

# **Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMEs) Disputes**

JEAN-FRANÇOIS ROBERGE & VÉRONIQUE FRASER\*

- I. INTRODUCTION
- II. THE NEED FOR ACCESS TO COMMERCIAL JUSTICE
- III. TOWARDS AN OPTIMAL ODR PLATFORM—THE INCADI MODEL
- IV. DESIGNING KNOWLEDGE CAPACITY PROCEDURES
- V. DESIGNING PREDICTABILITY CAPACITY PROCEDURES
- VI. DESIGNING COST-TIME EFFICIENT PROCEDURES
- VII. DESIGNING RELATIONSHIP CARING PROCEDURES
- VIII. CONCLUSION

---

\* Jean-François Roberge is Professor of Law and Director of the Graduate Programs in Dispute Prevention and Resolution at the Faculty of Law, Université de Sherbrooke (Canada). Veronique Fraser is Professor of Law and teaches in the Graduate Programs in Dispute Prevention and Resolution at the Faculty of Law, Université de Sherbrooke (Canada). The authors want to acknowledge the contribution of our summer 2018 research team members, namely Ms. Tessa Manuello, Ms. Thais Helena Carneiro Barros Aguiar, Mr. Dmytro Derkach, Mr. Jesus Omar Montoya Hernandez and Ms. Kylyna Zabrodska for their excellent research assistance, tireless efforts, and insightful input. We are thankful for the financial support of MITACS, through its Globalink internship program, and to the Canadian Social Sciences Human Research Council (SSHRC), through the partnership research grants given to the projects “Accès au Droit et Accès à la Justice” (ADAJ) and “Autonomy through Cyberjustice Technologies” (ACT). The authors also are grateful for the meticulous and rigorous work of the editorial team, and in particular, Hayley Kick, the Chief Managing Editor of the *Ohio State Journal on Dispute Resolution*.

ABSTRACT

Access to justice through technology is a growing topic of interest worldwide. Based on a user-centric approach, this paper explores the needs and challenges for micro, small, and medium-sized businesses (SMEs) to deal efficiently and fairly with disputes. We put forth a framework to design an optimal online dispute resolution (ODR) platform to maximize SMEs' interests and build their capacity in the prevention and resolution of disputes (INCADI model). Based on empirical studies' findings and promising available technological options in the field of ODR, we issue recommendations to implement this framework with efficiency and relationship-driven procedures to improve SMEs' knowledge and predictability capacities, with the objective to provide them access to justice from a commercial perspective.

## I. INTRODUCTION

Access to justice is currently attracting growing interest from academics, practitioners and international institutions worldwide. The United Nations (UN), for instance, recognizes that access to justice is essential to reach many of its seventeen Sustainable Development Goals (SDG).<sup>1</sup>

Along the same lines, the Organisation for Economic Co-operation and Development (OECD) considers delivering access to justice for all crucial for leveraging SDG for inclusive growth.<sup>2</sup> Tackling access to justice challenges has evolved worldwide towards a promising trend that we refer to as “user-centric.”<sup>3</sup> This user-centric approach has as a main distinctive feature

---

<sup>1</sup> Access to justice is explicitly mentioned in Goal 16 (“Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”) U.N. DEP’T. OF ECON. & SOC. AFFAIRS, THE SUSTAINABLE DEVELOPMENT GOALS REP., at 19, U.N. DOC. E.19.1.6 (2019). It is also crucial to the implementation of other Goals, such as Goals 1 and 2 (labor contracts in farming and environmental standards, Goal 5 (discrimination against women,)), and Goal 15 (rights over common lands). *Id.* at 4, 5, 8, 18.

<sup>2</sup> ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT [OECD], LEVERAGING THE SDGS FOR INCLUSIVE GROWTH: DELIVERING ACCESS TO JUSTICE FOR ALL, 3 (2016), <http://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf> (“Legal empowerment—the ability of people to understand and use the law for themselves—enables even those who are most marginalized to achieve justice, meet their basic needs, hold authorities to account, protect their interests and participate in economic activities in an inclusive manner.”). [hereinafter *LEVERAGING THE SDGS FOR INCLUSIVE GROWTH*] See also ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT [OECD], TOWARDS INCLUSIVE GROWTH - ACCESS TO JUSTICE: SUPPORTING PEOPLE-FOCUSED JUSTICE SERVICE (2018), <https://www.oecd.org/gov/access-to-justice-supporting-people-focused-justice-services.pdf>. [hereinafter *ACCESS TO JUSTICE: SUPPORTING PEOPLE-FOCUSED JUSTICE SERVICE*]

<sup>3</sup> Org. for Econ. Co-operation and Development [OECD], *Equal Access to Justice: OECD 2nd Expert Roundtable Background Notes*, at 3–4 (Dec. 1, 2015), <http://www.oecd.org/gov/Equal-Access-Justice-Roundtable2-background-note.pdf>. [hereinafter *OECD*]

Recent experience shows that citizen-centred modernization efforts are key to ensuring equal access to justice, which requires the integration of citizen perspectives and experiences in the planning, operation, and evaluation of these efforts. . . Meeting legal and justice needs is a distinct policy objective from the general modernisation goal of increased efficiency within the broader justice sector as a main mechanism for fostering access to justice. It shifts attention away from the perspective of the justice

the fact that it examines “the broad range of legal problems experienced by the public,” and “not just those that are adjudicated by courts.”<sup>4</sup> In other words, instead of being centered on the formal justice system’s issues (courts, tribunals, lawyers, and judges related), access to justice is focused on the users’ perspectives and the everyday legal problems experienced by them.

