raises awareness on ADR, details the developments in the field of extrajudicial dispute resolution and notes that the development of those specific methods for resolving disputes should not be seen as a way of addressing the difficulties that characterize the functioning of the courts, but as an alternative means to consensual social peace, which in many cases might be more convenient to resort to.

Especially for consumer disputes which are considered the most advanced regarding extrajudicial settlement,[59] the Commission considered that ADR through impartial mediators can lead to constructive solutions and proceeded to issue recommendations according to which there are two major categories of alternative methods of dispute resolution. One includes procedures under which the third party finds a solution which then submits to the parties and the other includes

[57] DONEGAN L. Susan, *Alternative dispute resolution for global consumers in E-commerce transactions. E-commerce: law and jurisdiction* (Kluwer Law International), 2003, p. 61.
[58] COM/2002/0196 final, *op. cit.*, p. 10.
[59] JACOBS Wendela and JOUSTRA Caria, Consumer redress schemes from a comparative perspective, *Consumer Law Journal*, vol. 11, 1995, p. 16.

procedures in which a third party helps the parties to reach an agreement, without taking a firm stand on how to resolve the dispute. The interest of the Community and the great importance it attaches to alternative ways of dispute resolution is shown by the creation in 2000 of the European Extra judicial - Netbook "EE j-Net" to coordinate dispute resolution in Member States and provide communication and support to the parties. The "Directive 2008/52/EC of the European parliament and of the council of 21 May 2008 on certain aspects of mediation in civil and commercial matters" encourages the use of mediation and amicable settlement of disputes and is applicable (initially) in cross-border disputes in civil and commercial matters, excluding tax, customs, administrative affairs and the liability of the State for acts omissions.[60] One can clearly see the EU efforts to facilitate access to ADR, by promoting amicable settlement and the use of mediation and by balancing the relationship between ADR and the judicial route.

Over the last years it has become standard in several European member states for the court to recommend or require the prior attempt of the resolution of the dispute through ADR before the parties are allowed to proceed to litigation. For instance, "in Portugal and several German 'Länder', claimants

[60] 2008/52/EC Directive of the European parliament and of the council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal of the European Union L 136/3.

must first resort to ADR before the actual judicial proceedings may begin, whereas in Ireland and Sweden, the court will attempt to achieve a settlement among the parties, even if such is not legally required".[61]

In France the prevailing alternative ways of settling civil disputes include conciliation and mediation. Both are proposed by the judge and exercised by a third party. The French procedural law expressly provides that settlement is among the powers of the court. Mediation is primarily exercised in family matters, inheritance, labor, joint ownership and commercial matters as well as general matters of business law. The court, if it considers that a dialogue can take place between the parties and that an alternative method is more suitable for the resolution of the dispute may appoint a neutral third party to conduct mediation. The mediation should be completed in three months, but there is a possibility to extend for another 3 months. A legal person (an agency or a mediation company) or a natural person may be appointed as a mediator. The mediator is independent and acts freely in mediation without following a strict procedure, but under the supervision of the judge. In the end, if the parties come to a settlement, they report it to the court. The judge, if the parties so request, may declare enforceable the

[61] EU study on the Legal analysis of a Single Market for the Information Society. New rules for a new age? *Digital Agenda For Europe; A 2020 initiative*, 2010, pp. 10, 11.

agreement for resolving the dispute, if it does not violate any rule of the law, is not contrary to public policy or abusive.[62]

In England, in addition to the ordinary civil courts and to complement them, alternative justice operates successfully and with the prospect of advancement. Initiated by family law in 1980 ADR has been extended to almost all areas of private law, primarily in commercial law, which has shown considerable growth. Several ADR centers operate, such as the "London Court of International Arbitration", as independent organizations (bodies), staffed by lawyers and other trained professionals, covering the entire spectrum of ADR. The rules of civil procedure in England, after a radical reform by Lord Woolf, argue explicitly and unambiguously in favor of the alternative justice. Explicitly given is the right in court to stay the proceedings for a month, even if the parties do not wish to attempt to resolve their dispute through mediation.

Furthermore, besides Europe in other parts of the world ADR has become a commonality. Japan has an extensive tradition in ADR and the beginnings of alternative methods of resolving disputes are reaching the 16th century. Mediation is praised by all relevant players, as the way to resolve disputes, which is the most convenient and the most adapted to the mentality and culture of the Japanese people. When it comes to

[62] FERRAND Frederique, *op. cit.*, p. 10.

small claims (under 300,000 yen) the judge refers the case to a mediator for amicable settlement and the lawyers themselves seek an amicable settlement of cases. In Japan, the current legal framework is not limited to mediation and there are many ADR organizations, depending on the types of cases (e.g. environmental pollution, employment relationships, construction, accidents, credit agreements, trade in raw materials, defective products, intellectual property, etc.).

In India, extrajudicial settlements are encouraged to address the growing backlog of cases pending before the courts. In 1996 India adopted the Law on Arbitration and Conciliation, which was based on the "United Nations Commission on International Trade Law (UNCITRAL) Model Law on international Commercial Arbitration", and since then has further developed and promoted ADR, by facilitating the use of various ADR methods, such as arbitration, mediation, conciliation, negotiation, Mini-Trials, consumers forums, Lok Adalats and the Banking Ombudsman. For the effective implementation of alternative dispute resolution mechanisms, a number of important organizations have been established, making significant contributions to the promotion of ADR in India, that need special mention, such as the "Indian Council of Arbitration" (ICA), the "International Centre for Alternative Dispute Resolution" (ICADR) the "Federation of Indian Chamber

of Commerce and Industry", the "Indian Chamber of Commerce" and the "Chamber of Commerce and Industry of Bengal".

In Canada and particularly in Quebec the amicable settlement of cases occurs through judicial mediation before the Court of Appeals. This alternative measure has proven highly successful and has met the positive contribution of lawyers.[63] In the U.S. ADR is in the minds of the parties the most popular institution for fast, economical and efficient resolution of the dispute. The "Uniform Mediation Act" is the special legal framework that regulates the issue throughout the country and mediation is applied in many branches of law (family, labor, criminal and administrative litigation). Furthermore, Alternative Dispute Resolution is analyzed at a high scientific level in many American universities. The scientific development of alternative justice was launched by Harvard University and soon expanded to almost all the United States, in many universities, where many European mediators go for special education. Most of the research and education relates to various techniques of alternative dispute resolution and novel techniques and methods are created, which often combine elements of conciliation, mediation and arbitration (e.g. med-arb, rent- a-judge, mini-trial etc.).

[63] OTIS Louise, Pour une nouvelle justice civile, *Magistrats Européens pour la Démocratie et les Libertés*, 2011, p. 27.

Today ADR, after thousands of years of evolution and after its modern rebirth due to the ADR movement of the twentieth century, has built an indisputable foundation and holds a secure foothold in the resolution of disputes. Negotiation, mediation and arbitration have become popular and highly utilized surrogates for litigation, to the extent that ADR is considered the usual way to resolve disputes in a wide variety of areas, such as workplace disputes, insurance claims, construction defects, intellectual property, and public policy disputes.

Chapter 2

Forms of ADR

Traditional ADR includes a wide variety of dispute resolution methods from party-to-party engagement in negotiations, mediation and arbitration to variations such as expert evaluation and mini-trials, to hybrid forms that combine methods such as med-arb. The various techniques of traditional ADR can be envisioned along a spectrum. At one end there are ADR techniques with which the parties have control over both the procedure and the outcome. At the other end are techniques with which control is transferred totally to a third neutral decision maker who resembles a judge. All other techniques can be found somewhere in between.[64] However, these various methods and techniques will not be examined in detail here, as the goal of this thesis is not to enumerate or describe all the different variations, but instead provide a better understanding of the techniques that came to influence ODR and the techniques that describe the different steps of dispute resolution, operating as building blocks for all else; negotiation as a voluntary procedure between the parties, mediation because it includes an assisting neutral third party and arbitration because it includes a

[64] RULE Colin, *op. cit.*, p. 37.

neutral third party with decision authority. The distinction between methods assisted by third neutrals and the ones that are not as well as the distinction between adjudicative and not will be of great importance later on in the examination of ODR. However, the last section presents not only arbitration but also some of the hybrid forms of ADR, because a brief presentation is essential in better understanding ADR and its whole spectrum. The other methods that are included in the brief presentation are conciliation, mini-trials, med-arb and the Ombudsman.

Section 1: Negotiation

"Let us never negotiate out of fear
but let us never fear to negotiate".[65]
J. F. Kennedy

Negotiation is one of the most basic forms of interaction[66] and people are constantly negotiating in everyday life and in business even if they don't realize it.[67] Negotiation is so

[65] KENNEDY F. John, President of the United States of America inaugural address, January 20, 1961.
[66] MOFFITT Michael & BORDONE Robert, *The handbook of Dispute Resolution*, (San Francisco: Jossey Bass), 2005, p. 279.
[67] BETANCOURT C. Julia and ZLATANSKA Elina, Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?, *International Journal of Arbitration*, vol. 79, Is. 3, 2013, p. 4

common that it is practically involved in all interpersonal communication and can be identified in most of the everyday interactions.[68] After all, it is essential to understand that it is a communication process that takes place whenever we want something from someone or someone wants something from us.[69]

Negotiation is the most common and simplest method of alternative dispute resolution and is placed at the core of practically any ADR process, especially non-binding dispute resolution procedures such as mediation.[70] Negotiation theory has been the theoretical background for dispute resolution theory. Negotiation is the means by which conflicting parties settle their differences, with their mutual effort to reach an agreement through processes based on communication, persuasion and the consolidation of confidence.[71] Communication and consultation with the other side to achieve a resolution of the dispute constitute the process of negotiation. "In its simplest

[68] "You negotiate with your kids about their bedtime, you negotiate with your boss about your raise, you negotiate with the car dealer about the purchase price for your new minivan [...] as the saying goes, in work as in life, you don't get what you deserve, you get what you negotiate". RULE Colin, *op. cit.*, p. 38.

[69] SHELL G. Richard, *Bargaining for advantage: Negotiation Strategies for Reasonable People*, (Viking), 1996, p. 6.

[70] MOEVES S. Amy and MOEVES C. Scott, Two Roads Diverged: A Tale of Technology and Alternative Dispute Resolution, *William & Mary Bill of Rights Journal*, vol. 12, Is. 3, 2004, pp. 2-5.

[71] LUECKE Richard, Harvard business essentials: negotiation, *Harvard Business School Press*, 2003, p. 2.

form, negotiation involves an exchange of views and proposals by parties who wish to settle out of court".[72]

To reach an agreement, the parties are combining collaborative and competitive methods. So, depending on the circumstances, the negotiation is distinguished either for its aggressive or its competitive approach, or for the attempt to work together, or finally for the desire to solve the problem by creating a range of alternatives. Negotiation is based on social norms of reciprocity but very important success factor in any negotiation is the negotiating style.

In the field of ADR, negotiation is characterized primarily by three types of approaches; the competitive bargaining approach, the collaborative or operative bargaining approach and the ethical or principled negotiation. The competitive negotiation or win-lose negotiation attaches to the negotiation the nature of a confrontation with winners and losers. It is characterized by hard negotiators, who aim to capture, retain and expand their positions (positional bargaining) and it is used when there is a negative correlation between their interests. This strategy has little creative and distributive nature. The strong interest of each side is only essential to achieving its own goals, i.e. to close the deal, to win in the negotiation with little or no

[72] BENYEKHLEF Karim and GELINAS Fabien, Online Dispute Resolution, *Lex Electronica*, Vol. 10, No. 2, 2005, p. 44.

regard for the consequences to the subsequent relationship or transactions with the other side. The main goal of the negotiators is victory. They usually start with an extreme position and insist upon it until the end of the negotiations. They use lies, threats and often harm their relationship with the other side, because the hard bargaining tactics raise equally harsh reactions.

Collaborative negotiation or win - win negotiation is characterized by mild negotiators and win / win outcomes. It aims to solve the problem, to cover the interests and meet the needs of both parties (interest - based bargaining), consistently focusing on interests and not on either side's supporting positions. It is used when the goals and objectives of both parties have a positive correlation. This approach considers the "opponents" as partners in finding a common solution by redirecting the conflict. In this strategy it is also important to achieve the substantive goals and at the same time keep the relationship intact. The parties are typically expected to have a reciprocal relationship where both make concessions. The main idea behind the negotiation is that the objectives of the two sides are compatible and not mutually exclusive; if one side achieve their goals, this does not prevent the other to achieve its own. The gain of one side is not achieved at the expense of the other. The more skilled negotiators seek to avoid having

personal conflicts; they tend to make many concessions to reach an agreement and create an environment which will allow negotiations to take place based on cooperation, honesty, equality and generally good relations between them. The parties convert the initial dilemma of one party versus the other, to a both party collaboration with a win-win result. In the end both parties feel vindicated, because even if the solution is not optimal, it is their common effort.[73]

Finally, principled negotiation orients the parties into two main directions; to always seek mutual benefits and when their interests collide, to look together for fair standards. The biggest advantage of this method is that it allows parties to be fair while protecting them from the other side when they try to exploit this fact. The negotiation must follow some criteria; it should lead to a wise agreement that meets the legitimate interests of each side. It should be efficient i.e. save time and cost as well as meet the deeper needs and concerns of the parties, based on the exchange of information between the parties. And finally, it should improve the relationship between the parties. In principled negotiation the main concern of the negotiator are the interests and needs of both parties. The negotiators take into account the

[73] DONALDSON C. Michael, *Negotiating for dummies*, (Wiley Publishing Inc.: Indiana) 2nd Ed., 2007, p. 317.

existing conditions and look for a way to resolve the dispute objectively and impartially.[74]

One of the key parts of negotiation and the main difference from other ADR methods is the autonomy and independence of the parties who have no need of an arbitrator, mediator or judge. In negotiation there is no intervention by a third party.[75] Because no third party acts as facilitator or umpire in the communications between the parties as they attempt to resolve their dispute, it is the most cost-effective and efficient method of resolving disputes between parties.[76] "Finding a mutually acceptable solution to the dispute depends on the parties and the negotiation process is confidential and completely voluntary; generally, the parties can withdraw at any point".[77] .

Although each negotiation is an independent and autonomous process that usually displays certain specific to each case characteristics, there are however some stages that are common to all negotiations. The first stage includes the "design and analysis". This step is essentially the beginning of the negotiating process and is particularly important because preparation is the key part of any negotiation. Good preparation

[74] FISHER Roger, URY L. William and PATTON Bruce, *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin), 2011, pp. 13- 49.
[75] MENKEL-MEADOW J. Carrie, Lawyer Negotiations: Theories and Realities- what we learn from Mediation, *Modern Law Review*, vol. 56, 1993, p. 361.
[76] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 2, 3.
[77] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 44.

creates a solid foundation for the negotiation and gives the necessary confidence for the negotiators to reach success. The preparation process is continued throughout the negotiation. At this stage the negotiators collect all the relevant information related to the subject of the negotiation. The collection of the maximum amount of information on the subject gives to each of the negotiators bargaining power. During the design stage the negotiators recognize the goal of negotiation, which should be clear-cut in order to formulate the plan to be followed. Each negotiator analyzes the needs, identifies the interests, selects the strategy, the technique and gets familiar with his opponent. The planning process includes the definition of the range of issues and the anticipation of potential questions that might embarrass the negotiator. Finally the stage includes the timing of the process, which depending on the circumstances, should be neither too long nor too short.[78]

The second stage is the main negotiation where the exchange of information takes place. At this stage the negotiations begin. By sharing information the parties attempt to discover what elements each side prefers to acquire. Each negotiator has reviewed the proposals of the other side, has completed his research, knows what he wants and is ready to pass his positions on the opposite side. Particularly important is

[78] DONALDSON C. Michael, *op. cit.*, p. 317.

the way and the order in which they analyze the initial positions. Each negotiator's objective should be to challenge his opponent to first state their views and ideas. This stage includes the sharing of each negotiator's views and their careful examination, something absolutely essential in all negotiating relationships.

The third stage is the post-negotiation stage which includes the compromises. At this stage all the details that each negotiator might reveal to the other are already presented, and the parties clarify their dispute through the final presentation of their claims. The parties implement tactics that will result in a better approximation of the anticipated result, the satisfaction of their requirements with the minimal possible deviation, by making compromises and mutual concessions and creating a friendly atmosphere which helps to resolve the dispute.

The last stage is the agreement. At this stage, proposals, counterproposals and compromises are evaluated and conclusions are drawn defining the end of the negotiation. At this point the agreement between the conflicting parties occurs as a result of the previous stages. The agreement can occur either because the full acceptance of the positions of one side or the other or due to the discovery of middle ground, i.e. a mutually acceptable solution.[79]

[79] FISHER Roger, URY L. William and PATTON Bruce, *op. cit.*, pp. 41, 42.

The negotiation is considered successful if the benefits to one side have been achieved while the other side feels the same way.[80] If no point of agreement is found and the process does not reach an arrangement, then the process must be repeated from the beginning or the process must end. If the parties still cannot reach an agreement, other forms of alternative dispute resolution must be adopted. Positional bargaining and biases such as the tendency to be overly optimistic about their positions and the tendency to devalue proposals made by adversaries may result in the failure of a negotiation, leaving parties with the options, of going to court, opting for another alternative dispute resolution procedure or not resolving the dispute at all.[81] However, negotiation is an important building block for many other ADR procedures, and is a prerequisite for the successful implementation of several methods of ADR, such as mediation, which is examined next, as well as several of the hybrid forms.

[80] EL-HAKIM Jacques, Les modes alternatifs de règlement des conflits dans le droit de contrats, *Revue Internationale de Droit Compare*, vol. 2, 1997, p. 349.
[81] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 2, 3

Section 2: Mediation

A. What is mediation?

When a dispute arises the parties will normally attempt to resolve it initially by negotiating with each other. However, since the parties in most cases are not professional negotiators, often the negotiations do not prove fruitful. On the contrary mediation allows the parties to retain their control and their decision making authority, but also involves a third neutral party to assist the parties during the process; making mediation a kind of assisted negotiation.[82] Mediation is one of the most representative types of alternative dispute resolution as well as one of the most widely used ADR methods.[83] Mediation is a method of alternative dispute resolution, in which parties resolve the dispute with the assistance of a neutral third party, the mediator, who employs various techniques in order to help the parties find a common ground and settle the dispute. It is the process in which the parties of a dispute, guided by a third party, systematically isolate the points of the disagreement, with the aim to reach a consensual resolution of the dispute, which

[82] RULE Colin, *op. cit.*, p. 39.
[83] BOULLE Laurence and NESIC Miryana, *Mediation: Principles, Process, and Practice*, (Butterworths), 2001, p. 4.

serves both their interests. Mediation is essentially a dialogue or a negotiation with the involvement of a third party.[84] The mediator does not decide on the dispute, but helps the disputing parties to come to an agreement by finding a commonly acceptable solution. "Managing the mediation process can also be collegial, in other words, performed by more than one individual".[85] The need for involvement of a third person is justified in theory based on the premise that many times the parties are simply not able to identify themselves, in a clear and meaningful way, the conflicting elements of their dispute and negotiate in order to achieve a compromise. This may be due to mutual prejudice, fear of notification of certain details, the risk of misinterpretation of a compromise, due to ignorance and the possible devaluation of the position of the opponent and due to potential mutual hostility.

The importance of mediation is evidenced by its multiple functions. Mediation defines the dispute; the impartial mediation process helps to identify and refine the problems within the scope of the dispute. Mediation resolves disputes between rival parties concerning a particular claim for matters related to interests, principles or procedures. Even if the mediation process does not produce the desired effect it promotes the use of another procedure, such as arbitration. Mediation helps in the

[84] MOORE W. Christopher, *op. cit.*, p. 14.
[85] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 45.

management of lengthy conflicts that are expected to continue. Even if the opposing parties do not desire to reduce or resolve the dispute, the mediation process can control the conflict by establishing appropriate rules, structures and modes of communication. This allows for future involvement in settlement procedures. Mediation assists in negotiating contracts. The conflicting parties, with the assistance of a mediator, can manage processes in order to establish a positive climate between the parties, to identify the interests and priorities, to improve communication, to achieve handling negative emotions, to make suggestions and to register agreements. Mediation creates an environment that allows for lateral thinking which involves restructuring, escape, and the provocation of new patterns and leads to brainstorming and subsequently to the rise of many different ideas in order to resolve the dispute.[86]

Mediation has its roots in ancient practices and is one of the oldest methods originated mainly in Africa and Asia. The mediator in commercial relations of the Arabs, the elders as mediators in China, the judge with the task to promote a compromise in the Swiss, German and Japanese practice, exemplify the need for a third party as a neutral who will reduce tensions and overcome potential impasses. But the most important development in recent decades has been the necessity

[86] DE BONO Edward, *Lateral Thinking: A Textbook for Creativity*, (Australia: Penguin Books Ltd), 2009, p. 11.

of particular Anglo-Saxon jurisdictions to avoid the cost and delay of litigation system, developing mediation in civil and commercial matters. Mediation in its modern version is an institution of American inspiration. Even though mediation was subject to theoretical and practical processing since the 70's and 80's, especially in recent years it has spread rapidly in many states. For instance, In Great Britain, where mediation exists since 1989, 85% of the cases of disputes addressed through mediation were successfully resolved, and international mediation developed to such an extent in the legal world in England that since 1999 has been part of the English civil justice. These developments, of course, were not only a privilege of the Anglo-Saxon countries. At the end of the 20th century such dynamic trends did emerge in France, Canada, Hong Kong and several European countries. For example, in Germany, in 2002 special rules for mediation were established and more so in two levels because of the federal form of the state, i.e. both in the German Civil Procedure (Zivilprozessordnung) and in specific legislation of the Länder of the Federal Republic of Germany.

Mediation differs from judicial resolution in several aspects. Mediation, as mentioned above, is characterized by having a neutral third party who works with the parties to identify issues, explore their interests and possible solutions,

whereas in litigation the judge is not affiliated with the parties, instead simply assesses the evidence and decides. In mediation the parties retain control of the process and determine the potential compromise while in litigation the parties shift control to the judge and there are few prospects for compromise because the process is determined by the evidence presented. Mediation is characterized for facilitating negotiations, something which is completely absent in litigation. Mediation is confidential and may lead to agreements on how much publicity will be given to the dispute. Instead court proceedings are public and attribute error to one of the parties hurting in this way its reputation. In some cultures, such as Asian or Middle East cultures, it is important for each party in a dispute to emerge from it without harm to its honour and reputation. This is ensured in mediation because the mediator does not impose liability to any party but facilitates agreements that do not offend any of the parties. The main difference of mediation is the focus on the interests of the parties, on the objectives and the relationships between them, contrary to litigation where great importance is given to the substantive and procedural laws, as well as to rights instead of interests.

It is characteristic that in mediation the parties are encouraged to communicate between themselves and the meetings are informal, while litigation undermines the effective

communication of the parties, by focusing on the defence of their arguments, essentially limiting the communication between lawyers and courts, and replacing informal meetings with formal court sessions in a certain place and time.[87] Moreover, the agreement in mediation is consistent with the needs of the parties and a mutually satisfactory settlement is made between the parties, offering the opportunity for both parties to come out of the process as winners without damaging the relationship between them. Instead in litigation decisions are made based on the evidence and the law and record one of the parties as the winner and its opponent as the defeated. Finally mediation offers flexible terms between the parties, accelerated process and low cost. On the contrary in litigation there is lack of flexibility, the process is quite time consuming and expensive. Based on these differences between mediation and litigation it is understood that mediation is framed with several advantages that make it an attractive and preferred option.

Mediation is regarded as a voluntary procedure by which parties in dispute communicate with the assistance of a third neutral party with no decision power (called mediator), who improves the communication between them by using techniques, such as restating their arguments, and tries to bring them to an

[87] BREIDENBACH Stephan, *Mediation: Struktur, Chancen und Risiken von Vermittlung im Konflikt*, (Schmidt Dr. Otto KG), 1995, p. 69.

amicable agreement.[88] There are several kinds of mediation. The first kind is known as settlement mediation and does not necessarily require any special knowledge, experience or special preparation. The mediator seeks solutions through interventions and the objective is to encourage the development of an appropriate agreement between the two parties based on a "central point". The second kind is known as facilitative mediation where the mediator acts as a facilitator who mediates the dispute in terms of the underlying needs and interests of the parties rather than strict legal requirements. It contributes significantly to the establishment of a code of ethics (a Code of Conduct and Rules which may apply in the exercise of its powers, governs the dispute, the extent and limits of liability and the solution) and facilitates the negotiation, ensuring a safe environment and seeking a constructive dialogue between the parties by encouraging the direct involvement of the parties in the process through the absence of other agents and by recognizing the influence of each party. In facilitative mediation the third neutral party assists the parties in reaching an agreement but does not make recommendations about the settlement. The third kind is therapeutic mediation, which deals

[88] "Mediation shall mean any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, regardless of whether the process is initiated by the parties, suggested or ordered by a court, or prescribed by the national law of a Member State". See Report on the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 2007, Article 2 (a).

with the causes of the conflict in the relations between the rival parties. The mediator is required to have expertise in counseling, psychotherapy and general understanding of the psychological factors. The mediator follows the path of empowerment and mutual recognition between the parties in order to achieve a resolution of the dispute and not simply settle the matter. Finally, the fourth kind of mediation is known as evaluative mediation, which is advisory and managerial and the mediator can acts as an evaluator. The mediator gives an assessment of the case, which involves analysis of the dispute in accordance with the legal rights of the parties. The parties are encouraged to consider and formulate proposals for resolution of the dispute based on the evaluation. The responsibility of the mediator in this approach is great, and the result approximates the concept of a decision. The interventionism of the mediator is greater in this approach; the parties do not acquire skills for the future handling of their disputes and the boundaries with arbitration are close. In evaluative mediation the third party evaluates the parties' positions and makes recommendations about the settlement based on its view.[89]

[89] HÖRNLE Julia, *op. cit.*, p. 51.

B. Choosing Mediation

Mediation takes place most often on a voluntary basis since "parties cannot be forced to participate in a mediation procedure and may also abandon the mediation at any stage prior to the signing of a settlement agreement".[90] However, mediation can also be discretionary, in the sense that it may be undertaken at the discretion of a particular person and mediation may be mandatory as for instance it is in Belgium, several states in the United States, and many Australian jurisdictions.[91] Mediation can be applied to any disagreement with the condition that the participants are willing to try. Submitting a dispute to mediation can be agreed by the parties either before or after the dispute arises. A mediation agreement can be binding if the parties' obligations are sufficiently clear, as illustrated by *Cable & Wireless Plc* v. *IBM*.[92]

Of course, some cases are more suitable than others, and often the question arises how to make the choice of whether the dispute should be resolved through mediation. In this case the participants from each side should first consider whether the

[90] HEUVEL V. D. Esther, *op. cit.*, p. 7.
[91] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 3, 4.
[92] "In *Cable & Wireless Plc* v. *IBM*, a mediation clause was held to be enforceable since it referred to an institution and specified procedure, and the court held that the parties' obligation was to participate in the process of initiating the mediation, selecting a mediator and presenting the mediator with the case and relevant documents". See HÖRNLE Julia, *op. cit.*, p. 51

dispute could theoretically be resolved through negotiations and whether there is progress in the on-going negotiations between the parties.[93] Mediation is informal and has a more flexible form, which makes it compatible with a variety of cases and therefore can be invoked at any stage, before or during the trial.[94] Mediation often is part of a multi-method ADR process, in which case mediation is usually preceded by negotiation and followed by arbitration. It must be noted that the application of mediation becomes difficult in cases of forgery, plagiarism or any other case where the bad faith of at least one party can infringe the trust and communication between the parties.[95]

However, even though the parties cannot be forced in truly participating in the mediation process, it is still a fairly common practice for contracts to include mediation clauses. These clauses operate as a conditions that must be fulfilled before the parties can go to court or use arbitration to resolve their dispute, and they usually require for a certain amount to pass, time that should ideally be utilized for conducting the mediation procedure. "This type of mechanism is common in instruments providing for private dispute resolution among states and investors, such as those of the International Centre for

[93] BEVAN H. Alexander, *Alternative dispute resolution: a lawyer's guide to mediation and other forms of dispute resolution*, (Thomson, Sweet & Maxwell Editions), 1992, pp. 39- 44.
[94] FIADJOE Albert, *op. cit.*, pp. 22-23.
[95] VARADY Tibor, BARCELLO J. John and VON MEHREN T. Arthur, *International Commercial Arbitration, A Transnational Perspective*, (Thomson West), 2003, p. 10.

Settlement of Investment Disputes (ICSID), in legal instruments required by the World Bank in some of the infrastructure contracts that it finances, as well as in a growing number of commercial contracts".[96] Furthermore, this way mediation can be suggested by one of the parties without hints of incrimination and without giving the impression to the other party that the suggestion of conducting the mediation is based on the fear of a potential unfavorable outcome through the judicial route. In order for the parties to take part in mediation, they must be willing and capable; willingness implies that the parties are prepared to make a good faith attempt to negotiate an outcome to their dispute, while capacity implies that the parties have an ability to express and negotiate for their own needs and interests.[97]

The process of mediation can be used to resolve all private disputes, such as civil, commercial, family, leasing, trade, real estate, construction, property, and banking disputes, regardless of type, which can be resolved by agreement and are within the contractual freedom of the parties, except those subject to mandatory provisions (like the dissolution of marriage). One can solve a dispute with a partner, associate, supplier, tenant or landlord and with members of family (especially as regards the latter category one may solve issues of maintenance or property

[96] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, pp. 45, 46.
[97] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 3, 4.

but not the divorce, which by order of the law is the responsibility of the courts). Apart from the particular application in cases of family and commercial law, mediation generally applies in cases where the emotion is dominant at the expense of reason as well as in cases of low economic interest. Mediation is suited for situations where the parties are more interested in a compromise, rather than participating in a formal juridical process.

The reasons for choosing mediation can be illustrated by four basic elements which define mediation and are Consensus, Continuity, Control and Confidentiality, often referred as the “4 C’s”. The Consensus (consent) guaranties that the process and outcome of mediation depends entirely on the will of the parties; the Continuity, allows for the development of a professional and on-going relationship between the parties contrary to litigation which only escalades the disputation; with Control, the development of the case depends on the ability of the parties to find the most appropriate solution for them.

Finally, the principle of Confidentiality applies to all discussions and actions of stakeholders and parties involved. Cornerstone for the recognition and acceptance of mediation as an effective method of alternative dispute resolution is to ensure confidentiality, since the mutual trust of the parties is a

prerequisite of a successful mediation.[98] The confidentiality enhances the sincerity and honesty and confirms that any suggestions, ideas and statements expressed by a party in order to resolve the dispute are not going to affect the outcome of the result and will not be used later against that party during arbitration or litigation. There is no prejudice in mediation and negotiations are conducted without bias since parties do not fear that their discussions might be revealed in court.

Confidentiality, despite the participation of the third party is not endangered in any way, certainly not to the extent that this happens in litigation, where the principle of publicity applies, or in arbitration where the secret process often involves many third persons (referees, arbitrators, lawyers, parties etc.) and increases the risk of information leaking.[99] The mediation agreement prohibits the mediator to disclose material or information in court or in arbitration. Information disclosed must be returned or otherwise destroyed, if the party chooses so. In conclusion, the information obtained during the mediation shall be confidential and the responsibility falls both the on the mediator and the parties.[100]

[98] BREIDENBACH Stephan, *op. cit*., pp. 288-289.
[99] FOLBERG Jay and TAYLOR Alison, Mediation*; A Comprehensive Guide to Resolving Conflicts without Litigation*, (San Francisco: Jossey Bass Publishers), 1984, pp. 8-9.
[100] VARADY Tibor, BARCELLO J. John and VON MEHREN T. Arthur, *op. cit*., p. 9.

As already mentioned, one of the strongest selling points for mediation is the increased probability of reaching a mutually acceptable solution that meets the interests of both parties (win-win-solution). The resolution is formed to the measures of the parties that satisfy their real interests, without being bound by legal arguments. In particular, the nomination and consideration by the parties, with the assistance of the mediator, even of non-legal factors that serve their interests and the possibility of detachment from legal arguments is a key advantage of mediation, since the solution is more oriented towards interests and not the rights of the parties.[101]

A key advantage of mediation is that it is fast and cost efficient. The process is quick, without delays, bureaucracy, or the perpetuating the dispute. The economic benefit is most apparent when the mediation process takes place in the early stage of the dispute, when the cost of the whole process can be calculated in advance. It offers easy access to people and provides time saving, allowing the opposing parties to solve their common problem in very short time, which is especially useful in commercial matters, where time counts significantly.

A big advantage of mediation is the flexibility and elasticity of the process. The process is specified freely by the

[101] DUVE Christian, EIDENMULLER Horst and HACKE Andreas, *Mediation in der Wirtschaft: Wege zum professionellen Konfliktmanagement*, (Schmidt), 2011, p. 162.

mediator in cooperation with the parties. The parties, rather than facing the stringent requirements of the juridical process may benefit from procedures that are tailor made to their own needs. Furthermore, the voluntary nature of the process means that although the parties agreed to resolve any or all of the differences through the mediation process, they shall not be required to continue that process after the first session, and can leave whenever they wish. Thus the parties constantly keep control of the resolution of their dispute. Moreover, the non-binding nature of the process means that a decision cannot be imposed on the parties, unless the parties themselves wish to adopt it. Therefore, if adopted, the outcome of the dispute satisfies both parties, the gain is mutual and there are no winners and losers. The contracting parties who have made an agreement between themselves to resolve their dispute through mediation are more likely to follow and comply with the conditions set by them than if they were imposed by the mediator. Voluntary compliance can lead to the restoration of disturbed relations between the parties and contribute to a more sustainable economic and social climate.

Another advantage is that there is no infringement of fundamental rights of the parties, because of the equality and fairness that characterize mediation as well as, because the parties retain their right to recourse to litigation. Finally,

mediation is appropriate for multilateral disputes because more persons involved in a situation can participate in the process, persons who in case of judicial proceedings could not become parties. In conclusion it can definitely be said that the advantages of mediation outweigh any disadvantages or imperfections and give an answer to the question of why to choose mediation. Mediation is a useful tool to resolve existing conflicts and prevent future ones, contributing the preservation of social peace.

C. The Mediation process

The mediation process consists of several stages; in the preliminary stage, the parties are informed of the process, the usefulness and feasibility and agree to the responsibility of a partnership. During this stage the parties announce the issues of the dispute as well as their initial position to the mediator, who draws up a summary. The next phase usually includes document and information exchange with the presence of representatives of the parties and of course the mediator. It is the first substantive meeting between the parties, where everyone has the opportunity to state their views on the legal, financial and emotional

implications of the dispute and to propose preferable solutions. The main procedure starts with the acceptance of the rules of conduct involving mainly the timetable and with the inaugural post of the mediator. At this stage of the process, especially in commercial disputes, the mediator after a series of meetings, either simultaneously with both sides or separately with each side, encourages both parties to consider the positions of the other side and proposes options that will help them in the negotiations on the terms of the agreement. The mediator uses "assisted storytelling" to help the parties reframe their positions and arguments with more clarity, reveal the underlying issues and work more effectively towards a mutually acceptable settlement.[102] For the effectiveness of this phase, the mediator should work with a small group from each side and mainly with people who make the decisions.[103] In most international commercial mediations, people involved in the second phase are up to six to ten, while in the third phase there are up to two or three participants from each side.[104] Finally, usually near the end of the mediation procedure or at an impasse, and after taking into account all the accumulated information, such as the arguments of the parties, their common ground and their differences, the mediator may issue a recommendation in order

[102] RULE Colin, *op. cit.*, p. 41.
[103] FISHER Roger, URY L. William and PATTON Bruce, *op. cit.*, p. 14.
[104] CARROLL Eileen and MACKIE Karl, International *Mediation - The Art of Business Diplomacy*, (Kluwer Law International), 2000, pp. 101-102.

to further assist the parties to reach a resolution, but in no way can the mediator issue a decision.

D. The Mediator

The mediator does not render a decision; instead the mediator improves the communication between the parties in the attempt to assist them to find by themselves a commonly acceptable way to resolve the dispute. In short, "the mediator does not make a decision, but helps the disputing parties to find the solution that is acceptable to all parties involved".[105] Modern mediation, in which the facilitator operates as an "intermediate" in the dispute, is influenced by the modern theory of negotiation by which the goal is to help the parties find themselves an appropriate solution based on their needs and interests.[106] The mediator only assists the parties in reaching resolution on their own without advocating in favor of one or the other party; instead the mediator will scrupulously avoid appearing biased toward one side or the other, because it's not the opinion of the

[105] HEUVEL V. D. Esther, *op. cit.*, p. 7.
[106] BÜHRING-UHLE Christian, *op. cit.*, pp. 274, 280, 282.

mediator but the opinion of the parties that will lead to the settlement.[107]

The mediator with absolute impartiality and credibility, having experience in the process and negotiating skills, without having decisive authority, is limited to bringing the parties together, facilitate cooperation, relationships and communication and encourages them to understand their needs and interests and those of their opponents by creating the right conditions that will result in the satisfaction of the interests of both sides. However, although a mediator usually "has no determinative role in regard to the content of the dispute or the outcome of its resolution",[108] the mediator may advise on or determine the mediation process and may even evaluate the content of the dispute.

Usually, the mediator is allowed to hear the parties together and separately. One of the most important features of mediation and the means to a successful settlement is known as "caucusing". During the mediation, the mediator is likely to take the initiative for a break, the "caucus" in order to meet the parties separately and after a discussion, evaluate their proposals for resolving the dispute. The "American Arbitration Association" (AAA) states that the caucusing allows the

[107] RULE Colin, *op. cit.*, p. 41.
[108] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 3, 4.

mediator the selective use of information obtained by each party to reduce hostility between the parties and help them to engage in a meaningful dialogue on key issues to uncover additional facts and the real interests of the parties, to construct a setting to resolve current problems and future needs of the parties.[109] Also it makes the reaching of a settlement more likely because often the parties are more willing to share sensitive information that they would not reveal to the other party, information which could lead to possible middle ground that the parties might not have suspected was there without the help of the mediator.[110]

The mediator must be able to listen carefully, to appreciate and understand the parties, to be able to suggest compromises by modifying views, relationships and principles and ultimately to interpret in a proper way the position of the parties.[111] The mediator must be skilful in public relations, to conduct what we call diplomacy mediation (also known as shuttle diplomacy) in the sense that he should be active during the negotiations and

[109] CONNERTY Anthony, A *Manual of International Dispute Resolution*, (Commonwealth Secretariat Library), 2006, p. 269. For more information see American Arbitration Association available at www.adr.org

[110] "However, caucus meetings are very sensitive undertakings and require some reserve on the part of the mediator because the basis for agreement has to be woven out of confidential information. In cases where the dispute resolution system allows the mediator to become an arbitrator if mediation fails, it is very inadvisable for the mediator to meet with the parties separately. Under the law of many countries, such a process would contravene the principles of fair hearing, and could nullify any arbitration award on the grounds that it violates public order. The principle of fair hearing is entrenched worldwide, and prevents an individual invested with judicial functions from hearing one party without allowing the other party to respond to the representations". See BENYEKHLEF Karim and GELINAS Fabien, op. cit., p. 47.

[111] MACKIE J. Karl, *A Handbook of Dispute Resolution; ADR in Action*, (London and New York: Routledge and Sweet & Maxwell), 1991, pp. 89-90.

discussions with the parties and able to transfer critical messages about the outcome of the result.[112] The mediators work is often hard and described as equal parts art and science since it can be very difficult to facilitate an agreement in an environment of conflict and distrust.[113]

The role of the mediator is to settle any personal differences between the parties, putting aside any unreasonable requirements, mitigating initial rigid positions and seeking to prevent the escalation of tension and competition between them. The mediator helps the parties to work together to understand the common features in their interests and for each party to understand the respective interests and opinions of others. The mediator helps stabilize and control the parties' emotions and at the same time helps to understand that in a dispute the challenge is to find a solution and not the victory of one party over the other. The mediator encourages the parties to engage in a dialogue with perspective and motivates them not only to participate in the process but also be more imaginative in their

[112] HIBBERD Peter and NEWMAN Paul, ADR *and Adjudication in Construction Disputes*, (Blackwell Science), 1999, pp. 63-64.

[113] "Some mediators have an innate ability to help people understand each other, and their involvement can be the catalyst that enables resolutions to emerge when there seems no possibility an agreement could ever be achieved. There is no ideal mediation style. Some mediators are very aggressive and challenging, like trial lawyers, focusing on the details in the dispute and pushing disputants on inconsistencies. Other mediators are much more reflective, like therapists or counselors, letting the parties go through their own exploration of the issues, and focusing on the relationship between the parties. Different styles fit different types of disputes and different types of disputants". See RULE Colin, *op. cit.*, p. 41

quest to find themselves alternative ways to resolve the dispute and to reach a mutually acceptable solution.

The mediator must maintain the momentum of the negotiations and encourage the parties to continue even under extreme conditions of intense personal rivalry, maintaining open communication with each of them and cooperating equally with both parties. Furthermore the mediator is responsible for creating an environment that ensures confidentiality, for him, for the procedure itself, but also between the rival parties. When there is trust, the parties are less defensive and appear more willing to share information among themselves and with the mediator during private meetings. The mediator in order to win the confidence of the parties must be impartial and keep an equal distance from the opposing sides, facing the opposing parties with respect and dignity, showing understanding of their problem and genuine interest in resolving the dispute, as well as making clear that he has no personal interest that could prevent the achievement of an agreement between them. The mediator must not criticize the parties, impose own views or ask threatening questions. The mediator must ensure that any confidential information shall not be communicated to the other party. The mediation must be conducted in a manner that does not violate privacy, unless the parties agree otherwise. Finally, the mediator must present a range of mechanisms to solve the

problem in question and promote a plan of settlement which would actually contain the agreed position of the parties.[114]

It is important that the effective mediator must have some theoretical knowledge as well as the necessary practical skills, such as being able to carefully listen to the parties but also pick up on any silent cues of communication and assist parties to listen carefully to each other. The mediator must be able to carefully word any questions, to summarize the parties' positions and to pay attention to the arguments, opinions and feelings of the parties. The mediator must be able to facilitate the emergence of shared concerns and interests of the parties, to effectively use language and to give focus on the ordinary rather extreme nature of the dispute. The mediator must be able to manage the process but also the expression of emotions, to develop and promote additional perspectives, ideas and options, to strengthen the three sided model by avoiding alliances, to keep equal distance from each of the parties, to be silent when necessary and to obey to moral commitments (Code of Ethics and Rules of procedure). The mediator must have emotional sensitivity, which is an ability that allows the mediator to respond to the expression of emotions of the parties and to approach sensitively any manifestations of confrontation or reconciliation of the parties. The identification and handling of

[114] MACKIE J. Karl, *op. cit*. pp. 89, 90.

emotions is a necessary element of mediation and there are various stages of handling emotions such as the clarification of emotions, the management of the response of each party to the emotional extremities of the other side and the recognition of the right as well as the time needed for each side to externalize the accumulated pressure.[115]

Important are the skills of good judgment, the ability to understand the particularities of each specific case, practical knowledge, creativity, flexibility, perception, intuition, reliability and the competence to exercise the relevant duties in an effective, constructive and self-reliant manner. Furthermore, the mediator must have the necessary communication skills that are required in the process of conflict resolution, the absence of which may cause substantial problems, such as the lack of understanding of each side's position, and the creation of misunderstandings because of the inability to successfully convey the message or due to differences in culture, education, etc. In order to improve the mediator's communication skills, active attention is required for the understanding of the positions and feelings of each side as well as the context in which communication takes place. The mediator must use a way of speaking that aims at understanding and not impressing the parties, reporting only what is appropriate and potentially

[115] HIBBERD Peter and NEWMAN Paul, *op. cit.*, pp. 63, 64

productive and adjusting to personality and cultural differences. Finally, the mediator must be able to schedule meetings.

In conclusion, the catalytic assistance and guidance of the mediator through all the above mentioned capabilities allows the parties to find a tailor made solution based on their needs and interests, a solution that would never be reached through litigation. The search for the causes of the conflict, the analysis of the conflict cycle, the diagnosis and the application of specific patterns for behavior analysis is the theoretical basis based on which the mediator brings the parties to a successful outcome of their attempt to resolve their dispute. According to the above it is clear that the skills of a mediator vary and extend beyond legal science, psychology and negotiations. It comes down to the ability of "empathy", i.e. the ability to understand the parties, to be confidential, actively listen and effectively use silence, submit the appropriate questions, absorb the negative emotions of the parties to unblock the process, analyze interests and find possible points of identification. The role of the mediator and the limits of that role must be presented in a calm and possibly informal tone before the start of the mediation process.

E. The settlement

One of the main features of mediation is its non-binding character as opposed to other forms of ADR like arbitration.[116] Initially, the parties can leave the mediation at any point and are not obligated to sign the settlement. Even mediation under a binding mediation agreement as *Cable & Wireless Plc* v. *IBM* is voluntary, since the parties are only obligated to initiate and attempt the process.[117] The mediation process can be a failure and leave the parties basically where they started, though better informed. But, it can be a success, in which case a settlement agreement is drafted and signed by the parties. In some countries, for instance in the United States, "parties decide whether or not they wish to make their agreement legally enforceable or not, in which case a non-enforceable agreement is based on the idea that parties have reached a mutually acceptable solution that will be honored by both of them without having to resort to legally binding written agreements".[118]

However, in most countries, as far as the legal nature of the agreement goes, the settlement agreement is accepted as a binding contract, which in case of non-performance, when one of

[116] See infra at section 3.
[117] HÖRNLE Julia, *op. cit.*, p. 51.
[118] HEUVEL V. D. Esther, *op. cit.*, p. 7.

the parties does not honor the agreement, allows for a legal cause of action. Even though, settlement agreements have a special status in some countries making them easier to enforce, internationally there is not an accepted framework to facilitate the enforceability of international settlement agreements. Unfortunately this problem was not overcome by UNCITRAL's Model Law; although several solutions were suggested to make mediation agreements binding and enforceable internationally, such as "submitting the agreement, in cases that lend themselves to such an approach, to an arbitral tribunal required to render an arbitration award that was described as containing agreed terms or consider the agreement itself as an arbitral award for the purpose of recognizing its enforceability",[119] the Model Law could not provide the necessary international remedies that might have made settlement agreements easier to enforce and mediation a much more desirable choice for the resolution of international disputes.

Unlike mediation, arbitration is more easily enforced and therefore the preferred ADR method at least for international disputes. The fact that the mediation procedure is voluntary and the fact that mediation is not suitable for all disputes, make clear the need for a binding and adjudicative dispute resolution method such as arbitration, which must be available and

[119] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 48.

accessible for disputes and especially those not lending themselves to compromise. After all, although mediation aims to find out the parties' respective interests and align the resulting preferences in such a way, that the solution satisfies each party's interests; however, one must not forget that not all disputes can be solved in this way. In some cases, the underlying interests of the parties simply cannot be aligned, and it is therefore necessary to resort to adjudication.[120]

Section 3: Arbitration and the hybrid forms

This section includes the presentation of arbitration and the examination of its main characteristics, but also includes the presentation of several other forms of ADR referred to as the "hybrid" forms. The examination of these methods is included in the section about arbitration because it was deemed that it would be better for presentation purposes not to dedicate a whole new section about these hybrid forms, but instead that it would be preferable to present them briefly after arbitration as to demonstrate a more complete picture of the whole spectrum of ADR and consequently provide a better understanding of ADR.

[120] HÖRNLE Julia, *op. cit.*, pp. 55- 58.

A. What is Arbitration

Arbitration is an institution recognized by the law, which appears as an alternative to resolving a dispute, a proposition different from litigation. Arbitration is the oldest and most confrontational form of alternative dispute resolution; it is a system of justice, created by merchants thousands of years ago.[121] The vast growth of arbitration in recent decades is due to the fact that arbitration is a crucial component in the development of economic life, particularly in international trade.[122] The big increase in international trade that occurred in modern times caused major problems always associated with international business such as the geographical, linguistic ethnic, economic diversity of the environment of the parties. But the needs created by international trade consistently proved stronger than the obstacles. Thus the practice of international trade applied a variety of means and methods for facilitating its conduct, with emphasis on the exchange of benefits. One the more successful and popular methods amongst them was arbitration. The main reasons for leading the parties to a dispute, to arbitration remain about the same today as in the

[121] ROEBUCK Derek, Cleopatra Compromised: Arbitration in Egypt in the First Century BC, *Journal of the Chartered Institute of Arbitrators*, 2008, p. 263.
[122] CARABIBER Charles, L'evolution de l'arbitrage commercial international, *Recueil des Cours de l'Académie de Droit international*, vol. 99, 1960, pp. 125- 130.

past.[123] However, in modern times, arbitration is preferred for additional reasons, such as the protection of privacy, the control of the parties and the ease in the international recognition and enforcement of arbitral awards against judicial decisions.

From very early, human societies had manifested a spirit of resolution of disputes and essential attempts had been made for the peaceful and amicable settlement of disputes through the process of arbitration. Whether or not arbitration proceeded the justice of state institutions is not easy to determine and is not the subject of this thesis. However it is argued that the roots go back to ancient Greek law, the "heroic" period and the epics of Homer, where a scene of the quarrel between Odysseus and Aias Telamonios is described, the resolution of which was performed by arbitrators. Ancient Greek arbitration was divided into private and public and included as a first stage the attempt to reconcile the two defendants. To conduct the arbitration a contractual agreement was required, which had to be in writing, signed by the parties, including the number of arbitrators and determining the number of votes required for the validity of the decision. Arbitrators in each case had to decide in a spirit of fairness and not merely strict observance of the law. The role of arbitrators in ancient Greek law strongly reminiscent the basic characteristics of the municipal courts (juge de paix) of French

[123] CARBONNEAU E. Thomas, Etude historique et compare de l'arbitrage, *Revue Internationale de droit comparé*, 1984, pp. 727- 730.

law after the French Revolution. Arbitration was favoured in most ancient legal systems and historically functioned as an independent adjudicative dispute settlement mechanism. For instance, commercial arbitration agreements were very common among the ancient Greeks and Phoenicians traders.[124]

In ancient Sumeria, one of the most innovative ancient cultures, cities were trading centres with a high number of commercial relations and the corresponding inevitable disputes. Disputes were resolved by the king who was considered God's representative on earth and his legal responsibility was to arbitrate disputes between cities and citizens, give rulings and when necessary enforce decisions. Furthermore, the Code of Hammurabi in Babylon includes confirmed mentions of a duty to administer justice through arbitration.[125]

In India arbitration has a long history and the arbitration system which was a feature of Indian life, was very similar to the system of ancient Greece. People voluntarily presented their disputes to a person or a group of wise men of the community, called “Panchayath”, who resolved the disputes and their decisions were binding. Later the “Regulation of Bengal” in 1772 provided for cases involving private disputes to be referred

[124] BONNER J. Robert, The Jurisdiction of Athenian Arbitrators, *Classical Philology*, vol.2, 1907, pp. 132 -135.
[125] WATSON Adam, *op. cit*., p. 57.

to arbitration. The first Indian Arbitration Act was passed in 1889 and its elements were similar to modern arbitration.

In Egypt an original papyrus from the 3rd century proves the existence of private arbitration surprisingly similar to modern arbitration and in the Middle East the concept of arbitration (thakim) was practiced since the early days of Islam as a peaceful means of settling disputes. The arbitration system in Egypt followed the provisions of the Islamic Sharia in accordance with the tenet Hanafi. The Koran includes arbitration as a recommended means of settling disputes and the Sharia decides whether an arbitration award is binding on the parties.

In China, the institution of arbitration dates from 1600 B.C. The Chinese believed that if a dispute cannot be avoided, then it is imperative that the parties (alone or with the help of an arbitrator) take the necessary measures early on to understand the moral significance of the relationship causing the dispute and explore the possibilities offered to overcome the root of the problem and achieve a morally just solution. From the period of Zhou there were local judges the “Tiao Pen”, whose main function was to assist in resolving disputes. Since then arbitration was used extensively in ancient Chinese feudal society, became the main method for resolving disputes and was an integral part of the legal system and not just an alternative. Conceptual basis for the prevalence of arbitration was the moral

and social teachings of Confucius. The Chinese believed that the laws are not the appropriate way to regulate disputes in everyday relationships and should be limited to a secondary role, as reflected by the Chinese proverb: “in death avoid hell, in life avoid the law courts”.[126]

In Roman times arbitration was very popular. The Romans called referees ''arbitri'', ''recepti arbitri'' or ''compomissorii''. The Justinian Digest states that disputes arising should be resolved by a third party, the arbitrator. The arbitrator was usually an elder with significant wisdom, prestige, respected in the community and had no relation to state authority. In the arbitration proceedings, under Roman law, the parties had the opportunity to introduce to their agreement a double condition which would provide that if a party fails to honour the arbitration agreement or the award, would have to pay the other party a kind of penalty. However, in general arbitration was optional and the decision was not res judicata. Cicero testifies to the administration of justice in private disputes through arbitration and indicates what criteria the Romans used to choose between the courts or arbitration.

