

Online dispute resolution: what future?

Isabelle MANEVY

imanevy@yahoo.com

D.E.A. de droit anglais et nord-américain des affaires

Université de Paris 1

Under the supervision of Maître Antoine ADELIN

June 2001

Plan

Introduction	4
I. From Alternative Dispute Resolution to Online Dispute Resolution.....	8
A. TRADITIONAL ALTERNATIVE DISPUTE RESOLUTION MECHANISMS.	8
1. <i>Traditional advantages of ADR.</i>	8
2. <i>Traditional disadvantages of ADR.</i>	10
B. PRESENT ONLINE DISPUTE RESOLUTION MECHANISMS.	11
1. <i>Online negotiation.</i>	11
2. <i>Online mediation and arbitration.</i>	13
2.1. Online mediation.	14
2.2. Online arbitration.....	15
1. <i>Business to Consumer.</i>	15
2. <i>Domain names.</i>	17
II. Discussion: present Online Dispute Resolution.....	22
A. DISADVANTAGES OF ONLINE DISPUTE RESOLUTION.	22
1. <i>Legal issues.</i>	22
1.1. The online dispute resolution agreement.....	22
1.1.1. Validity of Online Dispute Resolution agreement in the Business-to-Business sector.....	22
1.1.2. Permissibility of binding consumer Online Dispute Resolution.	23
1.2.1. Internet: a boundless medium.....	24
1.2.2. Minimum standards for the proceedings.	26
1.3. Applicable law to Cyberspace.	27
1.4. Enforceability of online agreements.....	29
2. <i>Practical issues.</i>	29
2.1. Security of the online proceedings.	30
2.2. Lack of face-to-face encounters.....	31
2.3. Cross-cultural issues.	33
2.4. Inappropriateness of the Internet medium.	34
B. SPECIFICITY OF ONLINE ARBITRATION.	34
1. <i>The arbitration agreement.</i>	35
1.1. Conditions as the form, the parties and the contents.	35
1.1.1. Conditions as to the form.....	35
1.1.2. Conditions as to the parties.....	38
1.1.3. Conditions as to the contents of the arbitration agreement.	39
1.2. Applicable law.	40
1.3. The designation of arbitrators.....	40
2. <i>The process of online arbitration.</i>	40
2.1. The conduct of the proceedings.....	40
2.2. The place or seat of arbitration.....	42
2.3. Arbitration rules adapted to electronic commerce.....	43
3. <i>Arbitral awards in online arbitration.</i>	43
3.1. The form of arbitral awards.	43
3.2. The effects of arbitral awards.	44
3.2.1. Enforcement of online awards.....	44
3.2.2. The archival record.	45

3.2.3. The absence of publicity.....	45
3.3. Non-binding Online arbitration.....	45
C. ADVANTAGES OF ONLINE DISPUTE RESOLUTION.....	46
1. <i>More time- and cost- savings</i>	46
1.1. Cost savings.....	46
1.2. Time savings.....	46
2. <i>Better convenience</i>	47
2.1. The more level playing field.....	47
2.2. Availability of information and process options.....	47
2.3. Possibility of using experts.....	48
<u>III. The transformation of the litigation scene (towards AADR)?.....</u>	<u>50</u>
A. SELF-REGULATION PREFERABLE TO GOVERNMENTAL INTERVENTION.....	50
B. INCREASING AWARENESS OF ONLINE DISPUTE RESOLUTION.....	52
1. <i>Building trust in Cyberspace</i>	52
2. <i>ODR: a replacement of ADR or litigation?</i>	53
3. <i>For hybrids: A & ODR and O & ADR</i>	54
C. THE TRANSFORMATIONS AHEAD.....	54
1. <i>The conflict: towards dispute avoidance</i>	54
2. <i>The legal profession: towards multidisciplinary services</i>	55
3. <i>The future of law?</i>	55
<u>Conclusion:.....</u>	<u>56</u>

“The notion that most people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their dispute is not correct. People with problem, like people with pains, want relief, and they want it as quickly and inexpensively as possible”.

Warren E. Burger
Former Chief Justice
United States Supreme Court

Introduction

Since the early days of civilization, people and business organizations have been looking for alternatives to litigation. In the Corinthians, Paul rejected the idea of lawsuits among believers: “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, one brother goes to law against another –and this is in front of unbelievers”¹. In the middle ages, in the event of a crime, “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”². At the same time period, another source of extra-judicial adjudication was the fair courts settling disputes at annual fairs, involving traders from around the world³. In the early English legal system, there were for instance⁴, a number of early examples of consensual jurisdiction more like modern arbitration” in addition to property based power of the king (and the local lord)⁵ In the United States, alternatives to litigation have existed for generations. For instance, statutes like those enacted in Pennsylvania in 1705 and 1810, provided for arbitration in matters pending in court⁶.

The ways in which parties choose to solve their conflicts has changed over the centuries. In the United States, for instance, the first half of the twentieth century has seen the development of professional mediation on a large scale. “In the 1960s, local communities established neighborhood justice centers to provide facilitative dispute resolution for neighbors, families, tenants and consumers”⁷. In the 1970s, jurists such as Lon Fuller⁸ 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 to “match the forum with the fuss”.

Such procedures are referred to as alternative dispute resolution (“ADR”)⁹ and range from no

¹ 1 Corinthians 6: 5-6.

² PATLYEK, Susan, “Dispute Resolution in Cyberspace” PATLYEK, Susan, « *Dispute Resolution in Cyberspace* », available at: <http://chss.montclair.edu/leclair/LS.papers/cyberadr.htm> quoting SEVERSON, Margaret M., BANKSTON, Tara V., “ Social work and the pursuit of Justice Through Mediation”, *Social Work* 40 1995, n°5, p.683.

³ See CONA, Frank, A., “ Focus on Cyber law: application of online systems in ADR “, 45 *Buffalo Law Review*, p.976.

⁴ Ibid.

⁵ Ibid.

⁶ See MARKS, Jonathan B, JOHNSON, Carl Jr, BIZARTON, Peter L, “ *Dispute Resolution processes in America*”, Fiona Boyd University of East Anglia, 1984, p.80.

⁷ HARVARD LAW REVIEW ASSOCIATION, “ The paths of civil litigation: ADR, the Judiciary, and Justice: Coming to terms with the alternatives”, 113 *Harvard Law Review*, May 2000, p.1852.

⁸ See FULLER, Lon, “The forms and limits of adjudication”, ”, *Harvard Law Review*, 1978, vol.92, p.353-409.

⁹ See GOLDSMITH, Jean-Claude, “ Les modes de règlement amiable des différends”, *Revue de droit des affaires internationales, International Business Law Journal*, n°2, 1996, p.221-251.

intervention in one-on-one negotiation¹⁰ to non-decision making intervention in a mediation¹¹, to advisory decision-making intervention in a neutral evaluation, to partial decision making intervention in a fact finding¹², to full decision –making intervention in an arbitration¹³.

Since modern ADR mechanisms have their roots in the United States, they to face considerable skepticism in Europe because it was perceived as a way to Americanize the law¹⁴. This reluctance explain the absence of institutionalization and the slow growth of ADR court-annexed ADR. But in France or in the United Kingdom (UK), the use of contractual mediation clauses, namely in the same professional spheres, like that of major computer or electricity transactions, has become current practice¹⁵. In addition, mediation becomes more and more popular in Europe. For instance, in France, it was recently decided that students could directly mediate their disputes instead of submitting them to the head-master.

The widespread use of Internet technology in the late 1990s in the United States and to some extent in Europe¹⁶ has heightened interest in ADR. 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 sector¹⁷. Online dispute resolution was heralded as a way to circumvent clogged and slowing moving American federal and state courts. From 1995 to 1998, informal online dispute resolution mechanisms were recognized as distinct from ADR and since 1998 they have become an industry in the United States¹⁸.

The first online experiments in Northern America were:

- the Virtual Magistrate (1995)¹⁹ was launched by cyberlaw academics belonging to by the National Center for Automated Information Research (NCAIR) and Cyberspace Law Institute as well as the American Arbitration Association²⁰. “For 10 \$ per filing, anyone with a beef about wronged on the Internet could visit the web, file a formal complaint and receive an emailed

¹⁰ See Glossary.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid. Some authors do not include arbitration in ADR but we will not adopt that distinction. See FOUCHARD, Philippe, “Arbitrage et modes alternatifs de règlement des litiges du commerce international”, in *Mélanges en l'honneur de Philippe KAHN*, Edition Litec 2000, p.95-115.

¹⁴ See MARRIOTT, Arthur, “Tell it to the judge...but only if you feel you must”, The School of International Arbitration 1995 Freshfields Lecture, delivered on November 8 1995, reprinted in *Arbitration International*, December 1995, vol.12 n°1, p.13.

¹⁵ See GOLDSMITH, Jean-Claude, “ Les modes de règlement amiable des différends”, *Revue de droit des affaires internationales, International Business Law Journal*, n°2, 1996, p.232.

¹⁶ If only 5% of the contacts between consumers and businesses in Europe are made through e-mail, that figure should be multiplied by four within 2004. in ZILBERTIN, Olivier, “Le mail en mal de réponses”, *Le Monde*, 21 février 2001.

¹⁷ See the HARVARD LAW ASSOCIATION " The Domain Name system: a case study of the significance of norms to Internet governance", 112 *Harvard Law Review*, May, 1999, p.1657-1680

¹⁸ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, Chapter 2 “ A Brief History of ODR” p.45-70.

¹⁹ See GELLMAN, Robert, “ A brief history of the Virtual Magistrate Project: the early months “ at <http://www.mediate.com/articles/gellman.cfm>.

²⁰ Which still exists as a project of the Chicago Kent College of Law. See website at <http://www.vmag.org>.

decision from an trained arbitrator within 10 days²¹;

- the University of Massachusetts Online Ombudsman Office ²² (OOO) was created in 1996 by the Center for Information Technology and Dispute Resolution of the University of Massachusetts and also funded also by NCAIR. The OOO is primarily interested in mediating disputes arising out online activities. Each user provides the OOO information about his or her dispute. If both parties are cooperating, the ombudsperson²³ can start the mediation²⁴;

- and the Cyber Tribunal²⁵ was initiated in 1998 by the University of Montreal which used both mediation and arbitration. The experiment ended in December 1999 and the project has evolved into a commercial venture called e-Resolution²⁶.

These three examples show that ODR employs traditional techniques such as arbitration and mediation²⁷ and adapts them to online environment.

According to Henry H. Perritt Jr²⁸, “three characteristics of the Internet make traditional dispute resolution through administrative agency and judicial procedures unsatisfactory for many controversies that arise in Internet-based commerce and political interaction”. First, “the Internet’s low barrier to entry invite participation in commerce and politics by small entities and individuals who cannot afford direct participation in many traditional market and political arenas”. Second, “the geographic openness of electronic commerce makes stranger-to-stranger transactions more likely”. The potential use of the Internet to resolve international disputes can be divided into two distinct areas: using Internet-related technology to resolve “real world” disputes online or partially online and using the Internet to resolve disputes arising on the Internet itself. “Third, the Internet is inherently global”. Indeed, though practically unknown in 1989, the Internet today links more than 130 countries around the globe. Businesses, organizations, institutions, governments, and time on virtually any subject. On December 31, 2001, there were 134.6 million Internet users in the United States, 16.8 million in the United Kingdom and 9 million in France²⁹. “Based on a monthly growth rate of nine to twelve percent and estimates that a new person plugs into the Internet every ten minutes, some have speculated that every person on the planet will be networked by the year 2003.³⁰ With the corresponding rise of what many call “virtual communities” on the Internet comes the certainty of online conflicts and disputes”.

This paper seeks to understand the nature of the online environment, and how this environment affects disputes and dispute resolution. Indeed, “disputes and dispute resolution do not occur in a vacuum. Every dispute arises in a setting or context, and the setting from which it arises may

²¹ See WASSERMAN, Elisabeth, “The net as a virtual courtroom”, *The Standard*, August 20 1998, at <http://www.thestandard.com/article/0,1902,1443,00.html>.

²² See Glossary.

²³ This mechanism still exists see <http://www.ombuds.org>.

²⁴ See CONA, Frank, A., “Focus on Cyberlaw: application of online systems in ADR”, 45 *Buffalo Law Review*, p.989.

²⁵ See CAPRIOLI, Eric A, "Arbitrage et médiation dans le commerce électronique: l'expérience du CyberTribunal", *Revue de l'arbitrage*, N°2, 1999, p.225-248.

²⁶ e-Resolution is one of the accredited providers of arbitration for domain name disputes (see Glossary) which we will study in part one (see <http://www.eresolution.ca>).

²⁷ See Glossary for the differences between arbitration and mediation.

²⁸ See PERRITT, Henry H., “Dispute Resolution in Cyberspace: Demand for New Forms of ADR”, 15 *Ohio State Journal of Dispute Resolution*, 2000, p.675.

²⁹ See KAHN, Annie, “Les vertus cachées du krach technologique”, *Le Monde*, 22 mai 2001.

³⁰ See BORDONE, Robert C., See BORDONE, Robert C., “Electronic Online Dispute Resolution: A Systems Approach-Potential Problems and a Proposal”, 3 *Harvard Negotiation Law Review*, Spring 1998, p. 175.

shape the expectations of the parties, the timing of settlement, the perceived urgency of resolution, the consequences of and available alternatives to failure, the role of third party and even the form of dispute resolution”³¹.

Consequently, in part one of this paper, advantages and disadvantages of traditional ADR will be briefly exposed before presenting the role of ODR through online negotiation, mediation or arbitration. Then, the two successful areas of ODR: business to consumer and domain names will be examined.

Part two will be focused on legal and technical issues surrendering ODR. The challenges posed by online arbitration will be studied separately. In addition, advantages of ODR through concrete case studies will be presented.

Finally, in part three, the transformations ahead will be examined: that is to say if ODR mechanisms are going to replace ADR, what should be the role of governments and other stakeholders in the United States and in Europe, and the impact of information technology on the litigation scene.

³¹ See KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, “ E-commerce, e-disputes, and e-dispute resolution: in the shadow of “e-Bay Law””, *15 Ohio State Journal of Dispute Resolution*, Spring 2000, p.706.

I. From Alternative Dispute Resolution to Online Dispute Resolution

ADR presents many advantages over litigation but has also some disadvantages. Consequently trials are still employed to vindicate's people rights. What has ODR new to offer compared to ADR? According to Ethan Katsh and Janet Rifkin, if "ADR moves dispute resolution "out of court". ODR moves it even further even from court"³². To illustrate the changes brought to dispute resolution, we will take the examples of business to consumer disputes and domain names.

A. Traditional Alternative Dispute Resolution mechanisms

Mediation and other conventional ADR techniques have significant advantages to court-based litigation, but they also present some drawbacks. A review of ADR pros and cons is necessary to understand how the Internet can play a role in the dispute resolution process.

1. Traditional advantages of ADR

Three major advantages of ADR over litigation will be studied now. First, ADR are generally considered a more efficient process than litigation because it is quicker and less expensive. Indeed, in general, arbitration and other forms of dispute resolution provide a significant reduction in the cost of litigating commercial transactions generally necessitating the review of written evidence and expert witness testimonies. If we take for example disputes involving patent infringement, ADR can provide significant savings. "In 1995, the American Intellectual Property Law Association reported that the total cost of a patent infringement suit through trial in the United States was between \$500, 000 and \$1.9 million. In sharp contrast, the total cost through binding arbitration of a patent infringement claim was between about \$99 000 and \$500 000"³³. In addition, disputes settled through arbitration and mediation are typically resolved much faster than with traditional litigation (typically several months as opposed to several years). Dispute avoidance systems such as partnering³⁴ can be very efficient in this regard. For instance, "the Lacey V. Murrow Bridge in Seattle, an \$88 million project, was completed 2 per cent under budget and one year ahead of schedule"³⁵. It included regular meetings at several levels between owner, contractor and subcontractors. A formal escalation procedures, involving fast-track arbitration by a Dispute Review Board³⁶ was defined. However, it should be noted that, in arbitration, hard cases may take just as long to resolve than before a court.

The second type of advantages of ADR over litigation is the control of the proceedings by the parties. Unlike court-based suits which sometimes requires to make case documents and information to the public, confidentiality is a prerequisite of an ADR process. Consequently, there is no risk of information leakage which can be damaging for a commercial reputation. In addition, there are some situations in mediations where the parties cannot disclose information to each other without weakening their bargaining power. During *ex parte* sessions or caucuses³⁷,

³²See KATSH, Ethan, RIFKIN, Janet, "Online Dispute Resolution: resolving conflicts in Cyberspace", 2001, Jossey-Bass, San Francisco, p.25.

³³ See CONA, Frank, A., "Focus on Cyber law: application of online systems in ADR", 45 *Buffalo Law Review*, p.984.

³⁴ See Glossary.

³⁵ See HILL, Richard, "The theoretical basis of Mediation and other Forms of ADR: Why they Work", *Arbitration International*, Vol. 14, N°2, 1998, p.182.

³⁶ See Glossary.

³⁷ See Glossary.

“the mediator can serve as non-threatening channel for the exchange of information”³⁸. Furthermore, alternatives to litigation, particularly mediation and negotiation, are typically less confrontational than a court trial because they take place in a much less formal setting than a courtroom. Even in arbitration proceedings, the parties have greater latitude than in litigation. The parties can choose a neutral arbitral forum. According to Frank A. Cona, “anyone familiar with litigation is aware of the strategic importance of forum shopping in choosing the best court within which to bring an action. Conversely, the location of a suit can be a significant disadvantage to the other party”.³⁹ In addition, the parties can exercise control over the relevant procedures. “They decide the degree of formality which will govern and the extent to which the trappings of litigation, from pre-trial to discovery, are relevant”⁴⁰. Finally, the parties can select a neutral more expert in their dispute area than a judge.

The third type of advantages of ADR over litigation stems from the flexibility in outcomes. Arbitrators, for instance, have greater flexibility in decision-making than judges since they are not bound, unlike the common law judges, by the *stare decisis* principle. As far as negotiation is concerned, it can also be resolved to the parties mutual satisfaction. In “*Getting to Yes*”⁴¹, Roger Fischer and William Ury proposed a bargaining model for using the problem-solving approach to negotiation, which focuses on the opportunities for joint, rather than individual gain. Mediation is also oriented toward a positive sum solution rather than a zero-sum.

If we take the well-known example of the orange “Two people both have a legitimate claim to an orange and neither is willing to accept half the orange. If the claim is resolved in accordance with a judicial paradigm, one person will get some portion (possibly none) of the orange, and the other will get the remaining portion. But the people decide to call a mediator, who asks each person what they intend to do with the orange. The first person answers that she intends to use the rind to make perfume, while the second answers that she intends to use the pulp to make orange juice. The mediation process yields a solution that is fair and that better satisfies the interests of each interest that could *any* solution based on an adversarial process”⁴².

As was stated by Lon Fuller, mediation “has the capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attention toward each other”⁴³. Mediation is also an “empowering process”⁴⁴ since the parties have considerably more autonomy in mediation than they would in an adjudication process. In addition, the result of a mediation process is only binding on the party once they have reached an agreement. This absence of coercion of the mediation and other ADR processes is also a major drawback, which we will study now.

³⁸ HILL, Richard, *Ibid.* p.176.

³⁹ See CONA, Frank, A., “Focus on Cyber law: application of online systems in ADR”, 45 *Buffalo Law Review*, p.985.

⁴⁰ See NOHAN-HALEY, Jacqueline M., “*ADR in a nutshell*”, West Publishing, St Paul, Minnesota, 1992, p.125.

⁴¹ See FISCHER, Roger, URY, William, “*Getting to yes: negotiating Agreement without giving In*”, Penguin Books Inc, New York, 1991, p.200.

⁴² See HILL, Richard, “The theoretical basis of Mediation and other Forms of ADR: Why they Work”, *Arbitration International*, Vol. 14, n°2, 1998, p.181.

⁴³ See FULLER, Lon, “Mediation-Its Forms and FUNCTIONS”, 44 *South California Law Review*, 1971, p.305.

⁴⁴ See NOHAN-HALEY, Jacqueline M., “*Alternative Dispute Resolution in a nutshell*”, West Publishing, St Paul, Minnesota, 1992, p.84.

2. Traditional disadvantages of ADR

Three major disadvantages of ADR can be mentioned. First, ADR need the consent of all parties in order to be binding and enforceable unlike conventional litigation, in which the *imperium*⁴⁵ of the court can be used to compel a party to resolve a dispute (even by default)". "Such an agreement can occur *ex ante*, such as by a contractual provision entered into before the substance of the dispute arose, or *ex post*, such as when the parties agree to arbitrate after a dispute has arisen"⁴⁶. Consequently, parties have to be willing to come to the bargaining table in good faith for the ADR to be successful. Absent good faith, " some parties may be using the process as a fishing expedition or simply to stall the litigation process"⁴⁷.

Second, ADR is not always appropriate. Arbitration and other ADR are most beneficial when the motivating force driving the parties is economic and damages can be awarded by one party to another. "However, in situations where one of the parties seeks a vindication of legal rights, ADR is much less effective"⁴⁸. In addition, ADR are not adequate when there is power balance between the parties because it would be much more difficult to reach a win-win solution. Moreover, mediation lacks "the procedural and constitutional protections of adversarial justice., such as the right to a jury trial and the right to counsel"⁴⁹. Without these procedural safeguards, there is no guarantee that the agreement reached will be a fair one. Moreover, when the disputants are unable to negotiate due to one party's strong emotional involvement in the dispute, ADR are inadequate. Regarding arbitration, it has been criticized on numerous grounds. Some commentators have argued that efficiency may be lost when the arbitral proceedings are conducted by a panel of arbitrators whose scheduling problems increase delay and costs⁵⁰. Other argue that efficiency is achieved at the expense of the quality of justice and that the difficulty of appealing an arbitral award ⁵¹ may give arbitrators a license to do injustice. Finally, in some areas, particularly hard cases, the increasing formality of arbitration resembles aspect of the judicial system as was shown by Bruno Oppetit⁵².

Third, ADR is not necessarily consistent when there is a need of a precedent⁵³ or of an enforceable judicial decision which can help resolve latter cases. Indeed, third party neutrals are not bound by previous cases. In addition, a settlement is binding in between the parties as a regular contract. An arbitral award has only *res judicata*⁵⁴ as to each particular dispute.

To sum up this first subpart, ADR are best suited when the parties do not seek to avenge legal rights because they are "solution rather than blame oriented"⁵⁵. Their best quality is to be time

⁴⁵ See Glossary.

⁴⁶ See CONA, Frank, A., " Focus on Cyber law: application of online systems in ADR ", 45 *Buffalo Law Review*, p.985-986.

⁴⁷ See NOHAN-HALEY, Jacqueline M., "*Alternative Dispute Resolution in a nutshell*", West Publishing, St Paul, Minnesota, 1992, p.60.

⁴⁸ See CONA, Frank, A., " Focus on Cyber law: application of online systems in ADR ", 45 *Buffalo Law Review*, p.986.

⁴⁹ See NOHAN-HALEY, Jacqueline M., "*Alternative Dispute Resolution in a nutshell*", West Publishing, St Paul, Minnesota, 1992, p. 59.

⁵⁰ See *Ibid*, p.125.

⁵¹ See Glossary.

⁵² See OPPETIT, Bruno, " Les Modes alternatifs de règlement des conflits et la vie économique ", *Justices*, n°1, Janvier-Juin 1995, p.55.

⁵³ in common law countries.

⁵⁴ See Glossary.

⁵⁵ See KATSH, Ethan, RIFKIN, Janet, "*Online Dispute Resolution: resolving conflicts in Cyberspace*", 2001, Jossey-Bass, San Francisco, p.25.

and cost efficient. “In the Internet environment and in information-related industries, these factors are likely to be even more important. Where the value decline declines quickly over time, litigation becomes an even less desirable option”⁵⁶. In addition, “part of the attraction of ADR is that it moved dispute resolution out of the courtroom and courthouse, moving it from an identifiable place to any place”⁵⁷ since there is no need of showing at a particular time and place for mediation and arbitration sessions. Finally, ADR represent a move “away from a fixed and formal process”⁵⁸. These changes paved the road for Online Dispute Resolution.

B. Present Online Dispute Resolution mechanisms

As we have seen, offline ADR involved a triangle: the two parties and a neutral⁵⁹. ODR introduces a “fourth party”⁶⁰ at the table, “which is the technology that works with the mediator or arbitrator”⁶¹. Indeed, offline mediation and arbitration were “already multimedia process” involving exchanges of information through face to face meetings and other means of communication, including emails. In ODR, technology does not replace the mediator or arbitrator, except in some cases⁶², but “can displace the third party in the sense that new skills, knowledge and strategies may be needed by the third party”. An increasing number of organizations are providing online dispute resolution services, especially in the United States⁶³, either offering electronic negotiation services or more traditional arbitration and mediation services.

1. Online negotiation

Negotiation thrives on technological changes through blind bidding which is one of the most prevalent dispute resolution services available online. “The common characteristic of these processes is the parties’ submission of monetary offers and demands which are not disclosed to their negotiating counterpart, but are compared by computer in rounds. If the offer and demand match, fall within a defined range or overlap the case is settled for the average of the offer and demand, the matching amount, or the demand in the event of an overlap. If the claim is settled, the participants are immediately notified while online or by email”⁶⁴.

Three negotiation expert systems invented in the United States at the end of the 1980s⁶⁵ will be studied now. Cybersettle⁶⁶ was the first website to offer settlement of financial disputes⁶⁷. Not surprisingly, its primary users are insurance companies. The program is initiated by the claimant⁶⁸ who is assigned a password designed to insure privacy and prevent unauthorized access and enters three figures constituting demands in differing amounts. The other party is then

⁵⁶ Ibid. p.26.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ See Glossary.

⁶⁰ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, Chapter 4 “Introducing the Fourth Party” p.93-116.

⁶¹ Ibid, p.93.

⁶² See blind bidding defined in the Glossary.

⁶³ There should be around 24 ODR service providers in the US.

⁶⁴ See WIENER, Alan “Opportunities and Initiatives in Online Dispute Resolution“, SPIDR News, Summer 2000, Volume 24, N°3, republished in <http://www.mediate.com/articles/awiener1.cfm>.

⁶⁵ See Glossary.

⁶⁶ See website at <http://www.cybersettle.com>.

⁶⁷ See CHRISTENSEN, Christopher, “Can Disputes Be Resolved in Cyberspace?”, *New York Law Journal*, May 8 2000 (about Cybersettle and ClickNsettle).

⁶⁸ See Glossary.

notified that the case is online and available for settlement and also enters three amounts. The amounts entered are automatically compared, starting with the highest demand and the lowest offer. If on comparing any of the three pairs of figures the offer and demand are within 30% or \$5,000 of each other, the claim is settled for the median amount, and notification of the settlement is sent to the parties. Should settlement not be achieved, a party's offers or demands are not disclosed to the other party. 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 \$10,000, the fee is \$150 for each party. If a case settles for more than \$10,000, the fee is \$200 for each party. This automated online process is effective because it avoids the posturing and personality conflicts that can occur in personal negotiations. In addition, the non-disclosure of unsuccessful offers and encourages the parties to be more realistic in their evaluations. Since August 1988, according to co-founder James Burchetta, more than 5,000 disputes have been settled in this manner by CyberSettle⁶⁹.

Cybersettle was followed by ClickNSettle⁷⁰. With also the help of an expert system. It offers two settlement process options: one intended for personal injury and workers' compensation claims and one for other types of monetary disputes. The complainant initiates settlement negotiation, which includes the option to proceed to NAM⁷¹ mediation or arbitration should efforts at settlement fail. The parties have sixty days to settle their dispute. The initiating party submits three demands in varying amounts. Parties are given the option of a "closed" or "open" negotiation model. Under the closed model⁷², neither party either sees the other's demands or offers. Under the "open" model, a party can view the other's party offer or demand only after having made a demand or offer. Whenever any offer is within twenty percent of any demand, there is settlement of the median. ClickNSettle charges a \$20 registration fee per party and an additional \$10 fee for each offer or demand made. If there is no settlement and a party has made less than five offers or demands, there is an additional \$50 "expiration fee". If the parties achieve settlement, each party is charged an additional fee based on the amount of settlement.. Currently, ClickNSettle is used by Toys "R" Us to settle claims in New York City and Connecticut, by American Transit Insurance, an insurer which handles inter-city claims and by a regional office of Traveler's Insurance⁷³.

These two processes have successfully adapted the ADR called baseball or final-offer arbitration⁷⁴ to the online environment. These systems are quick and relatively easy to use. They are also moderately expensive compared to the cost of litigation, particularly high in the US. Indeed "Americans spend \$300 billion a year just on litigation fees"⁷⁵. But they are also extremely limited. Indeed, they apply only to single variable disputes. "The insurance context is a perfect first arena for blind bidding because differences often focus exclusively on money and the existing system is both expensive and inefficient"⁷⁶. Due to its effectiveness to resolve purely monetary disputes, the use of blind bidding systems will not solely be used in insurance claims. Indeed, they can be "injected into any phase of a dispute resolution process.