As for now, most of the attention under this approach has been put towards addressing individuals’ needs, whether as court litigants or consumers looking for redress. Just like individuals, businesses can face serious problems when dealing with disputes, especially micro-, small-, and medium-sized

---

system and the emphasis on courts, tribunals, ADRs, process, rules and structure and towards a citizen-based focus on everyday legal and justice problems, their connection with other problems and outcomes. One major aspect of this shift is an increased emphasis on meeting the “upstream” needs of individuals and SMEs for timely assistance with legal problems rather than on formal mechanisms for dispute resolution.

*Id.* (footnotes and citations omitted). See also Org. for Econ. Co-operation and Development [OECD], *Equal Access to Inclusive Growth: Putting People at the Centre* (2019), <https://www.oecd-ilibrary.org/docserver/597f5b7f-en.pdf?expires=1573749642&id=id&accname=ocid194754&checksum=28BE0F5951CE43799FBE65C609F179E2>; ACCESS TO JUSTICE: SUPPORTING PEOPLE-FOCUSED JUSTICE SERVICE, *supra* note 2.

<sup>4</sup> *Access to Civil and Family Justice; A Roadmap for Change*, ACTION COMM. ON ACCESS TO JUST. IN CIV. AND FAM. MATTERS, at 2 (2013), [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) (last visited May 15, 2018). See also, *Canadian Access to Justice Initiatives: Justice Development Goals Status Report*, ACTION COMM. ON ACCESS TO JUST. IN CIV. AND FAM. MATTERS (Mar. 2017), <http://www.cfcj-fcjc.org/sites/default/files/docs/Canadian%20Access%20to%20Justice%20Initiatives%20-Justice%20Development%20Goals%20Status%20Report.pdf>; Access to Justice Committee, *Reaching Equal Justice Report: An Invitation to Envision and Act*, CANADIAN BAR ASS’N. (Nov. 2013), <https://www.cba.org/CBA-Equal-Justice/Equal-Justice-Initiative/Reports?lang=en-CA>.

## ACCESS TO COMMERCIAL JUSTICE

enterprises (SMEs<sup>5</sup> or MSMEs<sup>6</sup>). Access to justice in the commercial context is far from guaranteed. Challenges are even more important in the context of cross-border disputes that are becoming more frequent as e-commerce and free trade agreements expand business opportunities. As for now, little work has attempted to understand access to justice from the businesses' perspectives using a user-centric point of view focusing on their needs. This paper explores the underestimated topic, but nevertheless important, of "access to commercial justice," i.e., dealing efficiently and fairly with disputes from a business standpoint.

Online dispute resolution (ODR) is a rising trend worldwide, both in the public and private sectors for dealing with disputes.<sup>7</sup> Approximately 97% of the global population live in areas covered by a mobile cellular network,<sup>8</sup> with more than 4.5 billion people now connected to the internet.<sup>9</sup> Not

---

<sup>5</sup> WORLD TRADE ORG. [WTO], WORLD TRADE REPORT 2016: LEVELLING THE TRADING FIELD FOR SMES 15 (2016), [https://www.wto.org/english/res\\_e/booksp\\_e/world\\_trade\\_report16\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf) [hereinafter *WTO*] ("The acronym SME – 'small and medium-sized enterprise' – is used in most contexts as the generic term to qualify all enterprises that are not large. In most instances, the term is not defined precisely in the sense that no upper or lower size thresholds are indicated.").

<sup>6</sup> *Id.* ("The acronym MSME – 'micro, small and medium enterprise' – is used to emphasize the inclusion of the smallest firms.")

<sup>7</sup> G.A. Res. 71/138, at 1–2 (Dec. 13, 2016). The resolution states, in part, that it is:

*Recognizing* that the sharp increase in online cross-border transactions has raised a need for mechanisms for resolving disputes that arise from such transactions, and recognizing also that one such mechanism is online dispute resolution . . . [and] *[n]oting also* that the Technical Notes are expected to contribute significantly to the development of systems to enable the settlement of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.

*Id.* (emphasis in original).

<sup>8</sup> INTERNATIONAL TELECOMMUNICATION UNION, MEASURING DIGITAL DEVELOPMENT: FACTS AND FIGURES 2019, 8 (2019), <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf>.

<sup>9</sup> See INTERNET WORLD STATS 2, <https://www.internetworldstats.com/stats.htm> (last visited Oct. 2, 2019). See also INTERNATIONAL TELECOMMUNICATION UNION, ICT FACTS AND FIGURES 2017, 2 (2017), <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2017.pdf> (according to this report, 48% of the world population in 2017 had access to the internet).

surprisingly, ODR is becoming the preferred method for resolving transactional e-commerce disputes.<sup>10</sup> It can be used for both online and offline disputes, and some anticipate that most disputes will be resolved online in the future.<sup>11</sup> Based on the *Technical Notes on Online Dispute Resolution* of the

---

<sup>10</sup> Ethan Katsh, *ODR: A Look at History — A Few Thoughts About the Present and Some Speculation About the Future*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE — A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 9, 12 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012) (highlighting that ODR expanded in a way that, by 2010, eBay had already solved 60 million disputes). As an example, Alibaba, a Chinese e-commerce platform, has an ODR system and deals with hundreds of millions of disputes a year. See Alibaba Presentation Notes, INT'L CONF. ON ONLINE DISP. RESOL. (Beijing, China, Sept. 19–20, 2016) (on file with authors), cited in Orna Rabinovich-Einy & Ethan Katsh, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 *CARDOZO J. CONFLICT RESOL.* 637, 647 (2017); Jennifer Sackin, *Online Dispute Resolution with China: Advantageous, but at What Cost*, 12 *CARDOZO J. CONFLICT RESOL.* 245, 245 (2010) (“ODR is a growing, highly attractive, and arguably necessary phenomenon in the e-commerce world. It is an accommodating and useful process in that it employs online technology to provide traditional alternative dispute resolution (ADR) mechanisms via the Internet”) (citation omitted). See also Arthur Pearlstein, Bryan Hanson & Noam Ebner, *ODR in North America*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE — A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 431, 445 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012); Dafna Lavi, *Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes*, 37 *U. PA. J. INT'L L.* 871, 881–82 (2016).