An important chapter in the development of arbitration dates back to the middle Ages. Originally arbitrator tasks were

[126] PAN Junwu, Chinese Philosophy and International Law, *Asian Journal of International Law*, vol. 233, 2010, p. 6.

performed by the pope, by emperors or kings, parliaments and even law faculties. However, arbitration was further developed by the merchants. At the end of the 11th century the Italian cities had become independent and merchants organized their governance in their own way and according to their interests, and had their own leadership such as the “Consules Mercatorum” in Genoa and Milan. They had political powers and judicial functions and led the various unions and guilds of merchants. In many Italian cities the unions and guilds exercised power by adopting regulations to resolve their differences. Initially these unions were voluntary associations, but were finally combined into a federation known as the “Mercanzia”. Traders from various cities came together in markets to do business. Very often one party in a transaction would challenge another. The inefficiency of traditional courts to resolve these disputes led to the development of specific procedures for dealing with trade issues and a specific substantive law of merchants, the “Lex Mercatoria”. The Council of Federation of the “Officium Mercanziae” referred most cases to arbitration, which was ultimately recognized as an institution and ordinary courts were forbidden to interfere with the jurisdiction of the arbitrators. The rules, regulations and decisions of this institution were mandatory for merchants and citizens, even for foreigners.

During the early 10th century, in England, individuals wishing to settle a dispute resorted to juries which consisted of small groups of "neighbours", expressing their grievances and disputes and operating themselves as lawyers.[127] During the 16th century, cases are referred to arbitrators, not only with the agreement of the parties but also by reference from the judicial authority specifically for commercial differences between British and foreigners. The first recorded judicial decision relating to arbitration in England was in 1610, noted by the English legal scholar Sir Edward Coke. The acceptance of arbitration was substantial something that bothered the judges who considered arbitration competitive and were trying to impede its development. But the institution survived with the Arbitration Act passed in 1698, which encouraged traders and businessmen to submit their disputes to be resolved by the arbitrators and not the courts. In Scotland the earliest known treatise which refers to arbitration is the "Regiam Majestatem", which dates to the early 14th century. It examines issues, such as who could refer the dispute to arbitration, when it was arbitrable, what could happen if there were two arbitrators who disagreed and how a decision should be issued.

As stated, France is one of the homelands of modern alternative resolution. The origin of the concept of arbitration in

[127] CARTER T. Albert, *op. cit.*, pp. 2, 3.

France dates back to the ancient courts “Pie poudre”, established to resolve disputes between traders during market days. Arbitration in France first appeared in the 13th century during trade fairs. Before 1789, the institution of arbitration in France was not used often, although it was allowed for most cases and was mandatory for the resolution of various family disputes under various decrees adopted in the 16th century. After the French Revolution arbitration was reconceptualised, regarded as “natural droit” and the Constitution of 1791 declared the constitutional right of citizens to resort to arbitration. In each canton there were founded “tribunaux de la paix”, manned by “juges de la paix” acting more like regular people than like judges and their main concern was to reconcile the parties and resolve the dispute in question based on the principle of equity. Family courts were established to adjudicate disputes between spouses and between relatives as well as “tribunaux de commerce” for commercial disputes. The “Napoleonic Code” and the “Code de Procedure Civile” adopted in 1806 as well as the Commercial Code contain regulatory provisions for arbitration cases such as for disputes relating to maritime insurance and disputes between the shareholders of a commercial company. In other areas, the law authorized the submission of existing disputes to arbitration, but arbitration clauses for future disputes were not allowed. After the signing by the France of the

"Geneva Protocol on Arbitration" Clauses of 1923, with the Law of 31 December 1925 such clauses were allowed in disputes arising from commercial relations. Subsequent laws enacted from 1926 to 1975 dealt mainly with the scope of arbitration in specific sectors without any changes on the procedural rules.[128]

In the United States, Native American tribes used arbitration not only to resolve disputes that arose within the tribe, but also for the resolution of disputes that arose between the different tribes. From the European colonization of the U.S., arbitration operated in accordance with the British customary law. Already in 1632 the colony of Massachusetts introduced legislation in support of arbitration as a means of dispute resolution, followed by Pennsylvania in 1795. But while there was arbitration in the colonial era, however, it was not popular and not widely accepted. Arbitration was met with hostility and scepticism. The distrust in arbitration was due to the fear of displacement of justice and public policy and the belief that the state should keep its monopoly in conflict resolution. But even with these reservations, arbitration in the USA was an established form of dispute resolution before the American Revolution. In 1768 the "New York Chamber of Commerce" was created, which was the first permanent board of arbitration and its main activity was initially to resolve disputes between

[128] CARBONNEAU E Thomas, *op. cit.*, pp. 9- 11.

merchants and in 1794 the arbitral tribunal in New Haven was established. In 1799 George Washington in his will, which included an arbitration clause, stated the explicit intention that all differences (if any arise unfortunately) must be solved by three impartial and intelligent men, known for their honesty and their good understanding. Two would be chosen by each of the disputants, the third chosen by these two, and the decision would be binding similar to a Supreme Court of the United States decision. In 1891 in Philadelphia the Chamber of Commerce was established. Arbitration received the full supporting of the Supreme Court in 1854 when the court upheld the right of arbitrators to issue binding decisions. Arbitration was formally institutionalized in the USA in 1822 when business leaders created an educational organization called “The Arbitration Society of America” and in 1854 the Supreme Court recognized the importance of arbitration by giving arbitrators broad discretionary power. In 1919 a small group of industrialists, traders and businessmen decided to create an organization that would represent businesses everywhere and that would bring hope to a world destroyed by the recent war. They managed to replace fear and suspicion with a new spirit of friendship and international cooperation. They founded the “International Chamber of Commerce” (ICC) and called themselves the "The merchants of peace". In an attempt to overcome the distrust and

animosity in dealing with arbitration, the Chamber of Commerce and the “Bar Association of New York” contributed to establish arbitration as a viable form of dispute resolution. Thus in 1920 New York City's first Modern Law on Arbitration was established. The statute served as a model for other state laws. In 1925 the “Arbitration Foundation” was founded. The “Arbitration Foundation” as well as the “Arbitration Society of America” ceased to exist in 1926 and were replaced by the “American Arbitration Association” (AAA). In 1925 Congress passed the Act known as the “Federal Arbitration Act” (FAA) which allowed companies to agree on a private contractual settlement of commercial disputes, and awards in cases of interstate or international commerce became enforceable.

The recent years to improve the handling of international commercial disputes several permanent arbitration bodies have been established. The most famous centres of international arbitration are the “Chambre de Commerce Internationale”, the “International Court of Arbitration” of the “International Chamber of Commerce” based in Paris, the “London Court of Arbitration”, the “American Arbitration Association” (AAA), the “Inter-American Commission of Commercial Arbitration”, and the “International Centre for the Settlement of Investment disputes” (ICSID). From the overview of the history of arbitration it becomes obvious that arbitration is an important

tool for the proper functioning of international trade. The continued presence and evolution from antiquity to modern times confirms its significant value. Today it is clear that arbitration presents an unprecedented growth and has become the preferred method for the resolution of international commercial disputes. The evolutionary process requires, however, theorists and practitioners of law to look into the future of arbitration, to understand the current and future needs the international commercial practice and ensure a smooth and trouble-free operation of arbitration in the international arena and in Cyberspace.

Arbitration can be defined as an institution founded on the will of divergent parties who respecting the law, outsource the resolution of certain legal dispute to third, neutral and independent persons who derive their authority from the parties themselves and not by the state, and resolve the difference based on that agreement after a fair hearing, issuing a final decision, legally binding for the parties. In arbitration the parties transfer the control over the outcome to the neutral party who has decision making authority, making arbitration a kind of private judging.[129] The parties involved in a dispute agree to submit their dispute and present their evidence to a neutral party, the arbitrator, or an independent, private tribunal that renders a

[129] RULE Colin, *op. cit.*, p. 42.

decision. The arbitrator has the power of decision in the dispute. Once the dispute is submitted to be resolved through arbitration, "a party cannot unilaterally withdraw from the arbitration".[130] Unlike mediation, arbitration is not voluntary but mandatory and if the respondent refuses to participate in the arbitration, the arbitrator may issue a default award.[131]

One thing that makes arbitration such a fascinating subject is its dual nature. Arbitration is at the same time an exercise of private ordering, formed by private agreement, shaped as a result of conscious private choice and also it is an exercise in adjudication which results in an award that the force of the state makes obligatory on the litigants in much the same way as the judgment of a public tribunal.[132] Arbitration is a procedure held in a confrontational manner and is the closest form to litigation.[133] However, it is a private, more flexible and less formal process than litigation in court that produces final decisions, the arbitral awards, which are equally binding, as well as easier to enforce internationally. Furthermore, like mediation,

[130] HEUVEL V. D. Esther, *op. cit.*, p. 5.
[131] HÖRNLE Julia, *op. cit.*, p. 59.
[132] RAU Alan Scott, The Culture of American Arbitration and the Lessons of ADR, *Texas International Law Journal*, vol. 40, 2005, p. 1.
[133] GENN Hazel, Mediation in Action, Resolving Court Disputes Without Trial, (London: Galouste Gulbenkian Foundation), 1999, p. 14.

"arbitration is for parties that are in conflict but nonetheless wish to pursue their contractual relationship".[134]

There are different kinds of arbitration; for instance, depending on the nature of the outcome, arbitration can be either binding or non-binding. However, normally when one speaks of traditional arbitration, more often than not means binding arbitration. There are many types of arbitration systems because parties can design them however they choose. Some procedures are informal allowing parties the opportunity to present any evidence they wish. Others apply rules of evidence, permit motion practice, and include other judicial procedures. Some permit discovery and some do not. "Arbitration hearings can be formal but the rules of evidence used in courts do not usually apply".[135] Arbitrations can be held with a single decision-maker and others can be held with a panel of three or even five. Arbitrations can be documents only, i.e. without the need for parties to present their positions in face-to-face hearings.[136] Another important distinction is between ad hoc and institutional arbitration. In ad hoc arbitration, one arbitrator or several arbitrators resolve the dispute outside of any institutional framework. The main problem with ad hoc arbitration is that in case of disagreements concerning mostly the arbitral tribunal,

[134] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 49.
[135] SHAMIR Yona, *op. cit.*, p. 38.
[136] RULE Colin, *op. cit.*, p. 42.

the parties have to recourse to national courts, something that normally parties want to avoid. However, the same problem does not exist with institutional arbitration, in which the institution provides a framework for the procedure, solves any disagreements or problems that arise, appoints the arbitrators, sets parameters for the award and generally provides a more stable foundation for the basis of the arbitration.[137]

B. *Choosing Arbitration*

Like in mediation, parties can agree to use arbitration to resolve their disputes when they sign their initial contract by including an arbitration clause, according to which all disputes that may arise from that relationship will be resolved through arbitration, respecting the conditions set out in the agreement as well as the law (pre-dispute arbitration). Another way to recourse to arbitration is after a dispute has arisen (post-dispute arbitration), but usually creates more difficulties since the parties may disagree on several points, even the preferred ADR method or details concerning it. However, once the parties have

[137] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 50.

chosen arbitration to resolve their dispute they renounce the right to regular recourse before the courts.

Fundamental attributes of arbitration are the autonomy of the parties across the whole spectrum of the procedure, and the binding nature of the decision adopted. The free will of the parties to choose the resolution of the dispute away from the state courts and the power to shape the terms and conditions for the arbitration procedure distinguish it from litigation.[138] Arbitration is a widely utilized ADR method particularly for commercial disputes and presents considerable advantages compared to litigation, with most important amongst them, the resolution of the dispute in a much faster and a less expensive way than litigation. Contrary to litigation in court, where there is publicity, arbitration takes place behind closed doors in a private and confidential manner. Furthermore, arbitration provides flexibility as the parties are free to agree on and shape several aspects of the arbitration, such as the tie and place of the arbitration procedure as well as the degree of formality. "Conventional wisdom suggests that businesses choose binding arbitration mainly because it is perceived to be different from litigation in several important to them aspects".[139] Cost and time savings, less formality, expert third neutral parties,

[138] STURGES A. Wesley, Arbitration- What is it? *New York University Law Review*, vol. 35, 1960, p. 1047.
[139] STIPANOWICH J. Thomas, Arbitration: The "New Litigation", *University of Illinois law Review*, 2010, p. 4.

confidentiality, and the finality guaranteed by the rendering of binding decisions, made arbitration a wide-ranging surrogate for civil trial, with arbitration provisions utilized in all kinds of contracts.

C. The Arbitrator

The arbitrator communicates with the disputing parties and, after taking into account their arguments as well as the evidence, renders a decision. This method of alternative dispute resolution is chosen mainly in the business sector where differences that arise must be adjusted individually by a specialist whose expertise will correspond to the nature of the dispute. The parties can choose the arbitrator, who will resolve their dispute. An arbitrator can be part of a court-annexed scheme, or an arbitrator who is not necessarily legally qualified; however, in some jurisdictions, such as France and India, arbitrators need to have a legal background.[140] Parties are free to choose an arbitrator who has "extensive legal and practical experience in the specific factual and legal issues in dispute".[141]

[140] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 4, 5.
[141] HEUVEL V. D. Esther, *op. cit.*, p. 5.

The arbitrator can be an expert on the field relating to the dispute in case such as an accountant or an engineer.[142]

However, since the arbitration process has a lot of similarities to the process in courtrooms, arbitrators often rely to a very great degree on the applicable law, relevant legal documents and contracts, and other precedent-setting decisions. Therefore, arbitrators are usually lawyers with legal expertise in the matters on which they are called in to decide.[143] The arbitrator hears the parties, assesses the relevant facts and arguments presented by each side, and after considering all evidence and respecting laws and procedures, the arbitrator issues a decision, which is called arbitral award. This process is very often less formal as well as much faster than the judicial process.

D. The Arbitral award

After the consideration of all relevant evidence, the arbitrator issues a decision, the arbitral award, which is legally binding, similarly to a court judgment, as well as final and not

[142] SHAMIR Yona, *op. cit.*, p. 38.
[143] RULE Colin, *op. cit.*, p. 42.

appealable, except in very limited instances. An arbitration award is final in the sense that awards have "res judicata" effect and once an award has been issued, unless the award is successfully challenged, the same matter cannot be brought before a court or arbitration tribunal again.[144] Decisions of an arbitrator can only be appealed to a court on narrow grounds, such as fraud or misconduct by the arbitrator. Errors of fact or law by an arbitrator cannot be appealed.[145] International Arbitration is greatly facilitated by multilateral treaties, mainly the "New York Convention", which regulates the recognition and enforcement of foreign arbitral awards. The arbitral award can be enforced in all countries that have signed the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)". One of the main reasons for the success of arbitration and its suitability for resolving commercial disputes is the ease for enforcing arbitral awards due to this multilateral treaty, which manages to ensure the recognition and enforceability of arbitral awards, in a way that is much easier than the recognition and enforcement of foreign court judgments.[146] The fact that awards can be easily enforced in any

[144] HÖRNLE Julia, *op. cit.*, p. 59.
[145] STONE V.W. Katherine, *Alternative dispute Resolution*, Public Law & Legal Theory Research Paper Series, 2004, p.1.
[146] "The Convention requires the courts of the some 125 signatory states to acknowledge written arbitration agreements, declare themselves incompetent to hear disputes that are subject to arbitration clauses, and enforce awards in accordance with criteria set out in its provisions. The New York Convention commits the states in question to recognizing and enforcing foreign arbitral awards in accordance with a regime that essentially restricts their legal authority to the protection

of the signatory states is one of the main reasons why arbitration is popular for US companies, since the United States do not have any treaties on the execution of foreign verdicts, but have signed the "New York Convention".[147] Besides the "New York Convention", arbitration is also greatly facilitated by the harmonization of national legislation as a result of the "UNCITRAL Model Law on International Commercial Arbitration" (1985). The finality and binding nature of arbitral awards make arbitration a unique and ideal method for the resolution of any kind of dispute and the only true alternative to litigation as a binding and enforceable avenue for redress.[148]

E. The hybrid forms

i. Conciliation

Conciliation is the process of peaceful settlement of disputes and the term conciliation means any activity for

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of public order, in other words, protection of the core values that would justify state intervention in the most liberalized system". See BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 51.

[147] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 4, 5.

[148] HÖRNLE Julia, *op. cit.*, p. 59.

harmonization or reaching a settlement between two conflicting parties. This process is intended to facilitate contact between the parties through the intervention of a third party, the conciliator, to achieve settlement of their dispute. Conciliation is characterized by the involvement of three parties, namely two parties between which there is a dispute and a third which aims to harmonize and improve relations between the parties. On 24 June 2002, the "UNCITRAL Model Law on International Commercial Conciliation" was adopted. According to Part 1, Article 1 (3), "the process of conciliation is defined as a process whether referred to by the expression conciliation, mediation, or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or related to a contractual or other legal relationship".[149]

In conciliation the third party undertakes to assist the parties to resolve their dispute, but cannot impose upon them a particular solution. Conciliation is different from negotiation because of the involvement of a third neutral party. Conciliation differs from arbitration in that the outcome of the conciliation depends on the willingness of the parties and the parties decide whether they will come to an agreement. The objective in conciliation is an amicable settlement rather than the

[149] UNCITRAL Model Law on International Commercial Conciliation, 2002, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

formulation of adjudicative crisis. The distinction from mediation is not always easy. French theory considers the boundaries between the two concepts blurry and the differences only in external features such as payment, referral time, etc., but essentially nothing changes. In both forms the parties trust the abilities of a third party who fulfills certain conditions. Perhaps a difference could be related to the submittal of a proposal by the third party. When this proposal or suggestion is submitted to the parties, then the process is called conciliation and when there is no such proposal it is called mediation.[150] The differences are small and hardly anyone could argue that there is real consistency in the controversy between mediation and conciliation, since they are used interchangeably, they provide similar services and have a common objective. The distinction is rather theoretical but conciliation is identified as a distinct method of ADR.

The commencement date and the conciliation procedure are designated by the parties and in case they have failed to do so, the conciliator may conduct the conciliation proceedings in such a manner the conciliator considers appropriate. Confidentiality and impartiality are two fundamental principles of conciliation. The conciliator must respect the information the parties entrusted and additionally should not serve as an arbitrator in

[150] HIBBERD Peter and NEWMAN Paul, op. cit., p. 59.

the process of conciliation, unless otherwise agreed by the parties. The role of the conciliator is to approximate the views of the parties and motivate them to enter into negotiations with each other in order to find a solution to the dispute. The conciliator is not primarily involved in the essence of the dispute, but is limited to achieving the appropriate climate for resolution. The continuation of discussions, the reassurance of tension, proposing measures to create favorable conditions for discussions, clarifying the proposals and counterproposals of the parties, finding extreme negotiating boundaries, and making mutually acceptable compromises for achieving agreements, are the most important tasks of the conciliator.

The conciliator is limited to one person only unless otherwise agreed by the parties. The conciliator's role is to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. The process begins with the submission to the conciliator of a written report from interested parties together or separately. When the report is communicated separately, it must be disclosed by any means to the other party with the care of the conciliator within three days. The report describes the case and clarifies the position of the parties. Conciliation, like other methods of ADR, has as its main characteristics flexibility and confidentiality. The confidentiality principle excludes

information whose disclosure is necessary to allow the presentation of appropriate explanations from the other party. Conciliation can be contrasted to the judicial route because of its non-binding nature and the right for the parties to participate actively in the process. Nevertheless, conciliation shares many common elements and principles with mediation, their distinction becomes truly difficult and are both considered as two of the most widely used alternative methods of resolving disputes.[151]

ii. Mini- trials

The term mini-trial is an American invention, which according to the English terminology, is encountered as either mini-trials or executive tribunal and describes an alternative method of dispute resolution ideal for corporate and commercial disputes. Usually it is used to solve major disputes involving complex matters combining legal and factual elements, such as product liability and antitrust cases, but where the parties wish to maintain a friendly relationship. It is voluntary and the parties can only freely agree to resolve their dispute by using

[151] HUNTER Martin, PAULSSON Jan, RAWDING Nigel, REDFERN Alan, *op. cit.*, p. 65.

the process of mini-trial. The process is informal, as there are no established procedures or rules of evidence governing the process. However, the parties agree on a set of rules governing the facts of the case and the evidence and these rules are defined in the agreement for the mini-trial. The process is voluntary and non-binding because generally there is no obligation for the parties to take part in the mini-trial and the opinion of the neutral third party is not binding; instead, decisions are only reached by the agreement of the parties. The greatest advantage of mini-trials is their informative nature, since, even if the procedure does not lead to resolution, it leaves the parties better informed about the case and the strength of their arguments. This is especially helpful for the resolution of the dispute through traditional litigation, which most often follows a mini-trial. Like other methods, mini-trial is characterized by flexibility and this practically means that through the agreement of both sides, a mini-trial can be adapted so that it meets the needs of each particular case.

Mini-trial utilizes and combines elements from the traditional techniques of negotiation, mediation and arbitration. The dispute is resolved by a three-member panel which consists of the neutral third party and a representative of each party. The neutral third party can be for instance a lawyer, a retired judge or an expert related to the subject matter of the dispute, or

someone who has extensive experience in resolving disputes. The third neutral party is a key person in the process and its role is mainly a coordinating role aiming to facilitate the procedure exactly as the neutral party in mediation. The representatives of the parties usually have the power to bind each side, so usually the people who are chosen have prestige and influence in the business or on the individual they are representing. The procedure to be followed in a mini-trial is not always given and differs depending on the specific circumstances of each case. Initially, the parties agree to settle their dispute through mini-trial and the agreement contains the obligations, the right to withdraw from the agreement or to terminate the process, the principle of confidentiality etc. In its modern form, this process takes place in the presence of real audience in a virtual court, composed especially for this occasion, which issues a decision that has no binding force but allows stakeholders to be informed about the arguments and positions of their opponents and also to listen to an objective opinion by a third neutral party.[152]

Although designed as a quick trial, it is actually a means to hear the parties and the view of the other side and attempt a settlement through negotiation. Prior to the hearing the parties exchange documents, evidence, short recommendations and summaries of witness statements, agree on procedure and on

[152] NAMMOUR Fady, *Théorie et Pratique de l'arbitrage interne et international*, (Editions Juridiques Sader), 2000, p. 15.

schedules, decide on the venue, the allocation of time, i.e. the time each party will have at its disposal, the witnesses of each side, the cost of process and all other details about the course of the procedure. During the hearing, each side summarizes the arguments of its case, as in a trial, with the difference that the cases are presented by the parties themselves and the presentations are shorter. The neutral third person normally presides over the process, making key questions, helping the parties to understand the issues, and if necessary, express an opinion. The representatives of the parties enter into negotiations, which are facilitated by the neutral third person who may be invited to present views in writing on the strengths and weaknesses of each opposing party's opinion. In the process of mini-trial, representatives may be more practical and creative in their negotiations, unlike with the traditional way of resolving disputes in the courts. The neutral third party has the role of a judge or arbitrator without being able to issue a binding decision. In the process, although there is evidence, deposits and a "judge" presiding, in fact there is no trial. The process is more similar than the other alternatives to the traditional court process, hence the name mini-trial, since the three-member committee reminds the synthesis of a three-member tribunal. This hybrid technique may present differing levels of assistance of a third neutral, but a neutral third party

often facilitates the procedures for the presentation of evidence, the debate among decision makers, and serves as a mediator to reach a solution. Mini-trials can be more expensive than most other ADR techniques because the cost of presenting evidence, but costs are considerably less than in litigation.

A mini-trial is similar to mediation because the parties in dispute are able to communicate their side of the story and are usually not bound by the outcome of the process, which, without the consent of the parties, cannot lead to resolution. However, there is a significant difference between mediation and a mini-trial. In mini-trials there are representatives for each of the parties. The parties present their arguments, but do not take active role in the negotiations. There are two reasons why the parties do not negotiate by themselves in a mini-trial. First, the parties involved in a dispute usually and understandably approach the issues relating to the dispute in a subjective manner instead of remaining distant and objective. The parties also may be biased or act based on emotion. Therefore, the representatives, who are more likely able to remain distant and detached, speak on behalf of their respective parties and usually handle the resolution of the dispute in a more objective manner. Secondly, the representatives in a mini-trial tend to be knowledgeable and experienced in such matters and can better categorize the opposing evidence and arguments. Finally, a mini-

trial differs from other forms of ADR, as it usually takes place after a formal action has been already brought. The parties to a lawsuit are waiting for litigation while the mini-trial is conducted. Thus, the mini-trial itself is not so much an alternative route for resolving the dispute, as for instance is the case with arbitration, but rather a temporary secondary attempt to come to an agreement before the commencement of the litigation proceedings. The outcome of the mini-trial is confidential and if it does not manage to resolve the dispute, the parties can go to court without it being revealed. As the biggest disadvantages of mini-trials, there should be mentioned the fact that mini-trials are not appropriate for all cases and the fact that mini-trials, when the parties will eventually seek legal remedy, increase the costs and may delay the resolution of the dispute.[153] Many specialized organizations provide settlement services through mini-trials and also provide third neutral parties. Such organizations are the "Centre for Effective Dispute Resolution" (CERD) based in London and the "Chartered Institute of Arbitrators". In the USA, similar services are provided by the "American Arbitration Association" (AAA).

[153] Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources*, (Edmonton, Alberta), 1990, pp. 26, 27.

iii. Med-Arb

Another hybrid process is the one known as Med-Arb, which as the name suggests is the result of combining mediation and arbitration. Parties prefer mediation because of the flexibility and initiative that offers them. In contrast, they prefer arbitration because of its binding decision. In practice, these two methods can often be viewed as complementary. Many times there is an effort to combine the key advantages of each method in order to achieve maximum effectiveness. This is achieved by a temporary or permanent conversion of arbitration to mediation and vice versa, depending on the nature, the course and the needs of the dispute. This approach is called multi-track or multi-step dispute resolution approach and is used more often in demanding construction projects and in the field of technology. For instance, such an approach was utilized in the construction contract of the new airport in Hong Kong, which provided for mediation and in case of failure for arbitration.[154] Since both mediation and arbitration are based on the principle of party autonomy which is a basic principle of contract law internationally, people can settle their disputes in any way they wish and the parties to a dispute can combine mediation and arbitration without the need to have rules issued in this matter

[154] CARROLL Eileen and MACKIE Karl, *op. cit*., p. 100.

by a national legislature or by an international organization. Party autonomy justifies the combination of mediation and arbitration. However, in order to answer the question of whether or not these two methods should be combined, it is essential to examine the different techniques of combining mediation and arbitration.

The first technique is the combination of mediation and arbitration, where mediation is used as the first method for resolving the dispute and if the parties do not reach an agreement, then the process is converted to arbitration and the arbitrator finally decides on the dispute.[155] The problem with this method is the fact that the mediator and arbitrator is the same person, therefore the success of this combination depends on the experience and skills of a person who conducts the proceedings. Another problem is the confidentiality of information and the risk of abusing information during arbitration. Furthermore, if there is the risk of the mediator and later arbitrator to use information in the arbitration proceedings, the parties may behave strategically during mediation rather than be concentrated in achieving a friendly settlement. Although it is clear that the mediator may not disclose confidential information and the arbitrator must take an impartial decision, however, the

[155] TELFORD M. Elisabeth, *Med-Arb: A Viable Dispute Resolution Alternative*, IRC Press, 2000, p. 1.

two different roles contrast each other.[156] An obvious advantage of this method is that it reduces the costs and increases the effectiveness of procedures and the time savings.

The second possibility of combined mediation and arbitration is that of the arbitrator also acting as a mediator. Arbitration proceedings are interrupted and mediation is attempted. If the parties cannot resolve the dispute through mediation, the neutral party returns to arbitration and takes a binding arbitration decision. This leads to the same problems as those of the combination of the first method, the difference lies in the order of these procedures. Again here the alternation of roles is the weak point; since the effort of the same person in two different roles in the same procedure for resolving a dispute may prove damaging if this person could be biased because of the previous role. Only a fairly experienced person with great self-control could act in such a procedure.

Another technique of combination of mediation and arbitration is the succession of the two forms of alternative dispute resolution but in separate procedures. The parties agree to mediation and if it is not successful, an independent arbitration procedure follows. Both procedures are carried out by two independent third parties. So none of the problems

[156] OGHIGIAN Haig, The Mediation/Arbitration Hybrid, *Journal of International Arbitration*, vol. 20, 2003, pp. 75, 76.

mentioned in two former combinations arise here, since there are two different persons, there is no information exchange and each procedure is governed by its own principles. Finally, there is the combination in which arbitration proceedings are suspended to commence mediation, but in two separate and independent processes. The right to request the suspension of the arbitration belongs to both the parties, and the third neutral. This combination also does not have the problem of alternation of roles or the risk of the misuse of information.

Summarizing, it can be said that the combination of mediation and arbitration provides considerable advantages, but at the same time is quite a risky venture. It is difficult in practice for a third neutral party, even one extremely experienced, to be able to act as both mediator and arbitrator or vice versa. This fact may create problems relating to the validity of the award and may have as a result that the parties to the dispute will not gain the benefits of either mediation or arbitration. The mere succession of mediation and arbitration does not constitute a real improvement compared to the "conventional forms" of arbitration and mediation. In contrast, the suspension of arbitration proceedings for mediation combines the advantages of mediation and arbitration in the best manner and combines the flexibility of mediation and the final

and binding nature of arbitration.[157] Med-Arb is a hybrid process and is considered as a separate ADR method, although has many common features with other procedures and specifically binding arbitration. Its main defect is that it lacks structure, which makes it practically a weak process that the parties to a dispute often ignore preferring a better defined ADR process.

iv. Ombudsman

A distinctive form of ADR is what is known as the Ombudsman, where an independent third party with experience and authority attempts a friendly resolution of the dispute. The Ombudsman's authority extends from the simple examination of complaints to the resolution of disputes.[158] The institution of Ombudsman was established originally in Sweden in 1713, when the Swedish emperor being exiled to Turkey, instituted the office of "Hogste Ombudsmannen", which would have an overview of the compliance of laws and the performance of duties by officials. The Ombudsman in Scandinavian means delegate. Subsequently, it was adopted by other Nordic countries

[157] CARROLL Eileen and MACKIE Karl, *op. cit*., pp. 101, 102.
[158] GREGORY Roy, The Ombudsman: An Excellent Form of Alternative Dispute Resolution, *The International Ombudsman Yearbook*, Vol. 5, 2001, p. 98.

(Finland in 1920, Denmark in 1953 and Norway in 1962), with several variations in particular as regards the scope and nature (e.g. the Swedish Ombudsman has expanded its powers to reach that of the public prosecutor), however in all those countries, the Ombudsman is a constitutionally protected institution. Today, the Ombudsman is found in several European, Anglo-Saxon, Asian and African countries. In Europe it has been adopted by almost all countries, for instance by Great Britain where the institution has a history since 1967, when the "Parliamentary Commissioner for Administration" was established, by France since 1973, where the "Mediateur de la Republique" is appointed by decree of the President of the French Republic and by Germany and Belgium since 1992. Internationally common features of the institution are the institutional independence and the immediacy of the exercise of its jurisdiction. The institution depending on each country is called "Defensor de Pueblo", "Human Rights Defender", "State Controller", "Mediateur de la Republique", and is tailored to the needs, the political, social and ideological traditions.

Since the 1980s the Ombudsman was adopted by private operators and particularly in the financial and banking sectors, in the context of self-regulation, and in an attempt to improve the image of each sector in the market. Such bodies are accessible to consumers without paying a fee for their services,

they deal with matters already addressed by the company as part of an internal procedure, they decide, or propose solutions, they are binding for the institutions that set them up and they do not prevent the recourse to litigation or other procedures.[159] The Ombudsman is a neutral third person, whose role is to resolve a dispute set in the form of a report or a complaint. The Ombudsman listens to the parties, examines their complaints and issues a decision or a recommendation. The Ombudsman seeks to address complaints by making suggestions and trying to persuade those responsible to modify their positions or just submit proposals to prevent recurrence of errors based on the same cause. Each of the parties shall discuss with the Ombudsman voluntarily and freely, expressing their complaints in confidentiality, discuss priorities and interests in order to define the scope for compromise and orient parties' choices to a commonly accepted solution abandoning the logic of profit and loss that characterizes the judicial controversy. The transparency in the functioning and effectiveness of the work of the Ombudsman is ensured through compliance with operating rules, the equal participation of the parties in the proceedings, the explanation of the grounds for the rejection of the request of the complainant and the publication of a report evaluating the process.

[159] STEYN H. Jan, Alternative Dispute Resolution: The Role of the Private Sector Ombudsman, *The International Ombudsman Yearbook*, Vol. 5, 2001, p. 134.

In order to guarantee the good operation and responsible management of the complaints filed, several organizations have been established such as the "British and Irish Ombudsman Association" (BIOA),[160] the "American Center for Public Resources", the "British Center for Dispute Resolution" and the "Nederland's Mediation Institute".[161] Organizations like these can have a supervisory role and can help promote uniform and smooth operation of private Ombudsmen, cultivating ethical guidelines and codes of conduct, training of personnel and making sure that the public is properly informed about their operation. Although there are concerns about classifying the Ombudsman as an ADR method, however, it is generally accepted that the mediating role of the Ombudsman is what makes it an ADR method.[162]

[160] JAMES Rhoda, *Private Ombudsmen and Public Law*, (Aldershot: Dartmouth), 1997, p. 223.
[161] DE ROO Annie and JAGTENBERG Rob, Mediation in the Netherlands: Past –Present-Future, Electronic *Journal of Comparative Law*, vol. 6, 2002, p. 4.
[162] BROWN J. Henry and MARRIOTT L. Arthur, *op. cit.*, p. 279.

Chapter 3

Advantages and Drawbacks of ADR

The third chapter of this part of the thesis is dedicated to the analysis of the advantages as well as the disadvantages of ADR. The demonstration is necessary in order to provide a full evaluation of ADR methods and to illustrate their importance for the resolution of disputes. Furthermore, as ADR and ODR share many commonalities most of the advantages and disadvantages of ADR will also apply to ODR. However, although this is definitely the case with regard to the advantages, as far as the disadvantages go, ODR manages to overcome some of them, as will be evidenced in the next part of the thesis.

Section 1: Advantages of the traditional ADR methods

The development, widespread acceptance and preference of alternative dispute resolution presuppose certain characteristics that differentiate ADR methods guaranteeing them a special position in relation to litigation. The advantages result from the

nature of the ADR methods which allow for a more informal procedure, faster and less costly, which in turn affects the relations between the parties, contrary to litigation which is inflexible, time consuming and costly. Despite the potential flaws of ADR, it should be noted that the much larger list of advantages, especially the speed of processing and the financial benefits, show the great worth of ADR methods.[163]

A. Confidentiality

A key positive feature of ADR explaining the popularity of these methods, especially in commercial disputes, is the guarantee of confidentiality in the process as opposed to litigation. Unlike court-based suits, where hearing a lawsuit may result in disclosure of business or personal data with predictable or unpredictable consequences, ADR offers the best guarantees of privacy because confidentiality is a precondition of an ADR process. The purely extrajudicial nature of ADR asserts that the procedure is a private matter between the parties and allows the parties to maintain the existence of rivalry and effort to resolve

[163] ROBERTS Simon, Alternative Dispute Resolution and Civil Justice; An Unresolved Relationship, *Modern Law Review*, vol. 56, 1993, p. 452.

the dispute away from public view, as opposed to judicial dispute resolution which requires publicity and so many times results to the compromising of important information.[164] Consequently, the confidentiality of ADR protects the parties from the unwanted disclosure of sensitive personal information that would potentially damage their reputation or interests.

B. Time and cost savings

ADR is more efficient than litigation in court, because it allows significant time and cost savings. Disputes settled through negotiation, mediation or arbitration, are usually resolved much faster than with traditional litigation since they are freed from the strict legal formalism of litigation. ADR typically resolves the dispute in a matter of several days, weeks or months as opposed to litigation where it can take up to several years.

In addition, ADR methods allow for significant cost savings compared to litigation, where the costs are usually considerably increased due to the great necessity for written

[164] HUNTER Martin, PAULSSON Jan, RAWDING Nigel, REDFERN Alan, *op. cit.,* pp. 71-73.

evidence and expert witness testimonies. The significant savings that only ADR can provide, become easily evident in disputes involving patent infringement, where "the American Intellectual Property Law Association reported that the total cost of a patent infringement suit through trial in the United States, in 1995, was between $500, 000 and $1.9 million, whereas the total cost through binding arbitration of a patent infringement claim was between about $99, 000 and $500, 000".[165] The fact that alternative dispute resolution methods are more cost-efficient has a significant impact on the parties. The cost advantages provided by ADR are further advanced by the faster resolution of the dispute. Consequently, the cost of ADR cannot be compared with the high cost of a prolonged judicial process.

C. Conciliatory function

Another important advantage of ADR is its conciliatory function. These alternative forms of dispute resolution which are voluntarily chosen by the parties involve cooperation, constructive communication, and the ability to rescue their

[165] CONA Frank, Focus on Cyber law: Application of Online Systems in ADR, *Buffalo Law Review*, vol. 45, 1997, p. 984.

prestige (save face), since the resolution of the dispute lies in approaching a common ground without winners or losers. ADR aims to cooperation, to the fair and acceptable reconciliation of opposing views and reaching a mutually acceptable agreement that meets the needs and interests of both parties resulting to a win-win-solution, i.e. a situation in which there are gains for both sides.[166] ADR "focuses on the opportunities for joint, rather than individual gain, oriented toward a positive sum solution rather than a zero-sum".[167]

Illustrating this is the famous example of a dispute regarding the ownership of an orange. According to it, there are two parties and both are claiming that the orange is their own. If this dispute were to be resolved through the traditional judicial route there would be a decision which would recognize that the orange belongs to one of the parties or possibly split the orange between them based on the legitimacy of each party's claim. However, if the same dispute was to be resolved through ADR, for instance mediation, the neutral would communicate more effectively with the parties and would reveal and focus on their actual purposes and interests, such as their intend for the orange. In the example each party has a different use for the orange; one wants to use the rind for perfume and the other wants the pulp for orange juice. The ADR process manages to

[166] FIADJOE Albert, *op. cit.*, p. 1.
[167] MANEVY Isabelle, *op. cit.*, p. 9.

find a fair and commonly acceptable solution that gives both parties what they want.

Furthermore, ADR advances social harmony, since (more so in those ADR methods that aim for settlements) "the parties do not engage in confrontation but rather in a process of rapprochement".[168] ADR empowers the parties to perceive the dispute as a common struggle that they will resolve, with and not against each other. The agreement that will result from the resolution of the dispute should reflect a shared vision for the future. It is a promise not only to resolve the current conflict, but also a baseline for differences that might emerge in the future. The settlement which is based on a friendly compromise of the parties' interests, allows them to continue the business or other cooperation for the benefit of themselves and their wider professional or social cycles, as in the case of custody of children after a divorce and commercial matters where the continuation of the relationship is crucial. Instead, in litigation the relations between parties are rarely restored, while sometimes controversy and collateral disputes are generated. Often both parties in litigation are dissatisfied with the outcome of the trial, because rarely court decisions fulfill their aspirations; so the possibility of reconciliation achieved through

[168] COM/2002/0196 final, *op. cit.*, p. 9.

ADR is considered one of the most important advantages of ADR.[169]

D. Flexibility

ADR methods are usually less confrontational than litigation due to the lesser degree of formality. The informal setting provides the parties with flexibility giving them greater latitude than in litigation. The procedure is controlled by the parties, who can agree on how formal or informal the resolution will be, "by choosing the forum, the procedure that will be followed and whether or not to take part in the proceedings in person or to be represented".[170] Moreover, the parties can adopt more than one ADR options, so as to increase the probability to reach a mutually acceptable agreement. The choice of ADR allows parties to form themselves the agreement, which can provide for any solution that settles the dispute even the prediction of future cooperation between the parties, which no

[169] LANGELAAR V. Anton, Dispute Boards as an ADR Mechanism on Construction Projects in Southern Africa, *Arbitration International*, vol. 70, 2004, p. 100.
[170] COM/2002/0196 final, *op. cit.*, p. 9.

judgment can order, since judgments consider the past, while ADR agreements may also handle the future.[171]

The flexibility extends to the neutral party as well as the outcome of the procedure. The parties can decide which organisation or person will be in charge of the proceedings and perhaps "select a neutral more expert in their dispute area than a judge".[172] Furthermore, the neutral party itself enjoys flexibility relating to the resolution of the dispute, since it is not bound by principles like the stare decisis of the common law judges, and their bargaining abilities entail creative solutions that no judge could possibly achieve.[173] Unlike a judge who focuses on the parties' rights, the neutral party in an ADR procedure focuses on the parties' interests and how these will be affected by the outcome of the resolution, allowing for creative solutions that cannot be reached through the traditional judicial route.[174]

[171] ALISON R. John, Five Ways to keep Disputes Out of Court, *Harvard Business Review on Negotiation and Conflict Resolution*, 1997, pp. 163-187 .
[172] MANEVY Isabelle, *op. cit.*, p. 9.
[173] BÜHRING-UHLE Christian, op. cit., p. 337.
[174] For instance, "a judge has to grant reimbursement of the price paid for a defective product if the plaintiff has a right to it. A mediator, who takes the parties' rights into account but is not confined to examining rights alone, is free to explore a more advantageous alternative solution for the parties, for example, replacement of the defective product by one of greater value to the plaintiff but less costly to the respondent than reimbursement". See BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 46.

Section 2: Drawbacks of the traditional ADR methods

First of all it must be noted that ADR methods are best suited to resolve disputes in which the parties do not seek to avenge legal rights because they are oriented to finding a solution based on compromises. Their best qualities are time and cost efficiency as well as flexibility. However, alternative forms of dispute resolution despite their numerous advantages described above, also present several drawbacks which have led to criticism especially because of the fact that these methods replace the traditional way of resolving disputes in the courts. Most criticisms concern the legality of the final solution achieved and the ability to enforce it, while others focus on the allegation that ADR provides a second class justice.

A. For The parties

The first set of drawbacks relates to the parties and the difficulties that may arise in their relationship. It should be noted that often parties who prefer the use of ADR methods, believe that this may be perceived as a weakness. However, this

can be avoided if in the original contract a clause is incorporated, which provides for the use of ADR in case a dispute arises.[175] Voluntary ADR methods cannot be effective if one of the parties is unable to negotiate due to strong emotional involvement in the dispute, if one of the parties has adopted very negative positions and views on the other, or if there is a big power imbalance between the parties making it harder to compromise and reach a mutually acceptable solution.

Another drawback of ADR closely connected to the parties but also to the settlement of the dispute, is the full dependence on the cooperation of the parties because for most ADR methods there is a lack of legal rules to facilitate the execution and finality of agreements.[176] Therefore, the resolution depends on the good faith of the parties, whereas without it "some parties may be using the process as a fishing expedition or simply to stall the litigation process".[177] Particularly, voluntary and non-binding ADR methods are solely based on the voluntary cooperation and compliance with the outcome the process, contrary to litigation where the court has the power to enforce its decisions.

[175] HUNTER Martin, PAULSSON Jan, RAWDING Nigel, REDFERN Alan, *op. cit*., pp. 71-74.
[176] TWEEDDALE Andrew and TWEEDDALE Keren, *Arbitration of Commercial Disputes, International and English Law and Practice*, (Oxford: Oxford University Press), 2005, pp. 5-6.
[177] NOHAN-HALEY Jacqueline, *Alternative Dispute Resolution in a nutshell*, (West Academic Publishing), Ed. 4, 2013, p.60.

B. For The procedure

As far as the procedure goes, most ADR methods lack the "procedural and constitutional protections of adversarial justice, such as the right to a jury trial and the right to counsel".[178] The absence of these safeguards creates doubts about the fairness of the final agreement. Furthermore, the lack of strict rules of evidence can lead to the presentation of irrelevant and superfluous material thus increasing time and money.[179] Others criticize ADR because it promotes compromise, which is a good way to resolve some disputes, but in others it is not appropriate; in conflicts over jurisdictional or moral issues, it will be difficult to bring about a compromise between the disputants.

Another disadvantage is the fact that the resolution of issues through ADR is private and thus it may lead to the public not finding out crucial information that could affect them directly or indirectly. For instance, if a company sold defective products and harmful to the health of consumers, by resolving the dispute through ADR, the company would not have to expose the problem publicly, something that would happen if the legal route had been followed. So an important issue that directly affects the health of consumers could remain hidden without the

[178] *Ibid.*, p. 59.
[179] BÜHRING-UHLE Christian, *op. cit.*, p. 339.

company being forced to take some drastic measures such as the withdrawal of the defective product from the market. Finally, third party neutrals are not bound by previous cases, which create a lack of precedent that does not help resolve latter cases. For most ADR methods the agreement is "binding between the parties as a regular contract and even in arbitration, the award has only res judicata as to each particular dispute".[180]

C. For Arbitration

Perhaps the greatest problem for most ADR methods is the inability to enforce the agreement when one of the parties refuses to comply. However, this not the case with arbitration, where the "New York Convention" greatly facilitates the enforcement of arbitral awards making arbitration the preferable method especially for commercial disputes. Arbitration has been portrayed, over the past several decades, "as a more efficient, less costly, and more final method for resolving disputes with

[180] MANEVY Isabelle, *op. cit.*, p. 10.

little or no discovery, motion practice, judicial review, or other trappings of litigation".[181]

However, arbitration has also been repudiated over the years. The arguments against arbitration relate to the concern that the scheduling inefficiency of arbitrators may void the time and cost savings normally provided by arbitration. Another concern relates to the fact that in arbitration, the attempt of arbitrators to increase efficiency, may lead to injustice, which will be harder to correct because of the difficulty of appealing arbitral awards.

Finally, over the past several years arbitration has witnessed a dramatic increase in the degree of formality to the extent that arbitration procedures may come to be very similar to litigation. Especially lately the situation has become even worse; nowadays arbitration has become formal, costly, time consuming and subject to hardball advocacy, "to the point that in the U.S. business arbitration is referred to in terms similar to civil litigation".[182] However, many of these problems disappear when arbitration is transferred to the online environment, an issue examined extensively in the following parts of this thesis.

[181] STIPANOWICH J. Thomas, *op. cit.*, p. 8.
[182] *Ibid.*, p. 9.

D. Remarks

In each case, however, we should note that it is entirely at the discretion of the parties to consider alternative methods beneficial or not for their dispute, to assess whether ADR techniques promote their interests and to decide whether to adopt or reject them. Only the parties can decide whether the judicial route of resolution or ADR is the most effective solution to save time and money and therefore are responsible for the way in which they resolve their dispute.

Judge Dorothy Nelson of the United States Federal Court of Appeals in San Francisco who traveled to Israel to monitor the application of the law of divorce in different religious groups, while monitoring the achievement of justice in a case resolved by three Orthodox priests, where the compromise proposed in the end satisfied both spouses who left the room hand in hand, made her wonder about the resolution of the same dispute through the traditional judicial method, with orders for appearance in court, lengthy meetings and the high cost of lawyers.[183] It should also be noted that the undeniable fact of the endless list of advantages of these methods, especially the speed and handling of cases and the economic benefits, deserve special

[183] ALISON R. John, *op. cit.*, p. 167.

attention and create the conditions for the extension of the use of ADR in a wide range of cases and particularly in the field of family, labor and commercial relationships.

Title 2

The Digital Era

As mentioned, ADR methods exist since the early days of civilization. However, the ways of communication and interaction have considerably changed over the years. For instance, "during the Middle Ages talking or writing about someone in one village or country would not affect others thousands of miles away and historically, conflicts are perpetuated by physical interactions, by people who know each other or who have at least seen each other".[184] The explosive growth of technological advances, particularly the development of the information society and the rapid spread of digital technology has created new standards worldwide, has affected significantly and adjusted many practices of social and economic life, heavily influencing the daily life of people and making evident the urgent need for gradual change of the legal framework governing these practices.

[184] WAHAB S. A. Mohamed, The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution, *Journal of International Arbitration*, vol. 21, 2004, p. 143.

The arrival of Internet technology[185] allowed people to interact with each other in an instance from anywhere on the planet. Today the Internet[186] is the largest computer system in the world; the most modern means of communication and probably the biggest communications revolution,[187] since it brings into direct contact people from all corners of the world. It is also called Net or Information Highway or Cyberspace.[188] The universality and global nature of the Internet,[189] which exists everywhere and nowhere at the same time, making borders unnecessary,[190] allows daily transactions to people all over the world. In the Cyber-world disputes may arise "over something that does not even physically exist or that can be changed with a

[185] "The Internet began in 1969 as experimental network called ARPANET and funded by the US Department of Defense to insure that its computer system would remain functional in the event of an enemy attack. In the 1980s, the National Science Foundation (NSF), the scientific and technical agency of the United States Federal government expanded ARPANET. In 1989, the name "World Wide Web" was invented by the European Center of nuclear research in Geneva. Then, the rise of popularity of the Internet in the United States coincided with the outsourcing in 1995 of the internet management from NSF to the private sector". See MANEVY Isabelle, *op. cit.*, p. 5.

[186] The term Internet derives from the words International / Interconnected / Network. For a definition, see MILLET J. Marcus, Same Game in a New Domain- Some Trademark Issues on the Internet, *New Jersey Lawyer*, vol. 198, 1999, p. 32. "Professor Chris Reed defines the internet as 'an open network which permits communication between parties without the need for both to subscribe to the same closed network'". See WANG Fangfei Faye, *Online Dispute Resolution - Technology, management and legal practice from an international perspective,* (Chandos Publishing: Oxford · England), 2009, p. 2.

[187] Data Protection Working Group, Privacy in the Internet, 2000, p.64

[188] Cyberspace: the term first appeared in 1984 in the science fiction novels of William Gibson "Neuromancer". Officially the term was first introduced in 1996 by the Federal Court of Pennsylvania, as means of communication and decentralized world, connecting people, organizations, companies, governments around the world.

[189] KRISTULA Dave, *The History of the Internet*, 2001, available at http://www.davesite.com/webstation/net-history.shtml

[190] GINSBURG C. Jane, Putting cars on the "Information superhighway": authors, exploiters, and copyright in Cyberspace, *Columbia Law Review*, vol. 95, 1995, p. 1467.

push of a button".[191] As a natural consequence, the increased exercise of the rights of free movement of people, goods and services[192] inevitably leads to the creation of online legal relationships involving more jurisdictions.[193] Initially, before the great expansion of the internet, the online legal relationships between users were limited mostly to online chat rooms without any economic relevance and the disputes that arose were limited to disagreements and use of foul language. Before the commercial use of the internet, online conflicts were mostly disputes between users who would get caught in "flame wars", with high tempered discussions and insults exchanged and where the attempt for resolution extended to the intervention by forum moderators in order to calm down emotions. Until 1995 the internet was mainly used by the military, governmental and academic sectors.However, the situation drastically changed once the internet began to be used for commercial purposes and led to what is today known as e-commerce.[194] It is only within

[191] ARSIC Jasna, International commercial arbitration on the Internet – Has the future come too early?, *Journal of International Arbitration*, vol. 14, 1997, p. 209.

[192] LESSIG Lawrence, SLAUGHTER Anne-Marie and ZITTRAIN Jonathan, Developments in the Law of Cyberspace, *Harvard Law Review*, vol. 112, 1999, pp. 1578, 1579.

[193] O' ROURKE A. Maureen, Fencing Cyberspace: Drawing borders in virtual world, *Massachusetts law Review*, vol. 82, 1998, p. 615.

[194] The term electronic commerce or e-commerce describes the sale and purchase of goods or services by electronic means, over computer mediated networks and particularly over the Internet. It includes transactions between businesses, households, individuals, governments, and other public or private organizations". See DUCA D. Louis, RULE Colin, LOEBL Zbynek, Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law), *Penn State Journal of Law & International Affairs*, vol.1, No. 1, 2012, pp. 58, 59.

the last ten years that commerce has increasingly been conducted over the internet, selling goods and providing services electronically.[195]

The popularity and extended use of electronic commerce had as a result the increase of "conflicts over contracts which have been entered into online, regarding price, late delivery, defects and specifications".[196] Before the Internet, cross border commerce was limited to large international companies, whereas consumers conducted most of their shopping locally. However, today cross border online shopping is available to anyone with a computer and an internet connection making problems like the non-delivery of goods and the difficulty obtaining refunds a daily occurrence. The internet, e-commerce and online disputes are inextricably connected to each other. The widespread acceptance and rise in the use of the internet leads to the increase of e-commerce[197] which in turn leads to the increase of

[195] WANG Fangfei Faye, op. cit., p. 2.

[196] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit*., p. `13.

[197] "In the late 1990s roughly between two and five percent of the world's population used the Internet. By 2010, however, that percentage had increased to nearly thirty percent, with users dispersed over every geographic region around the globe. The acceptance of the Internet as a commercial trading platform also increased and continues to increase as the number of commercial transactions that consumers complete online continues its meteoric rise, so too does the amount these consumers are spending. From 1999 to 2009, for example, the value of e-commerce in the United States alone expanded nearly 400% from $33 billion in 1999, at best, to $182 billion in 2009. At the same time, internet usage in the United States expanded from 36.6% of the population to an enormous 78.1%. For the period 2009-2015, e-commerce sales in the United States are projected to rise 10% a year to a total of $279 billion by 2015. For the period of 2010-2015 worldwide, e-commerce sales are projected to rise at the rate of 19% per year from a total $572.5 billion to $1.4 trillion in 2015". *Ibid*., pp. 59, 60

online disputes as rapidly as e-commerce itself.[198] In the past two decades the world has entered what can only be described as the digital era and the ever emerging new technologies such as the internet (which becomes more and more accessible every day even wirelessly), the new generation mobile phones, satellites and optic fibers allow for almost any activity or transaction to be performed online. The world has become a "drive through" (or "drive-thru") society; "as in the past drive through windows allowed customers to get their meals without stopping or leaving their cars, today, these convenience windows are provided for things such as marriage and political constituency services and continually more means are created allowing for banking, buying, transacting, and communicating quickly, conveniently, and without people leaving their cars, couches or computers".[199]

Therefore, the question that naturally arises is whether to adopt traditional dispute resolution methods for the resolution of online disputes or find a new resolution method which is better suited to the new reality of an increasingly virtual world. In the online world without borders, where complete strangers interact with each other from anywhere in the world, there is a greater possibility that the relationship may go awry because of

[198] "Between 1 and 3 % of all Internet transactions end up in some kind of disputes. Unofficial estimates put the number of online disputes into the hundreds of millions of cases per year, maybe even into the billions." See RULE Colin, *op. cit.*, p. 37

[199] SCHMITZ J. Amy, 'Drive-thru' Arbitration in the Digital Age: Empowering Consumers through Binding ODR, *Baylor Law Review*, vol. 62, 2010, pp. 179- 182.

misunderstandings, mistakes or simply fraud. For disputes arising out of these kinds of relations, the traditional means of dispute resolution i.e. the courts, prove to be inconvenient, time-consuming and expensive mainly because of the low value, the high volume of the transactions and the physical distance between the parties. Furthermore, courts are unable to keep up with the constantly evolving developments regarding online disputes.[200] In this online environment, dispute settlement faces new problems including the distance between parties, the difficulty of determining the applicable law and the competent jurisdiction and the enforcement of judgments. These problems create lack of effective redress and necessitate access to justice in the online environment.