⁶⁹ See KATSH, Ethan, "The new Frontier: Online ADR becoming a global priority", *Dispute Resolution Magazine*, Winter 2000, p.7 available at: http://www.umass.edu/cyber/katsh_aba.pdf.

⁷⁰ It is a wholly owned subsidiary of NAM Corp which is trading on the NASDAQ. See website at <http://www.clicknsettle.com>.

⁷¹ See supra.

⁷² which resembles the Cybersettle system.

⁷³ See SUSSKIND, Richard, "Net service breaks net ground", *The Times*, December 14 1999 (about ClickNsettle).

⁷⁴ Ibid.

⁷⁵ See KELLNER, Tomas, "Forget the gavel and click on the mouse", *Forbes*, July 2 1999.

⁷⁶ See KATSH, Ethan, RIFKIN, Janet, "Online Dispute Resolution: resolving conflicts in Cyberspace", 2001, Jossey-Bass, San Francisco, p.62.

OnlineResolution.com⁷⁷, for example offers blind bidding as a standard feature in its 'Resolution Room' process⁷⁸.

The third process is much more sophisticated. SmartSettle⁷⁹ offers support for simple and complex disputes through a patented neutral site. "The system is promoted as integrating interest-based negotiation principles with technology designed to optimize settlements"⁸⁰. A neutral helps parties jointly model their negotiation problem and then assists each party individually input their confidential preferences from their private computer terminal. SmartSettle works by having disputants move through several stages, each of which clarifies what is at issue in the dispute, how strongly the parties feel about the different issues, and what range of outcomes might be acceptable⁸¹. This information is regrouped on a single negotiating form. The striking feature of this system is that "it can take any tentative agreement and suggest alternative approaches that give each party more than they were willing to accept in the settlement that had been agreed to"⁸². This software bring parties to reach win-win solutions which were not previously apparent to them. It is less user-friendly than blind bidding systems but this multi-tier negotiation approach could be used in the future by other ODR service providers, especially by mediation websites whose numbers are growing.

2. Online mediation and arbitration

An increasing number of ODR providers are mediating and arbitrating disputes over the Internet. They are mostly American but mediation websites have started to develop on the other side of the Atlantic. In the UK, Consensus Mediation.com⁸³ was the first dispute resolution service to offer online mediation services. Since 1999, the e-Mediator deals with disputes arising out of online relationship. In addition, a new ODR service "the Claim Room"⁸⁴ also provides since April 11 2001 an always open online negotiating/mediating area and blind bidding tool for resolving monetary disputes and consumers' complaint.

As far as France is concerned, the Imaginons un réseau Internet solidaire (IRIS)⁸⁵ did a mediation experiment regarding non-contractual conflicts between private parties from March 1998 to March 1999. During one year, the IRIS Mediation experiment received 125 mediation requests, 61 had an effect (50% could not be carried through due to the absence of consent of the other party. Out of the 61 mediations, 53 were successful (31 involved trademark violation claims, 19 concerned privacy violations or defamation, and 2 were about domain names) and 8 failed (in 6 cases: one party gave up during the process, and in 2 cases: no amicable agreement were

⁷⁷ See website at <http://www.onlineresolution.com>.

⁷⁸ See, KATSH, Ethan, RIFKIN, Janet, Ibid., p.63.

⁷⁹ Originally called OneAccord see website at <http://www.smartsettle.com>. See for an hypothetical environmental negotiation on SmartSettle: THIESSEN, Ernest M., MACMAHON, Joseph P. "Beyond Win-Win in Cyberspace", 15 *Ohio State Journal on Dispute Resolution*, 2000, p. 643 also available at <http://www.smartsettle.com/more/beyond/BeyondWinWin.html>.

⁸⁰ See WIENER, Alan " Opportunities and Initiatives in Online Dispute Resolution ", Society for Professionals in Dispute Resolution (SPIDR) News, Summer 2000, Volume 24, N°3, republished in <http://www.mediate.com/articles/awiener1.cfm>.

⁸¹ KATSH, Ethan, RIFKIN, Janet, "Online Dispute Resolution: resolving conflicts in Cyberspace ", 2001, Jossey-Bass, San Francisco, p.63.

⁸² Ibid.

⁸³ See website at <http://www.consensus.uk.com/e-mediator.html>.

⁸⁴ See website at <http://www.theclaimroom.com>.

⁸⁵ IRIS is an Association founded on October 4 1997 by the members of the Internet association users " l'Association des utilisateurs d' Internet" (AUI) and of the members of the citizen group "Citoyens Associés pour la défense des libertés" which aims at promoting public and private liberties on the Internet.

found)⁸⁶. In addition, the “Centre de Médiation et d’ Arbitrage de Paris (CMAP)⁸⁷” launched since November 2000 an online website to mediate and arbitrate business-to-business (B2B) ⁸⁸disputes called CyberCMAP in partnership with the Canadian ODR service provider eResolution ⁸⁹. But no case has been submitted to the CyberCMAP⁹⁰. Finally, the German ODR service provider TrustShops wants to expand its activities in France⁹¹.

2.1. Online mediation

A typical online mediation procedure takes place as follows. The complainant initiates it by completing a confidential form on the provider’s website. Then, a mediator contacts the respondent in order for him/her to participate. Both parties set forth the mediation ground rules. The mediator communicates with the parties, sometimes jointly and sometimes individually, to facilitate an agreement. If an agreement is reached, it usually takes the form of a writing.

Thus, the online process does not differ very much from the offline process, except for the expanded use of technology. Email is the mediator’s best friend for purposes of framing and moving discussion forward. But email was already used by offline mediators. In online mediation, websites are providing online mediators with new tools to supplement email with other communication tools including electronic conferencing, online chat ⁹², video-conferencing, facsimile and telephone. Some ODR providers will arrange face-to-face meetings ⁹³ with the participants if necessary and practical, however there is a discernable preference among many for electronic communication.

If we take the example of Online Resolution.com⁹⁴ an American company which is a spin-off of the highly used Mediation Information and Resource Center⁹⁵ and Mediate.com and which offers online mediation and arbitration services in the business-to-business (B2B) sector and in the business-to-consumer (B2C) sectors. After the complainant registered the dispute, the ODR service provider contacts the respondent. If the other party agrees to use Online Resolution.com, the mediation begins. All online mediators have intensive offline experience and receive additional specialized online training. Each mediator assists the parties to search for a solution and helps the parties draft the terms of the agreement when it is reached. The fees range from \$50 per hour per party for disputes under \$10, 000 to \$100 per hour per party for disputes over \$50, 000⁹⁶.

The beauty of mediation is that parties retain decision-making power. Online mediation may be appropriately followed by online arbitration. But it is advisable that online arbitration would not

⁸⁶ Figures given by the President of IRIS Meryem Marzouki during the ADR Conference for Business to Consumer (B2C) e-Commerce, June 1, 2001, U.S Embassy Paris. More details at <http://www.iris.sgdg.org/documents>.

⁸⁷ Paris Center for mediation and arbitration depends on the Paris Chamber of Commerce and Industry and was created in 1995 in partnership with the Tribunal de Commerce de Paris, l’Ordre des Avocats du Barreau de Paris, l’Association française d’arbitrage and le Comité français de la Chambre de Commerce Internationale.

⁸⁸ See Glossary.

⁸⁹ See <http://www.eresolution.ca>.

⁹⁰ Information given by Rémi Tournade, the Responsable du Secrétariat Général, CMAP, during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris. For more details see the website <http://cybercmap.asso.fr>.

⁹¹ See <http://www.trustshops.de>.

⁹² See Glossary.

⁹³ Ibid.

⁹⁴ See website at <http://www.onlineresolution.com>.

⁹⁵ See website at <http://www.mediate.com>.

⁹⁶ Information given by Colin Rule the President of Online Resolution during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris. For more details see the website <http://cybercmap.asso.fr>.

be offered by the same impartial that offers online mediation services. Otherwise, the mediation process itself becomes contaminated and parties will feel that they are at risk and need to persuade the mediator/ arbitrator from the very beginning. An acceptable alternative is that parties may opt out of the process following mediation component or at that time choose to substitute another decision-maker.

2.2. Online arbitration

Online arbitration proceeds along different communication stages (process agreement, initial presentations, rebuttals, consideration, decision). "Arbitration is in general a much less complicated communication process than mediation and the technology and software required for arbitration will tend to be less complicated. In the simplest arbitrations, software that allows positions to be stated and documents to be shared may provided a sufficient frame for the process"⁹⁷.

One of the challenges with online arbitration is that it is binding and parties may give up all due rights to participate without fully understand this. To the extent that one or more parties are disappointed with the imposed solution, they may be substantial problems with implementation and enforcement. We will studied the legal issues involved in online arbitration in a second part.

Webdispute.com⁹⁸ is an example of an online arbitration service provider. This US based company arbitrates online commercial disputes for business-to-business (B2B) and business-to-consumers disputes (B2C)⁹⁹. First, the consent of both parties is required. Then, they 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 will notify the parties of his/her decision within twenty business days. Webdispute.com costs from \$ 100 to \$ 600 for online arbitration.

Other ODR providers do not call their online dispute resolution specialists either "arbitrator" or "mediator". For instance, Square Trade which was founded in 1999 by three former McKinsey and Co. consultants and Harvard Business graduates. For them, "the lure of the Net is that expertise can be aggregated, applied, enhanced by new network software, even when the third party and disputants are in different places"¹⁰⁰ SquareTrade is involved in setting B2C disputes. This is one of the two areas where ODR is successful and which will be examined now.

C. Examples of successful Online Dispute Resolution

1. Business to Consumer

Article 2 (e) of the European Directive on electronic commerce¹⁰¹ defines the term "consumer" as

⁹⁷, KATSH, Ethan, RIFKIN, Janet, "Online Dispute Resolution: resolving conflicts in Cyberspace", 2001, Jossey-Bass, San Francisco, p.138.

⁹⁸ See website at <http://webdispute.com>.

⁹⁹ See Glossary.

¹⁰⁰ See KATSH, Ethan, "The new Frontier: Online ADR becoming a global priority", *Dispute Resolution Magazine*, Winter 2000, p.7 available at: http://www.umass.edu/cyber/katsh_aba.pdf.

¹⁰¹ See E-commerce Directive 2000/31/EC of June 8 2000 available at <http://europa.eu.int/ISPO/eif/Internet/PolicesSite/E-commerce/ECOMM16oct2000/TSLD009.htm>. See extracts in COSTES, Lionel, "La directive européenne sur le commerce électronique", *Cahiers- Lamy- Droit de l'informatique*, août- septembre 2000, n°128, p.1-5.

meaning “any natural person who is acting for purposes which are outside his or her trade, business or profession”¹⁰². The number of Internet-related complaints is skyrocketing, especially for online auctions. “In 2000, the Federal Trade Commission received 10, 700 consumer complaints, more than half of the Net-related complaints”¹⁰³. The business-to-consumer ODR providers generally “take a small cut-about 2 percent to 4 percent of the disputed amount as their fees. Most e-commerce squabbles over relatively small amounts of money and between different parties in different geographic locales, so traditional approaches like going to court are not practical”¹⁰⁴.

Two examples will illustrate this point of view. First, the most ambitious recent American ODR start-up which began in February 2000 called SquareTrade ¹⁰⁵ will be examined. It is based on a model developed by the Center for Information Technology and Dispute Resolution at the University of Massachusetts Amherst. This hybrid process, which relies on a two stage process: negotiation between the parties and mediation with the intervention of a third party. Regarding negotiation, “It provides web-based software that walks users through a step-by-step process for working out disputes related to online transactions”¹⁰⁶. “The web-based service standardizes complaints through “radio buttons” that let a buyer click to articulate a problem for a seller – rather than writing a long email and sending it blindly to a random address”¹⁰⁷. If this does not resolve the case, SquareTrade may assign a mediator at the request of the plaintiff ¹⁰⁸. It has agreements to be the dispute resolution provider for over a dozen marketplaces, the largest of which is the online auction site e-Bay ¹⁰⁹ and as of early December 2000, had handled over thirty thousand disputes, most of which probably originated in transactions at eBay”¹¹⁰.

E-Bay has chosen SquareTrade as its preferred dispute resolution provider after a successful pilot program of several months. SquareTrade offers “a free and paid service to eBay users whose transactions go wrong. Initially, a disgruntled user can file a complaint through the website and try for a totally automated (and totally free) solution”¹¹¹. After the respondent is notified about the complaint, the parties are given a web-based decision tool to say what they are willing to

¹⁰² See VAHRENWALD, Arnold, WILIKENS, Marc, MORRIS, Philip, from the JOINT RESEARCH CENTER of the EUROPEAN COMMISSION, “ Out-of-court dispute settlement systems for e-commerce- the report from the workshop held in Brussels on March 21 2000 “, Part II The protection of the recipient available at <http://dsa-isis.jrc.it/ADR.report.html>.

¹⁰³ See MILLER, Leslie, “Legal site helps untangle web disputes”, USA Today, July 10 2000 at <http://www.usatoday.com/life/cyber/tech/cti200.htm>.

¹⁰⁴ See SAID, Carolyn, “Net services referee disputes between online sellers and buyers”, June 12 2000, San FranciscoChronicle,at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/06/12/BU472261.DTL&type=business>.

¹⁰⁵ See <http://www.squaretrade.com>.

¹⁰⁶See MILLER, Leslie, “Legal site helps untangle web disputes”, USA Today, July 10 2000 at <http://www.usatoday.com/life/cyber/tech/cti200.htm>.

¹⁰⁷ See TILLET, L. Scott, “New Channel to resolve disputes”, *Internet Week*, August 14 2000 at <http://internetwk.com/ebizapps/ebiz081400-2.htm>.

¹⁰⁸See WIENER, Alan “ Opportunities and Initiatives in Online Dispute Resolution “, Society for Professionals in Dispute Resolution (SPIDR) News, Summer 2000, Volume 24, N°3, republished in <http://www.mediate.com/articles/awiener1.cfm>.

¹⁰⁹ E-Bay is an American web-based auction service popular with consumers and small businesses wishing to buy and sell merchandise and services. “Approximately five million items are for sale at any one time and two millions transactions take place each week”. See KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, “ E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law””, *15 Ohio State Journal of Dispute Resolution*, Spring 2000, p.705-734.

¹¹⁰ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, p.66.

¹¹¹ See DENNEHY, Michelle, “E-bay extends SquareTrade deals”, *National Public Radio*, July 26 2000,at <http://www.squaretrade.com/aboutus/nationalpublicradio.jsp>.

give up. "SquareTrade has found, quite remarkably, that approximately 80 percent of the disputes filed are resolved through direct negotiation"¹¹². "If the initial mediation does not work, users can request a professional mediator for a \$15 fee. The process is then voluntary until both parties agree to an outcome. Businesses who want to notify their customers that they agree to be mediated by SquareTrade can purchase a SquareTrade seal¹¹³ and post it wherever they sell, whether it be individual item description pages or web pages. As we shall discuss in part three, it is difficult to build trust in the online environment, and a seal or a trustmark is one way to do it, but we will return to that issue again in part three.

Second, Better Business Bureau (BBB) Online¹¹⁴ provides a consumer complaint dispute resolution process. During 1999, the BBB system handled over 420, 000 formal complaint cases. Since 1995, a special BBB program called BBB AUTO LINE¹¹⁵ handles automobile warranty disputes between US, Japan and Northern American automobile manufacturers and consumers. During 1999, BBB AUTO LINE handled nearly 33, 00 cases. After receiving a consumer complaint filed online¹¹⁶ or offline, BBBOnline will initially try a form of simple conciliation¹¹⁷ by approaching the right person within a company. This often solves the problem immediately.¹¹⁸ If conciliation does not work, a simplified mediation process is conducted using email, correspondence and telephone¹¹⁹. If the parties do not reach an agreement after these semi-online efforts, BBBOnline try to solve the case through traditional offline means like F2F mediation or conditionally binding arbitration¹²⁰.

Another forthcoming¹²¹ online mediation and arbitration project called ECODIR¹²² should also be mentioned. Through ODR it is possible to handle a large number of consumer disputes efficiently. However, a parallel universe for online transactions in which consumers are deprived of their rights should not be created¹²³. Another successful area of ODR is going in the technical field of domain names will be studied now.

2. Domain names

The application of ODR to domain name disputes is an extension of its already prominent use in intellectual property disputes¹²⁴ Created in 1998, at the initiative of the Department of

¹¹² See KATSH, Ethan, RIFKIN, Janet, "Online Dispute Resolution: resolving conflicts in Cyberspace", 2001, Jossey-Bass, San Francisco, p.142.

¹¹³ See Glossary and part three for more explanations.

¹¹⁴ BBBOnline is a subsidiary corporation of the Central Business Bureau which regroups 129 American and 75 Canadian Better Business Bureaus and has a vast offline ADR experience. See <http://www.bbbonline.org>.

¹¹⁵ see <http://www.bbbonline.org/COMPLAINTS/BBBautoLine.asp>.

¹¹⁶ On average month during 1999, roughly 24 % of all BBB complaints arrived online. In November 1999, that figure was 27 % and in December 1999, it had increased to 34 %. In January 2000, that percentage has augmented again. Information given by Charles Underhill, Senior Vice President, Dispute Resolution Division, Council of Better Business Bureau, during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris

¹¹⁷ See Glossary.

¹¹⁸ See VAN DEN HEUVEL, Esther, "Online dispute resolution as a solution to cross-border e-disputes: an introduction to ODR", August 2000, at http://www.oecd.int/dsti/sti/it/secur/act/Online_trust/vandenheuvel.doc.

¹¹⁹ Ibid.

¹²⁰ Conditionally binding arbitration means that it is binding on the business but not on the consumer.

¹²¹ launched at the end of June 2001 and which will be fully operational by 2002.

¹²² which is an acronym of Electronic Consumer Dispute Resolution See <http://www.ecodir.org>. It partakes in the European Union initiatives in the field of consumer access to justice and confidence in the online environment.

¹²³ See part two and three. BBBOnline like SquareTrade offer a seal or trustmark to be posted by businesses.

¹²⁴ HALPERN, Marcelo, MEHROTRA, Ajay K., " From international treaties to internet norms: the evolution of international trademark disputes in the internet age", 21 *University of Pennsylvania Journal of International Economic Law*, 2000, p.547.

Commerce, “the Internet Corporation for Assigned Names and Numbers (ICANN) consists of a broad coalition of business leaders, technical advisers, academics and other Internet users”¹²⁵. “Prior to ICANN, the domain name registration process was administered by only one company, Network Solutions, Inc, a private US corporation based in Herndon, Virginia”¹²⁶. One of ICANN’s primary duties has been to co-ordinate the technical management of the Internet ‘s domain name¹²⁷ system (DNS).

To further this goal, ICANN has implemented on October 24 1999 one of its most significant policy achievements: the Uniform domain name Dispute Resolution Policy (UDRP)¹²⁸. The UDRP is only applicable to the registration of any generic top-level Generic Top Level Domains (gTLDs)¹²⁹ such as .org or .com. By applying for registration, the applicant has to declare his or her consent to the UDRP.

ICANN aims at the settlement of disputes between any registrar of a gTLD and a complainant who asserts that the applicant’s domain name is identical or confusingly similar to a trademark¹³⁰ or service mark¹³¹ in which the complainant has rights, that the applicant has no rights or legitimate interests in respect of the domain name and that the applicant’s domain name is being used in bad faith.

However, ICANN does not organize the out-of-court settlement itself, it merely provides a list of organizations which serve as dispute resolution forums to “arbitrate” domain names disputes under the UDRP rules¹³². Even if the term “arbitration” is employed, the UDRP is however not mandatory¹³³. It corresponds more to non-binding “arbitration”¹³⁴. Some authors even call it a unique or *sui generis* process¹³⁵. Indeed, unlike disputes over goods or services, no monetary damages are awarded. The only “award” is the right to use a domain name. In addition, trademark holders or the party which has lost the “arbitration” can still go to court to enforce their rights after the “award” is handed down. Court cases, however, are relatively few compared to the number of disputes handled through the UDRP¹³⁶.

Since October 1999, ICANN has accredited four dispute resolution providers to hear Internet domain name disputes¹³⁷.

--- On December, 1, 1999, the World Intellectual Property Organization (WIPO) Arbitration and

¹²⁵ See LIDE, Casey E., " ADR in Cyberspace: the role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation", 12 *Ohio State Journal on Dispute Resolution*, 1996, p.193-221.

¹²⁶ Ibid.

¹²⁷ See Glossary.

¹²⁸ See Rules for Uniform Domain-Name-Dispute Resolution Policy at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>.

¹²⁹ See Glossary.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² See LETOURNEAU, Emmanuelle, “Noms de domaine: la résolution des conflits sous la politique de règlement uniforme de l’ ICANN”, 11 octobre 2000, at <http://www.juriscom.net/pro/2/ndm20001011.htm>.

¹³³ See MOYSE, Pierre - Emmanuel, “La force obligatoire des sentences arbitrales rendues en matière de noms de domaine”, 10 octobre 2000, at <http://www.juriscom.net/pro/2/ndm20001010.htm>.

¹³⁴ See Glossary.

¹³⁵ See ADER, Basile, "le nom de domaine dans le paysage juridique français", *Légicom*, 2000/1 et 2, n°21/22, p.37-44.

¹³⁶ which is one measure of the UDRP ‘s success. See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, p.65.

¹³⁷ Approved providers for Uniform Domain-Name-Dispute Resolution Policy are listed at <http://www.icann.org/udrp/approved.providers.htm>

Mediation Center¹³⁸ was the first to gain approval. It is based in Geneva, Switzerland and is a unit of the International Bureau of the World Intellectual Property Organization. Established in 1994, the Center is generally preferred by European companies due to the reputation of independence and neutrality of its parent body¹³⁹ and is the most used. The WIPO Arbitration and Mediation Center has been obliged to adapt its standard arbitration rules to accommodate online arbitration.¹⁴⁰ Since the beginning of year 2000, the WIPO Arbitration and Mediation Center has been submitted 1010 cases, 525 of which were already solved in August 2000.¹⁴¹ This is the most commonly used body for resolving domain name disputes¹⁴². and the number of cases submitted to it is growing rapidly¹⁴³. The current fee is \$ 1,000 for a single-panelist proceeding and \$2, 500 for a three-panelist proceeding and the average delay is 40 days¹⁴⁴.

--- Second, on December, 23 1999, the National Arbitration Forum (NAF)¹⁴⁵ was accredited by ICANN. NAF was founded in 1986 and is based in Minneapolis, Minnesota. Most of its neutrals are retired American judges. For a single-member panel, the fee is cheaper than WIPO at \$750 but for a three-member panel it is \$2,500 it is the same.

--- Third, e-Resolution¹⁴⁶ gained approval as domain name dispute-resolution service provider on January 1 2000. Companies based in current and former British Commonwealth countries tend to favour e-Resolution, which offers, like the other three domain name online dispute resolution provider, legal expert in the field of Intellectual Property and Internet Law, drawn primarily from law faculties all over the world. E-Resolution is a relatively new organization established in 1999 and based in Montreal, Quebec. "Due to its relative youth and lack of an established track record, some attorneys have expressed doubts about the forum"¹⁴⁷. In addition, e-Resolution is the most defendant friendly than WIPO and NAF which tend to be more complainant-friendly providers¹⁴⁸. Finally, e-Resolution is the least expensive among the four providers. The current fee is \$ 750 for a single-panelist proceeding and \$ 2,200 for a three-panelist proceeding.

--- Fourth, ICANN granted accreditation to the Center for Public Resource (CPR) Institute for Dispute Resolution¹⁴⁹. CPR which is located in New York established in 1979 "a widely respected alliance of 500 general counsel of global corporations and partners of major law firms formed to integrate ADR into the mainstream of law departments and law firms"¹⁵⁰. CPR has so

¹³⁸ See <http://www.arbiter.wipo.int>.

¹³⁹ See LEE, Christopher S., "The development of arbitration in the Resolution of Internet Domain Name Disputes", *7 Richmond Journal of Law and Technology*, Fall 2000, p.6.

¹⁴⁰ See DONAHEY, Scott "Current developments in Online Dispute Resolution", International Conference on Electronic Commerce and Intellectual Property, Geneva, September 14 to 16, 1999 available at: <http://www.wipo.org/publications/general/121/2000/february.pdf>.

¹⁴¹ See LAUNET, Edouard, NOUALHAT, Laure, "L'instance genevoise arbitre les querelles liées aux adresses du web: 1010 litiges en huit mois", *Libération*, 17 août 2000.

¹⁴² "WIPO and NAF attracts the largest number of complaints (61% and 31% respectively)" see MUELLER, Milton, "Rough justice: an analysis of ICANN's Uniform Dispute Resolution Policy, November 2000 available at <http://dcc.syr.edu/roughjustice.htm>.

¹⁴³ See COSTES, Lionel, "Le rôle du centre de médiation et d'arbitrage de l'OMPI pour le règlement des litiges relatifs aux noms de domaine", *Cahiers- Lamy- Droit de l'informatique*, Octobre 2000, n°129, p.1-5.

¹⁴⁴ See BUCKI, Céline, "Le conflit entre marques et noms de domaine", *Revue du droit de la propriété intellectuelle*, 1^{er} juin 2000, p.33.

¹⁴⁵ See <http://www.arbforum.com/domains>.

¹⁴⁶ See <http://www.eresolution.ca>.

¹⁴⁷ See LEE, Christopher S., "The development of arbitration in the Resolution of Internet Domain Name Disputes", *7 Richmond Journal of Law and Technology*, Fall 2000, p.6.

¹⁴⁸ See MUELLER, Milton, "Rough justice: an analysis of ICANN's Uniform Dispute Resolution Policy, November 2000 available at <http://dcc.syr.edu/roughjustice.htm>.

¹⁴⁹ See at <http://www.cpradr.org>.

¹⁵⁰ See LEE, Christopher S., "The development of arbitration in the Resolution of Internet Domain Name Disputes",

far handled a very small number of cases. This is likely due to the higher fees that CPR charges (\$2, 000 for a single-member panel and \$4, 500 for three-member panel) and the relative newness and therefore lack of established track record in domain name disputes.

The UDRP rules provide a twelve-step process for a dispute resolution forum¹⁵¹ to settle a domain name dispute. “The process is designed to take a maximum of sixty days to complete from initial submission of the complaint to the final decision rendered. Step 1: 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. Step 2: the arbitrator acknowledges receipt via email and hard copy responses. Step 3: the dispute resolution forum contacts the Internet domain name registrar(s) to provide details regarding the domain name in dispute. Step 4: 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. Step 5: 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. Step 6: respondent is required to submit a response to the complaint with 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. Step 7: the forum then acknowledges receipt of the response or sends notice of default by respondent to both complainant and respondent. If the response is received after the twenty-day deadline, the dispute resolution center must then decide whether or not to accept the late submission”. Step 8: it consists of 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-endeavouring 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 complainant if it alone or with respondent elect three panelists and by all parties equally if the respondent alone has elected three. Step 9: the panel submits its decision to the forum within fourteen days of its appointment. Step 10: within three days after receipt of the decision, the forum notifies the parties, ICANN, and the respective Internet domain name registrar(s). Step 11: 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. Step 12: the registrar (s) implements the final decision”¹⁵².

On January 14, 2000, the WIPO Arbitration and Mediation Center resolved its first dispute under UDRP in less than 40 days and the total cost of between \$2, 000 and \$ 3, 000. The timeliness of the process was beneficial to the complainant World Wrestling Federation. Likewise, Michael

⁷ *Richmond Journal of Law and Technology*, Fall 2000, p.6.

¹⁵¹ Both the WIPO Center and e-Resolution have adopted supplementary rules.

¹⁵² LEE, Christopher S., "The development of arbitration in the Resolution of Internet Domain Name Disputes", 7 *Richmond Journal of Law and Technology*, Fall 2000, p.7. See also DAVIS, Benjamin G, "The New New Thing: Uniform Domain-Name Dispute-Resolution Policy of the Intbernet Corporation for Assigned Names and Numbers", *Journal of International Arbitration*, June 2000, Vol.17, n°3, p. 124-131.

Bosman, the individual who was forced to relinquish the “worldwrestlingfederation.com” domain name, expressed his satisfaction that the entire dispute ‘did not cost him a dime’ and was ‘fair and unbiased’ even though he was disappointed at the decision¹⁵³. On April 6 2001, thanks to the WIPO Center, “British authors Julian Barnes and Louis de Bernières, British historian Antony Beevor and French erotic film star Laure Sinclair have won control of Internet sites registered in their names”¹⁵⁴.

From December 1999 to May 2001, approximately thirty-five hundred complaints were filed with almost three-quarters of the decisions being made in favour of the complainant or trademark holders¹⁵⁵. “In the 54 completed cases posted on the ICANN website through March 15 2000, 49 of them were resolved by a decision. All but one were heard before single-member panels, with one case before a three-member panel. And of those cases, 17 were decisions taken with a defaulting respondent”¹⁵⁶. The number of cases is likely to expand in the future ¹⁵⁷.