<sup>11</sup> JOSHUA COOLEY, *RESOLVING OFFLINE DISPUTES ONLINE: THE ADVANTAGES OF USING ODR IN LIEU OF FACE-TO-FACE ADR* 39–41 (Bepress eds., 2012), [https://works.bepress.com/joshua\\_cooley/1/](https://works.bepress.com/joshua_cooley/1/) (arguing that new patterns of interaction offered increase the understanding between disputants and create an appropriate environment for solving conflicts). Accordingly, ODR is a viable option both for online and offline disputes—in fact, some ODR platforms have evolved to resolve disputes that arose offline. *Id.* Many dispute resolution practitioners reached satisfactory results for offline disputes with online platforms. *Id.* See also Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 *S. CAROLINA L. REV.* 329, 339 (2016). Katsh and Rule state:

ODR, like ADR, is a range of processes. ODR is a how, not a what. In time, most dispute resolution processes will likely migrate online, and ODR will be relevant to almost every kind of dispute. Professor Frank Sander's oft-cited concept of the multi-door courthouse is an apt model for ODR systems designers, because online processes can offer a nearly infinite range of 'doors' customized for nearly every kind of dispute.

*Id.* (citation omitted).

## ACCESS TO COMMERCIAL JUSTICE

United Nations Commission on International Trade Law (UNCITRAL), “[o]nline dispute resolution, or ‘ODR’, is a ‘mechanism for resolving disputes through the use of electronic communications and other information and communication technology.’”<sup>12</sup> It refers to the spectrum of alternative dispute resolution (ADR) mechanisms for resolving disputes outside of courts, such as negotiation, mediation, arbitration, and mixed modes (med-arb, arb-med, etc.), with the addition of a technology-based intermediary. In terms of opportunity, the United Nations General Assembly is “*observing* that online dispute resolution can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing.”<sup>13</sup>

This paper pursues the objectives of defining what access to commercial justice means for businesses, more specifically for SMEs, and how online dispute resolution can accelerate trade and justice for businesses. After exploring businesses’ needs of dealing fairly and efficiently with disputes, we tackle those challenges by searching for promising avenues in ODR empirical studies’ findings and available current technological options<sup>14</sup>

---

<sup>12</sup> U.N. COMMISSION ON INT’L TRADE L., TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION, U.N. DOC. 71/138, Section V, para. 24 (2017), [http://www.uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf). The same definition has been used for the Asia-Pacific Economic Cooperation (APEC) Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes. ASIA-PACIFIC ECONOMIC COOPERATION [APEC], APEC COLLABORATIVE FRAMEWORK FOR ONLINE DISPUTE RESOLUTION OF CROSS-BORDER BUSINESS-TO-BUSINESS DISPUTES – ENDORSED (August 26–27, 2019), [http://mddb.apec.org/Documents/2019/EC/EC2/19\\_ec2\\_022.pdf](http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_022.pdf).

<sup>13</sup> G.A. Res. 71/138, *supra* note 7, at 1.

<sup>14</sup> ODR providers were identified from the list administered by The National Center for Technology and Dispute Resolution, *see* ODR.INFO, <http://odr.info/provider-list/> (last visited Aug. 16, 2018). The data was extracted on August 16, 2018, with a total of 82 ODR providers. Out of them, 34 ODR websites associated to the listed providers were no longer accessible or not relevant, leaving 48 listed ODR providers for our review. This list is not intended to be exhaustive because of the rapid changes in the field of ODR. With a view to being as exhaustive as possible under the circumstances, other online resources were used for identifying more ODR providers, such as the ODR list provided by Harvard University. *See ODR Providers*, HARV. U., <https://cyber.harvard.edu/olds/e-commerce/odr.html> (last visited Nov. 13, 2019). The ODR platforms and apps list by ODREurope, an open source of information for the development and dissemination of technological applications for resolving disputes, was also used. *See ODR Platforms & Apps*, ODREUROPE, <http://www.odreurope.com/odr-services/odr-platforms-apps>. As of August 16, 2018, those resources comprised of the same ODR providers with a few additional ones that have been included in our review. In addition, an internet search was made using the keywords “ODR” leading to a few extra ODR

on the market. Many of the existing ODR platforms focus on consumer and family disputes; nevertheless, we included them in our review to provide a complete panorama of existing ODR features that may be transferable to commercial disputes. This paper puts forth an original framework comprising essential characteristics that an ODR platform should have to optimally address SMEs' needs. Furthermore, we issue recommendations to design tailor-made procedures to maximize SMEs' interests and build their capacities to deal fairly and efficiently with disputes. This paper offers a macro perspective on potential ODR features: it is the first to synthesize promising technological options available in platforms worldwide and set empirically-proven ground rules for innovative ODR procedure design that aims to provide access to commercial justice from a user-centric perspective.

## II. THE NEED FOR ACCESS TO COMMERCIAL JUSTICE

Why should we care about SMEs' capacity to have access to commercial justice? The answer lies in the importance they play in our daily life and their contribution to our collective wealth. SMEs represent 99% of all businesses<sup>15</sup> and play a tremendous role in the employment rate<sup>16</sup> and gross domestic product (GDP) of both developed and developing countries.<sup>17</sup>

---

providers, which were also added in our review. As a result, a total of 64 ODR platforms were reviewed.