Particularly one of the greatest problems of traditional court justice is the inadequacy of current private international law when applied to delocalized online disputes, creating problems relating to jurisdiction and choice of law. According to private international law the determination of jurisdiction and choice of law is based on the localization of the dispute according to certain conflict rules. However, this localization can be considerably harder in the delocalized online world. In the virtual world it can be very complicated and unpredictable to determine, for instance, the defendant's domicile or the place of

[200] CORTES Pablo, *Online Dispute Resolution for Consumers in the European Union* (Routledge: London and New York), 2011, p. 2.

the specific performance or the place in which the branch, agency or other establishment is situated. Regarding choice of law, again, it might be difficult to determine, for instance, the domicile of the parties, since they can access the Internet from anywhere in the world. The determination the jurisdiction and the law applicable in disputes, which are essential for legal certainty, are very difficult in online transactions. “Cyberspace transactions are in tension with the private international law rules, which are territorial and national in nature”.[201]

The rapid growth of Internet technology pointed once more to alternative dispute resolution. Very soon it became clear that the unique nature of the cyberspace and online disputes could not be resolved effectively by the traditional courts. In the case of e-commerce disputes, recourse through traditional judicial mechanisms presents several difficulties with most important the determination of the competent jurisdiction in a virtual world without boundaries, the choice of the applicable law and the enforcement of foreign judgments. These issues create complexities that at the very least make recourse a very time consuming and unaffordable process. Therefore, “as economic stakeholders search for law and justice equitable and adapted to their activities, they have no choice but to turn to mechanisms

[201] HERBOCZKOVÁ Jana, op. cit., pp. 2, 3

that utilize and challenge the freedom to contract".[202] The need for speedy, affordable and reliable justice brought forth once again the concept of Alternative Dispute Resolution.

But, even traditional ADR was evident not to be the most appropriate means. The characteristics of the Internet make traditional alternative dispute resolution unsatisfactory for many controversies that arise in the online world. The internet invites small entities and individuals that do not have the ability to participate in traditional ADR procedures especially if one accounts for the great travel expenses that accompany the global nature and the low value of online disputes. Furthermore, traditional ADR was better suited for resolving disputes between parties with pre-existing relationships, whereas the internet cultivates more stranger to stranger relationships.[203] For these kinds of disputes litigation as well as traditional ADR simply proves inefficient; in order to provide effective resolution the methods for the resolution of disputes had to be adapted to the electronic environment. A new dispute resolution system was needed that would provide effective solutions in a shorter time frame, with the possibility of using experts and all that with the cost being proportionally appropriate to the specific nature of online disputes.

[202] BENYEKHLEF Karim and GELINAS Fabien, op. cit., p. 35.
[203] PERRITT Henry, Dispute Resolution in Cyberspace: Demand for New Forms of ADR, *Ohio State Journal of Dispute Resolution*, vol. 15, 2000, p. 675.

Since such disputes normally generate from online activities in the Cyber-world, it would be reasonable to assume that there is where they should also be resolved. ADR appeared to be a particularly promising avenue when used in the virtual world. The proposed solution to handle such disputes was to use, rather than traditional court litigation or traditional ADR, online dispute resolution (ODR) mechanisms. The internet was already used by ADR practitioners, but in the beginning only as an information booth or clearinghouse of information for people who were first learning about ADR.[204] However, "from 1995 to 1998, informal online dispute resolution mechanisms were recognized as distinct from ADR and since 1998 they became an industry, especially in the United States".[205] Experimental projects such as the Virtual Magistrate at the Villanova University and the Online Ombuds Office at the University of Massachusetts had started by the mid-nineties and by 2001, commercial sites offering ODR services, such as "SquareTrade", "Cybersettle", "SmartSettle" in the US and ECODIR and "Médiateur du Net" in Europe had reached their peak. Not only that, but ODR has become a priority for all stakeholders in e-commerce from governments to businesses and consumer groups, as they realized the potential for an effective way to resolve

[204] VICTORIO M. Richard, Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century, *Pepperdine Dispute Resolution Law .Journal*, vol. 1, 2001, pp. 3-5.
[205] POBLET Marta, *Mobile Technologies for Conflict Management: Online Dispute Resolution, Governance, Participation*, (Springer), 2001, p. 8.

disputes. For instance, traditional offline arbitration and mediation institutions have been focusing on the possibilities raised by online technology. Furthermore, some statutory dispute resolution schemes that use ODR have been established but more importantly, recent years have also seen an amount of private entrepreneurial activity in the ODR field.[206] Resolving disputes over the Internet will play an even more important role in the future of electronic commerce.[207]

The following part of the thesis analyses in depth ODR and all its surrounding issues. It defines ODR, the technology used, the different forms of ODR and provides a comprehensive journey of ODR by examining real world ODR initiatives, from the first that appeared to ones operating successfully until this day. It demonstrates the numerous advantages of ODR and the few unwelcome drawbacks. This examination illustrates that ODR is not only a necessity dictated by the evolution in the way people interact created by the innovations of the digital era but also a viable and preferable solution for resolving disputes online.

[206] HÖRNLE Julia, *op. cit.*, p. 76.

[207] SCHULTZ Thomas, BONNET Vincent, BOUDAOUD Karima, KAUFMANN-KOHLER Gabrielle, HARMS Jürgen and LANGER Dirk, "*Electronic Communication Issues Related To Online Dispute Resolution Systems*", Proc. WWW2002 – The Eleventh International World Wide Web Conference – Alternate Track CFP: Web Engineering, Honolulu, Hawaii, conference on 7-11 May, 2002, p. 2, available at http://www2002.org/globaltrack.html

Chapter 1

ODR and its characteristics

This chapter is an in depth examination of ODR. It examines and defines the concept of ODR, illustrates the way ODR was born, identifies the contribution of the technology as the “fourth” party and analyzes the fundamental ODR methods.

Section 1: What is Online Dispute Resolution?

It is difficult to attribute an autonomous definition to ODR because of the fast pace of development in the field of information technology and because of the peculiar balance of the synergy between traditional ADR and ICT. The variety of terms used to describe the field of ODR might sound confusing even to the most familiar with the field; some include: “Technology mediated dispute resolution” (TMDR), “Electronic-ADR” (e-ADR), “Online ADR” (o-ADR) and “Internet Dispute Resolution” (IDR). Related terms are "virtual ADR", "cyber mediation" and "cyber arbitration". ODR was created from the

combination of ADR and ICT, as a method of resolving disputes that were arising online, "and for which traditional means of dispute resolution were unavailable or inefficient".[208] The primary methods of alternative dispute resolution were complemented with ICT and ODR started out as the conducting of ADR processes online.[209]

ODR has been a broad term that has covered many forms of dispute resolution incorporating the use of the Internet and other information technology as part of the dispute resolution process. Scholars initially defined ODR exclusively as ADR complemented with ICT tools; "however, part of the doctrine incorporates a broader approach including online litigation and other sui generis forms of dispute resolution that are assisted by ICT".[210] The letter definition for ODR incorporates all flexible methods used to resolve disputes that are conducted mainly through the use of ICT.[211] In this context, the term "online ADR" is used to refer to those methods involving primarily ADR methods assisted largely by ICT. However, in a stricter sense, the term "Online Dispute Resolution" (ODR) is used

[208] KATCH Ethan & RIFKIN Janet, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey Bass), 2001, p. 9.
[209] RULE Colin, *op. cit.*, p. 44.
[210] KAUFMANN-KOHLER Gabrielle and SCHULTZ Thomas, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International, The Hague), 2004, p. 5.
[211] For instance,"the ABA Task Force on E-Commerce and ADR provides a generic definition of ODR: ODR is a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the internet, websites, e-mail communications, streaming media and other information technology as part of the dispute resolution process". See WANG Fangfei Faye, op. cit., p. 25.

internationally to describe different forms of on-line extrajudicial dispute resolution. The main difference between traditional ADR and ODR is that instead of meeting face to face, the parties interact online.[212] Online Dispute Resolution is a new and evolved form of ADR adapted to the specific conditions of the Cyber-world; a branch of dispute resolution which differs from other non-judicial ways, because of its innovative and advantageous use of application development and computer networks for the resolution of disputes.[213] Therefore, in this thesis, ODR is considered as dispute resolution outside the courts carried out by using ICT and, in particular, Internet applications.[214] ADR aims to resolve disputes out of court and ODR is the application of technology to achieve the same goal.[215]

ODR methods are "ADR provided online, meaning that they are alternatives to litigation and to state justice, but not all methods are online ADR".[216] Like ODR, ADR is a debatable concept. In England and Wales, ADR is considered all methods for resolving disputes other than litigation. By contrast, in the United States ADR is generally referred to as "non-adjudicative"

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[212] HANG Q. Lan, Online Dispute Resolution Systems: The Future of Cyberspace Law, *Santa Clara Law Review*, vol. 41, 2001, p. 846.
[213] CALLIESS Gralf-Peter, Online Dispute Resolution: Consumer Redress in a Global Market Place, *German Law Journal*, vol. 7, 2006, p. 647.
[214] HÖRNLE Julia, *op. cit.*, p. 75.
[215] RULE Colin, *op. cit.*, p. 43.
[216] SCHULTZ Thomas, *Online Dispute Resolution: an Overview and Selected Issues*, United Nations Economic Commission for Europe Forum on Online Dispute Resolution Geneva, 6-7 June 2002, p. 2

dispute resolution, excluding arbitration and other adversarial proceedings. Similarly to ADR, in ODR there is a wide range of ODR mechanisms, however, ODR methods can be categorized in the same way as ADR methods.[217] Consequently, although in a broad sense of the term there is a numerous selection of ODR mechanisms, amongst them negotiation, mediation and arbitration are the most commonly practiced as well as the basis for most platforms.[218] In this thesis, the examination of ODR will be focused on the major ADR methods of negotiation, mediation and arbitration, in their virtual representation. These traditional ADR methods are transplanted into the online environment and adapted accordingly. This view is adopted as more accurately corresponding to the future of ODR. After all, it is considered preferable and more realistic to examine and attempt to improve online ADR methods that will benefit from the experience of the entire ADR movement than trying to "come up" with new ODR methods.

However, although ODR is based on ADR, the combination of ADR methods with technology is not a mere transplant but a transformation of the underlying ADR processes making ODR unique and with endless possibilities.[219] The use of the Internet

[217] SCHULTZ Thomas, BONNET Vincent, BOUDAOUD Karima, KAUFMANN-KOHLER Gabrielle, HARMS Jürgen and LANGER Dirk, op. cit., p. 2.
[218] BETANCOURT C. Julia and ZLATANSKA Elina, op. cit., p. 258.
[219] "To say that ODR is merely online ADR would similarly underestimate the transformative power of the technology […] in the same way as the argument that, for all forms of motorized

and the ICT tools in dispute resolution manifestly influences the traditional ADR processes (negotiation, mediation and arbitration) and changes the form of communication, creating new possibilities and advantages, but also creating new concerns, such as those relating to the security of online communications and data.[220] The following chapters of this part examine in depth all the new capabilities of ODR, in order to take advantage of them, as well as the drawbacks that need to be avoided.

ODR evolves existing ADR methods by the use of ICT tools "based on the assumption that certain disputes (and foremost e-disputes) can also be resolved quickly and adequately via the Internet".[221] ADR methods are assisted by the speed and convenience of ICT and the internet, which makes them better suited to the needs of cyberspace and especially e-commerce. However, ODR is suitable to resolve not only disputes that arise online or small claims arising from e-commerce disputes but ODR has also proven successful in resolving offline and large value disputes as shown by the example of "CyberSettle". Technically ODR can be used to resolve any kind of disputes

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transport, the horse that drew the cart has merely been replaced by an engine, but that the transportation itself has not changed". See HÖRNLE Julia, *op. cit.*, p. 76.

[220] "As ODR services began to roll out, some new wrinkles to the technology emerged. Some of the mainstays of face-to-face dispute resolution practice did not translate well into the online environment, and some capabilities of online dispute resolution were entirely new". See RULE Colin, *op. cit.*, p. 44.

[221] HEUVEL V. D. Esther, *op. cit.*, p. 8.

regardless of their origin (from the offline or the virtual world) and their nature.

However, there are types of cases that are better suited for resolution through ODR. There are specific examples of these better suited cases, such as disputes originating in Cyberspace where the use of ODR can avoid complex jurisdictional questions, disputes relating to domain names,[222] or intellectual property disputes, for the resolution of which the use of arbitration is considered highly suitable.[223] The protection of intellectual property in cyberspace cannot solely rely on civil or criminal sanctions but instead it would be more efficient for parties to choose neutrals who are experts and know the subject and customs of the matter at hand rather than expend resources teaching a judge or jury about complex technological issues and hoping they will grasp the issues.[224] Today, ODR is mainly used to resolve employment disputes, family disputes and commercial disputes, including those with cross-border elements.[225] However, generally ODR is less appropriate for fields "where legal constraints are higher, such as family law and taxation law,

[222] See infra at "ODR in action".

[223] "The development of digital communication has spawned a number of issues for intellectual property owners. With the use of new technologies, particularly the Internet, it has become much easier for intellectual property pirates to infringe upon intellectual property rights. For instance, copyrights in songs and movies are constantly infringed with their dissemination on file-swapping platforms such as Kazaa. Similarly, unauthorized hyperlinking, framing, and meta-tagging on the Internet could also violate copyright and trademark rights". See SHAH Aashit, Using ADR to Solve Online Disputes, *Richmond Journal of Law & Technology*, Vol. 10, Is. 3, 2004, pp. 4, 5.

[224] VICTORIO M. Richard, *op. cit*., pp. 21- 23

[225] CORTES Pablo, *op. cit.*, p. 2

because states are more sensitive to interventions in their sovereignty in these fields".[226] Furthermore, ODR methods are better suited for monetary disputes such as credit card and insurance claims rather than disputes that relate to recognition of rights, because of the nature of the cyberspace which involves numerous economic transactions and usually between strangers with no prior relationship. In monetary disputes ODR can provide a fast and easy resolution as is evident by the successful operation of several providers such as "clickNsettle" and "Cybersettle". For disputes that are purely economic such as in insurance claims, construction defect disputes, and e-commerce, ODR can help the bargaining process move swiftly and quickly, and may even preserve the contractual relationship. Where ODR is best suited to resolve disputes is in e-commerce where the use of ICT tools and methods can be utilized by businesses and consumers to resolve disputes that arise out of economic transactions. E-commerce transaction and the corresponding disputes are usually of low value and ODR allows for their resolution but at the same time manages to keep the costs proportionally low. Furthermore, in these cases the fact that the dispute arose over the internet suggests that the parties are already familiar with the peculiarities of the cyberspace and have all the necessary tools to resolve the dispute over the

[226] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, p. 13.

internet. ODR makes it possible to resolve lesser-value and cross-border disputes which simply could not be resolved otherwise, providing access to justice to parties that would not be able to find recourse otherwise. For e-commerce disputes, ODR is not just an alternative but often the only viable way to resolve disputes. E-commerce disputes arise out of commercial transaction that occur online and include three different categories based on the parties that take part in the transaction. The dispute may arise from a transaction between two businesses (B2B), or between private individuals i.e. consumers (C2C), or finally between a business and a consumer (B2C).[227]

The perspective adopted in this thesis regarding the nature of specific disputes will be a broad one so that the observations and conclusions reached can apply to the resolution of all kinds of disputes. However, when it is deemed necessary the thesis makes distinctions based on the nature of the dispute in order to address specific issues not common to all disputes. Such an example are B2C disputes where the power imbalance between

[227] "An example of an individual versus individual online dispute is when the buyer bids the highest price for an item auctioned by the seller through an online auction venue such as eBay. An online business may also find itself in a dispute with another online business. In one case, eBay sued another online auction site for trespass because the rival web site sent an automated query program, or 'robot', to search eBay's web site for bidding prices. This burdened eBay's computer network since the excess traffic to its web site by the robots took up valuable capacity". See CORTES Pablo, (2010) Online Dispute Resolution for Consumers, in WAHAB Mohamed S. Abdel, KATSH Ethan & RAINEY Daniel, *Online Dispute Resolution: Theory and Practice - A Treatise on Technology and Dispute Resolution,* (Eleven International Publishing), 2012, p. 151. Finally, "a B2C dispute may arise when an individual conducts business with an online merchant, for example when a buyer purchases a license to use software from a merchant through merchant's web site". HANG Q. Lan, *op. cit.*, pp. 4- 6.

the parties creates the need for protection of the consumer who is the weaker party and where ODR has a dual role of resolving disputes and increasing consumer trust, essential in the development of sustainable e-commerce.

Finally, in order to complete the definition of ODR, a more acute description of its online nature must be provided.[228] Today, ODR is not just a form on a website or simply the use of e-mail. ODR is understood as the use of sophisticated software capable of handling online administrative processes previously conducted offline; a significant part of the dispute process must be conducted online. ODR services must be able to perform online the major part of the dispute resolution procedure, from the initial filing of the dispute, to the appointment of the third neutral party, the presentation and evaluation of evidence, the conducting of oral hearings when applicable, the communication between the parties, and even the rendering of binding settlements. ODR is a distinct way to resolve disputes that takes place mostly in the online environment with the assistance of ICT, but at the same time respects due process.

[228] "ODR can involve automated negotiation processes administered by a computer, or it can provide world-class experts to administer binding arbitration procedures. 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 the administration of a small case". See RULE Colin, *op. cit.*, p. 44.

It would be difficult to establish a clear borderline between ADR and ODR.[229] ADR processes do not exclude the use of Internet communications such as emails; in the same manner ODR processes may be complemented by face to face meetings.[230] However, it is commonly accepted that ODR includes mainly those methods in which the use of ICT has a principal role in the procedure. A range of communication methods can be used, including: "Email (a virtually instantaneous transfer of mainly text messages), Instant Messaging (a variant on email that allows synchronous online chat), Online Chat (a synchronous, text-based exchange of information), Threaded Discussion (also known as bulletin boards, an asynchronous, textual exchange of information organized into specific topics), Video/Audio Streams (asynchronous transfer of recorded messages) and Videoconferencing (a synchronous transfer of video information)".[231]

[229] HÖRNLE Julia, Online Dispute Resolution: the Emperor's New Clothes, *International Review of Law, Computers & Technology*, vol. 17, 2003, p. 27.
[230] KAUFMANN-KOHLER Gabrielle and SCHULTZ Thomas, *op. cit.*, p. 5.
[231] RAINES S. Susan and TYLER C. Melissa, From e-bay to Eternity: Advances in Online Dispute Resolution, *University of. Melbourne Legal Studies Research Paper*, 2006, p. 4.

Section 2: Technology as a fourth party and the various ICT tools

In ODR the resolution of the dispute is performed not only by physical persons, but also "by computers and software, which provide an independent contribution to the management of the dispute".[232] In the offline world, dispute resolution is face-to-face; all communication happens by voice, either in the same room or over the telephone and the features of the place of meeting are of lesser importance.[233] On the contrary, in the virtual world the tools used to communicate substantially shape the way information is transmitted and the way messages are understood by the parties.[234] The influence of technology can be seen by the fact that ICT assistance has been characterized as the fourth party by the academia, which comes to be added to the traditional three side model, comprised by the two parties who are involved in a dispute, and the third neutral party.[235]

[232] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 93.
[233] "Occasionally one side or the other will submit a brief, such as in arbitration, but the vast majority of communications are voice-based. […] the neutral can do little more than arrange the room and table as everyone liked and ask questions to help the parties make progress". See RULE Colin, *op. cit.*, pp. 45, 46.
[234] CORTES Pablo, *op. cit.*, p. 85.
[235] WAHAB S. A. Mohamed, Globalization and ODR: Dynamics of change in e-commerce dispute settlement, *International Journal of Law and Information Technology*, vol. 12, 2004, p. 123.

The fourth party participates in the resolution procedure in different ways; at times it can substitute the third party, or it is frequently used by the third party in order to facilitate the communication between the disputants and the resolution process in general.[236] Some of the forms of assistance that the fourth party may provide include simple tasks like organizing information, shape writing communications between the parties and making them more polite and constructive, sending automatic responses to keep parties informed, stopping bad language and scheduling meetings. Others more complex may include evaluating and storing information, helping the parties to prioritise, and fostering brain-storming.[237] For instance, in online arbitration, the fourth party can play a significant role to structure the positions of the parties and a structured presentation of issues and statements allows the arbitrator to determine, almost immediately, the extent of the disagreement between the parties.[238]

The role of the forth party is not always limited to a mere assistant, since technology also strongly influences the way communications take place and even further in some forms of ODR the fourth party can displace the third one to significant

[236] GAITENBY Alan, The Fourth Party Rises: Evolving Environments of Online Dispute Resolution, *The University of Toledo Law Review*, vol. 38, 2006, p. 372.
[237] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 129
[238] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, p. 79

extend.[239] The transformative power of the fourth party can also shape the underlying ADR process and create new dispute resolution mechanisms, such as blind bidding negotiation, which has no equivalent in the offline world.[240] The fourth party adds value and can alter the third-party roles of mediator or arbitrator, since the third party will gradually rely more and more on the capabilities provided by ICT, the fourth party will increasingly become indispensable in dispute resolution with the experience and the realization that certain parts of how third parties handle disputes need to be reevaluated given the new tools that allow to change how and where interactions with parties might take place.[241]

Similarly to ADR, where lawyers initially questioned the need for a third neutral party to assist the disputants with the resolution; today many ADR practitioners are opposed to the involvement of the fourth party. Some dispute resolution professionals have criticized the concept of ODR and specifically the use of ICT tools with one of their main concerns being ODR's lack of face to face interaction between the parties, which would not allow the development of ODR.[242] However, the realisation that when dealing with online disputes that usually

[239] KATCH Ethan & RIFKIN Janet, *op. cit.*, pp. 32, 94

[240] "Technologies used are not merely subordinate tools in the same way that pen and paper pads are for recording an award or mediation settlement". See HÖRNLE Julia, *op. cit.*, pp. 86, 87.

[241] MOFFITT Michael & BORDONE Robert, *op. cit.*, pp. 432 433.

[242] EISEN Joel, Are we ready for mediation in cyberspace, *Brigham Young University Law Review*, vol. 4, 1998, pp. 1305, 1354.

are also cross border and low value disputes, ODR may be the only cost-effective manner of resolving them, "has convinced many dispute resolution practitioners to now recognize the value of the Internet and use it on a day-to-day basis, especially to provide, access, and exchange of information".[243] Furthermore, the argument about the lack of face to face contact becomes less and less accurate, since the development of ICT especially with the use of broadband connections and the ability to perform video-calls from all new generation cellular phones has made it possible for parties to present all kinds of information, even their feelings and emotions.[244] The electronic instruments facilitate the transmission of information and thus promote the communication between the two parties. Reliability and speed add to their value.[245] The use of modern technological media plays a role of primary significance in the ODR process and can prove very beneficial to the parties as well as to the ODR practitioner. In accordance with the principle of contractual freedom and the fundamental principle of party autonomy, the parties have the ability and the freedom to decide which electronic media will be used during the proceedings, or

[243] SYME David, Keeping Pace: On-line Technology and ADR Services, *Conflict Resolution Quarterly*, vol. 23, 2006, p. 345.
[244] CORTES Pablo, *op. cit.*, pp. 83, 84.
[245] GIBBONS Llewellyn Joseph, Creating a Market for Justice: A Market Incentive Solution to Regulating the Playing Field : Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration, *North-western Journal of International Law & Business*, vol. 23, 2002, pp. 1 , 4.

which will be excluded.[246] An ODR platform may employ various communication tools, each with different strengths and weaknesses, suitable more or less depending on the nature of each particular dispute and ODR method.[247] Some of these tools include the e-mail, chat and videoconference.

One of the most commonly used ICT tools in ODR is the use of e-mail for communication.[248] It is an electronic mail system through which parties can exchange all kinds of data. The only requirement is for users to have an electronic mailbox which is free and can be easily acquired online in a matter of minutes. Besides the classical messages via e-mail, parties can exchange data including documents, images, audio messages, spread sheets, programs and even voicemails (voice e-mail) where users record voice messages using a microphone (standard issued with any personal computer and mobile phone). Electronic mail is one of the most popular services of the Internet, the most common and clearly easiest form of electronic communication; it saves money, since the cost of sending messages is practically zero, and the internet now with one simple subscription is unlimited. Also it saves time since it provides fast communication, compared to traditional letters,

[246] DUMORTIER Jos and VAN EECKE Patrick, The European Draft Directive on a common Framework For Electronic Signatures , *The Computer Law & Security Report*, vol. 15, 1999, p. 2.
[247] RULE Colin, *op. cit*., p. 46
[248] CHAFFEY Dave, *Total E-mail Marketing*, (Taylor & Francis), 2003, pp. 86-123.

because messages reach millions of people around the world in seconds, i.e. in real time virtually zero. E-mail is the most basic ICT tool, easy to use, personalized, it has a fast download process and it does not require bandwidth since most messages are text based.

When integrated in ODR services email has the advantages of being an asynchronous communication which everyone is familiar with, it is very flexible for every type of dispute and enables the exchange of complex written information. Whereas in face-to-face dispute resolution processes, the communication is mostly in-person or over-the-telephone synchronous voice communication, e-mail has changed the dispute resolution process regarding the participant's notion of time by providing the option of asynchronous communication.[249]

Synchronous communication is direct communication, when minimal time is required for a message to reach the other party and for the latter to reply. Synchronous communication in the offline world is face to face communication or communication by telephone and in the online world communication through audio or videoconference. Asynchronous

[249] "Synchronous is when you and the other party are communicating in "real-time," and you are expected to respond to the other side as soon as they finish making their comments. Phone and face-to-face interactions are both synchronous communications. Asynchronous communication is when you and the other party are not communicating at the same time. When you get a message from the other side you are not expected to respond immediately. Sending letters back and forth through the mail is asynchronous, and posting messages on an online bulletin board or discussion forum is also asynchronous". See RULE Colin, *op. cit*., pp. 47, 48.

communication is when the parties do not communicate at the same time, one party's message does not reach the other immediately nor does the latter reply. Asynchronous communication is the communication via e-mail or text messages. Asynchronous communication provides parties with more time and space to read a message, to understand its meaning and more calmly consider the relevant issues of the dispute. Furthermore, because messages are saved, an email account also serves as a storage facility. However, it may slow down the rhythm of the communication and make it more difficult to discover the root of the problem. Although there are benefits of synchronous as well as asynchronous communication and which communication form should be preferred depends on the nature of the dispute and the parties involved, however, both forms of communication can be combined; an example of a provider supporting both is the Italian provider "Risolvionline", which offers both e-mail and chat.[250]

Currently, e-mail is an essential facilitator which complements ODR as well as ADR for providing information, scheduling, brief contacts, etc. Its main disadvantage is that e-mails in most cases are not encrypted, which would allow third parties to read them and recipients to forward them to others. These issues concerning the security and privacy of the

[250] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 73, 74.

communication can be tackled through the use of encryption technology (cryptography).[251] Unfortunately, the assessment of such complex issues requires specific technical knowledge and usually not easily accessible to the average user.[252] However, as seen in the next part of this thesis, ODR providers can use appropriate technological tools and ensure the security and confidentiality of the communication.

Chat and Instant Messaging (IM) are ways to directly contact a number of people, who are concentrated in a particular Web site called "chat room" by typing text messages to each other through a software application in real-time. Chat and IM differ from e-mail in that the text exchange is faster. Although Chat and Instant Messaging are very similar methods their main difference is that chat exchanges are more synchronous than IM

[251] "The word cryptography is composite word. The first component is 'crypto' and the second component is 'writing'. So then, cryptography means hide what I write. Cryptography is the science or art of concealment of writing from unwanted readers. Cryptography was originally the art form the secrets of which knew only a select few. The history of cryptography begins around 4000 B.C. in ancient Egypt and in ancient Greece according to references by the historian Polybius. The first encrypted text dates in 1500 B.C. Babylon associated with the preparation instructions for the manufacture of enamel-painted clay pots. The earliest known encryption device is the 'baton' which was used by the Spartans". As seen at Encyclopaedia Papyrus Larousse Britannica, vol. 36.
"The most striking development in the history of cryptography came in 1976 when Diffie and Hellman published 'New directions in cryptography'. In 1978 Rivest, Shamir and Adleman discovered the first practical application of the proposed scheme. It was called the RSA scheme and was based on a hard mathematical problem, namely the difficulty of factoring large integers which ensures confidentiality in digital communications so the message can be read only by the addressee, as in the intermediate stages, the message appears with unintelligible characters, i.e. unreadable". See KUMAR Anil, Network Security and Cryptography, *International Journal for Scientific Research & Development*, vol. 2, 2014, p. 845.

[252] AALBERTS Babette and VAN DER HOF Simone, *Digital Signature Blindness: Analysis of Legislative Approaches toward Electronic Authentication*, (Kluwer), 2000, p. 16.

exchanges because they appear in a single "window" contrary to IM where there are separate "windows" that usually pop-out when the message is finished and sent to the recipient.

The previous ICT tools are based on written communications. One the one hand, this provides parties with the ability to separate emotions from the issues in disputes and to choose words more carefully when they appear in writing. The main disadvantage of Chat and Instant Messaging is that it is a very textual method to resolve disputes and "lacks non-verbal communication such as postures, facial expressions, gestures and tone of voice",[253] a fact which makes it more difficult for the ODR practitioner to establish trust between the parties and confidence in the process. Furthermore, some users are more able to express efficiently by writing and others who type slower will quickly get frustrated.[254] Another problem with chat and IM is that parties tend to write fast and short messages, which may encourage escalations of insults and misunderstandings; these miscommunications happen more often because of the loss of body language, voice inflection, facial expressions, etc. Most exchanges are mainly text format, though popular services, such

[253] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 141.

[254] For instance, "If one side types thirty words per minute and the other types ninety words per minute the latter party can get in three words for every one of the other side. There will undoubtedly be delays as one side or the other makes their points, but the thirty-words-per-minute party will probably get frustrated as he struggles to keep up with all the points coming from the other side. This frustration will likely degrade the quality of the discussion as well, as the parties become more focused on getting their points in than thinking through what they really want to say". See RULE Colin, *op. cit.*, p. 52

as, “MSN Messenger”, “Yahoo!”, “Skype” and “Apple's iChat”, now allow voice messaging, file sharing and even video based communications.[255]

Today the advancements of technology as well as the high internet speed reached allow for much more complex communication tools such as audio and videoconference, which are technological breakthroughs in ODR. Audio conference is a completely synchronous means of communication that allows a voice based dialogue between multiple parties. Videoconference is a live connection between people usually involving audio, text and video communications. In its simplest form the communication can be the exchange of text or images between two parties, whereas more sophisticated forms include the transmission of high-quality audio and video. Today most software platforms allow for both audio and video conference as well as document-presentation and application-sharing feature; that is the immediate presentation and exchange of electronic documents. However, the most important and revolutionary aspect is the video-communication from a distance, which can be used to replace the traditional face to face meetings and hearings of witnesses.[256] The main advantage is that the parties, the ODR

[255] HILL Richard, Online arbitration: issues and solutions, *Arbitration International*, vol. 15, 1999, p. 199.

[256] “Video has been considered the ultimate ODR technology. Once parties can see each other and the neutral, some observers have reasoned, little incentive remains to ever bother getting together face to-face”. See RULE Colin, *op. cit.*, p. 54.

practitioners or the witnesses do not have to travel, thus saving time and money.[257] The only necessary requirements to perform a videoconference include the acquisition of the appropriate software which can easily be downloaded even for free by many providers such as Skype.com[258] and the use of a webcam, which nowadays is provided almost as a standard accessory with any personal computer. Videoconference allows for face to face (F2F) communication which consequently adds to the ODR procedure the formally missing non-verbal cues. Even though there are some concerns about the quality of the video link and the tribunals ability to evaluate testimonies through such a means;[259] these issues become less and less concerning each day due to the fast pace of technological development. Videoconference provides several advantages such as the ability to record the proceedings which helps to memorialize the points of agreement, prevents fraud and allows parties to go back and review parts of it. Furthermore, the virtual nature of videoconference creates a safe distance between parties preventing one of them to dominate the other.[260] Conducting videoconference calls can be necessary for high value disputes

[257] HOFFMANN A. David, The Future of ADR, Professionalization, Spirituality and the Internet, *Dispute Resolution Magazine*, vol.14, 2008, p. 6.
[258] The last 5 years Skype has become one of the most commonly used computer applications in the world, to an extend which led to coined phrases such as "I will Skype you" or "Skype you later".
[259] HÖRNLE Julia, *JISC Legal Briefing Paper: Online Dispute Resolution*, 2004, p. 10 available at www.jisclegal.ac.uk
[260] MOEVES S. Amy and MOEVES C. Scott, *op. cit.*, pp. 19-21.

or more complex ones such as those related to family law, rather than low value consumer or financial disputes, where less complex tools such as the email may be enough.[261] However, presently it seems that ODR development tends to incorporate audio and videoconferencing with textual communications.

Minor concerns have been expressed about whether virtual face-to-face is actually face-to-face communication. The fact that the parties are not really in the same room may result in lack of well-organized cooperation and may disrupt the constructive relationship between them. For example, during a long teleconference problems may arise such as the difficulty to assemble and the parties may find it exhaustive to stare at a screen constantly for a large amount of time. However, the main concern lies around the fact that the use of such a tool would be inappropriate and even unfair to parties who lack the necessary experience in this type of technology. A satisfactory answer to this concern would be the proposition of a trial run before the actual proceedings to familiarise the parties with the procedure.

Presently, the extensive use of broadband and the exponential advance of ICT, which is apparent from the advance of computers and Internet connections in the last decade, are creating opportunities for new multimedia and higher

[261] SCHULTZ Thomas, *Information Technology and Arbitration: A Practitioner's Guide*, (The Netherlands: Kluwer Law International), 2006, pp. 168-169.

technology.[262] New ICT tools may be available for ODR in the forthcoming future, "such as virtual meeting rooms, holographic images and AI and ICT will become smarter, smaller, safer, faster, always connected and easier to use, with content moving to three dimensional multimedia formats".[263] Already, what was seen as science fiction before ten years seams today an everyday reality, as users can make video-calls and almost everything, which could formerly be done only with the use of personal computers, from their handheld devices and the new generation mobile phones.[264]

Although the use of electronic media is really a novelty, their application in practice may create some difficulties.[265] The technological developments in electronic communication are accompanied by risks such as the challenging of electronic documents and the collection of personal data in an unlawful manner, actions that could jeopardize the ODR process and make it dependant on the quality of the software.[266] This implies that using the advantages of electronic commerce and electronic

[262] KATSH Ethan and WING Leah, Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future, *University of Toledo Law Review*, vol. 38, 2006, p. 27.
[263] COM (2005) 229 final, Communication from the Commission to the Council, European Parliament, the European Economic and Social Committee and the Committee of the Regions, i2010 – A European Information Society for Growth and Employment, 3.
[264] "If wireless access becomes the norm, people may have the ability to engage in dispute resolution procedures on their handheld devices or cellular phones". RULE Colin, *op. cit.*, p. 300.
[265] STYLIANOU Paul, Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Gross- Border E-Commerce Disputes, *Syracuse Journal of International Law and Commerce*, vol. 36, 2008, pp. 117, 124.
[266] KATSH Ethan and WING Leah, *op. cit.*, p. 30.

communication to the maximum extent can be challenging.[267] This is why it has been argued that the virtual rooms, videoconference, e-mails and many other electronic media can contribute to the evolution of ADR, but provided that the main role is to facilitate.[268] But, it seems more logical to argue that the use of electronic means in the process of ODR can prove very beneficial and even replace the traditional means of dispute resolution as long as they satisfy all the necessary safety requirements, uphold the integrity of communications, respect the principles of good faith and the consumer protection provisions[269] and define the exact way the electronic communication of relevant parties, will be held; in short, ICT tools are valuable when used in the right way and in appropriate cases,[270] since their efficiency depends on the appropriate combination of ICT tools and traditional methods for the specifics of the dispute.[271] Therefore, ODR providers and third party neutrals must be aware of the various ICT tools, the advantages and disadvantages that the use of each of them

[267] For instance, "a difficulty in the growth of ODR is to devise technology which would be compatible between different users and providers. This is important when ODR users may need to store and exchange evidence and other documents. To such end there are ongoing efforts to develop ODR-XML (Exchange Markup Language), which is a variant of XML that enables information exchange among ODR systems, providing a standardized system". CORTES Pablo, *op. cit.*, pp. 83, 84.

[268] HILL Richard, *op. cit.*, p. 199.

[269] LOPEZ-TARRUELLA Aurelio, A European community regulatory framework for electronic commerce, *Common Market Law Review*, vol. 38, 2001, pp. 1337, 1339.

[270] WAHAB S. A. Mohamed, Does technology emasculate trust? Confidentiality and security concerns in online arbitration, *International Court of Arbitration Bulletin Special Supplement on Using Technology to Resolve Business Disputes*, 2004, p. 43.

[271] SYME David, *op. cit.*, p. 346.

entails, in order to apply the tools most appropriate for each dispute.

Section 3: ODR forms

As stated, ODR in a broad sense may include numerous mechanisms, basically any method that resolves disputes through the use of ICT tools and particularly the internet. In this sense ODR can be considered as not a predetermined concept but as a continually evolving concept that includes any dispute resolution process that uses ICT and that may be born out of public of private initiatives.[272] Therefore, ODR can be divided to sui generis ODR (ODR in the broad sense), which includes all methods of dispute resolution that are based on the innovative technologies such as the internet and ODR in a strict sense, which includes mainly online ADR. This thesis adopts the latter of the two distinctions. As in traditional ADR, ODR services provide a gamut of ADR possibilities, from direct negotiation to binding arbitration.[273] However, the standard typology of ODR systems mainly includes automated negotiation, computer

[272] CORTES Pablo, *op. cit.*, p. 54.
[273] RULE Colin, *op. cit.*, p. 44.

assisted negotiation, online mediation and online arbitration.[274] This is because these methods are the most commonly used and preferred by ODR providers. But, also because an ODR system based on traditional ADR techniques takes advantage of the invaluable experience of the ADR movement.[275] Another distinction that will play an important role in tis thesis, is between consensual and binding forms of ODR. This distinction is based on whether or not the result of the dispute resolution process is binding for the parties and enforceable or it requires the voluntary adoption of the settlement by both parties. According to this distinction, non-binding ODR forms include online negotiation, online mediation and non-binding arbitration whereas the only binding form is binding online arbitration. Depending on the nature of the dispute one or the other method may be more or less suitable for its resolution; for example for purely monetary disputes negotiation can be adequate, but the same cannot be said for more complex disputes, such as disputes relating to partial or total liability, or when the disputed fact is

[274] SCHULTZ Thomas, The Roles of Dispute Settlement and ODR, in A. Ingen-Housz, *ADR in Business: Practice and Issues across Countries and Cultures*, Vol. II (Kluwer Law International BV: The Netherlands), 2011, p. 138.

[275] "ODR as online ADR will be more effective than new specific forms of dispute resolution once it can benefit from the legal instruments developed for ADR, which may only be a question of time. And ODR may evolve in the direction of ADR, because just as lawyers have conquered the ADR movement, injecting formalities drawn from their judicial experience, they are likely to conquer ODR, injecting formalities drawn from their ADR experience". See SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, pp. 3, 4

the payment of goods or services.[276] This section examines the basic characteristics of each of these methods.

A. Online Negotiation

In the age of the internet and e-commerce, negotiation has evolved and the use of new communication tools and software facilitate the goal of reaching an agreement. Negotiation has moved off the court corridors and law firms on to the Web, which resulted in the advancement of the idea of electronically based negotiations.[277] Instead of being confined to a few meetings, the online environment assists the communication between parties making negotiations easier. For instance, it is more possible for the parties to come to an agreement, if there is the ability to resolve issues and details about the agreement without having to travel each time for the meeting. Many integrated ODR programs[278] now add a negotiation stage before the mediation or arbitration process begins.[279]

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[276] CORTES Pablo, *op. cit.*, pp. 163, 164

[277] BETANCOURT C. Julia and ZLATANSKA Elina, *op. cit.*, p. 259.

[278] For instance Online Resolution offers blind bidding as a standard feature in its 'Resolution Room' process". See www.onlineResolution.com

[279] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, pp. 44, 45.

In ODR, negotiation can be a traditional process that uses technology as the communication medium, but also the use of technology can have a transformative effect on the process and negotiation can become an automated procedure, which uses algorithms to drive the negotiation process.[280] Therefore, negotiation in its online manifestation comes in two different forms; that of automated negotiation (also called blind-bidding or Single Variable Blind-Bidding Process[281]) and that of assisted negotiation (also called facilitated negotiation). The common point in both forms of negotiation is that no physical third-party person normally intervenes in the process. Other than that there are significant differences.

Automated negotiation does not highly resemble its ADR equivalent. The negotiation process involves the submission of offers (bidding) by both parties for the potential settlement of the dispute. These offers are not disclosed to the other party; hence 'blind' bidding.[282] The settlement proposals are in the form of monetary figures and the parties can usually submit up to three offers. A computer compares the settlement offers, and calculates the spread between them, either in the form of a percentage or of an amount of money. If the offers are within

[280] RULE Colin, *op. cit.*, p. 56.

[281] SCHMITZ J. Amy, 'Drive-thru' Arbitration in the Digital Age: Empowering Consumers through Binding ODR, *Baylor Law Review*, vol. 62, 2010, pp. 13, 14.

[282] "Offers and demands remain confidential, so as to not prejudice future negotiations". See PONTE M. Lucille and CAVENAGH D. Thomas, *CyberJustice: online dispute resolution (ODR) for E-commerce*, (Pearson/Prentice Hall), 2005, p. 44.

certain limits (usually from 30 to 5 per cent), the software sets the settlement at mean value; if they are not the parties are asked to enter a new settlement proposal until the number of rounds or the time-limit has expired. The simplicity of the process can be illustrated with a simple hypothetical. For instance, if the settlement range is 20% and one party offers eighty and the other a hundred, the dispute will be automatically settled for ninety.[283] The fact that the process is driven by software and no human third party is directly involved, makes the process particularly cost-effective and removes considerations of bias.

It is a particularly successful process designed to determine the economic settlement for claims in which the facts are not challenged, such as with insurance compensations and commercial activities, since it splits the difference when the amounts are close. It can also effectively be used in those cases "where initially a number of issues are at stage, but after the use of mediation for example, the only remaining issue in dispute is the agreement relating to an amount of money".[284] There are minor concerns about the advantages that repeat users, familiarized with the process may have compared to one- time

[283] SCHULTZ Thomas, The Roles of Dispute Settlement and ODR, *op. cit.*, p. 138.
[284] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 62.

users and about the failure to provide trade-offs[285] which often may result to suboptimal settlements.[286]

However, currently automated negotiation is quite successful and is offered by several providers such as "CyberSettle".[287] "CyberSettle" has been one the first providers using automated negotiation for the resolution of financial disputes, with most common amongst them insurance disputes. The claimant accesses the provider and initiates the dispute resolution process from a private and secure account by entering three different amounts (bids) as proposals for the resolution of the dispute. The ODR provider then contacts the other party who is asked to also to enter three bids. The software compares the proposed amounts and calculates the distance between them. If the difference between any of the amounts proposed by the disputants does not exceed a percentage of 30% or the amount of 5,000$, the claim is settled for the mean amount, and the provider notifies the parties. However, if the difference is greater and there is no settlement, each party's bids remain confidential. "If a case fails to settle, there is no fee charged to either party. If a case settles for $5, 000 or less, the fee is $100 for each party. If a case settles for between $5, 000 and $10,

[285] WEISS Russell, Some Economic Musings on Cybersettle, *University of Toledo Law Review*, vol.38, 2006, p. 89.
[286] DEFFAINS Bruno & GABUTHY Yannick, Efficiency of Online Dispute Resolution: A Case of Study, *Communications &Strategies*, No. 60, 4th Q., 2005, p. 205.
[287] For more information visit www.cybersettle.com

000, the fee is $150 for each party. If a case settles for more than $10, 000, the fee is $200 for each party".[288] Another example is ECODIR's negotiation software offering a dynamic table of "bids and counterbids designed to lead to agreements as quickly as possible".[289] Furthermore, other ODR providers with similar services are the "Mediation Room" and "SmartSettle One".[290] The main advantage of automated negotiation is that it has the potential of saving money and years of litigation to both parties. The main disadvantage is that it is technically restricted to purely monetary disputes excluding non-monetary issues. "The fees for automated negotiation are usually determined on the basis of the settlement amount and split between the two parties; for a settlement amount below 20.000 USD, the fee is typically around 100 to 200 USD".[291]

Blind bidding negotiation besides resolving purely monetary issues, might also be used before beginning a lengthier process as well as a valuable tool that can be added at any phase of a dispute resolution process. However, most of all it raises the question of what else a network-connected computer can do to facilitate the resolution of a dispute, since computers, "are

[288] MANEVY Isabelle, *op. cit.*, p. 12.
[289] BENYEKHLEF Karim and GELINAS Fabien, op, *cit.*, p. 45.
[290] CORTES Pablo, *op. cit.*, p. 65.
[291] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 5.

much more than calculators, and systems can be built to process and evaluate qualitative information".[292]

Assisted negotiation is the form one might find more familiar since basically it is the corresponding ADR method assisted by online facilities. The parties negotiate to resolve their dispute and in the process they use one or more of ODR's ICT tools, such as the internet in general and more specifically e-mail, chat or audio and videoconference. The procedure is designed to improve parties' communications through the assistance of software enhancing the advantages of the process such as informality, simplicity and user friendliness.[293] The provider assisting the parties may provide some additional services such as identifying and assessing standard solutions, writing agreements or storing information. Assisted negotiation is a highly successful ODR method with highly used providers such as "Square Trade" and "SmartSettle".[294] "The fee range is normally between 50 and 300 USD per party and per hour".[295]

[292] MOFFITT Michael & BORDONE Robert, *op. cit.*, p. 431.
[293] CORTES Pablo, *op. cit.*, p. 66.
[294] "SmartSettle, originally called OneAccord, is much more sophisticated negotiation software than the blind bidding systems. SmartSettle is intended for use in disputes that are simple or complex, single issue or multi-issue, two party or multi-party, composed of quantitative or qualitative issues, of short or long duration, and involving interdependent factors and issues". WANG Fangfei Faye, op. cit., p. 57. For more information see www.smartsettle.com
[295] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 4.

B. Online Mediation

Online mediation is the online equivalent of traditional mediation with the only difference in the fact that the parties communicate online, often over sophisticated communication platforms. Online mediation is a non-binding extrajudicial dispute resolution method in which the parties agree to use the opportunities provided by the Internet and conduct the procedure online by replacing the physical meetings of the parties with communication based on electronic transmissions.[296] Using their personal computers, parties can communicate with each other from the far corners of the earth. Technology plays an important role because communication is central to mediation in order to reduce tensions and reach a voluntary settlement agreement.

Because mediation is less formal, it is highly suitable to the online environment and the internet offers participants an enhanced role in resolving disputes. The online mediation process is usually initiated by one of the parties, who visits the website of the online mediator or mediation organization and files a dispute. The provider then contacts the other party to find out whether they are willing to participate in an online

[296] United Nations Conference on Trade and Development, Dispute Settlement , International Commercial Arbitration, Electronic Arbitration, (New York and Geneva: United Nations, 2003) p. 4.

mediation procedure. If so, a mediator is chosen or assigned and the process begins. For instance, “Online Resolution.com” is an American company that was formed by the combination of the “Mediation Information and Resource Center” and “Mediate.com” and uses online mediation and arbitration for the resolution of “business-to-business” (B2B) and “business-to-consumer” (B2C) commercial disputes. In order to initiate, for instance, the mediation procedure one of the parties must contact the ODR provider and register the dispute. The ODR provider then contacts the other party, the agreement of who initiates the mediation procedure. The mediators resolving the dispute are experienced practitioners with online training and they assist the parties to communicate more effectively and come to an agreement. “The fees range from $50 per hour per party for disputes under $10, 000 to $100 per hour per party for disputes over $50, 000”.[297]

Although the form of communication is adapted to each individual case and situation; most commonly, the communication takes place via e-mail, instant messaging, or audio and video conferencing managed through intermediaries, forming a place of digital communication,[298] a virtual room in the cyber world. Only the participants in the mediation process

[297] MANEVY Isabelle, *op. cit.*, p. 14.
[298] ROSENTHAL David, *Internet. Schöne, neue Welt? Der Report über die unsichtbaren Risiken,* (Orell Füssli, 2nd Ed.), 1999, p. 21.

may be present in such a virtual room, and their exclusive access can be ensured by the use of special codes or passwords.[299] The mediator can interact exclusively with one of the parties, without disrupting the course of the mediation process, in a separate virtual conference room, whose access is protected by password, while the other parties are waiting in another virtual room. This way it is even possible for the mediator to be in different "rooms" simultaneously, something which would be impossible in real-world, offline mediation.[300]

There are concerns that mediation as a voluntary and informal process presents greater risks of abuse on the internet because the parties are not in physical proximity. Certainly the impersonal process and the lack of physical presence of the parties to the dispute and the mediator can work against the development of trust in online communication because of possible gaps in communication and increased uncertainty,[301] "giving the impression that the online environment does not

[299] BIUKOVIC Ljiljana, International commercial arbitration in cyberspace: recent developments, *North-western Journal of International Law & Business*, vol. 22, 2002, pp. 319, 332.

[300] "It is possible to segment the online platform into spaces, such that Space A is only accessible to one party and the mediator, Space B is only accessible to the other party and the mediator, and Space C is accessible to both parties and the mediator. Spaces A and B could be used for virtual private caucuses, and Space C for public discussions. In this way, the platform can be used to replicate the traditional three room procedure by the use of virtual meetings on an online platform. The mediator and the parties in an online mediation can be simultaneously in Spaces C and A/B, thus being in a joint meeting and caucus at the same time". See. HÖRNLE Julia, *op. cit.*, pp. 79, 80.

[301] D' ZURILLA T. William, Alternative Dispute Resolution: ADR Hits the Internet, *Louisiana Bar Journal*, vol. 45, 1995, p. 352.

seem conducive to successful mediation".[302] Also there are concerns about the appropriateness of online mediation in resolving certain kinds of disputes. Legally, mediation can be used to resolve any dispute that falls under the contractual freedom of the parties. However, "as electronic communication brings along depersonalization, it presents a particular challenge to emotionally charged disputes, such as family law issues or when physical harm has occurred".[303] This is not the case for commercial disputes, the resolution of which has spurred numerous online mediation initiatives into existence.

Online mediation has numerous advantages with foremost the ability to substitute physical meetings with virtual meetings which obviates the need to travel and the ability to conduct the mediation procedure asynchronously which ads to convenience and increases the chances of success.[304] Another main advantage of online mediation is the use of flexible procedures which allow for a greater control of the outcome and encourage participation. It aims not only to resolve the dispute, but the dynamic process creates new values and perspectives serving as a forum of ideas by enhancing the information exchange and the cooperation between the parties.[305] Online mediation can achieve what

[302] EISEN Joel, *op. cit.*, p. 1305.
[303] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 5.
[304] HÖRNLE Julia, *op. cit.*, p. 80.
[305] E-mediation, available at http://www.judgelink.org/a2j/system.design/Resolution/emediation.cfm

litigation or for that matter traditional ADR cannot guarantee to the same extend;[306] the voluntary character and the informal nature of the process provide great flexibility, faster decisions, simplicity, user-friendliness and consequently the mediator's ability to adapt parts of the process and address special needs.[307] Participants in e-mediation need not respond immediately as in face-to-face conversations, so they can look more closely at the proposals and the data, developing options, saving time and reducing operating costs. The cost of an online mediation process may depend on the provider, the nature of the dispute, the complexity of the matter in hand and the time required for the resolution. However, in general the cost of an online mediation will certainly be less than that of a traditional mediation. The substitution of the physical meetings by virtual meetings spares the parties of costs relating to travel expenses and securing venues to hold these meetings.[308] "Fees for online mediation are usually computed on an hourly basis, and range from 50 to 250 USD per party and per hour".[309]

However, in terms of acceptance by citizens and the legal community there is still reluctance and potentially a long way

[306] BATES M. Donna, A consumer's dream or Pandora's Box: Is arbitration a viable option for cross-border consumer disputes?, *Fordham International Law Journal*, vol. 27, 2004, pp. 823, 824.
[307] LIDE E. Casey, ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation, *Ohio State Journal on Dispute Resolution*, vol. 12, 1996, p. 208.
[308] MOEVES S. Amy and MOEVES C. Scott, *op. cit.*, pp. 862- 864.
[309] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 5.

ahead. The number of ODR providers offering online mediation during the past years is relatively high including providers such as "BBBOnline", the "Camera Arbitrale di Milano", "SmartSettle", "SquareTrade", "Web Trader", "WebAssured", "WebMediate" and "Internet Neutral".[310]

C. Online Arbitration

Online arbitration is the online equivalent to traditional arbitration, where a third neutral party chosen by the parties to a dispute, or nominated by the ODR provider chosen by the parties, resolves the dispute by issuing a decision, after taking into account the parties' arguments and the relevant evidence. Again, the main difference lays on the way of communication. ODR introduces the technology, which transforms the communication between the parties influencing the entire process of arbitration. For their communication the parties use various ICT tools, such as e-mails, audio and videoconferences.