“With the cost of Internet domain name litigation \$15 000 before United States Federal civil courts and the length of proceedings ranging from six months to three years”, online domain name dispute resolution stands as a less expensive, faster alternative”¹⁵⁸. Furthermore, the relative ease of filing, the conduct of proceedings without the need to travel make it an excellent tool.¹⁵⁹ Finally, the use of expert on “arbitration” panels make ICANN ’s Policy more efficient. However, the UDRP has been criticized for “reinforcing a bias towards large commercial interests, namely those who already have trademarks registered”¹⁶⁰. It has also being said that the decentralized aspect of the proceedings, goes against the uniformity of the decisions rendered in domain name disputes.¹⁶¹ Nonetheless, this system remains a significant example of a successful ODR process, even though its growth is not smooth due to legal and also technical issues.

¹⁵³ See WALKER, Luke A. “ICANN's uniform trademark policy”, 15 *Berkeley Technology Law Journal*, 2000, p.308. See also CHANDRANI, Rupesh, “Beating the Cybersquatters- Dispute Resolution v. U.S. Statutory Protection”, *Entertainment Law Review*, 2000, April 1st, p.76-79.

¹⁵⁴ See Reuters News Agency, “Writers, porn star win Web names”, *Globe and Mail*, April 6 2001 available at <http://rtnews.globetechnology.com/>.

¹⁵⁵ See also statistical summary of proceedings under Uniform Domain-Name-Dispute Resolution Policy, May 16 2001, can be found: at <http://www.icann.org/udrp/proceedings-stat.htm>.

¹⁵⁶ See DAVIS, Benjamin G, "The New New Thing: Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers", *Journal of International Arbitration*, June 2000, Vol.17, n°3, p. 132-133.

¹⁵⁷ Indeed, there are believed to be currently over 10, 000 disputed domain names for every domain name registration dispute, approximately and domain name grabbing or cybersquatting (See Glossary) is likely to grow with the exponential development of e-commerce.

¹⁵⁸ See LEE, Christopher S., "The development of arbitration in the Resolution of Internet Domain Name Disputes", 7 *Richmond Journal of Law and Technology*, Fall 2000, p.9.

¹⁵⁹ See DREYFUS-WEILL, Nathalie, “La procédure en ligne: une solution dans les conflits entre noms de domaines et marques”, *Les Petites Affiches*, 14 mars 2000, n°52, p.4-8.

¹⁶⁰ See HALPERN, Marcelo, MEHROTRA, Ajay K., " From international treaties to internet norms: the evolution of international trademark disputes in the internet age", 21 *University of Pennsylvania Journal of International Economic Law*, 2000, p.556 and see MUELLER, Milton, “Rough justice: an analysis of ICANN’s Uniform Dispute Resolution Policy, November 2000 available at <http://dcc.syr.edu/roughjustice.htm>.

¹⁶¹ See DE CANDE, Patrice, " Conflit noms de marques- noms de domaine: premières décisions de jurisprudence UDRP", *Dalloz*, 2000, n°35, p.543.

II. Discussion: present Online Dispute Resolution

It is generally agreed that ADR occurs in “the shadow of law meaning that negotiation, mediation and arbitration take place with the parties being somewhat aware that law, looming in the background, is a force that should enter into any calculations in how one develops and pursues a strategy. But where is law in cyberspace? What is the law? Whose law and jurisdiction apply?”¹⁶². Online arbitration will be studied separately because it is highly regulated by international private law rules unlike online mediation or negotiation. Finally, outside of the legal considerations involving in handling disputes online, there are some technical issues.

A. Disadvantages of Online Dispute Resolution.

1. Legal issues

The introduction of information technology into the dispute resolution process raises a number of legal issues. The precise nature of these issues and the manner which they are treated may vary from one system to another. Nevertheless, they are some general traits. Contracts concluded by electronic means, including dispute resolution agreement raise a number of legal issues. Other legal problems may arise in the course of the proceedings.

1.1. The online dispute resolution agreement

The legal basis for any ODR mechanism, whether it be negotiation, mediation or arbitration is the agreement of the parties. Final decisions of the ODR services provider will only be legally enforceable by national courts if they were based originally on a valid agreement of the parties to submit their dispute of ODR. When the ODR agreement is formed between two businesses, there is no hindrance to its validity in US, UK or French law. There are more limitations concerning the business to consumer sector.

1.1.1. Validity of Online Dispute Resolution agreement in the Business-to-Business sector

Concerning the Business to Business sector (B2B), the use of online general terms and conditions, for example available via a link on the website is widespread. It may facilitate ODR agreements provide that the ODR services provider does not have to provide the relevant communication of such terms and conditions on paper¹⁶³. In cross-border contracts, the validity of such clauses will depend on the international private law. The same principles are applicable which govern the validity of such terms in the traditional commerce. If both parties use general terms which are contradictory, the relevant problem will be dealt with traditional international private law rules. For example, if the ODR services provider uses a term according to which disputes shall be referred to arbitration but to mediation to the recipient’s general terms, the solution will depend on the contractual relation between the parties.

In many cases, the reference to out-of-court dispute settlement is exclusive, that is to say the dispute can no longer be brought before the courts. The validity of such clauses is subject to each national law. But such clauses will be generally considered as effective in US, UK and French law regarding the B2B sector. It might, however, not be the case regarding B2C.

¹⁶² KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, “ E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law””, *15 Ohio State Journal of Dispute Resolution*, Spring 2000, p.706.

¹⁶³ See *Ibid*, p.10.

1.1.2. Permissibility of binding consumer Online Dispute Resolution

Regarding B2C transactions, the permissibility of such an agreement needs to be checked. There are instances in which it may be legally impossible for a consumer to agree to submit a dispute to a binding ODR. Indeed, in the European Union, the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters¹⁶⁴ and the EU Council Directive 93/13/EEC of April 5 1993¹⁶⁵ place stringent restrictions on the ability of consumers to waive their rights to go to court.

On the one hand, Article 13 of the 1968 Brussels Convention, which applies to out-of-court settlements but is inapplicable to arbitration, generally gives consumers the right to bring suit in the Contracting State in which they are domiciled, and provides that the right may not be derogated except in some special circumstances, such as by an agreement which is entered into after the dispute has arisen [Article 15(1)]. On the other hand, Article 3 of the 1993 EU Directive on “Unfair terms in consumer contracts” provides that contractual clauses are presumptively unfair which exclude or hinder “the consumer’s right to take legal actions or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions”. This provision has been interpreted as meaning that “any ADR system’s which forecloses a consumer’s ability to go to court must provide legal safeguards similar to those applicable in the court system”¹⁶⁶. Consequently, it seems that any agreement by a consumer to submit a dispute to ODR and to waive the right to go to court would have in the European Union to, at a minimum, fulfil the following conditions. The agreement would have to be entered into by a consumer after the dispute has arisen and with full awareness of the consequences. ODR services provider would have to ensure at least the same degree of procedural fairness for the consumer as would litigation in court.

1.1.1. Form requirements

As to the form of the forum selection clause, there are not requirements in the above mentioned national laws, other than the studied limitations applying to the B2C sector. Article II (1) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10 1958¹⁶⁷ requires that the forum selection clause be in writing but it only applies to foreign arbitral awards¹⁶⁸. In addition, Article 17(1) of the European Union E-Commerce Directive¹⁶⁹ requires that “Member States shall not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means”. It removes legal uncertainties concerning the validity of electronic-concluded ODR agreements. Finally, President Clinton has signed in 2000 an Executive Order confirming that contracts may be reached online, without an original signature, based upon the digitally intent of the parties¹⁷⁰.

¹⁶⁴ <http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/index.html>.

¹⁶⁵ EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, *O.J.*, L95/29 of 21/04/93. Official Journal of the European Community.

¹⁶⁶ See <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

¹⁶⁶ See subpart B/

¹⁶⁷ See <http://europa.eu.int/ISPO/eif/Internet/PoliciesSite/E-commerce/ECOMM16oct2000/TSLD009.htm>.

¹⁶⁸ See MELAMED, Jim, HELIE, John, ”Online Dispute Resolution in the US“, available at <http://www.mediate.com/articles/ecodir1.cfm>.

¹⁶⁹ See <http://europa.eu.int/ISPO/eif/Internet/PoliciesSite/E-commerce/ECOMM16oct2000/TSLD009.htm>.

¹⁷⁰ See MELAMED, Jim, HELIE, John, *Ibid.*

1.2. The proceedings

1.2.1. Internet: a boundless medium

In online proceedings it may not be possible to determine a physical location where procedural acts of the ODR services provider are performed¹⁷¹. Indeed, “the Internet establishes a technological platform for a multimedia and computing converge and the boundaries surrounding them collapse. As a result, the Internet creates a functional whole, a ‘virtual reality’ or a ‘cyberspace’ that effectively takes communication off the ground and relieves the activity thereon from territorial boundaries. Events in cyberspace take place “everywhere if anywhere, and hence in no place in particular”¹⁷².

“The Internet’s novel, functional characteristics complicate the application of traditional principles of international law to any activity taking place thereupon”¹⁷³. Indeed, “while the Internet -or rather-, the cyberspace, that it functional creates-is essentially borderless and ubiquitous, traditional principles of international law, on the contrary, developed and intended to be developed on the basis of territoriality”¹⁷⁴.

This territorial concept pervades, in particular, the principles governing the jurisdiction of the States. Jurisdiction is important because it is used in private international law to determine what legislature, court or other decision making, including an ODR provider, has authority to decide legal questions about commerce or other activities. However, Internet diminishes territoriality since it is largely a boundless medium and it is difficult to localize an activity on the net. Indeed, a website may be viewed from any place in the world where there is access to Internet. In addition, “websites may be interconnected, regardless of location, by the use of hyperlinks”¹⁷⁵. Information that arrives on a website within a given jurisdiction may flow from a linked website outside that jurisdiction. Moreover, the actual location of computers is irrelevant to either the providers or recipients of the information, and there is no necessary connection between an Internet address and a physical location”¹⁷⁶. For instance, if French citizens are able to compose a webpage with pro Nazi material on a server located in the United States¹⁷⁷, where at least some such material is protected by the First Amendment¹⁷⁸. Does France have jurisdiction with respect to the material or must it yield it to the US? Do the French courts have jurisdiction over the web author or the operator of the Web server? Do the French authorities have enforcement jurisdiction to force the operators of routers in France to exclude the packets from the US server? Do they have enforcement jurisdiction to conduct electronic measures that would disable the webpage on the US server?

¹⁷¹ SCHNEIDER, Michael E., KUNER, Christopher, « Dispute Resolution in International Electronic Commerce », *Journal of International Arbitration*, Vol.14, n°3, September 1997, p.15.

¹⁷² See POST, David “Governing Cyberspace”, 43 *Wayne Law Review* 1997, 155 also available at <http://www.cli.org/Dpost/escl.htm>.

¹⁷³ See HEISKANEN, Viejo, “Dispute Resolution in International Electronic Commerce “, *Journal of International Arbitration*, Vol. 16, N°3, September 1999, p.32.

¹⁷⁴ However, a State may be entitled to exercise extraterritorial jurisdiction in some circumstances (e. g over nationals or over acts commenced within the State’s territory but completed or consummated aboard).

¹⁷⁵ See Glossary.

¹⁷⁶ See RICE, Dennis. T, " Jurisdiction in Cyberspace: which law and forum apply to security transactions on the Internet", 21 *University of Pennsylvania Journal of International Economic Law*, p.595-596.

¹⁷⁷ The facts are similar to the Yahoo case see references below.

¹⁷⁸ See PERRITT, Henry, “Jurisdiction and the Internet: some Anglo-American perspectives”, *Internet Law and Policy Forum Jurisdiction: Building confidence in a Borderless Medium*, Montreal, Canada, 26-27 July 1999 at <http://www.ilpf.org/confer/present99/perritt99/perritt.htm>.

“At present, the rules of jurisdiction over activities on the Internet are evolving from principles that predate the personal computer age. Repeatedly, the courts and regulators, when analyzing jurisdictional questions have analogized the Internet to telephone and print media”¹⁷⁹. In France, the accessibility of a website has been judged sufficient in the Yahoo case¹⁸⁰ to assert the jurisdiction of the state on a dispute concerning that particular website. Yahoo was ordered to block access to Nazi paraphernalia from websites available to French citizens because the website was accessible from France and to auction such materials was contrary to French public policy principles, in particular its longstanding hate-crime laws.

But the American and French approaches are diverging. Indeed, some American federal courts notably¹⁸¹ have been reluctant to assert jurisdiction based solely on the accessibility in the country of a passive website¹⁸². In addition, the American Bar Association (ABA) Global Jurisdiction Project is of the same opinion¹⁸³. The ABA Report wants to promote the enforceability of forum selection clause, including the jurisdictional choice of an ODR provider to settle a dispute in B2B and B2C¹⁸⁴ contracts.

This is also the case at an international level of the Hague Conference on private international law. On October 30 1999, a preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters was adopted to unify notably private international law procedural regarding conflict of jurisdiction and conflict of laws¹⁸⁵. But it was agreed that arbitration as a particular dispute settlement mechanism should be excluded from the scope of the future Convention¹⁸⁶. For online contracts in general – which include ODR agreement – it was decided that in the matter of jurisdiction and applicable law, that if the performance of the contract takes place offline, the existing rules of private international law referring to the place of performance remained relevant¹⁸⁷. But if the performance takes place online – which is generally the case of ODR agreements – the place of performance was no longer appropriate as a connecting factor and should be replaced by the location of each of the parties involved¹⁸⁸. Then,

¹⁷⁹ *S. W Bell v. Pub. Util. Comm'n of Texas*, 208 F 3rd, 475, 480 (5th Circuit case.2000)

¹⁸⁰ See ordonnances de référé (court orders) du juge des référés du Tribunal de Grande Instance de Paris from May 22 2000, August 11 2000 and 20 novembre 2000 PEREIRA, Acacio, “La justice française est embarrassée par l’affaire Yahoo”, *Le Monde*, 13-14 août 2000, PEREIRA, Acacio, “Yahoo interdit la vente aux enchères d’object nazis”, *Le Monde*, 4 janvier 2001, RICHARD, Jean-Alphonse, “L’ex PDG de Yahoo en correctionnelle”, *Le Point*, 25 mai 2001, p.84.

¹⁸¹ See *Zippo Mfg Co. v. Zippo Dot Com, Inc*, 952 F. Supp, 1119,1124 (W. D Pa, 1997); *Cybersell Inc v Cybersell Inc*, 130 F.3rd 414 (Ninth Circuit Court of Appeals) and see *People Solutions Inc v. People Solutions, Inc*, 2000, *U.S Dist. LEXIS* 10444 (N. D. Texas, Dallas Div., July 25, 2000).

¹⁸² It should be noted a case has been filed by Yahoo before the federal court of San José, California to check the compatibility of the French court orders with American law, particularly the First amendment.

¹⁸³ See ABA Report “Achieving Legal and Business Order in Cyberspace: a report on jurisdictional issues created by Internet” (2000) available at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html> and see - PODGERS, James “Adapting to a New World: ABA project calls for revised rules on Internet jurisdiction at <http://abanet.org/journal/nov00/novalede.html>.

¹⁸⁴ Where the consumer demonstrably bargained with the seller.

¹⁸⁵ See Press Release Geneva Round Table, September 2,3,4 1999 available on the website at <http://www.hcc.net>. This proposed Convention has not yet entered into force.

¹⁸⁶ Special Commission on the future Hague Convention on International Jurisdiction, Mars 1998, available at <http://www.hcc.net>.

¹⁸⁷ See KESSEDJIAN, Catherine, Deputy Secretary General of the Hague Conference on private international law, “Electronic Data Interchange, Internet and the Electronic Commerce”, Preliminary Document n°7 of April 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>. KESSEDJIAN, Catherine, ““Electronic Data Interchange, Internet and the Electronic Commerce”, Preliminary Document n°12 of August 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>.

¹⁸⁸ The ABA recommendations are similar on that point. See KESSEDJIAN, Catherine, Deputy Secretary General of the Hague Conference on private international law, “Electronic Data Interchange, Internet and the Electronic Commerce”, Preliminary Document n°7 of April 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>.

the proposed Convention distinguishes between Business-to-Business (B2B) and Business-to-Consumer (B2C) electronic transactions.

Concerning B2B, party autonomy was affirmed as the leading principle, both as regards jurisdiction and applicable law. The draft Convention upheld the validity of forum selection clause, including those which give jurisdiction to an ODR services provider “if they are entered into writing or by any other means of communication¹⁸⁹ which renders information accessible so as to be usable for subsequent reference”¹⁹⁰.

Regarding B2C, Catherine Kessedjian wished to avoid the traditional dichotomy between the “country of origin” (i.e. of the seller or provider) and the “country of reception” (i. e. that of the consumer) and proposed to start with a process of site-certification¹⁹¹, which should include minimum substantive rules of the protection for the consumer and a fair dispute resolution mechanism which would be possibly free of charge to the consumer. “If the site is certified, it could provide for the application of the law of the country of origin and for the courts of that country for the residual cases which could not be solved by the dispute resolution mechanism part of certification. If the site has not been certified, then the courts of the consumers’ location would be competent and the law of this location would be applicable”¹⁹². But before such a certification system is fully in place, rules could be developed to allow countries to differ in the protection they afford to consumers residing on their territory. “This principle could be enshrined in a provision amending the present drafting of Article 7, paragraph 3 of the proposed Convention”¹⁹³.

1.2.2. Minimum standards for the proceedings

In its March 1998 “Communication on the out-of-court settlement of consumer disputes”¹⁹⁴, the European Commission has presented the minimum standard to be observed when the consumer has waived further access to the court. But they can also apply to B2B dispute resolution.

Seven principles were mentioned by the EU Commission. First, the decision-maker must be independent from any professional association which appointed him (the independent principle). Second, the process should be transparent (the transparency principle). Third, all parties must be allowed to present their arguments to the decision-maker and must have equal access to evidence (the adversarial principle). Fourth, the consumer must be able to represent himself or herself in the procedure, which must be free or of moderate cost. The decision must be rendered rapidly, and the decision-maker must have an active role in the proceedings (the effectiveness principle). Fifth, the consumer must not be deprived of mandatory provisions of the law of the place where the decision-making body is established, and of the Member State where he or she is normally a resident (the legality principle). Fifth, if the decision is to be binding on the consumer

KESSEDJIAN, Catherine, “Electronic Data Interchange, Internet and the Electronic Commerce”, Preliminary Document n°12 of August 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>.

¹⁸⁹ This proposed provision is similar to the Article 17(1) of the above-mentioned E-Commerce Directive.

¹⁹⁰ See Article 4 of the preliminary draft Convention in KESSEDJIAN, Catherine, “Electronic Data Interchange, Internet and the Electronic Commerce”, Preliminary Document n°12 of August 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>.

¹⁹¹ We will examine that issue in more details in part three.

¹⁹² See KESSEDJIAN, Catherine, “Electronic Data Interchange, Internet and the Electronic Commerce”, Preliminary Document n°7 of April 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>, “Electronic Data Interchange, Internet and the Electronic Commerce”, Preliminary Document n°12 of August 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>.

¹⁹³ See Press Release Geneva Round Table, September 2,3,4 1999 available on the website at <http://www.hcc.net>.

¹⁹⁴ See http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just/ut02/en.html.

and further recourse to court is excluded, the consumer should be fully aware of this in advance and have accepted it (the liberty principle). Finally, the consumer must be able to be represented or assisted by a third party, including a lawyer, at all stages (principle of representation)¹⁹⁵.

But some of these principles may unintentionally create difficulties for the design and functioning of ODR systems. For instance, the independence principle may prevent the parties from using the decision-maker they want. The principle of legality would mean in effect that the decision-maker would have to apply mandatory rules of law of both the place where it is established, and of the consumer's country of residence, which seems both overly complicated and unnecessary. However, they are not specific to ODR since the same principles also apply to traditional ADR.

In the United States, perhaps, the most challenging legal issue facing online mediation, as well as face-to-face, is the degree of confidentiality for mediation in the event of legal review challenging the propriety of a mediated agreement. On the one hand, the courts have been very supportive of the confidentiality of mediation discussions¹⁹⁶. On the other hand, "there is concern that there may sometimes be participant incompetence, over-reaching, misrepresentation, fraud or duress, and the courts are somewhat confused about under what circumstances, if any, a reviewing court may look at the mediation discussions themselves to determine whether a settlement was properly reached or not"¹⁹⁷.

The leading American cases on this question are *Olam*¹⁹⁸ and *Foxgate*¹⁹⁹, which have been criticized²⁰⁰. The new draft of the Uniform Mediation Act (UMA)²⁰¹ from August 2000 also addresses this issue and lays down some exceptions to confidentiality. Consequently, "the reality in the United States is that confidentiality in mediation is not a 100 % guarantee"²⁰².

Nonetheless, it seems that confidentiality is a prerequisite in all online processes. Indeed, "private confidential ODR encourages openness and honesty between the parties and the third party neutral"²⁰³. ODR service providers have understood this and most of them assure users that the third party neutral will reveal no information to the opposing party unless he or she is given

¹⁹⁵ See Kuner, Christopher, Of Counsel, Morrison & Foerster, "Legal obstacles to ADR in European Business to Consumer Electronic Commerce" December 2000, OECD Presentation, available at <http://www.odrnews.com/library.htm>, p.14-15.

¹⁹⁶ See NOHAN-HALEY, Jacqueline M., "Alternative Dispute Resolution in a nutshell", West Publishing, 1992, p.92-96.

¹⁹⁷ See MELAMED, Jim, HELIE, John, "ODR in the US", available at <http://www.mediate.com/articles/ecodir1.cfm>.

¹⁹⁸ *Olam v. Congress Mortgage Company*, 68 F. Supp. 2d 1110 (Oct. 15, 1999)- The US District Magistrate compelled a mediator to testify as to a party's capacity to sign the settlement agreement-It should be noted that during the mediation proceedings the parties validly waived the privilege of having the mediation proceedings be held confidential.

¹⁹⁹ *Foxgate Homeowners Association, Inc. v. Bramalea California Inc*, 78 Cal App. 4th 653; 92 Cal Rptr.2d, 916 (Feb.25 2000). In this case, the neutral-a retired judge-served both as a mediator and discovery special master in a court ordered mediation. The trial court, after considering the report of the mediator, ordered sanctions against the defendants for failing to bring expert witnesses as required during the court-ordered mediation.

²⁰⁰ See FISCHER, Paul, "Changes in mediation confidentiality", <http://www.mediate.com/articles/fisher1.cfm> LEAHY, William B., RUBIN, Karen E., "Keeping the 'R' in ADR: How Olam treats confidentiality" at <http://www.mediate.com/articles/cprolam1.cfm> and REUBEN, Richard C., "Deconstructing confidentiality" at <http://www.mediate.com/articles/reuben.cfm>.

²⁰¹ The UMA is not law anywhere but rather leading academics seeking to develop recommended law. See <http://www.mediate.com/articles/umaaugustdraft.cfm>.

²⁰² See MELAMED, Jim, HELIE, John, "Online Dispute Resolution in the US", <http://www.mediate.com/articles/ecodir1.cfm>.

²⁰³ See VANDEGARDE, Blake Edward « Alternative Dispute Resolution becomes Online Dispute Resolution », December 2000, available at: www.ukans.edu/~cybermom/C1J/vande/vande.htm.

permission to do so.

1.3. Applicable law to Cyberspace

To the extent that online negotiation/mediation takes place like traditional ADR within the “shadow of law”, “there are also challenging issues about just what “shadow” to consider in a particular situation. Still, this is not substantially different than the world of face-to-face dispute resolution where the legal context is often not clear”²⁰⁴. As more and more commerce is done internationally and online, “this uncertainty as to the controlling law”²⁰⁵ and principles will make online negotiation/ mediation both more difficult and easier. It will be more difficult in the sense that the legal result is less predictable but, perhaps, easier in the sense that, as soon as participants realize that the law and courts are, essentially, irrelevant for most consumer disputes, there will likely be more motivated to resolve the matter online”²⁰⁶.

Consequently, some authors argue that a distinct set of substantive rules should be created since the justification for the application of certain legal rules which focus on the concept of territory is less obvious in Cyberspace²⁰⁷. Indeed, traditional principles of the private international law which regulate the conflict of laws refer to territorial concepts. The focusing on the place “where the performance which is characteristic of the contract is made”²⁰⁸ or “the protection afforded to (the consumer) by the mandatory rules of the law of the country where he has his habitual residence”²⁰⁹ seems questionable in the case of ubiquitous computer networks such as the Internet and global electronic-commerce. Aaron Mefford promotes the idea of *lex electronica*, *cyberlaw*, or *netetiquette*, which could be based on transnational law or the “*lex mercatoria*”^{210,211}. The autonomy of the parties as to the applicable law²¹² enable them to choose a non-national law as the law applicable to the merits of their disputes such as the Unidroit Principles of International Commercial Contracts²¹³ or the Principles of EU contract law²¹⁴.

However, both sets of principles do not offer a comprehensive regulation for the contractual relation between the parties. Accordingly, it may be necessary to supplement such principles with other substantive rules such as the Vienna Convention on the international sale of goods of April 11, 1980²¹⁵ or the UNCITRAL Model law on electronic -commerce of December 16, 1996²¹⁶ otherwise the result of the ODR process might lack foreseeability. Some authors argue

²⁰⁴ See KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, « E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law” », *15 Ohio State Journal of Dispute Resolution*, Spring 2000, p.705-734.

²⁰⁵ See COSTES, Lionel, " La délicate question de la détermination du droit applicable aux contrats du commerce électronique", *Cahiers -Lamy- Droit de l'informatique*, août- septembre 2000, n°128, p.21-25.

²⁰⁶ See MELAMED, Jim, HELIE, John, " *Online Dispute Resolution in the US* ", <http://www.mediate.com/articles/ecodir1.cfm>

²⁰⁷ See JOHNSON, David R, POST, David, " Law and Borders- the rise of law in Cyberspace", *48 Stanford Law Review*, May 1996, p.1367-1401.

²⁰⁸ See Article 4 § 2 of the Rome Convention on the law applicable to contractual obligation of June 19 1980 See <http://flechter.tufts.edu/multi/texts/BH784.txt>. It should be noted that the Rome Convention does not apply to arbitration agreements.

²⁰⁹ See Article 5 § 2 of the Rome Convention, Ibid.

²¹⁰ See Glossary.

²¹¹ See MEFFORD, Aaron, " *Lex informatica*-Foundations of the law in Internet", *5 Indiana Journal of Global Legal Studies*, Fall 1997, p.211-236.

²¹² See notably Article 3 of the Rome Convention, Ibid.

²¹³ Published in 1994, see <http://unidroit.org/english/principles/pr-pres.htm>.

²¹⁴ Contrary to Unidroit Principles which only apply to international commercial contracts, the Principles of European Law of contract published in 1998 are intended to be applied as general rules of contract in the European Union, see <http://www.jus.uio.no/lm/eu.contract.principles/1998/doc.html>.

²¹⁵ See <http://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/index.html>.

²¹⁶ See <http://www.uncitral.org/en-index.htm>.

that a major challenge for creating a “*lex informatica*” is to deal with resistance of territorially-based governments that might think they are giving up sovereign authority²¹⁷ but it seems that the real issue is that transnational rules, especially on e-commerce are only at their infancy. Finally, it should be noted that the choice of law by the parties does not affect the rules of mandatory law of member states insofar as they constitute public policy.

1.4. Enforceability of online agreements

Compared to the parties in unassisted negotiation or court awards, mediation participants are much more supportive of their mediated resolution “about 75% will reach agreement and over 80% will comply with the results”²¹⁸. Undoubtedly in many cases, both parties will have a strong interest in resolving the dispute finally through the ODR procedure. There are two basic ways in which parties to an ODR procedure can obtain a legally binding result²¹⁹:

- by enforcing the agreement to comply with the decision-maker’s recommendation as a contract
- by participating in a proceeding which results in the decision-maker renders a binding arbitral award, we will examine that issue in subpart B.

“The first 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 However, cross border enforceability has often been criticized as been too costly and burdensome to be of much to consumers²²⁰. Furthermore, online agreements would be easier to enforce if consumer protection laws were harmonized.

Consequently, in most cases, there is no real need for enforcement of ODR settlements since both parties agree to comply with them. But a person whose interest it is to delay resolution will not voluntarily agree to be bound by the settlement. It is likely that in some cases the absence of enforceability of ODR settlement and their voluntary nature will be a legal barrier to their utilization. Other barriers lie in the social and technical fields.

2. Practical issues

²¹⁷ See BORDONE, Robert C., “Electronic Online Dispute Resolution: A Systems Approach-Potential Problems and a Proposal”, 3 *Harvard Negotiation Law Review*, Spring 1998, p. 193 and CHAMOIX, Jean-Pierre, « *Internet vers une véritable information sans frontière? Nouvelles technologies et lex mercatoria* », in *Mélanges en l’honneur de Philippe KAHN* à l’initiative de Charles Leben, Eric Loquin et Mahmoud Salem, Travaux du Centre de recherche sur le droit des marchés et des investissements internationaux, Université de Bourgogne CNRS, Faculté de droit - Institut de relations internationales “*Souveraineté étatique et marchés internationaux à la fin du 20ème siècle: à propos de 30 ans de recherche du Centre de recherche sur le droit des marchés et des investissements internationaux*”, Edition Litec CREDIMI, 2000, p.281-297.

