

From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?

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I. INTRODUCTION

In 1876, President Rutherford B. Hayes said about the telephone, "[t]hat's an amazing invention—but who would ever want to use one of them?" One hundred and thirty years later, President Hayes would be surprised to realize that the telephone has been the starting point of so many technological innovations in telecommunications. These innovations question the notion of borders, and a mouse click in Japan leads to numerous legal issues throughout the globe. While the libertarian view that the Internet would be an environment free of any regulation is not seriously contended anymore,¹ questions remain as to the extent to which existing regulations should apply and how.

In spite of the "dot-com" crisis faced by several companies in the last few years, the development of e-commerce continues.² In 2004, the UK Office for National Statistics (ONS) reported that Internet sales in the UK had risen by 81% in one year to £71.1 billion, and that the proportion of businesses selling having sold online had grown by 24%.³ According to Verisign, e-commerce dollar volume rose in 2004 by 88% during the Christmas holidays in comparison with 2003, which had an annual growth of 39%.⁴ While this data can always be disputed, it reveals an undeniable trend towards a growing significance of e-commerce year after year.

The growth of e-commerce is bound to be linked with online disputes. Unlike offline disputes, these disputes present several features. In the real world, *business-to-consumer* (B2C) transactions tend to bind parties that are submitted to the same legal system. The situation may be different in e-

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¹ See JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? (2006).

² E-commerce is defined as "the practice of buying and selling goods and services through online consumer services on the Internet." BLACK'S LAW DICTIONARY 530 (7th ed. 1999).

³ OFFICE OF NATIONAL STATISTICS, INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) ACTIVITY OF UK BUSINESSES, 2004, available at http://www.statistics.gov.uk/downloads/theme_economy/ecommerce_report_2004.pdf (last visited Sept. 15, 2007).

⁴ Verisign, Internet Commerce Grows 88 Percent by Dollar Volume and 39 Percent by Transaction Volume: Fraud Remains a Concern, http://www.verisign.com/press_releases/pr/page_028572.html (last visited Sept. 15, 2007).

commerce, where parties will regularly be subject to different jurisdictions. While this diversity has been a daily reality in the *business-to-business* (B2B) environment for several decades, it had never been faced in a B2C and a fortiori in a *consumer-to-consumer* (C2C) environment. Considering the fact that the average transaction on the Internet amounts to \$146.00,⁵ one does not need to be an economist to realize that a French citizen will never spend several thousands of dollars to bring an action in a U.S. court for a breach of contract. As Crawford states, "[t]raditional courts are ill suited for settling small claims due to cost barriers."⁶ In other words, online transactions may often imply a renunciation to any possible legal remedy. Having this concern in mind, the stakeholders quickly realized that they had to find a way to deal with online disputes out of the court system to enhance the consumers' confidence and allow the development of e-commerce.

Since 1996,⁷ this "out of the court system" solution has a name: *Online Dispute Resolution* (ODR). ODR can be defined as any "form of alternative dispute resolution (ADR) that incorporate[s] the use of the Internet"⁸ or technological tools.⁹ While ODR is primarily designed to solve online disputes, the management of offline disputes could benefit from this development as well.¹⁰ In their survey conducted in 2003, Melissa Conley

⁵ *Id.*

⁶ Victoria C. Crawford, *A Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a Model*, 25 HASTINGS INT'L & COMP. L. REV. 383, 389 (2002); Mohamed Wahab, *Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement*, 12 INT'L J. LAW & INFO. TECH. 123, 129 (2004); see also LUCILLE M. PONTE & THOMAS D. CAVENAGH, *CYBERJUSTICE: ONLINE DISPUTE RESOLUTION (ODR) FOR E-COMMERCE* 12 (Elizabeth Sugg ed., Prentice Hall 2005).

⁷ This is the time when the first legal scholars started to write about ODR and when the first attempts to put in place ODR systems can be observed. See Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953 (1996).

⁸ ABA, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 419 (2002).

⁹ See GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* 7 (Julian Lew ed., Kluwer Law Int'l 2004).

¹⁰ Beatrice Baumann, *Electronic Dispute Resolution (EDR) and the Development of Internet Activities*, 52 SYRACUSE L. REV. 1227, 1239 (2002); see Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 990 (1997). Hörnle mentions in particular the use of electronic file management and the exchange of documents on CD-ROM. Julia Hörnle, *Online Dispute Resolution: The Emperor's New Clothes?*, 17 INT'L. REV. L. COMPUTERS & TECH. 27, 33 (2003). Clark refers to the use of video links and video testimony by witnesses in Australian Courts in

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Tyler and Di Bretherton listed seventy-six websites aimed in some way at solving disputes.¹¹ Just two years later, there would be more than 100.¹²

Governmental agencies and public organizations have also entered the game and provided several reports and recommendations as to the development of ODR in the last few years.¹³ The number of ODR providers and the interest raised by this development has been tremendous in legal scholarship, and probably disproportionate as compared with its current practical significance. Strangely enough, and as will be shown, legal scholars have either undermined or totally ignored one aspect that seems particularly relevant to analyze the potential development of ODR: the psychological perception of computer-mediated disputes as compared with face-to-face negotiation or mediation.

This paper shall be divided in two parts. In Part II, I shall conduct a review of legal scholars who have dealt with ODR. This part will start by providing the reader with a general overview of the current state of ODR in Subsection A, before summing up the advantages which have been pointed out by legal scholars in Subsection B and the concerns they have raised in Subsection C. Part III, the core of this paper, will reflect the experiments that have been conducted as to the differences of perceptions between face-to-face and computer-mediated disputes and their outcomes. In Part IV, the

particular. Eugene Clark et al., *Online Dispute Resolution: Present Realities, Pressing Problems, and Future Prospects*, 17 INT'L. REV. L. COMPUTERS & TECH. 7, 14 (2003).

¹¹ MELISSA CONLEY TYLER & DI BREHERTON, SEVENTY-SIX AND COUNTING: AN ANALYSIS OF ODR SITES 1 (2003), available at <http://www.odr.info/unece2003/pdf/Tyler.pdf> (last visited Sept. 15, 2007).

¹² Thomas Schultz, Seminar Given for the Swiss Arbitration Association (ASA), *Online Dispute Resolution: tour d'horizon de la pratique*, slide 6, <http://www.online-adr.org/Talk-ASA-slides.pdf>. (last visited Sept. 5, 2007).

¹³ See ABA, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 419–21 (2002); EUROPEAN UNION-DELEGATION OF THE EUROPEAN COMMISSION TO THE UNITED STATES, STATEMENT OF THE EUROPEAN UNION AND THE UNITED STATES ON BUILDING CONSUMER CONFIDENCE IN E-COMMERCE AND THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION (2000), available at <http://www.eurunion.org/partner/summit/Summit0012/Ecommerce.htm> (last visited Sept. 15, 2007); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR CONSUMER PROTECTION IN THE CONTEXT OF COMMERCE (1999), available at http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1,00.html (last visited Sept. 15, 2007) (hereinafter "OECD"). For a general discussion of these initiatives, refer to Wahab, *supra* note 6, at 132–42. On the ABA report in particular, see Benjamin G. Davis, *Building The Seamless Dispute Resolution Web: A Status Report on The American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution*, 8 TEX. WESLEYAN L. REV. 529, 533–34 (2002).

conclusion, I shall sum up the results of my review and make suggestions as to fields of investigations that need to be addressed in the future.

II. ODR IN LEGAL SCHOLARSHIP: WHERE ARE WE GOING?

A. *Current State of ODR*

ADR traditionally refers to three types of institutions: negotiation, mediation, and arbitration. Thanks to its specificities, the online environment allows the creation of new ADR models that did not exist and which use the technological architecture that is currently in place. This includes automated negotiation or credit card chargeback systems described below. This led Ethan Katsh and Janet Rifkin to speak of information technology as a "fourth party" in addition to the parties and the neutral.¹⁴

Authors traditionally deal with and make a distinction between several kinds of ODR:

1. *Assisted Negotiation*

Unlike mediation or arbitration, negotiation does not imply the intervention of a third party. Assisted negotiation enables the parties to refer to a technological tool offered by the provider to try and settle their case on their own.¹⁵ In other words, the main service of assisted negotiation systems is to provide software for setting up the communication, assistance in developing agendas, engaging in productive discussions, identifying and assessing potential solutions, as well as writing agreements. While e-mail might be seen as a form of primitive assisted negotiation, this type of negotiation more commonly implies the use of complex software.¹⁶ Several ODR providers offer assisted negotiation tools as a first phase where the

¹⁴ ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION* 93–116 (Jossey-Bass 2001).

¹⁵ COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS* 55–56 (Jossey-Bass 2002).

¹⁶ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 11–16; *see also* NORMON SOLOVAY & CYNTHIA K. REED, *THE INTERNET AND DISPUTE RESOLUTION: UNTANGLING THE WEB* 2–46 (Law Journal Press 2006).

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parties try to solve their dispute on their own.¹⁷ Using these tools, the rate of settlement would be around 60%–80%.¹⁸

2. Automated Negotiation

This type of ODR, which fully uses the potential provided by technology, does not have any equivalent in the offline world. In automated negotiation, the dispute is solved through software, which plays the role of a negotiator.¹⁹ In other words, technology supersedes human intervention. Often called "blind-bidding negotiation," the system operates as follows: a claimant presents its request to the chosen institution, which then contacts the other party.²⁰ The respondent is either bound to the procedure through a contractual provision, or can decline the offer of negotiation.²¹ When the respondent accepts to negotiate, the parties enter a "blind bidding" procedure, in which each of them, in turn, offers or demands a certain amount of money. However, the bids offered by each party are never communicated to the other one. When the amounts offered are sufficiently close according to an algorithm contained in the software, i.e., within a range of 5%–30% depending upon the provider, the case is settled and the difference split between the parties.²² The parties usually have three rounds of bidding that have to take place within a certain time.²³ For obvious reasons, this method is primarily designed to solve financial disputes and encounters real success in the context of insurance claims.²⁴ While Cybersettle is the most famous of these providers,²⁵ with about 3,000 disputes solved per month, Kaufmann-

¹⁷ ECODIR, <http://www.ecodir.org> (last visited Sept. 5, 2007); SquareTrade, <http://www.squaretrade.com> (last visited Sept. 5, 2007).

¹⁸ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 16.

¹⁹ SOLOVAY & REED, *supra* note 16, at 2–48.

²⁰ RULE, *supra* note 15, at 57–58.

²¹ ECODIR Resolution Rules, Art. 3, <http://www.ecodir.org/odrp/rules.htm> (last visited Sept. 14, 2007).

²² For more about the process, see RULE, *supra* note 15, at 57–58. The example provided by Cybersettle can be found online. Web Assisted Claim Resolution Services, <http://www.cybersettle.com/info/products/claimresolution.aspx> (last visited Sept. 14, 2007); see also SOLOVAY & REED, *supra* note 16, at 2–48.

²³ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 18–19.

²⁴ See generally RULE, *supra* note 15, at 135–36, 142–44 (regarding the development of ODR in the insurance industry, and the success of Cybersettle); KATSH & RIFKIN, *supra* note 14, at 62.

²⁵ Cybersettle, <http://www.cybersettle.com> (last visited Sept. 5, 2007); Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J. L. & TECH. 25, 27 (2004); Scott

Kohler and Schultz mention around twenty other providers offering the service.²⁶ According to a survey conducted at the University of Geneva, this type of ODR would be more popular than assisted negotiation, presumably because it takes advantage of all the technological possibilities,²⁷ and in spite of the fact that such systems are limited because they do not allow any legal consideration regarding the merits of a claim.²⁸

3. Online Mediation

As previously mentioned, mediation will regularly follow an unsuccessful phase of negotiation between the parties. Unlike negotiation, mediation implies the intervention of a third party.²⁹ As compared with an arbitrator, a mediator does not have any decisionmaking power and can only help the parties come to an agreement.³⁰ The Online Ombuds Office (OOO), an academic ODR pilot project developed at the University of Massachusetts by Ethan Katsh and Janet Rifkin, was one of the first ODR website to be put in place.³¹ After having mediated disputes between sellers and buyers on

Donahay, *Current Development in Online Dispute Resolution*, 16 J. INT'L ARB. 115, 116–17 (1999); Rachel I. Turner, *Alternative Dispute Resolution in Cyberspace: There is More on the Line, Than Just Getting "Online,"* 7 ILSA J. INT'L & COMP. L. 133, 141–42 (2000); see William Krause, *Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution*, 19 J. MARSHALL J. COMPUTER & INFO. L. 457, 460–61 (2001).