[310] For Instance "Internet Neutral allows parties to choose from several online mediation alternatives, including e-mail, instant messaging, chat conference rooms and video conferencing. Internet Neutral uses conferencing software that enables the mediator to communicate with the parties in designated channels or 'rooms' accessed securely with passwords. During the mediation, the software enables the parties to communicate through two channels: one for a private dialogue between one party and the mediator, the other for open dialogue with all participants, including the mediator". See WANG Fangfei Faye, *op. cit*., p. 57.

ODR combines the effectiveness of traditional arbitration with the innovative power of the Internet; "known terms include cyber-arbitration, cybitration, cyberspace arbitration, virtual arbitration, electronic arbitration, arbitration using online techniques".[311]

Online arbitration is usually been distinguished to arbitration for the resolution of disputes that arise on the web, and arbitration to resolve offline disputes. This distinction tends to limit the scope of online arbitration to disputes arising on the internet. But online arbitration does not depend on the origin of the dispute; offline disputes arising from real world transactions may well be subjected to online arbitration and resolved in accordance with the free will of the parties using the diverse and innovative technologies that the internet has to offer.[312] Thus, online arbitration is perceived in the broader sense, as any arbitration proceedings "conducted partly or wholly by electronic means associated with the development of internet".[313] It is most suitable for disputes arising out of electronic transactions, because the parties who use the internet are familiar with it and its implementation will have fewer

[311] HERRMANN Gerold, Some legal e-flections on online arbitration ('cybitration'), *in Law of international business and dispute settlement in the 21st century*, (Bredow eds. Cologne), 2001, p. 267.
[312] MOREK Rafal, *op. cit*., p. 45.
[313] CALLIESS Gralf-Peter, *op. cit.*, p. 450.

disadvantages and more advantages.[314] For instance, it can be used to resolve disputes concerning the exchange of material goods and to resolve disputes arising from online transactions for intangible electronic goods.[315]

Online arbitration is an autonomous extrajudicial dispute resolution mechanism, which has as its essential feature the pursuit of a private solution by a third party, has its foundation on the autonomous will of the parties, is governed by a-national rules and standard international trade practices, uses innovative electronic media and has its own area transnational and virtual. What one realizes easily in an online arbitration procedure is the absence of a material venue for the proceedings. Traditional face-to-face hearings are replaced by means of visual distance communication, such as Web communication and video conferencing, and witnesses, parties and arbitrators do not need to travel, thus reducing time wasted and cost.[316] In online arbitration, all the key phases, like the arbitration agreement, the appointment of arbitrators, the arbitral proceedings and the award, make use of the internet. The traditional documents and the evidence in general can easily be replaced by electronic files transferred online, and the distance that usually separates the parties possibly located at both ends of the planet, disappears

[314] HEISKANEN Veijo, Dispute Resolution in International Electronic Commerce, *Journal of International Arbitration*, vol. 16, 1999, p. 29.
[315] KALOW M. Gwenn, From the Internet to court, *Fordham Law Review*, vol. 65, 1997, p. 2214.
[316] HÖRNLE Julia, *op. cit.*, p. 84.

instantaneously in cyberspace; the physical separation becomes insignificant in online arbitration.

Arbitration is most suitable for the online environment.[317] Arbitration is more suitable to be performed online than mediation "because third neutral parties do not have to engage with the parties in such an intense manner and communication processes are less complex than in online mediation".[318] Online arbitration is much simpler and documents only arbitration can take place without the benefit of a single face-to-face conversation between the neutral and the parties.[319] Based on the outcome of the process, online arbitration is distinguished to binding and non-binding online arbitration. As far as the latter goes, the are no additional issues since any non-binding ODR procedure is sanctioned by the principle of party autonomy. On the other hand, in the case of binding online arbitration there are some issues regarding the validity of online arbitration agreements and online arbitral awards, especially, within the meaning of the "New York Convention" (NYC).[320]

[317] LODDER R. Arno and VREESWIJK Gerard, Online arbitration services at a turning point, *ICC International Court of Arbitration Bulletin*, 2004, pp. 21-28.
[318] BERNSTEIN Ronald, J. TACKABERRY John, and MARRIOTT L. Arthur, Handbook *of Arbitration Practice* (Sweet & Maxwell 3rd Ed.), 1998, p. 5.
[319] RULE Colin, *op. cit*., p. 44.
[320] "The NYC was adopted at a time when the drafters could not foresee that arbitration agreements and arbitral awards could take other than a physical form". See BETANCOURT C. Julia and ZLATANSKA Elina, *op. cit.*, pp. 262, 263.

Although currently treated with some caution, it shows significant growth potential and comparative advantages versus conventional arbitration. Today online arbitration is becoming more popular, fully private, can be binding or non-binding, creates a climate of cooperation, confidentiality and communication between the parties and is an ideal mechanism for resolving disputes. Online arbitration is becoming more desirable because it represents some additional benefits for the parties to the dispute, such as speed, accessibility, cost effectiveness, flexibility and relocation.[321] However, despite the obvious advantages of online arbitration and the existence of several online providers, arbitration is not yet a very popular ODR method, especially at an international level. Successful ODR initiatives are rare and the number of arbitration cases online is quite small, except in some Asian countries such as Japan and more recently in North America. In B2C disputes, consumer groups have traditionally disfavoured the use of arbitration for fear that arbitration would impede consumers from enforcing their full procedural and substantive rights. Presently consumer groups are taking a more supportive approach given the existing difficulties in applying domestic laws to cross-border disputes, and the increase of consumer arbitration services managed by public authorities.

[321] KAUFMANN-KOHLER Gabrielle and SCHULTZ Thomas, *op. cit.*, p. 68.

Online arbitration is expanding daily, particularly in consumer disputes related to cross border trade and this is not just evidence of its success and rising popularity, but also indicates the change in attitudes towards the existing legal reality.[322] Online arbitration has been listed as a legal concept and procedure in Article 17 of "Directive 2000/31/EC", according to which "Member States shall ensure that in cases of disagreement between a provider and a recipient of the service information society, their legislation does not hamper the use of means existing under national law, for the extra-judicial dispute settlement, including appropriate electronic means".[323]

Currently, several traditional offline institutions, such as the "Chartered Institute of Arbitration" and the "International Court of Arbitration" in the EU, the "American Arbitration Association" and the "Better Business Bureau" in the US, have introduced ODR technology.[324] Online arbitration attracts the attention of the legal community more and more especially the last two decades.[325] The first experience of a formal dispute resolution online was on 8 May 1996 when a composition of the

[322] DONAHEY Scott, Dispute resolution in cyberspace, *Journal of International Arbitration*, vol. 15, 1998, p. 127.
[323] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Article 17.
[324] DAVIS G. Benjamin, Symposium Enhancing Worldwide Understanding through Online Dispute Resolution: Walking Along in the Mission, *University of Toledo Law review,* vol. 38, 2006, p. 2.
[325] ARSIC Jasna, *op. cit*., p. 209.

"Virtual Magistrate"[326] issued a decision in a dispute, after the communication was done exclusively by electronic means.[327] Currently there are several ODR providers which offer online arbitration; examples include "Web-dispute"[328] and "e-Resolution".[329] "Fees for online arbitration are usually the same as for mediation: they are in most cases charged on an hourly basis, and range from 50 to 250 USD per party and per hour".[330] The time required for conducting the online arbitration procedure may vary depending on the case, but usually it takes between 4 hours and 60 days.

Any problems related to the way online arbitration operates, such as confidentiality, transparency and efficiency are followed by technological development and enhanced data security; this thesis argues that the continuous and rapid

[326] See infra at 'ODR in action'.

[327] KAUFMANN-KOHLER Gabrielle and SCHULTZ Thomas, *op. cit.*, p. 27

[328] "Webdispute.com is an example of an online arbitration service provider. It is a US based company that arbitrates online commercial disputes for business-to-business (B2B) and business-to-consumers disputes (B2C). The consent of both parties is required, who need to mutually agree on an arbitration forum and sign an "oath of participation". Webdispute.com offers "document/email" hearing as an option. Parties submit documents to the arbitrator and the other party and comment on the evidence submitted by both sides via email to the arbitrator. The arbitrator notifies the parties of his decision within twenty business days. Webdispute.com costs from $ 100 to $ 600 for online arbitration". See MANEVY Isabelle, *op. cit.*, p. 15

[329] "E-Resolution is a virtual tribunal to settle domain name disputes. The ICANN (Internet Corporation for Assignment Names and Numbers) has accredited e-Resolution to settle domain name disputes online in accordance with the ICANN Uniform Domain-Name- Dispute-Resolution Policy. A domain name complaint can be submitted online by means of a secure web based complaints form or by e-mail. The arbitrator deals with the parties' claims in conformity with ICANN's Policy and ICANN's Rules and e-Resolution's own supplemental rules. After both parties have had the opportunity to make their case, the arbitrator will issue a legally binding decision. Anyone registering a domain name is bound by the ICANN Rules". See HEUVEL V. D. Esther**,** *op. cit.*, pp. 9, 10.

[330] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 6

development of technology[331] will not only cover any defects arising in online arbitration proceedings, but will more than that equip it with endless possibilities of means and very soon turn online arbitration to the primary and dominant form of dispute resolution; a truly alternative arbitration compared to traditional arbitration.[332] Arbitration has unique advantages that make it invaluable and necessary for any ODR system. Online arbitration, the key stages of the online arbitration procedure and the corresponding issues as well as the outcome of the procedure are examined in the second part of the thesis where online arbitration is presented as an invaluable part of any effective and fair ODR system.[333]

[331] HÖRNLE Julia, Online Dispute Resolution: the Emperor's New Clothes, *op. cit.*, pp. 29-59.
[332] YU Hong-lin and NASIR Motassem, Can online arbitration exist within the traditional arbitration framework? *Journal of International Arbitration*, vol. 20, 2003, p. 455.
[333] Se infra at 'Arbitration as the final step of the ODR process'.

Chapter 2

ODR in action; Examples of ODR providers

The previous chapter examined dispute resolution and its evolution into ODR as well as ODR as a concept in general. This section supports the theory behind ODR with real world examples, from the first to current initiatives, offering a brief account of the also brief ODR history. This way it provides a better understanding of ODR and how it operates as well as allows identifying the successful initiatives and the elements that led to their success.

From 1995 to 1998, there was an unprecedented growth of informal online dispute resolution mechanisms which provided the necessary recognition to realize that ODR was not only a suitable means to resolve disputes, but also a whole new sector of industry. The record breaking increase of disputes arising out of online activities pointed the spotlight to the new possibilities that ODR mechanisms could provide. The "National Center for Automated Information Research" [334] (NCAIR) sponsored a conference on online dispute resolution in 1996, which in turn

[334] "Professors Ethan Katsh and Janet Rifkin founded the National Center for Technology and Dispute Resolution, which supports and sustains the development of information technology applications, institutional resources, and theoretical and applied knowledge for better understanding and managing conflict". See BETANCOURT C. Julia and ZLATANSKA Elina, *op. cit.*, p. 257.

led to the funding of three experimental ODR projects. The "Virtual Magistrate project", the University of Massachusetts "Online Ombuds Office" and the project of the University of Maryland were the precursors of ODR.[335] Regardless of their success those projects illustrated that resolving disputes over the internet was no longer science fiction but a realistic and viable possibility. Furthermore, the viability of ODR is evident by the interest shown in this phenomenon by organizations such as the "Hague Conference on Private International Law", the "World Intellectual Property Organization", and the "European Union". According to Pablo Cortes the evolution of ODR can be divided into four separate phases. The first one is described as the hobbyist phase prior to 1995, when online disputes were only limited and ODR mechanisms not really existing. The second phase was the experimental phase from 1995 to 1998 that gave birth to the precursors in ODR. The third phase was the entrepreneurial phase from 1998 to 2002, when private stakeholders saw ODR's great potential in dispute resolution and created many successful private initiatives such as EBay's SquareTrade and CyberSetlle. Finally, the last phase that is ongoing until today is the institutional phase, which describes an era when ODR is seen as a viable and successful solution for dispute resolution not only by private entities but also by public

[335] *Ibid.*, p. 256.

bodies and this realization leads to new initiatives and the widespread adoption of ODR programs.[336]

Section 1: The Virtual Magistrate Project (VMP)

The "Virtual Magistrate" was one of the first ODR projects launched in March 1996 and sponsored by academics specializing in cyber law under the auspices of the "National Center for Automated Information Research" (NCAIR), the "Cyberspace Law Institute" (CLI), the "American Arbitration Association" (AAA), and the "Villanova Center for Information Law and Policy" located in Villanova University (Philadelphia, USA).The VMP was a pilot project and its principal goal was to demonstrate that online technology could be used to resolve online disputes through online arbitration in a quick and cost-effective way. The VMP used as its method of resolution voluntary, contractual online arbitration to resolve mainly disputes between Internet Service Providers (ISPs) and users.[337] The VMP heard cases arising solely from Internet-related

[336] CORTES Pablo, *op. cit.*, pp. 55, 56.

[337] "It was a voluntary procedure better described as a contractual arbitration that had some binding effects but not the executory effects within the meaning of the legislation and treaties on recognition and execution of arbitral awards". See BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 90.

activity involving users of online systems and system operators, "such as complaints about wrongful electronic messages and postings, copyright and trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate materials, and invasion of privacy".[338] The disputes involved system operators ("sysops") where one party posts a message or file on the sysop's system that another party finds offensive defamatory, libelous, an infringement of the complaining party's trademark or copyright, fraudulent, obscene, etc. and demand that the sysop remove the offending message.[339]

Complainants could visit the web and file a formal complaint with which they submitted their dispute to the Virtual Magistrate and provided the necessary information about the date of the dispute, the parties concerned and the category of dispute. There was a small fee of $10 per filing in order to discourage frivolous action. The arbitration process was

[338] "In particular the Virtual Magistrate's agenda aimed to establish the feasibility of using online dispute resolution for disputes that originate online; provide system operators with informed and neutral judgments on appropriate responses to complaints about allegedly wrongful postings; provide users and others with a rapid, low-cost, and readily accessible remedy for complaints about online postings; lay the groundwork for a self-sustaining, online dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings); help to define the reasonable duties of a system operator confronted with a complaint; explore the possibility of using the Virtual Magistrate Project to resolve other disputes related to computer networks; develop a formal governing structure for an ongoing Virtual Magistrate operation". See PONTE M. Lucille, The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse, *North Carolina Journal of Law and Technology*, vol. 4, 2002, p. 67.

[339] VICTORIO M. Richard, *op. cit*., pp. 6, 7.

conducted using email. After receiving complaints, the Virtual Magistrate would randomly select an impartial arbitrator from a pool of arbitrators familiar with cyber law, qualified by CLI and the AAA and trained by the AAA. The arbitrators would generally decide, "whether the activity complained of was reasonable in light of available information, network etiquette, applicable contracts, and appropriate substantive laws";[340] the "Villanova Center for Information Law and Policy" received the complaint and the AAA reviewed it before formally accepting it for resolution. After the start of the procedure, the dispute would be resolved within three days.

Unfortunately the Virtual Magistrate was not proven successful mainly because of the limited scope of disputes that it could handle (social relations arising out of use of the Internet, and did not include economic relationships created through electronic transactions) and because the project was not widely advertised, thereby creating less awareness of this service. Furthermore, since the ODR method used was voluntary arbitration there was a considerable difficulty convincing parties to take part in the procedure. Not only AOL which had agreed to refer disputes to the VMP decided not to risk its power and independence by outsourcing these decisions, but also the VMP did not manage to persuade other ISPs to participate in the

[340] SHAH Aashit, *op. cit.*, p. 2.

scheme.[341] Finally, the use of contractual arbitration which could not render binding awards and the use of outdated software were additional reasons for the failure of this initiative. The Virtual Magistrate project handled only one case and rendered only a single decision, the significance of which was adulterated by the fact that the one of the parties, the alleged wrongdoer, did not even participate. The VMP's case involved James Tierney, an "America Online" (AOL) user, who complained, mainly because it promoted spamming, about an advertisement posted by "EMail America" on AOL's web site that offered for sale mass e-mail addresses. The parties involved in the resolution of the case were Tierney and AOL while "EMail America" did not participate. AOL responded to the complaint by removing the ad from its system. Although the dispute was resolved, the project did not manage to attain credibility and convince users to utilize it mainly because of two reasons. First, because one of the parties in the dispute, the complainant James Tierney, had also a role as an advisor in the VMP, and second, because another party in the dispute, "EMail America" did not take part in the procedure, claiming that it was not contacted by the VMP. Instead, the dispute was resolved by AOL alone, by removing the advertisement based on the fact that "EMail America" had violated the policy regarding spamming. Because of the

[341] CORTES Pablo, *op. cit.*, pp. 54, 55.

aforementioned reasons, the VMP did not manage to take off, since "it was easy to discount the case as a publicity stunt and attracting more cases was a problem for VMP".[342] Even though the project was considered unsuccessful, it managed to effectively pave the road for future ODR providers.

Section 2: The Online Ombuds Office

Another one of the early ODR initiatives was the "Online Ombuds Office" (OOO) project which was launched in 1996 as a beta version of the "Virtual Magistrate". The Hewlett Foundation provided an award to establish the "Center for Information Technology and Dispute Resolution" at the University of Massachusetts with the aim of developing a richer set of online dispute resolution tools.[343] The "Online Ombudsman Office" was sponsored by the "Center for Information Technology and Dispute Resolution" of the University of Massachusetts and also funded by "National Center for Automated Information Research" (NCAIR). The Online Ombuds Office was a mediation service aiming to resolve disputes

[342] HANG Q. Lan, *op. cit.*, p. 861.
[343] SHAH Aashit, *op. cit.*, p. 3.

arising out of online activities. Since 1996, the Online Ombuds Office has been using mediation for the resolution of disputes arising on the Internet, "such as disputes between members of discussion groups, disputes concerning domain names, disputes between competitors, between Internet access providers and their subscribers and disputes concerning intellectual property".[344] The OOO resolved disputes through an ombudsperson, whose function was practically that of a mediator. It was an attempt to transplant the ombudsman model of dispute resolution into cyberspace by providing information, consultation and resolution by experienced ombudspersons from anywhere in the world.

The procedure was similar to that of the Virtual Magistrate since each party provided the OOO information about the dispute and if both parties agreed to resolve their dispute, the ombudsperson started the mediation. The initiating of the process took place when a user provided the OOO with information on the dispute. An ombudsperson was assigned to the case and contacted the user initiating the procedure, as well as the other party to ask questions about the dispute. The OOO also had an Online Ombuds Conference Room where, using "Internet Relay Chat", the ombudsperson could have live discussions with the parties either in one chat room with both parties or could put each party in a different chat room and

[344] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 91.

shuttle back and forth.[345] Even though there is not much information about the disputes resolved, the OOO's web site demonstrates its operation by referring to the resolution of one dispute.

The case involved two parties Robert Gray, who provided a news and information service through his web site and the newspaper Hampshire County News, which was accusing the former of posting material acquired from the paper as his own, thereby infringing the paper's copyrights. Gray contacted the OOO to initiate the resolution of the dispute. The OOO assigned Ethan Katch as the ombudsperson, who communicated via e-mail with both parties. The ombudsperson facilitated the effective communication between the parties. The newspaper expressed its concern relating to the sources of the material posted by Gray, who in turn explained that the material was gathered using various sources. The newspaper was convinced and the dispute was resolved. "The process took less than one month and at virtually no cost to either of the parties".[346] Among the initiators of the OOO were Professors Ethan Katsh and Janet Rifkin, who are also main consultants for another ODR provider, the "SquareTrade" project.

[345] VICTORIO M. Richard, *op. cit.*, pp. 7, 8.
[346] HANG Q. Lan, *op. cit.*, p. 847.

Section 3: CyberTribunal

"CyberTribunal" was an experimental project launched in 1996 by the University of Montreal's "Centre de recherché en droit public" (CRDP) and its main goal was to determine whether or not disputes could be successfully resolved in an online environment and particularly through the use of mediation and arbitration. The "CyberTribunal" mediators and arbitrators included highly trained professionals specializing in mediation, commercial arbitration and information technology law. The procedure included two steps but this time the methods were mediation and arbitration. "CyberTribunal" provided easy-to-use software that guarantied confidentiality and facilitated communications between the parties to a dispute, allowing them to reach settlement. If the parties could not reach an amicable settlement through mediation, "CyberTribunal" had a second step in which the parties would proceed to arbitration, since they were bound by an arbitration clause.

More specifically, in mediation, in order for the procedure to be initiated, one of the parties contacted the provider and shared all the relevant information of the dispute, such as personal information and information regarding the facts of the dispute as well as the goal and the potential of resolution.

"CyberTribunal" would then assign a mediator to the case who would contact the other party and if the latter agreed, the resolution procedure would begin. Usually there was a prior agreement between the parties to resolve any disputes that would arise between them through mediation or arbitration. Once the procedure was initiated, "CyberTribunal" provided a secure online framework through which the parties and mediator could effectively communicate towards the resolution of the dispute. Arbitration operated in a similar environment, although "the process was structured by more formal rules that were based freely on the rules of procedure generally used in commercial arbitration, such as the arbitration rules developed by the 'United Nations Commission on International Trade Law' (UNCITRAL) and the 'International Chamber of Commerce' (ICC)".[347] The "CyberTribunal" project resolved hundreds of disputes and was considered highly successful especially because it managed to incorporate arbitration into the online environment. The experiment ended in 1999 and the project evolved into a commercial venture called "e-Resolution".

[347] BENYEKHLEF Karim and GELINAS Fabien, op. cit., p. 93.

Section 4: EBay and SqaureTrade

In 1999, the online auction site "eBay"[348] asked the "Center for Information Technology and Dispute Resolution" at the University of Massachusetts to conduct a pilot project to determine whether ODR mechanisms could assist in the resolution of disputes arising out of the transaction between eBay's buyers and sellers. The result was the University of Massachusetts pilot project which handled hundreds of disputes and was considered fairly successful. The success of this initial project prompted eBay to select an Internet start-up, "SquareTrade", to be its dispute resolution provider. The partnership between "eBay" and "SquareTrade" ended in 2008. However, "SquareTrade" was for a long time the leading ODR provider in consumer disputes and therefore its examination presents a great analytical interest from a researcher's point of view since it significantly furthered the development of ODR.

[348] "EBay is an online auction site created in 1995 by Pierre Omidyar as a way to improve online classifieds and allow users on the internet from anywhere in the world to buy or sell personal items faster and easier. The EBay Company was founded in 1996 and since then has grown from a small start up to multibillion dollar company making it one of the most successful examples of ecommerce with experience in business-to-business, business-to-consumer, and consumer-to-consumer transactions. EBay has made numerous acquisitions over the years, including the PayPal payment service in 2002. More than forty-five billion dollars in merchandise is sold on eBay each year and eBay has more than ninety-million active buyers and sellers, in 16 languages and 36 countries around the globe". See DUCA D. Louis, RULE Colin, LOEBL Zbynek, *op. cit*., pp. 66, 68.

"SquareTrade" has proven that mechanisms such as online negotiation and online mediation can be effectively and easily used to resolve e-commerce disputes. "SquareTrade" handled disputes between sellers and buyers on eBay related to a specific number of problems, such as non-delivery of goods or services, delays, improper selling practices, unsatisfactory services, bad descriptions and negative feedback.[349] Its great success was mainly based on two reasons. First, the fact that "SqaureTrade" dealt with specific disputes in a high volume of cases made it possible to create an automated process that guarantied accuracy of information and evaluation of the specific issues in each category of disputes. Second, "SquareTrade" handled low value disputes between users that would otherwise have no redress and were compelled to participate because of the feedback system; sellers wanted to obtain positive feedback in order to retain their good reputation in the "eBay" community and buyers wanted redress.

"SquareTrade" offered a two-step dispute resolution process. The first step was an online negotiation procedure in which the parties attempted to resolve the dispute by themselves without the involvement of a third neutral party. A user could file a complaint through the website and initiate the negotiation process which was automated and free. "SquareTrade" contacted

[349] WANG Fangfei Faye, *op. cit.*, p. 65.

the other party, who would then be able to respond to the complaint. All correspondence took place through a secure, password protected virtual area where only the parties had access and could communicate to resolve their dispute. For the filing of the complaint and the communication the website provided structure through web-based software and forms that allowed users to standardize complaints through "radio buttons" and this way pinpoint the problem more clearly and spare the process from unnecessary confusion. Parties seemed more willing to negotiate via the Web than email and the negotiations were more frequently successful. "SquareTrade" recognized that "almost all eBay disputes fall into eight to ten categories and created forms that clarified and highlighted both the parties' disagreements and their desired solutions and reduced the amount of free text for complaining and demanding, although still allowing parties to describe concerns in their own words, and lowered the amount of anger and hostility between them".[350] The great revolution of this process lied on the innovative software that created a constructive environment, stimulated the proposition of agreements and avoided confusion by associating solutions to the problems. The software illustrated how the use of ICT tools could truly be the "fourth" party in the resolution process since it assisted parties to reformulate the problem and

[350] KATCH Ethan, Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace, *Lex Electronica*, vol.10 n°3, 2006, pp. 4, 5.

the solution and allowed to focus more on the solution rather than the problem.[351] The majority of the disputes, approximately eighty percent were resolved through negotiation, without the need to resort to mediation.[352]

If the first step did not lead to an amicable resolution of the dispute, there was a second step where the parties could request the involvement of a neutral third party though an online mediation procedure. Users could request a professional mediator for a minimal fee of $15 to $30. Upon the parties' request the mediator recommended possible solutions for the resolution of the dispute and assisted in reaching a fair and mutually agreeable settlement. The online mediator provided the disputants "with the tools to solve their own problems effectively by helping each party see the other's perspective, guiding the parties toward the goal of finding a resolution, asking them questions and proving information to each other's needs and interests".[353] The settlement agreements were confidential and became binding as contracts. Businesses who agreed to mediate any possible disputes through "SquareTrade" could purchase a "SquareTrade" seal which could be placed on the website of online businesses. The seal or Trustmark assured

[351] "Moving the parties from a problem mode to a solution stance". See RABINOVICH-EINY Orna, 'Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation', *Harvard Negotiation Law Review*, vol. 11, 2006, p. 258.
[352] KATSH Ethan and RIFKIN, Janet, *op. cit.*, p.142.
[353] MOEVES S. Amy and MOEVES C. Scott, *op. cit.*, p. 19.

potential users that there is an easy and secure way of recourse in case the transaction proved problematic and this way build confidence and trust in the online environment.[354] SquareTrade entered into partnerships with several online businesses and had agreements to be the dispute resolution provider for over a dozen marketplaces including "eBay", "Verisign", and "PayPal".[355] During the time it operated as an ODR provider, SquareTrade resolved over 2 million disputes across 120 countries in five different languages and employed around 200 mediators from over 15 different countries.[356]

As stated, the partnership between "eBay" and "SquareTrade" ended in June 2008 from which point the latter stop resolving "eBay" feedback disputes. Today, "SquareTrade" continues to provide services to "eBay" users, such as warranty services and the Trustmark program but as far as the ODR services formerly provided by "SquareTrade go, these are currently provided by "eBay" and "PayPal" dispute resolution services. In 2009, "eBay" added the dispute resolution services available through "PayPal" and initiated an on-eBay ODR platform called "eBay Buyer Protection Policy". This ODR scheme allows buyers to initiate a dispute resolution procedure when they have not received an item they purchased or if the

[354] MANEVY Isabelle, *op. cit.*, p. 17.
[355] SHAH Aashit, *op. cit.*, p. 3.
[356] CORTES Pablo, *op. cit.*, pp. 66, 68.

item was received but did not match the seller's description; in short it handles two kinds of disputes described as "item not received" and "item not as described".[357] Today, the “eBay” platform handles over 60 million e-commerce disputes annually through its online platform and the number rises as the transaction volume on the site increases, about 13% per year. “These disputes have an average value of $70-100 and they are processed through a Resolution Center that enables parties to resolve their problems amicably through direct communication”.[358]

Section 5: The Internet Corporation for Assigned Names and Numbers (ICANN)

One of the most successful initiatives of ODR was launched in 1999 in the United States of America under the

[357] “The types of claims for buyers offered for resolution under the policy include: The buyer did not receive the items within the estimated delivery date, or the item received was wrong, damaged, or different from the seller’s description. For example: Buyer received a completely different item; the condition of the item is not as described; the item is missing parts or components; item is defective during the first use; the item is a different version or edition displayed in the listing; the item was described as authentic but is not; the item is missing major parts or features, and this was not described in the listing; the item was damaged during shipment; the buyer received the incorrect amount of items”. See DUCA D. Louis, RULE Colin, LOEBL Zbynek, *op. cit*., pp. 66, 68.

[358] *Ibid.*, p. 68.

auspices of the Department of Commerce and was called the "Internet Corporation for Assigned Names and Numbers" (ICANN). ICANN's aim was the settlement of disputes relating to domain names.[359] However, ICANN is not an ODR provider but an organization that provides a list of ODR providers which serve as dispute resolution forums to arbitrate domain names disputes, as well as the rules for the resolution of the disputes. ICANN implemented the "Uniform Dispute Resolution Policy" (UDRP) establishing the process and the set of rules for resolving domain name disputes.

The UDRP is not classic arbitration but corresponds more to non-binding arbitration since no monetary damages are awarded and the only decision concerns the right to use the domain name. The UDRP, unlike traditional arbitration, is not intended to supplant court proceedings, but merely to afford an additional and alternative forum for dispute resolution, which,

[359] "For the Internet to function, every computer connected to it must have a unique identifying number or Internet address. Such addresses typically look something like 128.119.28.27. Because humans find it difficult to remember strings of numbers, a system was developed that allowed a domain name, such as adr.org, to be typed in instead of the number string. What occurred when someone typed in the domain name was that a machine somewhere translated it into the number string, something the computer could process to find a particular machine. The demand for domain names grew as commercial activity on the Internet grew and as businesses wanted potential customers to have an easy way to find them. The domain name system had been designed before commercial activity was permitted on the Internet and it had not been anticipated that many businesses with similar names might want the same domain name, or that owners of trademarks would be upset if someone registered a domain name that was similar to a trademark. The combination of domain name scarcity and the concerns of trademark holders led to disputes over domain names." See KATCH Ethan, Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace, *op. cit.*, pp. 5, 6.

however, still allows parties to recourse to court at any time.[360] The dispute resolution professionals are called panelists instead of arbitrators and nothing hampers the parties to a dispute to resort to litigation in order to enforce their rights after the "award" is handed down. However, only a very small percentage goes to court compared to the overall number of cases handled by the UDRP. UDRP panelists are empowered by terms in the contract agreed to, when a domain name is registered, and the decisions are enforced by making necessary changes in the domain name registry. The UDRP procedure constitutes an efficient ODR system with an evidence based process that limits the results to the cancellation or transfer of a domain name registration making the execution of the decision relatively easy and straight forward.

"The fees vary according to the number of panelists and the number of domain names in dispute but are approximately between 2,000$ and 5,000$ and the resolution takes up to 60 days whereas through traditional judicial mechanisms the cost comes to an average of 15,000$ and can take up to three years".[361] Since 1999, ICANN has accredited several dispute resolution providers to resolve Internet domain name disputes including the "World Intellectual Property Organization" (WIPO), the "National Arbitration Forum" (NAF), "e-

[360] CORTES Pablo, *op. cit.*, pp. 167, 168.
[361] HANG Q. Lan, *op. cit.*, p. 850.

Resolution", the "Center for Public Resource Institute" (CPR) and the "Asian Domain Name Dispute Resolution Centre" (ADNDRC). Among those providers "e-Resolution" was the first that realized the potential of using the online environment in a full way by transferring most parts of the process to the virtual world.

The first award was rendered on 2000 by the WIPO Arbitration and Mediation Center in the case World Wrestling Federation Entertainment, Inc. v. Michael Bosman. Even Michael Bosman, who was forced to relinquish the "worldwrestlingfederation.com" domain name, was satisfied by the fairness and efficiency of the process. Overall the UDRP system is considered a fairly successful example of Online Dispute Resolution.[362]

[362] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, pp. 29-36.

Chapter 3

The Advantages and the Challenges of ODR

ODR methods provide hope for the future of international transactions and e-commerce, by overcoming several of the problems related to traditional justice, as well as traditional ADR. ODR makes possible the relocation of the traditional methods of alternative dispute resolution from the physical to the virtual world.[363] ODR is a useful tool, which helps the parties to a dispute reach an agreement by electronic means; the technology essentially intervenes during the procedure in order to assist the communication between the parties.[364] However, the use of ICT to resolve disputes changes the way in which parties communicate and interact. There are pros and cons when using ICT; the objective is to design ODR platforms that maximize the pros and minimize the cons.[365] Negotiating, mediating and arbitrating through the Internet medium have several important advantages such as the increased efficiency of the process and ease of application.

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[363] BELLUCCI Emilia, LODDER R. Arno and ZELEZNIKOW John, *Integrating artificial intelligence, argumentation and game theory to develop an online dispute resolution environment*, ICTAL ,18TH IEEE International Conference on Tools with Artificial Intelligence, 2004, pp. 749-754.

[364] GLASS M. Carolyn, Online counseling: A descriptive analysis of therapy services in the Internet, *British Journal of Guidance and Counseling*, vol. 34, 2006, pp. 145-160.

[365] RULE Colin, *op. cit.*, p. 85.

In cyberspace there is no uniform legal and court system which makes the resolution of disputes quite problematic. The Internet is global and without borders which hampers the resolution of disputes by the traditional courts of any state and presents substantial difficulties regarding the choice of the applicable law as well as the recognition and enforcement of decisions. In the context of e-commerce, "the lack of well-established and credible online conflict resolution mechanisms dampens consumer confidence in the online marketplace".[366] However, ODR enjoys many of the same advantages as ADR, such as avoiding traditional litigation mechanisms which can be time consuming, costly and raise jurisdictional problems. But, ODR goes one step further and by transferring ADR services to the online environment increases the celebrated advantages in terms of cost, time, flexibility and appropriateness for current trade practices, "provided of course that the transition to online delivery is smooth and does not involve any losses".[367]

[366] PONTE M Lucille, Boosting Consumer Confidence in E-business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions, Albany Law Journal Science and Technology, vol. 12, 2002, p. 441.
[367] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 85.

Section 1: Advantages of Online Dispute Resolution

ODR has to offer great advantages for parties, third neutrals and in the case of e-commerce for businesses and consumers. In the first part of the thesis the advantages of traditional ADR were examined.[368] These advantages not only translate to ODR but are also heightened and complemented by additional advantages. The advantages of ODR relate to time and cost savings, convenience and flexibility. The use of the Internet to resolve disputes can speed up the procedure since parties have more options when using ODR; information and evidence is transmitted faster, and the use of the email allows for asynchronous communication, which adds to the overall process of resolving disputes. The parties in dispute can communicate towards the resolution at any time, twenty-four hours a day, seven days a week, and not just during working hours or during meetings that are difficult to plan and must be scheduled well in advance. Furthermore, the parties can communicate from any place of their convenience, such as from their home or their workplace. For instance, people living in remote areas will be able to resolve their dispute from afar without having to travel hundreds or even thousands of miles to meet the other party and resolve the dispute. The use of distance communication allows

[368] See supra at advantages of ADR.

parties to resolve disputes without the need to travel and the corresponding cost and time consumption. Documents can be accessed from anywhere and at any time and the use of asynchronous communication allows for a dispute resolution procedure that revolves around the needs of the parties. These features make dispute resolution cheaper, quicker and more accessible.[369]

A. Time savings

One of the great advantages of ODR is that it offers considerable time and money savings. Traditional ADR was already less time consuming and costly than litigation. But ODR is even less time consuming and costly than traditional ADR. Disputes, which in the past required months or years to being resolved, with ODR they may now require only days or hours. When a dispute arises, the parties using ODR have the ability to address and resolve the matter much faster that through litigation or traditional ADR. In fact the parties can start the resolution process almost immediately instead of waiting months or at least weeks before their case goes to trial or before they

[369] HÖRNLE Julia, *op. cit.*, p. 87.

agree to all the details (such as selecting the venue, the ADR professionals and travelling to the meetings) for the ADR procedure to begin.[370] Whereas traditional judicial systems welcome delay as a means to ensure the serious intentions of litigants and traditional ADR systems become less efficient with each passing day, ODR is much faster and can be initiated almost instantly after the dispute arises, "since a virtual meeting room can be opened instantaneously and a neutral can be engaged from anywhere around the world".[371] Especially today "broadband connections", wire-less Internet and smartphones provide the ability to conduct instantly high-quality videoconferences, saving considerable time and money. ODR systems can instantly provide a virtual room, for parties to communicate at any time and from anywhere in the world and to work towards the resolution of their dispute. "It takes an average of only four months to resolve a dispute online, but 18-36 months to obtain a decision through the courts or using traditional ADR".[372] In the case of e-commerce disputes, time savings are invaluable for both consumers and businesses, since ODR allows for the early intervention, the prevention of

[370] HANG Q. Lan, *op. cit*., pp. 856- 859.
[371] RULE Colin, *op. cit*., p. 63.
[372] BENYEKHLEF Karim and GELINAS Fabien, *op. cit*., p. 86.

escalation and the addressing of grievances before they evolve into formal conflicts.[373]

B. Cost savings

ODR systems are cost effective. ODR can provide significant cost savings compared to litigation and compared to traditional ADR, both of which can be quite expensive.[374] Again, traditional ADR was already less costly than litigation and ODR is even less costly than traditional ADR. The lower costs associated with the ODR are often cited as an advantage in choosing these methods. The cost for those involved in an online dispute resolution varies depending on the nature of the dispute, the technology utilized, the complexity of the dispute and the time needed to reach resolution. Expenditure on computer software should also be considered. For the parties of course that already have access, there is no additional cost. However, even for those that do not have yet access, buying a computer and gaining Internet access becomes cheaper as each day passes.

[373] RULE Colin, *op. cit.*, p. 77.
[374] G. H. Friedman, (1997) Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities, *Hastings Communications and Entertainment Law Journal*, vol. 19 pp. 695- 712.

The main reason why ODR is less costly is because overall expenses are often much lower and mainly because there are no travel expenses. ODR allows parties who are located in multiple countries or different time zones, or who cannot agree on a time or place, to meet without travel and related expenses.[375] It is only natural, "when the raw material of an institution is software rather than bricks and mortar, bits rather than atoms, construction costs and costs of modification are likely to be reduced. When delivery can occur at electronic speed rather than at the speed of automobile or airplane, it will occur both at cheaper cost and faster".[376] ODR is 35-60% cheaper than judicial proceedings and traditional ADR.[377] Especially in case of arbitration, the enforceable nature of the award saves from the cost of appeals of other resolutions methods. In the case of e-commerce, there are great financial benefits for businesses, since by using ODR businesses can prevent many of the disputes from going to court and limit the financial exposure of the company.[378] Modern business are operating worldwide and are facing countless disputes all over the world, many among them are relatively small disputes and it would too expensive, time-consuming and therefore impractical to travel to each country in

[375] WANG Fangfei Faye, *op. cit.*, p. 28, 29.
[376] KATCH Ethan, RIFKIN Janet and GAITENBY Alan, E-commerce, e-disputes, and e-dispute resolution: in the shadow of 'eBay Law', *Ohio State Journal of Dispute Resolution*, vol. 15, 2000, p. 727.
[377] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 86.
[378] RULE Colin, *op. cit.*, p. 77.

an attempt to resolve each of these disputes. On the contrary ODR by taking place on the Internet via e-mail, instant messaging, chat conference rooms, or Internet videoconferencing, mitigates the costs related to travel. Sending a document via e-mail or posting it on a web site for the parties to view is virtually effortless, fast and cheap whereas the documentation required in the offline world creates mountains of paper and spent cash.[379]

C. Access to justice

As stated, ODR is better suited for cross-border transactions, as it eliminates the problems of transition to certain places, since it easily crosses between borders, with transactions made regardless of the distance separating the parties to the dispute. This achieves lower costs and reduces time consumption,[380] illustrating that ODR may be the only feasible option for people who are unable to travel long distances[381] or for persons often engaged in e-commerce and

[379] VICTORIO M. Richard, *op. cit*., p. 12.
[380] BATES M. Donna, *op. cit*., p. 854.
[381] BORDONE C. Robert, Electronic Online Dispute Resolution: A Systems Approach - Potential Problems and a Proposal, *Harvard Negotiation Law Review*, vol. 3, 1998, p. 176.

involved in low values disputes where the parties cannot meet face to face unless they spend a substantial amount of money, often more than the value of the dispute; there are no travel and accommodation expenses, "which in international consumer disputes are frequently higher than the value of the dispute".[382] ODR reduces time delays and costs, especially those related to travel and by providing cheaper and quicker dispute resolution and allows access to parties with limited resources; access to ODR and consequently access to justice.

Furthermore, ODR provides access to justice by removing the problem of bias, a problem that cannot successfully be addressed in traditional face to face ADR. Although impossible in traditional ADR, online dispute resolution creates an environment where bias can be removed as a factor in building an agreement between two disputants, since it is not immediately obvious in an online interaction if the other party or neutral is male or female, black or white, gay or straight, or old or young.[383] Finally, ODR provides access to justice by reducing power imbalances between the parties.[384] Especially by communicating through the asynchronous and textual medium of e-mail, parties can overcome the power imbalances and communicate more freely than with face to face

[382] HÖRNLE Julia, *op. cit.*, pp. 89, 90.
[383] RULE Colin, *op. cit.*, p. 68.
[384] HÖRNLE Julia, *op. cit.*, pp. 89, 90.

communication.[385] Parties are not intimidated when there is a power imbalance and also can more effectively save face after the settlement of the dispute.

Any economic or other power imbalance that exists between the parties is masked by the medium which can assist the ODR practitioner further by rendering ineffective a party's attempt to dominate and the parties can have a more balanced, fair and effective communication. Furthermore, the internet medium provides a neutral forum for the procedure and "the 'conference table in cyberspace' denies a dominating party the potential to exploit the 'home court advantage'".[386]

[385] "Research into the use of email in organizations has found that lower-level employees are willing to send emails to upper management with comments and observations that they would be uncomfortable saying in person. I've spoken with parents who had a very difficult time communicating with their children when they are in the same house, yet after they send their children off to college, a rich email correspondence began. The parent and child were not able to communicate face-to-face partially because of the power dynamic between the two of them. Many husbands and wives get into similar communication patterns based on the relative power in their relationship, and when they begin to communicate textually through an online interface it's different enough from the normal modes of communication that they're able to break out of those patterns". See RULE Colin, *op. cit*., pp. 64, 65.

[386] VICTORIO M. Richard, *op. cit*., pp. 14, 15.

D. Convenience

Using ODR for the resolution of disputes is not only less time consuming and costly, but also offers parties a solution in a way that provides convenience and ease. The role of technology replaces the meetings with communication that relies on electronic transmissions, achieving significant reduction in cost and time[387] and providing comfort and accessibility, giving easy access from home or the workplace throughout day and night.[388] Convenience relates to availability. Initially ODR makes it easier to start the process just by the click of a button and users can initiate the process and be provided with all the necessary information without having to resort to some physical office of the provider during office hours, but instead all can be done from the comfort of the party's home 24 hours a day, 7 days a week, by finding the appropriate site and filling out a web form or writing an e-mail, without delays associated with waiting for forms or for changes to become available, since the full content of all materials is directly accessible.[389]

[387] KLAMING Laura, VEENEN V. Jelle, LEENES Ronald, I want the opposite of what you want: summary of a study on the reduction of fixed - pie perceptions in online negotiation. ''Expanding the horizons of ODR'', Proceedings of the 5th International Workshop on Online Dispute Resolution (ODR Workshop '08), 2008, pp. 84-94.

[388] MELAMED Jim and HELIE John, The World Wide Web Main Street of the Future is there Today, 1999, available at http://www.mediate.com/articles/jimmjohn.cfm

[389] VICTORIO M. Richard, *op. cit.*, p. 13.

Particularly in the world of online commerce, it is only natural to resolve disputes online, since the relationship of the parties in most cases has developed in the online environment; it makes sense and it is only natural to use the same medium for the resolution of their dispute. Online consumers, who interact with businesses purely online, would find it very strange if they were asked to meet face to face for the resolution of the dispute.In offline dispute resolution parties have to spend considerable time, money and energy simply to sit down at the table and discuss the issues of the dispute. This considerable effort from the parties is called "convening penalty".[390] ODR provides online interactivity by establishing dialogue and communication between multiple users via e-mail, chat and videoconference and all that through a computer screen, fast and comfortable.

The convenience factor increases the potential of ODR for time and cost savings; parties and practitioners need not travel distances to attend meetings and there is no need to coordinate schedules because of the use of asynchronous messages. Regarding third party neutrals, ODR allows them to keep assisting the parties after key communications.[391] The parties can stay connected to the discussion by responding at available times

[390] "In a face-to-face process, the participants must dress up, take time off of work, travel perhaps long distances to the meeting place, and spend hours discussing the issues underlying the dispute". See RULE Colin, *op. cit.*, p. 69.
[391] *Ibid.*, p. 62.

and have also the ability to postpone their response to consult with others, do research, look at the data, or just "take the time needed to formulate calm, constructive questions and answers and produce their best response".[392] Communication is recorded and archived which allows parties to go back at any time and revisit all the available information so that they can make their decisions better informed. An additional benefit from keeping digital records is that they also "serve as a check on the behavior of mediators, parties and their representatives, even if no formal appeal procedure exists".[393]

Even the physical absence of the parties, which is considered one of the greatest drawbacks of ODR, can prove beneficial in some occasions. The distance provided by ODR communication combined with the ability for asynchronous communication allows parties to cool down, reflect on the arguments and their responses and allows neutrals control the aggressiveness of the communication and defuse a possible escalation of the dispute.[394] The asynchronous nature of online communication and the lack of face-to-face contact prevent escalations like name calling and violence much more effectively, make confrontation less intense and the process more productive; parties can reflect on an issue, communicate in

[392] RAINES S. Susan and TYLER C. Melissa, *op. cit.*, p. 6.
[393] WANG Fangfei Faye, *op. cit.*, p. 29.
[394] HÖRNLE Julia, *op. cit.*, p. 89.

a considered way and "be at their best".[395] This lack of personal interaction can prove essential in disputes in which "the emotional involvement of the parties is so high that it is preferable that they do not see each other".[396] The absence of physical presence provides the parties with a dispassionate way to look at dispute, especially when there is a lack of trust between the parties and emotions stand in the way of effective communication, then the "cooling distance" provided by the means of communication can allow parties not to focus on the "enemy" party but instead on the dispute. Particularly, asynchronous communication via e-mail allows parties time to reflect on their positions before articulating them without the time pressure of an immediate confrontation and the written nature of the arguments allow better articulating, reducing emotional hostility and diminishing expressions of power or bias.[397]

[395] "This dynamic has come to be called *cooling distance"*. See RULE Colin, *op. cit.*, pp. 66, 67.
[396] WANG Fangfei Faye, *op. cit.*, p. 29.
[397] VICTORIO M. Richard, *op. cit.*, pp. 14, 15.

E. Flexibility

Besides the convenience and the faster decisions,[398] ODR allows for greater flexibility and more creative solutions.[399] The informal nature of ODR builds a trusting environment that fosters settlement and encourages honesty, where parties start working on the resolution of their disputes immediately and consequently have a better chance of voluntary compliance. Parties can usually be legally unrepresented, since ODR allows for "a greater control over processes and the decision and the rules of evidence do not apply so procedures are more flexible.[400] Hence parties can reach any type of agreement without the limitations imposed by the law; parties create their own agreement without having it imposed. Furthermore, "the parties and the neutral third party have the flexibility to choose forms of communication more tailored to the circumstances".[401]

The flexibility of ODR allows parties not only to choose the most convenient procedure, but also as in ADR, select the most convenient third neutral, who can also be an expert on a

[398] COM (2002) 196 final, Alternative Dispute Resolution for Online Consumer Transactions, Public Workshop, Federal Trade Commission / Department of Commerce, June 6-7, 2000. Green paper on alternative dispute resolution in civil and commercial law , presented by the Commission.
[399] KAUFMANN-KOHLER Gabrielle and SCHULTZ Thomas, *op. cit.*, p. 68.
[400] PONTE M. Lucille and CAVENAGH D. Thomas, *op. cit.*, p. 24.
[401] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 87.

specific field. As in ADR, also in ODR parties can choose a mediator or arbitrator that is an expert and even more so online, where the number and availability of experts as well as the ability to reach them more easily allows obtaining a more equitable solution than could be achieved in court.[402] Choosing an expert neutral is less costly in ODR, since there is larger availability. ODR brings neutrals instantly in touch with the parties. Parties can choose any neutral and consequently the best neutral for their case, "regardless of where that neutral is in the world, his time zone, or even his other commitments, since geography, schedule, and expertise are no longer major concerns".[403]

The flexibility of ODR relates to the use of various ICT tools for the resolution of the dispute, something which is not possible in offline dispute resolution. The technology improves communication and aids the conveying of the messages by using ICT tools that make resolution more effective and lead to fairer outcomes. For instance, the technology aids the understanding of what a person is alleging or explaining by visualization, such as with the use of collaborative workspaces or by providing access to knowledge resources, such as with the use of legal databases and case-management systems and the direct visualization of

[402] VICTORIO M. Richard, *op. cit.*, pp. 14, 15.
[403] WANG Fangfei Faye, *op. cit.*, p. 29.

that knowledge with the hypertext linking of text with legal authority or evidence.[404]

Furthermore, there is greater flexibility during the resolution process. During the process the parties have the ability to simultaneously conduct any necessary research by going online and verifying any received information and share the findings with the other parties; this way the parties are better informed and more equipped to reach an agreement.[405] Furthermore, the parties have the ability to use information processing tools such as electronic document management and information-retrieval systems, which allows them to process information faster, and more efficiently; reducing delay and costs and making the process more effective than it would be in the offline world.[406] The flexibility during the process allows third party neutrals to multitask and at the same time conduct the joint discussion as well as separate discussions with each party, in a way similar to having several documents open in a word processor; the ability to multitask increases the effectiveness of the process.[407]

[404] HÖRNLE Julia, *op. cit.*, p. 88.
[405] For instance "If a representation is made by one side about the cost of a component or the value of an item, the other side can easily verify the cost over the Internet". See RULE Colin, *op. cit.*, pp. 65, 66.
[406] HÖRNLE Julia, *op. cit.*, p. 89.
[407] RULE Colin, *op. cit.*, p. 73.

Section 2: The challenges of ODR

ODR by substituting the real world with the virtual world also presents several new difficulties compared to traditional forms of alternative dispute resolution, mainly because ADR cannot easily be replicated online, since Cyberspace is not an actual representation of the physical world.[408] ODR changes the way parties communicate with the use of ICT tools. As evidenced, these changes lead to significant advantages of ODR compared to traditional ADR. However, at the same time these changes present drawbacks.[409] These drawbacks relate to practical challenges of communication, challenges regarding authenticity, data security and confidentiality and finally challenges in enforcing ODR decisions.

A. Practical challenges

The practical challenges for ODR are related to the ability of the parties to participate in the online resolution just as they

[408] EISEN Joel, *op. cit.*, p. 1308.

[409] "Many of the characteristics of ODR processes are double-edged, with both plusses and minuses". See RULE Colin, *op. cit.*, p. 80.

would in any of the traditional methods. These challenges include matters like the ability of the parties to have access to the necessary equipment, the ability to develop the skills to make proper use of that equipment and finally the ability of the parties and practitioners to adjust to the changes resulting from the transportation of the resolution to the virtual world.

i. The literacy of participants

First of all, to take part in ODR, one must have access to a computer and the Internet. Although it becomes increasingly easier to gain that access, "there are sharp differences among countries".[410] The unfamiliarity of the parties using the internet and the disparity in the level of infrastructure of communication and proper use of electronic equipment are few of the major disadvantages of ODR. Even asynchronous communication can cause frustration when internet availability is more limited.[411] The problem is also known as the digital divide. The fact that only a relatively small percentage of the total population has

[410] In 2001 about one-third of a billion people were already online. Almost one-half (147 million) were from North-America, just over a quarter (92 million) European, and roughly 6 per cent (19 million) British. France had only 17% of its population using Internet against 26% for England. See MANEVY Isabelle, *op. cit.*, p. 33.
[411] RULE Colin, *op. cit.*, p. 68.

access to and use of the Internet, urged President Clinton, in his 2000 State of the Union Address, to emphasize the need to close the gap between the technology haves and have-nots, because the Net is becoming a major engine of economic growth and those people left out of the Internet revolution stand to lose out on the benefits of a wired nation.[412]

Besides access to the equipment, participating in online resolution also requires certain skills both for the parties and the ODR practitioner. Parties must be able to navigate on the web and participate in the online procedure. Third party neutrals must also adjust their skills to be better suited for the online environment. Of course ODR providers and practitioners have an important role in delivering meaningful communications and building trust, but it requires different training, for instance, the interpretation of written communications, which although different from physical communications, is also possible.