²¹⁸ Ibid.

²¹⁹ See Kuner, Christopher, Of Counsel, Morrison & Foerster, “*Legal obstacles to ADR in European Business to Consumer Electronic Commerce*”, December 2000, OECD Presentation, available at <http://www.odrnews.com/library.htm>, p.18-19.

²²⁰ It should be noted that a EC Regulation to amend the Brussels Convention, which should firmly anchor the place of the consumer’s domicile as a default jurisdictional rule in e-commerce disputes has been approved by all EU Member States on November 30 2000 should enter into force in March 1 2002. See Press Release November 30,2000 at <http://www.europa.eu.int>.

The practical challenges for ODR are technical and social²²¹. The first concern involves security and confidentiality, a basic concern of ADR which becomes even more crucial in an online environment. Then, the third party neutral needs to be provided with “an array of communication capabilities for communicating and working with information in as easy a manner as one can work with information while sitting face to face with someone with a problem”. In addition, it is necessary for the parties to be computer literate and to overcome the language barriers. All these requirements show that ODR is not always the most appropriate medium to further the goals of fair and equitable dispute settlement.

2.1. Security of the online proceedings

Despite the above-studied efforts to secure the confidentiality of ODR processes, an important technical issue remains concerning the security of the proceedings, particularly those conducted online. The Internet is an inherently insecure medium. “Hackers can intercept email messages and the messages are temporarily stored on servers they pass through. Parties may accidentally type an incorrect email address and send compromising information to a competitor”²²².

Steps have been taken to protect the security of any messages or documents transmitted over the Internet. Secure servers are available to help on this problem also but they will be studied in part three. Encryption software²²³ is also an option on this issue.

In the United States, section 101 (a) (1) of the Electronic Signatures in Global and National Commerce Act²²⁴ has put an end to the debate among American scholarship about whether electronic arbitration agreement constituted “writings” for purposes of the Uniform Commercial Code. This new federal statute resolves the question for arbitration submitted to the Federation Arbitration Act of 1925. It provides as a general rule that a signature, contract, or other record relating to a transaction in or affecting interstate or foreign commerce transaction in or affecting interstate or foreign commerce transaction shall not be denied legal effect, validity or enforceability solely because it is in electronic form. According to subsection (2), a contract relating to such transaction shall not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation. However in the case of transactions with consumers which require the written form, the consumer’s consent to electronic records may be necessary according to Section 101 (c) of the Act²²⁵.

In the European Union, in the case of high-value disputes, it is arguable that EU data protection law would require the use of appropriate technical mechanism such as encryption to protect the security of the proceedings²²⁶. But restrictions on the export and use of encryption technologies

²²¹ Some of the topics mentioned below were discussed through online forums during the “ADR Cyberweek 2001: a laboratory in Online Dispute Resolution”, February 26 to March 2 2001, Co-sponsored by Online Dispute Resolution Section of the Society for Professionals in Dispute Resolution designed to explore current and future dispute resolution technologies to address the following features could be accessed in April 2001 at www.disputes.net/cyberweek2001/.

²²² See VANDEGARDE, Blake Edward “ADR becomes ODR”, December 2000, available at: www.ukans.edu/~cybermom/C1J/vande/vande.htm.

²²³ See Glossary.

²²⁴ L N°106-229, signed by President Clinton on June 30, 2000 and effective October 1 2000, with some exceptions. See commentary by Christopher Reinhart, “*Federal and State Electronic Signature Laws*” at <http://www.cga.state.ct.us/200/rpt/olr/htm/2000-R-0795.htm>.

²²⁵ See commentary by Christopher Reinhart, “*Federal and State Electronic Signature Laws*” at <http://www.cga.state.ct.us/200/rpt/olr/htm/2000-R-0795.htm>.

²²⁶ See EU 95/46/EC Directive on Data Protection Directive of October 24 1995, *OJEC*, L281, of November 23, 1995, Art.17(1) providing that “data controllers must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized

national laws on encryption and authentication could inhibit the proper level of security in online proceedings. For instance, In France, encryption were long only used by the military. Until 1996²²⁷, 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 bits²²⁸.

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 Signatures²²⁹ 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 2000²³⁰ and the Décret d'application of March 31 2001²³¹. In the UK, in May 2001, the government was still consulting for the implementation of the e-sign directive²³².

Software, in form of encryption software just guarantees that only one person possessing the appropriate key can read a message. But it solves the identity problem but not the authentication. Indeed, "cyberspace is an environment in which copying is easier but guaranteeing the authenticity of messages is harder"²³³. Indeed, on the Internet "it is possible for one to assume many identities (pseudonyms) and to change one's identity by pressing a few keys or to have no identity (anonymity). Thus, while it is ordinarily possible to copy any message that one sees on the screen, one also tends to be wary of attributing the message to the person who appears to be sender"²³⁴. There are software solutions to the authenticity problems²³⁵. Digital signatures, for example, are codes that are embedded in a message that can be employed to authenticate a message.

2.2. Lack of face-to-face encounters

The principal practical criticism aimed at ODR involves the lack of face-to-face encounters. "There is a richness in face to face meetings because interaction can occur quickly and spontaneously and often on a non-verbal level"²³⁶. Without F2F, the parties may not be satisfied with any settlement that is concluded, regardless of the speed and efficiency of the process.

disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected". Kuner, Christopher, Of Counsel, Morrison & Foerster, "Legal obstacles to ADR in European Business to Consumer Electronic Commerce", December 2000, OECD Presentation, available at <http://www.odrnews.com/library.htm>.p.16.

²²⁷ Loi n°96-259 July 26 1996, regulating telecommunications, *O.J.*, July 27 1996, p.11384. Décret n°98-207 replaced by Décret n°99-199 of March 17 1999. See FERAL SCHUHL, Christine, "Cyber Droit", Dunod, Paris, 2000, p.199-206

²²⁸ 128 bits (See Glossary) according to the Décret n°99-199 of March 17 1999.

²²⁹ See EU Directive 99/93/EC of January 19 1999. OJEC, L 13 of January 19 1999.

²³⁰ See Loi n°2000-230 of March 13 2000 on electronic signatures *O.J.*, of March 14 2000.

²³¹ Décret d'application n°2001-272 of March 30 2001 pris pour l'application de l'article 1316-4 du code civil et relatif à la signature électronique, *O.J.*, March 31 2001, p.5070. See HAZAN, Alain, "La valeur d'une signature numérisée", *Le Monde*, 10 janvier 2001 and FRAISSARD, Guillaume et NUNES, Eric, " La signature électronique arrive", *Le Monde*, 4 avril 2001.

²³² See Digital Signatures Law Survey at <http://rechten.kub.nl/simone/ds.new.htm>.

²³³ See KATSH, Ethan, « Dispute Resolution in Cyberspace », 28 *Connecticut Law Review* 1996, p.974.

²³⁴ Ibid.

²³⁵ See LONGWORTH, Elisabeth, "Design Issues in Online Dispute Resolution Systems", WIPO International Conference on Dispute Resolution, Geneva, November 6 2000 available at http://www.oecd.int/dsti/sti/it/secur/act/online_trust/Longworhslides.pdf.

²³⁶ See KATSH, Ethan, "The new Frontier: Online ADR becoming a global priority ", *Dispute Resolution Magazine*, Winter 2000, p.8 available at: www.umass.edu/cyber/katsh_aba.pdf.

It is, indeed, much more difficult for a negotiator, mediator or arbitrator to see the “real dispute” and potential solutions from written texts than from seeing the parties face to face. Indeed, “One of the drawback with email is its reliance on text. Any mediator relying solely on email will be engaged in a time consuming task, since reading many emails and composing may emails is labor intensive. Forum or conferencing software that allows for threaded conversations provide a degree of organization which is lacking with email”²³⁷.

Furthermore, the lack of important medias such as body language or pronunciation make it much more difficult for the parties to express their feelings and for the third party neutral to give hints and steer the parties into a direction where settlement may be possible.

Due to its limitations, some authors have taken the extreme view as to reject ODR. According to Joel B. Eisen, “Online mediation is an unwise idea until at least two substantial developments take place. First, the mediation profession must fundamentally reorient itself to take into account of the different demands of the online community”²³⁸. Indeed, for him, “the great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact”²³⁹. For Joel B. Eisen, “skilled and accountable mediators (to the participants and to the polity) don’t exist”²⁴⁰. “Second, and no less important, technology must progress to the point where replicating face-to-face interaction is universal, inexpensive and easily understood by every participant”²⁴¹.

Bruce Leonard Beal takes another view which provides a nice contrast. Even if he concedes that “online mediation will not manifest fully until videoconferencing becomes commonplace and the following apply (1) video cameras and microphones are built into computers; (2) videoconferencing software is bundled with computers; and (3) modems are fast enough (i.e, ‘broad hand’ or 512 kilobytes per second and greater) to accommodate videoconferencing”²⁴². Similarly, Ethan Katsh, Janet Rifkin and Alan Gaitenby endorse videoconferencing as an obvious solution in lack of face-to-face encounters²⁴³.

There are other practical challenges to online resolution.” For example, what is the best way to achieve a psychological rapport with participants? How is it best to facilitate the sharing of what are often righteously held view”²⁴⁴ But “these issues exist and are also challenging in the face-to-face world”²⁴⁵.

The literacy of participants is equal in importance to “non-verbal cues”. First, to participate in an

²³⁷ See KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, “ E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law””, *15 Ohio State Journal of Dispute Resolution*, Spring 2000, p.722.

²³⁸ EISEN, Joel B. “Are We Ready for Mediation in Cyberspace?”, 1998 *Brigham Young University Law Review*, p.1310.

²³⁹ Ibid.

²⁴⁰ Ibid, p.1330.

²⁴¹ Ibid, p.1310.

²⁴² See BEAL, Bruce Leonard, “Online Mediation: Has its Time Come?”, *15 Ohio State Journal on dispute resolution* 2000, p.736.

²⁴³ See KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, « E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law”», *15 Ohio State Journal of Dispute Resolution*, Spring 2000, p.714.quoted in WARE, Stephen J., COLE, Sarah Rudolph, “ ADR in Cyberspace”, *15 Ohio State Journal on Dispute Resolution*, 2000, p.594.

²⁴⁴See MELAMED, Jim, HELIE, John, ” *Online Dispute Resolution in the US*“, <http://www.mediate.com/articles/ecodir1.cfm>

²⁴⁵ Ibid.

ODR program, people must be familiar with the ADR process (e.g. mediation) from which the ODR is derived. But it may be difficult for potential users to get information about ADR or ODR since both processes are confidential. In addition, ODR have not been long in existence to earn the trust of their potential users. We will return to that issue again in part three.

Then, it also goes without saying that, to participate in online resolution, one needs to have a computer with a web access. Even though more and more people are getting online and the cost of equipment is dropping, there are sharp differences among countries. Currently, according to a recent research, “about one-third of a billion people are now online”. “Almost one-half (147 million) are from North-America, just over a quarter (92 million) are European, and roughly 6 per cent (19 million) are British”²⁴⁶. France has only 17% of its population which uses Internet against 26% for England²⁴⁷.

In addition to equipment, people need to have special technological skills, mostly related to navigating on the web, to participate in an online negotiation (particularly blind bidding) or mediation. Sites must be designed so that parties have a clear understanding of the process, especially if they are paying to participate. Third party neutrals must also put real effort in clarifying client expectations before the process begins.

Finally, technology increases the potential for power imbalance. Concerning real-time discussions, the person who types faster has a real advantage. In addition, a party which has a visual or physical problem is even more disadvantaged in the Internet setting compared to the other party. There may also be some cross-cultural issues.

2.3. Cross-cultural issues

Language barriers are also challenging in a cross-cultural context whether it be in traditional ADR or an ODR. Some expressions or idioms may not translate correctly from one party in one country to someone in another. The impact of an email can also be underestimated. “Somebody may dash off quickly an email message without thinking but recipient can take the message very seriously. This can create misunderstandings and even full blown arguments”²⁴⁸.

Online negotiators/mediators/arbitrators need to be aware of that and if they do not speak the languages involved, they should be assisted by professional translators. But working a dispute through a translator tends to be more complicated.

Cultural differences are also an issue in international disputes. This is especially true in business-to-consumer dispute resolution. In her paper Nora Femenia²⁴⁹ infers that collective high context societies such as Italy, Japan or Mexico, have a greater need than individualistic low context societies such as the United States for maintaining a positive image (face maintenance) and therefore may not wish to participate in a process where face may not be maintained or where there is a perception of loss of face.

²⁴⁶ See SUSSKIND, Richard, “Transforming the law: essays on Technology, Justice and the Legal Marketplace”, Oxford University Press, Oxford, 2000, p.109.

²⁴⁷ See ALBERGANTI, Michel, “La vraie fausse fracture numérique”, *Le Monde*, 15 mars 2001.

²⁴⁸ See HELIE, John, “Technology creates opportunities and risks”, available at <http://www.mediate.com/articles/helie2.cfm>.

²⁴⁹ See FEMENIA, Nora, “Online Dispute Resolution and the global management of customers’ complaints: how could Online Dispute Resolution techniques be responsive to different social and cultural environments?”, Paper presented at the Joint Conference of the OECD, HCOPI, ICC, The Hague, Holland, December 2000, available at www.mediate.com/articles/femenia/cfm.

2.4. Inappropriateness of the Internet medium

An online mediation/ negotiation/arbitration may be impracticable when too many parties are involved. The negotiation, mediation or arbitration websites studied in the first part involved only claims between two parties. A multiparty negotiation, mediation, or arbitration online will be difficult to control. A high number of participants will make the third party neutral's task almost impossible. It will be hard for the discussion to stay focused since given the asynchronous character of email, participants can all send messages simultaneously. It is best for ODR as was suggested by Blake Edward Vandegarde, to keep the parties involved at a minimum²⁵⁰. However, in the future, it will be easier to have ODR in multiparty disputes through the use of videoconferencing and faster modems.

For an ODR process to be successful, sellers and consumers have to have an incentive to collaborate. However, for large commercial claims, ODR may not be appropriate since both parties may not enter into it in good faith and their diverging financial interests may prevent them to settle. When large sums of money are at stake, the advantage provided by ODR of cost reduction may not appeal to the parties. They will not be reluctant to invest in lawyers' or arbitrators' fees for instance to win their case. Thus, OnlineResolution.com combines online arbitration with face-to-face meetings in large commercial matters to allow discovery, cross-examination of witnesses and pleadings. In addition, the lack of spontaneity and immediacy due to the above mentioned technical pitfalls make ODR more suited for document only procedure than bricks and mortar disputes where finding of fact may be preliminary before legal issues are tackled.

Finally, to sum up there will be some dispute situation, where for reasons of a long standing relationship, practical or a complexity of legal issues, getting face to face will be preferred over ODR. Online arbitration faces the same technical challenges than online mediation, even though "online arbitration is a less complicated communication process"²⁵¹. However, since online binding arbitration "leads to authoritative decisions" contrary to online negotiation/mediation, it faces specific legal challenges which will be studied now in a second subpart.

B. Specificity of Online arbitration

The legal challenges faced by online arbitration "lie more in the realm of law than technology"²⁵². Arbitral awards are binding decisions. Some of the authority of these decisions comes from knowing that the courts will enforce them. In order for a court to do this, however, there is a need to know which court to turn to and whether all the conditions determined by the courts for the enforceability of the award have been satisfied²⁵³. Such criteria are contained in international instruments, the most important of which is the of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10 1958 (thereafter the New York Convention)²⁵⁴ and in national laws. In any case, "most of the questions that might be raised concerning online arbitration concern the arbitration agreement, the arbitration process,

²⁵⁰ See VANDEGARDE, Blake Edward « Alternative Dispute Resolution becomes Online Dispute Resolution », December 2000, available at: www.ukans.edu/~cybermom/CIJ/vande/vande.htm.

²⁵¹ See KATSH, Ethan, RIFKIN, Janet, "Online Dispute Resolution: resolving conflicts in Cyberspace", 2001, Jossey-Bass, San Francisco, p.138

²⁵² Ibid.

²⁵³ Ibid, p.143.

²⁵⁴ See <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>. It entered into force in France on September 24 1959, in the UK on December 23 1975 and in the United States on December 29 1970.

and the arbitration award”²⁵⁵.

1. The arbitration agreement

Different international instruments are susceptible to apply to an online arbitration agreement:

- on an international level: the New York Convention of June 10 1958²⁵⁶ and the UNCITRAL Model Law of 1985²⁵⁷;
- for European Union Member States: the Geneva European Convention on international commercial arbitration of April 21 1961²⁵⁸ which is presently under revision by the Working Party on International Contract Practices in Industry of the United Nations Economic Commission for Europe²⁵⁹. This opens the possibility to adapt the Convention to the needs of dispute settlement by means of electronic commerce. With regard to Article 293 clause 4 of the EC Treaty²⁶⁰, it may be argued that the United Kingdom should ratify the Geneva Convention;
- on the American continent: The Inter-American Convention on International Commercial (thereafter the Panama Convention) of 1975²⁶¹ supplemented by The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (thereafter the Montevideo Convention) of 1979²⁶².

1.1. Conditions as the form, the parties and the contents

1.1.1. Conditions as to the form

The New York Convention was drafted well before the Internet age and present problems of interpretation in the online context and may interfere with the conduct of arbitration. Indeed, Article II (1) of the Convention²⁶³ requires that “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 may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”. The New York Convention then specifically states in its Article II (2) that “an exchange of letters or telegrams satisfies the ‘agreement in writing’ requirement”²⁶⁴. Article 1 of the Panama Convention also states that the arbitration agreement shall be set forth in “an instrument signed by the parties or in the form of an exchange of letters, telegrams or

²⁵⁵ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, p.139

²⁵⁶ See supra.

²⁵⁷ Which has been transformed into national law by more than 20 countries. See <http://www.jus.uio.no/lm/un.arbitration.model.law.1985.index.html>.

²⁵⁸ It entered into force in 1964 and was ratified by nine EU countries including France but not by the UK see <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/index.html>. France has amended Article IV of the Convention see <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> update of 23/06/2000.

²⁵⁹ See United Nations Economic and Social Council, Economic Commission for Europe, Committee for trade and industry and Enterprise Development, document TRADE/WP.5/1998/10 of 06/10/98 at <http://www.unece.org/trade/tips/comarbit/prague.htm>.

²⁶⁰ Article 293 Clause 4 of the EC Treaty states that “Member States, shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefits of their nationals [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards”.

²⁶¹ Which entered into force in 1976. See http://www.ftaa-alca-org/busfac/comarb/intl_conv/caicpae.asp#fjaat.

²⁶² Which entered into force in 1980 See http://www.ftaa-alca-org/busfac/comarb/intl_conv/caicpae.asp#fjaat.

²⁶³ See <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

²⁶⁴ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, p.139

telecommunications”.

But is an agreement formed by the exchange of emails an “agreement in writing”? Some commentators have expressed doubt about this,²⁶⁵ but more recent writings²⁶⁶ have suggested that email be treated no differently from more tangible forms²⁶⁷. According to Jérôme Huet and Stéphanie Valmachino, Internet could be analogized to fax media, which has been assimilated to telegrams²⁶⁸. Consequently, it is likely that electronic arbitration agreements are valid under the Panama Convention.

However, the UNCITRAL Model Law on International Commercial Arbitration of 1985²⁶⁹ takes a different stand. Its Article 7 (2)²⁷⁰ states that the requirement of the written form is fulfilled if the arbitration agreement is contained in a “document signed by both parties...or in...other means of telecommunications which provide a record of the agreement”. It should be noted that the same approach is followed by the European Convention of Geneva of 1961 on international commercial arbitration in its Article I (2)²⁷¹.

Three solutions were proposed to reconcile Article II (1) and (2) of the New York Convention with Article 7(2) of UNCITRAL Model law on International Commercial Arbitration. First, it was suggested that Article II (1) and (2) of the New York Convention should be amended.²⁷² However, it can be feared that “such amendment might not be easily achieved because in such a case other provisions would be subject to discussions”²⁷³. Another alternative could be a statement addressing the interpretation of Article II (1) and (2) of the New York Convention. “But concern was expressed with regard to states not accepting such an instrument and the status of reciprocity”. The best solution seems that the “requirement of a writing” of Article II of the New York Convention should be interpreted liberally in the light of the subsequent UNCITRAL Model law.

Such a view is supported by the previously studied EU Directive on Electronic commerce²⁷⁴ and by national laws. Indeed, the Directive in its Article 17 provides that electronic means be used for out-of-court settlement and its Article 9 (1) expressly imposes on Member States, i.e. to France and to UK a duty to ensure that their contracts can be concluded by electronic means.

Concerning national laws, the UK Arbitration Act of 1996²⁷⁵ gives an expanded meaning of “agreement in writing”. According to Section 5 (2) of this Act, “there is an agreement in writing –(a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the

²⁶⁵ See ARSIC, Jasna, “International Commercial Arbitration on the Internet: Has the future come too early?”, *Journal of International Arbitration*, Vol .14, N°3, September 1997, p.216.

²⁶⁶ See HILL, Richard, “*Online arbitration: issues and solutions*”, in *Arbitration International*, April 1999, republished at <http://www.umass.edu/dispute/hill.htm>.

²⁶⁷ Ibid.

²⁶⁸ See Paris, 20 janvier 1984, *Revue de l'arbitrage*, 1987, p.482, note Catherine Kessedjian. Quoted in HUET, Jérôme, VALMACHINO, Stéphanie, “Réflexion sur l'arbitrage électronique dans le commerce international”, *La Gazette du Palais*, N°9, Janvier 9 2000, p.9.

²⁶⁹ See <http://www.jus.uio.no/lm/un.arbitration.model.law.1985.index.html>.

²⁷⁰ Ibid.

²⁷¹ See <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/index.html> and

²⁷² See VAHRENWALD, Arnold, WILIKENS, Marc, MORRIS, Philip, from the JOINT RESEARCH CENTER of the EUROPEAN COMMISSION, “Out-of-court dispute settlement systems for e-commerce- the report from the workshop held in Brussels on March 21 2000”, Part IV Arbitration available at <http://dsa-isis.jrc.it/ADR.report.html>.

²⁷³ Ibid.

²⁷⁴ See <http://europa.eu.int/ISPO/eif/Internet/PoliciesSite/E-commerce/ECOMM16oct2000/TSLD009.htm>.

²⁷⁵ See <http://www.hmso.gov.uk/acts/acts1996/96023-1.htm>.

agreement is made by exchange of communications in writing or (c) if the agreement is evidenced in writing (3) where the parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing; (4) 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 (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement other 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 (6) Reference in this Part to anything being written or in writing include its being recorded by any means". The Act provides then in Section 6 (2) that the reference in an agreement constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement". Consequently, a signature is necessary but not useful. According to the UK Act, Section 5(3), even an oral agreement to arbitrate will be regarded as being 'in writing' if it is made by reference to "terms which are in writing" or according to Section 5 (4) of the Act if an oral agreement 'is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement'.

In French law, the requirement of a writing for the validity of the arbitration is only applicable to domestic arbitration (Article 1443 of the Nouveau Code de Procédure civile²⁷⁶). In international arbitration, French law does not require any form for agreement to arbitrate, the proof of the consent of the parties is sufficient²⁷⁷. "In these modern arbitration laws, there has in effect been a triumph of substance over form. As long as there is some written evidence of an agreement to arbitrate, the form in which the agreement is recorded is immaterial"²⁷⁸.

Concerning the United States, international arbitration is regulated both by federal and state laws. In federal law, a writing is required in domestic arbitration (Chapter 1§2 of the Federal Arbitration Act of 1925²⁷⁹) as well as in international arbitration (Chapter 2§202 of the Federal Arbitration Act of 1925²⁸⁰). But this requirement of a writing is construed loosely by federal courts so as to include electronic agreement²⁸¹. "Regarding state law, the 1920 New York statute provided a model for the Uniform Arbitration Act of 1955 (UAA)²⁸². Today, the majority of states have adopted arbitration rules modeled on the UAA" In Section 1 of the UAA, a writing is required for the validity of an arbitration agreement²⁸³.

Finally, it should be mentioned that the "requirement of a writing" is usually accompanied by the requirement for signatures. The New York Convention is no exception in this respect. It expressly requires the signature of both parties where arbitration is based on an arbitration clause in a contract or arbitration (submission) agreement. "It is not quite clear whether such a requirement exists in the case where the arbitration clause or (submission) agreement is contained in an exchange of letters or telegrams"²⁸⁴. To solve this problem, we can refer to the

²⁷⁶ See ROBERT, Jean, "*L'arbitrage: droit interne et droit international privé*", 6ème édition, Dalloz, 1993, p.337.

²⁷⁷ See CADIET, Loïc, "*Droit judiciaire privé*", Litec, 2ème éd., Paris, p.848 et p.871.

²⁷⁸ See REDFERN, Alan, HUNTER, Martin, "*Law and Practice of International Commercial Arbitration*", 3rd ed, Sweet and Maxwell, London, 1999, p.142 and p.143.

²⁷⁹ See NOHAN-HALEY, Jacqueline M., "*Alternative Dispute Resolution in a nutshell*", West Publishing, 1992, p.248.

²⁸⁰ which implements the New York Convention Ibid. p.258.

²⁸¹ See BURNSTEIN, Matthew "A Global network in a compartmentalized legal environment" in "*Internet- which court decides? What law applies?*", BOELEWOELKI, Katherine, KESSEDJIAN, Kluwer, the Hague; 1998, p.32.

²⁸² See NOHAN-HALEY, Jacqueline M., "*Alternative Dispute Resolution in a nutshell*", West Publishing, 1992, p.234-245.

²⁸³ See, Ibid, p.120 and p.234.

²⁸⁴ See ARSIC, Jasna, "International Commercial Arbitration on the Internet: Has the future come too early?",

EU Directive on a Community Framework for Electronic signatures²⁸⁵ and the US Electronic Signatures in Global and National Commerce Act²⁸⁶ which permit the use of technological means for the conclusion of arbitration agreements and for the procedure²⁸⁷.

1.1.2. Conditions as to the parties

Given that the parties have never met before contracting online, it is more likely that one contracts with somebody who has not the capacity to do so²⁸⁸. Compared to mediation or negotiation processes, there are far greater legal concerns regarding the consent given to online arbitration. Indeed, “the basic concern is that participants in arbitration may give up all of their legal due process rights without understanding what that means”²⁸⁹. This explains why there might be some restrictions when disputants – especially weaker party such as consumers – are asked, as part of the contracting process, to commit exclusively to binding arbitration.

In the European Union, a survey shows that many national laws of EU Member States are restrictive as to the possibility to resort to arbitration by means of a contractual clause in consumer contracts. In France, consumer disputes can be found non arbitrable, at least to the extent that the rights of consumers to go to court is excluded²⁹⁰. However, such restrictions mainly apply in the case of domestic arbitrations and may not apply with regard to international arbitrations involving consumers²⁹¹, such as those falling under the New York Convention²⁹².

In the UK, consumer arbitration agreements are particularly regulated in the Arbitration Act of 1996²⁹³. According to Section 89 of the Act, the application of the unfair terms regulations in the Consumer Contracts Regulations 1994 are applicable to arbitration agreements as which are defined agreements to submit to arbitration present or future disputes. These rules apply whatever the law applicable to the arbitration agreement. In particular, an arbitration clause is considered unfair according to Section 91 for the purposes of the Regulations if it relates to a claim which does not exceed the amount specified by an order. Section 90 of the Act states that the Regulations are applicable even if the consumer is a legal person. In the UK, special dispute resolution systems in consumer affairs exist.²⁹⁴ The example of the Chartered Institute of

Journal of International Arbitration, Vol .14, N°3, September 1997, p.217.

²⁸⁵ See *OJEC*, L13/12 of January 19 1999. See subpart A/.

²⁸⁶ Section 101 (a) (1) of the L N°106-229, signed by President Clinton on June 30, 2000 and effective October 1 2000, with some exceptions. See subpart A/.

²⁸⁷ See above *Ibid*.

²⁸⁸ See HUET, Jérôme, VALMACHINO, Stéfania, "Réflexion sur l'arbitrage électronique dans le commerce international, *La Gazette du Palais*, N°9, Janvier 9 2000, p.10.

²⁸⁹ See MELAMED, Jim, HELIE, John, "Online Dispute Resolution in the US", <http://www.mediate.com/articles/ecodir1.cfm>.

²⁹⁰ See TILMAN, Vincent, "Arbitrage et nouvelles technologies: Alternative Cyberdispute Resolution, *Revue Ubiquité*, 1999, n°2, p47-64, citing as support Art.2061 of the French Civil Code, Art.631 of the former Code de Commerce and Cour de cassation case-law

²⁹¹ See Cass, 1^{ère} civ, 7 mai 1963, Gosset case, *Dalloz*, 1963, p.543, Cass, 1^{ère} civ 4 juillet 1972, Hecht case, *Clunet* 1972, 843, note Oppetit. Paris, 7 décembre 1994, *Dalloz* 1995, somm., 318, obs. Pizzio, Cass, civ, 1^{ère}, 20 décembre 1993, Dalico case *Revue de l'arbitrage*, 1994, 116, note GAUDEMET-TALLON, Cass, civ, 1^{ère}, 5 janvier 1999, Zanzi case *Revue de l'arbitrage*, 1999, 280, note Fouchard.