²⁶ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 21 (mentioning, for instance, BBBOnline, DisputeManager, Intersettle, MARS, SmartSettle, The Claim Room, Web Assured, WebMediate, and WeCanSettle).

²⁷ Thomas Schultz et al., *Online Dispute Resolution: The State of Art and the Issues* 5–6 (Dec. 2001) (on file with The Ohio State Journal on Dispute Resolution).

²⁸ Krause, *supra* note 25, at 460; SOLOVAY & REED, *supra* note 16, at 2–48; see also KATSH & RIFKIN, *supra* note 14, at 62.

²⁹ RULE, *supra* note 15, at 39–41.

³⁰ RULE, *supra* note 15, at 40.

³¹ SOLOVAY & REED, *supra* note 16, at 2–20. While the website can still be accessed, the Online Ombuds Office does not seem to have had any activity since 2003, and now directly refers to the Center for Information Technology and Dispute Resolution of the University of Massachusetts, <http://www.ombuds.org/center/ombuds.html> (last visited Sept. 15, 2007). For more on the OOO, see Cona, *supra* note 10, at 988–90; Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 846–48 (2001); Katsh, *supra* note 7, at 966–80; Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705, 706 n.6, 709 n.10 (2000); George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and*

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eBay, OOO was finally taken over by SquareTrade,³² which can probably be referred to as the most efficient provider in this category with over 1,500,000 disputes solved between February 2000 and June 2004.³³ SquareTrade's success story, however, seems to be an exception. While Kaufmann-Kohler and Schultz have counted over twenty-five ODR providers offering online mediation, none seem to be very active but SquareTrade.³⁴ The system can be described as follows: once the buyer or seller files a complaint with the site, SquareTrade notifies the other party of the complaint. The contractor can respond. Parties then try and settle their case on their own for free through assisted negotiation, and if this phase does not lead to a settlement, they can then request the intervention of a neutral to solve their dispute through mediation for a moderate fee.³⁵

4. Online Arbitration

Online arbitration allows an arbitrator designated by the parties or by an institution, such as the ICC or AAA, to render a decision with binding force.³⁶ The first ODR provider to be created was the The Virtual

Opportunities, 19 HASTINGS COMM. & ENT. L.J. 695, 706 (1997); KATSH & RIFKIN, *supra* note 14, at 56; SOLOVAY & REED, *supra* note 16, at 2–20.

³² KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 21; PONTE & CAVENAGH, *supra* note 6, at 64–65; RULE, *supra* note 15, at 103; *see also* KATSH & RIFKIN, *supra* note 14, at 66.

³³ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 16; *see also* SquareTrade, <http://www.squaretrade.com> (last visited Sept. 15, 2007). For an explanation related to the operation of the system itself, *see* Steve Abermethy, *Building Large-Scale Online Dispute Resolution & Trustmark Systems (2003)*, <http://www.odr.info/unece2003> (last visited Sept. 15, 2007). Considering its success, a lot of scholars have written about SquareTrade and describe its mode of operation. Shah, *supra* note 25, at 27; Krause, *supra* note 25, at 462–63.

³⁴ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 26 n.76 (mentioning ADR Group/TheClaim Room; ARyME; BRC; The Camera Arbitrale di Milano; Cibertribunal Peruano; NAM/ClickNsettle; DisputeManager; Consensus Mediation; eNeutral; Internet Neutral; JAMS; MARS; Mediation First; National Arbitration Forum; NovaForum; Online Resolution; PrivateJudge.com; Resolution Forum; Retail Tenancy Unit NSW Online Mediation; SettleTheCase.com; SquareTrade; and WebMediate).

³⁵ For more about the process, *see* SquareTrade, Step-by-Step Procedure for Filing a Case, <http://www.squaretradedisputeresolution.com/step-by-step.html> (last visited Sept. 14, 2007).

³⁶ RULE, *supra* note 15, at 42. For a definition of the notion of arbitration, *see* generally CHARLES JARROSSON, *LA NOTION D'ARBITRAGE* (Paris 1987) (Fr.).

Magistrate.³⁷ While the procedure was indeed adjudicatory, it could not be considered as an arbitration *stricto sensu* since the parties were not bound by an arbitration agreement before the dispute arose, but only after the agreement of the parties to proceed "in front of" the Virtual Magistrate. Designated in 1996 to solve online disputes encountered by persons harmed by wrongful postings on the Internet, the Virtual Magistrate never met the expectations of its founders. While the website still exists, the ODR provider has only had to deal with one case, *Tierney v. Email America*,³⁸ that was rendered by default since the defendant did not proceed.³⁹ According to the scholars, the failure of the Virtual Magistrate was the result of several factors: a limited scope of disputes, a lack of advertising, and the fact that the project was voluntary so that the case managers had no way to force the defendant to take part in the proceedings or to enforce the decisions.⁴⁰ While the second and third factors certainly played a significant role in the failure of the Virtual Magistrate, the limited scope of disputes is not at stake, as proved by the success of the Uniform Domain Name Dispute Resolution Policy (UDRP), in spite of its limitation to domain names disputes. According to Kaufmann-Kohler and Schultz, there are more than twenty-five providers offering online arbitration services.⁴¹ However, after having reviewed most of these websites, it appears that some do not work properly, others only offer assisted arbitration, i.e. allow the online filing of a claim such as AAA, and others are not really arbitration, such as the UDRP or the Virtual Magistrate. In other words, arbitration *stricto sensu* is still not very

³⁷ Virtual Magistrate, <http://www.vmag.org> (last visited Sept. 5, 2007).

³⁸ Virtual Magistrate Sample Opinion, <http://www.vmag.org/sample.html> (last visited Sept. 15, 2007).

³⁹ As the first provider, the Virtual Magistrate obviously drew the attention of several scholars. Joseph Matthews & Karen Stewart, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1123–24 (2002); Crawford, *supra* note 6, at 391–92; Shah, *supra* note 25, at 26; Cona, *supra* note 10, at 987–88, 995–97 (also includes analysis of the *Tierney* dispute); Hang, *supra* note 31, at 845–46, 861–62 (also including reasons for its failure); Friedman, *supra* note 31, at 700–06; KATSH & RIFKIN, *supra* note 14, at 56; PONTE & CAVENAGH, *supra* note 6, at 88–90; SOLOVAY & REED, *supra* note 16, at 2–6.

⁴⁰ See Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 458–61 (2002).

⁴¹ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 34 (mentioning the AAA; the ADR Group; ARyME; BBOnline; the BRC; the CIArb; the Cibertribunal Peruano; Consensus Mediation; Dispute Manager; eNeutral; JAMS; MARS; NovaForum; the Online Public Disputes Project; Online Resolution; the PrivateJudge.com; Resolution Canada; the Resolution Forum; and SettleTheCase).

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frequently used to solve disputes in cyberspace. This assumption is confirmed by Schultz, according to whom 5%–10% cases would be settled through automated negotiation, 60%–70% through assisted negotiation, 20%–30% through mediation, and only 1% through arbitration *stricto sensu*.⁴²

5. *The UDRP*

The UDRP deserves a place on its own. Enacted in December 1999, under the auspices of the Internet Corporation for Assigned Names and Numbers (ICANN), and currently managed by the World Intellectual Property Organization (WIPO), the UDRP and SquareTrade are the most successful ODR provider so far.⁴³ The UDRP quickly became the ordinary way to solve domain name disputes registered under the generic top-level domains (gTLDs., i.e. ".com," ".org," and ".net"). Considering its phenomenal success, several countries later decided to adopt it for disputes encountered within their own country code top level domain (ccTLD, i.e. ".us," ".fr," and ".uk").⁴⁴ To succeed in a case, a complainant must demonstrate that the domain name in dispute is identical or similar to a trademark in which rights are held, that the defendant does not have any legitimate interest in the domain name, and that the defendant registered and uses it in bad faith.⁴⁵ New gTLDs were introduced first in 2000 and 2005, each submitted to additional ODR during a pre-registration phase.⁴⁶ The

⁴² Schultz et al., *supra* note 27, at 26–27; Schultz, *supra* note 12, at 12.

⁴³ See generally WIPO, Domain Name Dispute Resolution Service, <http://www.wipo.int/amc/en/domains/cctld/index.html> (last visited Sept. 5, 2007). The success met by the UDRP has resulted in the publication of numerous publications, and even books. See, e.g., PHILIPPE GILLIÉRON, *LA PROCÉDURE DE RÉOLUTION EN LIGNE DES CONFLITS RELATIFS AUX NOMS DE DOMAINES* (CEDIDAC 2002); Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001).

⁴⁴ In September 2007, forty-seven States submitted their domain name disputes to the WIPO Arbitration and Mediation Center. WIPO, *supra* note 43. If most of these countries adopted the UDRP, others, while submitting the management of their disputes to WIPO, enacted their own procedure, including Switzerland. The Swiss Education and Research Network, Rules of Procedure for Dispute Resolution Proceedings, http://www.switch.ch/en/id/disputes/rules_v1.html (last visited Sept. 5, 2007).

⁴⁵ ICANN, Uniform Domain Name Dispute Resolution Policy, § 4(a), <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (last visited Sept. 5, 2007).

⁴⁶ New gTLDs included ".aero," ".biz," ".coop," ".info," ".museum," ".name," and ".pro" in 2000. For an overview of the specific ADR related to these gTLDs, see GILLIÉRON, *supra* note 43, at 183–94. In spite of the relative success of these new gTLDs,

UDRP, however, remains the main provider of these ODR systems. Its success is not decreasing, with more than a thousand decisions rendered every year since 2002, and a total of more than seven thousand decisions delivered since its enactment. Unlike other ODR providers, the UDRP presents the particularity to deal with IP infringements. Despite this particular feature, the UDRP has a contractual nature. The ICANN rules the domain name system (DNS).⁴⁷ In order to be allowed to register domain names, registrars have to be accredited by the ICANN; to be accredited, registrars have no choice but to accept to be submitted to the UDRP, and thus to impose it on their registrants.⁴⁸ In other words, the only entity not to be submitted to the UDRP from the beginning is the rightholder. This is one of the main differences with arbitration *stricto sensu*. Parties do not sign any arbitration agreement but submit to the procedure separately and independently: the complainant by filing his complaint, and the respondent by registering his domain name.⁴⁹

With the notable exception of the UDRP, disputes submitted to ODR providers can generally be of any type and filed by anyone.⁵⁰ In other words, the scope of disputes is extremely wide, even though most of them deal with B2C or C2C cases. While these ODR methods are considered to be the traditional ones, it is worth mentioning some other kinds that have drawn the attention of some authors.

6. Other Types of ODR Providers

Credit card chargeback systems appear to have become a significant mode of dispute resolution in recent years. As defined by Mary Shannon Martin:

ICANN adopted new sponsored gTLDs in 2005, including ".cats," ".travels," ".jobs," and ".mobi." See ICANN, Status Report on the sTLD Evaluation Process, <http://www.icann.org/tlds/stld-apps-19mar04/stld-status-report.pdf> (last visited Sept. 5, 2007).

⁴⁷ ICANN, <http://www.icann.org> (last visited Sept. 14, 2007).

⁴⁸ ICANN, Registrar Accreditation Agreement, Art. 3.8, <http://www.icann.org/registrars/ra-agreement-17may01.htm#3> (last visited Sept. 14, 2007).

⁴⁹ Frederic Glaize, *UDRP : une décision rendue par le Centre d'arbitrage et de médiation de l'OMPI est-elle une sentence arbitrale?*, RLDI 2005/1 n° 3, at 13 (Fr.) (discussing the decision rendered on June 17, 2004 by the First Chamber of the Court of Appeals in *M.L.P. v. Sté Miss France*, in which the Court denied the arbitral nature of the procedure).