<sup>15</sup> WTO, *supra* note 5 at 15 (citing Chiara Criscuolo, Peter N. Gal & Carlo Menon, *The Dynamics of Employment Growth: New Evidence from 18 Countries*, OECD SCIENCE, TECHNOLOGY AND INDUSTRY POLICY PAPERS, no. 14, 26 (2014), <http://dx.doi.org/10.1787/5jz417hj6hg6-en> (“[I]n all economies, small firms – defined as firms with less than 50 employees – represent more than 95% of all firms, [...] On the other hand, firms with more than 250 employees represent only 1% of the firm population.”)).

<sup>16</sup> In a sample of 99 emerging and developing countries, SMEs were found to be responsible for two thirds of formal non-agricultural private employment. WTO, *supra* note 5, at 17. Similar numbers were found among 17 OECD countries plus Brazil, where MSMEs accounted for 63% of the total employment. *Id.* In 2013, more than a half of the formal jobs in Brazil were generated by SMEs, which represented 99% of the businesses in the country at the time. SERVIÇO BRASILEIRO DE APOIO ÀS MICRO E PEQUENAS EMPRESAS [SEBRAE], ANUÁRIO DO TRABALHO NA MICRO E PEQUENA EMPRESA [MICRO AND SMALL BUSINESS WORKING YEAR 2014, 55, 84 (7th ed. 2015), <https://www.sebrae.com.br/Sebrae/Portal%20Sebrae/Anexos/Anuario-do%20trabalho-na%20micro-e-pequena%20empresa-2014.pdf>).

<sup>17</sup> *Id.* at 18. The World Trade Organization explains:

The available data do not provide a full picture of the contribution of SMEs to GDP. The most comprehensive study to date is Ayyagari et al.



## ACCESS TO COMMERCIAL JUSTICE

However, SMEs contribute comparatively less to GDP than to employment, at least in part because “SMEs are, on average, less productive than large firms.”<sup>18</sup> Many factors can explain the lower productivity of SMEs.<sup>19</sup> In the

---

(2007). They use a sample of 76 countries (33 developed, 43 developing), with data averaged over the 1990-99 period. Their sample only includes formal SMEs, mostly in the manufacturing sector, and excludes micro enterprises. The median GDP contribution of SMEs in Ayyagari et al. (2007) is 45 per cent (49 per cent in developed countries, 35 per cent in developing countries). Very similar descriptive statistics are obtained with a completely different dataset combining information from the following sources: ACCA (2010), the Economist Intelligence Unit (EIU) (2010), the Asian Development Bank (ADB) (2013), the Edinburgh Group (2013) and the European Commission (2013). In the resulting sample of 33 countries (10 developed, 23 developing), the median GDP contribution of SMEs is equal to 45 per cent (55 per cent in developed countries, 35 per cent in developing countries).

*Id.*

<sup>18</sup> *Id.* As the World Trade Organization explains:

[I]t can be noted that the median GDP contribution of SMEs, roughly equal to 45 per cent, is lower than their median share of employment, which, as argued above, is roughly equal to two thirds. At least part of the explanation for this has to do with the fact that SMEs are, on average, less productive than large firms.

*Id.* (citations omitted).

<sup>19</sup> *Id.* at 7–8, 19. The World Trade Organization states:

The International Trade Centre (ITC), the United States International Trade Commission (USITC), the European Commission, the World Bank and the OECD-WTO have all conducted a number of surveys that allow firms to be distinguished by their size. These surveys show that poor access to information, costly requirements, burdensome customs procedures and lack of trade finance are major barriers to international trade for SMEs. . . .

coming years, SMEs contribution is expected to grow with *e-commerce*<sup>20</sup> and participation in global value chains<sup>21</sup> that may expand their market, sustain

---

The lower productivity of SMEs is often attributed to their inability to take advantage of economies of scale, the difficulties they face in getting access to credit or investment, the lack of resources in terms of skilled labor, and the informality of their contracts with clients and suppliers.

*Id.* (citation omitted).

<sup>20</sup> *Id.* at 14, 46. The World Trade Organization notes that:

[T]he rise of online marketplaces such as eBay or Alibaba which, by globally linking buyers and sellers, simplifying international payments, and leveraging express delivery systems, has allowed SMEs to enter markets and supply customers almost anywhere in the world . . . Some of the services that the Internet-based technologies have made more accessible to SMEs include shipping/logistics, international payments, translation services, customer services and market research.

*Id.*

<sup>20</sup> *Id.* at 7, 14. As the World Trade Organization states:

There is some evidence that SMEs engaged in global value chains can potentially improve their performance by importing intermediate goods and mobilizing their resources on tasks in which they have particular advantages. In turn, SMEs participating in GVCs can benefit from commercial linkages with customers and suppliers, including foreign suppliers, as well as training and increased competition, which can further increase the likelihood of exporting. Ultimately, the opportunity for these SMEs to further internationalize will depend on their capacity to absorb the spillovers from participating in global value chains . . . [T]oday almost two-thirds of world trade is in intermediate goods and services produced by firms specializing in just one stage of the production process—from components to assembly to back-office services. These value chains extend within countries, as well as between them, meaning that many small and medium-sized businesses are indirectly involved in

their growth and increase their survival rate. Accelerating cross-border trade promises to leverage productivity and there is significant room for improvement as SMEs account for approximately one-third of total exports and imports shares worldwide.<sup>22</sup>

Despite great promises for higher productivity, higher wages, and more innovation leading to economic growth,<sup>23</sup> the acceleration of trade will likely bring its share of drawbacks, including the increasingly complex issue of dealing with disputes. SMEs may face liquidity problems, as most disputes are payment related, and it can even be more critical when SMEs find themselves caught in the middle of supply chain disputes.<sup>24</sup> Therefore, speedy

---

international trade, even if their products are never directly exported.