Many ODR systems may require parties in a dispute to use advanced technological platforms and technology advances differently in every country.[413] An online form of communication may intimidate some users due to incomplete knowledge on new technologies that are constantly changing. The argument relates to the asymmetry of computer expertise according to which the

[412] VICTORIO M. Richard, *op. cit*., pp. 20, 21.
[413] For instance, within the EU many people still use various speeds of internet connections.

party who is more comfortable with computer technology will be at an advantage as compared to the party with less computer expertise. The disadvantaged party can overcome this difficulty by hiring an expert to take care of the technical details, but, this would add considerable costs making it a less desirable option.[414]

However, the argument that ODR favours those who are familiar with computers is losing support since the number of people using computers is increasing and everyone becomes more in touch with technology. This argument also relates more to offline disputes than disputes that arose in the online environment because in the latter cases it can be assumed that if the parties had the adequate knowledge to take part in the online transaction that gave rise to the dispute they can also take part in ODR.

ii. Lack of face-to-face encounters

One of the greatest drawbacks of ODR is considered the lack of face-to-face encounters. It is argued that in traditional ADR where the parties are physically present during the

[414] VICTORIO M. Richard, *op. cit.*, pp. 20, 21.

procedure,[415] the process is more efficient because there is a direct two-way information flow.[416] On the contrary, online communication cannot fully replace face-to-face conversations and therefore lacks the ability to promote important values of the dispute resolution process.[417] In an online setting, communication is distributed in time and the asynchronous nature of some forms of online communication, such as the e-mail, can create an uncertain rhythm. An email sent by one party may be answered in a few minutes, days or weeks without knowing when.

Furthermore, the distance of online communication makes it harder to maintain the attention and focus of the parties. Whereas in traditional ADR the parties are in the same room which makes it easier for them to focus on the resolution process, in ODR "it is very easy for parties to drop out or stonewall the other side and it is harder to ensure that the parties stay engaged with the process".[418] The distance of online communication and the fact that parties are not in the same room creates concerns about the inappropriateness of the Internet medium. The concerns relate to the difficulty controlling the conditions of the procedure, since the lack of physical presence

[415] KATCH Ethan, RIFKIN Janet and GAITENBY Alan, *op. cit.*, pp. 705, 714.
[416] The great paradox of ODR is that it requires an electronic distance for parties, while ADR is usually a verbal dispute resolution and is designed to engage participants in a direct face to face communication. See EISEN Joel, *op. cit.*, p. 1310.
[417] D' ZURILLA T. William, *op. cit.*, p. 352.
[418] RULE Colin, *op. cit.*, p. 82.

in the online process can make it difficult for the practitioner to maintain effective control over the procedure; as well as the inability to coordinate (especially in multiparty disputes), which may cause confusion.[419]

But more importantly the concerns relate to the difficulty of building rapport between the parties. In the online environment and especially when the parties use non-verbal, textual communication they tend to be more businesslike and therefore building rapport between them often does not come as naturally online as it might face-to-face.[420] Furthermore many ADR methods are considered valuable not just for the outcome they produce but also for their transformative and reconciliatory potential. For instance mediation can be about healing, educating, informing, persuading, opening lines of interpersonal communication and allowing parties to reexamine the dispute. However, the lack of physical presence hinders the establishment of trust since establishing trust via writing over an electronic distance is as effective as a therapist treating a patient by reading her journal.[421] Furthermore, it is argued that face to face interactions can result in a catharsis that is lacking in ODR, since an element of the catharsis is not simply to tell one's

[419] MANEVY Isabelle, *op. cit.*, pp. 29- 34.
[420] RULE Colin, *op. cit.*, p. 84.
[421] VICTORIO M. Richard, *op. cit.*, pp. 15- 17.

story, but also to have an effect on the listener, but in ODR the electronic medium creates distance from the listener.

With many forms of online communication, mostly written communication such as the email, parties cannot participate at the same time, making them unable to react instantly or ask for clarification;[422] interference with follow-up questions becomes harder as the matter is in general more tersely promoted. Instead communication is based on larger, more complex messages without the ability to interrupt the other party and provide verbal affirmation of their understanding.[423] Furthermore, the fact that communication in ODR is recorded and archived can hinder the resolution of the dispute if at any point during the process there is hostility between the parties and exchange of insults; these insults will also be archived and recorded and will remain a constant reminder which may not allow parties to move on towards a resolution.[424] This is truer especially for textual communication; as the Latin proverb goes “Verba volant, scripta manent” which means "spoken words fly away, written words remain".

[422] KRIVIS Jeffrey, *Taking mediation online: how to adapt your practice*, paper presented at the ABA Section on Dispute Resolution Conference, Seattle, April 4, 2002, p. 27.
[423] MORRIS W. Michael, NADLER Janice, KURTZBERG Terri, & THOMPSON Leigh, Schmooze or lose: Social friction and lubrication in e-mail negotiation, Group *Dynamics: Theory, Research, and Practice*, vol. 6, 2002, pp. 89-100.
[424] RULE Colin, *op. cit.*, pp. 80, 81.

Body language, tone of voice and facial expressions which are important components and can give an extra quality to communications, are absent in some forms of online communication.[425] The replacement of face to face contact by means of communication such as the email is difficult to give any weight to emotion. It is harder to use "intuitive cues of body language, facial expressions and verbal tonality, as cyberspace currently comes without all five senses attached".[426] The absence of non-verbal cues makes it easier to perceive messages out of context and create misunderstandings.[427]

Misunderstandings may occur because one party may not express well in writing and the message may be understood under a different intend or because the other party misreads the actual intend, no matter how well written, or finally misunderstandings may occur because of the practitioner's inability to filter the messages between the communications with the parties. Non-verbal communication may work against the development of trust in online communication because such an absence develops gaps in communication and creates an

[425] GIBBONS Llewellyn Joseph, KENNEDY Robin & GIBBS Michael John, Cyber-mediation: Computer-mediated Communications medium massaging the message, *New Mexico Law Review*, vol. 32, 2002, pp. 43- 45.

[426] EISEN Joel, *op. cit.*, p. 1308.

[427] However, "the loss of non-verbal information may be compensated by the increased comfort that participants feel because they are in their own homes. In the case of videoconferencing comfort can also bring patterns of interaction that could not otherwise be seen". See GILKEY L. Sonia, CAREY Joanne & WADE Shari, Families in crisis: Considerations for the use of web-based treatment models in family therapy, *Families in Society*: *The Journal of Contemporary Social Services*, vol. 90, 2009, pp. 37- 45.

atmosphere of uncertainty. This ambiguity leads parties to often ignore each other and possibly assume malice.

Furthermore, although the ability to conduct simultaneously research online allows parties to verify much of the information exchanged, however, in online communication parties are more likely to lie to each other because lies can be harder to detect. The distance of online communication and even more the use of textual communication make it easier to lie than in offline communication, where nonverbal cues may help detect a lie.[428] Lies can create distrust between parties and hinder effective communication.

For all these reasons, the lack of F2F communication was until recently considered the greatest drawback of ODR to the extent that it was considered the main reason why dispute resolution could not work in the online environment. However, this assumption has been proven wrong by successful ODR providers, such as the "UDRP" and "SquareTrade".[429] Furthermore, these proposed difficulties relate more closely to older and out-dated forms of online communication. Newer forms like videoconferencing and other online technologies that are developed with an extraordinary rate compensate for the lack

[428] "If someone looks you in the eye and says, 'Yes, I sent the check', most people believe that they will be able to tell if that person is being truthful. In an online interaction, that person could be laughing while he typed, 'Yes, I sent the check', and the other side would never know". See RULE Colin, *op. cit.*, pp. 82, 83.
[429] CORTES Pablo, *op. cit.*, pp. 83, 84.

of face to face contact. Until recently the objection of the lack of face-to-face contact was accompanied by the inability of technology to provide videoconferencing.[430] Today, when internet speed has reached unprecedented heights and cameras and software are easily accessible and extremely easy to use, videoconferencing seems as an obvious solution to the problem. Furthermore, ODR can provide various ICT tools to facilitate effective communication. Even textual communication may not be consisted simply by the use of words but also by the use of images, graphics, shapes, symbols and even colors could be used to represent emotions, creating a unique "screen-to-screen" communication.[431]

On the other hand, one could also argue that face-to-face communications tend to favour those who are physically attractive and better articulated, and it can create bias in terms of religion, sex, nationality or looks.[432] In this case, certain forms of ODR may provide a solution for people who feel more comfortable avoiding face to face communication and otherwise would not reach out to alternative dispute resolution.[433] Furthermore, F2F communication is not always necessary or practical to resolve online disputes and lacks other advantages

[430] BEAL Bruce Leonard, "Online Mediation: Has its Time Come?", *Ohio State Journal on dispute resolution*, vol. 15, 2000, p. 736.
[431] HÖRNLE Julia, *op. cit.*, p. 80.
[432] GIBBONS Llewellyn Joseph, KENNEDY Robin & GIBBS Michael John, *op. cit.*, p. 44.
[433] RULE Colin, *op. cit.*, p. 68.

like the ability of calming down the parties which is an important advantage of other forms of communication such as asynchronous communication via e-mail. Finally, as in the offline world, also in the online world the effectiveness of the resolution process depends on the way the available tools are used by the parties and the provider; the process will be effective if the tools are used appropriately and correctly, but if mishandled can create new problems and challenges.

B. Authenticity, data security and confidentiality

Some of the major concern about ODR have to do with the authenticity of identities and documents, the security of electronic communication, during the exchange of documents and data (for instance, through the exchange of e-mails) [434] or during discussions conducted through videoconference,[435] and the confidentiality of the procedure. The main concern is that users cannot be sure that the data sent and received in the virtual world, will not be tampered with or become accessible to

[434] CHOSH K. Anup, *E-Commerce Security: Weak Links, Best Defenses*, (John Wiley and sons), 1999, p. 98.
[435] ZEKOS I. Georgios, Issues of Intellectual Property in Cyberspace, *Journal of World Intellectual Property*, vol. 5, 2002, p. 233.

unwelcome eyes. ODR parties need to be assured that their communications are protected from external parties to encourage open participation.

As far as the authenticity goes, contrary to traditional ADR where most interactions occur in person, in ODR it might be difficult be certain about the identity of a person, for example the sender of an e-mail. Internet users may use different nicknames (pseudonyms) or simply disguise their identity. In cyberspace, as the saying goes, "no one knows you're a dog". For instance, this relates to Internet romances started in chat rooms and carried out over e-mail, in which one participant often finds out the other is not the woman of his dreams, but possibly not even his sex of preference.[436] However, technology has managed to find solutions based on authentication software such as digital signatures, “which are codes that are embedded in a message that can be employed to authenticate its origin”.[437] ODR providers and practitioners must take certain precautions and safeguards to ensure the parties are who they say they are, and that the ideas discussed in the virtual forum are protected from malicious disclosure.

For an ODR procedure to be successful, confidentiality is essential. As previously seen, confidentiality is one of the

[436] VICTORIO M. Richard, *op. cit.*, pp. 18- 20.
[437] MANEVY Isabelle, *op. cit.*, p. 31.

greatest advantages that make alternative dispute resolution more attractive than traditional dispute resolution, i.e. litigation. Where litigation is a public affair, settlement resulting from ADR is private and completely confidential and ensuring this same level of confidentiality in cyberspace is essential to ODR's success.

During the online communication the ODR provider creates digital files containing information. Information archiving is one of the advantages of ODR and a permanent record of the session helps the parties document each stage of the process leading to the settlement of each issue and the overall dispute.[438] However, this information must be protected from third intruders and deleted for default at the end of the process, except perhaps some non-personal data for statistical analysis. Otherwise, parties may be afraid of sharing confidential information especially in a textual form,[439] if there are no guaranties of privacy and confidentiality. The absence of such assurances may prevent the development of honest online

[438] "To transfer the data over the Internet there are numerous temporary copies made along the way. This is inherent to the nature of the Internet. It is necessary to make copies on the routers when transferring data from one computer to another, to make copies when downloading or uploading Information. In Cyberspace communication takes place through constant copying. When the confidentiality has been guaranteed by means of encryption, the fact that the Internet is built up from copies also has its advantages. The complete written file is accessible to both parties and the mediator at all times to check certain details or to see how things are. It is not necessary to take notes because everything is already written down". See HEUVEL V. D. Esther, *op. cit.*, p. 15.

[439] "Many people have had the experience of an email written months (if not years) before coming back and later embarrassing them". See RULE Colin, *op. cit.*, p. 81.

exchanges in Cyberspace.[440] Whereas in traditional, offline ADR "it is much harder to surreptitiously capture communications through the use of voice recording devices or similar techniques", [441] in ODR, concerns about privacy and confidentiality of the communication may seriously discourage potential participants. Therefore, it must not be possible for unknown third parties to intercept messages, or for the parties to tamper with the content of the messages.

Another prerequisite for ODR is the security of communications. "Computer viruses and worms lead us to question the value and reliability of the online environment."[442] One must keep in mind that no communication method is absolutely secure and even paper documents can be intercepted, copied or otherwise compromised. Furthermore, technology has considerably improved over the past several years producing security mechanisms to ensure the security and confidentiality of exchanges.[443]

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[440] GOODMAN W. Joseph, The Pros And Cons of Online Dispute Resolution: An Assessment of Cyber –Mediation Websites, *Duke Law and Technology Review*, 2003, pp. 10- 13.
[441] RULE Colin, *op. cit.*, pp. 81, 82.
[442] LARSON A. David, Online Dispute Resolution: Technology Takes a Place at the Table, *Negotiation Journal,* vol. 20, 2004, p. 131.
[443] "Protocols such as SSL, S-HTTP and SET that ensure the confidentiality and authenticity of exchanges by encrypting the data; firewalls that make it possible to screen the flow of information between an internal network and a public network and thereby neutralize attempts to penetrate the internal system from the public network; access to an ODR platform that is protected by a password, and managed and protected by the service provider; internal messaging tools so as to avoid the use of unprotected email, and the Secure Multipurpose Internet Mail Exchange Protocol (S/MIME), which makes it possible to authenticate the origin of every email while ensuring the

One way to provide security is through the use of web-page communication instead of the lesser secure e-mail communication, since in web-page communication parties are provided with a secure password that limits unauthorized access.[444] Another way currently used to great extend to provide confidentiality and data security is encryption.[445] Encryption allows the parties and ODR provider to communicate and exchange information without risking a breach of confidentiality by unauthorized parties.[446] The most common encryption methods are the use of "Hyper Text Transfer Protocol" (http), plus "Secure Socket Layer" (SSL) which is indicated by a domain name preceded by "https" and displaying a lock symbol in the corner of the user's screen, and the "Public Key Infrastructure" (PKI) encryption system, which is comprised of a public key (held by the client and server) and a private key (held exclusively by the client) so that only clients can decode the

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confidentiality and integrity of its content, thereby making it very difficult for the sender to repudiate it or the addressee or a third party to forge it (electronic signature can also serve the same purposes)". See BENYEKHLEF Karim and GELINAS Fabien, op. cit., p. 84. For instance, "Cyber Settle blind-bidding process encrypts all communications using a 128-bit SSL and Smart Settle uses OpenSSL algorithms with a 168-bit triple-DES encryption algorithm". See PONTE M. Lucille and CAVENAGH D. Thomas, *op. cit*., p. 41.

[444] "However, there is no foolproof way to prevent parties from copying information off of their screen for later use. Even if the parties are prevented from cutting and pasting text, they can still take a screen capture of the text." See RULE Colin, *op. cit*., pp. 81, 82.

[445] "Encryption is the automated process of making data inaccessible to unauthorized people by means of an algorithm and a key". See HEUVEL V. D. Esther**,** *op. cit*., p. 15.

[446] RABINOVICH-EINY Orna, Going Public: Diminishing Privacy in Dispute Resolution, *Virginia*
Journal of Law and Technology, vol. 7, 2002, p. 43.

information using both keys.[447] In Europe, although there are is still drawbacks with the use of encryption, it is argued that EU data protection law requires the use of encryption in order to ensure the confidentiality of the procedure.[448] In conclusion, there are concerns about security, confidentiality and privacy of online communication, but there are also solutions to the challenges. It is essential for ODR provides to take all the necessary steps to ensure the safeguarding of online communication.[449]

C. Enforcement of ODR decisions and Self-enforcement mechanisms

One of the major issues related to ODR is the one concerning the compliance of the parties with the result of the

[447] CORTES Pablo, *op. cit.*, pp. 84, 85.

[448] For instance, "In France, encryption was long only used by the military. Until 1996, French law was restrictive regarding the use of encryptions, it has been relaxed but after a certain level of encryptions, user are submitted to an obligation of declaration or prior authorization if the technology used exceeds a certain level of bits. However, restrictions on the use of encryption technologies should be eliminated due to the implementation of the EU Directive on a Community Framework for Digital Signatures which prevents all EU Member States from not recognizing the validity of an electronic writing. In France, it was done by the law n°2000-230 of March 13 2000 and the Décret d'application of March 31 2001. In the UK, in May 2001, the government was still consulting for the implementation of the e-sign directive". See MANEVY Isabelle, *op. cit.*, pp. 30, 31.

[449] RULE Colin, *op. cit.*, pp. 81, 82.

resolution procedure. How can compliance with the outcome of the dispute resolution process be ensured? The problem becomes even greater in e-commerce disputes and in general in cross-border disputes. First, a distinction must be made between the methods of ODR, relating to the effect of the process, to binding and non-binding ODR methods. In the former category there is binding online arbitration, which can produce a binding arbitral award and secure the compliance of the losing party and the enforcement of the award. Especially for cross-border disputes, arbitral awards are usually easier to enforce, because of the existing international treaties; the winning party has only to initiate enforcement proceedings by applying for an exequatur.[450] However, at this point binding online arbitration will not be examined since this task will take place in the relevant section.

In the latter category of non-binding ODR methods there are mainly online negotiation, online mediation and non-binding arbitration. These methods, although present a lesser degree of formality, unfortunately also present a significant problem, which is the enforcement of their outcomes. A major issue with all ODR methods except binding arbitration is that these mechanisms may prove ineffective, when parties do not comply voluntarily with the outcome, which is not binding. There is of course a majority of cases where it is in both parties' best

[450] KAUFMANN-KOHLER Gabrielle, *op. cit.*, pp. 453, 454.

interest to resolve the dispute in a final way and without further complications. But, there are other cases where one party might not be willing to comply voluntarily with the outcome of the process. Even when parties initially voluntarily agree on a settlement, compliance may be expected, but it cannot be always assured.

In non-binding ODR methods the outcome of the procedure can be non-binding at all, in which case without the voluntary compliance of the parties, there is nothing more to be done. But, in most cases the outcome can become binding as a contract, or otherwise known as a binding settlement agreement.[451] Yet, a binding settlement agreement does not really solve the problem because again without the voluntary compliance of the parties, the only way to enforce the outcome would be to go to court. However, this solution leads to the same judicial route that the parties hoped to avoid, defeating the actual purpose of ODR. Without voluntary compliance, the winning party has to go to court and start a new court action, not simply enforcement proceedings, as in the case of binding awards. However, this process is highly time and cost consuming, which may

[451] "This type of enforcement mechanism (a binding settlement agreement) could be implemented either unilaterally e.g. only the merchant could agree to be bound by the result of the ODR procedure which would be easier to enforce by court because it would be protective the consumer. It could be implemented bilaterally and be binding on both parties. Generally speaking such are binding in US, UK and France as contracts, which can be sued upon under national law if they are not complied with. In the European Union, the resulting judgment could then be enforced in all other Member States under the Brussels Convention". See MANEVY Isabelle, *op. cit.*, p.29.

discourage the winning party from seeking enforcement, especially in low value disputes which is the common case in e-commerce. Furthermore, in cross border disputes the problem is even greater due to higher costs and complex jurisdictional issues. In cross-border disputes, due to the greater expense and legal complexities, "the winning party will have only limited incentives to go to court, and the losing party will also have only limited incentive to obey the contract, because it is unlikely to become enforceable".[452] Consequently, the voluntary nature of non-binding ODR methods when combined with unwillingness of the losing party to comply can create an absence of enforceability for ODR settlements with no practically available solution. For these reasons, ODR's lack of enforcement mechanisms is considered one of its greatest shortcomings.

One proposition to overcome this problem is to support extra-judicial ODR by courts which will operate as secondary entities and enforce outcomes reached through ODR methods. One such example would be the online appeal processes proposed for the UDRP; however, "these proposals faced criticisms based on perceived delays, expenses, ease of abuse and lack of finality".[453] Consequently, in ODR outcomes are

[452] SCHULTZ Thomas, 'Online Arbitration: Binding or Non-Binding?' *ADR Online Monthly*, 2003, p. 1.
[453] CORTES Pablo, *op. cit.*, pp. 204, 206.

enforced without recourse to the courts, through what is known as self-execution or otherwise as self-enforcement mechanisms. Under circumstances, these mechanisms can give the outcome of a non-binding ODR method, binding force.

There are basically three ways by which a decision arising out of a voluntary ODR procedure can be enforced without the need for a court decision but instead with low costs and convenience. Each of these ways requires that the ODR provider has exclusive control over one of the three corresponding things. The provider may have technical control, financial control or control over reputation. Self-enforcement can be divided into two categories; direct self-enforcement and indirect self-enforcement. In direct self-enforcement the ODR provider controls the resources at play and particularly has either technical (UDRP) or financial control (escrow, chargebacks), whereas in indirect self-enforcement, incentives are created for the losing party to comply voluntarily, for example through the use of "trustmarks, reputation management and rating systems, publicly accessible reports, exclusion of participants from marketplaces, and payments for delay in performance".[454] The examination of these mechanisms at this point of the thesis is essential because these mechanisms, in more than one role, will

[454] WANG Fangfei Faye, *op. cit.*, pp. 83, 84.

be an integral part of the proposed ODR system that follows in the second part of this thesis.

i. Self-enforcement mechanisms based on Technical control

ODR decisions can be made self-enforcing in few cases when the ODR provider has technical control. The most representative example in this case is the self-enforcement mechanism applied by the UDRP procedure for the resolution of domain name disputes. However, this is a particular situation where the ICANN has unique control over domain names and the power to bind registrants to cancel or transfer domain names depending on the outcome of the dispute.[455] "Ten days after the decision by the panel of experts, the domain name is either cancelled or transferred to the winning party, by the registrar that registered the domain name and exercises technical control

[455] "The success of the UDRP as an ODR model for domain names rests on getting disputants to use the UDRP and its efficient self-enforcement mechanism. This self-enforcement mechanism may not be available for some types of disputes, such as mainstream disputes arising out of a transaction between an online vendor and a buyer; except if there is the collaboration of entities that could enforce the outcome, for instance, the payment service (*e.g.* VISA or PayPal) or if a dispute arouse on a third party platform or other intermediary, such as disputes arising out of market places (*e.g.* eBay) or disputes originated from information posted on mass collaboration sites (*e.g.* Facebook and Wikipedia)". See CORTES Pablo, *op. cit*., pp. 167, 168.

over the registration".[456] There is an exception in the case legal proceeding have been initiated, but the high cost of litigation and the short time period make self-enforcement the majority rule.[457] The UDRP example will be examined further in the second part of the thesis.

ii. Self-enforcement mechanisms based on Reputation incentives

In C2C and B2C disputes one effective way to ensure the compliance of the parties with the outcome of the ODR process is based on the reputation of individual buyers or sellers or companies. Basically, the reputation of users is linked with their performance and the compliance to both the ODR procedure and its result, so that failure to comply would harm their reputation. This in turn would hamper the user's trustworthiness and consequently the sales in the virtual marketplace. Therefore, holding a good reputation is an incentive to comply.

[456] KAUFMANN-KOHLER Gabrielle, op. cit., pp. 453, 454
[457] CORTES Pablo, *op. cit.*, p. 82.

1. Feedback systems

Feedback systems provide information about the reliability of online users based on experience and comments of former users from previous transactions. They are being used mostly by online auction sites where there is no other viable way for users to adequately assess each other. Ratings allow transaction parties "who do not know each other to see a record of the other side's positive or negative feedback from prior transactions".[458] Positive feedbacks increase the users' confidence and the desire to acquire positive feedbacks facilitates compliance. This was clearly shown by e-bay, where compliance with the outcome of the ODR process is ensured to a high extent because of what has become known as the "eBay Law". E-Bay uses a Feedback system,[459] which incentivizes market participants to be on their best behavior. Whenever one of the parties does not comply, it has as a result a negative feedback, which in turn hurts that party's reputation and has a negative effect in the ability of others to trust and select that party for future transactions. Therefore, the losing party feels compelled to comply in order

[458] RULE Colin, *op. cit.*, p. 102.

[459] "Currently eBay houses more than four billion feedback ratings left by transaction participants for each other… EBay assigns parties a "star" based on how many positive reviews they have received. For example, if the seller has 10 to 49 positive ratings, they get a yellow star and if the seller has 50 to 99 positive ratings they get a blue star. A seller with a million or more positive ratings is entitled to a 'shooting silver star'". See DUCA D. Louis, RULE Colin, LOEBL Zbynek, *op. cit.*, pp. 66, 67, 68.

not to jeopardize its position in the eBay community. In a similar fashion work the compliance incentives known as "blacklists".[460] As one can guess by this mechanism's self-evident name, names published in a blacklist are parties that failed to comply with dispute resolution decisions. This allows users to inform themselves about those users and avoid transacting with them and consequently the fear of being blacklisted compels compliance.

2. Trustmarks

Particularly in the case of B2C disputes, a way to ensure the compliance of the companies is through affiliate programs. The use of trustmarks and seals provides web traders with the necessary incentives to comply. "A business site granted a Trustmark certifies that it complies with a certain code of conduct that provides for ODR and for compliance with the resulting decisions".[461] If a company displays the Trustmark or

[460] For instance "The Consumer Complaint Board in Denmark states that 80 per cent of its decisions are voluntarily complied with by the businesses. The remaining decisions are published in a blacklist of defaulters on the consumer agency's website. This strategy of 'naming and shaming' has led to eventual compliance with an additional 30 per cent of the remaining decisions". See CORTES Pablo, *op. cit.*, pp. 82, 83.

[461] KAUFMANN-KOHLER Gabrielle, *op. cit.*, pp. 453, 454.

the seal of an ODR provider, it means that the company in case a dispute arises will agree to resolve the dispute through that provider and consequently will comply with the outcome of the process. In case the company fails to comply, the ODR provider, in collaboration with the appropriate controlling entity, will remove the Trustmark.

The Trustmark increases the consumers' trust in the company that displays it and reassures them that in case a transaction goes awry there will be a secure and relatively easy way to resolve the dispute. Therefore, it increases the chance that consumers will choose that company for their transaction. The threat of removing the Trustmark and losing the trust accompanied by it creates the company's incentive to comply with the outcome of the ODR process. At European level Trustmark providers include "Trusted Shops", "Euro-Label", "TrustUK" and "WebTraderUK". In the US the most popular are the "Better Business Bureau" (BBB) and "TRUSTe". There have also been attempts for the establishment of an international Trustmark scheme such as the "Global Trustmark Alliance" (GTA).[462]

[462] CORTES Pablo, *op. cit.*, pp. 59- 64.

iii. Self-enforcement mechanisms based on Financial control

ODR decisions can be enforced when the ODR provider has control over the finances. Methods of enforcement relying on money include setting up "judgment funds" to cover the outcome of ODR proceedings, or escrow accounts operated by a secure third party which holds temporarily the funds of a transaction until it is completed or any disputes are settled, as well as charge-back agreements with credit card companies.

Escrow accounts, where a secure third party holds the funds until the goods are delivered, "help to solve the problem of fraudulent sellers".[463] Credit card chargebacks are basically agreements between ODR providers and credit card companies. According to these chargebacks agreements, when a buyer has used a credit card to pay for a transaction, the credit company reserves the authority to charge back the amount of the transaction to the buyers account depending on the decision of the ODR provider.

Chargebacks mechanisms are used not only for online transaction but also for offline transactions and generally for any transaction in which the buyer uses a credit card, such as

[463] RULE Colin, *op. cit.*, p. 102.

payments in commercial stores and reservations of hotel rooms. Chargebacks mechanisms are widely utilized throughout the world and supported by the most reliable credit card companies, such as "Visa", "Master Card" and "American Express".[464] After the purchase, if a dispute arises the consumer can initiate the chargeback mechanism. The consumer notifies the credit card company, which transfers back the money from the seller to the buyer's account until the transaction takes place or the potential dispute is resolved. The most common reasons that may lead to a chargeback are the non-delivery of goods or services, the delivery of goods or services that do not match the description and the processing of charges that do not match the amount of the transaction. These chargeback mechanisms are useful for consumers not only because credit cards are the main method used to transfer money online, but also because they don't require evidence from the consumer and the burden of proof lies entirely on the seller. Only if the seller succeeds to provide substantial proof, the bank makes the payment. Basically, the

[464] "In the United States, federal law requires credit card companies to allow chargebacks. To take advantage of this system, a buyer must notify the credit card company of the disputed charge within sixty days of receiving notice of the charge from the credit card company. In Europe, credit card companies are not required to provide chargeback services. Although chargebacks are not as prevalent in Europe as in the United States, they are still used fairly frequently". See DUCA D. Louis, RULE Colin, LOEBL Zbynek, *op. cit.*, pp. 72- 75.
"However, the coverage of debit and credit cards varies considerably among different countries. Commonly, debit card holders have fewer protections than credit card holders, but these also vary depending on the jurisdiction. In the UK, for instance, credit card holders have more protections than debit card holders, while in Ireland the protections afforded to consumers are the same. This disharmony occurs even though the same European directives are applicable to both Member States; this is due to the fact that most of these services do not depend exclusively on the regulations, but also on self-regulatory provisions". See CORTES Pablo, *op. cit.*, pp. 69, 70.

credit card company acts as an arbitrator without engaging in an adversarial hearing process and by favoring the consumer.

A representative example of enforcement based on financial control is provided by "Paypal.com". When a dispute arises in those cases where the product or service was not delivered, or the description of the product was "significantly different" to the actual product delivered, "PayPal" holds the money transferred by the buyer until the dispute is settled. After a complaint is made by the buyer within forty five days from the payment, "PayPal" conducts a document-only online arbitration, examines the documentary evidence provided by the parties and resolves the dispute. If the dispute is resolved in favor of the seller the funds are resealed, but if the dispute is settled in favor of the buyer the funds are transferred back; this way PayPal provides instant and effective enforcement.[465]

The examination of few of the most commonly used self-enforcement mechanisms reveals promising solutions. However, one must keep in mind that these self-enforcement mechanisms are possible in very limited and specific types of cases. Furthermore, the efficiency of these mechanisms is based, especially in low value disputes, on the unlikelihood that "the losing party would seek to litigate after a decision has been self-

[465] "However, in circumstances where the seller withdraws the money from his account before the buyer makes the claim, Paypal.com will not be responsible for the buyer's loss". See CORTES Pablo, *op. cit*., pp. 63, 64.

executed".[466] But, in reality nothing actually prevents the losing party to seek redress through the traditional judicial route and therefore these mechanisms do not technically provide finality in the resolution of the dispute.

[466] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, pp. 10-13.

Part 2

The ODR system

The first part of the thesis analysed dispute resolution as a movement and its evolution from traditional ADR to ODR. The second part is a necessary subsequent to the first. The first part demonstrates that as the evolution of disputes in the past created the need for a faster and more efficient way to resolve disputes and ADR was the answer to that need; today, once more the evolution of disputes makes evident the need for a new dispute resolution system that can respond adequately to the needs of recent times and ODR is the answer to that need. As stated ODR was a result of the evolution of ADR and the combination of ADR techniques with the modern ICT tools of the digital era. Therefore, the first part started from the examination of ADR, its definition, the different forms, the reasons that created the need for ADR as well as the drawbacks that paved the way for ODR. The first part continued the evolutionary journey of dispute resolution to the digital era, where the changes in the way humans communicate and interact and the new world necessities led to the appearance of ODR. ODR is examined in depth from its definition and the use of technology, to its

advantages and drawbacks and is more clearly illustrated through real world examples of ODR providers. This way the first part provided an extensive analysis of dispute resolution in general and ODR more particularly.

The first part serves to provide an understanding of the dispute resolution movement necessary for the second part. The first part by examining the advantages of both ADR and ODR illustrated the necessary attributes of dispute resolution and by examining the drawbacks again of both ADR and ODR it identifies the problems that must be overcome. The examples of real world attempts by ODR providers allow distinguishing successful from failed attempts and identifying the reasons that led to either success or failure. The first part provides the lessons learned from the past of dispute resolution that must shape the future of it. ODR as a concept has the potential to be an effective way to resolve disputes and some of the initiatives examined in the previous chapter were proof of that. But, there are also difficulties and pitfalls and the limited popularity of ODR systems is evidence to that. So, the question is how can ODR be improved and truly become an alternative method of dispute resolution. By knowing the evolution in the dispute resolution field combined with a detailed examination of ODR and with the examples of ODR, one gathers the necessary experience to identify what works and what does not and is

equipped with all the essential information to draw conclusions about the necessary characteristics successful ODR must have and consequently make the corresponding suggestions about the future of dispute resolution.

The second part takes advantage of those lessons to illustrate the appropriate layout of the ODR system both as a process and as a structure as well as the necessary steps that must be taken so that ODR fulfils all its promising potential. The second part learns from the lessons of the ADR movement and the ODR movement up to today, and applies that knowledge to demonstrate the necessary future steps for an optimal ODR system. The second part outlines the parameters for a workable model of fair and effective online dispute resolution, drawing on the conclusions from the first part of the thesis. The second part identifies all the necessary requirements so that ODR provides the unique advantages and overcomes the potential drawbacks that are described in the first part. The second part demonstrates how future ODR should exemplify from the previous real world attempts demonstrated in the first part. In short, the second part describes how ODR should work based on the experience on dispute resolution provided by the first part. The second part designates how ODR should work in order to fulfil its full potential as a complete, fair and effective way to resolve disputes. To that extend, the first half of the second part relates

to the process of ODR and the second half relates to the ODR architecture.

The first half envisions ODR as a process which has learned from the experience of ADR, that a dispute resolution system to be complete, it must provide a process that takes advantage of the different strengths of the main dispute resolution methods examined in part one. It envisions a three step process with negotiation as the first step, mediation as the second and arbitration as the third step. For B2C disputes it envisions an additional pre-emptive step of online dispute prevention.[467] The first half takes a closer look to online arbitration, advocates its necessity as the final step of the ODR process and examines in depth the concerns and objections against it. It examines the entire process of online arbitration from the arbitration agreement, to the procedure, to the outcome of the process. In particular, it advocates the necessity of online arbitration as the final step of dispute resolution because only arbitration can provide the essential finality as well as provide solutions to disputes that do not lend themselves to compromise. However, the choice of online arbitration as the final step of the dispute resolution procedure gives rises to certain issues and questions regarding online arbitration. The first half of the second part answers the questions during the examination of the

[467] Hereafter referred to as ODP.

key parts of an online arbitration process, i.e. the agreement, the procedure and the outcome of the process.

The second half of the second part envisions ODR as a complete system and illustrates all the key factors for its structure. It envisions an international ODR system that will be comprised of private initiatives backed by governmental support and supervision and cooperation on an international level under the auspices of a global organization. It envisions a global network with online clearinghouses for every country. The parties will be able to access the clearinghouse which will direct them to the appropriate ODR provider depending on the nature of the dispute, the specifics of each case and the method of resolution. It envisions a network that will accredit ODR providers and ensure the compliance with some minimum regulatory standards as well as the safeguarding of fundamental principles. It identifies the core principles that must be safeguarded to ensure that the ODR system will be both fair and effective and illustrates how this translates in actual practice. More specifically it demonstrates how to address the relevant technological considerations as well as how ODR should be funded. Some of the fundamental principles such as accessibility and transparency are inextricably connected to the technology used and the way ODR is funded. Finally, it envisions a network that will raise awareness about the existence of ODR and

increase users' trust and confidence. In short, the second half of this part provides a complete layout of an ODR system from its funding and its technological structure, to its regulation and finally to the extra step of creating awareness and trust necessary for ODR to fulfil its full potential.

Although ODR examples demonstrate the success of ODR in the resolution of a wide range of disputes, such as e-commerce disputes and domain name disputes and despite the fact that the first part of the thesis illustrated that ODR could serve as a successful, fair and effective way to resolve disputes, however, today the social impact of ODR remains limited. Many reasons can be identified for that, such as the lack of awareness about the existence of ODR or about its great potential for success and the lack of a uniform framework for ODR initiatives that will provide clarity about ODR services, increase potential users' confidence and provide worldwide standards that will ensure the operation of ODR as a fair and effective system. Because of the above reasons, potential users may still be discouraged from choosing ODR for the resolution of their disputes. The second part of the thesis provides solutions on all the above issues.

The model demonstrated in the thesis will be general as to include all disputes. However, when necessary, the variations in certain points will be highlighted. For instance, variations from

the general model will be addressed in order for the ODR system to cover the specific demands of B2C disputes. These variations include extra steps in the ODR process, the use of different methods as well as specific requirements that result from the dynamic of the parties in B2C disputes i.e. the power imbalance between the parties.

Title 1

The ODR process

The first half of the second part relates to the ODR process. Particularly, it describes how the ODR process should work in order to ensure a fair and effective online resolution of disputes. More specifically, the first chapter demonstrates the different steps of the ODR process and envisions a three step process comprised of negotiation, mediation and arbitration, while in B2C disputes an additional step is included, that of online dispute prevention. Chapters two and three relate to the third step of the process, online arbitration. They demonstrate the necessity of online arbitration as part of the process and provide solutions and answers to all the proposed concerns and objections against online arbitration.

Chapter 1

The Three step process

The first chapter demonstrates the specifics of an ODR process designed to provide fair and effective online resolution of disputes. Based on the experience of the ADR movement and the conclusions drawn from the practice of ODR providers over the past years, the thesis identifies the need for a multi-step dispute resolution process. The focus in this thesis has been on the three main methods of dispute resolution, mainly negotiation, mediation and arbitration. This preference is justified by the fact that these methods represent three different but all fundamental ways to resolve a dispute. The negotiations between the parties themselves, the resolution through the assistance of a third neutral and the resolution of the dispute by a third party decision maker. These three fundamental approaches to resolve a dispute must be offered to the parties, ideally as escalating steps of a complete process. The first section of the chapter describes the three step process and demonstrates the reasons of its necessity. The second section relates specifically to B2C disputes and describes the additional step of Online Dispute Prevention. Finally, the third section

examines the UNCITRAL proposal which also states the necessity for a multi-method process.

Section 1: A multi-step process

The examination of ODR methods and specific systems in the previous sections provides some insight about the future of ODR. As seen in the first part of the thesis, in 1976 when the rebirth of traditional ADR started to gain popularity, the vision for a more efficient and successful dispute resolution as described by Frank E.A. Sander was the formulation of a multi-door courthouse. The goal was to tailor dispute resolution by choosing the appropriate ADR method for each specific dispute and take advantage of the variety of methods in a way that would lead to the resolution of every dispute. Influenced by those ideas traditional ADR formed into a three step system for the resolution of disputes. The parties usually try to resolve the dispute initially through negotiation; if that does not work they enlist the help of a neutral third party to guide them to a mutually acceptable settlement; and if that also does not work they resort to a third party neutral for a binding and final resolution of their dispute.

Although the best place to resolve any dispute is as early in the life of the dispute as possible, because the longer a dispute goes on, the more issues that need to be resolved in order for the parties to feel the matter has been dealt with and in general the harder it is to resolve the dispute; however, most dispute resolution systems are designed like locks in a canal, in which a matter advances to a more formal process only after a simpler process was unsuccessful in helping to resolve that dispute and this way the system allows both for a faster resolution when it is possible, but has also further options when the earlier steps are not able to generate a resolution.[468]

Today, the same principles can be modified and applied to the field of ODR. It is difficult to compare the different methods of ODR and come to a definite decision about whether or not one of them is preferable or "better" than the others. This is mainly because the most suitable ODR method depends on the type of case for resolution as well as the specific circumstances of each case. For example, it is well known that for family disputes the advantages of mediation are better suited for their resolution. On the contrary, for e-commerce disputes the preferable method may

[468] "For example, if an employee in a corporation is beginning to feel that her workplace is uncomfortable, it does not make sense for that employee immediately to jump into formal labor arbitration. Initially the employee may discuss the situation with her supervisor and ask for certain changes to be made in the working environment. If that strategy is not successful in resolving the matter, she may contact the human resources department. Should internal mechanisms prove inadequate for resolving the concerns of the employee, the employee might ask that an outside mediator be brought in to attempt to resolve the situation. If that is not successful, the matter may escalate to arbitration and/or a court proceeding". See RULE Colin, *op. cit.*, pp. 290, 291.

vary; for example for purely monetary disputes the efficiency, ease and fast pace of blind bidding negotiation may in several occasions prove to be most suitable. In order to have efficient and successful ODR more than one method must be incorporated. Multi-method dispute resolution processes must become the norm in ODR. Only this way may parties take advantage of the full potential that the different fundamental methods provide for the resolution of a dispute. The necessity of a multi-method dispute resolution became also evident by the strategic alliance between the "American Arbitration Association" (AAA) and "Cybersettle", which allows parties to use the dispute resolution services of both companies and ensure that no one walks away without a resolution. Parties will attempt to settle through "Cybersettle" and through online negotiation and if a settlement is not possible they will use AAA's dispute resolution processes, including conciliation, mediation and arbitration.[469]

In analogy with the multi-door courthouse, this thesis suggests a multi-door ODR where clearinghouses will redirect users to the appropriate provider and procedure, and a process which will be comprised by three steps. The first step must be an attempt from the disputants to resolve the dispute through negotiations without a third neutral party, but with the involvement of the "fourth" party. So the first step will include

WANG Fangfei Faye, *op. cit.*, p. 75.

assisted negotiation or blind-bidding negotiation when appropriate for the dispute. The success of automated processes for consumer disputes depends on the nature of the dispute, the accuracy of the information provided, and the capability of the software or fourth party in assessing the dispute. However, the limit of these platforms is that they deal only with repetitive and simple disputes. But as a first step it will significantly reduce the number of cases going to third party neutral for resolution.

The second step will include the attempt to settle with the help of a third party neutral; the prevailing method at this step will be online mediation. It can lead to a fast settlement with relatively little cost and at the same time keep the relationship between the parties intact. Non-binding forms of dispute resolution can terminate a dispute without the need for a binding decision. As seen in the first part of the thesis from the examples of Square Trade, eBay and PayPal, both assisted negotiation and online mediation can be very successful for certain kind of disputes.

The existence of consensual non-binding methods at the first steps before adjudication can serve as important method to filter out certain disputes where a compromise can be found and settlement can be reached.[470] Mediation provided in conjunction with adjudication and attempted before adjudication allows for

[470] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, p. 10.

the resolution of disputes and removes disputes at an earlier stage without the need for adjudication. However, the fact that these methods are followed by an effective adjudicative method as a next step allows them to be more efficient as the parties are more incentivized to utilize these consensual non-binding methods, early on in the dispute, in order to reduce potential formality, costs and time consumption. Furthermore, access to adjudication guards against unfairness in negotiation and mediation, since lack of available or accessible adjudication may lead to unfair settlements with parties pressurized in accepting compromises that do not reflect their interests or rights and entitlements.[471] However, "such an approach should not consider consensual ODR just as a first step before adjudication, but as an invaluable tool for the resolution of disputes that is offered in conjunction to adjudication".[472] The evolution of dispute resolution and the success of consensual non-binding methods in traditional ADR suggest that it is likely non-binding methods of dispute resolution will continue to be equally important in ODR, since they do not suffer from the inefficiencies of traditional justice, classical arbitration included.[473]

[471] HÖRNLE Julia, *op. cit.*, pp. 57, 58.
[472] CORTES Pablo, *op. cit.*, p. 20.
[473] "A reflection of what the French legal philosopher Mireille Delmas-Marty calls 'veritable triomphe du mou, du flou, du doux' (blandly, 'the true victory of soft law')". See KAUFMANN-KOHLER Gabrielle, Online Dispute Resolution and its Significance for International Commercial Arbitration, *Global Reflections on International Law, Commerce and Dispute Resolution*, 2005, pp. 19, 20.

The third step of the process will be online arbitration. Online negotiation and online mediation were extensively examined in the first part of the thesis so there will be no need for further analysis. This part of the thesis will however examine in detail the last step of the process i.e. online arbitration. As arbitration in traditional ADR, also online arbitration in ODR has several advantages that make it a unique and unparalleled method. These special characteristics differentiate online arbitration from litigation, traditional ADR and especially its counterpart traditional arbitration, but also from other ODR methods. Unfortunately, most ODR initiatives as well as the scholarship on ODR has focused more on non-binding ODR options or automated processes such as blind bidding negotiation.[474] "Arbitration is probably the least popular ODR method for the resolution of consumer disputes, especially at an international level".[475] This thesis aims to remedy this injustice and illustrate that the unique advantages of online arbitration can provide an invaluable solution for the online resolution of

[474] "ODR scholarship is fairly limited. Most commentators mainly have discussed use of the Internet for filing, scheduling, and managing ADR processes, or for numbers-focused processes such as Cybersettle's 'double blind-bidding' that gathers parties' confidential settlement offers and demands and determines if and what settlement the parties should mutually accept. Furthermore, articles and reports have provided more facial discussion of ODR's inevitability with the rise of e-communities and the Internet-savvy generation, or have focused on jurisdiction or technical aspects of encryption and Internet security. This has left binding online arbitration largely overlooked". SCHMITZ J. Amy, *op. cit*., pp. 6, 7.

[475] CORTES Pablo, *op. cit.*, pp. 68, 69.

disputes.[476] The previous part illustrated the limitations of court procedures, traditional ADR and consensual ODR methods. These limitations demonstrated a need for binding online-arbitration mechanisms to solve Internet disputes. Online arbitration provides access to justice because it widens the access to binding dispute resolution and captures a whole range of Internet disputes that cannot be solved by any other means.[477]

As stated some specific mentions during this part will address issues related to B2C disputes. In B2C disputes the tree step process is complemented by an additional pre-emptive step. Online dispute prevention is a concept often considered as a part of ODR. Although, technically ODP aims to the avoidance of dispute and not their resolution, it is nonetheless an important ally for successful ODR.

Section 2: Online Dispute Prevention

Whether Online Dispute Prevention should be considered a part or a complement to ODR is a matter of opinion. Besides, as

[476] Currently, adjudicatory online dispute resolution processes are rare among ODR alternatives, with one study indicating that such arbitration-like processes handled only 1% of cases settled online. This is despite the rise in Internet transactions. See SCHMITZ J. Amy, *op. cit*., p. 18.
[477] HÖRNLE Julia, *op. cit*., pp. 220, 225.

will be demonstrated, some of the same enforcement mechanisms examined in the first part of the thesis have a dual function before the dispute arises and at its end, which blurs the clear borders between ODR and ODP. This thesis considers ODP as a separate preemptive step before ODR. However, what becomes clearer day by day in dispute resolution is that ODP with its dispute avoidance mechanisms can definitely become a solid foundation for an efficient dispute resolution system. ODP refers to the use of ICT for the employment of mechanisms that aim to deal with potential disputes at an early stage and either prevent them from happening or resolve the issues before requiring the parties to turn to an external ODR provider and a fully engaged dispute resolution procedure.[478]

ODP is essential, especially in B2C and C2C transactions, where the high volume of potential disputes demands businesses and users to attempt all the more conflict prevention. This reduces the number of conflicts that escalate to disputes and subsequently allows ODR to be more efficient but also more valuable to the parties as ODR will deal with the hard cases where there are concerns of impartiality, complexities in cases

[478] "Colin Rule, Director of eBay's ODR services, undoubtedly the person with the best understanding of the workings and finalities of ODR, mentions for instance that when he arrived at eBay, almost no one used the word 'dispute' and terms such as 'report [and] complaint' were the normal language. He then goes on to describe one of the main strengths of ODR at eBay as the possibility to handle complaints so early on that 'we were able to resolve the issue before it became a dispute'". See SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 16.

and lack of trust. For instance, in a B2C transaction the use of an external ODR provider will be employed only if the buyer and the merchant are not able to resolve the dispute internally. This way ODP reduces the need for external resolution procedures and saves businesses and consumers' time and money. In C2C transactions, EBay is again a prime example. "EBay's in-house ODR process has resolved hundreds of millions disputes, while Square Trade resolved just over two million in its life time".[479]

There are many types of dispute avoidance mechanisms and many of the self-enforcement mechanisms examined previously have also a dual role as ODP mechanisms, because besides incentivizing parties to comply with decisions of ODR providers, they can also help prevent disputes. Mechanisms based on financial control like escrow accounts and chargebacks when used early on can identify fraudulent sellers and prevent potential disputes. Mechanisms based on reputation are also ODP mechanisms. In C2C transactions, feedback systems like the eBay feedback rating system can inform buyers beforehand about the reliability of the seller based on positive, negative and neutral feedback and therefore avoid dealing with unreliable ones. In B2C transactions, Trustmarks can assure consumers that Trustmark carriers comply with quality standards of good practice for privacy, dispute resolution and e-commerce and

[479] CORTES Pablo, *op. cit*., pp. 59- 64.

consequently operate as a way to identify reputable businesses. Other mechanisms based on reputation are online shopping assistants which are mechanisms that use software in order to better inform consumers in online marketplaces. A representative example is the "Howard Shopping Assistant" created by the "European Consumer Centre" (ECC) in Denmark.[480] Reputation mechanisms empower users in online market places and make it more difficult for rogue traders to operate.

Finally, another popular and effective ODP mechanism is the use of internal complaint procedures, such as customer service departments, where the use of ICT can help prevent issues before they become disputes and require the use of external ODR. These procedures should be employed and promoted by businesses before the use of external ODR. A dispute should only go to external ODR after the internal procedures to resolve the matter have been attempted and failed, the customer service department has been unable to resolve the matter after repeated interactions with the complainant and the

[480] "The consumer only has to type the domain name of the business and the software will deliver the following information: when the website was registered/updated, the results of an archive.org search, which shows the images of the website of the online business during the last few years, official company register information, the results of a Google search excluding the website of the online business, the adherence of the online business to a Trustmark scheme, the existing trustmarks in the country where the online business is based, the general limitation period, e.g. a minimum of two years, the general cancellation period, i.e. 14 days, examples of website comparison in the country of the online business and contact information of the national ECC". *Ibid.*, pp. 59- 64.

business has put a good faith effort and has done all it can to resolve the matter.[481]

Section 3: The UNCITRAL proposal

At this point the examination of the UNCITRAL initiative would be beneficial since it can operate as an example or a source of inspiration in several issues. The "United Nations Commission on International Trade Law" (UNCITRAL), which was established by the "United Nations General Assembly" by resolution 2205 (XXI) of 17 December 1966, is the legal body of the UN which aims "to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. One of these areas includes dispute resolution".[482]

To specific areas of research and development, UNCITRAL has projects, programs and agendas as well as creates specific working groups. UNCITRAL created Working Group III to

[481] RULE Colin, *op. cit.*, pp. 289, 290.
[482] A Guide to UNCITRAL. Basic facts about the United Nations Commission on International Trade Law, United Nation, Vienna 2013 available at http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf

research ODR as a solution to overcome issues related to e-commerce transactions, especially those with cross-border elements and particularly B2B and B2C transactions. The project is fuelled by the realization that "traditional dispute mechanisms, including litigation through the courts, were inadequate for addressing low-value/high-volume, cross-border e-commerce disputes because they were too costly and time-consuming in relation to the value of the transaction in controversy and because of complexities in the cross-border context regarding jurisdiction and applicable law".[483]

The Working Group III issued draft procedural rules to be used as a model by ODR providers in the resolution of e-commerce transactions, especially those with cross-border elements and particularly B2B and B2C transactions. The goal is to create an internationally accepted framework for ODR that would give clear solutions to the drawbacks of ODR and consequently give a push to ODR. The ODR model proposed is a three step process that consists of a negotiation step, a conciliation step and an arbitration step. As a first step, parties use negotiation for the resolution of their dispute. As a second step, the parties use conciliation and are assisted by a third neutral in order to reach an agreement and resolve the dispute. As a third step, the parties use arbitration and a third neutral

[483] DUCA D. Louis, RULE Colin, LOEBL Zbynek, *op. cit.*, pp. 17- 28.

party, perhaps the one involved in the conciliation, resolves the dispute by issuing a decision.

UNICTRAL approaches the ODR framework from the perspective of its previous work on arbitration. In an attempt to provide practical avenues of redress for small-value disputes where currently none exists, attempts to stay clear from private international law questions, such as whether pre-dispute arbitration agreements are valid in consumer contracts, and from using courts as enforcement mechanisms. Instead it makes a shift towards non-binding voluntary ODR and relies more on private self-enforcement mechanisms as a way to incentivize parties to agree to participate in ODR and comply with a settlement or decision.[484] Unfortunately the proposed model by UNICTRAL fails to provide answers to several questions and overcome several of the drawbacks of ODR especially concerning the structure of the ODR system and the enforcement of decisions and in any case it fails to provide the complete, fair and effective ODR system. Contrary to that, this thesis over the following sections provides a complete, fair and effective ODR system and describes its entire architecture.

[484] HÖRNLE Julia, *op. cit.*, pp. 4- 9.