⁵⁰ TYLER & BRETHERTON, *supra* note 11, at 8; Schultz et al., *supra* note 27, at 20.

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A chargeback occurs when a consumer files a complaint with their credit card company disputing a particular charge and seeking to halt payment of a particular item on the consumer's credit card bill. The amount in question is then "charged back" or credited to the consumer's account until the credit card company's investigation is complete.⁵¹

One of the weak points of this system remains the fact that the chargeback system is not always extended internationally,⁵² thus limiting its scope of application in e-commerce. However, most major credit card networks now seem to allow such a protection outside of the United States, even though they are not legally required to offer such a service.⁵³ As Crawford puts it, "the chargeback mechanism puts the private sector intermediary in the position of resolving the dispute."⁵⁴ In other words, the credit card issuer actually plays the role of a third party.⁵⁵ This particular form of ADR is described as a win-win-win situation by Crawford: the vendor because he utilizes "the protection of a credit card service to ensure the customer pays for what the customer agreed to pay;" the consumer because, as a cardholder, liability is limited; and the credit card company because more business is generated when the parties have confidence in its service.⁵⁶

Other types of providers, which are not, strictly speaking, ODR providers, include online legal advice, also known as complaints assistance,⁵⁷

⁵¹ Mary Shannon Martin, Note, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125, 153 (2002); Krause, *supra* note 25, at 472–73; Kah Wei Chong, *Online Dispute Resolution in Cross-Jurisdictional Consumer Electronic Commerce Transactions*, at 16 (2001) (unpublished thesis, Harvard University) (on file with the Ohio State Journal on Dispute Resolution); RULE, *supra* note 15, at 110–11; SOLOVAY & REED, *supra* note 16, at 7–62; *see also* Anita Ramasastry, *Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry*, 79 WASH. L. REV. 159, 167 (2004).

⁵² Martin, *supra* note 51, at 153.

⁵³ Crawford, *supra* note 6, at 393 (mentioning the fact that, in the United States, this requirement is a consequence of the Fair Credit Billing Act).

⁵⁴ *Id.* at 395.

⁵⁵ Julia Hörnle, *Online Dispute Resolution in Business to Consumer E-Commerce Transactions*, 2000 JILT § 2.7 (2002), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/hornle/ (last visited Sept. 5, 2007).

⁵⁶ Crawford, *supra* note 6, at 394–95.

⁵⁷ Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution*, 70 FORDHAM L. REV. 985,

or mock trials conducted with retired judges or mock juries in order to get an evaluation of one's case.⁵⁸

After this general overview of the existing types of ODR providers, the time has come to turn to the advantages and concerns perceived by legal authors.

B. *Advantages*

Scholars having dealt with ODR can be divided into two categories. The first, led by Ethan Katsh and Janet Rifkin and by far the prominent trend in ODR scholarship, focuses on the development of ODR to solve e-commerce disputes, namely B2C and C2C transactions.⁵⁹ The second, led by Gabrielle Kaufmann-Kohler and Thomas Schultz, is more interested in the development of online arbitration, i.e. the use of the technology not only to solve online disputes, but offline disputes as well.⁶⁰ While online arbitration faces specific issues, mainly as to its compatibility with the New York Convention, scholars tend to deal with the same questions, so that one cannot speak of several schools as to ODR scholarship. For this reason, we shall deal with both categories together.

For obvious reasons, scholars interested in ODR are in favor of its development and see it as a way—if not "the" way—to improve dispute resolution processes in the future both as to online and offline disputes. There is, however, little doubt that ODR presents several advantages as compared to court systems.

1. *Convenience*

Unlike courts or arbitral tribunals, ODR providers are available twenty-four hours a day and seven days a week; this feature enables the parties to send e-mails or communicate at any time without having to travel long

997–98 (2001) (however, Teitz's references do not seem to exist any longer); KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 45; Hörnle, *supra* note 55, at § 2.6 (mentioning that this type of service is in particular provided by the Better Business Bureau (BBB), The Internet Ombudsman, NovaForum, WebAssured, Trusted Shops, TrustUK, Econsumer scheme, and Howtoexplain.com).

⁵⁸ SOLOVAY & REED, *supra* note 16, at 2–50; KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 43 (mentioning LegalVote, iCourthouse, and SettleTheCase).

⁵⁹ ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION* (2001).

⁶⁰ GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* 7 (Julian Lew ed., Kluwer Law Int'l 2004).

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distances.⁶¹ Some scholars consider the asynchronism of e-mail exchanges as one advantage, since it allows the parties to think more thoroughly than in verbal exchanges before actually sending their messages.⁶² One may, however, also argue that e-mails create an expectation to receive quick answers, and that the frustration of not getting one immediately may raise more negative than positive effects.

2. *Low Costs*⁶³

One has to make a distinction between arbitration in a B2B framework and ODR in a B2C or C2C environment. As to the former, it is quite hard to know at this stage whether online arbitration would be cheaper than offline arbitration, but doubts remain because online arbitration would mainly consist of "assisted" online arbitration, i.e. the usage of technological tools to manage the case, keep records, enhance communication, et cetera. On the other hand, there is no doubt that in e-commerce, the possibility to refer to an ODR provider in a B2C or C2C dispute is far cheaper than to go to court. That fact is particularly true when the dispute arises between consumers and merchants in different countries. For the consumers, ODR is not only cheaper, it is often the single method of dispute resolution available, as one is unlikely to be willing to bring a costly action into court for a small value at stake, particularly if one has little chance of being able to enforce the decision abroad.

⁶¹ Hang, *supra* note 31, at 854; Friedman, *supra* note 31, at 711; Shah, *supra* note 25, at 29; Baumann, *supra* note 10, at 1233; Ramasastry, *supra* note 51, at 161; Clark et al., *supra* note 10, at 9; RULE, *supra* note 15, at 69; KATSH & RIFKIN, *supra* note 14, at 77–78 (dealing, however, with logistical and financial convenience). These authors note that, from a technical point of view, the level of convenience may depend upon the infrastructure at the parties' disposal.

⁶² KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 23; Shah, *supra* note 25, at 30; Baumann, *supra* note 10, at 1233; RULE, *supra* note 15, at 63–64; Wahab, *supra* note 6, at 130.

⁶³ Hang, *supra* note 31, at 855; Friedman, *supra* note 31, at 712; Shah, *supra* note 25, at 29; Baumann, *supra* note 10, at 1233; Ramasastry, *supra* note 51, at 160–61; Clark et al., *supra* note 10, at 9; PONTE & CAVENAGH, *supra* note 6, at 26–27; Wahab, *supra* note 6, at 131.

3. *Avoid Jurisdiction Issues*⁶⁴

As previously mentioned, e-disputes will often arise between parties in different legal systems. Considering the ubiquity of the Internet, conflicts-of-laws issues are difficult to solve. Literature on this area is abundant, and the American Law Institute (ALI) even has a project dealing with these issues in the context of intellectual property disputes.⁶⁵ To refer one's case to an ODR provider enables the parties to avoid these difficult questions and their uncertain outcomes, as they willingly agree to submit their dispute to a common provider for which jurisdictional issues are to a very large extent irrelevant.

4. *Speed*

The majority of legal scholars consider the potential for speed as the main advantage of ODR.⁶⁶ This is surely true for B2C and C2C disputes, since litigation will usually last much longer than an ODR proceeding, especially when the dispute involves parties coming from different jurisdictions. In contrast, the same may not be true of offline arbitration, particularly for B2B disputes. Does the mere use of technological tools allow the proceedings to speed up? One may have doubts about it. In other words, the speed potential is perhaps more likely the result of the usually non-adjudicatory nature of ODR than of the use of technological devices. Thus, a sub-question is whether the use of technology actually allows the proceedings to speed up as most legal scholars seem to assume, when experiments to the contrary tend to prove that computer-mediated disputes take longer time to get solved than face-to-face ones.⁶⁷ The situation is

⁶⁴ Hang, *supra* note 31, at 856–57; Shah, *supra* note 25, at 30; Ramasastry, *supra* note 51, at 161; Matthews & Stewart, *supra* note 39, at 1113–14; Chong, *supra* note 51, at 21; Wahab, *supra* note 6, at 130.

⁶⁵ The American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=1 (last visited Sept. 5, 2007). The reporters of this project are Professors Jane C. Ginsburg (Columbia), Rochelle C. Dreyfuss (NYU), and François Dessemontet (Lausanne). *Id.*

⁶⁶ KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 58; Nicolas de Witt, *Online International Arbitration: Nine Issues Crucial To Its Success*, 12 AM. REV. INT'L ARB. 441, 456 (2001); Shah, *supra* note 25, at 29; RULE, *supra* note 15, at 63; *see* Baumann, *supra* note 10, at 1233; Clark et al., *supra* note 10, at 9.

⁶⁷ *See infra* Part II.C.1.

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obviously different when ODR providers set up time limits to resolve the disputes submitted to them.⁶⁸

5. *Others Advantages*

Some authors present others advantages which seem contestable:

- 1) *Legitimacy*: Hang argues that "online users are more likely to adhere to the judgments of their own virtual communities than the laws of physical space far away from where they live."⁶⁹ The concept of merchant law within close-knit cyber-communities is an interesting one that deserves further analysis.⁷⁰ While this concept already proved to be effective in a B2B environment where transactions and trade customs played the role of merchant laws, one may doubt that the same can be said in a B2C environment, where the expectations of the consumers will be different from merchants. Legitimacy, and thus usage of ODR, can only exist if *lex electronica* is the result of a consensus among all the stakeholders, particularly merchants and consumers.⁷¹
- 2) *Non-confrontational Mechanism*: Shah argues that the anonymous nature of computer-mediated disputes might lead to a "dispassionate approach to the merits of [the] cause" and be beneficial to the parties who don't "trust each other or don't feel comfortable in front of each other."⁷² There again, these are mere assumptions which need further empirical research to get confirmed. One may alternatively wonder whether the anonymous nature of computer-mediated disputes prevents the building of trust and, consequently, a constructive approach of negotiation or mediation processes.

⁶⁸ See, e.g., KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 58–59.

⁶⁹ Hang, *supra* note 31, at 856.

⁷⁰ See generally Leon E. Trakman, *From The Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003).

⁷¹ Most scholars indeed favor a hybrid approach as to the adoption of standards rather than a mere private or public basis. See, e.g., Jay P. Kesan, *Private Internet Governance*, 35 LOY. U. CHI. L.J. 87 (2003); Llewellyn Joseph Gibbons, *Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 32 (2002); Krause, *supra* note 25, at 469; Teitz, *supra* note 57, at 1012.

⁷² Shah, *supra* note 25, at 30.

Some of the advantages perceived by legal scholars can be disputed. Asynchronism and non-confrontational mechanisms can only be considered as advantages based upon certain assumptions that would need empirical data to be confirmed. To my knowledge, not a single legal scholar has brought evidence that confirms these alleged benefits. Before turning to the second part of our study and referring to empirical data that contradicts these assumptions, let's take a look at the concerns raised by legal scholars for the future development of ODR.

C. Concerns

The main concerns raised by legal scholars can be divided into eight categories:

1. Trust⁷³

If ODR is to be successful, its users must have trust in the environment. This is probably the biggest and toughest issue ODR designers have to work on. Consumers have developed particular skills to discern whether trust or distrust of sellers is warranted in an offline environment: they can see their sellers in person, walk around the shop, and in case of any problem, go back to the physical shop where body language and verbal interactions help them to build trust or distrust. Such clues are nonexistent in cyberspace. Consumers are not familiar with this new environment and the analytical skills they developed over time in the real world do not work online. In other words, consumers feel lost and, consequently, lack confidence. Numerous papers have been written on this subject.⁷⁴ A first step towards the building of trust is the use of trustmarks or seal programs.⁷⁵ Logos are put on a

⁷³ Clark et al., *supra* note 10, at 20–21; Hörnle, *supra* note 55, at § 3.1; Teitz, *supra* note 57, at 1010; Krause, *supra* note 25, at 471–73; Baumann, *supra* note 10, at 1231; Janice Nadler, *Electronically-Mediated Dispute Resolution and E-Commerce*, 17 NEGOT. J. 334–37 (2001); see KATSH & RIFKIN, *supra* note 14, at 83–89.