*Id.*

<sup>22</sup> *Id.* at 29. The World Trade Organization states:

[T]he share of MSME exports in total exports of developed countries in the TEC database in 2013 was 34 per cent. The equivalent share on the import side was 38 per cent. Note that these shares include Turkey, which is usually classified as a developing economy but is a member of the OECD.

*Id.*

<sup>23</sup> *Id.* at 21 (“[P]articipation in trade is envisaged as one of the keys that could help unlock the potential of SMEs. Indeed, trading—directly or indirectly—is associated with higher productivity, higher wages, and more innovation.”).

<sup>24</sup> FED. OF SMALL BUSINESSES, TIED UP: UNRAVELLING THE DISPUTE RESOLUTION PROCESS FOR SMALL FIRMS 6 (2016), <https://www.fsb.org.uk/docs/default-source/fsb-org-uk/tied-up-unravelling-the-dispute-resolution-process-for-small-firms.pdf?sfvrsn=0> (last visited Sept. 30, 2018). As is further explained:

Of those small businesses reporting a dispute: Nearly three-quarters (72%) were in relation to late and non-payment, e.g. small businesses in supply chains experiencing late and non-payment from their customers. Just over a quarter (28%) had a dispute over non-payment related contractual issues. Small businesses are, on the whole, not well equipped to deal with disputes. They often do not have the resources to dedicate to pursuing a problem, whether that be negotiating its resolution informally, robustly through ADR, or through the courts.

dispute resolution is essential for SMEs, as well as keeping good business relationships, especially as SMEs have fewer clients. Overall, the consequences of unresolved disputes can have major impacts on SME business climate, profitability, growth, and even survival.<sup>25</sup>

What are SMEs' challenges for dealing with disputes efficiently and fairly? Following the results of a survey with MSMEs conducted in the context of the Asia-Pacific Economic Cooperation (APEC), more than a third of the respondents (35%) indicated that "effective and consistent dispute resolution" was a "major problem" for doing cross-border e-commerce.<sup>26</sup> Enforcing

---

*Id.*

<sup>25</sup> ECORYS, STUDY ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION FOR BUSINESS TO BUSINESS DISPUTES IN THE EUROPEAN UNION, FINAL REPORT 6–7 (2012), <https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/ADR-Final-Report-151012-1.pdf>. Furthermore, the study states:

The costs related to the increasingly high number of unresolved disputes are expected to be high, especially so for SMEs. For example, payments are the main source (71%) of B2B dispute. And payment loss due to the writing-off of debts is estimated to represent € 340 bln . . . As most disputes are about payments, suppliers are on the receiving end of these disputes. And these tend to be smaller organisations than the clients (e.g. Original Equipment Manufacturers), which are often backed up by in-house legal departments.”; *Id.* at 126 (“Unresolved disputes—and payment losses in particular—have an adverse effect on the business climate—and more specifically the business sentiment— . . . We expect this to lead to: a) a decrease in turnover, b) lack of financial support, and c) this ultimately contributes to failure and bankruptcy. SMEs are particularly vulnerable to late payment—as their cashflow and credit lines are more restricted than for larger companies. This can easily become a cyclical problem: when SMEs have turnover problems or go bankrupt, this creates costs for their own creditors.

*Id.*

<sup>26</sup> APEC BUS. ADVISORY COUNCIL, DRIVING ECONOMIC GROWTH THROUGH CROSS-BORDER E-COMMERCE IN APEC: EMPOWERING MSMEs AND ELIMINATING BARRIERS 69 (University of Southern California, Marshall School of Business, Nov. 2015), <http://ncapec.org/docs/ABAC%20Documents/USC%20Marshall%20ABAC%202015%20MSMEs.pdf> (last visited May 2, 2018).

## ACCESS TO COMMERCIAL JUSTICE

contracts might also be a challenge for SMEs in many economies.<sup>27</sup> Based on the *Global Pound Conference Series* (GPC) data collected worldwide,<sup>28</sup> party users of commercial dispute resolution services identified these top four challenges when dealing with disputes and corresponding degree of difficulty: financial or time constraints (65%), insufficient knowledge of options available to resolve disputes (53%), uncertainty of outcome (35%), emotional, social or cultural constraints (29%).<sup>29</sup> These can be considered the four most challenging situations for businesses, which also act as impediments to access to justice from the business standpoint.

Improving access to commercial justice from a user-centric perspective calls for an understanding of how businesses experience court procedures and other dispute resolution mechanisms.<sup>30</sup> It is generally agreed that domestic courts do not seem to be a viable option for most SMEs.<sup>31</sup> “SMEs

---

<sup>27</sup> See “Enforcing Contracts”, WORLD BANK GROUP, DOING BUSINESS 2018, 106–11, <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf> (last visited May 8, 2018). Time and costs as well as the quality of judicial processes to resolve a commercial dispute through a local first instance court is measured worldwide annually by the World Bank Group. *Id.*