Chapter 2

Online arbitration as the final step of the process

The first part of the thesis examined traditional arbitration. As stated, online arbitration was created by the synergy of traditional arbitration and ICT. In order to provide a better understanding of online arbitration it was essential to identify the characteristics of traditional arbitration from which it evolved. As illustrated in the first part of the thesis, traditional arbitration is an ADR method in which a third neutral party resolves the dispute by issuing a final and binding decision. It is characterized as a quasi-judicial method since it at the same time a private procedure but also produces an award which can be enforced like a court judgement. It is highly preferred in business disputes as it allows for confidentiality and fast resolution, both highly revered in the business world. "Cost savings, shorter resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality made arbitration a wide-ranging surrogate for civil trial, with arbitration provisions utilized in all kinds of contracts".[485] The wide adoption of the 1958 "New York Convention on the

[485] STIPANOWICH J. Thomas, op. cit., p. 4.

Recognition and Enforcement of Foreign Arbitral Awards" has as a result the enforceability of awards in many states and to the extent that arbitral awards frequently "prove easier to enforce than court decisions from overseas".[486]

The first part of the thesis also briefly examined online arbitration and provided a definition and a better understanding of online arbitration. Online arbitration is a process conducted through the use of ICT tools in which a third neutral party chosen by the parties to a dispute, or nominated by the ODR provider chosen by the parties, renders a decision on the case after having heard the relevant arguments and seen the appropriate evidence. Online arbitration appeared as an evolved form of traditional arbitration and the transplant to the virtual world had as a result the appearance of different forms of online arbitration. Based on the binding nature of the outcome, the forms in which online arbitration may appear include online binding arbitration and online non-binding arbitration.[487]

According to legal theory nothing inhibits the transplant of arbitration into the online environment and today there are several ODR providers offering online arbitration.[488] Due to its unique potential, "online arbitration is a notable advancement in

[486] CORTES Pablo, *op. cit.*, pp. 68, 69.
[487] BADIEI Farzaneh, Online Arbitration Definition and its Distinctive Features, In *Proceedings of ODR*, 2010, p. 93.
[488] CORTES Pablo, *op. cit.*, pp. 106 107.

international arbitration and there are no insurmountable obstacles for online arbitration within the view of international commercial arbitration rules".[489] Examples of well-established online arbitration providers in the past and today include the "Virtual Magistrate", "Online Resolution.com" , "Nova-Forum", the "American Arbitration Association" (AAA), the "Better Business Bureau" (BBB), the "National Arbitration Forum" (NAF), the "World Intellectual Property Organization" (WIPO) Arbitration and Mediation Centre, the "Judicial Arbitration and Mediation Services" (JAMS) and the "International Chamber of Commerce". For instance, in the US the AAA "maintains a roster of over 9,000 trained neutrals, has a long history of working with the federal government and has established arbitration panels for the Library of Congress, for the US Air Force, the Department of the Interior, the National Finance Center, and the Internal Revenue Service".[490] Internationally, the "International Chamber of Commerce" offers to parties the ability to take advantage of online arbitration through a website called "Net Case".

This part of the thesis examines online arbitration in depth as an essential part of the ODR process. The first section of this chapter demonstrates the necessity of online arbitration as an

[489] YÜKSEL, Armağan Ebru Bozkurt, Online International Arbitration, Ankara Law Review, Vol.4, No.1, 2007, pp. 92, 93.
[490] RODRIGUEZ Miguel Roberto, *Online Arbitration*, (Daniel Erdmann / World-Mediation-Centre), 2011, pp. 8, 9.

integral part of the ODR process as well as its numerous advantages which make arbitration an ideal method for resolving disputes online. Unfortunately, online arbitration differs from other ODR methods not only because of its unparalleled advantages, but it also faces some additional issues that spawn out of its unique nature. There are the general drawbacks that are common to all ODR methods such as technological issues and lack of face to face interaction (which, however, are becoming less of a problem due to astonishing technological advances), but there are also legal issues connected mainly to the fact that online arbitration renders binding decisions (arbitral awards) which are enforceable.[491] The enforceability of outcomes, as well as the reconciliation of online arbitration with the existing legal framework raise several legal issues and present new criteria and conditions as well as the increased dependence by laws either national or international. "Online arbitration is the most powerful method of ODR and has the greatest potential, but it also raises the most issues".[492] These issues result from the fact that the communication takes part online and there are concerns, such as those relating to the validity and the binding force of online arbitration agreements and awards.

[491] MANEVY Isabelle, *op. cit.*, p. 34.

[492] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust, *North Carolina Journal of Law and Technology*, vol. 6, Is. 1, 2004, p. 75.

The issues relating to online arbitration are being explored in relation to its different phases, i.e. the arbitration agreement, the arbitration process, and the arbitration award and more particularly relate to the conclusion of arbitration contracts in the cyberspace, the procedure of arbitration, the seat of arbitration, the applicable law, the establishment of awards, and the enforcement of awards. Sections two and three of chapter two as well as the entire chapter three identify these drawbacks and demonstrate the necessary solutions in order for online arbitration to fulfil its full potential and become a fair and efficient way to resolve disputes online that will overcome all the drawbacks relating to ODR.

Section 1: Why online arbitration?

The first special characteristic that makes online arbitration necessary is the fact that contrary to other methods, arbitration is an adjudicative method. This means that the third neutral has decision-making authority. Where the other methods aim to an agreed settlement, arbitration is fundamentally different as it focuses on each party's rights and entitlements. Although settlement is usually very useful, without the

possibility to recourse to an adjudicative method at the end of the process, some of the most sacred values are endangered, since settlement represents a step away from law.[493] Settlement is not justice, instead it simply aims to make the best out of a situation irrespective of each party's rights and entitlements, focusing on moving a case along, regardless of whether justice has been done or not. On the contrary arbitration is a truth-seeking process that fulfills the parties' need for a day in court, in a matter of speaking. More importantly, not all disputes can be solved through settlement. In some cases "the underlying interests of the parties cannot be aligned";[494] these disputes do not lend themselves to compromise and it is therefore necessary to resort to adjudication. Furthermore, processes leading to settlements are voluntary and a party can terminate the process at any stage; again resorting to adjudication, where the process cannot be abandoned, is necessary to provide an avenue of redress.

The preference of voluntary methods leading to settlements instead of decisions is not a result of the superiority of the former in achieving justice (on the contrary), but rather an easy "way out" of the complexities of arbitration. In

[493] "Brutally simplified, an over-development of settlement as a means of dispute settlement would be reminiscent of a family in which the parents systematically negotiate for peace with their children, instead of facing the more draining tasks of parenthood, giving force to the values forming their educational ideals". See SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 45.
[494] HÖRNLE Julia, *op. cit.*, pp. 55- 58.

traditional arbitration these complexities include procedural formalities and increased costs; in the online environment the complexities concern mostly the perceived legal difficulties and business-model difficulties.[495] Furthermore, from a law and economics perspective, the absence of an adjudicate method may hinder the ability to reach a settlement since the defendant may not be prepared to settle at all, or endanger availability of redress and fairness by producing unfair settlements.[496] Also in cases where power imbalance is significant, such as B2C disputes, an adjudicative process where one party cannot pressure the other "may be more adequate for correcting possible abuses of power".[497] For all the above reasons it is clear that in order for an ODR system to be effective and truly provide access to justice, online arbitration as an adjudicative process must be provided as the final step of the ODR procedure.

[495] "In 2003, the co-founder, President and CEO of SquareTrade, which a few years ago was by far the most successful ODR provider, mentioned that online arbitration would in principle have been the first choice, but that because of the legal complexities of arbitration, they decided to 'downgrade' the services to online assisted negotiation and online mediation". SCHULTZ Thomas, The Roles of Dispute Settlement and ODR, *op. cit.*, pp. 8- 15.

[496] "By way of illustration, if each party bears its own costs, the claimant's desire to settle could be expressed as S>A – CC ('S' standing for settlement, A being the adjudicated decision and CC the claimant's costs). The defendant's desire to settle could be expressed as S<A+CD (CD standing for the costs of the defendant). Therefore, if the claimant's costs are very high, the claimant will be prepared to settle low. If the defendant's costs are very high, the claimant can obtain a settlement substantially exceeding the adjudicated decision. However, in a court system, where the loser pays the winner's cost, assuming that it is clear that the claimant will win, the respective settlement desires would be S>A (claimant) and S< A+CC+CD (defendant). Hence, if the costs of either party are very high, the claimant could obtain a settlement vastly exceeding the adjudicated decision". See HÖRNLE Julia, *op. cit.*, pp. 52, 53.

[497] CORTES Pablo, *op. cit.*, p. 105.

A. Online arbitration versus litigation and traditional arbitration

Most of the advantages that differentiate online arbitration from litigation and traditional ADR can be found as characteristics of ODR methods in general and were demonstrated in depth at the relevant section about the advantages of ODR. In short, these include convenience, time, cost, travel and even paper savings. However, online arbitration specifically has some additional features that underline its importance. Litigation and traditional arbitration are adversarial procedures that can very often create power imbalances, make parties defensive, induce stress and increase the frustration making the resolution of the dispute so much harder. Furthermore, the formality of these procedures compels parties to pay large amounts of money for legal representation and often the costs may rise even higher because of the formalities and delays related to the proceedings. On the contrary, online arbitration by transferring the procedure to the virtual world reduces the intimidating nature and the formality of the proceedings and consequently the costs of legal fees,[498] as well

[498] "The comfort and freedom from having to go into a courtroom or other formal hearings also may allow consumers to forgo or minimize costs of legal representation. Parties often feel compelled to pay the costs of hiring attorneys when they face intimidating or unfamiliar proceedings, but may feel less pressure to employ attorneys in online arbitration involving fewer

as reduces the hostility between the parties since the resolution takes place from the safety and convenience of their home instead of attending nerve-wrecking formal meetings. But, the greatest advantage of online arbitration compared to litigation and traditional arbitration is the fact that the parties can resolve the dispute much faster. Online arbitration can produce a final and binding award in a matter of days or hours without the need for the parties to travel, coordinate schedules or wait months for a court date or a hearing and without the unnecessary formalities that may lead to unwanted delays.

B. Online arbitration versus other ODR methods

Online arbitration as one of the ODR methods enjoys all the advantages of ODR such as convenience, flexibility and time and cost efficiency. But, among the ODR methods, online arbitration in particular displays some unique characteristics that differentiate it from the other methods. The additional advantages of online arbitration contrary to other ODR mechanisms relate to the decision-making authority of the third

procedural formalities and no F2F dealings. Online arbitration processes also may be more automated, again easing need for counsel's direction". See SCHMITZ J. Amy, op. cit., pp. 26, 27

neutral, to the binding nature of the result and to the reliance of the procedure on documentary evidence. The fact that the dispute is resolved by a third party has a result the faster resolution of the dispute since the parties do not have spent countless hours exchanging proposals and counter proposals attempting to reach a mutually acceptable solution, which might even never come at the end of the procedure. Contrary to online negotiation and mediation, in online arbitration parties can rest assured that their dispute will be resolved by a third party who will decide based on the merits of their claims. Finally, online arbitration seems to be more suited for the online environment than the voluntary and non-binding ODR methods, because of its increased reliance on documentary evidence.

Online arbitration is most suitable for asynchronous communication because it mainly involves parties' exchange of information, documents, exhibits, and other evidence. Online arbitration does not require the same degree of interaction, and F2F contact, as nonbinding dispute resolution methods, since asynchronous communications in online arbitration allows parties to post and carefully review briefs, affidavits, documents and other evidentiary submissions on their own schedules.[499] One of the most used arguments against ODR in general is the lack of face to face to interaction and consequently the lack of body

[499] SCHMITZ J. Amy, *op. cit.*, p. 25.

language and nonverbal cues. First of all, the advancement of ICT tools today allows for teleconferencing though several software programs in an easy and affordable way. But regardless of that, face to face interaction is especially important to consensual and non-binding methods, such as negotiation and mediation, where face to face interaction can help create a climate of cooperation and lead to the consensual settlement essential for the dispute resolution. On the contrary, in online arbitration the resolution of the dispute is not based on a consensual settlement with which the parties will comply voluntarily, but on the decision of the third party as a result of the parties' presentations of their claims and not as a result of their cooperation. Online arbitration usually "is a much less complex communications process than on-line mediation, and the technology and software required for on-line arbitration will, as a result, tend to be less complicated".[500] Arbitration is more suitable for the online environment than consensual methods since usually communication is less intense; proceedings are mostly written and to use arbitration for dispute resolution there is seldom a need for more than e-mail and secure communications.[501]

Furthermore, the binding nature of online arbitration (binding online arbitration) provides finality in the resolution of

[500] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 138.
[501] CORTES Pablo, *op. cit.*, pp. 106, 107.

the dispute. Online arbitration provides an end to the dispute without the need to resort later on to other ODR methods or costly and time consuming appeal processes. This is especially important in e-commerce disputes where the usually low value of the dispute commands a final and financially proportional resolution without the likelihood of dragging on the dispute.[502] In international arbitration, dealing with cross-border disputes, the arbitral award often may prove easier to enforce than court judgments, at least in the countries that have signed the 1958 "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", also known as the "New York Convention".

However, being singed over fifty years ago, the "New York Convention" has become outdated and creates concerns about whether it can support and facilitate online arbitration and the enforcement of awards. Since online arbitration still operates under rules designed for traditional arbitration, in order to overcome the aforementioned difficulties, the New York Convention, at the very least, "would need to be interpreted broadly".[503] However, "although an extensive interpretation of its provisions can be of some help, ideally, its modernization

[502] RODRIGUEZ Miguel Roberto, *op. cit.*, pp. 9, 10.
[503] YÜKSEL, Armağan Ebru Bozkurt, *op. cit.*, pp. 85-87.

and amendment is necessary in order to keep track with the developments of modern society".[504]

Section 2: The online arbitration agreement

Whenever there is a dispute, the first step in order to resolve it through arbitration is for the parties to conclude an arbitration agreement. This agreement can be formed either before the dispute arises (pre-dispute agreement) in which case the parties agree that any future disputes arising out of their transaction will be resolved through arbitration, or it can be formed after the dispute arises for its specific resolution (post-dispute agreement). The agreement can be a separate contract or it can be a clause in an already existing contract. More specifically there are several forms in which an online arbitration agreement can be concluded. The parties can agree to online arbitration by e-mail or by referring to another document containing an arbitration clause.

In the case of B2C disputes one of the most common ways to form an arbitration agreement is through what today is known

[504] HERBOCZKOVÁ Jana, Certain Aspects of Online Arbitration, *Journal of American Arbitration*, vol. 1, No. 1, 2001, p. 11.

as “browse-wrap” or “click-wrap” agreements, according to which a consumer agrees to arbitrate disputes arising out of the transaction with the seller by accepting the “terms and conditions” form that will appear on his computer screen during the transaction, in which there is an arbitration clause. Although, based on the party autonomy principle the parties can freely determine the contents of the arbitration agreement, the applicable procedural law as well as the composition of the arbitral tribunal; however, because of the high volume of e-commerce disputes today it is very common for ODR providers and businesses to use model arbitration agreements. There are several national laws relating to arbitration agreements, but in the international level the most relevant instruments are the “New York Convention” of June 10, 1958 and the “UNCITRAL Model Law” of 1985 which provide standards for arbitration agreements by regulating the relevant issues. The main problems faced relating to online arbitration agreements concern their validity and enforceability.

A. Validity of arbitration agreements and the written requirement

The first issue regarding the validity of the online arbitration agreement relates to the requirement of a written form. Agreements for online arbitration are also typically concluded online. Since an agreement in order to be valid has to be in writing, the obvious issue that arises in online arbitration is whether or not an online agreement concluded over the internet using ICT tools instead of the traditional means of writing can fulfill this requirement of a written form? The "New York Convention" provides for the requirement of an agreement in writing in the first paragraph of Article II.[505] And in the second paragraph of the same article specifies the "agreement in writing" requirement.[506]

The main problem with the writing requirement in the "New York Convention" is that its description does not expressly include online means of concluding the agreement,

[505] "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration". See The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10 1958 Article II available at http://www.newyorkconvention.org/texts

[506] "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". See The New York Convention of June 10 1958 Article II available at http://www.newyorkconvention.org/texts

which is only natural since at the time it was formulated in 1958, the modern means of communicating such as the internet and all the cotemporary ICT tools did not yet exist. Therefore, the "New York Convention" does not and could not include the use of online communication as a way to conclude an arbitration agreement.[507] Contrary to the "New York Convention", the "UNCITRAL Model Law on International Commercial Arbitration" of 1985 adopts a more broad description of the term "agreement in writing" which includes all means of telecommunication,[508] and "uses the concept of 'data messages', which include electronic data interchange (EDI), telegram, telex and telecopy, and all of which satisfy the requirement of 'in writing', if the information contained therein is accessible so as to be usable for subsequent reference".[509]

One way to surpass this issue is to use the electronic means to conclude the online arbitration agreement and to refer to another tangible document which will include the agreement in traditional writing. However, this solution decreases to some

[507] HERBOCZKOVÁ Jana, op. cit., pp. 5, 6.

[508] The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract. See the UNCITRAL Model Law on International Commercial Arbitration of 1985 article 7 available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

[509] HERBOCZKOVÁ Jana, *op. cit.*, pp. 5, 6.

point the advantages of concluding the arbitration entirely online. On the other hand it has been argued that there is no such need, because concluding the arbitration agreement by using ICT tools like e-mails or by clicking the agree button on click-wrap agreements is considered as transferring information by letter or telegram. This solution that is most prominently accepted today, reconciles the "New York Convention" with the "UNCITRAL Model law on International Commercial Arbitration", by accepting a more liberal interpretation of the text of the former in light of the latter. More specifically, it is considered that since the New York Convention is a very old document, "drafted at a time when writing necessarily meant ink on paper and not bytes on a hard disk",[510] it must be interpreted according to the modern technological developments; the internet and ICT tools can be analogized to the mentioned fax and telegram so that the convention will not include only the limited cited methods.

The same conclusion can be supported by EU "Directive on Electronic commerce", which ensures that contracts can be concluded by electronic means,[511] as well as by several national

[510] KAUFMANN-KOHLER Gabrielle, Online Dispute Resolution and its Significance for International Commercial Arbitration, *Global Reflections on International Law, Commerce and Dispute Resolution*, 2005, pp. 444, 445.

[511] "This definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service". See 2000/31/EC Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic

laws. For instance, in the United Kingdom the UK "Arbitration Act" of 1996 accepts as writing form anything being recorded by any means.[512] Also the "European Convention on International Commercial Arbitration" considers as an agreement in writing, one concluded through letters, telegrams, or in a communication by tele-printer.[513]

In the United States of America the requirement for a written form according to the "Federal Arbitration Act" of 1925 is interpreted in a more liberal way so that it includes electronic agreements.[514] The same interpretation is supported by other instruments with similar or identical wording, such as the US "Uniform Computer Information Transactions Act" (UCITA), the US "Uniform Electronic Transactions Act" (UETA), the

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commerce'), Article 17 available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN

[512] "Agreements to be in writing**:** The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions "agreement", "agree" and "agreed" shall be construed accordingly. There is an agreement in writing if the agreement is made in writing (whether or not it is signed by the parties), if the agreement is made by exchange of communications in writing, or if the agreement is evidenced in writing. Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing. An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement. An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged. References in this Part to anything being written or in writing include its being recorded by any means". See UK Arbitration Act of 1996 section 5 available at http://www.legislation.gov.uk/ukpga/1996/23/section/5

[513] European Convention on International Commercial Arbitration, article I, 1961, available at http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/_1.html

[514] Federal Arbitration Act of 1925, available at https://www.ilr.cornell.edu/alliance/resources/Legal/federal_arbitration_act.html

"UNIDROIT Principles of International Commercial Contracts", and the "Brussels I Regulation".[515]

Conclusively, it is certainly time to recognize that the written requirement in Article II of the "New York Convention" is fulfilled not only by agreements on paper but also by agreements recorded through electronic communication, as long as the information is accessible for further reference.[516] Therefore an online arbitration agreement fulfills the written requirement and is considered a valid agreement. Technically, the argument is that since Article II (2) of the "New York Convention" interpreted broadly considers that online arbitration agreements, concluded through means of telecommunication, such as the use of telegrams, fulfill the written requirement and since the use of e-mails can be equated to the use of telegrams, therefore also online arbitration agreements concluded via e-mail are valid. The argument follows the same logic to say that online arbitration agreements, concluded by accepting the "terms and conditions" form and the included arbitration clause, also fulfil the written requirement, because "there has been an

[515] KAUFMANN-KOHLER Gabrielle, *Ibid.*, pp. 444, 445.

[516] "The electronic document must include the identity of the parties, the agreement itself (i.e. the offer and the acceptance), and the content of the agreement (i.e. the specific terms and the general conditions). This information must be stored in a manner that allows its accessibility for further evidence and its admissibility as evidence. In other words, this information must be stored using a technology which permits long-lasting compatibility and which excludes any serious risk of manipulation of the stored data". SCHULTZ Thomas, Online Dispute Resolution: an Overview and
Selected Issues, *op. cit.*, p. 9.

exchange of information entirely analogous to the exchange that takes place when e-mails or faxes are exchanged".[517]

B. *Expressing consent in electronic arbitration contract*

Another important issue relating to the online arbitration agreement is that of consent given by the parties that conclude the agreement. The main problem lays on whether or not the parties to an online arbitration agreement can express their consent for resolving their dispute through arbitration by using ICT tools, for example via e-mail or by agreeing to a "terms and conditions" form on an internet webpage. The first objection relates to the security and the concern is that these means are not secure enough to rely on them for the express of consent. However, as already made evident these technological concerns about security are becoming less and less of a problem because of the advancements of technology, cryptography and in general internet security mechanisms.

One of the best ways for the parties to express their consent and also a prerequisite for an arbitration agreement,

[517] YÜKSEL, Armağan Ebru Bozkurt, *op. cit.*, pp. 85-87.

besides the written form, is the use of signatures. The "New York Convention" expressly requires the arbitration agreement to be signed by the parties. This requirement is fulfilled by the use of electronic signatures because it is considered that the use of an electronic signature, for example in an email, expresses that party's consent and is equated to a traditional signature by hand.

Electronic signature (or digital signature) and authentication is an encryption technology, which is employed in electronic commercial transactions to ensure online business security.[518] The equation of an electronic signature with a traditional one is supported by several legal documents such as the "UNCITRAL Model Law on Electronic Signatures" adopted by UNCITRAL on 5 July 2001, which grants minimum recognition to most authentication technologies, and promotes the progressive harmonization and unification of measures and policies on e-signature issues. Furthermore, the "International Chamber of Commerce" (ICC) with several initiatives such as the "General Usage for International Digitally Ensured Commerce" (GUIDEC), the ICC "e-Terms" of 2004 and the ICC "Guide to Electronic Contracting", attempt to create a general framework for the use of digital signatures in international commercial transactions. In Europe the opinion is also supported

[518] WANG Fangfei Faye, *op. cit.*, pp. 18 – 23.

by the EU "Directive on a Community Framework for Electronic signatures"[519] which promotes the use and legal recognition of electronic signatures as means of authentication and sets out a framework for the recognition of e-signatures and certification service requirements for member states. In the United States the adoption of the "Electronic Signatures in Global and National Commerce Act"[520] (ESIGN Act) consolidates the legal effect and validity of electronic signatures and promotes consistency and certainty regarding the use of e-signatures in the US.

[519] "The purpose of this Directive is to facilitate the use of electronic signatures and to contribute to their legal recognition. It establishes a legal framework for electronic signatures and certain certification-services in order to ensure the proper functioning of the internal market. It does not cover aspects related to the conclusion and validity of contracts or other legal obligations where there are requirements as regards form prescribed by national or Community law nor does it affect rules and limits, contained in national or Community law, governing the use of documents". See Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML

[520] "Notwithstanding any statute, regulation, or other rule of law, with respect to any transaction in or affecting interstate or foreign commerce— (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation". See the Electronic Signatures in Global and National Commerce Act available at http://www.gpo.gov/fdsys/pkg/PLAW-106publ229/pdf/PLAW-106publ229.pdf

C. Arbitrability and pre-dispute arbitration agreements

The biggest issue relating to online arbitration agreements concerns the parties' capacity to conclude these kinds of agreements. It is an issue of high importance because contrary to other ODR methods, online arbitration is binding and there is a concern that parties may agree to resolve their dispute through arbitration over the internet without fully understanding the legal effects of their consent and that their legal due process rights may be infringed. The issue relates to the arbitrability of disputes and the enforceability of agreements to arbitrate.

The problem concerns more specifically B2C disputes. In general, consumer disputes are arbitrable as subject matter but many arbitration laws subject consumer disputes to certain restrictions. [521] An agreement to arbitrate involves a waiver of the right to go to court and an obligation to take part in the arbitration procedure. The parties' consent must be voluntary and fully informed. More specifically the problem relates to pre-dispute agreements, where it is argued that the consent given before the dispute arises may hinder the consumers' access to justice. In post-dispute agreements and after a dispute has arisen, the consumer usually will be fully informed of the

[521] KAUFMANN-KOHLER Gabrielle, Online Dispute Resolution and its Significance for International Commercial Arbitration, *op. cit.*, p. 10.

possible resolution options and the choice of arbitration is voluntary and fully informed. On the contrary, in pre-dispute agreements it is possible that the consumer has not read the standard terms and conditions (even if there was a clear link from the ordering webpage) and thus that the consumer is not even aware that there is an arbitration clause in the contract. Furthermore, even if the consumer is aware of the existence of an arbitration clause it is likely to be unaware of its significance since, at the stage of contract conclusion consumers are unlikely to give any thought to the issue of later disputes. In these cases it cannot be said that the choice of arbitration is fully informed. Consequently, several laws restrict in some way the enforceability of pre-dispute arbitration clauses against a consumer, but only very few jurisdictions disallow B2C arbitration agreement after the dispute has arisen.[522]

This issue becomes even more acute because of the power imbalances between parties in disputes and "many arbitration laws limit the arbitrability of disputes where the parties have substantially different bargaining powers, thereby seeking to protect tenants, employees, or consumers as the weaker parties".[523] In ODR the restrictions on mandatory pre-dispute arbitration clauses apply exclusively to consumer arbitration services and not in other civil law areas, such as landlord-tenant

[522] HÖRNLE Julia, *op. cit.*, p. 171.
[523] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 9.

relations.[524] The first concern is that the choice is not voluntary from the consumer's side, since arbitration clauses are included in standard form contracts and are offered on a "take it or leave it" basis.[525]

The consent of the parties is an essential prerequisite for traditional arbitration and their participation in the procedure must be based on their own free will. In online arbitration, the concern is that the arbitration agreement might not be based on the consent of the parties, who might be forced to participate. For instance, "where there is a monopoly of power or where there is a pre-dispute arbitration clause in a Business to Consumers (B2C) agreement, the weaker party has to choose between entering into an arbitration agreement or forgo contracting, and due to power imbalance in such cases, the parties may be considered to have been indirectly forced to enter into an arbitration agreement".[526]

The second concern is that consumers are in an inferior position since they are one-shot players contrary to businesses which are repeat players conducting numerous arbitrations each year and being familiar with the arbitration institution and the

[524] CORTES Pablo, *op. cit.*, pp. 107, 108.
[525] HÖRNLE Julia, *op. cit.*, pp. 171- 173.
[526] BADIEI Farzaneh, *op. cit.*, pp. 88, 89.

procedure. [527] Also the business is usually the one that chooses the ODR provider, a fact which can lead to some degree of (unconscious) systemic bias since the provider may regard the supplier as a repeat customer for referral.[528]

Because of the above concerns consumer associations advocate that pre-dispute arbitration agreements should not bind consumers and several laws have imposed certain restriction. In the European Union, according to the European Council "Directive on Unfair Terms in Consumer Contracts", many Member States may not recognize the compulsory nature of an online arbitration agreement on the grounds that it hinders consumers' rights to go to court. For instance, in France, as evidenced by cases such as Jaguar case,[529] "pre-dispute consumer arbitration clauses are invalid in domestic matters but considered valid in international arbitration, because French consumer protection law concerning jurisdiction (French Civil Code, Art. 2061 and French Consumer Code, Art. L. 132(2)) does not apply to international situations".[530] Also in England and Wales the 1996 "Arbitration Act" and the 1999 "Unfair

[527] O' HARA A. Erin, Choice of law for internet transactions: the uneasy case for online consumer protection, *University of Pennsylvania Law Review*, vol. 153, 2005, p. 1935.
[528] HORNLE Julia, *op. cit*., pp. 171- 173.
[529] "The first instance court stated the clause to be illegal, the Court of Appeal reversed that decision and the Supreme Court admitted the arbitrability of the dispute in the circumstances at hand (it was a transaction of high value and the consumer was not in a weaker position)". CORTES Pablo, *op. cit*., pp. 109, 110.
[530] KAUFMANN-KOHLER Gabrielle, Online Dispute Resolution and its Significance for International Commercial Arbitration, *op. cit*., p. 13.

Terms in Consumer Contracts Regulation" allow pre-dispute arbitration agreements in consumer disputes only when the amount at stake is more than £5000 and if the arbitration clause is not unfair according to the regulation.

In the United States the treatment of pre-dispute arbitration agreements differs. Many US standard terms in electronic contracts often include arbitration clauses. There is a distinction between two types of agreements, the "browse-wrap" agreements and the "click-wrap" agreements. The "browse-wrap" agreements are included in the standard "terms and conditions" section of the business' website and it is considered that the consumer by accepting to use the products or services offered by the business also accepts those terms. On the contrary, the "click-wrap" agreements require consumers to affirmatively indicate their acceptance of the terms, by checking a box or clicking a button labeled "I agree". The enforceability of browse-wrap agreements has been challenged in several occasions with most notable the "*Specht v. Netscape Communications Corp.* case where the Second Circuit denied Netscape's motion to compel arbitration under a browse-wrap software license agreement, holding that users of Netscape's software did not have reasonable notice of the license agreement

containing the agreement to arbitrate".[531] As far as the click-wrap agreements go, although there are concerns regarding illusory consent, generally they are held to be enforceable by courts[532] when there is an explicit display of agreement, through means such as clicking or checking "I accept" or "I agree" prior to the transaction.[533] Examples of cases, in which the validity of consumer arbitration agreements included in the standard "terms and conditions" is recognized, include the *Spartech CMD, LLC v. International Automotive Components* case, the *Blau v. AT&T Mobility* case and the *Vernon v. Qwest Communications Int'l, Inc.* case. The "Federal Arbitration Act" (FAA) considers pre-dispute binding agreements, as "valid, irrevocable, and enforceable", without distinguishing or mentioning specifically consumer contracts. But even when the FAA does not apply, under most state laws, consumer arbitration agreements are also enforceable. In the United States consumer arbitration clauses are legally binding as evident by the relevant case law.[534]

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[531] KAHN Sherman and KIFERBAUM David, Browse-wrap Arbitration? Enforcing Arbitration Provisions in Online Terms of Service, *New York Dispute Resolution Lawyer*, Vol. 5, No. 2, Fall 2012, p. 35.

[532] For example, I.Lan systems, Inc. v. Netscout Service Level Corp) on 2 January 2002 and Lieschke, Jackson & Simon v. Realnetworks Inc.

[533] SCHMITZ J. Amy, *op. cit.*, p. 32.

[534] "Several US Supreme Court cases have rejected challenges to pre-dispute arbitration clauses in consumer contracts. "In Hill v. Gateway 2000 an arbitration clause was contained in the general terms of contract on paper used by a computer vendor which were included in a computer box. The seventh circuit held with reference to ProCD v. Seidenberg that the consumer was bound by the terms because he had the opportunity to read them and reject them by returning the product". See MANEVY Isabelle, *op. cit.*, p. 39. "In *Buckeye Check Cashing, Inc. v Cardegna* the court ruled that the arbitration clause of an alleged illegal and void contract was enforceable. In *Allied-*

Only when the arbitration agreement does not comply with fundamental fairness or is found to be oppressive or highly unreasonable, it will be recognized as unenforceable by the courts, such as in cases where there are concerns about neutrality or about imposing excessive arbitration fees.[535] But, in general for an arbitration clause contained in a standard "terms and conditions" agreement to be valid, there must be a clear manifestation of the consumer's consent to the agreement (for instance by clicking an accept button) and the agreement must be clear and visible before the customer reaches the "I accept" button. Overall there is still some legal uncertainty about the validity of pre-dispute consumer arbitration agreements. However, it is argued that even according to EU law, a pre-dispute consumer arbitration clause clearly referenced in the contract, which mandates all disputes to be resolved through an

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Bruce Terminix Cos. v Dobson the US Supreme Court included consumers within the scope of the FAA, stating that '[the] Congress, when enacting [the FAA] had the needs of consumers, as well as others, in mind'. In this case the Supreme Court held that Alabama's statute prohibiting mandatory pre-dispute arbitration clauses was pre-empted by the FAA". See CORTES Pablo, *op. cit.*, pp. 110- 111.

[535] "In *Comb and Toher v PayPal* the judge found PayPal's arbitration clause unconscionable for consumers, holding that Santa Clara County in California was not a neutral forum". *Ibid*. "The New York court of appeals was concerned with a similar clause to the one in Hill v. Gateway 2000. The court found that the high cost of the International Chamber of Commerce (ICC) arbitration made the designation of ICC unconscionable in a consumer context. Nevertheless, it did not consider that the arbitration clause was invalid. It held that the dispute settlement should be conducted by the less expensive American Arbitration Association". See MANEVY Isabelle, *op. cit.*, p. 39.

arbitral procedure which is proven to be fair, inexpensive and easily accessible for consumers would be considered valid.[536]

However, in order to avoid the possibility of some courts and some countries not recognizing pre-dispute consumer arbitration agreements as valid, unilaterally binding arbitration agreements can be used, which are binding for the stronger party (i.e. the business), but allow the weaker party (i.e. the consumer) to choose whether to resolve the dispute through arbitration or go to court.[537] This way the agreement ensures the compliance of the stronger party and provides access to justice for the weaker party. If pre-dispute arbitration clauses are not binding for the stronger party, it would deprive the weaker party of access to redress, as the courts are not a viable or affordable option for most B2C disputes because of the distance, the costs and the legal complexities of litigation. The availability of online arbitration as a form of redress can only be secured by some form of encouragement or compulsion to take part in arbitration.[538] The different treatment of the parties is justified by the difference in the position of the parties (the weaker position of the consumer) and the need to redress this power

[536] KAUFMANN-KOHLER Gabrielle, Online Dispute Resolution and its Significance for International Commercial Arbitration, *op. cit.*, p. 13.
[537] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 9.
[538] "If the 'weaker' party (such as an individual in state A) has no access to the courts, why would the 'stronger' party (such as a multinational company involved in E-commerce established in state B) agree to arbitration?" HÖRNLE Julia, *Cross-border Internet Dispute Resolution*, *op. cit.*, p. 223.

imbalance. This way the more powerful businesses are bound by the agreement and the consumer gains access to justice, while the consumer is free to choose litigation instead of arbitration, although this scenario is less possible in B2C disputes where litigation most times is not a viable option. An example of a binding submission to arbitration is the ICANN system for disputes over domain name registrations under the Uniform Dispute Resolution Policy (UDRP), which is administered by a number of ODR providers. Furthermore, an example of a unilaterally binding, pre-dispute consumer arbitration agreement is "Ford Journey", an online motor vehicle sales dispute resolution program managed for Ford by the "Chartered Institute of Arbitrators" in London, according to which the "claimant (customer) has a choice of taking advantage of the service or using the courts instead, whereas the respondent has no choice".[539]

[539] KAUFMANN-KOHLER Gabrielle, Online Dispute Resolution and its Significance for International Commercial Arbitration, *op. cit*., pp. 4, 5.

Section 3: The Arbitration procedure

When a dispute arises between the parties that have entered into an online arbitration agreement, the next step is for the actual procedure of the online arbitration to begin. The most common way to initiate the process is for the plaintiff to contact the ODR provider and request the beginning of the online arbitration. After the request is registered, the provider contacts the other party and requests the relevant documents and evidences. The procedure may differ depending on the provider; the way of communication between the parties (through e-mail or web-based arbitration) and the use of ICT tools (for example document-only arbitration). The discussions with the arbitrators and the submission of evidences can be performed online. The process takes normally between 4 hours and 30 days. The main concern about the introduction of technology into the arbitration process was until recently that the lack of face to face communication would not allow for the implementation of the arbitration process in the online environment. However, today ICT tools such as email, chat rooms, word-processing software and videoconference have greatly advanced and can fully facilitate the online arbitration procedure. Especially lately use of video-conference has become most common in the field

allowing parties to hear and see each other as in the real world but also witnesses to give their testimonies online.

There are two fundamental principles that shape the procedure of online arbitration. The first one is the principle of party autonomy, which allows parties to determine and organize the specifics of the procedure by agreement. The second principle is the equal treatment of the parties according to which, "the parties have the right of equal access to the information, so they must also have the ability to have equal access to the electronic means for conducting the procedure".[540] Regardless of the specifics of the arbitration procedure the main issues that arise from the transportation of the arbitration process to the virtual world of cyberspace relate to two basic concepts of the arbitration procedure; the seat of arbitration and the applicable law.

A. The place or seat of arbitration

The place where the arbitration takes place is called the place or the seat of arbitration. Its determination is important

[540] YÜKSEL, Armağan Ebru Bozkurt, *op. cit.*, pp. 87, 88.

because the seat affects other aspects of the arbitration. For example, the seat may determine the nationality of the arbitral award, the determination of which is essential when seeking the assistance of national courts, the supervision of awards by the courts of the seat, the recognition and enforcement of the award, the power of national courts to set aside the award, as well as the applicable law.

The obvious issue that arises in online arbitration is the question of, how can one determine the seat of arbitration when the whole procedure of the online arbitration takes place online, in a virtual world where a physical location cannot be defined? In online arbitration the procedure does not take place in a single location; on the contrary the parties and the arbitrators may take part in the procedure from opposite corners of the world. The absence of a physical seat may lead to what is known as “floating arbitration” which in turn will lead to a “floating award” with potentially grave consequences for its enforcement.

However, traditionally the parties according to party autonomy can choose the seat of arbitration and based on “the seat theory”, which is widely accepted in legal theory and recognized by the arbitration laws of many countries, arbitration proceedings may be concluded in a country different than the place of arbitration, without changing the seat of arbitration,

which is the one agreed by the parties.[541] Furthermore, this opinion is supported by the theory of delocalization, according to which the arbitration should be detached from the place of arbitration.[542]

Today, there is a general consensus that online arbitration is a digitalized or virtual event that has no situs i.e. not a seat definable in traditional terms as a specific physical location. In online arbitration the seat is not defined as the place of the procedure or of the place where the provider is situated or the place where the award was made. It is determined based on legal criteria and is defined as the place agreed to be the seat of arbitration by the parties or by the arbitrators or the ODR provider. If the parties have not chosen the seat of arbitration, then the arbitral tribunal or the arbitration institution determines the seat of arbitration. According to the "UNCITRAL Model Law" if the parties have not chosen the place of arbitration, then the arbitral tribunal decides on the place of arbitration, based on the circumstances of the case.[543]

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[541] WANG Fangfei Faye, *op. cit.*, p. 89.

[542] HERBOCZKOVÁ Jana, *op. cit.*, p. 7.

[543] "Place of arbitration. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents". See UNCITRAL Model Law on International Commercial Arbitration (1985) Article 20 available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

Consequently, the seat of arbitration is chosen and is independent from any physical location making the absence of a traditional situs irrelevant. This is supported not only by the "UNCITRAL Model Law", but also by the ICC arbitration rules[544] as well as by the national laws of several countries such as UK[545] and France[546]. Therefore, it is accepted that the place or seat of arbitration refers to the place chosen by the parties or the arbitrators as a connecting factor to determine other aspects of the online arbitration procedure such as the procedural law, the jurisdiction of a court to set aside an award and possibly the material law of the procedure, which is related to next issue of the applicable law, since generally, if the parties have not chosen the applicable law it will be that of the seat of arbitration. In short, the arbitral award as well as the arbitration procedure do not have to be connected with the seat of

[544] "Place of the Arbitration: The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. The arbitral tribunal may deliberate at any location it considers appropriate". See The International Chamber of Commerce Rules of Arbitration article 18 available at http://www.icc.se/skiljedom/rules_arb_english.pdf

[545] "The seat of the arbitration: In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated by the parties to the arbitration agreement, or by any arbitral or other institution or person vested by the parties with powers in that regard, or by the arbitral tribunal if so authorized by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances". See UK Arbitration Act Section 3 available at http://www.legislation.gov.uk/ukpga/1996/23/section/3

[546] "According to the French Cour de cassation the seat of arbitration is not a physical concept but a purely legal concept. According to the French Cour d'appel de Paris, 'no particular form is imposed for the deliberations of the arbitral tribunal; in international it is difficult to hold multiple meetings of a group of people who live in different countries'. Consequently, no legal difficulty should arise if the arbitrators conduct proceedings over the Internet, provide that when they write the arbitration award they take the precaution of indicating the seat of arbitration". See MANEVY Isabelle, *op. cit.*, pp. 40- 41.

arbitration and once the seat of arbitration is chosen by the parties, the arbitrators or the arbitration institution, "all proceedings and hearings could be held electronically and the arbitrators need only state the seat of arbitration in the award itself, as the parties determined, and sign the award".[547]

B. The applicable law

The main issue regarding the applicable law in an online arbitration procedure relates to the question of which law will govern the various stages of the arbitration, mainly the agreement, the procedural issues and the substantive issues. Again, this issue is mostly resolved by the principle of party autonomy which allows the parties to choose the applicable law. The parties can agree to circumvent the choice of law rules of private international law and choose both the procedural and the substantive law applicable to the arbitration and the dispute. Therefore, by choosing the applicable law, the parties avoid any jurisdiction and choice of law issues and achieve legal certainty. The parties may agree on the substantive law and choose either the national law of a specific state, or international rules such as

[547] YÜKSEL, Armağan Ebru Bozkurt, *op. cit.*, pp. 6, 7.

lex mercatoria or lex informatica.[548] The parties may "give the arbitrator the powers of an 'amiable compositeur', to apply an international lex mercatoria".[549]

"Lex mercatoria" is the law of merchants. The notion is connected to ADR and was formed during the middle ages, when merchants from all of Europe traded at the annual fairs. The same reasons that made merchants use ADR instead of the courts, mainly the confusion created by the existence of several parallel laws, also motivated the creation of a distinct body of transnational laws, known as "lex mercatoria", originated from customs and usages and based on commonly acceptable, fundamental principles of commerce, allowing legal certainty, ease of application and a minimum standard of fairness. In the online world the equivalent of "lex mercatoria", is referred to as "lex informatica" and is defined as "the body of transnational rules of law and trade usages applicable to cross-border e-business transactions, created by and for the participants in cross-border e-business and applied by arbitrators to settle disputes on the basis of the intention of the parties and taking into account the rapid evolution in the state of the art of e-business".[550] These transnational rules are based on fundamental

[548] HERBOCZKOVÁ Jana, *op. cit.*, p. 3.
[549] WANG Fangfei Faye, *op. cit.*, p. 50.
[550] PATRIKIOS Antonis, Resolution of Cross-border E-business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-business Usages: The Emergence of the Lex Informatica, *21st BILETA Conference*, 2006, pp. 15, 16.

principles, internationally accepted laws, online customs and usages, standard "terms and conditions", contracts or clauses as well as codes of conduct and even user preferences and technical choices.[551]

The legitimacy of "lex informatica" is unquestionable and in the online world, where there are no boundaries, the application of transnational rules seems more reasonable than the application of national laws. The legitimacy and the potential of lex informatica is increased by the fact that it is in great extent shaped by the same people it governs, who are more willing to accept it.[552] Lex informatica has emerged, is widely accepted and encouraged by policy makers, and "the further application of transnational legal standards not only to the merits, but also to the agreement and procedure, would constitute the pinnacle of autonomous and delocalized or denationalized arbitration".[553] Applying lex mercatoria, and therefore also lex informatica, is in accordance with the "New York Convention" and the validity and enforceability of arbitral awards, based on transnational rules, is accepted by legal theory, national courts and the 1992 "Cairo Resolution" of the "International Law Association", according to which, "awards

[551] REIDENBERG Joel, Lex Informatica: The Formulation of Information Policy Rules through Technology, *Texas Law Review*, vol. 76, 1998, p. 555.
[552] MEFFORD Aron, Lex Informatica: Foundations of Law on the Internet, *Indiana Journal of Global Studies*, vol. 5, 1997, p. 236.
[553] PATRIKIOS Antonis, *op. cit.*, pp. 37- 39.

based on transnational rules are enforceable if they have been applied by the arbitrators pursuant to agreement of the parties or when the parties have remained silent regarding the applicable law".[554]

In case the parties have not chosen the applicable law, the arbitrator may determine the procedural and substantive law and may apply the rules of law, which considers appropriate. This opinion is supported by the UNCITRAL "Model Law on International Commercial Arbitration" according to which, in case the parties have not chosen a law, the applicable law shall be determined by the arbitral tribunal.[555] Furthermore, this opinion is supported by the "European Convention on International Commercial Arbitration" which calls for the law deemed applicable by the arbitrators.[556] In conclusion, the applicable law (which can include transnational rules) is primarily chosen by the parties and in case of absence of choice it is determined similar to the seat of arbitration, by the arbitrators or the institution.

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[554] HERBOCZKOVÁ Jana, *op. cit*., p. 10.

[555] "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate". "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable". See UNCITRAL Model Law on International Commercial Arbitration, Articles19 and 28 available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

[556] "Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable". See European Convention on International Commercial Arbitration, Article VII available at https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf

Chapter 3

The outcome of online arbitration

In traditional ADR, one of the most important elements that distinguish arbitration from other methods is the fact that in arbitration the third neutral party issues a binding decision, which is known as the award of the arbitration and is effective and enforceable by the public authorities in a way similar to a decision issued by a national court. However, as stated, online arbitration can appear in different forms. Based on the outcome of the procedure, online arbitration can be binding, non-binding or unilaterally binding. Binding online arbitration is classified as "true arbitration" since it has the fundamental elements of arbitration, i.e. the adjudicative role of the arbitrator and the issuing of a decision similar to a judgment.

Unilaterally binding arbitration may also be classified as "true arbitration" if the award is given "a binding effect after its issuance by the party not bound by the outcome and if the procedural standards applicable to arbitration have been met".[557] An example of unilaterally binding arbitration is "FordJourney", which is a dispute resolution program operated on behalf of Ford by the "Chartered Institute of Arbitrators in London", in which

[557] BADIEI Farzaneh, *op. cit.*, p. 5.

"the parties are bound by the Arbitrator's decision subject to either party's right of appeal under the Arbitration Act, 1996, and also the claimant's right to reject the award by pursuing the claim afresh in the courts".[558]

In the case of non-binding arbitration the ICANN system for the resolution of domain name disputes, under the "Uniform Dispute Resolution Policy" (UDRP), offered by several ODR providers, is the prime example. Under the "Uniform Dispute Resolution Policy", none of the parties are bound by the outcome of the procedure and they can recourse to litigation for the resolution of their dispute. Non-binding arbitration as used with domain names seems to be a preferred method when using online arbitration, because it avoids the legal obstacles relating to the enforceability of the award.[559] However, binding arbitration is also offered online; "the AAA, for instance, administers arbitrations conducted exclusively online under its Supplementary Rules for Online Arbitrations".[560]

[558] KAUFMANN-KOHLER Gabrielle, *op. cit.*, pp. 4, 5.
[559] CORTES Pablo, *op. cit.*, pp. 106, 107.
[560] KAUFMANN-KOHLER Gabrielle, *op. cit.*, pp. 4, 5.

Section 1: Non-binding online arbitration

As stated, based on the outcome of the online arbitration procedure there are two main forms of online arbitration i.e. binding and non-binding. At this point this thesis examines non-binding online arbitration. Non-binding arbitration sounds like an oxymoron, since one of the main characteristics of arbitration is the binding nature of its outcomes, meaning the issuing of a binding award. Non-binding arbitration is the arbitration that produces a decision which is not binding and consequently cannot be enforced.[561] The most representative example of non-binding arbitration is the "Uniform Dispute Resolution Procedure" (UDRP), which has proven very successful in the resolution of domain name disputes, in a way that is fast, efficient and cost-effective. This example of successful non-binding arbitration will be examined in the next section.

One of the main reasons for using non-binding online arbitration is that this form of arbitration avoids many of the legal obstacles that binding online arbitration faces, relating to the arbitration clause, the arbitrability of disputes which can be constrained under some national laws and the form of the award. However, as already seen, these obstacles can be overcome.

[561] SCHMITZ J. Amy, *op. cit.*, p. 194.

Nevertheless, non-binding arbitration avoids problems regarding "the recognition of agreements, the compatibility of its procedures with requirements of due process and the recognition of enforcement of its decisions by state authorities".[562] Another reason for choosing non-binding online arbitration is based on the idea that ODR aims not only to resolve disputes but also to facilitate online commerce. According to this mentality ODR systems must primarily be time and cost efficient, so that failed attempts to resolve the dispute are as least burdensome as possible.

Non-binding arbitration resembles the other non-binding ODR methods, in the sense that the involvement of the third party has no binding effect, but nevertheless constitutes negotiation resistance, by allowing them to evaluate their own and the other party's views and arguments and form an idea about the possible outcome in court or in traditional arbitration. Furthermore, it can be a place to vent providing catharsis and "helping alleviate anguish and aggression through expression and revelation".[563]

Although non-binding arbitration does not produce a binding award, however, its outcomes can result in a final resolution, either through the unforced compliance and

[562] SCHULTZ Thomas, 'Online Arbitration: Binding or Non-Binding? *op. cit*., p. 7.
[563] BENNETT C. Steven, Non-binding Arbitration: An Introduction, *Dispute Resolution Journal*, vol. 61, no. 2, 2006, p. 2.

acceptance of the outcome or through what was described in the first part of the thesis as self-enforcement mechanisms. The alternative binding force of the outcome is based either on technical control, on the control of the parties' funds, or on the control over their reputation. Trustmarks feedback systems, blacklists, escrow accounts, credit card chargebacks and specific technological systems are used as self-enforcement mechanisms and "a marketplace with non-binding arbitration enforces the decisions, not through courts but simply in the legal order of the marketplace.[564]

Non-binding arbitration is welcome for low value disputes where the attempt of any other adjudicative way such as binding arbitration would be impractical. Disputes in which, the enforcement of the award alone would require more money, energy and trouble than the value of the dispute. Disputes in which if there is no other effective way to resolve them rather than litigation, they will probably remain unresolved. Also, where self-enforcement mechanisms such as the use of technological tools would ensure compliance to a very high degree such as the UDRP or where self-enforcement mechanisms such as the exclusion from the marketplace would be considered more damaging than a condemnatory award. However, the problem remains and an ODR system that would rely on non-

[564] SCHULTZ Thomas, 'Online Arbitration: Binding or Non-Binding? *op. cit.*, p. 8.

binding arbitration alone would not be able to produce the necessary finality in the dispute. The need for an adjudicative, binding and final way to resolve disputes online remains and shows the necessity of online binding arbitration.

Section 2: The UDRP example

This section demonstrates a successful example of non-binding arbitration, to serve as an illustration of how non-binding arbitration can be effective under specific circumstances.

During the last decade of the millennium the Internet became commercial and experienced an impressive growth. This produced a vast amount of new disputes, such as disputes over domain names. Initially most people had never even heard about the existence of domain names and less so about the corresponding disputes. In the offline world businesses can operate under the same name, provided that their operation does not cross paths. For instance, when the businesses operate in different countries and cities, or when their operation relates to different sectors. However, this is not true for the online world,

where businesses operate in the same area, in a common-to-all cyber world and the only way to find them is through their domain names, which therefore cannot be shared. Consequently, domain names became invaluable for businesses and soon enough countless disputes over domain names were generated, relating to trademark infringement. Resolution of these disputes through the traditional judicial route proved ineffective, because these disputes were usually cross-border, raised complex legal issues and required a vast amount of time and money. As a result, developing alternative ways to resolve domain name disputes became necessary.[565] Realizing this necessity, the "Internet Corporation for Assigned Names and Numbers" adopted the "Uniform Domain Name Dispute Resolution Policy", which is operational since the year 2000.

According to the UDRP system, in order to resolve a domain name dispute, one does not have to recourse to litigation claiming trademark infringement, but instead can resolve the dispute online by contacting one of the several ODR providers accredited by the ICANN and file a complaint. The types of claims offered for resolution include "an Unsolicited Renewal or Transfer Solicitation, accreditation, an Unauthorized Transfer of Your Domain Name, a Trademark Infringement, a Uniform Domain Name Dispute Resolution (UDRP) Decision, a Registrar

[565] WANG Fangfei Faye, *op. cit*., pp. 72, 73.

Service, Inaccurate Who is Data, Spam or Viruses Content on a Website".[566] The UDRP procedure for resolving domain name disputes includes twelve steps, from the filing of the complaint to the potential transfer of the domain name, and is concluded within sixty days.[567]

Ten days after the decision is rendered and the dispute resolved, the registrar of the domain name either cancels or

[566] DUCA D. Louis, RULE Colin, LOEBL Zbynek, *op. cit.*, p. 4.