⁷⁴ See generally Rufus Pichler, *Trust and Reliance—Enforcement and Compliance: Enhancing Consumer Confidence in the Electronic Marketplace* (2000) (unpublished thesis, Stanford University) (on file with the Ohio State Journal on Dispute Resolution).

⁷⁵ See Hang, *supra* note 31, at 848–49 (discussing the "TRUSTe" seal, or the program developed by the Better Business Bureau); Friedman, *supra* note 31, at 705. For information on the seal programs in general, see Hörnle, *supra* note 55, at § 3.2; Martin, *supra* note 51, at 148–50; Ramasastry, *supra* note 51, at 165; Gibbons, *supra* note 71, at 32; Ponte, *supra* note 40, at 473; RULE, *supra* note 15, at 106–08; Teitz, *supra* note 57, at 995; see also SOLOVAY & REED, *supra* note 16, at 7–34.

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website to inform the consumer that the e-merchant meets the standards defined by the seal provider. These programs are often related either with the protection of privacy or with ODR systems. In either instance, they exist to show a commitment towards consumer protection, to prove that business is conducted seriously, and thus to appear credible and build trust. For the time being, seal programs are the result of private initiatives. This results in a multiplication of seal programs that do not mean anything for the consumer due to a lack of marketing campaigns. Consequently, this diversity leads to confusion among users, all the more than a single seal can potentially mean many different things.⁷⁶ To solve this problem, some authors have suggested that seal programs should be developed by an independent international body or a committee of government officials with the participation of consumer advocacy groups and business representatives.⁷⁷ Others emphasize the need to provide consumers with more detailed information as to the type of services provided, the procedure, the profiles of neutrals, the costs involved, and so forth.⁷⁸

2. *Due Process*⁷⁹

To be effective, ODR providers need to be trusted by consumers. To be trusted, they need to be credible. Credibility requires the respect of due process. In a digital environment, due process raises some questions:

- As previously mentioned, due process requires transparency, first through the deliverance of information to consumers, secondly through the publication of the decisions. The publication of the decisions is one of the best ways to assure the transparency of the proceedings.⁸⁰ It would both enhance predictability and allow consumers to get an idea of the degree of expertise of the ODR provider and its neutrals. As pointed out by Teitz, transparency may,

⁷⁶ Martin, *supra* note 51, at 149.

⁷⁷ *Id.* at 150.

⁷⁸ Gibbons, *supra* note 71, at 23, 26–27; Teitz, *supra* note 57, at 998; Baumann, *supra* note 10, at 1239.

⁷⁹ Clark et al., *supra* note 10, at 21; Gibbons, *supra* note 71, at 20–25; KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 197–209; Nadler, *supra* note 73, at 342–44; Wahab, *supra* note 6, at 146–471; see Martin, *supra* note 51, at 157; SOLOVAY & REED, *supra* note 16, at 8–25; OECD, *supra* note 13.

⁸⁰ Matthews & Stewart, *supra* note 39, at 1128–29; Ponte, *supra* note 40, at 477, 488–89; Hörnle, *supra* note 55, at § 4.2.1.

however, not be desirable in all forms of ODR.⁸¹ While publication is probably not a concern for small claims, it surely will be one if online arbitration were to develop for international business transactions, i.e., in a B2B framework.

- Some authors have, for instance, wondered whether due process allowed to the parties requires a face-to-face hearing.⁸² In my opinion, the general answer is no. While the right to be heard, i.e., to be able to hear the other party's arguments, to present one's case, and submit evidence is essential,⁸³ most jurisdictions now admit that the respect of this right does not necessarily involve a public hearing. The same can be said in ODR, as tends to be proved by the UDRP where public hearings are not conducted.⁸⁴ This does not seem to be a concern for the parties since the possibility of avoiding travel and costs is traditionally considered as one of the main advantages of ODR. One may, however, wonder whether the limited discovery usually at the parties' disposal respects the due process requirements.⁸⁵ Do the rules of an ODR provider that only accept written submissions respect the due process requirements? Should the parties be allowed to have witness hearings? While technology may one day allow the hearing of witnesses at a distance, this still is not the case. Do written depositions satisfy due process requirements? Maybe, maybe not. Further research should be conducted in this particular area.
- Others have wondered whether neutrals have to be independent.⁸⁶
- Finally, some pointed out that access to the procedure needs to be easy, i.e. cost effective.⁸⁷ If one has to spend more than the amount that is subject to the dispute, ODR will remain meaningless. Ideally, ODR systems should be designed to enable the parties to use them

⁸¹ Teitz, *supra* note 57, at 1008.

⁸² de Witt, *supra* note 66, at 457.

⁸³ Gibbons, *supra* note 71, at 23; Hörmle, *supra* note 55, at § 4.1.

⁸⁴ Teitz, *supra* note 57, at 1006 (sharing this opinion).

⁸⁵ Krause, *supra* note 25, at 487 (considering that the lack of discovery will at least be especially burdensome to complainants who carry the burden of proof); see PONTE & CAVENAGH, *supra* note 6, at 33.

⁸⁶ Gibbons, *supra* note 71, at 22; Hörmle, *supra* note 55, at § 4.1.1; SOLOVAY & REED, *supra* note 16, at 8–17.

⁸⁷ Hörmle, *supra* note 55, at §§ 1, 5.

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without being obligated to use a legal representative.⁸⁸ Parties should not, however, be deprived of the right to use a legal representative.⁸⁹

3. *Funding*

As Ramasastry correctly puts it, "[f]unding appears to be the crux of the problem."⁹⁰ ODR systems need to remain extremely cheap, if not free, to deal effectively with small claims. One may, therefore, wonder how these systems will be funded in order to be profitable. While the bilateral payment scheme, i.e. the payment of fees by the actual users of the system, is the ordinary way to handle legal costs in ADR and court systems, alternatives may be more appropriate for the development of ODR. Strangely enough, while some authors raise this point,⁹¹ few have made sound proposals on this crucial issue. Lucille M. Ponte suggests that:

Traditional businesses have purchased insurance packages to help pay legal costs and damage awards for a wide range of tort matters. Innovative private insurers could offer e-businesses insurance programs that also cover the costs of ODR services for both the e-business and the online consumer. Like most insurance programs, the expenses associated with ODR services would be spread through premiums paid by participating e-businesses and reflected in the price of goods and services offered to consumers.⁹²

Another alternative suggested by Ponte would be to obtain the support of governments because they have a clear interest in reducing their caseloads.⁹³ While a partnership with public entities could be a solution, one may wonder whether it would really reduce the courts' caseloads, because most e-disputes that cannot be solved through ODR will never go to court. Alternatively, Ramasastry evokes the membership scheme. In this system, used in several seal programs, the e-merchant pays a certain fee to the seal providers covering all or part of the fees of the ODR.⁹⁴ This is, for instance, the case of e-Bay, which actually pays part of the fees to SquareTrade. As pointed out by Ramasastry, the problem with the membership scheme is that it raises

⁸⁸ Gibbons, *supra* note 71, at 23.

⁸⁹ *Id.* at 24.

⁹⁰ Ramasastry, *supra* note 51, at 164.

⁹¹ Krause, *supra* note 25, at 485–86; SOLOVAY & REED, *supra* note 16, at 8.

⁹² Ponte, *supra* note 40, at 472–73; *see also* RULE, *supra* note 15, at 108.

⁹³ Ponte, *supra* note 40, at 473.

⁹⁴ Ramasastry, *supra* note 51, at 164–66.

questions as to the independence of the ODR provider whose viability depends upon the e-merchants.⁹⁵ Would an e-merchant be interested in renewing its membership if it keeps losing cases? Would the neutrals—who could be employees of the ODR provider—be influenced to a certain extent? The funding of ODR providers raises a lot of issues that remain unanswered. Further in-depth research on this particular issue is necessary if the systems implemented are to be efficient and effective.

4. *Privacy and Security*⁹⁶

Most scholars emphasize the need for confidentiality, one of the key features in ADR. While this is true of current ADR, in particular of international commercial arbitration where the disputes are often of high value, I am not sure that this is the case for ODR. It is true that the records and communications between the parties and neutrals have to be kept private; however, encryption technology currently satisfies this requirement. In any case, even if we accept the possible development of online arbitration where the confidentiality issue would probably matter, I do not think that confidentiality is a main issue for small claims such as the ones currently dealt with by ODR providers. This tends to be proved by the success of the UDRP, which publishes all decisions online. The publication requirement has never resulted in any comment or criticism from any stakeholder, who probably considers that there is no need for any confidentiality in a dispute over a domain name. In other words, I do not think that the "tension" feared by Ramasastry "between transparency and confidentiality" will be a practical hindrance to the development of ODR.⁹⁷ Publication will instead allow transparency, and thus help to build trust.

⁹⁵ *Id.* at 165.

⁹⁶ Clark et al., *supra* note 10, at 19–20; Shah, *supra* note 25, at 32; Turner, *supra* note 25, at 144; Hang, *supra* note 31, at 859; Friedman, *supra* note 31, at 713; Katsh, *supra* note 7, at 971; de Witt, *supra* note 66, at 462; Krause, *supra* note 25, at 489; PONTE & CAVENAGH, *supra* note 6, at 128; RULE, *supra* note 15, at 81; SOLOVAY & REED, *supra* note 16, at 8–21; Wahab, *supra* note 6, at 144–45.

⁹⁷ Ramasastry, *supra* note 51, at 166.

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5. *Validity of Online ODR Agreements*⁹⁸

It is important to make a distinction between B2B and B2C disputes. In the B2C environment, while there is no doubt that arbitration agreements can be concluded between businesses, the situation is more doubtful in the EU when one of the parties is a consumer. The EU and the United States have indeed approached consumer protection differently.⁹⁹ According to Crawford:

[I]n the 1998 Organization for Economic Cooperation and Development ("OECD") . . . the United States "gutted e-consumer protection from the agreement." The United States was concerned that the E.U. approach placed too much responsibility on sellers to figure out consumer protection laws of each separate country. The United States wished to "place more emphasis on self-regulation by encouraging businesses to establish fair, effective and transparent mechanisms rather than developing an international e-consumer protection standard." The E.U. advocated the use of formalistic codes and regulations adopted to ensure specific e-consumer protections, mirroring its own strong consumer protections.¹⁰⁰

In other words, while an arbitration clause contained in a contract of adhesion which binds the consumer is likely to be deemed unfair within the EU, consumer arbitration clauses are usually enforceable in the United States.¹⁰¹ This discrepancy is one of the main reasons for the current failure of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.¹⁰² The proposed Article 7.2 of the Hague Convention, drafted under the influence of the EU countries, states that "a claim against the consumer may only be brought by a person who entered into the contract

⁹⁸ Clark et al., *supra* note 10, at 19; Shah, *supra* note 25, at 33; Friedman, *supra* note 31, at 714.

⁹⁹ See John R. Aguilar, *Over the Rainbow—European and American Consumer Protection Policy and Remedy Conflicts on the Internet and a Possible Solution*, 4 INT'L J. COMM. L. & POL'Y 1, 1 (1999/2000); Crawford, *supra* note 6, at 388–89; Clark et al., *supra* note 10, at 15–16; Ponte, *supra* note 40, at 456–58; Teitz, *supra* note 57, at 992; Chong, *supra* note 51, at 36–44; see generally KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 171–72.

¹⁰⁰ Crawford, *supra* note 6, at 388–89 (citation omitted).

¹⁰¹ Hörmle, *supra* note 55, at § 2.1; Ponte, *supra* note 40, at 450 (pointing out that, "U.S. Courts have typically indicated that contracts of adhesion with consumers are not automatically unenforceable but will be scrutinized for compliance with existing contract law and with notions of fundamental fairness and reasonableness").