²⁹² See FOUCHARD, Philippe, GAILLARD, Emmanuel, GOLDMAN, Berthold (†), "On International Commercial Arbitration", Kluwer Law International, 1999, pp.38, 347-348.

²⁹³ See <http://www.hmso.gov.uk/acts/acts1996/96023-1.htm>.

²⁹⁴ See FEDERICI, Valeria (ed) and MANFREDI, Veronica, coordination "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes" Union Camere, Rome p.36 for Great Britain, quoted in See VAHRENWALD, Arnold, WILIKENS, Marc, MORRIS, Philip, from the JOINT RESEARCH CENTER of the EUROPEAN COMMISSION, "Out-of-court dispute settlement systems for e-commerce- the report from the workshop held in Brussels on March 21 2000", Part II, the protection of the recipient, available at

Arbitrators Ford Scheme which is binding on the seller but not on the buyer can be quoted.

According to US law, consumer arbitration clause are lawful. First, in *Hill v. Gateway 2000*²⁹⁵ 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. Zeidenberg*²⁹⁶ that the consumer was bound by the terms because he had the opportunity to read them and reject them by returning the product. Second, the New York court of appeals²⁹⁷ 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 unconscionable²⁹⁸ in a consumer context. Nevertheless, it did not considered that the arbitration clause was invalid. It held that the dispute settlement should be conducted by the less expensive American Arbitration Association²⁹⁹.

Regarding click-wrap agreements³⁰⁰, they are held to be enforceable by US federal and state courts³⁰¹. However, it makes their enforceability depend on fairness and unconscionability³⁰². In France, arbitration clause by reference to a model contract or model clause are valid if the parties were aware that by referring to it they were incorporating it into the contract. This case-law is applicable to online arbitration. However, it might be difficult to prove the consent of the parties³⁰³. Despite this case-law, which is favourable to the possibility of consumer arbitration,, some authors are generally hostile to the development of online arbitration in business to consumer disputes and think that it is best suited for business-to-business disputes³⁰⁴.

1.1.3. Conditions as to the contents of the arbitration agreement

Based on their autonomy, the parties may determine the contents of an arbitration agreement. Whether it is recommendable for the parties to establish in detail the content of their arbitration agreement for disputes in electronic commerce may be doubted. Indeed, it may be cumbersome for the parties to draft in individual negotiations the content of the arbitration agreement providing in detail for the use of means of electronic commerce. “The increase of the number of cross-border contracts in electronic commerce and the development of mass contracts concluded online require a certain standardization³⁰⁵ of arbitration agreements”. Some ODR service providers may suggest model arbitration agreements in the form of arbitration clause. It is

<http://dsa-isis.jrc.it/ADR.report.html>, p 7.

²⁹⁵ 105 F. 3rd, 1147 (7th Circuit 1997- certiorari denied 118 S. Ct 47 1997), *World Arbitration and Mediation Report*, vol.7 n°2, December 1997, p.295.

²⁹⁶ 86 F. 3rd, 1447 (4th Circuit 1996).

²⁹⁷ See *Day Brower v. Gateway 2000, Inc.*, 246 A.2d 246 (N.Y App. 1998), *the New York Law Journal* 17/08/98.

²⁹⁸ See Glossary.

²⁹⁹ See VAHRENWALD, Arnold, WILIKENS, Marc, MORRIS, Philip, from the JOINT RESEARCH CENTER of the EUROPEAN COMMISSION, “ Out-of-court dispute settlement systems for e-commerce- the report from the workshop held in Brussels on March 21 2000 “, Part II The protection of the recipient available at <http://dsa-isis.jrc.it/ADR.report.html>.

³⁰⁰ See Glossary.

³⁰¹ KENNEDY, John B., VASWANI, Raj R., “Click-wrap agreement held to be enforceable”, Morrison & Foerster, at http://www.mofo.com/mofocgi/gendisplaiylong?pubs_079LGLWATCH_MMEDIA_I.

³⁰² Ibid.

³⁰³ HUET, Jérôme, VALMACHINO, Stéfania, "Réflexion sur l'arbitrage électronique dans le commerce international, *La Gazette du Palais*, N°9, Janvier 9 2000, p.10.

³⁰⁴ See LLEWELLYN, Joseph Gibbons, "Rusticum Judicium? Private Courts enforcing Private Law and Public Rights: Regulating virtual arbitration in Cyberspace", 24 *Ohio Northern University Law Review*, 1998, p.790.

³⁰⁵ The Joint Research Centre of the European Commission aims at ODR standardization in B2C disputes See <http://econfidence.jrc.it/>.

advisable for procedural economy that the parties adopt a contractual clause according to which they agree to settle disputes out-of-court should also cover non-contractual disputes. Finally, it is preferable that the parties regulate expressly the number of arbitrators, the time schedule in which to appoint them, the place of arbitration and the language of arbitration.

1.2. Applicable law

As the parties can freely choose the substantive law (s) applicable to their contract³⁰⁶, they are free to determine procedural law to be followed by the arbitral tribunal³⁰⁷. However, in the absence of choice, the law of the seat of arbitration will apply³⁰⁸. Regarding the law applicable to the merits³⁰⁹, the parties are also free. The law chosen should be neutral. To choose the *lex informatica* may lead to an unpredictable result. The UNCITRAL Model Law on Electronic Commerce³¹⁰ can provide a satisfactory tool for the choice of law of the procedural law and the law applicable to the merits.

1.3. The designation of arbitrators

The composition of the arbitral tribunal is usually determined by the parties. The composition of the arbitral tribunal is, for instance, dealt with by Chapter III of the UNCITRAL Model Law of International Commercial Arbitration of June 21 1985³¹¹ which regulates the number of arbitrators-normally three-their appointment, grounds for the challenge of arbitrators, the challenge procedure, the arbitrator's failure or impossibility to act and the appointment of a substitute arbitrator. This issue will not be discussed in further details since there is no specificity in online arbitration compared to offline arbitration.

2. The process of online arbitration

2.1. The conduct of the proceedings

Online arbitration appears to be a common denominator for different issues which deal at least with the use of electronic communication in the arbitral process³¹² and at most a fully computerized process. Paul D. Carrington defends the idea of a "virtual arbitration which will have no situs but will be an entirely digitized event"³¹³. We think at this time and given the current technology, it is impossible to have a fully automated arbitral process, especially in complex cases. In addition, the conduct of a fully automated process might contradict due process and adversarial principle.

³⁰⁶ See above subpart A/.

³⁰⁷ See Article V(1)(d) of the New York Convention (<http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>) and Article IV(1)(b)(iii) of the European Geneva Convention (<http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/index.html>).

³⁰⁸ See Article V (1) (d) (see above). See HUET, Jérôme, VALMACHINO, Stéfania, "Réflexion sur l'arbitrage électronique dans le commerce international, *La Gazette du Palais*, N°9, Janvier 9 2000, p.11-12.

³⁰⁹ See Article VII of the European Geneva Convention (see above) and Article 28 of UNCITRAL Model Law on electronic-commerce of 1996 (see <http://www.uncitral.org/en-index.htm>) and see HUET, Jérôme, VA.

³¹⁰ See reference above.

³¹¹ See <http://www.jus.uio.no/lm/un.arbitration.model.law.1985.index.html>.

³¹² See Article 3 (2) of the ICC Arbitration rules of 1998 which implicitly enables the complainant to use electronic means to file its complaint before the ICC Secrétariat quoted in VERBIST, Herman, IMHOOS, Christophe, "L'arbitrage, les télécommunications et le commerce électronique", *Bulletin de la Cour d'Arbitrage de la CCI*, N°10, May 1 1999, p.23.

³¹³ See CARRINGTON, Paul D., "Virtual arbitration", 15 *Ohio State Journal on Dispute Resolution* 2000, p.669.

“The use of the Internet to provide and circulate information and materials should be agreed to by the parties”³¹⁴. Like for all ODR as we have seen in subpart A, “care should be taken to use reasonable means to protect the confidentiality and authenticity of messages. Digital signatures can be employed if desired. If agreed by the parties, deliberation of a panel of arbitrators through electronic means are also permitted. In the US, it is commonly accepted that for contractual matters³¹⁵ an e-mail is a writing.” 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”³¹⁶.

³¹⁴ See HILL, Richard, “*Online arbitration: issues and solutions*”, in *Arbitration International*, April 1999, republished at <http://www.umass.edu/dispute/hill.htm>.

³¹⁵ For administrative matters, however, an email may not be considered a writing. See HILL, Richard, “*Online arbitration: issues and solutions*”, in *Arbitration International*, April 1999, republished at <http://www.umass.edu/dispute/hill.htm>.

³¹⁶ Paris, 22 décembre 1978, IMR c/ Lynx Machinery, *Revue de l’arbitrage*, 1979, p.276. This decision was confirmed by the Cour de Cassation, Cass, 1^{ère} civ, 28 janvier 1981, *Revue de l’arbitrage*, 1981, p.425. See HILL, Richard, *Ibid*.

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”³¹⁷. “Care should be taken that all members of the panel have sufficient technological skill and resources to participate fully”³¹⁸.

2.2. The place or seat of arbitration

The terms “place or seat of arbitration” refers to the place which has been selected by the parties or the arbitrator as the legal domicile of arbitration, “the task of which is to serve as point of contact in case of a conflict of laws with the aim to determine, *inter alia*, the law applicable to the procedure”³¹⁹. The seat of arbitration gives access to the courts if necessary during the process of constituting the arbitral tribunal. “It sometimes leads to the application of mandatory procedural rules of the country where the seat is located. It has also an impact on the jurisdiction of the courts to set an award aside, and on compliance with any reciprocity condition that sometimes affects the application of conventions concerning the recognition and enforcement of awards”³²⁰. The seat of arbitration plays also an important role for the determination of the material law on the arbitration. On an application for the stay of the proceedings, if the parties did not choose the applicable law, it would generally be that of the seat of arbitration³²¹.

Designating a formal place of arbitration can be achieved through agreement of the parties or arbitrators”³²². In online arbitration, difficulties may arise with the determination of the place of arbitration if the proceedings were conducted online and the applicable law relies on physical location as did, at least with respect to the signature of the award, English arbitration law prior to the 1996 Act³²³. This could in turn lead to a so-called “floating arbitration” or “floating award”, which have legal repercussions for important matters ranging from interference by local courts in the proceedings to enforcement of an eventual award. Since 1996, the UK has adopted the “seat of arbitration” concept and these difficulties are no more likely to arise, since the seat refers to the factor connecting the arbitration to a specific legal system and is independent of the place where the proceedings usually take place³²⁴. The French Cour de cassation has adopted the same stand and states that “the seat of arbitration is a purely legal concept, which has important consequences, notably concerning the jurisdiction of national courts regarding appeals for annulment; (the choice of the seat) depends on the will of the parties, it is not a physical concept which depends on the place where the hearings took place or the place where the award was signs, places which can vary according to the fancy and clumsiness of arbitrators”³²⁵.

³¹⁷ See HILL Richard, “The Internet, Electronic Commerce and dispute resolution”, *Arbitration International*, Vol. 14, N°4, December 1997, p.104.

³¹⁸ See subpart A/.

³¹⁹ See VAHRENWALD, Arnold, WILIKENS, Marc, MORRIS, Philip, from the JOINT RESEARCH CENTER of the EUROPEAN COMMISSION, “Out-of-court dispute settlement systems for e-commerce- the report from the workshop held in Brussels on March 21 2000“, Part IV Arbitration available at <http://dsa-isis.jrc.it/ADR.report.html>.

³²⁰ See FOUCHARD, Philippe, GAILLARD, Emmanuel, GOLDMAN, Berthold (†)? “*On international commercial arbitration*”, Kluwer Law International, 1999, p.674 and 675.

³²¹ See KAUFMANN - KOHLER, Gabrielle, “Le lieu de l’arbitrage à l’aune de la mondialisation: réflexions à propos de deux formes récentes d’arbitrage”, *Revue de l’arbitrage*, N°3, July 1 1998, p.517-536.

³²² Ibid.

³²³ See the decision of the House of Lords in *Hiscox v. Outhwaite*, [1991] 1 *W.L.R* 279.

³²⁴ See Kuner, Christopher, Of Counsel, Morrison & Foerster, “*Legal obstacles to ADR in European Business to Consumer Electronic Commerce*”, December 2000, OECD Presentation, available at <http://www.odrnews.com/library.htm>.p.16.

³²⁵ See Cass, 1^{ère} civ, 28 octobre 1997, Société Procédés de Préfabrication pour le béton c/ Libye, *Revue de l’arbitrage* 1998, p.399-407.

2.3. Arbitration rules adapted to electronic commerce

Many sets of arbitral rules and national procedural laws contain requirements of form which would have to be modified in the context of online arbitration. For instance, Article 20.3 of the London Court of International Arbitration (LCIA) Rules of January 1 1998³²⁶ refer to the presentation of testimony in written form, without clarifying whether this would also include evidence in electronic form. In the European Union, Article 17 (3) of the E-commerce Directive provides a legal basis to remove such formalistic barriers to the use of ODR in the European Union³²⁷. The UNCITRAL Model Law on International Commercial Arbitration deals in Chapter IV with the conduct of the arbitral proceedings³²⁸. The establishment of rules of online procedures must be compatible with the requirements of rules of mandatory law applicable at the place or at the seat of arbitration even though the place or seat of arbitration may be virtual. Additionally, online procedures must be compatible with the transnational public policy to which belong the right to a fair trial the principles of transparency, impartiality, and representation. It is necessary that such rules be carefully drafted in order to make sure the subsequent award can be enforced by national courts.

3. Arbitral awards in online arbitration

3.1. The form of arbitral awards

Article IV of the New York Convention³²⁹ and Article 31 of UNCITRAL Model Law on International Commercial Arbitration³³⁰ require that arbitral awards should be contained in a writing signed by the arbitrators and the parties. The contents of UK, French, and US laws should be examined since they which be will applicable to an online award if chosen by the parties as their procedural law.

According to the Section 52 (1) UK Arbitration Act of 1996³³¹, “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” [Section 52 (2)]. In addition, “the award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons [Section 52 (3)]. Finally, “the award shall state the seat of arbitration and in the date of the award. In French law, Article 1472 of the Nouveau Code de Procédure Civile which applies to domestic arbitration but will also apply to international arbitration, unless the parties have agree otherwise³³². It requires *ad validitatem*³³³ that the award be dated and contains the names of arbitrators, other provisions such as the place where the award is rendered are only required *ad probationem*. Regarding US law, federal law refers explicitly to the New York Convention (Chapter 2 §202 of the Federal Arbitration Act of 1925³³⁴). Regarding state law,

³²⁶ See <http://www.lcia-arbitration.com/lcia>.

³²⁷ *ibid* (Kuner)p.17

³²⁸ See <http://www.jus.uio.no/lm/un.arbitration.model.law.1985.index.html> and see See VAHRENWALD, Arnold, WILIKENS, Marc, MORRIS, Philip, from the JOINT RESEARCH CENTER of the EUROPEAN COMMISSION, “Out-of-court dispute settlement systems for e-commerce- the report from the workshop held in Brussels on March 21 2000 “, Part IV Arbitration available at <http://dsa-isis.jrc.it/ADR.report.html>.

³²⁹ See <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

³³⁰ See <http://www.jus.uio.no/lm/un.arbitration.model.law.1985.index.html>.

³³¹ See <http://www.hmso.gov.uk/acts/acts1996/96023-1.htm>.

³³² See ROBERT, Jean, “*L’arbitrage: droit interne et droit international privé*”, 6ème édition, Dalloz, 1993, p.172.

³³³ See Article 1480 of the Nouveau Code de Procédure Civile, *Ibid*.

³³⁴ See NOHAN-HALEY, Jacqueline M., “*Alternative Dispute Resolution in a nutshell*”, West Publishing, 1992, p.258.

Section 8 of the Uniform Arbitration Act of 1955 (UAA)³³⁵ requires that the “award shall be in writing and signed by arbitrators joining in the award”.

These national and international provisions can cause problems regarding online awards because with electronic means copying is easier and it is not always easy to authenticate documents as we have previously seen.

In addition, it is questionable whether an arbitral award itself made on the Internet and written in an electronic version with the digital signatures of the arbitrators would qualify as “the duly authenticated original of an award or a duly certified copy thereof” as required by Article IV of the New York Convention for recognition or exequatur³³⁶. One practical solution to this problem would be to send the printed version of the arbitral award to the arbitrators to sign it or to use a trusted third party to conform that the digital signatures are those of the arbitrators³³⁷.

3.2. The effects of arbitral awards

3.2.1. Enforcement of online awards

Enforcement of online awards is another critical issue especially because contrary to “win-win” negotiations or mediations, one side only wins in arbitration. In this regard, “the online ICANN domain name dispute arbitration program is not typical”³³⁸. Indeed, in the ICANN system, compliance and enforcement are relatively easy as the four ICANN approved providers can order that a domain name stay or be transferred. Unless one literally control the fruits of the dispute (as with domain name ownership), one needs to go a national court to have an online arbitral award enforced. “But what court? And what law should apply? And what about physical jurisdiction over the person, not to say the practical ability to enforce payment and other terms even with the award being reduced to a court order”³³⁹.

The enforcement of arbitral awards is regulated by international instruments such as the New York Convention³⁴⁰ or possibly, bilateral agreements³⁴¹. According to Article V of the New York Convention³⁴², the grounds upon which an arbitral award can be annulled are basically: the lack of a valid agreement arbitration, the violation of the principles of due process, the violation of the scope of authority, the incapacity of a party and the violation of the transnational public policy, notably those which protect the weaker party (i.e the consumer).

Defenses to enforcement of foreign arbitral awards should be interpreted by national courts in light of technological advances and in a way that furthers the goal of promoting the enforcement of foreign arbitral awards. Two major difficulties can arise regarding online awards. First, if the

³³⁵ See Ibid, p.238.

³³⁶ implemented in French law by Article 1499 of the Nouveau Code de Procédure Civile. See ROBERT, Jean, “*L’arbitrage: droit interne et droit international privé*”, 6ème édition, Dalloz, 1993, p.284.

³³⁷ See ARSIC, Jasna, “International Commercial Arbitration on the Internet: Has the future come too early?”, *Journal of International Arbitration*, Vol.14, N°3, September 1997, p.217.

³³⁸ See MELAMED, Jim, HELIE, John, “*ODR in the US*”, at <http://www.mediate.com/articles/ecodir1.cfm>.

³³⁹ Ibid.

³⁴⁰ All European Union Member States have enacted the New York Convention but countries in Eastern Europe and in Africa have not. See Kuner, Christopher, Of Counsel, Morrison & Foerster, “*Legal obstacles to ADR in European Business to Consumer Electronic Commerce*”, December 2000, OECD Presentation, available at <http://www.odrnews.com/library.htm>, p. 19-21 and p. 22.

³⁴¹ Which usually follow the New York Convention.

³⁴² See <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

seat of arbitration cannot be determined due to international differences³⁴³, it may be difficult for national jurisdiction to verify whether the arbitral procedure was “in accordance with the law of the country where the arbitration took place”³⁴⁴. Second, if the parties have not kept a hard copy of the award has not been issued as required by Article IV of the New York Convention³⁴⁵.

3.2.2. The archival record

Other legal issues include what is to be done with the digital records of online arbitration³⁴⁶. This issue applies as well to online negotiation and mediation to a lesser extent³⁴⁷. But the award may need to be submitted to a court and it is desirable that the online service provider preserves a hard copy of the award that is signed manually by the arbitrators. But “doing this does not mean that the parties cannot be notified of the award through electronic means”³⁴⁸.

3.2.3. The absence of publicity

Finally, parties from different legal systems may have different ideas about whether online arbitral proceedings should be kept confidential like in traditional arbitration. But excessive restrictions may impede the development of an “arbitral case-law”. Consequently, mechanisms should be established so that decisions are published at least in redacted form³⁴⁹.

3.3. Non-binding Online arbitration

There is an unfortunate tendency to think online arbitration as a new form of ADR, administered by a new breed of techno-arbitrator, having little in common with its more traditional counterpart. This medium is promising but it must be utilized with caution due to the above-mentioned legal uncertainties. In the long run, but slowly, most arbitral institutions will invest in online arbitration. The London Court of Arbitration (LCIA)³⁵⁰ is currently exploring the idea of bringing about an online system. In addition, as online arbitration techniques evolve thanks to audio and video, the investment costs will decrease. The advances in technology will take arbitration into another realm.

For now, “there are few arbitration mechanisms that have been provided for but they are still not less developed”³⁵¹. The ICANN process of domain name dispute resolution is the only prevalent online arbitration since it is cost- and time- efficient. It operates as a document-only procedure where there is little interaction between the arbitrator (s) and the parties and it handles a high volume of caseloads that would overwhelm any F2F process. But it is non binding so we can

³⁴³ See above.

³⁴⁴ See Article V(1) d of the New York Convention.

³⁴⁵ See SCHNEIDER, Michael E., KUNER, Christopher, “Dispute Resolution in International Electronic Commerce”, *Journal of International Arbitration*, Vol.14, N°3, September 1997, p.24 and see above.

³⁴⁶ See DUCOURTIEUX, Cécile, " La France a la mémoire numérique qui flanche", *Le Monde*, 14 mars 2001.

³⁴⁷ See subpart A/

³⁴⁸ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*”, 2001, Jossey-Bass, San Francisco, p.140

³⁴⁹ See Kuner, Christopher, Of Counsel, Morrison & Foerster, “*Legal obstacles to ADR in European Business to Consumer Electronic Commerce*”, December 2000, OECD Presentation, available at <http://www.odmnews.com/library.htm>, p.17 and p.22

³⁵⁰ See <http://www.lcia-arbitration.com/lcia>.

³⁵¹ See KALLEL Sami, “Arbitrage et commerce électronique”, *Revue de droit des affaires internationales (International Business Law Journal)*, n°1, 2001, p.24.

ourselves if it still arbitration³⁵².

C. Advantages of Online Dispute Resolution

The growth of ODR is tied to the development of technology. The recent integration of email, web-based decisions, and instant messaging were notably profound technological additions. Negotiating, or mediating and to a lesser extent arbitrating through the Internet medium has certain qualitative advantages including mainly efficiency and ease.

1. More time- and cost- savings

ODR can save time and money. The cost of traditional ADR was already lower than litigation. But ODR has the potential for costing less and saving more time than traditional ADR.

1.1. Cost savings

The example of SquareTrade³⁵³ can be quoted again: it currently offers its' direct negotiation process free but charges when a mediator gets involved. The success rate of the direct negotiation is close to 80 percent, a rather astonishing percentage. When this fails, parties pay a fee for a human mediator to work with them³⁵⁴.

Consequently, "the smaller consumer is also more likely to accept ODR to resolve a dispute because there are no travel expenses and potentially lower overall expenses"³⁵⁵. Indeed, buying a computer and gaining Internet access is likely to become cheaper in the future.

Right now, it is difficult to have statistics about how much particular disputes should cost and how much mediators and arbitrators are able to charge since ODR is a very new process. But, "when successful structures can be replicated at virtually no cost, dispute resolution providers will grow, like any other online business, by copying successes and enjoying economies of scale"³⁵⁶. Indeed, "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"³⁵⁷.

1.2. Time savings

If ODR is a great expense cutter it also saves time. Most ODR sites are open twenty-four a day seven days a week. Parties can participate in ODR from their computers at home or work. People living in remote areas will not have to travel several hundred miles to a court or administrative office for adjudication of a matter. In addition, a service can appear to be located within a site even though it is an outsourced service managed by someone else"³⁵⁸. Consequently, disputes

³⁵² Ibid, p.108.

³⁵³ See part one subpart C/.

³⁵⁴ See KATSH, Ethan, RIFKIN, Janet, "Online Dispute Resolution: resolving conflicts in Cyberspace", 2001, Jossey-Bass, San Francisco, p.24.

³⁵⁵ See VANDEGARDE, Blake Edward « Alternative Dispute Resolution becomes Online Dispute Resolution », December 2000, available at: www.ukans.edu/~cybermom/C1J/vande/vande.htm.

³⁵⁶ See KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, "E-commerce, e-disputes, and e-dispute resolution: in the shadow of 'eBay Law'", 15 *Ohio State Journal of Dispute Resolution*, Spring 2000, p.727.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

that could last several months or years will be resolved much faster through ODR.

When Internet data transfer speeds allow for the use of video – and audio – conferencing equipment or document-editing in real-time, the potential for saving time and money will be tremendous. Some even say that it will kill traditional ADR. Indeed, a single teleconferencing chat room will be necessary, where participants could come and go as they wish and parties will be able to work on the same document together.

2. Better convenience

In addition, ODR is very convenient for those who have Internet access. The participants are enjoying new power because they decide when they respond and they have more process options open to them and are able to use experts.

2.1. The more level playing field

The online investor or consumer thanks to Internet is more powerful. This assertion is paradoxical since the bargained-for exchange model of contract seems to be conspicuously absent from the vast majority of consumer transactions. “Instead, sellers unilaterally specify the terms of the sale, offering them to consumers on a ‘take or leave it basis’”³⁵⁹. However, Internet intensifies competition, offering consumers a wider array of products and services from different sellers than they would have in geographically defined markets. First, the World Wide Web enables them to shop 24 hour a day but also to do comparative cost shopping. “While consumers may not be able to bargain with their voices across the negotiating table, they can bargain with their computers, rejecting offers from sellers specifying less attractive terms”³⁶⁰.

In addition, consumer transactions characterized themselves by their relatively low transaction value. “Indeed, the possibility of small transactions is what makes the Internet such an interesting medium for electronic commerce. Its inherently lower transaction costs make it economical for buyers and sellers to purchase and sells units of smaller value than they could economically do in physical markets with their higher inventory, rental, utility, labor and transportation costs”³⁶¹. But low transaction means that there is less at stake when something goes wrong. Thus, sellers and consumers have an incentive to collaborate and to settle.

Finally, particularly in the world of online commerce, consumers prefer to resolve disputes online because in most cases because “ there is a purely electronic relationship. It is somewhat presumptive to tell people who have a purely electronic relationship that they need to get together to resolve a difference between them !”³⁶².

2.2. Availability of information and process options

ODR might appeal strongly to less sophisticated parties with Internet grievances. Indeed, email, although insecure³⁶³, allows for the rapid transmission of information and a quick statement of position. In addition, the electronic medium creates a distance between the participants that could

³⁵⁹ See PERRITT, Henry H., “Dispute Resolution in Cyberspace: Demand for New Forms of ADR”, *15 Ohio State Journal of Dispute Resolution*, 2000, p.698.

³⁶⁰ Ibid, p.699

³⁶¹ Ibid, p.700.

³⁶² See MELAMED, Jim, HELIE, John, ” *Online Dispute Resolution in the US*“, <http://www.mediate.com/articles/ecodir1.cfm>.

³⁶³ See subpart A/

be beneficial. Since the process is void of physical contact, parties do not risk feeling threatened by the other party. In addition, having the option of asynchronous discussions on the Internet, which is impossible in a face-to-face environment, allow participants to craft their contributions as opposed to needing to respond in the moment may enhance the thoughtfulness of agreement-reaching efforts³⁶⁴. Finally, face saving may be easier in ODR since participants do not have to tell the non-verbal information which can be so effective at creating embarrassment³⁶⁵.

“In the mid 1990s, websites were already displaying both text and images easily. Now our screens have now color, shape and sound”³⁶⁶. For instance, “The CAN-WIN™ Internet conferencing system allows registered participants to log into an electronic conference room from anywhere in the world using standard browser software. A list identifying all parties present appears on each participant’s screen and clicking on a participant’s name opens a window to compose email to that individual. There is also an area on each participant’s screen to type messages to all participants. When sent, these messages immediately appear on the screen of all parties, identified with the sender’s name and time. Participants on one side of a dispute who are in different locations may also caucus privately with each other and/ or with the mediator during an online session. Two electronic conference rooms allow break-out sessions, during which the neutral may communicate with both rooms”³⁶⁷.

For instance, Online Resolution.com³⁶⁸ provides the parties with a Process Advisor which guides them to the best suited ODR process. Then, they enter a Resolution Room to attend current arbitration and mediation sessions, which allows both synchronous and asynchronous communication. Furthermore, it has also a built-in calendar and enables threaded discussion³⁶⁹. During an online session, the third party neutral has the possibility to re-frame the communications between the parties. Online caucusing is much more flexible. “A negotiator or a mediator can caucus with the parties at the same time than the joint discussion is going on. Archived communications allow the neutral (and the parties if they retain access to the archive) to actually copy out the words from a party’s posting and remind them of the sentiment and preference expressed. Finally, negotiators and mediators can confidentially poll participants to determine the extent to which they agree with certain statements, or to express what they see as key obstacles to agreement”³⁷⁰. Consequently, though the availability of information and process options, ODR could alleviate some legal and technical application problems relating to the rapid development of both law and technology.