[567] "At the first step the complainant files both paper and electronic copies of the complaint with the dispute resolution forum and the respondent; the paper copies can be delivered via posted mail or other courier service; the electronic copies can be transmitted via electronic mail or facsimile. Parties are not required to appear at the provider's forum physical location. No inter-person interaction is required or permitted except in unique circumstances. At the second step the arbitrator acknowledges receipt via email and hard copy responses. At the third step the dispute resolution forum contacts the Internet domain name registrar(s) to provide details regarding the domain name in dispute. At the forth step, after receiving the requested information from the Internet domain name registrar(s), the provider conducts a complete review of the complaint. If the complaint is found to be deficient, both the complainant and respondent are notified. The complainant has then five days to resubmit the complaint. If the complaint is not corrected and resubmitted within the permitted time frame, the complaint is deemed withdrawn without prejudice. At the fifth step, after the compliance is completed, the complainant is required to submit payment for the forum's fees by check, bank transfer or credit card. Formal proceedings start upon payment. At the sixth step the respondent is required to submit a response to the complaint within twenty calendar days of the commencement of the proceedings; if the respondent fails to submit a response within the allocated time period, he or she is considered in default, and the process continues. At the seventh step the forum then acknowledges receipt of the response or sends notice of default by respondent to both complainant and respondent. The eighth step is the panel constitution. If neither the complainant nor the respondent, have elected a three-member panel, the provider shall appoint a single panelist from its list of experts. The panelist's fees are to be paid by complainant. If either the complainant or the respondent elect a three-member panel, the provider will appoint a three-member panel-endeavoring to appoint one from a list of three names selected by complainant, one from a list of three names selected by respondent and the presiding panelist from a list of five names after submission to the parties and reasonably balancing the preferences of both parties. The fees of the panelists are paid by the complainant if it alone or with the respondent, elect three panelists and by all parties equally if the respondent alone has elected three. At the ninth step the panel submits its decision to the forum within fourteen days of its appointment. At the tenth step, within three days after receipt of the decision, the forum notifies the parties, ICANN, and the respective Internet domain name registrar(s). At the eleventh step, if the respondent prevails, no further action is taken and the process ends; if the complainant prevails, the registrar(s) is required to transfer the domain name with ten days from the respondent to the complainant. At the twelfth step the registrar (s) implements the final decision". MANEVY Isabelle, *op. cit.*, p. 20.

transfers the domain name. Between the registrar and ICANN there is a contract, a "Registration Agreement", according to which the registrars have to enforce the decisions rendered by any of the accredited ODR providers.[568] The UDRP uses technological tools to enforce the decision directly and the enforcement, or more accurately, the self-enforcement is based on the technical control over the domain name registry. "The UDRP is empowered by terms in the contract agreed to when a domain name is registered and the decisions are enforced by making necessary changes in the domain name registry".[569]

Much of the success of the UDRP is based on its self-enforcing ability. However, the UDRP is a particular case in which the ICANN can exercise unique technical control over the relevant resources. One must keep in mind that for other disputes, such as B2C disputes, such effective self-enforcement mechanisms might not exist, which might make the enforcement of outcomes, produced by non-binding arbitration, problematic. The UDRP procedure constitutes an efficient ODR system with an evidence based process that makes the execution of the decision relatively easy and straight forward. However, the ODR method used by the UDRP is non-binding arbitration (for instance, the dispute resolution professionals are called panelists

[568] Internet Corporation for Assigned Names and Numbers, available at https://www.icann.org/resources/pages/udrp-2012-02-25-en?routing_type=path

[569] KATCH Ethan, Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace, *op. cit.*, p. 6.

instead of arbitrators), which does not impede the parties from going to court.[570] Although, "it is unlikely that the losing party would seek to litigate after a decision has been self-enforced, especially if the dispute is of low economic value",[571] technically nothing hampers the parties to a dispute to recourse to the traditional judicial route.

The UDRP success, which depends upon its self-enforcement mechanism illustrates that non-binding arbitration can be an effective way to resolve disputes; however, ultimately it may lack the necessary binding force and it definitely lacks finality since parties can still recourse to court and render the whole procedure void.

Section 3: Online binding Arbitration

As seen in the first part of the thesis, traditional arbitration compared to the other methods of traditional ADR, has unique characteristics that ensure its special place. Arbitration is the only method that can produce a binding and final award; the award is directly enforceable, much like the

[570] CORTES Pablo, *op. cit.*, pp. 68, 69.
[571] SCHULTZ Thomas, 'Online Arbitration: Binding or Non-Binding? *op. cit.*, p. 10.

judgment of a national court and even easier in cross-border disputes, since the New York Convention ensures that arbitration awards are enforceable across most borders, and the award is also final creating res judicata effect. Therefore, only arbitration can be considered "a true alternative to litigation as a binding and enforceable avenue for redress".[572]

One of the biggest drawbacks of ODR examined in the first part of the thesis relates to the enforceability of the outcome of the ODR procedure. The voluntary methods of ODR preceding online arbitration in the three step process described, mainly negotiation and mediation, do not produce decisions that can be enforced, but instead, they either produce outcomes than are based on their agreement and voluntary compliance, or they produce no outcomes when the process is unsuccessful.[573] But even when they result in settlements, in order to be enforced, because settlements are contracts, the winning party needs to bring a contract action in court, obtain a judgment, and possibly start enforcement of judgment proceedings. It is obvious that it is a long road to bring ODR settlement agreements in court; while the enforcement in court of mediation and negotiation outcomes, requires an ordinary court action, the enforcement of an arbitration award can be granted in summary proceedings

[572] HÖRNLE Julia, *op. cit.*, p. 59.
[573] KAUFMANN-KOHLER Gabrielle, *op. cit.*, pp. 4, 5.

without a review of the merits of the award.[574] Therefore, the enforcement of an award is much easier and "especially for small and medium enterprises, particularly when they are far apart or depend on quick decisions, binding online arbitration may present major advantages".[575] Furthermore, as seen earlier, only online binding arbitration can produce a binding and final award, contrary to online non-binding arbitration, the outcomes of which can become enforceable but in the end the parties can always recourse to the court.

In online binding arbitration the arbitral proceedings are terminated when the arbitrators render a final and binding arbitral award. This is what separates arbitration from other consensual means of dispute resolution, because instead of relying on the voluntary compliance of the losing party, in arbitration the resolution produces a third party decision which is binding and enforceable. In traditional arbitration, the enforceability of arbitral awards is facilitated in a great extent by international instruments and mainly the "New York Convention" to the point that enforcing foreign arbitral awards can be easier than enforcing foreign court decisions. Contrary to traditional arbitration, in online arbitration some issues arise from virtual character of the process relating to the award.

[574] WANG Fangfei Faye, *op. cit.*, p. 87.
[575] KAUFMANN-KOHLER Gabrielle, *op. cit.*, pp. 19, 20.

Although in online arbitration parties often voluntarily comply with the award since they usually want to preserve the good status of their relationship with the other party, however, the thesis examines the enforceability of the award in absence of such a voluntary compliance. In traditional arbitration, the recognition and enforcement of foreign arbitral awards is mainly regulated by the "New York Convention". The question that arises is whether an online award produced by an online binding arbitration can be recognized and enforced under the "New York Convention" internationally. The main concerns relate to the form of the award, its nationality and its recognition by the courts.

The first issue concerns the form of the online arbitral award. According to the "New York Convention", the UNCITRAL "Model Law on International Commercial Arbitration"[576] and several national laws,[577] it is required for arbitral awards to be written and signed by the arbitrators and

[576] "Form and contents of award: the award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated". See UNCITRAL Model Law on International Commercial Arbitration (1985) Article 31 available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

[577] According to the Section 52 (1) UK Arbitration Act of 1996, "the parties are free to agree on the form of the award". But, if there is no such agreement, the award shall be in writing signed by all the arbitrators or all those assenting to the award. Regarding US law, federal law refers explicitly to the New York Convention (Chapter 2 §202 of the Federal Arbitration Act of 1925). Regarding US state law, Section 8 of the Uniform Arbitration Act of 1955 (UAA) requires that the "award shall be in writing and signed by arbitrators joining in the award". See MOREK Rafal, *op. cit.*, p.43.

the parties, a requirement which may cause difficulties in case of an online award in an electronic form and signed with "digital signatures". A first and obvious solution to overcome these problems would be to additionally create a hard copy of the online award which would be traditionally signed by the arbitrators and therefore satisfy the form requirements of the "New York Convention". However, today the international community, "by extensive interpretation of the Convention under the principle of functional equivalency, admits that digital online arbitral awards meet the written form and original requirements of awards under the Convention, and clearly recognizes the validity of digital signatures".[578] However, the ideal solution for the future of online arbitration would be the amendment of the "New York Convention" as to explicitly include online arbitral awards.

The second issue concerns the nationality of the award. The winning party after the issuing of the award will go to a national court and pursue the enforcement of the arbitral award and the court will examine the award. In this point the first question considered will be that of the nationality of the award.[579] Since the Internet does not have any boundaries, and the arbitration procedure can be performed entirely online, what is the nationality of the award and in which country was the

[578] WANG Fangfei Faye, *op. cit.*, pp. 89, 90.
[579] HERBOCZKOVÁ Jana, *op. cit.*, pp. 10, 11.

award made? However, as seen on the relevant previous section about the seat of arbitration, in online arbitration, the seat of arbitration is chosen by the parties or the arbitrators and the place chosen is defined by the award as the place of arbitration determining its nationality.

The third concern relates to the enforcement of the award and the requirement of an original of the award or a "duly certified copy". According to the "New York Convention" for the recognition and enforcement of the award it is required a "duly authenticated original of the award or a duly certified copy";[580] the issue that rises again is whether the online award with the digital signatures satisfies this requirement. Although, today it is argued that digital signatures and online records of an award can be adequate, even if that is not the case several solution have been employed to resolve those issues. Again, most common solutions include either the confirmation of the authenticity of the online award and the arbitrators' digital signatures by a trusted third party, or producing besides the online award also a hard copy of the award i.e. a printed version which will be sent to arbitrators to sign by hand. In the latter

[580] "To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof". See The New York Convention of June 10 1958 Article IV available at http://www.newyorkconvention.org/texts

case the procedure will produce a traditional award that will be regularly enforceable.

In conclusion, binding online arbitration can produce a final and binding award which will have the same effect of traditional arbitral awards and "will be subject to set aside only for the same limited procedural grounds as traditional arbitral awards".[581] However, in order for online arbitration to develop into its full potential, the amendment of the "New York Convention" is necessary so that it is up to date with the online nature of awards and facilitates their enforcement.[582]

[581] YÜKSEL, Armağan Ebru Bozkurt, *op. cit.*, pp. 92, 93.
[582] CORTES Pablo, *op. cit.*, pp. 68, 69.

Title 2

The ODR Architecture

The second half of the second part envisions ODR as a fully developed system and illustrates all the key factors for its structure and the elements of its architecture. It envisions an international ODR network that will be comprised of private initiatives backed by governmental support and supervision and cooperation on an international level under the auspices of a global organization such as UNCITRAL or the ICC. The network will be comprised by clearinghouses that will cooperate with the relevant government authority in each country. The international organization will regulate ODR by issuing guidelines and identifying the core principles that must be safeguarded to ensure that the ODR system will be both fair and effective. The international body will regulate the ODR market and strengthen ODR use, clarify core principles of ODR, service standards and recommend a model for codes of conduct or practice for ODR service providers.[583] The international organization will also accredit ODR providers through the clearinghouses and by providing them with the organization's Trustmark. In this proposal, only the top organization in each country would be

[583] WANG Fangfei Faye, op. cit., p. 80

admitted to the ODR network.[584] This part identifies the regulatory standards for ODR service providers as well as the fundamental principles that must be safeguarded. Finally, it takes a closer look at the ODR provider, its technological structure and its funding based on the aforementioned principles and on the experience of the dispute resolution movement. In short, the second half of the second part provides a complete layout of an ODR system from its funding and its technological architecture to its regulation and finally to the extra step of creating awareness and trust necessary for ODR to fulfil its full potential. More specifically, the first chapter demonstrates ODR from a macroeconomic view as an international network. The second chapter illustrates the regulation of ODR and the basic principles that must be safeguarded. The third chapter examines ODR from a microeconomic view at the level of the ODR provider.

[584] RULE Colin, op. cit., pp. 281, 282

Chapter 1

The ODR Network

This chapter demonstrates how the ODR network should be set up, as a system that is international and global with cooperation between states and under the auspices of an international body, which will have clearinghouses cooperating with the relevant authorities in each state, and through which ODR providers will be accredited and parties will be referred to them, as a means to regulating them.

Section 1: An International ODR system

As stated throughout the thesis, disputes evolved over the years. Whereas in older days disputes might have only involved parties with geographical proximity such as within the confines of a village, a city, or a country; as time passed and people started to communicate from afar and travel longer distances faster and easier, disputes became much more often than before cross-border. ADR managed to overcome the obstacles borders

put in resolving the dispute. But since the digital era, the internet allows people around the world to instantaneously interact with each other, making physical frontiers meaningless and borders not obstacles but merely speed bumps on the information superhighway. In commercial transactions the Internet and the globalization of the world economy demand that electronic commerce should be addressed on an international level.[585]

According to national sovereignty, each state has the exclusive power to apply its laws to the local effects of a cross-border transaction and each nation has no problem in legislating and enforcing certain rules within national borders to govern the activities of the Internet. In short, a country may gain control over computers within its borders. However, no one state has leverage against the whole system or can prohibit information flow on the internet. Therefore, individual Internet regulation and a lack of a coherent international system result to inconsistent regulatory schemes and spillover effects by conflicting national rules, with the potential for overlapping and contradictory approaches. Consequently, it is evident that not only is international cooperation useful, but it is requisite. Only

[585] "President Clinton issued a report entitled 'A Framework for Global Electronic Commerce', more commonly called the 'Magaziner Report', according to which governments should recognize the unique qualities of the Internet and electronic commerce over the Internet should be facilitated on a global basis". See ZHAO Yun, Dispute Resolution in Electronic Commerce, (Martinus Nijhoff Publishers: Leiden/ Boston), 2005, p. 50.

through international cooperation can the heavy demands of the digital society be satisfied.[586]

The digital era and the internet, which is global and international and knows no boundaries, have made disputes and their resolution an international and global problem which requires an international solution. As the internet is global, likewise ODR must also be global and international. ODR requires a global network with international cooperation. International cooperation must be achieved on two levels. It must be achieved on a national level, through the cooperation between governments and on a supranational level through international organizations. International cooperation between states is achieved through bilateral and mostly through multilateral treaties between governments, which unify the international practice and cut down the conflicts arising out of different national provisions. The efforts of UNICTRAL are unparalleled in this context.

International cooperation on a supranational level is achieved by creating or empowering an already existing international body under the auspices of an international

[586] "For instance, in the case of New York v. Vacco Golden Chips Casino, a subsidiary of a New York corporation is an Antiguan corporation licensed to operate gambling facilities in Antigua. Golden Chips operated web sites from Antigua, which were accessible to Internet users in New York. The New York Supreme Court ruled that Golden Chips violated New York's anti-gambling laws. This ruling was able to be enforced successfully as Golden Chips' directors and employees were in the US". *Ibid*., p. 67.

organization with global legitimacy. In the quest for appropriate dispute resolution mechanisms, international organizations are apparently the right bodies to represent the international community as a whole. This is evident in the context of B2C disputes, by examples of such networks that are provided by major consumer complaint-handling bodies around the world, such as the "Better Business Bureau", "Eurochambres", and the "Federation of European Direct and Interactive Marketing" (FEDMA).[587] Furthermore, it became evident by the success of ICANN and the UDDP system in facilitating arbitration of domain name disputes, which revealed possibilities for international organizations.

The international body will regulate ODR to pursue appropriate means to resolve disputes in ODR on a global basis and to ensure universal acceptance of common principles and policies to underpin national and international actions.[588] It will act also as a global information center for future parties and will encourage the use ODR so as to raise awareness and increase trust. The idea of a world information center is also recommended by the ABA which argues that the current patchwork limits the parties' ability to access the relevant information. However, "for such a project to have any chance of success, it will have to secure the support of an organization

[587] RULE Colin, *op. cit.*, pp. 281, 282.
[588] ZHAO Yun, *op. cit.*, p. 60.

with greater international legitimacy that the ABA".[589] The successful establishment of the global information center will be a leading worldwide ODR private organization, which will perform a similar function to the ICC in the future, and will help to boost users' e-confidence and trust.[590]

The necessity of an international network is advocated by the "Organization for Economic Co-operation and Development" (OECD) guidelines for the protection of consumers in electronic commerce, according to which "businesses, consumer representatives and governments should work together within a coordinated international approach to continue to use and develop fair, effective ODR".[591] The international acceptance of the OECD guidelines is evident by the fact that they were endorsed by the G-8 nations in the "Okinawa Charter on Global Information society" on the 22nd July 2000 and the "Building Trust in the Online Environment: Business to consumer dispute resolution" conference on December 2000 jointly sponsored by the OECD, the "Hague Conference on Private international law" and the ICC.[592] The ABA also states that in order to provide

[589] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 81.
[590] WANG Fangfei Faye, *op. cit.*, pp. 55, 56.
[591] OECD guidelines for consumer protection in the context of electronic commerce, available at http://www.oecd.org/fr/sti/consommateurs/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm For more information see infra at Guidelines.
[592] FORTUN Alberto, IGLESIA Alfonso, CARBALLO Alejandro, Basis for the Harmonization of Online Arbitration: E-arbitration-T Proposal, (2002), p. 10 available at http://brownwelsh.com/Archive/e-arbitration-t_harmonization_proposal.pdf

support to ODR and electronic commerce a global approach is required.[593]

Section 2: Clearinghouses

The ODR network will have online clearinghouses that will have a triple role of providing information, operating as gateway points for potential users and through the referral process form an accreditation system for ODR providers. Clearinghouses will provide all the necessary information about ODR as well as ODR providers and will raise awareness about ODR and increase user's confidence.

More than that, clearinghouses will control the access to ODR providers by operating as portals to the providers, as gateway entry points with experts who will provide information and assist the parties to choose the best possible provider from a menu of possible ODR options, based on the nature of the dispute and the specific circumstances of each case.[594] Clearinghouses will not merely provide information about different dispute-resolution service providers, but will also

[593] *Ibid*., p. 11.
[594] CORTES Pablo, *op. cit*., pp. 193, 195.

provide the access point for individuals seeking redress. Clearinghouses will operate websites indexing, listing and linking to all dispute-resolution service providers compliant with the minimum regulatory standards. These websites will be hyperlinked from relevant websites and Internet forums.

Furthermore, clearinghouses by operating as referral systems will evaluate the operation of ODR providers and ensure its accordance with a minimum of standards. The evaluation will be performed through feedback and reputation systems for consensual processes and through the publication of outcomes for adjudicative processes. Based on this evaluation the clearinghouses will accredit ODR providers by allowing them to display a logo of a global Trustmark on their website and will refer disputes to the accredited providers. On the contrary, if a provider does not comply with those minimum standards the clearinghouse will remove the Trustmark and stop the referrals to that provider.[595] In short, the referral system will operate as an accreditation system that will be monitored, updated and promoted, so that it provides channels to fair dispute resolution and excludes all providers who do not abide by a minimum set of regulatory standards. Finally, the clearinghouse will assist the parties with initiating the dispute by guiding them through all the relevant proceedings, such as the filing of the dispute, the

[595] RULE Colin, *op. cit.*, p. 281.

choice of the provider, and the payment, thereby providing the parties with a "light form of legal counsel".[596]. An example of such a system from ADR is the ECC-Net (European Consumer Centre Network) set up in 2001 by the European Commission for cross-border consumer disputes, which operates as a referral system for ADR in all European Union, provides a "one-stop shop" for cross-border dispute resolution and at the same time manages to overcome any jurisdictional and enforcement issues. When an individual wishes to bring a claim against a company established in another Member State, the national center will liaise with the equivalent center in the other Member State in order to refer the consumer to the most relevant dispute resolution system in that foreign Member State.[597]

A clearinghouse will also operate in a fashion similar to that of the i-ADR Centre recommended by the ABA Task Force; "it will disseminate information concerning best practices forms, codes, standards, and guidelines, it will list and provide information concerning the ODR service providers available for the resolution of disputes and it will provide all information on a multilingual basis via the World Wide Web".[598] According to ABA, the i-ADR center is the timeliest and most useful entity as it will disseminate information about guidelines and available

[596] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, pp. 97- 99.
[597] HÖRNLE Julia, op. cit., pp. 247- 249
[598] WANG Fangfei Faye, op. cit., pp. 55, 56

providers, it will develop codes standards and guidelines, it will provide multilingual services and it could become a Trustmark or certifying authority.[599] Other projects of clearinghouses already exist, but not governmental and normally consumers would more easily "trust a service related to dispute resolution provided by government",[600] or at least in cooperation with one.

Section 3: An accreditation system

In the global ODR network described, the international body will have a supervisory role by monitoring the operation of ODR providers. For instance in B2C disputes, the existence of such a body that will supervise the operation of ODR providers is proposed as a solution to avoid abuses from the businesses.[601] The international body will ensure the external accountability of ODR providers, who will have to answer to an authority that can

[599] ABA Task Force, Proposed guidelines for recommended best practices by online dispute resolution providers available at http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf

[600] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, pp. 97- 99.

[601] CORTES Pablo, *op. cit.*, pp. 195, 196.

mandate desirable conduct and sanction conduct that breaches identified obligations.[602]

The accreditation of ODR providers will be done in two ways; first, clearinghouses that will operate as gateways to ODR providers will refer cases only to the accredited and trusted ODR service providers. The referral system will operate as an accreditation system that will be monitored, updated and promoted, so that it provides channels to fair dispute resolution and excludes all providers who do not abide by a set of minimum regulatory standards.[603]

The second way to accredit ODR providers will be through an accreditation system involving a seal, for instance a global Trustmark, which will be awarded by the international organization to the accredited ODR providers. The providers that abide by minimum regulatory standards will be allowed to exhibit the seal on their webpages. However, if an ODR provider would violate those standards, the seal would be removed. The seal will be backed up by the relevant government authority, which will prevent an ODR provider from offering services once

[602] "Accountability can be internal and external, or both. Internal accountability typically promotes self-evaluation and organizational development and enhances management practices and strategic planning through internal measures and review, while external accountability usually involves evaluation of performance and outcomes by a credible external entity (private or public) in the context of predetermined boundaries". See WANG Fangfei Faye, *op. cit.*, p. 80.
[603] HÖRNLE Julia, *op. cit.*, pp. 247- 249.

the seal was removed.[604] Furthermore, besides the accreditation of the ODR providers the international organization will also accredit ODR practitioners to ensure they meet certain levels of education, training and performance. The criteria for accreditation in ODR include mainly practitioner knowledge, such as technology and language, and practitioner skills, such as maintaining communication and controlling information flow.[605]

The accreditation of ODR providers will be possible because the monitoring authority, in cooperation with the clearinghouses and the relevant state authorities will have control over the users' access to ODR and to the accredited providers. The accreditation body will provide information and refer cases only to the accredited providers, while the providers that do not respect the standards set by the accreditation body will not be referred to. By controlling users' access to ODR providers, the accreditation body will be able to regulate ODR providers. "The control of a valuable resource such as information allows provision of incentives, which in turn permits regulation".[606] A prerequisite for the effectiveness of such an accreditation system is the ability of potential users to trust the accreditation body and since users are generally more

[604] RULE Colin, *op. cit.*, p. 281.
[605] WANG Fangfei Faye, *op. cit.*, pp. 84, 85.
[606] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, p. 95.

trusting of such bodies when they are connected with the government, the cooperation of the accreditation body with the relevant state authorities seems to be a requirement.

Chapter 2

Regulation and guidelines

In the international ODR system the regulation of ODR should be co-regulation, based on private initiatives that will be backed by governmental control and supervision by the international organization, which will ensure the existence of minimum regulatory standards, by issuing guidelines in the form of codes of conduct, the compliance to those minimum standards and the safeguarding of fundamental principles.

Section 1: Regulation of ODR

One of the most important questions relating to ODR is whether ODR should be regulated and if so, how? In a broad sense regulation can include one or more of the following tasks; the formulation of standards or rules to be implemented, the undertaking of any action to help realize the purpose and aims of relevant rules or regulations and the sanction of any violations. In a stricter sense, regulation is understood as the formulation of

the standards and rules. The lack of a uniform regulatory approach to ODR has created diverse regulatory approaches. The significant and unparalleled changes brought on by the digital era and the internet technology have shown the limitations of traditional regulations which are too static and cannot effectively govern the inconstant and infinite cyberspace and have shown that there is not yet an appropriate framework for regulating Internet activities.

There are two prevailing ways to regulate ODR. One way to regulate ODR is through a public body, which may be a government or an international legal body that establishes regulatory standards and offers accreditation for ODR providers. The second way to regulate ODR is through self-regulatory initiatives independent from a public law framework. Finally, a combination of these alternatives produced a third hybrid way to regulate ODR through co-regulation. The thesis advocates in favor of co-regulation as a way to ensure a more harmonious and feasible regulatory framework.

The regulatory approaches differ at the two sides of the Atlantic. Europeans generally are not trusting of private regulation and feel safer with government intervention,[607] whereas in the United States there is a stronger tendency to rely

[607] For instance, the proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes in 2011.

on industry to regulate itself. However, both in Europe and the United States the regulatory approach to the deployment of ODR has been mostly hands-off and programs promoting this type of self-regulation (such as codes of conduct, trustmarks, reliability programs, and so on) have grown slowly but steadily over the past few years.[608] The popularity of privatization, especially on the internet, has created a tendency for self-regulation instead of government regulation for the internet in general and ODR more specifically. In the US the "Magaziner Report", of July 1, 1997 explicitly calls for self-regulation in the Internet. However, lately also in the EU Internet regulation policy has changed to support self-regulation because of the need to use creative and flexible regulatory regimes in the face of the novel situation.[609]

A. Governmental regulation

As stated ODR can be regulated through a public body and most of the times this body will be a state. Although states have

[608] RULE Colin, *op. cit.*, pp. 272, 273.

[609] "In September 1997, the European Internet Services Providers Association (EuroISPA) was established, thus marking transformation in EU policy. The EU provided funding to this Association and encouraged industry self-regulation of the Internet. The EU Internal Market Commissioner, Mario Monti, stated in April 1997, "We definitely want to avoid, like in other sectors, having too much legislation too early". See ZHAO Yun, *op. cit.*, pp. 49- 54.

regulated the Internet, the problem with this kind of regulation is that traditional laws are territorially based and "focused on elements of the physical world",[610] whereas the virtual world is not geographically based making it hard for states apply their laws to online activities and making traditional legal instruments inapplicable and confusing. In the online environment borders become blurry when for example users can access services and enter to transactions from anywhere in the world. Such a borderless world is difficult to be regulated by single states that may lack legitimacy or ability.[611]

The borderless nature of the cyberspace has presented a severe challenge to Internet regulation. Each state can regulate the internet and more specifically ODR, and state regulation has some invaluable advantages, such as the fact that "a government has a strong incentive to resolve disputes to keep society functioning smoothly and the fact that a state can be impartial because it usually has no vested interest in the outcome of most of the matters it is in charge of deciding".[612] However, as seen in the case of *New York v. Vacco*, it is almost impossible for a state to regulate the Internet without causing a rippling effect in other states and without individual Internet regulation to cause

[610] EU study on the Legal analysis of a Single Market for the Information Society, op. cit., p. 6.
[611] LIYANAGE Chinthaka Kananke, The Regulation of Online Dispute Resolution: Effectiveness of Consumer Protection Guidelines, *Deakin Law Review*, vol. 17, No. 2, 2012, p. 31.
[612] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, pp. 90- 92.

conflicts across borders.[613] Furthermore, the global nature of the internet and e-commerce made evident the fact that regulation of electronic commerce and consequently ODR should be addressed on an international level, as no single government can have control of the internet and ODR.

On the contrary, an ideal solution for the regulation of the internet and ODR are International organizations such as UNCITRAL, OECD, ICC, WIPO and WTO. International organizations have a worldwide reputation and image, which instils trust in dispute resolution and can regulate ODR and accredit ODR providers by awarding their seal. International organizations are impartial and independent since they do not aim to be economically profitable and have no vested interest in the outcome.

Finally, international organizations can regulate ODR uniformly, which will be an advantage in cross-border dispute settlements.[614] For instance, institutions such as the AAA, the "International Center for the Settlement of Investment Disputes" (ICSID), CIArb, the "China International Economic and Trade Arbitration Commission" (CIETAC), the "International Chamber

[613] "For example, one of the EU regulations, the European Data Protection Directive, prohibits transfer of personal information from the EU to countries lacking adequate privacy protection. This directive could be enforced against non-European companies with a presence in the EU. However, this shall constitute impermissible extraterritorial regulation to those with less restrictive privacy laws since it threatens to cut off their computers from European data". ZHAO Yun, *op. cit.*, pp. 57, 58.

[614] WANG Fangfei Faye, *op. cit.*, pp. 33, 34.

of Commerce" (ICC), the "Deutsches Institut fur Schiedsgerichtsbarkeit" (DIS), the "International Center for Dispute Resolution" (ICDR) and the "London Court of International Arbitration" (LCIA), have issued rules for ODR procedures under the auspices of their respective institutions, which are included in the ODR agreements and contractually bind the parties and the institution.[615]

International organizations as well as governments have what is known as "symbolic capital", "which is the recognition, institutionalized or not, that different agents receive from a group based on the recognition by society of a particular status, of prestige, of specific qualities, abilities, or assets".[616] The same is true in dispute resolution. Traditionally in the field of dispute resolution, people have greater confidence in the government and in judges. Similarly, international organizations as regulators of ODR have a greater symbolic capital and most people think that it is reasonable to trust them.

[615] HÖRNLE Julia, *op. cit.*, pp. 93- 95.

[616] "Brands, for instance, make use of symbolic capital". See SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, pp. 90- 92.

B. Self-regulation

The inability of traditional regulatory schemes to apply on the regulation of the internet made evident that cyberspace should be treated as a distinct and independent place for regulatory purposes and that there was a need for alternative concepts. In order to avoid complex issues of conflict of laws and consumer protection in low-value, cross-border, B2C, e-commerce, self-regulation was proposed. Self-regulation is regulation developed independently of any public body and state. Self-regulation can be the result of an industry, or a group of companies acting collectively in the form of a trade association or other organizations representing the interest of the industry; it can be the result of a single company regulating their own operations; and it can be the result social bodies the actions of which can have vital effects on the future industry. The Internet has given rise to numerous regulatory organizations that treat a different aspect of electronic commerce and strive to provide a basis for protecting and balancing the interests of the parties they represent.[617]

[617] "Internet Watch Foundation, Internet Local Advertising and Commerce Association, Internet Services Association, Better Business Bureau, Consumer Bankers Association, Direct Marketing Association, the Internet Privacy Working Group (IPWG), TRUSTe's, etc." See ZHAO Yun, *op. cit.*, pp. 43, 44.

The most common way for self-regulation, is through codes of conduct, "which are sets of rules that outline the responsibilities of or proper practices of the members that subscribe to the code of conduct, and undertake to comply with the rules contained in it".[618] Self-regulation is also inextricably connected with self-enforcement and for ODR to function properly; a code of conduct must be accompanied by a self-enforcement scheme, for instance trustmarks. However, this section focuses on the former. The idea behind self-regulation is again closely connected to ADR and its rise during the middle ages. It can be dated back to medieval times when guilds maintained standards among those in the trade of a particular geographic location and protected their interests against outside competitors.[619] The growth of international trade at that time gave birth to a set of rules known as "lex mercatoria" that was not based on national laws but on the usages and customs of international trade. Similarly, today the growth of online commerce and the use of the internet have created its own customs and usages which are the basis for a new kind of "lex mercatoria" this time called "lex informatica". According to self-regulation, the ODR industry shapes its own regulation without the assistance of governments and parliaments. This type

[618] "The drafting of codes of conduct is recommended by several Directives, including the e-commerce Directive and the Data Protection Directive". See EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, pp. 27- 29.
[619] ZHAO Yun, *op. cit.*, pp. 43, 44.

of market regulation promotes efficiency through competition, contributes to legal harmonization and accelerates the globalization and development of ODR.

i. Self-regulation in action

Self-regulation has been widely implemented in dispute resolution in electronic commerce, leaving governments to simply provide minimum acceptable standards. Examples include the "Virtual Magistrate Project", the University of Massachusetts "Online Ombuds Office", and eBay's "Escrow and Insurance Arrangement".[620] The effectiveness of self-regulation can be primarily portrayed in the cases of UDRP and EBay. The first example is the "Uniform Domain-Name Dispute-Resolution Policy" (UDRP) system created by the "Internet Corporation for Assigned Names and Numbers" (ICANN) for the resolution of domain name disputes. The UDRP is a prime example of self-regulation, which regulates the conduct of the procedure and the way in which cases are assessed. It applies its own procedural and substantive law developing a legal body on domain names and determining the resolution of disputes and cancellation or

[620] *Ibid*., pp. 49-54.

transfer of domain names separate from the law of any country or any international treaty.[621] By referring to previous decisions these self-regulatory laws can attain precedential force in the same manner that common law was created from the rulings of the courts. Dispute resolvers have efficiency incentives to rely on them even though they have no contractual or legal obligation to do so.[622]

A successful system of self-regulation is also enacted by eBay, which implements its own rules through its own consumer satisfaction services or external dispute resolution mechanisms and enforces them through an effective reputation incentive. EBay dispute resolution mechanisms, outsourced until 2008 to SquareTrade, offer online dispute resolution in a two-step process which includes assisted negotiation and mediation. For eBay disputes, litigating through the courts seems unreasonable because of the complex jurisdictional questions and the prohibitive costs of litigation, which are disproportioned to the usually low-value eBay disputes, and so it is rare for a eBay dispute to reach the courts, in the range of less than one per million. The rarity of resolving eBay disputes through the traditional judicial route made evident that national laws had little bearing on these cases. Instead what has more relevance is what became known "EBay law", eBay's detailed globally

[621] CORTES Pablo, *op. cit.*, pp. 184- 193.
[622] SCHULTZ Thomas, The Roles of Dispute Settlement and ODR, *op. cit.*, pp. 4, 5.

applicable user policies. “Regularly updated and completed on the basis of new commonly observed practices of eBay members, they progressed into a well-developed, relatively dense, detailed and formalized set of rules of conduct”.[623] EBay law has been given precedential force since the outcomes of prior cases were brought to bear on subsequent cases.[624] Finally, eBay ensures compliance to its law through its reputation incentives. EBay users were sanctioned if they refused to participate in the dispute resolution process or failed to comply with its outcome by receiving negative feedback in the form of “reputation points” that attach to each user’s profile, which is an important lever in such an environment. Consequently, the compliance rate was exceptionally high. Through this self-regulatory scheme, eBay had developed “a normative system that is autonomous, has its own norms, applies them privately and indirectly enforces them through the reputational incentive”.[625]

[623] SCHULTZ Thomas , Carving up the Internet : Jurisdiction, Legal Orders and the Private/Public International Law Interface, The European Journal of International Law, vol. 19, 2008, p. 836.
[624] CORTES Pablo, *op. cit.*, pp. 184- 193.
[625] SCHULTZ Thomas, The Roles of Dispute Settlement and ODR, *op. cit.*, p. 5.

ii. Advantages of self-regulation

Self-regulation has considerable advantages compared to public or more so to governmental regulation. For e-commerce the preference of self-regulation by the business industry is justified by the need to avoid complex and numerous governmental regulations and the confidence on the idea that the market will provide adequate incentive to put these programs in place and to make sure that they are efficient and effective. [626] In general, self-regulation has several invaluable advantages relating mostly to expertize, time-efficiency and flexibility.

Self-regulation is better equipped to provide solutions because of the greater expertize of the industry players involved, who are better familiarized and closer connected to the issues at stake, especially when specialized knowledge is required, such as in complex cross-border or technical issues.[627] Furthermore, from a law and economics point of view, the cost of regulation is shifted to the industry and the willingness to follow rules made by the experts rather than those passed by administrators could directly affect the expense of governmental regulation, since less enforcement is required.[628] Self-regulation is usually faster

[626] RULE Colin, *op. cit.*, pp. 272, 273.
[627] CORTES Pablo, *op. cit.*, pp. 184-193.
[628] ZHAO Yun, *op. cit.*, pp. 45, 46.

in establishing rules compared to governmental regulation, even when it attracts several groups representing various interests. Furthermore, self-regulation is better equipped to keep up with the constant changes of technology and business models, which are developing rapidly. Governmental regulation for ODR can easily become outdated with these developments and "by the time any law came into effect, the e-commerce environment and technology would likely have changed so much that the law would be irrelevant at best or an obstacle to progress at worst".[629] Self-regulation is flexible, easier to change and in most cases more appropriate since it can be created having in mind the specific needs of a certain ODR service or the specific nature of a dispute resolution method or process.[630]

When a self-regulation scheme is accompanied by an effective self-enforcement mechanism, self-regulation can prove to be very efficient, especially for cross-border disputes, from application to enforcement. For all the above reasons, it has been extensively argued that in ODR, "self-regulation seems better than governmental intervention since private entities which are operating online can better grasp the transformations

[629] United Nations Conference on Trade and Development, E-commerce and Development Report, 2003, p. 190, available at http://unctad.org/en/Docs/ecdr2003ch7_en.pdf
[630] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, pp. 32-37.

happening on the Internet than territorially-based governments".[631]

iii. Disadvantages and limitations of self-regulation

The first problem with self-regulation relates to how can self-regulatory organizations ensure that their members comply with the agreed rules? Although there are mechanisms to compel members to compliant behavior based on reputation incentives, monetary sanctions or the use of software, however, there is always the difficulty of convincing all the relevant players to support the self-regulatory initiative and the fact that the real "baddies" never join.[632] Furthermore, the private nature of self-regulation and the corresponding need for self-enforcement raise concerns, because "without a strong commitment to ensuring adherence to policies, self-regulation is doomed to squelch needed regulatory activities".[633] Another problem with self-regulation is that initiatives are decentralized and the number and variety of them may create confusion, especially when

[631] MANEVY Isabelle, *op. cit.*, pp. 51, 52.
[632] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, pp. 32-37.
[633] ZHAO Yun, *op. cit.*, p. 46.

potential users are not willing or able to do the necessary research.[634]

However, the greatest concern about self-regulation relates to the protection of users and the safeguarding of public interest, because "self-regulation can indirectly bind end-users, although these users have not been involved in the drafting process and may not always sufficiently protect the rights of neither users nor the public interest".[635] Especially when there is inequality of bargaining power, such as in the case of B2C disputes effectiveness must be balanced with fairness and consumer protection. But, self-regulation, if it is designed by only some of the stakeholders may be biased in favor of corporations, since they often pay the bills for ODR services, use them repeatedly and choose the providers. Consumer groups point out the significant potential for abuse of ODR processes by business and industry in the absence of strict supervision and argue in favor of governmental intervention which will define and enforce minimum standards for ODR.[636]

[634] LIYANAGE Chinthaka Kananke, *op. cit.*, p. 31.
[635] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, p. 36.
[636] RULE Colin, *op. cit.*, pp. 272, 273.

C. Co-regulation

Although it has been argued that the market can improve the standards and protection through competition and privately created protections to promote fairness, however, "users do not derive the benefits of competition in a market of insufficient information and limited client choice".[637] Furthermore, ODR as a form of private justice carries serious public policy concerns and its regulation should not be left entirely up to private organizations that may exhibit self-interest and disregard for public interest. Instead, there is a need for public control to verify the soundness of self-regulatory rules and control market abuses. Although, the various regulatory approaches accompanied by the constant changing nature of the internet and consequently ODR, make it harder to agree on a stable regulatory framework,[638] however, it has become clear that the answer will be provided by co-regulation.

The main argument against public regulation in ODR is that it can obstruct the development of ODR and the opponents of public regulation are usually in favor of the complete absence of regulation or in favor of self-regulation when necessary. However, "regulation is not a case of extremes, i.e. no

[637] MOREK Rafal, op. cit., p. 67.
[638] LIYANAGE Chinthaka Kananke, *op. cit.*, p. 31.

regulation or full-blown oppressive regulation".[639] As evidenced, there are different ways to regulate ODR but the best way is co-regulation, since it can provide a stable framework that consolidates confidence without obstructing the development of ODR.

Co-regulation combines self-regulatory initiatives by recognized parties in the field (such as economic operators, social partners, non-governmental organizations or associations), drawing on their practical expertise, backed with public control in areas of fundamental importance, such as privacy and consumer protection.[640] Self-regulatory initiatives are combined with the essential public control that ensures the soundness of rules, checks compliance and makes sure that violations do not occur. Co-regulation balances the need for flexibility and innovation so that the framework is adaptable to markets and up to date with the constantly changing technical demands of the Internet, with the need for legal certainty, quality and impartiality. The flexibility and innovation of self-regulation is combined with constraints that ensure the ability to have at once both freedom and accountability.[641]

[639] According to Lawrence Lessig "We should resist simpleton distinctions; the choice has never been between anarchy and totalitarianism, or between freedom and total control". See SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, p. 106.
[640] CORTES Pablo, *op. cit.*, pp. 184- 193.
[641] ZHAO Yun, *op. cit.*, pp. 47, 48.

The optimum regulatory framework consists of multi-stakeholder, multi-level and multi-instrument private regulatory initiatives based on lex informatica, combined with control by an international public body, cooperating with state authorities, that will create legal standards in the field of ODR by safeguarding public policy and consumer protection issues and ensuring that self-regulation organizations are willing to adhere to principles of good regulation, such as independence, impartiality, transparency, accessibility, effectiveness and fairness. As already stated an ODR system must be an international system and consequently all regulatory efforts must be made at a global scale. Centralization of control can be achieved by international cooperation at a state level through multilateral treaties, as well as by international governing bodies, and international regulation should be carried out in different levels, by the industry, by governments and international organizations.

Section 2: Guidelines

The international body will ensure that the self-regulatory initiatives are safeguarding some minimum regulatory standards

by issuing guidelines for ODR in the form of codes of conduct. The codes of conduct should suggest principles for managing ODR, with policies and also through methodologies and technologies as well as articulate a fair, clear process which is often the most significant contribution toward reaching resolution.[642] The codes of conduct should include all aspects of ODR from general provisions to more specific ones concerning the rules, the procedure the accreditation of providers and practitioners, the clearinghouse and the ODR Trustmark scheme as well as the enforcement of outcomes, mainly through self-enforcement. Finally, it should cover the safeguarding of ODR core principles such accountability, transparency, confidentiality, accessibility and security.[643] Since 1999 with the prospect of rapid expansion of ODR, many governments, multinational organizations, and advocacy groups have issued recommendations regarding quality ODR and detailing their sense of how ODR providers should operate.[644] ODR programs and providers should endeavor to meet or exceed existing standards, so as to ensure that they do not later encounter

[642] RULE Colin, *op. cit.*, p. 265.
[643] WANG Fangfei Faye, *op. cit.*, p. 92.
[644] "Some of the organizations that have compiled standards for ODR service providers include: the Organization for Economic Cooperation and Development; the G-8; the European Union; agencies in the United States government, as well as those of Australia, Canada, Japan, and New Zealand; the International Chamber of Commerce; the Better Business Bureau; the Global Business Dialogue on e-Commerce; and the Trans-Atlantic Consumer Dialogue (TACD)". See RULE Colin, *op. cit.*, pp. 269, 270.

resistance or opposition from standard setting bodies that question their processes.[645]

The public control will ensure that self-regulatory initiatives and consequently ODR service providers respect certain minimum values and adhere to some basic principles of good regulation.[646] The safeguarding of those principles can be promoted through the establishment of guidelines to be taken into account by ODR providers. Only ODR providers that comply with the guidelines will be accredited. Several organizations and governments have issued recommendations and guidelines. Particularly with respect to consumer protection in B2C disputes it is worth mentioning the OECD "Guidelines for Consumer Protection in the Context of Electronic Commerce",[647] as well as the international co-operation meeting and the "Building Trust in the Online Environment: Business to consumer dispute resolution" Conference (December 2000) of the "Hague

[645] *Ibid*., p. 282.
[646] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit*., p. 22.
[647] "Businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions. Businesses and consumer representatives should continue to establish fair, effective and transparent internal mechanisms to address and respond to consumer complaints and difficulties in a fair and timely manner and without undue cost or burden to the consumer. Consumers should be encouraged to take advantage of such mechanisms. Businesses, consumer representatives and governments should work together to continue to provide consumers with the option of alternative dispute resolution mechanisms that provide effective resolution of the dispute in a fair and timely manner and without undue cost or burden to the consumer". See OECD guidelines for consumer protection in the context of electronic commerce available at http://www.oecd.org/fr/sti/consommateurs/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm

Conference on Private International Law", the "International Chamber of Commerce" and the OECD, promoting in ADR for consumers, the principles of "independence, impartiality accessibility, transparency, rapidity and services free of charge or low cost for consumers".[648]

In the European Union, several regulative initiatives on ADR have been taken over the years. Several directives deal with aspects of online trade, most notably the 2000/31/EC "Directive on electronic commerce"[649] and the 97/7/EC "Directive on distance contracts".[650] These directives although do not directly address ODR, they apply to what is called "information society services, which are defined as services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Regardless of what process is used to resolve the conflict, online dispute resolution services fall under this definition since ODR process is conducted online, and at a distance.[651]

[648] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 77.

[649] 2000/31/EC Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML

[650] 97/7/EC Directive of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) Statement by the Commission re Article 3 (1), available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0007&from=en

[651] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, p. 33.

The directive 2000/31/EC which is usually called the e-commerce directive, or the directive on e-commerce regulates central issues regarding electronic commerce and according to article seven, it attempts to "lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market, in order to ensure legal certainty and consumer confidence".[652] Directive 97/7/EC on distance selling applies to consumers buying products and ordering services at a distance and includes not only e-commerce sellers but also distance service providers therefore also ODR providers. The Directive requires distance sellers and providers to provide information necessary to make an informed decision and according to article one "the object of the Directive is to approximate the laws, regulations and administrative provisions concerning distance contracts".[653]

The commission "Recommendation on the principles for out of court bodies involved on the consensual resolution of consumer disputes"[654] (2001/310/EC) of April 4 2001 explicitly refers to ODR and requires easy access to practical, effective and inexpensive means of redress, including access by electronic means. Furthermore, recital six states that "new technology can

[652] 2000/31/EC Directive, article 7.
[653] 97/7/EC Directive, article 1.
[654] 2001/310/EC , Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001H0310:EN:HTML

contribute to the development of electronic dispute settlement systems, providing a mechanism to effectively settle disputes across different jurisdictions".[655] The recommendation applies to consensual ODR methods but not arbitration and recital nine defines dispute resolution mechanisms falling under its scope, as "any other third party procedures, no matter what they are called, which facilitate the resolution of a consumer dispute by bringing the parties together and assisting them, for example by making informal suggestions on settlement options, in reaching a solution by common consent".[656] Finally, it recommends the four principles of impartiality, transparency, effectiveness and fairness.

The European Union 2008 Mediation Directive 2008/52/EC[657] dates from 21 May 2008 and aims to introduce framework legislation, "addressing, in particular, key aspects of civil procedure, in order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework".[658] The Directive addresses ODR as evident by recital nine which states "the Directive should not in any way prevent the use of modern communication

[655] 2001/310/EC, recital 6.
[656] 2001/310/EC, recital 9.
[657] 2008/52/EC, DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF
[658] 2008/52/EC, recital 7.

technologies in the mediation process".[659] Article one describes the objective of the Directive "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation".[660] Article three defines mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator".[661] Article four encourages the development of, and adherence to, voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services. Article six facilitates the enforceability of agreements resulting from mediation between Member States. Article seven ensures the confidentiality of mediation. Article nine recognizes the limited awareness of mediation especially in ODR and encourages the availability to the general public, in particular on the Internet, of information on how to contact mediators and organizations providing mediation services.[662]

In the case of arbitration, as an adjudicative process, there is a need more procedural guarantees and clearly set minimum legal standards for consumer disputes. In arbitration, the 1998

[659] 2008/52/EC, recital 9.
[660] 2008/52/EC, article 1.
[661] 2008/52/EC, article 3.
[662] 2008/52/EC, articles 4, 6, 7 and 9.

commission "Recommendation on the Principles applicable to the bodies responsible for out of court settlement of consumer disputes"[663] (98/257/CE), identifies principles that must be followed in consumer adjudicative processes and in those dispute resolution processes where the neutral party plays an active role in making a decision or a recommendation. The aim of the recommendation is the adoption of principles at a European level to facilitate the implementation of out-of-court procedures for settling consumer disputes, enhance mutual confidence between existing out-of-court bodies in the different member states and strengthen consumer confidence in the existing national procedures. The recommendation applies to arbitration which is defined as any procedure which, no matter what is called, lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution; whereas, therefore, it does not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent. Although the application of the principles is limited to dispute resolution forms where a third party decides, like arbitration and consumer complaints procedures, however, "they should be taken into account when setting up any form of ODR".[664] The 1998 EC

[663] 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998H0257&from=EN

[664] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 26.

Recommendation provides for seven general principles that should apply to binding dispute resolution: independence, transparency, adversarial principle, effectiveness, legality, liberty and representation. However, the principles should be refined and developed to make them more useful and to avoid divergent interpretation.[665] The additional principles include the adversarial principle, according to which all parties must be allowed to present their viewpoint and hear that of the other party. The principle of legal representation, according to which the procedure must allow the parties to be legally represented or assisted at all stages and the principle of liberty, according to which the parties must be aware of the binding nature of the procedure and freely agree to it. For instance, any arbitration clauses must be clear before the contract is signed.[666]

In the United States the most influential guidelines are the "recommendations on best practices for ODR service providers" from 2002, drafted by the "American Bar Association (ABA) task force on E-commerce and ADR".[667] The ABA recommendations propose "protocols, workable guidelines and standards that can be implemented by the parties to online

[665] HÖRNLE Julia, *op. cit.*, pp. 93- 95.
[666] CORTES Pablo, *op. cit.*, pp. 200- 204.
[667] ABA Task Force, Proposed guidelines for recommended best practices by online dispute resolution providers available at .http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf

transactions and by online dispute resolution providers".[668] The principles defined are intended "to enable consumers to make intelligent choices concerning ODR providers, to help give them confidence in the efficacy of ODR and therefore in B2C commerce generally, and to encourage consumers to use ODR as a means of obtaining resolution of their complaints".[669] The implementation of the Recommended Best Practices by ODR providers "may take the form of codes of conduct, codes of practice, best practices statements, protocols and similar statements; or be reflected in the operation of their websites and in material posted on their websites; or both".[670] The principles proposed by the ABA recommendations include transparency and adequate means of providing information and disclosure, impartiality, confidentiality, privacy and information security, and accountability for ODR providers and neutrals.

Finally, there have been several recommendations on online dispute resolution by international bodies, particularly addressing the question of best practice in ODR and proposing guidelines, such as the "US federal trade commission and department of commerce"; the "Canadian working group on electronic commerce and consumers"; the "Australian national alternative dispute Resolution advisory council" (nadRac); "the

[668] *Ibid.*, p. 1.
[669] *Ibid.*, p. 25.
[670] *Ibid.*, p. 25.

alliance for global Business"; the "global Business dialogue on Electronic commerce"; the "transatlantic consumer dialogue"; consumers international; the "European consumers' organization" (BEuc); and the "International Chamber of Commerce" (ICC).[671]

Section 3: Principles of ODR

It is recommended that the conduct of ODR should include six core principles: The principles include independence, impartiality, transparency, accessibility, effectiveness and fairness. From the discussion of the various regulative initiatives for ODR above, it became clear that these principles are key concepts and any ODR provider taking itself seriously will comply with the initiatives safeguarding these principles.

[671] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, p. 36.

A. Independence and Impartiality

Independence and impartiality are essential guarantees to ensure a fair dispute resolution and boost the parties' confidence in the fairness of the ODR procedure.[672] Independence and impartiality are essential to avoid any appearance of bias.[673] The principle of independence demands that ODR providers create a fair environment, unbiased towards any individual party or type of party (e.g. businesses). Independence measures the relationship between the ODR provider, the practitioner and the parties' personal, social, and financial relation, in a way that the closer the relation in any of these spheres, the less independence there is.[674] In cases where there is a substantial power imbalance between the parties, such as B2C disputes, ODR providers must address issues of systemic bias that arise between parties who belong to two opposing interest groups whose interests clash in the particular dispute. If an ODR provider begins to enter too close a relationship with any one organization there is a risk that

[672] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, p. 22.

[673] "Impartiality has been given the meaning 'absence of actual bias' (subjective), whereas independence has been taken to mean 'absence of appearance of bias' (objective), or in more modern terminology, 'absence of a relevant conflict of interest' under the English common law. Partiality or actual bias relates to the adjudicator's internal prejudices, prejudgment or predisposition towards one of the parties or the subject matter of the dispute. Independence is a factual concept, in that it means absence of an objectively ascertainable conflict of interest. Independence goes some way towards effectuating an absence of actual bias". See HÖRNLE Julia, *op. cit.*, pp. 113, 114.

[674] BADIEI Farzaneh, *op. cit.*, pp. 90, 91.

its independence will be questioned and the fear that the provider is not truly independent.

The principle of impartiality or neutrality,[675] demands that ODR practitioners have no professional or personal connection with the parties, no conflict of interest with either of them.[676] The neutral must come to the process without any preconceptions that might impede his ability to function as an effective third party in a dispute and ODR providers should work to ensure that the panelists they assign to work with the parties are impartial in the services they deliver. The parties must be allowed to recuse practitioners if there is (or if it is perceived that there is) a conflict of interest and there should be an independent third-party ruling on any challenge brought by a party alleging a conflict of interest or bias of a panelist.

[675] "Impartiality and neutrality are often used interchangeably, but they have very specific meanings in the context of dispute resolution. Neutrality is regarded by many in the ADR field as unattainable. No person is truly neutral. The word 'neutral' is not an implication that the person playing the role of the third party is to be a Zen master free from any opinion or thought on the matters at hand. On the contrary Impartiality is a more attainable goal". See RULE Colin, *op. cit.*, pp. 277, 279.