¹⁰² See generally Martin, *supra* note 51, at 141–47.

in the course of its trade of profession before the courts of the State of the habitual residence of the consumer." Such a clause is considered unacceptable for the United States as it "would 'create an absolute rule against choice of forum clauses [or arbitration agreements] in consumer contracts.'"¹⁰³ At this stage, one has to admit that the validity of online arbitration agreements is more than doubtful when they involve an EU consumer. In other words, while an e-merchant will have no right to impose an ODR procedure towards an EU consumer, the latter will have the choice between going to court or referring the case to the ODR provider.

On the other hand, in the B2B environment, arbitration has become the usual way to solve international business transactions. The success met by international commercial arbitration is partly due to one multilateral treaty that enables the parties to easily enforce the awards anywhere in the world: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention.¹⁰⁴ The implication of technological tools in assisted online arbitration raises several questions as to their compliance with the New York Convention. First of all, Art. II of the New York Convention requires the arbitration agreement to be made "in writing."¹⁰⁵ Does an electronic agreement satisfy this requirement? Considering the fact that an amendment of the New York Convention is an illusion,¹⁰⁶ some authors recommend interpreting the "in writing" requirement in compliance with Article 7 of the UNCITRAL Model Law on International Commercial Arbitration, which defines "written" as any "other means of telecommunication which provide a [written] record of the agreement."¹⁰⁷ As pointed out by Yu and Nasir:

¹⁰³ *Id.* at 143.

¹⁰⁴ United Nations Commission on International Trade Law, 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the "New York" Convention, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Sept. 5, 2007).

¹⁰⁵ de Witt, *supra* note 66, at 442–44; Matthews & Stewart, *supra* note 39, at 1134–35; Hong-lin Yu & Motassem Nasir, *Can Online Arbitration Exist Within the Traditional Arbitration Framework?*, 20 J. INT'L ARB. 455, 458 (2003); Friedman, *supra* note 31, at 714 (raising the same issue regarding the Federal Arbitration Act); Chong, *supra* note 51, at 34–36; M.H.M. Schellekens, *Online Arbitration and E-commerce*, 9 ELECTRONIC COMM. L. REV. 113, 120 (2002); SOLOVAY & REED, *supra* note 16, at 2–37.

¹⁰⁶ To amend the New York Convention requires a unanimous decision of all the members. Some authors' proposals to amend it remain totally academic and without any practical relevance.

¹⁰⁷ Gibbons, *supra* note 71, at 51 (adding that the United Kingdom Arbitration Act also defines writing as "being recorded by any means").

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No one is in a position to ignore the fast development of cybertrade, which has generated a large number of electronic contracts for the purpose of international trade, such as e-bills of lading and electronic arbitration agreements. Consequently, over the last decade both international documents and national laws have started to address this development.¹⁰⁸

I share this opinion. Considering the recent legal developments and importance gained by e-commerce, an extensive interpretation of the "in writing" requirement should not be as problematic as it seems. Only the future will say for sure. Another important issue for online arbitration is the definition of the "seat of the arbitration."¹⁰⁹ The seat of arbitration first determines the *lex arbitri*, i.e. the law applicable to the procedural aspects of the arbitration when the arbitral tribunal seeks the assistance of local courts. Most importantly, it defines the nationality of the award in the context of the New York Convention and thus its possibilities of enforcement. According to Article I of the New York Convention, "[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal." Yu and Nasir argue in favor of the delocalization theory, so as to detach the arbitration from controls imposed by the law of any country, a solution that would lead to the application of some *lex mercatoria*.¹¹⁰

6. Enforcement¹¹¹

Authors discuss several types of possible enforcement methods. To be legally enforceable in another country, the ODR agreement needs to be valid, which, as seen previously, raises serious concerns in the EU.¹¹² While a traditional legal enforcement requires the support of governments, the Internet may offer others types of enforcement. Cona suggests that

¹⁰⁸ Yu & Nasir, *supra* note 105, at 459.

¹⁰⁹ de Witt, *supra* note 66, at 451–52; Yu & Nasir, *supra* note 105, at 462–64; Schellekens, *supra* note 105, at 122–23.

¹¹⁰ Yu & Nasir, *supra* note 105, at 463–64; Chong, *supra* note 51, at 57–59.

¹¹¹ See generally Shah, *supra* note 25, at 32; Hang, *supra* note 31, at 860; KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 211; Krause, *supra* note 25, at 473–76; Matthews & Stewart, *supra* note 39, at 1130–33; Chong, *supra* note 51, at 60–65; SOLOVAY & REED, *supra* note 16, at 8–28.

¹¹² See *supra* Part II.C.5.

disconnection might be one type of enforcement.¹¹³ While interesting, this suggestion faces some practical hindrances. First, it would require the support of Internet Service Providers (ISPs) and their adherence to the ODR in question. Second, to prohibit access to a website should only be a remedy towards the consumer, not towards the e-merchant since a disconnection of the website would surely be disproportionate. If an e-merchant were to face disconnection of the website at every single claim, one could seriously doubt any possible development of e-commerce. Hörnle seems to suggest that social norms may develop considering the role played by reputation in e-commerce.¹¹⁴ Under this theory, e-merchants and their consumers could be seen as a close-knit community where the bad behaviour of the one would quickly lead to exclusion from the community. Gibbons, however, argues that "[r]eputation is likely to be less effective in one-time consumer transactions, particularly if consumers are isolated and sellers can readily discriminate between sophisticated and unsophisticated buyers," and that "[a]n anonymous e-consumer with a series of one-time transactions with different e-merchants best describes the e-marketplace."¹¹⁵ Several studies indeed tend to prove that social sanctions only play a role within close-knit communities that entertain ongoing relationships.¹¹⁶ Gibbons, however, assumes that e-consumers are "one-shot" players on the e-market.¹¹⁷ While there is a lack of empirical data on this issue, this presumption seems doubtful. At least anecdotally, e-consumers tend to go back to the same website if they have once been satisfied with it and can therefore be considered repeat players. In this case, reputation indeed plays a role. The importance of reputation and social norms on the Internet tend to be proved by e-Bay, where sellers are rated depending upon the satisfaction of the client. E-consumers who go back to the website have the ability to see how good or bad each seller is and decide whether or not they will enter into a transaction with a particular seller.¹¹⁸ Studies about enforcement methods in ODR are only at their infancy and need further in-depth research.

¹¹³ Cona, *supra* note 10, at 993.

¹¹⁴ Hörnle, *supra* note 55, at § 3.2; *see also* KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 226–27.

¹¹⁵ Gibbons, *supra* note 71, at 28 (quoting, in part, Christopher Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 796 (2001)); *see also* Katsh et al., *supra* note 31, at 714.

¹¹⁶ *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991).

¹¹⁷ Gibbons, *supra* note 71, at 13.

¹¹⁸ According to SquareTrade, lots of cases would have to deal with the rating of e-merchants by consumers. Bad-rated e-merchants would file a complaint so as to reach an agreement with unsatisfied consumers who would then agree to change their rating. If

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7. *Education of Neutrals*¹¹⁹

Some authors have correctly wondered who would play the role of mediators. If efficiency requires the design of low cost ODR systems, this implies low fees for the neutrals. But who will agree to serve as neutral for low fees? One can easily imagine that experienced arbitrators or mediators would not be interested in serving for low fees. Could one think of junior associates who could try and develop their skills through these small claims disputes? Should the neutrals consist of customers and sellers, i.e. peers of stakeholders, specifically trained to handle online disputes? In any case, there is no doubt that the neutrals will have to be educated because online disputes raise new psychological issues.¹²⁰

8. *Lack of Human Interaction*

Considering the amount of literature published by legal scholars about ODR, it is quite surprising to notice that few authors have dealt with,¹²¹ or primarily focused on the issue of human interaction.¹²² It is all the more surprising because this issue is crucial. While the legal issues can easily be grasped and analyzed, it is much more difficult to understand how ODR

this is the case, it would prove that reputation indeed plays a role on the Internet. See Katsh et al., *supra* note 31, at 729; *but see* RULE, *supra* note 15, at 105 ("Efforts at creating a Web-wide rating system have had mixed results."). While this may be true in general, there is little doubt that the rating system proves to be effective as far as eBay is concerned.

¹¹⁹ Krause, *supra* note 25, at 483–85; Ponte, *supra* note 40, at 74; Clark et al., *supra* note 10, at 22; SOLOVAY & REED, *supra* note 16, at 8–22; RULE, *supra* note 15, at 69–70 (stating that one advantage of ODR is the fact that parties may choose an expert in their field). This, however, is an advantage of any type of ADR process, so the added value of ODR as compared with traditional ADR is not easily discerned. For a listing of advantages of ODR for neutrals, see RULE, *supra* note 15, at 71–76. As to the relevant criteria to choose a mediator, see Baumann, *supra* note 10, at 1234–35. For issues related to neutrals generally, see RULE, *supra* note 15, at 239–44.

¹²⁰ See *infra* Part III.

¹²¹ E.g., Ethan Katsh, *Online Dispute Resolution: Some Lessons from the E-Commerce Revolution*, 28 N. KY. L. REV. 810, 816 (2001); Katsh, *supra* note 7, at 974; KATSH & RIFKIN, *supra* note 14, at 150–51; Cona, *supra* note 10, at 992; Krause, *supra* note 25, at 481–83; PONTE & CAVENAGH, *supra* note 6, at 32–33; RULE, *supra* note 15, at 45–46, 83–84; Yu & Nasir, *supra* note 105, at 456.

¹²² E.g., Janice Nadler, *Electronically Mediated Dispute Resolution and E-Commerce*, 17 NEGOT. J. 333 (2001); David A. Larson, *Online Dispute Resolution: Do You Know Where Your Children Are?*, 19 NEGOT. J. 199 (2003).

proceedings are perceived by the stakeholders as compared to courts or offline ADR systems. I hope that this paper will fill that void and be the starting point of further discussions.

D. Preliminary Conclusion

The phenomenon of ODR has drawn the attention of numerous legal scholars as well as governments and public organizations. While all of them recognize the importance of providing efficient dispute resolution methods to the consumer in order to increase e-commerce, several concerns remain unanswered. Two of them are crucial and deserve further investigation: the funding of providers and the building of trust between the parties. To build trust, I believe that one has to understand the psychological difference of perceptions between computer-mediated-disputes and face-to-face interactions. This issue has never been addressed in sufficient depth by legal scholars. I hope to fill that void by using empirical data resulting from experiments conducted by psychologists in Part C of this paper.

III. COMPUTER-MEDIATED-DISPUTES: A NEW DIMENSION?

A. Computer-Mediated Communication Theories

1. Introduction

The first experiments dealing with computer-mediated-communications (CMC) were conducted in the 1970s and 1980s, and at that time the main focus was to determine the factors that influenced impression formation.¹²³ Psychologists were interested in trying to find out "the extent to which the CMC environment modifies or eliminates many of the cues and sources of information that have been identified as important in traditional impression formation research."¹²⁴

The most obvious feature of CMC disputes as compared with face-to-face (F2F) disputes is the absence of non-verbal cues, such as facial expression, bodily gestures, and tone of voice or language, which obviously play an important role in F2F. That deficit is important, as pointed out by Kiesler and Sproull, because people come to understand social order through

¹²³ Jeffrey T. Hancock & Philip J. Dunham, *Impression Formation in Computer-Mediated Communication Revisited*, 28 COMM. RES. 325, 326 (2001).

¹²⁴ *Id.*

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"static"¹²⁵ and "dynamic"¹²⁶ social context cues, and "[o]nce people perceive social context cues, they adjust their targets of communication, the tone and content of their communications, and their conformity to social norms."¹²⁷ This was confirmed by Knutson, who demonstrated that facial expressions of emotions convey messages of both dominance and affiliation to observers which may "seed" interpersonal inferences for the future.¹²⁸ Eye contact has, for instance, been shown to be a cue for dominance, friendliness, approval, romantic love, status relationships, and speech synchronization.¹²⁹ Social cues are important to build interpersonal "rapport," which has been described by Thompson and Nadler as containing three components: "(1) mutual attentiveness (i.e., my attention is focused on you and your attention is focused on me), (2) positivity (i.e., we are friendly to each other), and (3) coordination (i.e., we are in sync, so that we each react spontaneously to the other)."¹³⁰ In other words, "rapport" can be described as "a state of mutual positivity and interest that arises through the entrainment of expressive behavior in an interaction."¹³¹ F2F allows more "rapport" than CMC, which in turns lead to more trust and thus more cooperation.¹³²

The ease of perceiving nonverbal cues allows a classification of communication media depending upon their "information richness," "richness" being "defined as the potential information-carrying capacity of

¹²⁵ Sara Kiesler & Lee Sproull, *Group Decision Making and Communication Technology*, 52 *ORG. BEHAV. & HUM. DECISION PROCESSES* 96, 102 (1992) ("Static cues emanate from artifacts such as the chair at the head of a conference table" or the appearance of people's suits).