<sup>28</sup> GLOBAL POUND CONF. SERIES, SHAPING THE FUTURE OF DISPUTE RESOLUTION & IMPROVING ACCESS TO JUSTICE, CUMULATED DATA RESULTS (March 2016–June 2017), <https://www.globalpound.org/gpc-series-data/> (last visited June 4, 2018). The *Global Pound Conference Series* convened more than 4,000 people at 28 conference in 24 countries across the globe in 2016–2017. *Id.* Most businesses that participated in this study were large companies. In our opinion, results show general commercial concerns and needs shared by all businesses, including SMEs. *Id.*

<sup>29</sup> See JEREMY LACK, A SUMMARY OF THE PRELIMINARY GLOBAL POUND CONFERENCE (GPC) DATA IN 2016: TRENDS AND THEMES 1–3 (2016), [https://www.globalpound.org/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd\\_category\\_id=398&wpfd\\_file\\_id=8652&token=82f4a7c5eabeacbe7a5d65c57e1a716e&preview=1](https://www.globalpound.org/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd_category_id=398&wpfd_file_id=8652&token=82f4a7c5eabeacbe7a5d65c57e1a716e&preview=1) (last visited July 4, 2018). In this study there were five categories of stakeholders: (1) parties (users of dispute resolution services) —persons or in-house counsel involved in commercial disputes, (2) advisors—external lawyers or consultants to a party, (3) adjudicative providers—judges, arbitrators or organizations providing services, (4) non-adjudicative providers—conciliators, mediators or organizations providing services, (5) influencers—researchers, educators, representatives of government. *Id.* at 1. They answered 20 multiple choice questions by way of selecting their top three options. *Id.* at 2. The first option received 3 points; the second, 2 points; and the third, 1 point, to measure popularity of the options. *Id.* Each option’s score was then accumulated and compared to its highest possible rating and presented in the form of a percentage. *Id.* Voting was made online through an application. *Id.*

<sup>30</sup> OECD, *supra* note 3, at 4 (“[C]itizen-centred modernisation [sic] efforts are key to ensuring equal access to justice, which requires the integration of citizen perspectives and experiences in the planning, operation, and evaluation of these efforts.”).

<sup>31</sup> ECORYS, *supra* note 25, at 7. The study states:

tend to agree on an amicable solution much more often than large enterprise as they have more interest in rapidly settling a dispute as their businesses do not have the capacity to survive a long procedure.”<sup>32</sup> Therefore, alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration, have major potential, and so does online dispute resolution (ODR) at an even larger scale in terms of cost-time ratio. A growing number of online platforms have been developed in recent years, most of them aiming to deal with business-to-consumer disputes. The EU has adopted regulations to promote online dispute resolution for cross-border disputes between businesses and consumers.<sup>33</sup> In

---

The legal system faces increasingly severe challenges to address B2B dispute resolution. The backlogs of courts are likely to increase in several European countries, especially so in Southern Europe as the judicial system appears not to be protected from such cuts. Hence, the case for B2B ADR appears to be growing.

*Id.* See also IPSOS AUSTRALIA, DISPUTE RESOLUTION IN VICTORIA: SMALL BUSINESS SURVEY 24 (2007) <https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/dispute-resolution-in-victoria-small-business-survey-2007-report.pdf> (“It is noteworthy that the majority of small businesses (70%) did not see any particular advantage in taking a dispute to court or to a tribunal in preference to using a dispute resolution service.”).

<sup>32</sup> ECORYS, *supra* note 25, at 117. See *id.* at 117–118, (“The fact that time of dispute resolutions procedures appears in some cases longer for SMEs than larger companies both within- and across-countries, might be an issue in terms of sustainability for small and micro enterprises.”). See also TNS POLITICAL & SOCIAL, FLASH EUROBAROMETER 347, BUSINESS-TO-BUSINESS ALTERNATIVE DISPUTE RESOLUTION IN EU 46 (2012), [http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl\\_347\\_en.pdf](http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_347_en.pdf) (last visited May 4, 2018). The report states:

Company characteristics analysis shows that large enterprises took less time to resolve their issue in court compared to SMEs (15.2 months vs. 17.9 months). Small enterprises spent the longest in a court procedure to resolve their dispute, with an average of 22 months. This is much longer than the average for medium-sized enterprises (14.1 months).

*Id.* (footnote and internal explanatory note omitted).

<sup>33</sup> See, e.g., European Parliament and Council Act of 2013, 2013 O.J. (L 165) 1–12 (Regulation on consumer ODR) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0524&from=EN> (last visited May 29, 2018); European Commission Act of 1998, 1998 O.J. (L 115) 31–34 (Recommendation of 30

contrast, initiatives to deal with business-to-business (B2B) disputes have been limited.

### III. TOWARDS AN OPTIMAL ODR PLATFORM—THE INCADI MODEL

There is a call for a renewed research agenda in ODR and dispute system design in the online environment is considered to be a cutting-edge challenge.<sup>34</sup> Invitations to discuss a globally unified ODR system have been made to stakeholders of e-commerce disputes with the aim of overcoming design caveats and providing criteria for creating a just ODR system.<sup>35</sup> This paper tackles the same design challenge, but from a different perspective. Building on SMEs' realities explored previously and following a user-centric approach, what framework might be used to provide businesses with access to commercial justice through technology? This paper proposes a framework, the INCADI model (see figure 1), to help SMEs deal efficiently and fairly with disputes. It is based upon the premise that an optimal ODR platform should maximize SMEs' interests (IN) and build their capacity (CA) in the prevention and resolution of disputes (DI). The INCADI framework was created from four essential characteristics mirroring SMEs' needs: (1) instrumental cost-