[676] "[The practitioner's] professional or business background may mean that he or she belongs to a particular interest or stakeholder group that influences his or her view of a dispute, which favors one or the other party. In order to illustrate this argument, one could imagine an arbitrator, who is a leading member of a consumer association, adjudicating a consumer-law dispute between a business and a consumer as sole arbitrator. Similar constellations can be made out (e.g. IP rights holder / user of IP, doctor/patient dispute or accident insurance company / claimants' association in personal injury cases) where the arbitrator belongs to one of the interest groups (e.g. to the association of IP rights holders, the medical profession or an association of personal injury claimants)". See HÖRNLE Julia, *op. cit.*, pp. 126, 127.

Software algorithms must similarly be designed to offer no systemic benefit to one party over another.[677]

These principles create requirements for both ODR providers and dispute resolution practitioners. The first requirement relates to the choice of the ODR provider and might create concerns when the provider is chosen by one of the parties. However, this issue is easily resolved in a system with clearinghouses that refers cases to ODR providers. The second requirement relates to the way ODR providers are funded, however, this issue will be addressed in the relevant section.[678] In short, if a dispute resolution service is funded by an organization that may have a particular preference regarding the outcome; it can lead to an impression of bias.

The third requirement relates to the independence and impartiality of the practitioners. In arbitration, the independence and impartiality of the practitioners "is determined prior to holding arbitration and it is an objective test to establish whether or not the arbitrator can arbitrate between the parties independently and with courage to displease".[679] In Commonwealth Coatings Corp. v. Continental Casualty Co. (393 U.S. 145, 1968), Judge Black expressed the need for arbitrators' high ethical standards and stated that "since arbitrators have

[677] CORTES Pablo, *op. cit.*, pp. 200- 204.
[678] See infra at funding.
[679] BADIEI Farzaneh, *op. cit.*, p. 91.

completely free rein to decide the law as well as the facts and are not subject to appellate review, their ethical behavior had to be impeccable".[680] To resolve this issue, ODR providers must ensure that neither party should have more control over the allocation of the panelists to a case, or preferably such allocation should be done by randomly selecting members from of a pool of practitioners that fulfil the criteria of each case. For arbitration, three-member panels of more balanced composition, when possible, would improve the quality of decision-making. These principles are connected with the principle of transparency because in order to ensure their safeguarding it is essential for ODR providers to reveal all the information pertinent to their independence and impartiality.[681]

B. Transparency

According to the principle of transparency all the information about the ODR provider and the procedure must be clear and available to the users.[682] The information must be able to answer users' questions about "the services, the governing

[680] RODRIGUEZ Miguel Roberto, *op. cit.*, p. 12.
[681] CORTES Pablo, *op. cit.*, pp. 200- 204.
[682] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, p. 22.

structure, funding models, fees, officials, shareholders, users and outcomes".[683] ODR providers must make sure to provide all the information relevant to the independence, impartiality and neutrality of the process and demonstrate their safeguarding. Only by providing this information can ODR providers increase trust and create an effective ODR system. Providing this information will increase the confidence that the ODR process is functioning smoothly and ethically, whereas if the process is operated as a black box, where matters come in and see resolutions come out, confidence in ODR as well as the caseload of ODR providers will decrease over time.[684] The necessity of transparency is also highlighted by the ABA Task Force. ODR providers must strive to achieve transparency through information and disclosure as a basis to achieve sustainability, which will help to instill confidence and trust in the new ODR industry.[685] Furthermore, "an emphasis on greater and more uniform disclosure mechanisms will help to educate and inform all stakeholders".[686]

[683] CORTES Pablo, *op. cit.*, p. 203.

[684] Some of the questions that must be answered include: What types of disputes are being handled by the ODR service? What mechanisms are being used to handle them? Who is acting as a neutral in these cases? What resolutions are being reached (either in mediations, during which the parties craft the outcomes, or in arbitrations, in which the neutrals decide the outcomes)? See RULE Colin, *op. cit.*, pp. 273, 275.

[685] WANG Fangfei Faye, *op. cit.*, p. 55.

[686] "The recommended course of action includes: publishing statistical reports; employing identifiable and accessible data formats; presenting printable and downloadable information; publishing decisions with whatever safeguards to prevent party identification; describing the types

Transparency must be achieved regarding several aspects of ODR, such as the provider, the process, the outcome of the procedure and the neutrals. Regarding the provider, transparency demands disclosure of ODR providers, including ownership and location of the provider as well as transparency and monitoring the origin of the funds, which would hinder the creation of bias in favor of any of the parties involved. Regarding the process, transparency demands disclosure of ODR process, including duration and costs, the character of the outcome (binding or non-binding), and substantive rules or principles governing the merits. Transparency in the process will ensure that the parties fully understand what they're getting in to and that they will not be surprised by an element of the process which might lead to them losing their confidence in the system.[687] The transparency principle demands a list of information requirements regarding the types of disputes the provider resolves, including information on eventual territorial or monetary restrictions. Also the procedural rules should be disclosed, and the costs of the procedure, since it is important for participants to know what norms apply, and how the process is conducted and on the basis of this information they can decide if they want to use a specific

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of services provided; affirming due process guarantees; disclosing minimum technology requirements to use the provider's
technology; disclosing all fees and expenses to use ODR services; disclosing qualifications and responsibilities of neutrals; disclosing jurisdiction, choice of law and enforcement clauses". See ABA Task Force, Proposed guidelines for recommended best practices by online dispute resolution providers, p. 22.

[687] RULE Colin, *op. cit.*, pp. 273, 275.

ODR provider.[688] Transparency at the levels of the panel composition ensures "strict procedures for selecting neutral arbitrators and mediators and that the panelists will be selected in a manner that balances the different interests that inevitably arise in such a procedure".[689]

Regarding the outcome of ODR procedures, transparency relates to the recording and publication of cases outcomes. The publication of ODR outcomes is essential for instilling trust in ODR. It would be impossible to trust an ODR procedure without knowing and being able to access the results these proceedings produce.[690] If it is not possible to see what resolutions were made (and how they were achieved), then there is potential for abuse.[691] Transparency is essential in cases where there is a power imbalance between the parties (e.g. consumer cases). Especially for online arbitration when one party uses arbitration repeatedly, whereas the other party only uses arbitration once, there should be a mechanism for publishing awards, as otherwise the "one-shot" player will suffer considerable disadvantage.[692]

[688] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, p. 25.
[689] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 83.
[690] WANG Fangfei Faye, *op. cit.*, p. 81.
[691] RULE Colin, *op. cit.*, pp. 273, 275.
[692] Two US circuit courts, in *Cole* v. *Burns International*, and more recently in *Ting* v. *AT&T*, have explicitly acknowledged that confidentiality provisions for arbitration in adhesion contracts favor companies over individuals if companies continually arbitrate the same claims. By way of example, one tentative step in this direction has been made by the Californian Code of Civil Procedure. It requires the publication of statistics about consumer awards, including the name of the business party, type of dispute, the amount of the claim and the amount of the award made. See HÖRNLE Julia, *op. cit.*, p. 146.

Transparency in online arbitration allows for quality assurance of the decision, to ensure decisions are rational since the adjudicator's decision is put to public scrutiny.[693] The importance of transparency through the publication of outcomes is evident in the TACD guidelines, according to which a solution for achieving transparency is for ODR providers "to report their cases to a publicly accessible central clearinghouse".[694]

However, the publication of outcomes faces some difficulties which make it controversial. First, the publication of case outcomes may facilitate forum shopping, as parties will be able to identify the providers that have a tendency to rule in favor of the party that chooses the provider and consequently select one of those providers. However, this problem is avoided by having clearinghouses that refer the cases to ODR providers and therefore the parties do not select the provider. The second problem relates to the possibility of misinterpretation of the outcomes. The fear is that the publication of outcomes will lead to misrepresentation of the data and the formation of an inaccurate conclusion about the fairness of the provider.[695]

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[693] "Transparency is an essential safeguard against bias and incompetence – to quote Bentham: [Publicity] is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.'" *Ibid.*, p. 147.

[694] RULE Colin, *op. cit.*, p. 275.

[695] "The National Arbitration Forum was the focus of a story in the *Washington Post* in 1999 that revealed that the forum's decisions went more than 70 percent of the time in favor of the business interest. Many critics took that statistic to mean that the process was biased in favor of the businesses. However, many of the cases taken on by NAF dealt with unpaid credit card bills.

The biggest concern about the publication of outcomes and transparency in general, is the fact that it clashes with the principle of confidentiality, which is one of the most important advantages of alternative dispute resolution and ODR. Confidentiality encourages parties to bring sensitive matters into ODR and creates a safe haven for disputants, allowing them to bring forth disputes that they may not have been willing to pursue otherwise. The lack of confidentiality may deter some parties from participating; especially "businesses may not want to disclose some of their disputes, because it means bad publicity and may lead to copycat claims".[696]

On the other hand, if decisions are not released bias can go undetected and uncorrected and the lack of transparency may reduce the general public's trust in the process and deter future disputants from using it. The consumer advocacy groups subscribe to this perspective, because they are very concerned about the potential closed ODR programs have to systematically create disadvantages for individual consumers.[697] Furthermore, in online arbitration the publication of online arbitral awards not only increases trust in online arbitration but also awards should

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These cases are not 'pure' disputes, meaning a genuine misunderstanding between two well-intentioned parties. Many of these cases were essentially collections matters". See RULE Colin, *op. cit.*, p. 275.

[696] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 14.

[697] RULE Colin, *op. cit.*, pp. 268, 269.

be published to allow for the development of arbitral case law.[698] Moreover, "the absence of published awards does not permit any comments or conclusions regarding the application of lex informatica by online tribunals, whereas, the publication of awards will raise awareness, increase predictability and will facilitate the development of lex informatica, its acceptance by the e-business community, and its application by online arbitrators".[699]

Therefore, even though transparency clashes with the principle of confidentiality which is one of the most important advantages of alternative dispute resolution in general, the aforementioned importance of transparency demands a balance between the two principles. To that end, an ODR system can ensure transparency by publication of outcomes but also confidentiality by keeping the anonymity of parties by concealing their identities.[700] The competent body should publish "an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified".[701] The ABA Task Force has recommended that "participants should be encouraged to allow the decisions to be published with any confidential or propriety

[698] YÜKSEL, Armağan Ebru Bozkurt, *op. cit.*, pp. 91, 92.
[699] PATRIKIOS Antonis, *op. cit.*, p. 27.
[700] RULE Colin, *op. cit.*, pp. 268, 269.
[701] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, p. 25.

information deleted".[702] The possibility of such a solution has been made evident by the example of SquareTrade, which has managed to gather extensive information internally by collecting a vast amount of information on the services it provides, much of which is gathered in real time, simultaneously with the act of participation in the ODR process, without completely foregoing confidentiality externally.[703]

C. Accessibility, effectiveness and fairness

According to the principle of accessibility in ODR, potential users must be able to easily find and access ODR. ODR providers must lift cultural, language, financial and technological barriers. ODR providers must make sure that the technology is easily accessible and that the technological tools used are appropriate depending on the dispute. Accessibility is about providing an easy-to-utilize venue for disputants to initiate when a dispute arises and major components of accessibility are convenience as well as the affordable cost of

[702] RODRIGUEZ Miguel Roberto, *op. cit.*, p. 13.
[703] WANG Fangfei Faye, *op. cit.*, p. 74.

the service.[704] Taking into account the global nature of ODR, accessibility should be worldwide and should give solutions to any culture related differences so that a dispute resolution mechanism can take charge of the problem whenever and wherever it emerges through sets of rules that suit both same and cross-cultural disputers. Furthermore, ODR providers and practitioners must show cultural sensitivity and "be respectful of the norms and customs of people from other cultures as they will handle cases with parties from different races, languages, and cultures".[705] ODR providers and practitioners must not be ethnocentric but instead open minded and aware of the fact that they are working in the international scene.[706]

According to the principle of effectiveness, an ODR process must be both time and cost effective. The process should be fast and there should be a short period between referral of the case to the third party and a decision being made. The process should also be cost effective with costs proportional to each specific dispute. In B2C disputes it is argued that ODR services must be free of charge for the consumer.[707] This is an understandable requirement, since the monetary value of the consumer disputes is often low and the process cannot be called effective if a consumer has to pay more for the process than

[704] RULE Colin, *op. cit.*, pp. 275, 276.
[705] RODRIGUEZ Miguel Roberto, *op. cit.*, p. 17.
[706] WANG Fangfei Faye, *op. cit.*, p. 31.
[707] CORTES Pablo, *op. cit.*, pp. 200- 204.

what is at stake. However, the cost effectiveness of ODR raises the question of funding and who will pay for the process? This question is answered later on.[708]

According to the principle of fairness, which again is co-dependent with the above principles, the ODR provider must ensure a fair procedure. Independent of the type of dispute resolution process, fairness is the basic assumption underlying all processes and while the degree of fairness varies from process to process; all dispute resolution processes possess a minimal standard of fairness. Elizabeth Thornburg in order to illustrate the importance of fairness in the process uses as an example the game of tic-tac-toe. This game has no winning strategy and if parties pursue an optimal strategy, each game ends in a draw. However, if the rules were changed so that one of the players would have to pick a spot randomly or could have two consecutive moves, one of the players would win but the result would be unfair.[709]

In B2C disputes "fairness primarily aims to protect the consumer as the weaker party".[710] In online arbitration, due process is necessarily a vital component without which the process does not constitute arbitration. At first the due process requirement may seem as a hindrance for the cost effectives and

[708] See infra at funding.
[709] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 20, 21.
[710] EU study on the Legal analysis of a Single Market for the Information Society, *op. cit.*, p. 22.

the time efficiency of the online arbitration process. However, "due process is a flexible principle and the arbitration tribunal or institution may adjust the degree of compliance to the nature of disputes to keep the process from stalling and costs from rising".[711] An interesting example from practice concerning fairness and the concept of reasonable time comes from PayPal. According to Colin Rule users of PayPal dispute resolution consider the time the process takes as more important than the outcome and they would rather lose after a few days, than win after a few weeks. However, there comes a point where shortening the time of the process too much would become unfair, if for example PayPal decided to throw a dice for each dispute and outcomes would then be too arbitrary. Therefore, the challenge is to find the right equilibrium between effectiveness and fairness.[712]

In arbitration the principle of fairness demands a fair hearing according to which both parties must be allowed to present their cases.[713] According to article 34 of the UNCITRAL

[711] BADIEI Farzaneh, *op. cit.*, p. 92.

[712] LODDER R. Arno and ZELEZNIKOW John, *op. cit.*, pp. 20, 21.

[713] "A good example of how the principle of fair hearing has been applied in international arbitration is the US case of *Iran Aircraft Industries* v. *Avco*. In this case, the US Court of Appeals for the 2nd Circuit refused to enforce an award by the Iran–US Claims Tribunal on the basis that the US company had been denied an opportunity to present its case. The tribunal had agreed at a pre-hearing conference that the US company would be allowed to present a summary of 'kilos and kilos of invoices' produced by an independent audit. Later, the tribunal dismissed the US company's claim for the reason that the evidence was insufficient. The US courts refused to enforce the award on the basis that the claimant had been denied an opportunity to present its

Model Law, an action for setting aside the award may be brought where "the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to present its case".[714] The principle of fair hearing is closely connected to the principle of equal and rational treatment of the parties according to which an arbitration procedure must treat the parties equally and must use a rational method for fact-finding and applying the law,[715] as well as the duty to give reasons explaining the grounds for the award.[716]

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claim, as the tribunal had unwittingly misled the claimant as to the evidence to be presented". See HÖRNLE Julia, *op. cit*., p. 143.

[714] UNCITRAL Model Law on International Commercial Arbitration, 1985, article 34.

[715] "The equal treatment principle means that any hearing dates should be fixed at a date and place that are roughly equally convenient for each party. Likewise, deadlines or word-limits that are too tight for one party only, or the use of technology that is inaccessible for one party may be a breach of the principle of equal and fair treatment. The principle of equal treatment also means that both parties must have equal access to all documents and other evidence. Consequently, some opportunity should be given to each party to acquaint itself with, and comment on, the observations as to law and fact made by any other party". *Ibid.*, p.144.

[716] For instance, the English Arbitration Act 1996 provides that if the parties have agreed to an award without reasons, they are deemed to have excluded the right to appeal to the court on a point of law.

Chapter 3

The ODR provider

This chapter relates to the architecture of ODR at the level of the provider and particularly it illustrates the way ODR providers should be funded as to ensure accessibility, independence and impartiality; as well as demonstrates the technological architecture of ODR providers as to ensure a fair and effective system. Finally, this chapter shows the extra steps that ODR providers and the ODR network in general must take to increase awareness and trust in ODR so that ODR can fulfill its true potential.

Section 1: The ODR Funding

One of the major advantages of ODR is that it is cost-effective and by transferring the procedure to the virtual world the costs are minimized. However, there are still costs and an ODR provider in order to effectively operate needs to cover “the costs of hardware and software infrastructure, the secretariat

costs related to case administration, and the fees and expenses of mediators and arbitrators".[717] In order to cover these costs the ODR provider can search for funding from either both the parties by charging bilateral fees, or from one party by charging unilateral fees or by external sources.

An ODR system that is funded by either bilateral or unilateral charging fees is considered a "for-profit" ODR provider. Most providers are for profit since user fees have been the predominant funding mechanism for ODR providers, as they also were for ADR providers. This has taken many forms, including a filing fee, an hourly rate for neutral third parties, a standard fee or a percentage of settlement reached. However, the difficulty with funding an ODR service through user fees relates to securing the necessary funds for the operation of the provider without charging fees that are too high, which can be the case for bilateral fees, and without obtaining the necessary funds in a way that may compromise the independence of the provider, which can be the case for unilateral fees. Especially in B2C disputes, it can prove very difficult for ODR providers to secure the funds necessary for their operation and at the same time facilitate consumer access.

[717] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 82.

A. Bilateral user fees

Although some ODR services are provided for free, the usual practice is for ODR providers to ask the users to cover at least some of the costs for the service. In the case of bilateral fees, the costs are shared by the parties. The way the costs are divided may vary depending on the provider, but the standard practice for most ODR providers is to divide the costs equally between the parties. Based on the experience of the ADR movement, it was only natural to think of bilateral fees to fund the ODR procedure. Bilateral user fees are easy to implement and are definitely a reasonable solution in B2B cases. However, bilateral user fees present problems when used in B2C and C2C cases. In these cases the fees might be either insufficient to cover the costs of the service and the funding model might not be sustainable (C2C disputes), or they might be too high compared to the disputed amount, which might impede consumer access (B2C disputes). For instance, B2C disputes are often of low economic value (between $50 and 100$) and if the mediator charges $50 for the first hour of service no party will ever elect to utilize ODR.[718] Therefore, service providers cannot ignore the requirement of accessibility with respect to cost.

[718] RULE Colin, *op. cit.*, pp. 294- 296.

B. Unilateral user fees

In order to ensure consumer access to proceedings, in B2C cases the use of unilateral fees has been proposed as a way to produce sufficient income and at the same time keep user fees proportionally low as to allow for consumer access. In the case of unilateral fees, the costs for the ODR service are covered by one of the parties i.e. a web trader or an insurance company, by paying annual or processing fees; or both parties pay the costs but they are charged with different fees. Especially in B2C transactions, charging unilateral fees is an effective way to convince consumers to participate in ODR. The funding and the existence of ODR has additional economic benefit to the overall marketplace and businesses more specifically because customers are more likely to buy something if they know there is redress available to them should anything go wrong.[719] However, the fact that the funds come from the business raises implications of bias in that process and concerns as regard to the provider's independence and impartiality. If all the costs are borne by one side in a dispute, the ODR provider will have an incentive to

[719] "SquareTrade and eBay are a good example of this. Users of eBay need to pay a small filing fee when a mediator is brought into their case, but eBay pays SquareTrade for its services as well. There is an acknowledgement that eBay is getting value from the presence of SquareTrade in their trading environment, and eBay is helping to cover the cost of SquareTrade's services by pitching in on paying the cost of the neutral". *Ibid.*, p. 296.

take care of the business interest because that is where the funds are coming from.

C. Safeguards

ODR providers must be funded without endangering the principles of independence and impartiality. A way to ensure the safeguarding of those principles is by the monitoring of the funding of ODR providers by public bodies. In each country the corresponding clearinghouse cooperating with the relevant state institution must check the funding of ODR providers and their independence and impartiality and accredit those providers that safeguard these principles. ODR providers by being trustmarked can ensure that they safeguard the principles its independence and impartiality. As stated earlier, an essential requirement to guarantee independence and impartiality is transparency. Transparency of the ODR provider about the origin of its funding and whether receives any funding given by businesses can ensure the independence and impartiality of the provider.

D. Funding by External sources

The best way to fund an ODR provider and reduce the costs for the parties allowing access to affordable dispute resolution without endangering the independence and impartiality of the provider is funding by external sources. For instance, external sources of funding can be universities, governmental or non-governmental organizations and consumer associations. One type of funds from external sources is typically research grants, but unfortunately these funds are less frequent and their purpose is often purely academic. External funding "provides indisputably the best guarantees for independence and impartiality because it is largely independent from vested interest".[720] ODR models may be promoted as matter of public policy by governments since efficient ODR can contribute to greater access to affordable dispute resolution and in case of B2C disputes to the sustainable growth of e-commerce.[721] Such a solution is possible "because government intervention does not aim to be economically profitable and the government can intervene in dispute resolution and thereby lose

[720] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 15.

[721] "The Better Business Bureau (BBB) has suggested that the expense of effective systems will require a partnership amongst governments, not-for-profit foundations, academic institutions and the private sector, in order to ensure that, at the least, the technological infrastructure is created. The American Bar Association (ABA) Task Force has also supported the idea of government subsidies". See CORTES Pablo, *op. cit.*, p. 76.

money, which is exactly what government does with traditional dispute resolution, where courts are absolutely not profitable, nor is the regulation of lawyers and legal practice".[722]

Such a solution eliminates implications of bias and solves the problem of consumer disputes which are the main obstacle for providers "when designing business models with a minimum of sustainability".[723] In fact, to date most B2C ODR projects have obtained some funding from public bodies. External funding would allow for ODR services that would be provided to consumers free of charge or at least with a small fee to deter frivolous claims. The free of charge services to consumer has been advocated by Consumers International as a way to ensure access to consumers who would not use ODR if fees are too high. A good example of a successful ODR provider that benefits from public funding is the Austrian Internet Ombudsman.[724]

[722] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, p. 93.
[723] BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p. 83.
[724] HÖRNLE Julia, *op. cit.*, pp. 253, 254.

E. Solutions

Although ODR initiatives seek the creation of a self-financing ODR scheme, the issues examined above make such a solution difficult to be sustained. For this reason it has often been proposed public financing to build an ODR network, but expecting to be self-financed once it starts operating. This is not an easy task. In fact there have already been a number of failed attempts.[725] The best solution is a combination of for-profit ODR providers that offer transparent services monitored by public authorities and that are also backed by public funding, at least in the beginning. This solution corresponds with the experience of the ADR movement.[726]

This is essential for ODR providers resolving disputes in which there is a power imbalance between the parties, such as B2C disputes, as well as for providers that offer low cost

[725] "For instance, Electronic Consumer Dispute Resolution (ECODIR) was initially funded by the European Commission, but it did not succeed in becoming a self-financed ODR provider. This may be due to a number of reasons, the major of which was that it failed to get the co-operation of large ecommerce vendors. This was indeed the key strategy of successful ODR providers, such as CyberSettle partnerships with public and private institutions or the Internet Corporation for Assigned Names and Numbers (ICANN) approved Uniform Domain Names Dispute Resolution Policy (UDRP) providers". See CORTES Pablo, *op. cit.*, p. 76.

[726] "For instance, the Dutch Foundation of ADR Committees for Consumer Affairs, an independent organization offering ADR services, in addition to the users' fees, has received financial support from the Ministry of Justice. Also, the Danish Consumer Complaints Board is funded by public funds and fees paid by businesses and consumers. The fee is refunded when parties either settle or win the claim. Similarly, the UK Chartered Institute of Arbitration charges claimants a low registration fee that will be refunded if they succeed with their claim". *Ibid.*, pp. 77.

services which may raise due process concerns. Fairness, due process, access to justice and, ultimately, the rule of law are important values that should be supported by public funding.[727] Regarding the fees of the parties, if a dispute is between equals such as individuals or businesses, they have to share the costs equally.[728] If the dispute is between parties with unequal power, such as B2C disputes, the weaker party should pay nothing at all or only a minimum amount to deter frivolous claims. This way access to justice is increased and the power imbalance can be overcome.

Section 2: Technological architecture

ODR uses ICT tools and the Internet to resolve the dispute in the virtual world. But, how does the user access this virtual world? Practically, ODR is a service offered on the web and the user gains access to the provider and the procedure by visiting a web page. Therefore, the technical features of such a service are of equal importance to its effectiveness and the question that

[727] HÖRNLE Julia, *op. cit.*, pp. 253, 254.

[728] "In some cases, the complainant may also be required to pay a fee to register the case. This is logical since when the proceedings are initiated, the respondent is not aware of the complaint and, even when so informed, can choose not to respond". See BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, p.82.

arises is that of, how should an ODR system be structured, from a technological point of view?[729] The technological considerations extend to the software used in the procedure and in the whole layout of the service. Of course, the technological structure of ODR providers may differ depending on the methods of dispute resolution and on the nature of the disputes handled. However, there are core requirements that are necessary and must be common to all ODR providers. To be effective an ODR provider must be easy enough to use and accessible by as many people as possible. It must take advantage all possible ICT tools to the most recent technological advances and provide specific communication capabilities when required. ODR systems must be able to adapt to the specific needs of the parties and the peculiarities of each case.[730] They must properly secure sensible data and communication. ODR systems must be able to adapt to the fast paced technological changes and provide the best tools

[729] "Before, the neutral could do little more than arrange the room and table as everyone liked and ask questions to help the parties make progress. Online, however, the neutral could completely redesign and reshape the environment the parties found themselves in. The burdens of this responsibility were both exciting and overwhelming, as few neutrals had any idea how to build an online environment that would help their parties come to agreement". See RULE Colin, *op. cit*., p. 46.

[730] "For instance, typing and technical skills of the parties; time-zones; emotional stress; socioeconomic and cultural differences; or the scale of investments by the parties that is reasonable and feasible. In some cases, real time communication sessions, be it by email or web-based communication tools, are best because they force the parties to more spontaneous and because it may operate faster. In other cases it creates power imbalances, for instance when parties have different typing skills. Sometimes, holding conversation in a turn-based and delayed manner, for instance one day between each communication, is best, because the parties live in very different time-zone or because it reduces the risk of the parties overreacting to statements of the other party. Sometimes videoconference is needed because it reveals details of cultural and ethnic background, age and gender.". See SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, pp. 15 -18.

available as every day more sophisticated and powerful applications are being developed. Technology is one of the most essential aspects of any ODR because "if carefully designed and thoughtfully applied, it can be an essential component in helping parties reach optimal resolutions to their disputes, whereas if misapplied and poorly designed, it can be a major obstacle to reaching agreement".[731]

A. Accessibility

To be effective the ODR system needs to be accessible and easy to use for as many as possible users, even for the technologically illiterate, the low-tech users and the inexperienced. At the same time it must also provide all the necessary tools to satisfy the more experienced and technologically equipped users. The architecture must be as simple as possible and provide basic tools of asynchronous communication, such as the e-mail for low-tech users, but at the same time provide additional more advanced tools, such as videoconferencing, teleconferencing and discussion

[731] RULE Colin, op. cit., p. 60

environments, to accommodate the experienced users.[732] An ODR provider must address issues concerning the digital divide between users created either by the experience of users or simply the quality of their access to technology. An example of the later is the divide users may experience relating to the speed of their internet connection. ODR providers must employ tools and interfaces that will be able to accommodate both users with slow and fast connections.

Furthermore, accessibility is closely connected with interoperability. Interoperability is a property referring to the ability of diverse systems and organizations to work together. With respect to software and ODR systems, interoperability is the capability of different programs to exchange data via a common set of exchange formats, to read and write the same file formats, and to use the same protocols. Lack of interoperability would mean that the parties to a dispute would not be able to take their dispute to another provider or that it would be highly difficult. Lack of interoperability can have economic consequences, "because if competitors' products are not interoperable, the result may well be monopoly or market

[732] For instance, "the UDRP does not envisage the use of innovative communications for online hearings. The imaginative use of technology for real-time interaction, such as Web- and video-conferencing and chat, should be explored to improve communication and the decision process". See HÖRNLE Julia, op. cit., pp. 209, 210

failure".[733]. Therefore, ODR systems must be designed with interoperability.

B. Ease of application

Besides being accessible, an effective ODR system needs to be easy to use. Although the interface must ideally be adaptable to the specific user, generally it must be easy even for the unexperienced to figure out how the system works and how to navigate it.[734] The ease of application can be increased through several ICT tools besides the basic tools used for communication between the parties. At the beginning of every procedure ODR providers should use intelligent filing forms or ("dynamic forms") which allow parties to file the statement of case and defense online in a much easier way through forms that adapt to the specifics of the case and utilize the experience

[733] POBLET Marta, *op. cit.*, p. 15.

[734] "For instance, access to multiple files in the system; user-friendly structured navigation; personal space reserved for each user so that documents can be viewed and organized before they are filed; easy access to the library of procedures; multi-format upload filing of digitized documents; chronological table of events; protected and hierarchized message system; online user guides, checklists, advice and assistance concerning both the procedure and use of the platform itself; process management that is integrated yet can be broken into modules; incorporation of access control lists and the lightweight directory access protocol (LDAP); incorporation of daybook functions (calendar, reminders, to do lists); audio and video teleconferencing; online payment". See BENYEKHLEF Karim and GELINAS Fabien, *op. cit.*, pp. 128, 129.

accumulated by similar former cases on particular types of disputes.[735]

During the procedure the ease of application can be increased by the use of applications such as shared collaborative workspaces, electronic file management and online platforms; shared collaborative workspaces, which are online applications providing a facility to share visual information by displaying and manipulating a graphic interface, make it easier for parties to explain their case and arguments and make the process quicker and more efficient; electronic file management and online platforms make it easier for parties to upload, view, browse, search and retrieve documents reducing the necessary time and effort.[736] Finally ODR providers can use online applications to make it easier to produce an outcome by the ODR procedure, such as solution set databases and multivariable resolution optimization programs. Solution set databases, which are constantly growing and evolving databases of possible resolutions, based on the dispute type, that are proposed to the

[735] "Such online forms are ordinarily easier to complete than offline forms as they change depending on the information entered. For example, if the claimant classifies the type of dispute as 'non-delivery of goods', the questions the form asks are tailored to this particular type of dispute". See HORNLE Julia, *op. cit.*, p. 79.

[736] "In this context, it is interesting to look at the results of a user survey conducted by the American Arbitration Association (AAA) in 2004. They asked the users of their online filing platform, WebFile, for what purposes did they use the WebFile; the result was that only 16.2 per cent of users completed the entire arbitration process online. This may indicate that users do not entirely trust or are not entirely familiar with online platforms as yet. However, 61 per cent of users said that if the other party suggested using the online platform, they would in principle agree to use it for some part of the procedure." *Ibid.*, p. 82.

parties, can make it easier and faster to resolve the dispute; multivariable resolution optimization programs can calculate a mathematically optimal solution to the dispute based on a list of preferences provided by the parties.[737]

C. Security

For an ODR provider to be efficient, the security of the service is a necessary prerequisite, as it is essential to ensure trust and confidence in the online environment, where security threats cannot be easily detected. Confidentiality which is essential in ODR depends on data security which is a top priority for ODR providers.[738] Although it is true that "absolute security online is not possible, in the offline world, security is never perfect either".[739] An ODR system must be designed in a way to ensure the highest degree of security to parties and thereby

[737] "SquareTrade has reported that a simple solution set system they have deployed, resolves almost 80 percent of their incoming disputes without requiring human intervention". See RULE Colin, *op. cit.*, p. 56.

[738] "In face-to-face processes, confidentiality concerns reside almost totally with the actions of the dispute resolution service provider. But in online processes confidentiality goes hand-in-hand with data security. Whatever technological platforms are provided for the parties to use in working out their disagreement need to be well protected against those who might try to compromise the data they contain". *Ibid.*, pp. 252, 253.

[739] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, *op. cit.*, p. 15.

induce confidence in the dispute resolution mechanism. It must employ a combination of mechanisms to maximize the security of exchanges such as digital signatures, encryptions and firewalls. It must create a secure environment by protecting the access of the parties and the transmission and storage of information with encryption. It must employ authentication mechanisms such as digital signatures to identity the parties and authenticate the transmissions between them and the documents uploaded by them. For instance, e-mails can be secured by digital signatures, or other tools, such as the "Secure Multipurpose Internet Mail Exchange Protocol" (S/MIME) or the "Pretty Good Privacy" program. Web-based communication must be secured by using the "Secure Sockets Layer" (SSL), which secures the "Hypertext Transfer Protocol", or even better by using "Transport Layer Security" (TLS), the successor to the "Secure Sockets Layer" (SSL) protocol. These cryptographic tools provide secure communications across the internet protecting the confidentiality and integrity of data transmissions and allow most types of application (such as web browsing, e-mail, instant messaging, video conferencing and other data transfers) to communicate across networks in a way designed to prevent tampering or forgery.[740] Similarly, stored data must be secured with firewalls.

[740] WANG Fangfei Faye, *op. cit.*, pp. 85, 86.

Section 3: Creating awareness and trust

Although ODR has exhibited a vast potential for successful and effective dispute resolution, however, ODR has not achieved a widespread implementation and many ODR providers have failed in the past years.[741] Of course there are many reasons that could lead to a failure, from lack of ability to enforce decisions, to funding and technological considerations. However, there are additional reasons why an ODR provider might fail. As most ODR providers will be for profit, like all businesses in order to be successful must raise awareness about their existence, so that customers are aware of their availability and where to find them, and establish trust, because only then will potential users use ODR to resolve their disputes. Awareness and trust are essential for the "widespread acceptance of online dispute resolution as a fully-fledged alternative to ADR and litigation".[742]

[741] CORTES Pablo, *op. cit.*, pp. 183, 184.
[742] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 20.

A. Awareness

In an attempt to understand the lack of awareness about ODR there is a simple experiment than anybody can easily perform by asking about ODR amongst friends and family. The author of this thesis decided to raise the issue using one of the modern technological tools at his disposal to perform a mini survey using his Facebook friends. The result of the survey illustrated that an exceptionally high percentage (9 out of 10) of the authors' Facebook friends (including several lawyers and academics) were unaware of the existence of ODR.

One of the biggest problems an ODR system faces during its operation is the lack of awareness about its existence. Awareness is limited among the legal profession and even more so in the general public. Therefore, an ODR provider faces the danger of failing to attract parties and being unsuccessful, as happened with the Virtual magistrate project and the ECODIR, which were not deemed successful despite their viability, their adequate funding and the free of charge services during their initial pilot phase.[743] The same problem was evident also in traditional ADR and to a certain extend is still today, since lawyers and even more so the general public are not fully aware

[743] CORTES Pablo, *op. cit.*, pp. 77- 79.

of its existence. However, as stated in the first part of the thesis, the past two decades ADR is being more heavily promoted especially as a way to alleviate the pressure on the judicial system and awareness has significantly increased. But, still raising awareness for ADR is essential as it also leads to raising awareness for ODR.[744] Greater awareness and understanding of ADR concepts and processes are needed for ODR to flourish.[745]

The lack of awareness is even greater in ODR despite the fact that ODR operates in the virtual world where information is faster and more easily accessible, and despite the fact that ODR systems have been proven as the "world's most successful dispute resolution systems, caseload-wise".[746] One reason for the lack of awareness about ODR is its misrepresentation. The blurred lines between ODR and ODP[747] and the fact that in B2C disputes ODR services were developed essentially as substitute systems for complaints management mechanisms aiming to customer satisfaction, often leads to the misrepresentation of ODR as an after purchase service. This forms part of the reason why ODR has remained so much under the radar, although "many

[744] KATCH Ethan & RIFKIN Janet, *op. cit.*, p. 21.
[745] CORTES Pablo, *op. cit.*, pp. 75- 77.
[746] "To anyone asking whether online dispute resolution (ODR) works, whether it is important, a simple answer may be offered: eBay today resolves through ODR about sixty million disputes per year". See SCHULTZ Thomas, The Roles of Dispute Settlement and ODR, *op. cit.*, p. 2.
[747] See supra at Online Dispute Prevention.

online shoppers have used an ODR system, but without actually identifying it as such".[748]

Furthermore, businesses are reluctant to advertise the fact that they offer ODR because their customers might think that disputes were a frequent occurrence, when in fact the opposite is true, since the existence of adequate redress options through a fair, neutral, and well-thought-out complaint-handling process is bound to attract more customers; furthermore, businesses have the ability to make the consumer aware of the availability of the dispute resolution service without detracting from the marketing messages the business is attempting to communicate.[749] Another reason for the lack of awareness about ODR, also evident in traditional ADR, is due to the confidentiality of these methods. Most cases are not published; therefore the public is not adequately informed and consequently reluctant to "take part in a process they do not know and do not understand".[750] Furthermore, the public is not informed about the "success stories" which would convince potential users to utilize ODR.

[748] SCHULTZ Thomas, The Roles of Dispute Settlement and ODR, *op. cit.*, p. 2.
[749] "For instance, on eBay, the availability of dispute resolution services is only made clear at one point in the initial transaction process, and is only advertised on a page, two or three levels down in the website under customer service". See RULE Colin, *op. cit.*, pp. 291, 292.
[750] KATCH Ethan & RIFKIN Janet, *op. cit.*, p 22.

B. Trust

There is an inextricable connection between ODR and trust. ODR itself is a trust building mechanism. Besides settling disputes, ODR has the role of facilitating trust in the online environment and e-commerce transactions. Future development of the Internet, e-commerce and ODR are co-dependent. Risk, fear, and uncertainty limit activity, while "trust helps people overcome barriers and makes it easier to trade and interact".[751] Trust in a transaction is a judgment made by one party based on the experience and perception and an assessment of whether the other party will perform according to expectations.[752]

Transactions require trust, more so in the online environment which is woefully lacking in trust.[753] Especially in the online environment where the parties to a transactions cannot

[751] RULE Colin and FRIEDBERG Larry, The appropriate role of dispute resolution in building trust online, *Artificial Intelligence and Law*, vol.13, n.2, 2005, p. 197.

[752] "Trust in the context of dispute resolution is an expectation that one's cooperation will be reciprocated, in a situation where one stands to lose if the other chooses not to cooperate. Risk: The existence of risk is a precondition for trust. Only when one is at risk, dependent or vulnerable, can his/her behavior or expectations demonstrate trust. Uncertainty: Trust can manifest only when there is a degree of uncertainty regarding another's future behavior; if the other's behavior is pre-ordained or controlled, trust is unnecessary and moot. Expectations: One expects that his/her cooperation, or other trust-indicating action, will be reciprocated by the other". See EBNER Noam, *ODR and Interpersonal Trust*, In M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.) ODR: Theory and Practice, (The Hague: Eleven International Publishing), 2012, pp. 3, 4.

[753] "The recent Chinese survey 'Lack of Trust Stifles Online Trade' by the China Electronic Commerce Association (CECA) alarmingly discovered that more than a third of Chinese companies with experience in online trading do not trust e-commerce, while an earlier report showed that 71.1 per cent of Chinese internet users who bought and sold online were wary of fraud". WANG Fangfei Faye, *op. cit.*, pp. 15, 16.

be sure about who is on the other end of the computer screen trust is much harder to establish.[754] The sense of distrust is only enhanced by cases of fraud and exploitation.[755] People are often afraid to share private information over the internet, such as using their credit cards for online purchases, because they are worried about misuse and about the lack of availability in resolving potential disputes.[756]

Providing fair and effective ODR for systems such as e-commerce increases the potential users' confidence in the system.[757] Especially since the parties that utilize a dispute resolution process, start with a decreased sense of trust. Online dispute resolution can reverse the negative trust impact the problem caused to the extent that users trust the online environment even more because of its ability to resolve the issues in case a transaction goes awry and become more loyal to the marketplace than they would have been if there had been no

[754] "There is an overarching sense of distrust people have whenever they approach the Internet. Its positive characteristics and opportunities notwithstanding, the Internet has become something similar to a bad neighborhood after dark. We watch where we are going, try and stay close to familiar sites, and complain about the lack of competent policing. We constantly warn our children regarding this global neighborhood, telling them not to stray from the main road and above all – not to speak to strangers, let alone take candy from them. This environment is fraught with distrust". See EBNER Noam, *op. cit.*, p. 8.

[755] "Patricia Wallace, one of the early writers on the psychology of the Internet, noted how the fact that all of these interactions have been used exploitatively in the past, cause users to approach the Internet bearing a pre-emptive filter of distrust". *Ibid.*, p. 9.

[756] WANG Fangfei Faye, *op. cit.*, pp. 15, 16.

[757] EBNER Noam, *op. cit.*, pp. 1, 2.

problem at all.[758] The best way to establish trust in the online marketplace is the use of trustmarks to ensure users about the trustworthiness of online merchant or services. Displaying the Trustmark is a way vouching for the trustworthiness of online merchants or services and helps to build trust particularly where there is limited information about their credibility.[759]

Besides the trust building role of ODR, ODR service providers themselves rely on trust for their successful operation. Although all forms of ADR have encountered distrust, ODR is based on internet communication which can be cold and distance-creating and make it even more challenging to establish trust.[760] This distrust is only increased by the number of disputes arising out of e-commerce.[761] ODR in order to be effective must create an environment of trust which puts people into a mindset that maximizes the chance of a faster and smoother resolution.[762] In order for an ODR provider to be successful it needs to be trustworthy so that it's chosen by potential users. ODR providers ask parties to trust the ODR process, to discuss their interests and to divulge sensitive information despite the risk and

[758] "If the complainant's anxiety grows to the point where they are coming to suspect that they have been victimized, and then through direct communication the problem is resolved and their anxiety is removed, then the negative presumptions they might have made about the trustworthiness of the marketplace are cut off at the knees". See RULE Colin and FRIEDBERG Larry, *op. cit.*, p. 202.
[759] *Ibid.*, p. 200.
[760] EBNER Noam, *op. cit.*, pp. 1, 2.
[761] CORTES Pablo, *op. cit.*, pp. 77- 79.
[762] RULE Colin and FRIEDBERG Larry, op. cit., p. 203

uncertainty involved. Therefore, the ODR provider must establish trust by providing an efficient and effective way of managing disputes and at the same time safeguard confidentiality and impartiality.[763] Between the parties, trust is hindered by both the inherent distrust created by the appearance of the dispute and by additional distrust because of the medium of communication. The ODR provider must establish trust in order to promote a trust-filled environment for problem solving based on cooperation without distrust that would make users feel threatened and defensive.[764] The ODR provider must establish trust to allow users to freely share information without the fear that it might be used against them.

Cyberspace has a notorious confidence problem and the same problem also affects ODR which operates in the same environment. The reason for the lack of trust in cyberspace is the absence of control since the lack of physical interaction can decrease the sense of control and make it more difficult for people to trust their counterparts. The lack of trust is due to the absence of "traditional points of reference, which form an architecture of confidence and by which people assess the trustworthiness of an offline situation".[765] In the offline world people are usually able to access a situation, evaluate those

[763] *Ibid.*, p. 203.
[764] EBNER Noam, *op. cit.*, pp. 4, 5.
[765] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, p. 75.

"points of reference" and form an opinion about the trustworthiness of their counterpart. For instance, if one hires a lawyer to resolve a dispute, one deals with a real person or a real office or a license and there is something connected to a physical existence. Similarly if someone visits the physical establishment of a commercial store or a bank, there are "points of reference" that can be evaluated in order to form an informed opinion about their trustworthiness. For example, expensive buildings and furniture, sufficient advertising, wide client base and good reputation can increase peoples' trust. However, the same does not apply in the online world, where the lack of such "points of reference" makes it difficult if not impossible to assess the credibility of the other party and consequently trust them. In the online world and subsequently in ODR "such an architecture or such points of reference must be created to allow people to have confidence".[766]

C. Solutions

It is evident that for its effective and successful operation an ODR provider needs to raise awareness and attract users but

[766] *Ibid.*, p. 84.

also establish trust to retain those users. There are several ways by which ODR providers can raise users' awareness and enhance users' sense of trust. Building trust and boosting confidence requires legal and technical tools, from regulation and accreditation mechanisms to mechanisms for providing security, certification and privacy.[767] At the level of design a way to enhance trust is by safeguarding data security and privacy, by using encryption techniques and digital signatures. At the level of operation a way to enhance trust is transparency. A way to achieve transparency is by providing information about the process and third neutrals.[768] In adjudicative methods, transparency and trust may be assured by the publication of decisions which will also raise awareness. The publication of decisions will provide the transparency essential to increasing trust in ODR, but at the same time must be balanced with confidentiality, one of the main advantages of ODR, for instance by keeping the names of the parties confidential or using impersonal statistical data, sample cases, selective publication of decisions. In consensual methods or highly automated

[767] WANG Fangfei Faye, *op. cit*., pp. 15, 16.

[768] "All ODR providers should be subject to mandatory disclosure requirements, including: the type of ODR procedure and its main features, e.g. languages; restrictions of the procedure, e.g. monetary threshold etc.; requirements that consumers must meet, e.g. the previous attempt to obtain redress through the business internal complaint system; governing structure; criteria for becoming a neutral third party; costs, including fees and possible extra costs when decisions need to be enforced; rules that serve as the basis for the body's decisions, e.g. legal provisions, considerations of equity, codes of conduct etc.; security measures to keep private data confidential; enforceability of decisions and agreements; an annual report evaluating the functioning of the provider". See CORTES Pablo, *op. cit*., pp. 77- 79.

procedures, feedback systems enhance the establishment of trust by allowing users to voice their concern and at the same time provide insights on how to improve ODR.[769] Another way to raise awareness and enhance the trustworthiness of ODR providers is through clearinghouses that would raise awareness by being gateway entry points and portals to ODR providers that users might otherwise never been aware of. Clearinghouses will also establish trust by providing an accreditation system to assess ODR providers and a reputation system to rate them. For instance, it could be with the use of trustmarks to certify ODR providers and ensure potential users about their trustworthiness.[770] In order to avoid confusion a single and global Trustmark could be used granted by a central institution.

[769] SCHULTZ Thomas, Does Online Dispute Resolution Need Governmental Intervention? *op. cit.*, pp. 75- 84.

[770] "This is currently being effected in an informal manner by the European Commission, which publishes a list of those providers that have been approved by the Member States. However, the existing structure is rather limited, since providers have to comply only with unsupervised recommendations and do not display a Trustmark". See CORTES Pablo, *op. cit.*, p. 194.

Conclusion

The main subject of this research project is online dispute resolution and the proposition of a fair and effective ODR system. ODR is not examined as a distinct modern phenomenon but as the latest step in the evolutionary ladder of dispute resolution. The thesis illustrates the evolution of disputes over the years and the fact that dispute resolution always evolved in parallel. In the beginning disputes were simpler and occurred between parties with geographical proximity, such as within the confines of a village or a city. For those disputes, traditional courts were the principal way of resolution. However, as people started to travel further distances and communicate from afar, disputes evolved and became more complex and increasingly cross border. In order to provide a satisfactory resolution of these disputes, dispute resolution also evolved and alternative dispute resolution was proposed as the solution. ADR managed to respond to the need created by cross border disputes and provide a fast, cost effective and flexible way to resolve disputes. ADR overcame the inefficiencies of the traditional court system and greatly facilitated international commerce. As distance communication, international travel and international commerce were rising, so did ADR.

However, disputes evolved once more when the world was introduced to what has become to be known as the digital era. The invention of personal computers and the internet as well as the digitalization of information completely changed the way people communicate and interact. In the digital era people are now able to communicate, interact and transact from the far corners of the world with the push of a button, through the use of their personal computer equipped with an internet connection. A whole new world was created i.e. the cyber world. Disputes evolved because the number of cross border disputes increased as never before and new disputes arose, which were borderless as they existed solely in the cyber world. The traditional court system and traditional ADR proved ineffective and in order to satisfy the needs of the digital era dispute resolution combined ADR with the information and communication tools of the digital era and ODR was created.

The first part of this research project illustrates the evolution of disputes and dispute resolution from the analog era, when dispute resolution was face to face, to the digital era, when disputes are resolved in cyberspace. ODR was created from the combination of ADR with ICT tools, therefore, in order to understand ODR it is essential to begin with ADR. The first half of the first part is dedicated to ADR. Particularly, the first chapter defined ADR and demonstrated the evolution of disputes

and the dispute resolution movement from the birth of ADR to the 20th century modern rebirth. The second chapter analysed the main forms of ADR as they, in their virtual representation, are also the main forms of ODR. Although there are several ADR methods, many of which are briefly demonstrated, however, this thesis focused on the three main methods of negotiation, mediation and arbitration, as they represent three distinct fundamental ways to resolve disputes; one that takes place between the parties and without any external help; one where a neutral third party assists the parties to a dispute to come themselves to a resolution; and one where a neutral third party resolves the case for the parties with a binding and final decision. The third chapter demonstrates the advantages and disadvantages of ADR, not only because the tipping scale in favour of the former shows the essentiality of alternative resolution for disputes, but also because many of the advantages and the drawbacks are also common to ODR.

The second half of the first part demonstrates dispute resolution in the digital era i.e. ODR. The first chapter defines ODR and describes the main methods of ODR, online negotiation, online mediation and online arbitration. It also analyses the second of the building blocks of ODR i.e. the ICT tools and illustrates the influence and transformative power of technology in dispute resolution. The second chapter provides a

brief account of the relatively short evolution of ODR, by presenting the first initiatives as well as two of the most successful ODR examples, one connected to eBay and one to the Internet Corporation for Assigned Names and Numbers (ICANN). These examples, as well as others presented in relevant sections, are used in the second part of the thesis in order to identify successful practices for ODR providers. The third chapter presents the advantages of ODR which illustrate the necessity of ODR and the fact that ODR can respond more than adequately to the needs of the digital era, as well as again help to identify the characteristics that an ODR provider must have and the services that it must provide in order to be successful. It also presents the drawbacks that the ODR system must overcome. This information is used in the second part to formulate the proposition of an ODR system.

The first part provides an in depth illustration of the evolution of disputes and dispute resolution and demonstrates that ODR is a necessity of the digital era but also that it has the potential to be a revolutionary, effective and successful way to resolve disputes; a way that will be the future of dispute resolution. The second part of the thesis identifies the necessary characteristics of the ODR system.

The second part is a proposal for the formulation of the ODR system based on the conclusions drawn from the first part

of the thesis. The second part describes the ODR system, its process and its architecture. The first half of the second part is dedicated to the ODR process. Based on the experience of the dispute resolution movement it is demonstrated that there is a need for a multi-method and multi-step process that takes advantage of the distinct capabilities of the main ways of dispute resolution. The first chapter presents the three step process, the additional step of online dispute prevention for B2C disputes and the UNCITRAL proposal as an example of such process.

Chapters two and three are dedicated to online arbitration. They demonstrate the necessity for online arbitration as the final step of the process because only arbitration can provide a binding and enforceable avenue for redress and overcome one of the greatest drawbacks of ODR which is the enforceability of the outcomes. They also provide solutions to all proposed concerns relating to online arbitration regarding the agreement, the procedure and the outcome, such as the amendment of the New York convention in order to expressly facilitate the enforcement of online arbitral awards. As far as the outcome is concerned the thesis suggests online binding arbitration except in cases where enforcement can be better ensured through self-enforcement mechanisms, in which cases non-binding online arbitration

would suffice. The thesis provides such an example by presenting the UDRP system.

The second half of the second part describes the architecture of the ODR system regarding the network, the regulation and the providers. Again the examination of ADR and ODR in the first part of the thesis allows conclusions to be drawn, which are integrated as essential characteristics of the ODR system. The first chapter demonstrates the necessity of a global and international ODR network of cooperation in a national level through treaties and in supranational level under the auspices of an international organisation, which will have clearinghouses in each respective country cooperating with the relevant state authorities and allowing access to ODR as well as accredit ODR providers. The second chapter is dedicated to the regulation of ODR and it demonstrates the necessity for co-regulation, with self-regulating initiatives backed by public control. Also, it demonstrates is the necessity for guidelines in the forms of codes of conduct issued by the international organization to ensure minimum regulatory standards and the safeguarding of the basic principles of impartiality and independence, transparency, accessibility, effectiveness and fairness. The compliance with the guidelines must be ensured by the clearinghouses that will accredit the complying providers.

The third chapter describes the architecture of the ODR provider and particularly the way ODR providers must be funded and their technological architecture. As far as the funding goes, the best solution is a combination of for-profit ODR providers that offer transparent services monitored by public authorities and that are also backed by public funding, at least in the beginning. As far as the technological architecture goes, the thesis demonstrates the necessary steps so that ODR providers ensure accessibility, ease of application and security. Finally, in spite of all the potential, to date ODR has not achieved a widespread market implementation. Awareness and trust are essential for the widespread acceptance of online dispute resolution as a fully-fledged alternative to ADR and litigation. The thesis again proposes the necessary solutions.

In conclusion, the thesis demonstrates how the evolution of disputes and dispute resolution led to ODR and based on the research conducted on this evolution identifies the essential characteristics that an ODR system must possess in order to be fair, effective and successful and in order for ODR to fulfil all its promising potential as the dispute resolver of the digital era.

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