¹²⁶ *Id.* ("Dynamic cues emanate from people's behaviors" such as nodding, frowning, shaking one's head, etc.)

¹²⁷ *Id.*

¹²⁸ Brian Knutson, *Facial Expressions of Emotion Influence Interpersonal Trait Inferences*, 20 *J. NONVERBAL BEHAV.* 165, 179 (1996).

¹²⁹ Ederyn Williams, *Experimental Comparisons of Face-to-Face and Mediated Communication: A Review*, 84 *PSYCHOL. BULL.* 963, 971 (1977).

¹³⁰ Leigh Thompson & Janice Nadler, *Negotiating via Information Technology: Theory and Application*, 58 *J. SOC. ISSUES* 109, 111 (2002).

¹³¹ Aimee L. Drolet & Michael W. Morris, *Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts*, 36 *J. EXP. SOC. PSYCHO.* 26, 28 (2000).

¹³² Thompson & Nadler, *supra* note 130, at 111; Drolet & Morris, *supra* note 131, at 26, 33–34; Williams, *supra* note 129, at 968–69; *see generally* M. Mühlfelder et al., *Teams Without Trust? Investigations in the Influence of Video-Mediated Communication on the Origin of Trust Among Cooperating Persons*, 18 *BEHAV. & INFO. TECH.* 349 (1999).

data."¹³³ CMC has thus traditionally been referred to as lower in social presence.¹³⁴ F2F obviously is the richest media since it allows the simultaneous perception of multiple cues.¹³⁵ The telephone medium is less rich; while its feedback capacity is as fast as F2F, visual cues are unavailable so that the parties have to rely upon language content and audio cues to reach understanding.¹³⁶ Written communication is the poorest communication medium since feedback is slow and cues are limited to what is written on paper.¹³⁷

Based upon this "richness information" scheme, authors have argued that media low in richness were only suited to simple topics and routine problems which are already understood and do not need further clarifications. However, complex tasks which require organization and rapid feedback would have to be dealt with rich media.¹³⁸ Experiments conducted in the 1970s showed that both the richness of the medium and the amount of information increase with the perceived uncertainty, thus leading managers to have a strong preference for verbal media rather than written communication.¹³⁹ Scholars thus considered in the 1980s that "audio and video conferences are perceived as effective for tasks involving exchanging information, asking questions, and exchanging opinions, but are not as satisfactory as FtF for high social presence functions such as getting to know

¹³³ Richard L. Daft & Robert H. Lengel, *Information Richness: A New Approach to Managerial Behavior and Organization Design*, 6 RES. IN ORG. BEHAV. 191, 196 (1984); Mei Du et al., *The Effects of Multimedia Communication on Web-Based Negotiation*, 12 GROUP DECISION & NEGOT. 89, 91-92 (2003).

¹³⁴ Joseph B. Walther & Judee K. Burgoon, *Relational Communication in Computer-Mediated Interaction*, 19 HUM. COMM. RES. 50, 53 (1992); Ronald E. Rice & Gail Love, *Electronic Emotion-Socioemotional Content in a Computer-Mediated Communication Network*, 14 COMM. RES. 85, 87 (1987); Starr Roxanne Hiltz et al., *Experiments in Group Decision Making-Communication Process and Outcome in Face-to-Face Versus Computerized Conferences*, 13 HUM. COMM. RES. 225, 228 (1986); Sara Kiesler et al., *Social Psychological Aspects of Computer-Mediated Communication*, 39 AM. PSYCHOL. 1123, 1125, 1131 (1984).

¹³⁵ Daft & Lengel, *supra* note 133, at 196-98.

¹³⁶ *Id.* at 198; Williams, *supra* note 129, at 967-68 (stating that some thirty years ago, "[r]esults showed significantly more cooperation in the audio and vision condition (87% cooperative responses), with lower cooperation for audio-only (72% cooperative), vision-only (48% cooperation), and no-communication (41% cooperative) conditions").

¹³⁷ Daft & Lengel, *supra* note 133, at 198. For more on these differences, see Kielser & Sproull, *supra* note 125, at 103.

¹³⁸ Daft & Lengel, *supra* note 133, at 199-200, 221, 223.

¹³⁹ *Id.* at 201-02; see Drolet & Morris, *supra* note 131, at 27.

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people bargaining, and negotiation."¹⁴⁰ In other words, CMC would only be suited for non socio-emotional tasks.¹⁴¹ Despite this assertion, Williams states that:

[R]esults suggest the medium of communication can affect the impressions that people gain of each other, with the effect generally being that the media that are richer in nonverbal cues lead to more favourable impressions. However, this effect does not appear to be particularly strong, in that it sometimes fails to be detected and is never highly significant statistically, even when fairly large numbers of subjects are used.¹⁴²

Besides, according to Drolet and Morris, dyads who communicate in F2F conversation exhibit a higher degree of rapport (positive affect and cooperation), than the ones who communicate by telephone. Nevertheless, they do not seem to have more expectations at the outset. In other words, expectations of the counterpart's cooperativeness played no role.¹⁴³

2. *Cues Filtered-Out Model*

Since the 1970s, theories related to CMC have evolved. The first approach has focused on the lack of nonverbal cues and has consequently been defined as the *Cues Filtered-Out Perspective* (CFO).¹⁴⁴ According to Hancock and Dunham, "[t]he unifying theme central to these approaches is that the reduction of nonverbal social and relational cues in CMC produces a depersonalized form of communication and decreased awareness of others, inhibiting interpersonal relations."¹⁴⁵ Experiments conducted by Morris have indeed shown that perceptions of the other side were more positive when participants had seen a picture of their opponents both before and after the negotiation.¹⁴⁶

¹⁴⁰ Hiltz et al., *supra* note 134, at 228.

¹⁴¹ Rice & Love, *supra* note 134, at 89; *see also* Du et al., *supra* note 133, at 92.

¹⁴² Williams, *supra* note 129, at 969.

¹⁴³ Drolet & Morris, *supra* note 131, at 40.

¹⁴⁴ Hancock & Dunham, *supra* note 123, at 326.

¹⁴⁵ *Id.* at 326 (citations omitted).

¹⁴⁶ Don A. Moore et al., *Long and Short Routes to Success in Electronically Mediated Negotiations: Group Affiliations and Good Vibrations*, 77 *ORG. BEHAV. HUM. DECISION PROCESSES* 22, 31, 35 (1999).

3. *Social Identification/Deindividuation Model*

In the beginning of the 1990s, CFO theory was challenged by the *social identification/deindividuation* (SIDE) model.¹⁴⁷ Unlike the CFO model, the SIDE model admits that, despite the low richness of written texts, socio-emotional content is nevertheless possible.¹⁴⁸ However, due to the lack of individuating cues, parties will tend to rely upon the few remaining social cues they can get; consequently, they will construct more stereotyped and exaggerated representations of their partners.¹⁴⁹ Walther has described this phenomenon as "overattribution."¹⁵⁰ This will lead to strong positive feelings towards people who perceive each other as part of the same group, thus building a group identity.¹⁵¹ This "social identity theory" suggests that the more similar we perceive others to be, the more cooperative and trusting we are and, conversely, negative perceptions as to outgroup members will be exaggerated, a phenomenon described as "sinister attribution error."¹⁵² In 1999, Morris however showed that this "sinister attribution error" could be corrected if the outgroup members engage in mutual self-disclosure.¹⁵³ Morris concludes that negotiations between people who engage in self-disclosure or who are considered as belonging to the same group achieve similar agreement rates.¹⁵⁴

4. *Social Information-Processing Model*

In the mid 1990s, Walther developed a new model called the social information-processing (SIP) or hyperpersonal theory. This model focuses on developmental processes in CMC. As put by Walther:

The SIP approach held that because all social information, as well as all task information, travels through one code system—a system in which even verbal messages travel slower than they do in oral speech—the expression

¹⁴⁷ Hancock & Dunham, *supra* note 123, at 327; Joseph B. Walther, *Group and Interpersonal Effects in International Computer-Mediated Collaboration*, 23 HUM. COMM. RES. 342, 346 (1997).

¹⁴⁸ Hancock & Dunham, *supra* note 123, at 327.

¹⁴⁹ *Id.*

¹⁵⁰ Walther, *supra* note 147, at 346.

¹⁵¹ Hancock & Dunham, *supra* note 123, at 327.

¹⁵² Thompson & Nadler, *supra* note 130, at 119; Walther, *supra* note 147, at 346.

¹⁵³ Moore et al., *supra* note 146, at 38.

¹⁵⁴ *Id.* at 38.

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and processing of information is retarded in CMC relative to FtF communication. As such information accumulates, however, participants reduce uncertainty about their partners and develop interpersonal relationships.¹⁵⁵

In other words, "[t]he major thrust of social information-processing theory is that CMC retards the rate at which impression-relevant cues are exchanged during social interaction, rather than simply reducing or eliminating the amount of such information. Communicators are assumed to take an active role in forming impressions through text-based information."¹⁵⁶ In other words, while social cues may be lacking in the beginning of the communications and lead to exaggerated impressions, this deficiency should disappear over time as the parties learn more about each other.

The hyperpersonal model currently is the leading model. Experiments have, for instance, demonstrated that in a one-time interaction, CMC participants were willing to rate their partners on a smaller array of attributes than F2F, but that they did it in a more extreme way.¹⁵⁷ However, it is interesting to note that participants in these experiments were able to rate their partners on more than half of the attributes.¹⁵⁸ In other words, while CMC undoubtedly carries less information than F2F, it would be wrong to assume that it does not contain any socio-emotional content at all. As most people using a computer and the Internet can now confirm, written texts can convey several messages and style, grammar, and spelling mistakes are relevant factors to get a first picture, which may indeed be exaggerated, of the person we are "talking" to.¹⁵⁹ Thompson and Nadler even suggested that participants nonconsciously imitate both the linguistic structure of each other's message (i.e. length and grammar) and the SE connotations of the other's message (i.e. tone, directness) as well as the rate of replies.¹⁶⁰ In 1992, Walther and Burgoon examined relational development over time in CMC and F2F communication; they concluded that "participants in both

¹⁵⁵ Walther, *supra* note 147, at 348; *see also* Walther & Burgoon, *supra* note 134 at 77.

¹⁵⁶ Hancock & Dunham, *supra* note 123, at 328.

¹⁵⁷ *Id.* at 339. In other words, on a scale from 1 to 10, CMC participants would rate their partner on a smaller array of attributes than F2F participants, but would grade each attribute closer to 10 than F2F participants would do, thus grading each attribute in an extreme way.

¹⁵⁸ *Id.*

¹⁵⁹ *See* Rice & Love, *supra* note 134, at 88.

¹⁶⁰ Thompson & Nadler, *supra* note 130, at 113.

conditions increased over time to similarly affiliative levels of intimacy and affection, reduced dominance, and greater social (versus task) orientation."¹⁶¹ As demonstrated by Rice and Love in 1987, the correlation between the total number of socio-emotional sentences and the number of messages does, however, not mean that initial messages among previously unacquainted interactants in CMC are lower in immediacy and affection than are later messages.¹⁶² Walther and Burgoon confirmed this outcome five years later.¹⁶³ The fact that SE content does not necessarily increase in percentage over time does not, however, contradict the fact that the parties get to know each other better over time.