2.3. Possibility of using experts

First, in ODR as in ADR, participants can choose their own neutral. But the cost of choosing an expert is even lower in ODR since they are extra-savings. In that respect, ODR could play a very

³⁶⁴ See MELAMED, Jim, HELIE, John “*The World Wide Web Main Street of the future is here today*”, available at <http://www.mediate.com/articles/jimmjohn.cfm>.

³⁶⁵ See LIDE, Casey E., “ADR in Cyberspace: the role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation”, 12 *Ohio State Journal on Dispute Resolution*, 1996, p.221.

³⁶⁶ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*”, 2001, Jossey-Bass, San Francisco, p.144.

³⁶⁷ See WIENER, Alan “Opportunities and Initiatives in Online Dispute Resolution”, Society for Professionals in Dispute Resolution (SPIDR) News, Summer 2000, Volume 24, N°3, republished in <http://www.mediate.com/articles/awiener1.cfm>.

³⁶⁸ See website at <http://www.onlineresolution.com>.

³⁶⁹ Information given by Colin Rule the President of Online Resolution during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris.

³⁷⁰ See RULE, Colin, “*New Mediators Capabilities in Online Dispute Resolution*”, at <http://www.mediate.com/articles/rule.cfm>.

large role in the resolution of many disputes involving recent information technologies. There are many practical reasons in favour of choosing it over litigation. “Its self-regulatory nature could promote rather than stifle, the natural evolution of a coherent body of cyberspace customary law”³⁷¹. Second, some sophisticated software³⁷², “allows the machine to assimilate the information presented by the parties and calculate resolutions that may provide each side with more than they themselves might be able to negotiate”³⁷³.

Clearly, the convenience, affordability and technical advantages of the Internet are hard to beat. But regarding ODR, “there are probably more questions than answers at the beginning of the new millennium, but it is clear that cyberspace is growing and that, increasingly, cyberspace is where disputes are. But, there will be a need for those who understand the process of dispute resolution and who are comfortable with the machines that have become a large part of our lives”³⁷⁴.

³⁷¹ See LIDE, Casey E., "ADR in Cyberspace: the role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation", 12 *Ohio State Journal on Dispute Resolution*, 1996, p.193-221.

³⁷² See blind bidding part one subpart B/.

³⁷⁴ See KATSH, Ethan, “The new Frontier: Online ADR becoming a global priority “, *Dispute Resolution Magazine*, Winter 2000, p.8 available at: www.umass.edu/cyber/katsh_aba.pdf.

III. The transformation of the litigation scene (towards AADR)?

Government, industry, consumer and dispute resolution organizations have been actively attempting to promote the opportunities and address the challenges of Internet. Nevertheless, “a principal are of disagreement is whether online dispute resolution should be regulated by government or self-regulated by industry³⁷⁵. Seals of approvals or “trustmarks” are currently one of the chief mechanism of self-regulation on the Internet. These new trends lead to the following questions: is the replacement of ADR by ODR part of the transformations ahead? Are we moving towards an alternative to ADR? What should we expect from the future?

A. Self-regulation preferable to governmental intervention

In the development of the standards for the Internet and mostly about online resolution of business-to-consumer disputes³⁷⁶, both multilateral governmental and unilateral initiatives have been taken. On the multilateral level, the Organization for Economic Co-operation and Development (OECD) has been urging since April 1997 for a coordinated approach to issues arising out commercial transactions in the Cyberspace. On December 9, 1999, it issued some guidelines which have been endorsed by leaders of the G8 nations in the Okinawa Charter on Global Information Society, dated July 22 2000³⁷⁷.

On December 1997, the European Union and the United States adopted a joint statement recognizing that global electronic commerce would be an important engine in the world economy in the 21st century. In December 2000, at their biannual summit, they reaffirmed their commitment to support self-regulatory codes of conduct, technologies to promote confidence and the OECD Guidelines³⁷⁸.

The OECD, the Hague Conference on Private International Law and the ICC Chamber co-sponsored the conference “Building trust in the online environment: Business to Consumer Dispute Resolution” on December 11-12 2000³⁷⁹. The need to find common ground among them on essential elements of any fair and effective ODR for business-to-consumer disputes.

Regarding national initiatives, even though the US government has helped to cristallize Internet customs and begin to record an Internet history, it has been more reluctant to enact guidelines or standards than the European Commission³⁸⁰. In July 1997, the Clinton Administration released a policy statement entitled “The Framework for Global Electronic Commerce”. It was decided that “(1) the private sector should lead and that (2) governments should avoid undue restrictions to electronic commerce, (3) where government involvement is needed, its aims should be to support and enforce a predictable minimalist, consistent, and simple legal environment for electronic

³⁷⁵ See WIENER, Alan “Regulations and Standards for Online Dispute Resolution: Summary of Public and Private Initiatives” at <http://www.mediate.com/articles/awiener.cfm>.

³⁷⁶ which face the most important legal challenges.

³⁷⁷ See *ibid* and December 9 1999: Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce see <http://www.oecd.org//dsti/sti/it/consumer/prod/guidelines.htm>.

³⁷⁸ See Statement of the European Union and the United States on building the confidence in e-commerce and the role of ODR, EU-US Summit, Washington, December 18 2000 see http://europa.eu.int/comm/external_relations/us/summit/12_00/e_commerce.htm.

³⁷⁹ See http://www.oecd.int/dsti/sti/it/secur/act/online_trust/documents.htm#relateddocuments.

³⁸⁰ It should, however, be noted that, regarding cyber criminality, the American government tends to much more repressive than Europeans. See COSTES, Lionel, " La conférence du G8 sur la sécurité et la confiance dans le cyberspace: un premier dialogue", *Cahiers-Lamy-Droit de l'informatique*, Juin 2000, n°126, p.1-5.

commerce (4) governments should recognize the unique quality of Internet, and (6) electronic commerce over the Internet should be facilitated³⁸¹.

In addition, the Federal Trade Commission has organized several workshops in June 1999, June 2000³⁸² and February 2001³⁸³ But no specific guidelines for either B2C in general or ODR have yet been proposed or promulgated by the US government.

Concerning the European Union even if ODR services provider are less numerous than in the United States, the European Commission (EC) has been early in promoting the enactment of guidelines to regulate the Internet. In March 1998, the EC promulgated Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-court settlement of Consumer Disputes³⁸⁴ and two more Recommendations were adopted in March 2000³⁸⁵.

The EC also convened the e-Confidence Group of Stakeholders to develop general principles that could be used by accreditation bodies in the EU Member States to approve codes of conduct and trustmark schemes covering online shopping³⁸⁶.

In France, the government and most authors are reluctant about the market self-regulation defended by the US government and they prefer that guidelines should be implemented³⁸⁷.

As far as industry initiatives are concerned, the propositions of the Global Business Dialogue on Electronic Commerce (GBDe)³⁸⁸ and the American Bar Association is currently working on e-commerce³⁸⁹ can be quoted. Regarding consumer initiatives, the Transatlantic Consumer Dialogue (TACD)³⁹⁰ which lobbies the EU and the US for the establishment of minimum standards in electronic commerce including effective complaint mechanism should be mentioned. In the area of ODR, self-regulation seems better than governmental intervention since private entities which are operating online can better grasp the transformations happening

³⁸¹ See LUI-KWAN, Kalama and OPSAHL Kurt, "The legal and policy framework for global electronic commerce: a progress report", *14 Berkeley Technology Law Journal*, Spring 1999, p.503.

³⁸² See June 2000 workshop FTC/DoC: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace see presentations all available at <http://www.odrnews.com/library.htm> See also FTC/ Department of Commerce "Summary of Public Comments from their Online ADR Conference, June 2000" at <http://www.ftc.gov/bcp/altdisresolution/summary.htm>.

³⁸³ Information given by Pablo Zylbergait, Legal Advisor for International Consumer Protection, US Federal Trade Commission during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris.

³⁸⁴ See http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just/uf02/en.html.

³⁸⁵ Information given by Timothy Fenoulhet, European Commission, DG Information Society Policy Planning, during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris

³⁸⁶ See the e-Confidence Group Guiding Principles for Generic Codes of Practice for the Sale of Goods and Services to Consumers on the Internet, E-Commerce Codes of Conduct-Specific requirements additional to Community Law at http://econfidence.jrc.it/default/page.gx?_app.page=entity.html_app.action=entity&_entity.object=EC8FORUM0000000000000088&_entity.name=Principles-Draft1.pdf.

³⁸⁷ See WOLTON, Dominique, JAY, Olivier "Internet: petit manuel de survie", Flammarion, Paris 2000, p.134-142 and see LAFITTE, Pierre, JOYANDET, Alain, HERISSON, Pierre, TURK, Alex, "Vers une régulation à la française" de l'Internet: les dernières propositions sénatoriales", *Cahiers-Lamy-Droit de l'informatique*, 1997, Octobre, n°96, p.18-20..

³⁸⁸ See HUET, Jérôme, "Commerce électronique: Loi applicable et Règlement des Litiges. Propositions des grandes entreprises (GBDe)", *La Semaine Juridique Edition Entreprises*, N°41, Octobre 1999, p. 1601-1602.

³⁸⁹ See American Bar Association Task Force on e-commerce and ADR, Draft preliminary report and concept paper and general survey available at <http://www.law.washington.edu/ABA-Eadr>. Information given by Karol Denniston, Vice-Chairman, ABA Task Force, during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris.

³⁹⁰ See TACD, ADR in the context of e-Commerce, February 2000, at <http://www.tacd.org/papers/ecommerce/Ecomm-12-00-rtf>.

on the Internet than territorially-based governments.

B. Increasing awareness of Online Dispute Resolution

1. Building trust in Cyberspace

Building trust is difficult in the online environment, and a seal or trustmark³⁹¹ is “one way to do it without relying on word of mouth from satisfied users”³⁹². “In general, independent organizations (Code Owners) establish standards (Codes of Practice) for conducting e-commerce and certify that particular online businesses (Code Subscribers) have met those standards. The Code Subscriber is then permitted to display the Code Owner’s seal or trustmark on their website”³⁹³.

“Consumers will not engage in impersonal exchange unless they either trust the merchant they are dealing with and believe that everything will go alright or they can comfortably rely on a third party to effectively afford them redress if things go wrong”³⁹⁴. Indeed, statistics published in June 1999 by Technical Assistance Research Program (TARP), now known as E-Satisfy show that “on average, 50% of consumers will complain about a problem to a ‘front-line person’. But only 1-5% of consumers will escalate a complaint to a local manager or corporate office, although for higher ticket items, the percentage of complainants is greater. On average, twice as many people are told about a bad experience than they are about a good experience. It is five times as expensive to win a new customer as to keep a current one. Finally – and perhaps surprisingly – TARP found that customers who complain and are subsequently are up to 8% more loyal than if they never had a problem”³⁹⁵. In addition, “online customers have higher expectations than offline customers for the time it takes for companies to respond to and resolve their concerns and only 36 % of online customers are completely satisfied with the electronic contracting experience”³⁹⁶. Rufus Pilcher conclude his thesis by asserting the need to enhance consumer confidence in the online marketplace through new institutions such as seals and trustmarks. This conclusion can also be applied to ODR since an essential aspect of the intervention of a third party neutral whether offline or online is trust³⁹⁷.

Indeed, “These seals should raise the level of trust and the willingness potential users have to use a particular website. Most merchants on the web are small businesses and do not have a recognizable brand name. By displaying a seal, the website indicates that he has agreed to observe various requirements of the seal issuer. The Square Trade seals commits a merchant to participation in a dispute resolution process of a problem occurs, to abide by a series of responsible business practices and in addition SquareTrade provides fraud insurance”³⁹⁸.

³⁹¹ See Glossary.

³⁹² See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, Chapter 2 “A Brief History of ODR” p.67.

³⁹³ See WIENER, Alan, “*Regulations and Standards for Online Dispute Resolution: Summary of Public and Private Initiatives*” at <http://www.mediate.com/articles/awiener.cfm>.

³⁹⁴ See PILCHER, Rufus, “*Trust and reliance-enforcement and compliance: enhancing consumer Confidence in the electronic marketplace*” at http://www.oecd.int/dsti/sti/it/secur/act/online_trust/documents.htm#relateddocuments (reference: <http://www.law.stanford.edu/library/special:rufus.thesis.pdf>).

³⁹⁵ Information given by Charles Underhill, Senior Vice President, Dispute Resolution Division, Council of Better Business Bureau, during the ADR Conference for Business to Consumer e-Commerce, June 1, 2001, U.S Embassy Paris.

³⁹⁶ Ibid.

³⁹⁷ See VAN DEN HEUVEL, Esther, “*Online dispute resolution as a solution to cross-border e-disputes: an introduction to Online Dispute Resolution*”, August 2000, available at http://www.oecd.int/dsti/sti/it/secur/act/Online_trust/vandenheuvel.doc, p.13 and 19.

³⁹⁸ See KATSH, Ethan, RIFKIN, Janet, “*Online Dispute Resolution: resolving conflicts in Cyberspace*“, 2001, Jossey-Bass, San Francisco, Chapter 2 “A Brief History of ODR” p. 66-67.

“The fee depends on the volume of goods they sell and begins at \$100 annually for businesses that do \$50, 000 or less a year. By using SquareTrade, businesses can protect one of their most important selling tools, their feedback rating both before and after negative comments are posted. “If both buyer and seller agree that someone has been unfairly flamed or negatively rated, then as part of the settlement agreement, they can agree to remove the negative rating”³⁹⁹. “All of these seals help the merchant as much as the consumer because they should raise the willingness of anyone of anyone to transact business at the site”.

The Better Business Bureau Online also offers an online reliability seal program to help web users find reliable, trustworthy business online. Merchants who want to use the BBBOnline reliability must meet certain standards. Notably, a Code of Online Business Practices will be applicable to the more 9000 websites that carry the BBBOnline seal after September 8, 2001⁴⁰⁰.

Other trustmark or webseals providers include: the American TRUSTe⁴⁰¹, TRUSTUK⁴⁰², TRUSTShops⁴⁰³ and Veritas⁴⁰⁴.

Another way to enhance awareness about ODR is to build culturally sensitive ODR systems. “The whole point of providing a no-cost, accessible, fast and culturally adapted online dispute resolution service to cross-cultural clients is to help retain satisfied and loyal customers”⁴⁰⁵.

Consequently, building certified or culturally-sensitive ODR websites allow to increase the awareness about ODR. In addition, it is good business so there is reason why these two ventures should not be promoted in the future. However, there is a need to avoid the over-proliferation of seals and trustmarks which may ruin these efforts.

2. ODR: a replacement of ADR or litigation?

Disputes over the Internet are not different from disputes in the physical world. They involve people and they will use whatever mechanism for resolving their disputes if it meets their needs. When a field is new, such as ODR, and the road marks are few, there is often a greater need for public precedents that can show the way. But because ODR is private and contractual it cannot generate a decision which has the same strength than a court order⁴⁰⁶. Furthermore, like traditional ADR, it cannot bring together unwilling parties⁴⁰⁷. Consequently, it seems that the courts will never be replaced totally by ODR as they were not by ADR⁴⁰⁸.

³⁹⁹ See DENNEHY, Michelle, “E-bay extends SquareTrade deals”, *National Public Radio*, July 26 2000, at <http://www.squaretrade.com/aboutus/nationalpublicradio.jsp>.

⁴⁰⁰ See <http://bbbonline.org/intl/code.asp>.

⁴⁰¹ American company See <http://www.truste.org>.

⁴⁰² UK company See <http://www.trustuk.org.uk>.

⁴⁰³ German company See <http://www.trustshops.de>.

⁴⁰⁴ French company See <http://bureauveritaswebvalue.com>.

⁴⁰⁵ See FEMENIA, Nora, “*Online Dispute Resolution and the global management of customers’ complaints: how could Online Dispute Resolution techniques be responsive to different social and cultural environments?*”, Paper presented at the Joint Conference of the OECD, HCOPII, ICC, The Hague, Holland, December 2000, available at www.mediate.com/articles/femenia/cfm p.8.

⁴⁰⁶ especially in common law countries where the decision of the highest court constitutes a binding precedent.

⁴⁰⁷ In certain circumstances, courts in common law countries can deprive somebody of his or her freedom through injunction for a personal debt.

⁴⁰⁸ ADR was even influenced by the judicial decision: they follow the same path than arbitration see FOUCHARD, Philippe, who talks about “processualisation of ADR”, « Arbitrage et modes alternatifs de règlement des litiges du commerce international », in *Mélanges en l’honneur de Philippe KAHN*, Edition Litec 2000, p.113.

3. For hybrids: A & ODR and O & ADR

“ODR should not expect or strive to duplicate the face to face environment. Rather it should focus on using the network in ways that maximize the power of technology, power that may even be missing in face to face encounters”⁴⁰⁹.

Many ODR service providers such as OnlineResolution.com focus now on hybrid where face-to-face are combined with online tools to create a much more efficient overall process “For example, a mediator could meet face-to-face with two geographically separated disputants for an initial meeting, then, move the discussion into an online environment for joint problem solving and agreement sharing, then, re-convene face-to face to get final buy in”⁴¹⁰.

Building ODR environments in such a way that they can easily be integrated to and complement face-to face will make dispute resolution professionals and parties more comfortable with ODR over time. Indeed, “ODR has only begun to realize its potential”⁴¹¹ as a complement to litigation rather than an alternative. In the future, “Advances in technology may allow the less popular forms of ODR to catch up, even surpass the popular forms of ODR”⁴¹².

C. The transformations ahead

1. The conflict: towards dispute avoidance

Certification and Codes of Conducts have for common denominator: to prevent, minimize them and resolving them⁴¹³. Richard Susskind thinks that the first transformation ahead is the move from dispute resolution to dispute pre-emption. For him, “the effective legal control of legal risks prior to their escalation and realization as problems will mean that disputes will be pre-empted and so will not progress to any formal or alternative resolution process”⁴¹⁴.

It is true there is a need for establishing guidelines regarding ODR service providers and that some disputes can be avoided through better information. But there will remain conflicts, which cannot be prevented and will be resolved by national courts, offline or online mediators or arbitrators.

Consequently, Richard Susskind’s view seems a little to extreme to reflect the future, even though there is clearly a globalized trend towards developing ways to avoid disputes, in which ODR can participate through negotiation devices such as SmartSettle which also offers trustmarks⁴¹⁵.

⁴⁰⁹ See KATSH, Ethan, “The new Frontier: Online ADR becoming a global priority “, *Dispute Resolution Magazine*, Winter 2000, p.8 available at: www.umass.edu/cyber/katsh_aba.pdf.

⁴¹⁰ See RULE, Colin, “*New Mediators Capabilities in Online Dispute Resolution*”, at <http://www.mediate.com/articles/rule.cfm>.

⁴¹¹ See VANDEGARDE, Blake Edward « *Alternative Dispute Resolution becomes Online Dispute Resolution* », December 2000, available at: www.ukans.edu/~cybermom/CIJ/vande/vande.htm.

⁴¹² Ibid.

⁴¹³ See HART, Christine, “*Online Dispute Resolution and avoidance in electronic commerce*”, August 1999 available at <http://www.law.ualberta.ca/alri:ulc:current.hart.htm>.

⁴¹⁴ See SUSSKIND, Richard, “*The future of law: facing the challenges of Information Technology*», Oxford University Press, Oxford, 1998, revised paperback edition, p.290 and SUSSKIND, Richard, “*Transforming the law: essays on Technology, Justice and the Legal Marketplace*”, Oxford University Press, Oxford, 2000, p.105.

⁴¹⁵ See above and part one subpart B/.

2. The legal profession: towards multidisciplinary services

Richard Susskind argues that “in the legal advisory paradigm of the print-based society, lawyers have enjoyed a dual role, combining that of being legal information engineers as providers”⁴¹⁶. But “in the IT⁴¹⁷-based information society (of tomorrow), in contrast, the process of analysis and formulation of information can and will be separated from that of the provision of legal information”⁴¹⁸.

Consequently, “a far larger number of lawyers will have to reorient their careers and will become the legal information engineers whose knowledge forms the basis of the legal information services. The legal profession of the future will be constituted by two tiers not the solicitors or barristers of today, but the legal specialists and legal information engineers of the information society”⁴¹⁹.

However, it is doubtful that future legal advice can be done entirely online. As we have seen with ODR, there is a need of face-to-face encounters. Richard Susskind overestimate the power of Internet to solve bricks and mortar disputes and the transformation affecting legal services. It is true that thanks to the Internet non-lawyers will have better access to legal guidance and to justice and that lawyers will need more and more to be familiar with technological tools. But it does not mean that the legal and engineering profession will merge since only lawyers retain the substantive legal knowledge necessary before breaking down concepts in lay terms and can advise the parties as to the process options available.

Richard Susskind also predicts that “the domestic user, while online, will gradually expect legal information to be bundled with other relevant information (integrated, say with consumer or leisure or health information), while business users will expect and require the guidance they receive to be oriented towards the problems or projects with which they are involved rather than the underlying, individual, legal disciplines.

Thus, legal guidance systems will either operate alongside or be fully integrated, as multidisciplinary systems, with other legal guidance systems, extending into areas such as accountancy, banking, and business and management consultancy”. This move towards multidisciplinary and global services is logically predictable and has been anticipated by some multinational law firms based in New York, London, Paris and Hong Kong⁴²⁰.

3. The future of law?

We will now comment Richard Susskind’s observations about the influence of information technology (IT) on the future of law. Indeed, the World Wide Web is likely to become “the natural first port of call”⁴²¹ for innumerable services, in both a social and business context. “As prices fall and more uses are made available, the Internet will become as commonplace as the

⁴¹⁶ See SUSSKIND, Richard, “*The future of law: facing the challenges of Information Technology*», Oxford University Press, Oxford, 1998, p.271.

⁴¹⁷ Information technology.

⁴¹⁸ Ibid.

⁴¹⁹ SUSSKIND, Richard, “*Transforming the law: essays on Technology, Justice and the Legal Marketplace*”, Oxford University Press, Oxford, 2000, p.107.

⁴²⁰ See POROY, Reha, “*L’avenir du droit: optimisme malgré tout*”, in *Mélanges en hommage à François Terré, “L’avenir du droit”*, Presses Universitaires de France, 1999, p 825.

⁴²¹ See SUSSKIND, Richard, “*Transforming the law: essays on Technology, Justice and the Legal Marketplace*”, Oxford University Press, Oxford, 2000, p.135.

telephone and television”.

The use of IT has an impact on the law. It can even weaken its effects since Internet users can avoid its application by changing their identities⁴²². But, it seems that IT has an overall beneficial effect on the law since “multi-media will enhance legal service as an information service and will render the law still further accessible”⁴²³.

Finally, Richard Susskind believes “the next shift in paradigm for the law (after the current one) will not occur until several centuries, hence, at the end of the information society when, though enablers such as nanotechnology, man and machine become one and supplementary information and knowledge will be genetically encoded in human beings”. Only time will tell if such a transformation occurs. But in the meantime – and it will hopefully be a long meantime – the foreseeable future of law lies in the law becoming more accessible to non-lawyers through the Internet.

Conclusion

“Cyberspace is an arena of experimentation and competition. It is not now and probably will never will be a harmonious place but it is a place of rapid change and even today of extraordinary achievements. The emergence of effective online justice systems will require considerable creativity but the larger and more active cyberspace becomes, the more likely it is that demand for online ADR will grow. It has been written that ‘businessmen want to do business not argue about it. But in the world of trade and commerce, disputes are inevitable’⁴²⁴. In an online environment, loss of time often causes loss of opportunities and persons involved in electronic commerce or any type of online relationship will wish to resolve problems in a fastest possible way. ADR has traditionally been a process of choice when relationships are of concern, and in Margaret Wertheim’s words⁴²⁵, cyberspace is ‘a network of relationships and is inherently relational’. As a result, online ADR, employing increasingly sophisticated tools provided by the network, can be expected to be a resource of growing value”⁴²⁶.

⁴²² See ROJINSKY, Cyril, “Cyberespace et nouvelles régulations technologiques”, *Dalloz*, 2001, Chroniques, p7.

⁴²³ See SUSSKIND, Richard, “*The future of law: facing the challenges of Information Technology*», Oxford University Press, Oxford, 1998, p.267.

⁴²⁴ See WESS, Harold B, “The myths we live by”, 15 *Chris.Econ*, n°16, p.3 quoted in DOMKE, Martin, “The nature of commercial arbitration 1”, 1965.

⁴²⁵ See WERTHEIM, Margaret, “*The pearly gates of Cyberspace*”, (1999), p.299.

⁴²⁶ See KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, “E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law””, 15 *Ohio State Journal of Dispute Resolution*, Spring 2000, p.734.

GLOSSARY

- **Adjudication:** is a process in which disputants present proofs and arguments to a neutral third party which has the power to hand down a binding decision, generally based on objective standards. Both, court litigation and binding arbitration, would fall within that definition.
- **Alternative Dispute Resolution (ADR) Process:** may be defined as a range of procedures which serve as alternatives to the adjudicatory procedures of litigation and arbitration for the resolution of disputes, generally but not necessarily involving the intercession and assistance of a neutral third party who helps to facilitate such resolution. Mediation and arbitration are the most commonly used ADR processes.
- **Arbitration:** is a process in which parties submit disputes to a neutral third person (an "arbitrator") for a decision on the merits. Each party has the opportunity to present evidence to the arbitrator in writing. An arbitrator not required to follow the Rules of Evidence used in court. An arbitrator decides cases by written decisions or "awards". An award is usually binding on the parties depending on the agreement to arbitrate. If necessary, a "binding" arbitration award may be enforced as a court judgment but judicial review of arbitration awards is limited.
- **Non-binding arbitration:** where a third party issues a recommended resolution in the dispute which the parties may elect to accept or reject.
- **Award:** the decision of arbitrators in a case submitted to them.
- **Bit:** the technical term of art for an indivisible unit of information stored or transmitted by e-means.
- **Blind bidding (or blind negotiation or electronic settlement negotiation):** these ODR service providers rely on the ability of the parties connected by a network to submit electronic settlement offers to a machine, and use software to compare the confidential bids submitted by disputants. If the offers are within a certain range, the machine will end the dispute by splitting the difference. When the offers are far apart, the machine keeps the offers secret and negotiations can continue without anything having been conceded by the parties.
- **Business:** refers to a seller or lessor of goods or services to consumers.
- **Business to Business (B2B):** trade in between two businesses.
- **Business to Consumer (B2C) or e-commerce:** means in a broad sense the sale of goods and services over electronic computer networks (primarily the Internet) from business entities to individuals acting in their personal capacity.
- **Case:** is a complete record of an attempt to resolve a dispute.
- **Caucus or ex parte sessions:** a private ex parte session between the neutral and each party. Arbitrators do not involve in ex parte sessions.
- **Online chat:** real-time or synchronous talk between two or more people on the Internet.

- **Claimant, Complainant (or plaintiff):** this is the person who lodges a complaint
- **Click-wrap agreements:** are mass market licences by which consumers are asked to agree on the licence terms and only after they have interactively clicked on the corresponding button the computer programme will continue.
- **Complaint:** contains the facts and any contention of law on which the claim relies.
- **Consumer:** an individual who purchases or leases goods or services or contracts to purchase or lease goods or services, intended for personal, family or household use.
- **Consumer to Business (C2B):** trade in between two consumers.
- **Conciliation:** is a process in which parties to a dispute try to reach a voluntary settlement with the help of a third party (a “conciliator”). According to Charles Jarrosson⁴²⁷, “conciliation” designates in a generic way any amiable settlement brought to the conflict, whilst mediation is the search for settlement of the conflict obtained by the intervention of a third party.
- **Domain Name System:** is the equivalent of an address or telephone number; two identical domain names cannot co-exist. Domain names allow websurfers to locate and access Internet websites by typing an easy-to-remember name rather than Internet Protocol (IP) number, which computers use to locate a requested website. For example, the IP number for Microsoft is 131.107.1.7 while its domain name is “microsoft.com”. Domain names are divided into two levels. Consider the example www.cnn.com. The suffix of a domain name is called the top level domain (TLD) (here .com). The “cnn” portion of the domain name is referred to as the second-level domain (SLD). The ownership of the SLD is the primary source of controversy in trademark⁴²⁸ disputes. Indeed, the current Internet domain name registration process permits any individual to register any domain name at a minimal cost, regardless of who owns the actual trademark or brand name which can give rise to cybersquatting. The “.com” portion is referred to as the top-level domain name.

There are two types of top-level domain names:

--gTLD: Generic Top Level Domains: there are six of them for now. But meeting on July 16, 2000, the ICANN Board of Directors decided the creation of new TLD's

-.com: for businesses (commercially available)

-.edu: for universities and schools (commercially available)

-.org: for non-profit organizations (commercially available)

-.net for businesses which are operating online (commercially available)

-.gov: for United States government (not commercially available)

-.mil: for United States military (not commercially available)

The Internet Corporation for Assigned Names and Numbers (ICANN) handles the registry of gTLDs. New gTLDs are available since January 2001 (.aero, .biz, .coop, .info, .museum, .name, .pro) for registry on the basis of “first come, first served”.