---

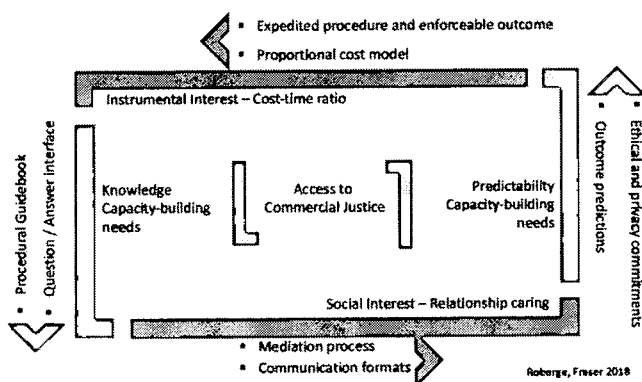
March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes) <https://publications.europa.eu/en/publication-detail/-/publication/0c096a7b-99f5-4794-93e6-e2bc374308ff/language-en> (last visited May 29, 2018); European Commission Act of 2001, 2001 O.J. (L 109) 56–61 (Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001H0310:EN:HTML> (last visited May 29, 2018).

<sup>34</sup> Katsh & Rule, *supra* note 11, at 342 (the authors provide a list of 17 topics that still need to be researched in the near future with a view to better distinguish ODR from ADR. Dispute system design is one of them.)

<sup>35</sup> See AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* (ABA Book Publishing, 2017); Amy J. Schmitz, *A Blueprint for Online Dispute Resolution System Design*, 21 J. INTERNET L. 3 (2018) (crystalizing key considerations and laying out design criteria to create a foundation for a global ODR system). See also Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS CLARK L. REV. 635 (2017).

time ratio interests, (2) social relationship caring interests,<sup>36</sup> (3) knowledge capacity-building needs, and (4) predictability capacity-building needs.<sup>37</sup>

**Figure 1.** INCADI model. A framework to design an optimal ODR platform aiming to provide access to commercial justice by maximizing SMEs' interests (IN) and building their capacity (CA) for the prevention and resolution of disputes (DI).



<sup>36</sup> Access to justice from a user-centric perspective implies taking into consideration parties' interests. Our definition of interests is based on Tom Tyler's works on cooperation. Instrumental motivations, illustrated here as cost-benefit ratio, refer to material self-interests sustained by incentives, sanctions, and dependence. Social motivations, illustrated here as socially caring relationships, correspond to internal predispositions driving behaviors and the desire to engage in a relationship. They are the two connectors for people to engage in cooperation. See TOM R. TYLER, *WHY PEOPLE COOPERATE? THE ROLE OF SOCIAL MOTIVATIONS* 27, 31 (Princeton University Press, 2011).

<sup>37</sup> Capacity-building can be understood as the ability to solve problems, perform functions, and set and achieve objectives. Capacity-building through legal empowerment may be an important step to improve access to justice for litigants. See *LEVERAGING THE SDGS FOR INCLUSIVE GROWTH*, *supra* note 2, at 12. OECD states:

Legal empowerment is designed to give people the power to know and use the law, and is one of the most effective and responsive methods for achieving access to justice . . . It emphasizes a people-centric approach to justice by highlighting the priorities of individuals and communities in using the law to advance and protect their interest.

*Id.*



## ACCESS TO COMMERCIAL JUSTICE

Based on an analysis of empirical findings about ODR and an exhaustive research about ODR platforms, we put forth that the four essential characteristics of the INCADI framework can be implemented in a platform comprising eight specific procedures: (1) a procedural guidebook, (2) an adaptive question and answer interface, (3) transparent ethical commitments, (4) outcome predictions based on precedents, (5) an expedited procedure with enforceable outcome, (6) a proportional cost model, (7) a mediation process, and (8) a range of communication media.<sup>38</sup> These procedures are currently available in the market, but as of now, no ODR provider offers them all in one platform. The optimal ODR platform for SMEs is still a promise to be delivered. Alternatively, these procedures can be adapted and still have value for ODR platform design efforts to deal with different contexts (users, types of disputes, etc.) and different stages (filing, pre-trial, etc.) of the dispute resolution process.<sup>39</sup>

---

<sup>38</sup> See *infra* Table 1.

<sup>39</sup> Design recommendations might be adapted, for example, to fit one of the following models of ODR cooperation with the court system: (1) full integration, (2) pre-trial, (3) as competitors to the courts, or (4) as a marketplace for legal and adjudication services. HIIL INNOVATING JUSTICE ODR AND THE COURTS: THE PROMISE OF 100% ACCESS TO JUSTICE? 79–86 (2016), <http://www.onlineresolution.com/hiil.pdf>.

**Table 1.** SMEs' challenges in disputes addressed by the INCADI model with recommended ODR procedures aiming to provide access to commercial justice.

SMEs' challenges in disputes	INCADI model	Recommended ODR procedures
Make informed decision on appropriate dispute resolution mechanisms	Knowledge capacity-building need about legal and dispute resolution options	1. Provide procedural guidebook, supported by tutorials and visual flowcharts
		2. Provide adaptive question and answer interface, supported by a search engine and chatbot.
Deal with uncertainty	Predictability capacity-building need for processes and outcomes	3. Provide transparent ethical commitments applicable to third-fourth-fifth parties, supported by rules of conduct, as well as data security and privacy policies
		4. Provide outcome predictions based on precedents, supported by negotiation tools
Control costs and delays	Instrumental interest in cost-time ratio	5. Provide an expedited procedure leading to an enforceable outcome, supported by self-enforcement mechanisms
		6. Provide a proportional cost model, supported by a dispute cost calculator
Deal with emotional, social and cultural constraints	Social interest in relationship caring	7. Provide a mediation process, supported by rules of practice and decision support tools
		8. Provide a range of communication media, supported by a communication guide for parties

## ACCESS TO COMMERCIAL JUSTICE

In the following sections, this paper explores the INCADI model starting with SMEs' capacity-building needs for dealing with disputes (knowledge and predictability), followed by instrumental and social interests (cost-time ratio and relationship caring). As a reminder, this paper uses a macro perspective rooted in SMEs' realities, an appropriate approach for contributing to the reflection of ODR platform design for dealing with business disputes. Further research may be needed to detail and implement in practice the procedures we recommend. The following sections are harmonized on the basis of a methodology that first describes challenges faced by SMEs, then gives an overview of the current empirical findings about ODR and, thereafter, focuses on ODR platform options currently available in the market. After analyzing the current state of knowledge, we provide recommendations for designing procedures aimed at providing access to commercial justice for SMEs, i.e. help them deal with disputes fairly and efficiently.