Walther's model currently is the dominant one in the literature, even though his opinion might be exaggerated.¹⁶⁴ To sum up, one may say that, quoting Walther, "[a]ll things considered, although initial differences in relational communication between CMC and FtF may exist, they tend to be eliminated over time The ways in which humans pursue these interpersonal functions are more robust than can be impeded for long by computer-mediation."¹⁶⁵ One may therefore confidently affirm that: "FtF contact between negotiators is not always necessary to build rapport. Some social, personalizing contact between negotiators communicating via written media can build rapport, as can common in-group membership. There appears to be more than one path to rapport."¹⁶⁶

This condensed "historical" background of CMC theories clearly shows that the key mediating factor is rapport. Communication "leads to increased perceptions of the counterpart's cooperativeness and, in turn, to increased cooperation."¹⁶⁷ Mutual self-disclosure prior to commencing negotiation is thus important to secure a positive relationship, build rapport, and consequently facilitate cooperation.¹⁶⁸

¹⁶¹ Walther, *supra* note 147, at 349; Walther & Burgoon, *supra* note 134, at 50.

¹⁶² Rice & Love, *supra* note 134, at 98 ("the proportion of SE [socio-emotional] content does not increase over time This result implies that users do not 'warm up' to a CMC system to display their propensity toward sending SE messages").

¹⁶³ Walther & Burgoon, *supra* note 134, at 70.

¹⁶⁴ *Id.* at 79 ("CMC members attempted to reduce uncertainty by overcompensating in the direction of playfulness, affection, and depth").

¹⁶⁵ *Id.* at 81.

¹⁶⁶ Moore et al., *supra* note 146, at 39.

¹⁶⁷ Drolet & Morris, *supra* note 131, at 34; *see generally* Charles E. Naquin & Gaylen D. Paulson, *Online Bargaining and Interpersonal Trust*, 88 J. APPLIED PSYCHOL. 113, 117-18 (2003).

¹⁶⁸ Moore et al., *supra* note 146, at 26, 40; Mühlfelder et al., *supra* note 132, at 353; Hiltz et al., *supra* note 134, at 246; *see* Thompson & Nadler, *supra* note 130, at 121; *see*

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After these general remarks as to the main differences between CMC and F2F, time has come to turn to the different types of ODR described in the first part of my study and to wonder how these tools might psychologically be perceived by the users based upon specific experiments conducted in the past.

B. *Technological Tools*

By "technological tools," I refer to ODR systems that provide the parties with technological tools at the exclusion of any human intervention, such as a credit card chargeback system or automated negotiation. Considering the fact that credit card chargeback systems do not involve any interaction between the parties at all, they can be excluded from the study. While automated negotiation such as Cybersettle does not involve any interaction between the parties either, as they only get into contact through the automated bidding process, one may still wonder what the parties' expectations and anticipations are prior to entering into the process and during the process itself. Do the parties have high expectations? Does their behavior change during the process itself?

Gabuthy and Marchand attempted to answer these questions at the CNRS in Lyon, France, in order to find out whether automated negotiation was effectively able to generate efficiency.¹⁶⁹ Based on forty rounds of bargaining, the authors concluded that behaviors were significantly affected by the design of automated negotiation.¹⁷⁰ For these authors, the computer software appears as a neutral who would drive the parties' strategies outside the range of potential negotiated settlements and create a prisoner's dilemma situation.¹⁷¹ Instead of encouraging them to reach the best mutual outcome, automated negotiation "encourages disputants to behave strategically by adopting aggressive bargaining positions, which implies that the mechanism is not able to promote agreements and generate efficiency Automated negotiation tends to 'chill' bargaining as it creates incentives for individuals to misrepresent their true valuations and discourage them to converge on

generally Kathleen L. Valley et al., *A Matter of Trust: Effects of Communication on the Efficiency and Distribution of Outcomes*, 34 J. ECO. BEHAV. & ORG. 211 (1998).

¹⁶⁹ Yannick Gabuthy & Nadège Marchand, *Does Resorting to Online Dispute Resolution Promote Agreements? Experimental Evidence* (Centre National de la Recherche Scientifique, Working Paper No. 04-01) (2004) (Fr.), available at <http://www.gate.cnrs.fr/documentation/workingpapers/2004/0401.pdf> (last visited Sept. 14, 2007).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 7-8.

their own."¹⁷² Concretely, the plaintiff will adopt an under-efficient behavior by asking an amount higher than his reservation value.¹⁷³ Interestingly, the experiment also shows that, in presence of a high conflict situation, parties tend to behave more efficiently and to adopt a more concessionary behavior.¹⁷⁴

One could therefore infer from this experiment that parties experience negative anticipation when using automated negotiation and tend to react in a more defensive way than would be the case in a traditional framework, except in high conflict situations. This outcome may explain why automated negotiation's main success is related to insurance claims where the pure monetary system of settlement is totally depersonalized. Considering the recent development and usage of automated negotiation, experiments remain extremely rare and lots of questions remains unanswered. Further research should be conducted to get a better idea of the perceptions of participants with regard to these procedures.

C. Assisted Negotiation

Unlike automated negotiation, assisted negotiation allows the parties to directly interact with one another through different technological tools, the most common being e-mail. We shall thus focus on CMC involving the use of e-mails, and later focus on audiovisual tools that will probably be more frequently used in the future.

1. Use of E-mail

In order to compare CMC and F2F interactions, it is worth mentioning the specific features of F2F. According to Kiesler and Sproull these characteristics are the following ones:

- 1) one and only one person has the floor at any one time; except for momentary silences, someone is always holding the floor;
- 2) speakers cannot pause too briefly or for too long a time;
- 3) speakers exercise some control over who the next speaker will be, as well as when they can interrupt;
- 4) speakers signal transitions using multiple cues in different modalities or channels;

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 16.

¹⁷⁴ *Id.* at 10.

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- 5) there is no anonymity in face-to-face groups;
- 6) group members share time unequally.¹⁷⁵

The passage from F2F to CMC questions all these features, as well as others.

First of all, one may think that the use of technological tools speeds up the negotiation process and its outcome. However, that assumption turns out to be wrong. As several scholars have pointed out, CMC participants take longer than F2F participants to achieve a similar outcome.¹⁷⁶ Kiesler and Sproull found that it took four times as long for a three-person group to make a decision and ten times as long for a four-person group.¹⁷⁷ There are three explanations offered to explain this difference.¹⁷⁸ To begin, technological deficiencies could be slowing down the transmission. While this might have been a relevant explanation some years ago, this surely is not the case any longer. Another possible explanation is that it could take "people longer to type and read than to talk and listen."¹⁷⁹ Consequently, there might be more communication and exchanges of information during a F2F meeting than during a computerized one that lasts the same amount of time.¹⁸⁰ The same could be true even if, in the end, the total number of messages exchanged in order to reach an agreement are the same.¹⁸¹ Finally, the lack of nonverbal cues could prevent the parties from strategically adapting their position to quickly reach an optimal outcome based upon each other's reactions.¹⁸²

Secondly, unlike F2F interactions, there is not necessarily always someone talking in CMC, and the asynchronism due to e-mail exchanges allows interruptions and absences. While a few scholars depict this asynchronism as an advantage, since it allows the parties to thoroughly think about their respective positions before posting their messages,¹⁸³ others

¹⁷⁵ Kiesler & Sproull, *supra* note 125, at 102 (referring on that point to McGrath and Hollingshead).

¹⁷⁶ Hancock & Durham, *supra* note 123, at 338; Drolet & Morris, *supra* note 131, at 33, 46; *see* Williams, *supra* note 129, at 965.

¹⁷⁷ Kiesler & Sproull, *supra* note 125, at 108.

¹⁷⁸ *Id.*

¹⁷⁹ Kiesler & Sproull, *supra* note 125, at 108.

¹⁸⁰ Hiltz et al., *supra* note 134, at 236, 243; Sara Kiesler, *Thinking Ahead—The Hidden Messages in Computer Networks*, 64 HARV. BUS. REV. 46, 52 (1986).

¹⁸¹ Walther & Burgoon, *supra* note 134, at 54.

¹⁸² Kiesler & Sproull, *supra* note 125, at 108.

¹⁸³ Moore et al., *supra* note 146, at 39; KAUFMANN-KOHLER & SCHULTZ, *supra* note 9, at 23; Baumann, *supra* note 10, at 1233.

believe this slows down the process and can lead to frustration for parties expecting a quick answer to their messages.¹⁸⁴ The use of technology also prevents the parties from immediately clarifying their position or correcting it so as to prevent misunderstandings. This is a disadvantage of the asynchronism of e-mail exchanges and is another factor which explains the longer time needed to reach an agreement in CMC than in F2F.

Third, and as mentioned previously, CMC is an impoverished medium as compared to the F2F medium. The absence of nonverbal cues leads to two main consequences as to the way the parties approach the process itself. First, the parties tend to be more task-oriented than in F2F.¹⁸⁵ While this absence of distraction might be seen as an advantage,¹⁸⁶ it actually is not since rapport is a key factor to build trust and enhance cooperation.¹⁸⁷ Second, the parties tend to be uninhibited and to speak more strongly in CMC than in F2F, a result known as "flaming."¹⁸⁸ For obvious reasons, people find it easier to say what they think to an anonymous and dehumanized person than to someone made of flesh and bones. Experiments have demonstrated "that e-mail encourages uninhibited and aggressive communications because e-mailers are less influenced by social norms in this environment."¹⁸⁹ Remarks containing swearing, insults, name calling, and hostile comments are eight times more frequent in CMC than in F2F

¹⁸⁴ Thompson & Nadler, *supra* note 130, at 117; Sara Kiesler et al., *Social Psychological Aspects of Computer-Mediated Communication*, 39 AM. PSYCHOL. 1123, 1125 (1984).

¹⁸⁵ Thompson & Nadler, *supra* note 130, at 115; Walther, *supra* note 147, at 343; *contra* Walther & Burgoon, *supra* note 134, at 76.

¹⁸⁶ Williams, *supra* note 129, at 973.

¹⁸⁷ See *supra* Part III.A.1.

¹⁸⁸ Kiesler et al., *supra* note 184, at 1129; Walther & Burgoon, *supra* note 134, at 53; Kiesler, *supra* note 180, at 48, 52.

¹⁸⁹ Elaine M. Landry, *Scrolling Around the New Organization: The Potential for Conflict in the On-Line Environment*, 16 NEGOT. J. 133, 139 (2000). Colin Rule is therefore wrong when he writes that:

Because of the asynchronous nature of online communication and the lack of face-to-face immediacy, online communication is often less likely to escalate to accusations, name calling, and violence than face-to-face communication. In addition to simply having more time to think about what you want to say, the emotional heat that can be generated by face-to-face confrontation is less intense in online interaction. This dynamic has come to be called *cooling distance*.

RULE, *supra* note 15, at 66.

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discussions.¹⁹⁰ Thompson and Nadler speak of "counternormative e-behaviour" to describe this phenomenon.¹⁹¹ Some scholars have, however, contested the idea that flaming would be a generalized phenomenon in CMC, and assume that it would only appear in some CMC groups.¹⁹² No empirical data has been brought to confirm this assumption. Nonetheless, it may be true. As seen previously, the urge to belong to the same group might compensate for the lack of identification. One may therefore assume that negotiations among in-group members would result in less flaming than negotiations among out-group members. Experiments tend, in any case, to prove that in-group members reach better outcomes than out-group members.¹⁹³ There is little doubt that the desire to entertain ongoing relations with the other party will also increase the exchange of social information and prevent flaming.¹⁹⁴ What remains sure is that anger is disruptive and leads to a lower rate of settlement.¹⁹⁵

The lack of nonverbal cues also has advantages. In F2F meetings, talking time is not distributed equally among participants.¹⁹⁶ Social and hierarchical status plays an important role.¹⁹⁷ The relative anonymity of CMC allows a democratization and equalization of the whole process.¹⁹⁸ Experiments have shown that the trend for dominance increases over time in F2F negotiation while it decreases in CMC.¹⁹⁹ For example, while male executives are five times more likely to make the first proposal than female executives in F2F, women make the first proposal as often as men in CMC.²⁰⁰ As Kiesler puts

¹⁹⁰ Thompson & Nadler, *supra* note 130, at 119; Kiesler & Sproull, *supra* note 125, at 110.