--ccTLD: Country Code Top Level Domains such as .us, .uk, or .fr.

ccTLD Registry is handled by the respective owner nations. In France, the .fr is handled by the Association Française pour le nommage Internet en coopération (AFNIC). See <http://nic.fr>.

⁴²⁷ See JARROSSON, Charles, “ Les modes alternatifs de règlement des différends”, *Revue Internationale de Droit comparé*, 1997, p. 325

⁴²⁸ See infra.

- **Domain Name grabbing or cybersquatting:** to register a domain name in bad faith in order to resell it at the highest price to its legitimate users.
- **Encryption:** this software encodes a message so that no one can decode it without the appropriate “key”. The key is separately communicated to the recipient. If the message is somehow intercepted before reaching the recipient, the message will be unintelligible.
- **Email:** refers to electronic mail.
- **Expert systems:** computer software that attempts to mimic the reasoning of a human specialist.
- **Face to face (F2F) meetings:** meeting between the parties and the mediator/ arbitrator either at the same time or separately.
- **Hyperlink or hypertext:** cross-reference which links a online document to another.
- **Imperium:** (latin) the right to command or to employ the force of the State.
- **Lex mercatoria:** transnational law including general principles, customs, trade usages without reference to a specific national system.
- **Mediation:** is a process in which parties submit disputes to a neutral third person (a “mediator”) which aids the parties in reaching a mutually acceptable agreement.

Typical mediation procedures include:

-Dispute Review Boards: stems from a contractual clause, binding on the parties, which specifies the rules of the mediation and the identity of the mediators . This type of clause appears in all countries in joint venture contracts but also between parties belonging to the same professional sphere. The Dispute Review Board is the generic name given to mediation committees so constituted.

-Fact finding: if the solution to the dispute depends on technical issues, for instance the authenticity of data, it may be appropriate to appoint a neutral expert who may inspect evidence such as documents, computers or other equipment.

-High-low arbitration: a scheme by means of which the mediator aims at a settlement by arriving at a compromise between the sum claimed by the plaintiff and the sum which the defendant is willing to pay.

-Baseball or Final-offer arbitration: a scheme according to which the parties declare their final offers for settlement to the mediator who then aims at the proposal of a settlement by balancing the interests of the parties.

-Mini-trial: this ADR procedure involves the formation of a committee (“panel”) made up of two high ranking senior managers of both parties and one neutral mediator as president.

-Med-arb: in this formula, which falls between mediation and arbitration, the parties agree in advance that the mediator will sit as an arbitrator in the event that mediation fails.

Differences between Conciliator/ Mediator and Arbitrator:

-an arbitrator has authority to act where one party declines to participate or stops responding. whereas a conciliator/ mediator has no such powers

-an arbitrator cannot have private communications with parties “caucuses” while a mediator/ conciliator can use caucuses all the time.

-an arbitrator has similar power to a court as to requiring attendance of witnesses and

production of documents (United States (Arbitration Act 1925 Section 7), United Kingdom (Arbitration Act 1996, Section 38), France (Décret du 12 mai 1981 Article 1460 Nouveau Code de Procédure civile).

-an arbitrator has the authority to settle a case since he/ she has a duty to render an award which has the same force as a judicial decision, whereas a conciliator/ mediator has no such powers. If settlement is reached during a conciliation/ mediation, it has no more force than a judicial decision.

- **Brand/trade name:** an arbitrarily adopted name given by a manufacturer or merchant to an article or service to distinguish it as produced and sold by him and that may be used and protected as a trademark.
- **Negotiation:** may be generally defined as consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter.
- **Neutral:** an arbitrator, a conciliator or a mediator or any other independent, impartial third person selected by the parties.
- **Partnering:** establishes working relations among the parties through a mutually developed, formal strategy of commitment and communication where trust and teamwork prevent disputes and create a cooperative bond. It generally includes informal and formal escalation procedures, mediation, and possibly fast-track arbitration by a Dispute Review Board.
- **Party:** generic term for the persons acting as the claimant and respondent.
- **Online Dispute Resolution (ODR):** uses the opportunities provided by Internet not only to employ ADR processes in the online environment but also to enhance these processes when used to resolve conflicts in offline environment.
- **Online Dispute Resolution Service Provider:** this is the body delivering the ODR process.
- **Ombudsperson or ombudsd(man):** a neutral individual who hears complaint, engages in fact finding, and generally promotes the resolution of disputes through informal methods such as mediation and counselling. The traditional notion of an “ombudsperson” derives from the Scandinavian countries where a public official would be designated to listen to the public’s complaints and attempt to respond to them. Ombudspersons are used in U.S Federal-labor management.
- **Respondent: (or defendant)** the person against which a complaint is filed.
- **Seal/Trustmark:** are issued by independent organizations (code owners) which establish standards (Codes of Practice) for conducting e-commerce. Code owners certify that particular online businesses (Code Subscribers) have met those standards and the Code Subscriber is then permitted to display the Code owner’s seal or trustmark on their website.
- **Settlement:** puts an end to the dispute. It is either agreed between the parties or imposed by the arbitrator or a tribunal.
- **Trademark:** a device (as a word) pointing distinctly to the origin or ownership of merchandise to which it is applied and legally reserved to the exclusive use of its owner as maker or seller.

- **Service mark:** a device used to identify a service (e.g.: insurance or transportation) offered to customers.
- **Unconscionable:** shockingly unfair or unjust (contrary to conscionable).
Noun: unconscionability.
- **Video-conferencing:** the holding of a conference among people at remote locations by means of transmitted audio and video-signals.

BIBLIOGRAPHY

Books:

■ *About Alternative Dispute Resolution and arbitration*

- CADIET, Loïc, "*Droit judiciaire privé*", Litec, 2ème édition, Paris, 934 p.
- DOMKE, Martin, "*The nature of commercial arbitration 1*", 1965.
- FISCHER, Roger, URY, William, "*Getting to yes: negotiating Agreement without giving In*", Penguin Books Inc, New York, 1991, 200 p.
- FOUCHARD, Philippe, GAILLARD, Emmanuel, GOLDMAN, Berthold (†) "*On international commercial arbitration*", Kluwer Law International, 1999, p.1000 p.
- NOHAN-HALEY, Jacqueline M., "*Alternative Dispute Resolution in a nutshell*", West Publishing, Saint Paul Minnesota, 1992, p298.
- MARKS, Jonathan B., JOHNSON, Carl J., BIZARTON, Peter L., "*Dispute resolution processes in America*", Fiona Boyd University of East Anglia, 1984, p.80.
- MOOKIN, Robert H., PEPPE, Scott R, TULUMELLO, Andrew S, "*Beyond winning: negotiating to create values in deals and disputes*", Harvard University Press, Cambridge, Massachusetts, London, England, 2000, 354 p.
- MURRAY, John S., SCOTT RAU, Alan, SHERMAN, Edward F., "*Mediation and non-binding processes*", The Foundation Press, Inc., Westbury, New York, 1996, 351 p.
- REDFERN, Alan, HUNTER, Martin, "*Law and Practice of International Commercial Arbitration*", 3rd ed, Sweet and Maxwell, London, 1999, p.142 and p.143.
- ROBERT, Jean, "*L'arbitrage: droit interne et droit international privé*", 6ème édition, Dalloz, 1993, 459 p.

■ *About the World Wide Web:*

- BENSOUSSAN, Alain, sous la direction de, "*Internet: aspects juridiques, 2^{ème} édition, Editions Hermès, Paris, 1998, 247 p.*
- BOCHURBERG, Lionel, "*Internet et commerce électronique*", 2^{ème} édition, Delmas, Paris, 352 p.
- BURNSTEIN, Matthew "A Global network in a compartmentalized legal environment" in "*Internet- which court decides? What law applies?*", BOELEWOELKI, Katherine, KESSEDJIAN, Kluwer, the Hague; 1998, p.23-34.
- FERAL- SCHUHL, Christine, "*Cyber Droit*", Dunod, Paris, 2000, 324 p.
- HANCE, Olivier, "*Business et droit d'Internet*", Best of Editions, Paris, 1996, 437 p.
- WERTHEIM, Margaret, "*The pearly gates of Cyberspace*", 1999, p.299.
- WOLTON, Dominique, JAY, Olivier "*Internet: petit manuel de survie*", Flammarion, Paris 2000, p.186.

■ *About ODR in general*

- CAPRIOLI, Eric, « *Aperçus sur le droit du commerce électronique (international)* », in *Mélanges en l'honneur de Philippe KAHN*, Edition Litec 2000, p.243-280.
- CHAMOUX, Jean-Pierre, « *Internet vers une véritable information sans frontière? Nouvelles technologies et lex mercatoria* », in *Mélanges en l'honneur de Philippe KAHN* à l'initiative de Charles Leben, Eric Loquin et Mahmoud Salem, Travaux du Centre de recherche sur le droit des marchés et des investissements internationaux, Université de Bourgogne CNRS, Faculté de droit-

Institut de relations internationales « Souveraineté étatique et marchés internationaux à la fin du 20ème siècle: à propos de 30 ans de recherche du Centre de recherche sur le droit des marchés et des investissements internationaux », Edition Litec CREDIMI, 2000, p.281-297.

-FOUCHARD, Philippe, « Arbitrage et modes alternatifs de règlement des litiges du commerce international », in *Mélanges en l'honneur de Philippe KAHN*, Edition Litec 2000, p.95-115.

-KATSH, Ethan, RIFKIN, Janet, « *Online Dispute Resolution: resolving conflicts in Cyberspace* », 2001, Jossey -Bass, San Francisco, 226 p.

-REYMOND, Claude, « Réflexions sur quelques problèmes de l'arbitrage international: Faiblesses, Menaces et Perspectives », in *Mélanges en hommage à François Terré, « L'avenir du droit »*, Presses Universitaires de France, 1999, p 787-799.

■ About the future of law

-POROY, Reha, “*L'avenir du droit: optimisme malgré tout*”, in *Mélanges en hommage à François Terré, « L'avenir du droit »*, Presses Universitaires de France, 1999, p 819-835.

-SUSSKIND, Richard, “*The future of law: facing the challenges of Information Technology*”, Oxford University Press, Oxford, 1998, revised paperback edition, 309 p.

-SUSSKIND, Richard, “*Transforming the law: essays on Technology, Justice and the Legal Marketplace*”, Oxford University Press, Oxford, 2000, 301 p.

Periodicals and Law Review Articles:

■ *About traditional ADR and arbitration*

-FEDERICI, Valeria (ed) and MANFREDI, Veronica, coordination “Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes” Union Camere, Rome p.36.

-FULLER, Lon, “ Mediation and its forms and its functions”, 44 *South California Law Review*, 1971, p.305

-FULLER, Lon “ The form and limits of adjudication”, *Harvard Law Review*, 1978, vol.9, p.353-409.

-GOLDSMITH, Jean-Claude, “ Les modes de règlement amiable des différends”, *Revue de droit des affaires internationales (International Business Law Journal)*, n°2, 1996, p.221-251.

-HARVARD LAW REVIEW ASSOCIATION, “The paths of civil litigation: ADR, the Judiciary and Justice: Coming to terms with the alternatives”, 113 *Harvard Law Review*, May 2000, p.1851-1866.

-HILL, Richard, “The theoretical basis of Mediation and other forms of ADR: Why they Work”, *Arbitration International*, vol.14, n°2, 1998, p.173-184.

-JARROSSON, Charles, “ Les modes alternatifs de règlement des différends”, *Revue Internationale de Droit comparé*, 1997, p.325.

-MARRIOTT, Arthur, "Tell it to the judge ... but only if you feel you must", The School of International Arbitration, The Freshfields Lecture delivered on November 8 1995, reprinted in *Arbitration International*, December 1995, vol.12, p.1-112.

-SEVERSON, Margaret M., BANKSTON Tara V., “Social work and the pursuit of Justice through Mediation”, *Social Work*, 40, 1995, n°5, p.683.

-TWINING, William, “Alternative to what? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American jurisprudence: Some neglected classics”, *The Modern Law Review*, 1993, vol.56, p.380-392.

-WESS, Harold B, “The myths we live by”, 15 *Chris.Econ*, n°16, p.3.

■ *About ODR in general*

- ALMAGUER, Alejandro E., BAGGOTT, Roland III, « Shaping new legal frontiers: Dispute Resolution for the Internet », *13 Ohio State Journal of Dispute Resolution*, 1998, 711.
- CONA, Frank, A., “Focus on Cyberlaw: application of online systems in ADR”, *45 Buffalo Law Review*, p.975-995.
- FINSTERWALD, Jacques, "Internet: les enjeux pour la France", *Cahiers –Lamy -Droit de l'informatique*, 1997, Décembre, n°98, p.10-12.
- HEISKANEN, Viejo, « Dispute Resolution in International Electronic Commerce », *Journal of International Arbitration*, Vol. 16, N°3, September 1999, p.29-43.
- HILL, Richard, “The Internet, Electronic Commerce and dispute resolution”, *Arbitration International*, Vol. 14, N°4, December 1997, p.103-110.
- HUET, Jérôme, “Commerce électronique: Loi applicable et Règlement des Litiges. Propositions des grandes entreprises (GBDe)”, *La Semaine Juridique Edition Entreprises*, N°41, Octobre 1999, p. 1601-1602.
- KATSH, Ethan, “Dispute Resolution in Cyberspace”, *28 Connecticut Law Review* 1996, p.953-980.
- KATSH, Ethan, RIFKIN, Janet, GAITENBY, Alan, « E-commerce, e-disputes, and e-dispute resolution: in the shadow of “eBay Law”», *15 Ohio State Journal of Dispute Resolution*, Spring 2000, p.705-734.
- LAFITTE, Pierre, JOYANDET, Alain, HERISSON, Pierre, TURK, Alex, "Vers une régulation à la française" de l'Internet: les dernières propositions sénatoriales", *Cahiers-Lamy-Droit de l'informatique*, 1997, Octobre, n°96, p.18-20.
- OLIVIER, Frédérique et SENACQ, Stéphane, " La société de l'information et le droit", *Légicom*, 2000, Janvier -Février, n°21/22, p.1-7.
- PERRITT, Henry H., “Dispute Resolution in Cyberspace: Demand for New Forms of ADR”, *15 Ohio State Journal of Dispute Resolution*, 2000, p.675-702.
- ROJINSKY, Cyril, “Cyberespace et nouvelles régulations technologiques”, *Dalloz*, 2001, Chroniques, p7-10.
- SCHNEIDER, Michael E., KUNER, Christopher, “Dispute Resolution in International Electronic Commerce”, *Journal of International Arbitration*, Vol.14, N°3, September 1997, p.5-37.
- WARE, Stephen J., COLE, Sarah Rudolph, “ ADR in Cyberspace”, *15 Ohio State Journal on Dispute Resolution*, 2000, p.589-595.

■ **About online mediation**

- ARSIC, Jasna, « International Commercial Arbitration on the Internet: Has the future come too early? », *Journal of International Arbitration*, Vol .14, N°3, September 1997, p.209-221.
- BEAL, Bruce Leonard, “Online Mediation: Has its Time Come?”, *15 Ohio State Journal on dispute resolution* 2000, p.735-768.
- EISEN, Joel B. “Are We Ready for Mediation in Cyberspace?”, *1998 Brigham Young University Law Review*, p.1305-1358.

■ **About online arbitration**

- CAPRIOLI, Eric A, “Arbitrage et médiation dans le commerce électronique: l’expérience du CyberTribunal”, *Revue de l’arbitrage*, N°2, 1999, p.225-248.
- CARRINGTON, Paul D., “Virtual arbitration”, *15 Ohio State Journal on Dispute Resolution* 2000, p.669-674.
- HUET, Jérôme, VALMACHINO, Stéfania, "Réflexion sur l’arbitrage électronique dans le commerce international", *La Gazette du Palais*, N°9, 9 janvier 2000, p.6-18.
- KALLEL Sami, “Arbitrage et commerce électronique”, *Revue de droit des affaires*

internationales (International Business Law Journal, n°1, 2001, p.13-29.

-KAUFMANN-KOHLER, Gabrielle, « Le lieu de l'arbitrage à l'aune de la mondialisation: réflexions à propos de deux formes récentes d'arbitrage », *Revue de l'arbitrage*, N°3, July 1 1998, p.517-536.

-LLEWELLYN, Joseph Gibbons, "Rusticum Judicium? Private Courts enforcing Private Law and Public Rights: Regulating virtual arbitration in Cyberspace", 24 *Ohio Northern University Law Review*, 1998, p.769-790.

-TILMAN, Vincent, "Arbitrage et nouvelles technologies: Alternative Cyberdispute Resolution", *Revue Ubiquité*, 1999, n°2, p.47-64.

-VERBIST, Herman, IMHOOS, Christophe, "L'arbitrage, les télécommunications et le commerce électronique", *Bulletin de la Cour d'Arbitrage de la CCI*, N°10, May 1 1999, p.20-25.

■ ***About Business to Consumer dispute resolution***

-Conseil national de la consommation sur le commerce électronique (CNC), " Rapport d'étape: l'offre commerciale et la protection du consommateur", *Cahiers-Lamy-Droit de l'informatique*, 1997, Décembre, n°98, p.12-14 et p.18-19.

-COSTES, Lionel, "Nouvelles techniques de communication à distance et protection des consommateurs", *Cahiers-Lamy-Droit de l'informatique*, Juillet 1997, Juillet, n°94, p.1-3.

-COSTES, Lionel, " La directive européenne sur le commerce électronique", *Cahiers-Lamy-Droit de l'informatique*, Août-Septembre 2000, n°128, p.1-5.

■ About Domain names

- ADER, Basile, "Le nom de domaine dans le paysage juridique français", *Légicom*, 2000/1 et 2, n°21/22, p.37-44.
- BEAURAIN, Nathalie, FAUCHOUX, Vincent, "Règlement des conflits de noms de domaine", *Légipresse*, Mars 2000, n°169, p.15-20.
- BUCKI, Céline, "Le conflit entre marques et noms de domaine", *Revue du droit de la propriété intellectuelle*, 1^{er} juin 2000, p.9-37.
- De CANDE, Patrice, "Conflit noms de marques- noms de domaine: premières décisions de jurisprudence UDRP", *Dalloz*, 2000, n°35, p.537-544.
- CHANDRANI, Rupesh, "Beating the Cybersquatters- Dispute Resolution v. U.S. Statutory Protection", *Entertainment Law Review*, 2000, April 1st, p.76-79.
- CHASSIGNEUX, Cynthia, "Le centre d'arbitrage et de médiation de l'OMPI et le règlement des litiges relatifs aux noms de domaine de l'Internet", *Droit de l'informatique*, avril 1997, p.73-74.
- COSTES, Lionel, "Le rôle du centre de médiation et d'arbitrage de l'OMPI pour le règlement des litiges relatifs aux noms de domaine", *Cahiers-Lamy-Droit de l'informatique*, Octobre 2000, n°129, p.1-5.
- COSTES, Lionel, DE GALARD, Thierry "Noms de domaine Internet", *Cahiers-Lamy-Droit de l'informatique*, novembre 1999, supplément au n°119, p.1-17.
- DAVIS, Benjamin G, "The New New Thing: Uniform Domain-Name Dispute-Resolution Policy of the Internet Corporation for Assigned Names and Numbers", *Journal of International Arbitration*, June 2000, Vol.17, n°3, p.115-140.
- DINWOODIE, Graeme D., "(National) Trademarks laws and the (Non-National) Domain Name System", 21 *University of Pennsylvania Journal of International Economic Law*, 2000, p.495-521.
- DREYFUS-WEILL, Nathalie, "La procédure en ligne: une solution dans les conflits entre noms de domaines et marques", *Les Petites Affiches*, 14 mars 2000, n°52, p.4-8.
- HALPERN, Marcelo, MEHROTRA, Ajay K., "From international treaties to internet norms: the evolution of international trademark disputes in the internet age", 21 *University of Pennsylvania Journal of International Economic Law*, 2000, p.523-561.
- HARVARD LAW REVIEW ASSOCIATION "The Domain Name system: a case study of the significance of norms to Internet governance", 112 *Harvard Law Review*, May, 1999, p.1657-1680
- FABRE, Cyril, "La fin du cybersquatting", *Expertises*, janvier 2000, p.408.
- JONES KATZ, Lisa, "Trademark.com: Trademark Law in Cyberspace", 37 *Alberta Law Review*, 1999, p.991-1016
- LEE, Christopher S., "The development of arbitration in the Resolution of Internet Domain Name Disputes", 7 *Richmond Journal of Law and Technology*, Fall 2000, p.2-12.
- LIDE, Casey E., "ADR in Cyberspace: the role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation", 12 *Ohio State Journal on Dispute Resolution*, 1996, p.193-221.
- MONTEIRO, José, "Conjuguer Internet avec marque déposée", *JurisPTT*, n°48, 1^{er} avril 1997, p.10-20.
- OSBORNE, David, "Domain Names Registration & Dispute Resolution and Recent UK cases", *European Intellectual Property Review*, November 1st, 1997, p.644-650.
- WALKER, Luke A. "ICANN's uniform trademark policy", 15 *Berkeley Technology Law Journal*, 2000, p.289-300.
- YANG, Sung, "Staking a Claim in Cyberspace: an overview of Domain Name Disputes", 36 *Willamette Law Review*, p.115-139.

■ *About security*

-COSTES, Lionel, "La conférence du G8 sur la sécurité et la confiance dans le cyberspace: un premier dialogue", *Cahiers-Lamy-Droit de l'informatique*, Juin 2000, n°126, p.1-5.

■ About jurisdiction/ applicable law to Cyberspace

-BORDONE, Robert C., "Electronic Online Dispute Resolution: A Systems Approach-Potential Problems and a Proposal", *3 Harvard Negotiation Law Review*, Spring 1998, p. 175-211

-COSTES, Lionel, "La délicate question de la détermination du droit applicable aux contrats du commerce électronique", *Cahiers-Lamy-Droit de l'informatique*, Août-Septembre 2000, n°128, p.21-25.

-JOHNSON, David R, POST, David, "Law and Borders- the rise of law in Cyberspace", *48 Stanford Law Review*, May 1996, p.1367-1401.

-MEFFORD, Aaron, "*Lex informatica*-Foundations of the law in Internet", *5 Indiana Journal of Global Legal Studies*, Fall 1997, p.211-236.

-RICE, Dennis.T, "Jurisdiction in Cyberspace: which law and forum apply to security transactions on the Internet", *21 University of Pennsylvania Journal of International Economic Law*, p.585-653.

■ About regulating Cyberspace

-ABRAMOWICZ, Michael, "Cyberadjudication", *86 Iowa Law Review*, January 2001, p.533-599.

-COSTES, Lionel, "Quel cadre juridique pour l'Internet", *Cahiers -Lamy- Droit de l'informatique*, Décembre 1997, n°98, p.1-8.

-LUI-KWAN, Kalama and OPSAHL Kurt, "The legal and policy framework for global electronic commerce: a progress report", *14 Berkeley Technology Law Journal*, Spring 1999, p 503-510.

Conferences:

-**ADR for Business to Consumer e-Commerce**, June 1, 2001, U.S Embassy Paris Co-sponsored by Yahoo France and Vivendi Universal. Program:

- The US government and regulatory point of view
- Business codes of conduct and self-regulation
- Experiences in US and in Europe

Cyberconference:

-**ADR Cyberweek 2001: a laboratory in Online Dispute Resolution**, February 26 to March 2 2001, Co-sponsored by Online Dispute Resolution Section of the Society for Professionals in Dispute Resolution designed to explore current and future dispute resolution technologies to address the following features could be accessed in April 2001 at <http://www.disputes.net/cyberweek2001/>.

- Cross-cultural issues and Online Dispute Resolution
- Issues in training and practice through discussions with various experts in IT/DR fields.
- Simulations with existing and new Online Dispute Resolution services/ products.

Web Documents:

■ *About ADR and arbitration*

- FISCHER, Paul, “Changes in mediation confidentiality”, <http://www.mediate.com/articles/fisher1.cfm>.
- LEAHY, William B., RUBIN, Karen E., “Keeping the ‘R’ in ADR: How Olam treats confidentiality” at <http://www.mediate.com/articles/cprolam1.cfm>.
- REUBEN, Richard C., “Deconstructing confidentiality” at <http://www.mediate.com/articles/reuben.cfm>.
- SHERMAN, Dean Edward F., “California Supreme Court defines procedural requirements for enforcing an arbitration clause” at <http://www.conflict-resolution.net/articles/sherman.cfm>.
- UNIFORM MEDIATION ACT, draft of August 2000, available at <http://www.mediate.com/articles/umaaugustdraft.cfm>.

■ *About ODR in general*

- CHASSIGNEUX, Cynthia, “Les nouvelles voies offertes pour la résolution des conflits”, *Lex Electronica*, volume 5, n°1, printemps 1999 at <http://www.lex.org/articles.chassigneux.htm>.
- DONAHEY, Scott “Current developments in Online Dispute Resolution”, International Conference on Electronic Commerce and Intellectual Property, Geneva, September 14 to 16, 1999 available at: <http://www.wipo.org/publications/general/121/2000/february.pdf>.
- HART, Christine, “Online Dispute Resolution and avoidance in electronic commerce”, August 1999 available at <http://www.law.ualberta.ca/alri:ulc:current.hart.htm>.
- KATSH, Ethan, “The new Frontier: Online ADR becoming a global priority”, *Dispute Resolution Magazine*, Winter 2000, republished at: http://www.umass.edu/cyber/katsh_aba.pdf.
- KESSEDJIAN, Catherine, Deputy Secretary General of the Hague Conference on private international law “Electronic Data Interchange, Internet and Electronic Commerce”, Preliminary document n°7 of April 2000, available at <http://www.hcch.net/e/workprog/e-comm.html>.
- KESSEDJIAN, Catherine, Deputy Secretary General of the Hague Conference on private international law “Electronic Data Interchange, Internet and Electronic Commerce”, Preliminary document n°12 of August 2000, available at <http://www.hcch.net/e/workprog/e-comm.html>.
- MELAMED, Jim, HELIE, John “The World Wide Web Main Street of the future is here today”, available at <http://www.mediate.com/articles/jimmjohn.cfm>.
- PATLYEK, Susan, “Dispute Resolution in Cyberspace”, available at <http://chss.montclair.edu/leclair/LS.papers/cyberadr.htm>.
- PILCHER, Rufus, “Trust and reliance-enforcement and compliance: enhancing consumer Confidence in the electronic marketplace” available at http://www.oecd.int/dsti/sti/it/secur/act/online_trust/documents.htm#relateddocuments; at <http://www.law.stanford.edu/library/special:rufus.thesis.pdf>.
- POST, David “Governing Cyberspace”, 43 *Wayne Law Review* 1997, 155 also available at <http://www.cli.org/Dpost/escl.htm>.
- ROUSSOS, Alexia, “La résolution des différends”, *Lex Electronica*, vol.6, n°1, Printemps 2000 available at <http://www.lex-electronica.org/articles/v6-1/roussos.htm>.
- De STEPHEN, Dan, HELIE, John, “Online Dispute Resolution: implications for the ADR profession”, <http://www.mediate.com/articles/helie1.cfm>.
- VANDEGARDE, Blake Edward “Alternative Dispute Resolution becomes Online Dispute Resolution”, December 2000, available at: <http://www.ukans.edu/~cybermom/C1J/vande/vande.htm>.

- VAHRENWALD, Arnold, WILIKENS, Marc, MORRIS, Philip, from the JOINT RESEARCH CENTER of the EUROPEAN COMMISSION, “*Out-of-court dispute settlement systems for e-commerce- the report from the workshop held in Brussels on March 21 2000*”, available at <http://dsa-isis.jrc.it/ADR.report.html>.
- VAN DEN HEUVEL, Esther, “*Online dispute resolution as a solution to cross-border e-disputes: an introduction to Online Dispute Resolution*”, August 2000, available at <http://www.oecd.int/dsti/sti/it/secur/act/online> trust/documents.htm#relateddocuments as <http://www.oecd.int/dsti/sti/it/secur/act/Online> trust/vandenheuvel.doc.
- WIENER, Alan “*Regulations and Standards for Online Dispute Resolution: Summary of Public and Private Initiatives*” at <http://www.mediate.com/articles/awiener.cfm>.
- WIENER, Alan “*Opportunities and Initiatives in Online Dispute Resolution*”, Society for Professionals in Dispute Resolution (SPIDR) News, Summer 2000, Volume 24, n°3, republished in <http://www.mediate.com/articles/awiener1.cfm>.
- WIENER, Alan “*Regulations and Standards for Online Dispute Resolution: a primer for policymakers and stakeholders*”, available since February 15 2001 at: <http://www.odrnews.com.library>.
- THIESSEN, Ernest M., MACMAHON, Joseph P. “*Beyond Win-Win in Cyberspace*”, 15 *Ohio State Journal on Dispute Resolution*, 2000, p. 643 also available at <http://www.smartsettle.com/more/beyond/BeyondWinWin.html>.

■ *About Online Negotiation*

-VALLEY, Kathleen, “*The Electronic Negotiator*”, Harvard Business Review, 2000, p.16-17 republished on <http://www.mediate.com/articles/valley.cfm>.