¹⁹¹ Thompson & Nadler, *supra* note 130, at 119.

¹⁹² Walther, *supra* note 147, at 347.

¹⁹³ Moore et al., *supra* note 146, at 25, 32, 38; Landry, *supra* note 189, at 139; Thompson & Nadler, *supra* note 130, at 116.

¹⁹⁴ See Walther, *supra* note 147, at 349.

¹⁹⁵ Ray Friedman et al., *The Positive and Negative Effects of Anger on Dispute Resolution: Evidence from Electronically Mediated Disputes*, 89 J. APPLIED PSYCHOL. 369, 373 (2004).

¹⁹⁶ Kiesler & Sproull, *supra* note 125, at 102.

¹⁹⁷ Kiesler & Sproull, *supra* note 125, at 102.

¹⁹⁸ Williams, *supra* note 129, at 970 ("[The a]mount of participation, in terms of numbers of messages, was most equal with teletypewriter communication, less equal with audio only, and least equal when the discussion was face to face"); Landry, *supra* note 189, at 135; Hiltz et al., *supra* note 134, at 239; RULE, *supra* note 15, at 68.

¹⁹⁹ Walther & Burgoon, *supra* note 134, at 74.

²⁰⁰ Kiesler & Sproull, *supra* note 125, at 109; see Kiesler et al., *supra* note 184, at 1125.

it, "Eliminating surveillance and social feedback, like laughter or a frown, reduces any embarrassment over being considered foolish and eliminates a feeling of obligation to respond in a certain way. Hence even busy, shy, or obnoxious people can communicate comfortably."²⁰¹ One can therefore consider that dominance is less strong of a factor in CMC groups.²⁰²

All in all, experiments tend to show that CMC creates less consensus,²⁰³ and thus leads to more impasses than F2F.²⁰⁴ Rapport seems to be the key, since the rate of agreements clearly increases when there is personalization or a feeling of belonging to the same group.²⁰⁵ When the parties reach an agreement, there is a dispute as to whether quality is affected. For Hiltz, Johnson, and Turoff, there does not seem to be any difference.²⁰⁶ According to them, "for both modes combined, quality of decision is positively related to the proportion of communications showing solidarity and giving suggestions and negatively related to showing tension release and giving orientation."²⁰⁷ Valley, Moag, and Bazerman, however, consider that F2F negotiations result in greater joint gains than those carried out in writing since the level of cooperation is higher.²⁰⁸

2. Use of Audiovisual Means

The use of audiovisual means currently remains the exception in ODR. However, one can expect that their usage will increase in the future. Audiovisual means are probably the closest to F2F so far and can thus be considered a rich media. This was demonstrated by Williams, according to whom participants using audio and visual means showed 87% of cooperative responses, which was more than any other means.²⁰⁹

According to Williams, reporting an experiment conducted by others, "participants in the audio-only condition felt that their ideas were less understood and accepted than was the case for the audio-video or face-to-

²⁰¹ Kiesler, *supra* note 180, at 58.

²⁰² Kiesler et al., *supra* note 184, at 1129; Landry, *supra* note 189, at 136.

²⁰³ Walther, *supra* note 147, at 343; Kiesler & Sproull, *supra* note 125, at 112.

²⁰⁴ Williams, *supra* note 129, at 973; *see* Valley et al., *supra* note 168, at 219, 224; Hiltz et al., *supra* note 134, at 236.

²⁰⁵ Thompson & Nadler, *supra* note 130, at 116; *see* Moore et al., *supra* note 146, at 32, 37.

²⁰⁶ Hiltz et al., *supra* note 134, at 240, 244.

²⁰⁷ *Id.* at 244.

²⁰⁸ Valley et al., *supra* note 168, at 221.

²⁰⁹ Williams, *supra* note 129, at 967.

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face subjects."²¹⁰ In other words, there is a preference for audio-video conversations over audio-only conversations.²¹¹ This being said, one should not necessarily assume that audiovisual means are identical to F2F. In the 1970s, William writes that:

[T]he second practical implication is that audio-video media seem not to be as effective as was suspected at first. Early enthusiasm that such media were 'just like face to face' has not been confirmed, and in most of the previously mentioned experiments, audio-video has turned out to be more similar to audio only than to face to face Considering the considerable cost disadvantages of audio-video media . . . this does not augur well for the long-term future of the video-phone or other video media.²¹²

In short, audiovisual means would be closer to audio means than F2F, even though F2F and audiovisual means are a richer media than mere audio. These reflections have been confirmed recently. In 1999, an experiment conducted by Mühlfelder showed that video-conferencing had "a negative impact on the origin of trust because it reduced the accuracy of the assessment," and as a result, it could not be assimilated to F2F.²¹³ In 2003, Yuan, Head, and Du demonstrated that the addition of video to audio means did not have any significant influence upon the outcome of the negotiations.²¹⁴

The poor quality of the image obviously plays a role in these results. Technology nonetheless makes progress. In an experiment conducted in 2001, Gary Bente and his team found that computer-animated movement led to remarkable similarities in the impression ratings as under F2F conditions, "indicating that most of the relevant social information available to observers in the video recordings was also conveyed by computer animations."²¹⁵ The assimilation of audiovisual means to F2F might be closer than we could think if one refers to the more and more common usage by law firms of videoconferences with clients located overseas. According to some attorneys who do not want to be mentioned, the quality of the image allows interactions that are similar to the ones met under F2F conditions. In other

²¹⁰ *Id.* at 969.

²¹¹ *Id.* at 968.

²¹² *Id.* at 973.

²¹³ Mühlfelder et al., *supra* note 132, at 356–57.

²¹⁴ Du et al., *supra* note 133, at 101–03.

²¹⁵ Gary Bente et al., *Computer Animated Movement and Person Perception: Methodological Advances in Nonverbal Behavior Research*, 25 J. NONVERBAL BEHAV. 151, 151 (2001).

words, while older generations may find it hard to negotiate screen-to-screen through audiovisual means, it may become the rule for a younger generation of attorneys that have knowledge of and access to high quality technological devices.

D. Online Mediation

Online mediation involves the intervention of a third party called the neutral. All the experiments conducted so far focus on the interactions between the parties, and mainly on negotiation. One may wonder what the influence of the medium is upon the neutral. There is little doubt that a neutral having to mediate a case online rather than offline will have to behave differently. Obviously, the absence of nonverbal cues makes the role of the neutral more complicated since he or she cannot use these signals to strategically adapt an attitude. Even though software now enables the neutral to caucus privately with the parties, the neutral may find it hard to calm down an irritated party through the mere use of e-mails. The feeling of remoteness for the neutral may ultimately lead to frustration. New skills will thus have to be developed, and new models will have to be found to educate online mediators.²¹⁶ Research on this crucial issue is lacking and empirical research is needed to develop new educational models.

E. Online Arbitration

To my knowledge, no empirical study related to online arbitration has been conducted so far. Unlike others types of ADR, arbitration presents two differences that are relevant for my study. First, it is the only form of ADR that has an adjudicatory nature. Second, arbitration is governed by rules that are far more formal than other types of ADR. In arbitration, parties have to submit briefs directly to the arbitrator at a given time. There is no direct contact between the parties, so that all the issues previously described and related to the exchange of e-mails have little relevance in online arbitration. Besides, they have to submit their briefs following certain rules that exclude socio-emotional content. Formalism hardly leaves any room to nonverbal behaviour, and it hardly leaves any room for such behaviour to provide any influence where possible.

My experience as a UDRP panelist, currently the only effective form of "online arbitration," confirms the irrelevance of nonverbal behavior. Parties have to follow the rules and never meet or interact with one another. The way

²¹⁶ See KATSH & RIFKIN, *supra* note 14, at 147–50.

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the procedure has been designed prevents any humanization of the process. In my opinion, interaction issues could only arise if online hearings were taking place through the use of audiovisual means. Such a development, however, remains remote for the time being, and the reader can be referred to the explanations given above as to the usage of audiovisual means.

IV. CONCLUSION

ODR is in fashion. Numerous scholars have dealt, deal, and will go on dealing with ODR in the future. While several types of ODR systems have been created, and while more providers are available, the actual use of ODR systems remains fairly low. Legal scholars keep pointing out the current shortcomings of ODR systems and wonder how to market them more appropriately. Two crucial issues deserve particular attention: the building of trust and the funding problem. This paper focuses on the building of trust.

Trust involves several sub-components. Credibility obviously plays an important role and certain providers try to develop seal programs in order to enhance the confidence of ODR consumers. Transparency and the communication of detailed information as to the different ODR providers is another way to build trust. This paper focuses on a third aspect of trust: the differences between face-to-face and computer-mediated communication interactions. This focus helps in determining whether the transition from face-to-face to screen-to-screen interactions has any influence upon the behavior of the parties, and if so, in which ways?

As one could have expected, differences are numerous. The absence of nonverbal cues has a negative impact upon the participants who tend to react defensively, and to construct more stereotyped and exaggerated representations of their partners based upon the few social cues they can get through the medium. The dehumanization of the interactions leads to uninhibited behaviors, which in turn can quickly lead to "flaming" in presence of a conflict and, consequently, in impasse. The social information-processing model (SIP) developed by Walther in the mid 1990s has demonstrated that these shortcomings could be overcome over time or through mutual disclosure before the ODR proceedings actually start. This theory convincingly shows that "the effects of time [are] stronger than the effects of medium in general."²¹⁷ The technological improvements may also quickly fill in the gap between F2F and CMC, as the experiment conducted

²¹⁷ Walther & Burgoon, *supra* note 134, at 77.

by Bente and his team, mentioned above, tend to demonstrate,²¹⁸ and because of more frequent use of video conferences among attorneys.

Existing experiments, however, leave certain issues unanswered. Future experimentation should investigate the effects of variations in the design of ODR systems upon the participants, and the role of culture. Further research focusing on the neutral rather than the parties themselves would also be desirable.

One can nevertheless already draw some conclusions based upon what precedes. Considering the fact that "the emotional aspect of communication is key in affecting behavior, not the rational-contractual aspect,"²¹⁹ ODR providers should be concerned about designing systems that allow as much personalization as possible. They can provide a profile of each neutral, maybe a picture of them as well as the parties, or enable the participants to have a first phone discussion about the issues at stake. This might help to build rapport and lead to positive expectations. Since in-group members seem to reach better outcomes than out-group members, one may also wonder whether ODR providers should identify different types of communities on the internet and whether they should design their system for each one of these close-knit communities.²²⁰ This movement could be reflected in the adoption of specific standards. To attract consumers, systems should be as easy to use as possible and allow feedback so as to improve perceived deficiencies. CMC technologies that are easier to use will indeed be more attractive for the individual.²²¹ To prevent lengthy negotiations, ODR systems should also provide a time-limit or a limited number of possible e-mail exchanges.

All in all, one can be confident that the gap between F2F and CMC interactions will be filled in sooner or later. Technology has evolved and will continue to evolve. Future generations may even wonder why their parents ever wondered if CMC could be assimilated to F2F. Our children may indeed fill in this gap on their own.²²² At a time when teenagers meet online and declare their love or break up relations through messages,²²³ there is no

²¹⁸ See Bente et al., *supra* note 215, at 151.

²¹⁹ Moore et al., *supra* note 146, at 40.

²²⁰ See Rice & Love, *supra* note 134, at 91-92.

²²¹ Linda Klebe Trevino & Jane Webster, *Flow in Computer-Mediated Communication*, 19 COMM. RES. 539, 546 (1992).

²²² David A. Larson, *Online Dispute Resolution: Do You Know Where Your Children Are?*, 19 NEGOT. J. 199, 199 (2003).

²²³ *Id.* at 202 (noting that 48% of the 12 through 17 year old teenagers say that "using the Internet improves their relationships with existing friends;" 56% say that

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doubt that effective relational behaviors can be developed in a screen-to-screen environment, and that trust and intimacy can be established online. The future may tell us that our children will be more confident using CMC than F2F, but this is another story, one that only they will be able to write.

online "communication holds a key place in their lives; one fifth of this online group asserts that instant messaging is the main way they deal with their friends").