■ *About online mediation*

-GRANAT, Richard S., “*Creating an environment for mediating disputes over the Internet*”, A working paper for the NCAIR Conference on-Line Dispute Resolution, Washington D.C, May 22, 1996 available at <http://www.mediate.com/articles/granat.cfm>.

-HELIE, John, “*Technology creates opportunities and risks*”, available at <http://www.mediate.com/articles/helie2.cfm>.

-KATSH, Ethan, “*The Online Ombuds Office: adapting Dispute Resolution to Cyberspace*”, available at <http://www.mediate.com/articles/katsh.cfm>.

-MELAMED, Jim, HELIE, John, “*Online Dispute Resolution in the US*”, available at <http://www.mediate.com/articles/ecodir1.cfm>.

-MELAMED, James, “*Integrating the Internet into your Mediation Practice*”, available at <http://www.mediate.com/articles/melamed8.cfm>.

-MELAMED, James “*Mediating on the Internet: today and tomorrow*” available at <http://www.mediate.com/articles/melamed5.cfm>.

-RULE, Colin, “*New Mediators Capabilities in Online Dispute Resolution*”, at <http://www.mediate.com/articles/rule.cfm>.

-RULE, Colin “*Online Dispute Resolution Section Editorial Fall 2000*”, at <http://www.mediate.com/articles/odr/odredit1.cfm>.

-RULE, Colin “*Online Dispute Resolution Links*”, available at <http://www.mediate.com/articles/odrlinks.cfm>.

■ *About online arbitration*

-GELLMAN, Robert, “*A brief history of the Virtual Magistrate Project: the early months*” at <http://www.mediate.com/articles/gellman.cfm>.

-HILL, Richard, “*Online arbitration: issues and solutions*”, in Arbitration International, April 1999, republished at <http://www.umass.edu/dispute/hill.htm>.

■ *About Business to Consumer*

- ASIA PACIFIC ECONOMIC COOPERATION ELECTRONIC STEERING GROUP, “Consumer Protection in Electronic Commerce”, Report and Proposals following the July 20 2000 APEC workshop available at: <http://www.ecommerce.g.ov/apec/meeting/072000/bangkokfollowup.html>.
- CONSUMERS INTERNATIONAL, “Disputes in Cyberspace: online dispute resolution for consumers in cross-border disputes-an international survey”, December 11 2000 available at <http://www.consumersinternational.org/campaigns/electronic/sumadr-final.html>.
- FEMENIA, Nora, “Online Dispute Resolution and the global management of customers’ complaints: how could Online Dispute Resolution techniques be responsive to different social and cultural environments?”, Paper presented at the Joint Conference of the OECD, HCOFIL, ICC, The Hague, Holland, December 2000, available at <http://www.mediate.com/articles/femenia/cfm>.
- MACDONALD, Duncan, “Educating business, consumers and governments about ODR”, December 12 2000 available at <http://www.odrnews.com/library.htm>.
- The Mediation Information and Resource Center (MIRC) “ADR or Consumer Transactions in the Borderless Online Marketplace”, answer to the 18 questions asked by the FTC/DoC in their February 9th 2000 notice available at <http://www.mediate.com/ftc>.
- PRICE WATERHOUSE COOPERS, “2000 Consumer Technology Survey”, November 1, 2000, summary available at <http://pwcglobal.com/fr>.

■ *About security*

- LONGWORTH, Elisabeth, “Design Issues in Online Dispute Resolution Systems”, WIPO International Conference on Dispute Resolution, Geneva, November 6 2000 available at http://www.oecd.int/dsti/sti/it/secur/act/online_trust/Longworhslides.pdf.

■ *About Domain names*

- Information on Uniform Domain-Name Dispute Resolution Policy (UDRP) is available on the ICANN website at <http://www.icann.org/udrp/udrp.htm>.
- Rules for Uniform Domain-Name Dispute Resolution Policy can be found at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>.
- The four approved providers for Uniform Domain-Name Dispute Resolution Policy are listed at: <http://www.icann.org/approved-providers.htm>.
- Statistical summary of proceedings under Uniform Domain-Name Dispute Resolution Policy, May 16, 2001 can be found at: <http://www.icann.org/proceedings-stat.htm>.
- LETOURNEAU, Emmanuelle, “Noms de domaine: la résolution des conflits sous la politique de l’ICANN”, 11 octobre 2000 at <http://www.juriscom.net/pro/2/ndm20001011.htm>.
- MOYSE, Pierre-Emmanuel, “La force obligatoire des sentences arbitrales rendues en matière de noms de domaine”, 10 octobre 2000, at <http://www.juriscom.net/pro/2/ndm20001010.htm>.
- MUELLER, Milton, “Rough Justice: an analysis of ICANN’s Uniform Dispute Resolution Policy”, November 2000, available at <http://dcc.syr.edu/roughjustice.htm>.

Press Articles:

■ *About the World Wide Web*

- ALBERGANTI, Michel, « La vraie fausse fracture numérique », *Le Monde*, 15 mars 2001.
- BON, Michel, « Internet ou la communauté rétablie », *Le Monde*, 10 février 2001.
- DELATTRE, Lucas, " Les Etats mettent en place une architecture mondiale du Net.", *Le Monde*, 11-12 février 2001.
- DUCOURTIEUX, Cécile, " La France a la mémoire numérique qui flanche", *Le Monde*, 14 mars 2001.
- FERENCZI, Thomas, "Internet: deux idées de la liberté", *Le Monde*, 31 décembre 2000-1^{er} janvier 2001.
- KAHN, Annie, "Les vertus cachées du krach technologique", *Le Monde*, 22 mai 2001.

■ *About the Yahoo case*

- PEREIRA, Acacio, "La justice française est embarrassée par l'affaire Yahoo", *Le Monde*, 13-14 août 2000.
- PEREIRA, Acacio, "Yahoo interdit la vente aux enchères d'objets nazis", *Le Monde*, 4 janvier 2001.
- RICHARD, Jean-Alphonse, "L'ex PDG de Yahoo en correctionnelle", *Le Point*, 25 mai 2001, p.84.

■ *About Click-wrap agreements*

- KENNEDY, John B., VASWANI, Raj R., "Click-wrap agreement held to be enforceable", Morrison & Foerster, at http://www.mofo.com/mofocgi/gendisplaylong?pubs_079LGLWATCH_MMEDIA_1.

■ *About online negotiation*

- CHRISTENSEN, Christopher, "Can Disputes be solved in Cyberspace?", *New York Law Journal*, May 8 2000 (about CyberSettle and ClickNSettle).
- KELLNER, Tomas, "Forget the gavel and click on the mouse", *Forbes*, July 2 1999 (about ClickNSettle).
- MARQUESS, Kate, "Point Click—Settle Quick: online negotiators hailed for efficiency" but some prefer face to face", April 18 2000, American Bar Association at <http://www.cliknsettle.com/aba.cfm>. (about ClickNSettle).
- SUSSKIND, Richard, "Net service breaks new ground", *The Times*, UK, December 14 1999 (about ClickNSettle).

■ *About online mediation*

- AUCTIONWATCH.COM "New Online Mediation Service", November 3, 2000 at <http://www.auctionwatch.com/AWDAILY/dailynews/JULY00/3-072600.html> (about OnlineResolution.com especially online mediators).

■ *About online arbitration*

- AMBROGI, Robert J., "Cyberspace becomes forum for resolving disputes", Legal.online, June 1996, at <http://legalonline.com/dispute.htm>.
- WASSERMAN, Elisabeth, "The net as a virtual courtroom", *The Standard*, August 20 1998, at

<http://www.thestandard.com/article/0,1902.1443.00.html>.

■ *About Domain names*

-CISNEROS, Oscar S., "ICANN't believe that domain name", Wired News, July 27 2000 at <http://www.wired.com/news/politics/0?1283?37801?00.html>.

-FUGERE, Dominique, "Des Montréalais aideront à freiner le cybersquattage mondial, Mutimédium, Montreal, 4 janvier 2000, at <http://www.mmedium.com/cgi/bin/nouvelles.cgi?Id=3019>.

-JACOB, Antoine, "Les adresses de sites Internet ont créé un marché mondial très convoité", *Le Monde*, 23 mars 2001.

-LAUNET, Edouard, NOUALHAT, Laure, "L'instance genevoise arbitre les querelles liées aux adresses du web: 1010 litiges en huit mois", *Libération*, 17 août 2000.

-REUTERS NEWS AGENCY, "Writers, porn star win Web names", *Globe and Mail*, April 6 2001 available at <http://rtnews.globetechnology.com/>.

■ *About confidentiality*

-HAZAN, Alain, "La valeur d'une signature numérisée", *Le Monde*, 10 janvier 2001.

-FRAISSARD, Guillaume et NUNES, Eric, " La signature électronique arrive", *Le Monde*, 4 avril 2001.

■ *About webseals and trustmarks*

-MACKÉ, Gaëlle, " Sécurisation: les marchands s'organisent", *Le Monde*, 4 avril 2001.

-MANOURY, Cécile, "Deux clefs pour signer", "*Le Monde*, 4 avril 2001.

■ *About the future of law*

-Inter@active Week, "Serving Cyberjustice", available at <http://www.zdnet.com/intweek/stories/news:0,4164,2449912,00.html>.

Other Online Information about ODR

-*American Arbitration Association*: <http://www.adr.org>. January 2001: Announcement of AAA new e-Commerce Protocol see <http://www.ordnews.com/archive.htm>.

-*American Bar Association*: <http://www.abanet.org>. ABA Report "Achieving Legal and Business Order in Cyberspace: a report on jurisdictional issues created by Internet" (2000) available at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>.

-PERRITT, Henry, "Jurisdiction and the Internet: some Anglo-American perspectives", Internet Law and Policy Forum Jurisdiction: Building confidence in a Borderless Medium, Montreal, Canada, 26-27 July 1999 at <http://www.ilpf.org/confer/present99/perritt99/perritt.htm>.

-PODGERS, James "Adapting to a New World: ABA project calls for revised rules on Internet jurisdiction at <http://abanet.org/journal/nov00/novaledede.html>.

-*Center for Information Technology and Dispute Resolution*, University of Massachusetts at <http://aaron.sbsumass.edu/center/default.htm>.

-*Center for Public Resources* at <http://www.cpradr.org>. On September 25, 2000, CPR Press

Release: Announcement of CPR's four new e-commerce focused tools: The CPR Global E-Commerce Commitment, The CPR B2B E-Commerce ADR Commitment, The CPR Model ADR Provision for B2B E-Contracts, and the CPR Model ADR Provision for B2B Platforms and Exchanges see: <http://www.cpradr.org/ecommerce.htm>. On April 4, 2001: strategic partnership between CPR and Online Resolution see <http://www.businesswire.com/webbox/bw040401/210940764.htm>.

-**EU/US Summit.** See Statement of the European Union and the United States on building the confidence in e-commerce and the role of ODR, EU-US Summit, Washington, December 18 2000 see http://europa.eu.int/comm/external_relations/us/summit/12_00/e_commerce.htm.

-**European Commission.** In March 1998: Recommendations on Principles Applicable to the Bodies Responsible for Out-of-court settlement of Consumer Disputes http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just/ut02/en.htm.

-**Federal Trade Commission (FTC).** In June 2000 joint workshop FTC/ Department of Commerce: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace see presentations all available at <http://www.odrnews.com/library.htm>.

-Abernethy, Steve, SquareTrade, presentation in pdf format.

-European Commission, May 5 2000, presentation in pdf format.

-Fares, David A., United States Council for International Business, presentation in pdf format.

-Keeney, Regina, M., Dell, presentation in pdf format.

-Long, Clyde H., iCourthouse, presentation in pdf format.

-National Consumers League, Electronic Privacy Information Center, Consumer Federation of America, presentation in pdf format.

-Underhill, Charles, BetterBusinessBureau, presentation in pdf format.

- See also FTC/ Department of Commerce "Summary of Public Comments from their Online ADR Conference, June 2000" at <http://www.ftc.gov/bcp/altdisresolution/summary.htm>.

-**The Hague Conference on private international law.** Special Commission on the future Hague Convention on International Jurisdiction, Mars 1998, available at <http://www.hcc.net>.

- See Press Release Geneva Round Table, September 2,3,4 1999 available on the website at <http://www.hcc.net>.

- See also KESSEDJIAN, Catherine, Deputy Secretary General of the Hague Conference on private international law, "Electronic Data Interchange, Internet and the Electronic Commerce", Preliminary Document n°7 of April 2000, available at <http://www.hcc.net/e/workprog/e-comm.html> and KESSEDJIAN, Catherine, "Electronic Data Interchange, Internet and the Electronic Commerce", Preliminary Document n°12 of August 2000, available at <http://www.hcc.net/e/workprog/e-comm.html>.

- and see the Permanent Bureau of the Hague Conference 's report, "The report of the expert meeting on the intellectual property aspects of the future Convention on jurisdiction and foreign judgments in civil and commercial matters", Preliminary Document n°13 of April 2001, available at <http://www.hcc.net/e/workprog/e-comm.html>.

-**The Joint Research Centre (JRC) of the European Commission** which aims at ODR standardization in business to consumer disputes See <http://econfidence.jrc.it>.

- See e-Confidence Group, Guiding Principles for Generic Codes of Practice for the Sale of Goods and Services to Consumers on the Internet, E-Commerce Codes of Conduct-Specific requirements additional to Community Law at http://econfidence.jrc.it/default/page.g.x?_app.page=entity.html_app.action=entity&_entity.object=EC_8FORUM00000000000000088&_entity.name=Principles-Draft1.pdf.

-**International Chamber of Commerce (ICC)** at <http://iccwbo.org>. See on April 5 2001: development of an Internet-based system that will guide parties in e-commerce disputes toward appropriate Online Dispute Resolution provider but has decided against providing online ADR services of its own for now, see <http://odrnews.com>.

-**London Court of International Arbitration (LCIA)**. See <http://www.lcia-arbitration.com/lcia> and in particular the London Court of International Arbitration (LCIA) Rules of January 1 1998.

-**The Mediation Information and Resource Center (MIRC)**. See articles at <http://www.mediate.com/articles> or <http://www.odrnews/library/htm>.

-**Organization for Economic Cooperation and Development (OECD):**

-On December 9 1999: Recommendation of the OECD Council concerning guidelines for consumer protection in the context of electronic commerce see <http://www.oecd.org//dsti/sti/it/consumer/prod/guidelines.htm>.

-In December 2000: OECD Presentations to share the some of the discussions of the June 2000 FTC/Department of commerce joint meeting, all available at <http://www.odrnews.com/library.htm>.

-Bond, Martin, Assistant Director, Department of Trade and Industry, UK, “*The roles of stakeholders especially of the UK Government in TrustUK*” presentation in pdf format..

-Dorkind, James, “*Overview of recent discussions about Online Dispute Resolution*”, Acting General Counsel, US Department of Commerce, presentation in pdf format.

-Drahozal, Christopher, “*Challenges to Online Dispute Resolution*”, Professor University of Kansas School of Law, presentation in pdf format.

-Kuner, Christopher, Of Counsel, Morrison & Foerster, “*Legal obstacles to ADR in European Business to Consumer Electronic Commerce*”.

-**Transatlantic Consumer Dialogue (TACD):**

See the report “*Alternative Dispute Resolution in the context of Electronic Commerce*”, February 2000, at <http://www.tacd.org/papers/ecommerce/Ecomm-12-00-rtf>.

Main dispute resolution mechanisms

For an extensive list, see the ICC Inventory.doc from September 2000, on <http://www.odrnews.com/library.htm>.

In between hyphens: country of origin (e.g.: -US-: United States).

■ **Blind Bidding**

-1-2-3 Settle-US- at <http://www123Settle.com> (online settlement of financial disputes).

-Allsettle-US-at <http://www.allsettle.com> (ibid.)

-ClickNSettle-US- at <http://www.clicknsettle.com> (online settlement of personal injury and workers’ compensation claims and other type of monetary disputes).

-CyberSettle-US- at <http://www.cybersettle.com> (online settlement of financial disputes)

-New Court City-US- at <http://www.newcourtcity.com> (ibid.)

-Resolve it now-US- at <http://www.resolveitnow.com> (ibid.)

-SettleOnline-US- at <http://www.settleonline.com> (ibid.)

■ *Online negotiation*

-SmartSettle-US- at <http://www.smartsettle.com> (all fields)

■ *Online mediation*

-Consensus Mediator (e-Mediator) –UK- at <http://www.consensus.uk.com/e-mediator.html> (all online activities)

-CyberCMAP-France (Centre de Médiation et d'Arbitrage de Paris) at <http://www.cmap.asso.fr> (online activities involving the business to business sector).

-CyberCourt-Germany- at <http://www.cybercourt.org> (all online activity).

-E-Mediation-Netherlands at <http://www.e-mediation.nl> (all fields).

-Iris Mediation Experiment -France- at <http://www.iris.sgdg.org/mediation> (all online activities-ended in March 1999).

-Online Ombuds Office at <http://aaron.sbs.umass.edu/center/ombuds/default.htm> (for now disputes involving online auctions, webmasters and domain names but wants to expand).

-The Claim Room -UK- at <http://www.theclaimroom.com/visitors.html> (all monetary disputes and customers' complaints does also blind bidding).

■ *Online arbitration*

-CyberArbitration –Indian- (domain names, online activity) at <http://www.cyberarbitration.com> (all online activities).

-Disputes.org -US/Canada-at <http://www.disputes.org> (settlement of domain names disputes).

-The Virtual Magistrate –US- at <http://www.vmag.org> (did all online activities, still exists as a project of the Chicago Kent College of Law).

■ *Online mediation and arbitration*

-European Advertising Standards Alliance –EU- at <http://www.easa-alliance.org> (only for - disputes arising out advertising claims).

-IntelliCOURT -US- at <http://intelligourt.com> (all fields-panels composed of US retired judges).

-OnlineResolution.com at <http://www.onlineresolution.com> (all fields)

-Peruvian Cybertribunal at <http://www.cibertribunal.peruano.org> (e-commerce, consumers' protection, IP, domain names).

■ *Business to Consumer*

-Better Business Bureau (BBB) Online -US/Canada- at <http://www.bbbonline.org>.

-BBB AUTO LINE see <http://www.bbbonline.org/COMPLAINTS/BBBautoLine.asp>.

-ECODIR -EU- at <http://www.ecodir.org> (the out-of-court settlement system will be implemented in June 2001).

-SquareTrade -US-at <http://www.squaretrade.com> (e-commerce).

■ *Domain Names*

-CEPANI -Belgium- at http://www.cepani.be/domainnames_internet.html (offers online arbitration and mediation regarding domain names).

-Center for Public Resource (CPR) Institute for Dispute Resolution-US-at <http://www.cpradr.org> (settlement of domain name disputes and all fields)

-E-Resolution -US/Canada- (which has replaced the CyberTribunal experiment which ended in December 1999) at <http://www.eresolution.org> (settlement of domain name disputes through

facilitated negotiation, mediation and arbitration)

-The National Arbitration Forum -US- (domain names and civil cases) at <http://www.arbforum.com/domains> (settlement of domain name disputes through mediation and arbitration).

-World Intellectual Property Organization (WIPO) Arbitration and Mediation Center -US- at <http://www.arbiter.wipo.int> (settlement of domain name disputes through mediation and arbitration).

■ *Trustmark and Seals*

-BBBOnline -US/Canada- at <http://www.bbbonline.org> (see the Code of Online Business Practices which will be applicable after September, 8 2001 at <http://bbbonline.org/intl/code.asp>).

-SquareTrade -US- at <http://www.squaretrade.com>.

-TRUSTe -US- <http://www.truste.org>.

-TRUSTUK -UK- <http://www.trustuk.org.uk>.

-TRUSTShops -Germany but wants to expand in France to provide online mediation- at <http://www.trustshops.de>.

-Veritas -France- at <http://bureauveritaswebvalue.com>.

■ *Other*

-I-Courthouse -US- at <http://www.i-courthouse.com> (all fields-use of a jury of online individuals who provide the parties with feedback on the merits of their different positions- similar to the traditional ADR summary jury trial).

List of International Conventions

BRUSSELS CONVENTION on jurisdiction and enforcement of judgments in civil and commercial matters of September 27 1968.

<http://www.jus.uio.no/lm/brussels.jurisdiction.and.of.judgments.in.civil.and.commercial.matters.convention.1968/index.html>.

It should be noted that a EC Regulation to amend the Brussels Convention, which should firmly anchor the place of the consumer's domicile as a default jurisdictional rule in e-commerce disputes has been approved by all EU Member States on November 30 2000 should enter into force in March 1 2002. See Press Release November 30,2000 at <http://www.europa.eu.int>.

EUROPEAN GENEVA CONVENTION on international commercial arbitration of April 21 1961

-It entered into force in 1964 and was ratified by nine EU countries including France but not by the UK. France has amended Article IV of the Convention:

<http://conventions.coe.int/treaty/EN/cadreprincipal.htm> Update of 23/06/2000.

<http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/index.html>.

-It is presently under revision by the Working Party on International Contract Practices in Industry of the United Nations Economic Commission for Europe.

See United Nations Economic and Social Council, Economic Commission for Europe, Committee for trade and industry and Enterprise Development, document TRADE/WP.5/1998/10 of 06/10/98 at <http://www.unece.org/trade/tips/comarbit/prague.htm>.

The Inter-American Convention on International Commercial (thereafter the Panama Convention) of 1975

Which entered into force in 1976. See http://www.ftaa-alca.org/busfac/comarb/intl_conv/caicpae.asp#fjaat.

The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (thereafter the Montevideo Convention) of 1979.

Which entered into force in 1980. See http://www.ftaa-alca.org/busfac/comarb/intl_conv/caicpae.asp#fjaat.

UN NEW YORK CONVENTION OF JUNE 10 1958 on recognition and enforcement of foreign arbitral awards

<http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

ROME CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATION OF JUNE 19 1980

See <http://flechter.tufts.edu/multi/texts/BH784.txt>.

VIENNA CONVENTION ON INTERNATIONAL SALES OF GOODS OF APRIL 11 1980

<http://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/index.html>

List of Model Laws

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION OF June 21 1985.

See <http://www.jus.uio.no/lm/un.arbitration.model.law.1985.index.html>.

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE OF December 16 1996

See <http://www.uncitral.org/en-index.htm>.

List of transnational rules

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, 1994

See <http://unidroit.org/english/principles/pr-pres.htm>.

PRINCIPLES OF EUROPEAN CONTRACT LAW, 1998

See <http://www.jus.uio.no/lm/eu.contract.principles/1998/doc.html>.

List of European Union Directives

EU Directive 93/13/EEC of April 5 1993 on Unfair Terms in Consumer Contracts

Official journal of the European Community, L95/29 of April 21 1993.

EU Directive 95/46 on Data Protection Directive of October 24 1995

Official journal of the European Community, L281, of November 23, 1995.

EU Directive 99/93/EC on a Community Framework for electronic signatures of January 19 1999

Official journal of the European Community, L13/12 of January 19 1999.

EU Directive 2000/31/EC on certain legal aspects of Information Society Services, in particular electronic commerce, in the Internal Market of June 8 2000 at <http://europa.eu.int/ISPO/eif/Internet/PoliciesSite/Ecommerce/ECOMM16oct2000/TSLD009.htm>.

List of national arbitration laws

-American Federal Arbitration Act of 1925

See NOHAN-HALEY, Jacqueline M., *"Alternative Dispute Resolution in a nutshell"*, West Publishing, Saint Paul Minnesota, 1992, p.247-262.

-The Uniform Arbitration Act of 1955 (used by most U.S states)

See NOHAN-HALEY, Jacqueline M., *"Alternative Dispute Resolution in a nutshell"*, West Publishing, 1992, p.234-245.

-English Arbitration Act of 1996

<http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

-French Décret du 14 mai 1980 on domestic arbitration

See CADIET, Loïc, "Droit judiciaire privé", Litec, 2ème édition, Paris, p. 844.

See ROBERT, Jean, "L'arbitrage: droit interne et droit international privé", 6ème édition, Dalloz, 1993, p.334-344

-French Décret du 12 mai 1981 on international arbitration.

See CADIET, Loïc, "Droit judiciaire privé", Litec, 2ème édition, Paris, p.870 and ROBERT, Jean, "L'arbitrage: droit interne et droit international privé", 6ème édition, Dalloz, 1993, p.344-346.

List of other national laws

US FEDERAL LEGISLATION

-The Electronic Signatures in Global and National Commerce Act L N°106-229, signed by President Clinton on June 30, 2000 (S.761 and effective October 1 2000, with some exceptions. See commentary by Christopher Reinhart, "Federal and State Electronic Signature Laws " at <http://www.cga.state.ct.us/200/rpt/olr/htm/2000-R-0795.htm>.

FRENCH

- Loi n°96-259 July 26 1996, regulating telecommunications, *O.J*, July 27 1996, p.11384. Décret n°98-207 replaced by Décret n°99-199 of March 17 1999.
- Loi n°2000-230 of March 13 2000 on electronic signature, *O.J*, of March 14 2000.
- Décret d'application of March 31 2001.

UK

In the UK, in May 2001, the government was still consulting for the implementation of the e-sign directive See Digital Signatures Law Survey at <http://rechten.kub.nl/simone/ds.new.htm>.

List of cases

American

1/federal:

- S. W Bell v. Pub. Util. Comm'n of Texas*, 208 *Federal Reporter Third*, 475, 480 (Fifth Circuit case.2000)- on drawing an analogy between Internet and telephone or print media.
- People Solutions Inc v. People Solutions, Inc*, 2000, *U.S District LEXIS* 10444 (Northern District Texas, Dallas Division, July 25, 2000)- on the absence of jurisdiction due to a passive website.
- Olam v. Congress Mortgage Company*, 68 *Federal Supplement*. 2d 1110 (Oct, 15, 1999)-about calling into question the confidentiality of the mediation.
- Zippo Mfg Co. v. Zippo Dot Com, Inc*, 952 *Federal Supplement*, 1119,1124 (Western District Pennsylvania, 1997)-on the absence of jurisdiction due to a passive website.
- Cybersell Inc v Cybersell Inc*, 130 *Federal Reporter Third* 414 (Ninth Circuit Court of Appeals-1997) on the absence of jurisdiction due to a passive website.
- Hill v. Gateway*, 105 *Federal Reporter Third*, 1147 (Seventh Circuit 1997- certiorari denied 118 S. Ct 47 1997), *World Arbitration and Mediation Report*, vol.7 n°2, December 1997, p.295.-enforceability of consumer arbitration.
- ProCD v. Zeidenberg*, 86 *Federal Reporter Third*, 1447 (4th Circuit 1996) .- on general terms of contract and consumer.

2/ state:

- Brower v. Gateway 2000, Inc.*, 246 *Atlantic Second* 246 (New York Court of Appeals 1998) See *the New York Law Journal* 17/08/98.- enforceability of consumer arbitration.
- Foxgate Homeowners Association, Inc, v. Bramalea California Inc*, 78 *California Appellate court*. 4th 653; 92 *California Reporter Second*, 916 (Feb.25 2000)- on compelling the mediator to testify in court.

French

- (Cour de) Cass (ation),1^{ère} (Chambre) civ(ile), 7 mai 1963, Gosset case, *Dalloz*, 1963, p.543-autonomy of the arbitration agreement.
- Cass,1^{ère} civ, 4 juillet 1972,Hecht case, *Clunet* 1972, 843, note Oppetit: principle of validity of the arbitration agreement based on the autonomy.
- Paris, 22 décembre 1978, IMR c/ Lynx Machinery, *Revue de l'arbitrage*, 1979, p.276-absence of form for the conduct of arbitral proceedings.
- Cass, 1^{ère} civ, 28 janvier 1981, *Revue de l'arbitrage*, 1981, p.425-absence of form for the conduct of arbitral proceedings.
- Paris, 20 janvier 1984, *Revue de l'arbitrage*, 1987, p.482, note Catherine Kessedjian: fax has been analogized to telegrams.
- Cass, civ, 1ère, 20 décembre 1993, Dalico case *Revue de l'arbitrage*,1994, 116, note Gaudemet-Tallon, principle of validity of the arbitration agreement regardless of national law.
- (Cour d'appel de) Paris, 7 décembre 1994, *Dalloz* 1995, somm., 318, obs. Pizzio- validity of an arbitration agreement in a business to consumer dispute

-Cass, 1^{ère} civ, 28 octobre 1997, Société Procédés de Préfabrication pour le béton c/ Libye, *Revue de l'arbitrage* 1998, p.399-407- on the seat of arbitration not a physical concept.
-Cass, civ, 1^{ère}, 5 janvier 1999, Zanzi case *Revue de l'arbitrage*, 1999, 280, note Fouchard-
substantive law: principle of validity of arbitration agreements in international arbitration.
-Ordonnances de référé du juge des référés du Tribunal de Grande Instance de Paris from May 22
2000, August 11 2000 and 20 novembre 2000 in the Yahoo case: *Juriscom.net*,
<http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>.

UK

-House of Lords in *Hiscox v. Outhwaite*, [1991] 1 *Weekly Law Report* 279- on the seat of
arbitration before UK Arbitration Act of 1996.