### IV. DESIGNING KNOWLEDGE CAPACITY PROCEDURES

One challenge experienced by SMEs is their ability to make an informed choice about existing processes that would allow them to deal efficiently with disputes.<sup>40</sup> Informed decision-making refers to the parties' "capacity to make decisions with full understanding of all the information needed and shared."<sup>41</sup> This includes legal information regarding their rights and possible remedies, taking into consideration that SMEs may be particularly vulnerable to the risks of disputes due to the fact that they tend to work without clear contracts and dispute resolution clauses.<sup>42</sup> Moreover, limited financial resources may be a serious constraint to hire legal counsels, leading, for some of them, to self-representation as the only viable option.<sup>43</sup>

---

<sup>40</sup> GLOBAL POUND CONF. SERIES, *supra* note 28, at 22 (party users of commercial dispute resolution indicated that insufficient knowledge of dispute resolution options is the second greatest obstacle to choosing an appropriate dispute resolution option).

<sup>41</sup> ASS'N FOR CONFLICT RESOL., FINAL REPORT OF ACR ETHICS COMMITTEE 2 (2010), [https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/ACR\\_Ethics\\_Committee\\_Final\\_R.pdf](https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/ACR_Ethics_Committee_Final_R.pdf).

<sup>42</sup> ECORYS, *supra* note 25, at 111.

<sup>43</sup> In the United States, recent statistics suggest that 76% of litigants in non-family civil courts are unrepresented and the vast majority of these litigants are defendants. THE NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, at iv (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>. In Canada, recent estimates show a growing percentage of self-represented litigants in civil and family cases, indicating that between 50% and 80% of parties are self-represented. JUST FACTS, DEP'T OF JUSTICE CAN. (June 2016), <http://www.justice.gc.ca/eng/rp-pr/fl->

SMEs are likely to face significant barriers to challenging unfair contract terms with more powerful counterparties.<sup>44</sup>

Generally speaking, SMEs' knowledge about dispute resolution processes needs to be improved, as well as their capacity to resort to online dispute resolution. An empirical study demonstrates that an ODR platform with clear and easy-to-navigate interfaces may increase the confidence of users.<sup>45</sup> Adequately informing users of the steps and type of actions that must or can be undertaken on the platform can improve their understanding of the ODR process. Efforts to assist users towards informed consent are varied among ODR providers. With the aim of increasing the predictability of the process from the user's perspective, some ODR platforms provide an overview of the dispute resolution services offered, showing every step of the process and how much time is required to complete each step. The best examples can be found in platforms such as the *Civil Resolution Tribunal*,<sup>46</sup> *Settle Today*,<sup>47</sup> *Agree Online*,<sup>48</sup> and the *Virtual Courthouse*.<sup>49</sup> Alternatively, some other platforms, such as *PayPal*<sup>50</sup> and *Rapid Rulings*,<sup>51</sup> do not use graphics or

lf/divorce/jf-pf/srl-pnr.html. For more details on the data, see JULIE MACFARLANE ET AL., TRACKING THE CONTINUING TRENDS OF THE SELF-REPRESENTED LITIGANTS PHENOMENON: DATA FROM THE NATIONAL SELF REPRESENTED LITIGANTS PROJECT 7 (2015–2016), <https://representingyourselfcanada.com/wp-content/uploads/2017/02/Intake-Report-2015-2016-FINAL1.pdf>.

<sup>44</sup> FED. OF SMALL BUSINESSES, *supra* note 24, at 12 (“[Forty] per cent of respondents put up with unfair contract terms because they felt that the supplier was too important to their business or too powerful to challenge. [Thirty-four] per cent replied that they would like to have challenged the supplier because of an unfair term in a contract and that they had a strong case, but did not have the resources or the knowledge to know how to challenge the other party.”).

<sup>45</sup> Udechukwu Ojiako et al., *An Examination of the ‘Rule of Law’ and ‘Justice’ Implications in Online Dispute Resolution in Construction Projects*, 36 INT’L J. PROJECT MGMT. 301, 309 (2018).

<sup>46</sup> *How the CRT Works*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/> (last visited July 18, 2018).

<sup>47</sup> *How it Works*, SETTLE TODAY, <https://settletoday.com/howitworks.php> (last visited July 18, 2018).

<sup>48</sup> *How it Works*, AGREE ONLINE, <http://www.agree-online.com/#work> (last visited July 18, 2018).

<sup>49</sup> *How it Works*, VIRTUAL COURTHOUSE, <https://www.virtualcourthouse.com/index.cfm/category/1/how-it-works.cfm> (last visited July 18, 2018).

<sup>50</sup> *Resolving Disputes, Claims, and Chargebacks*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/security/resolve-disputes> (last visited July 18, 2018).

<sup>51</sup> *How it Works*, RAPID RULINGS, <https://www.rapidrulings.com/how-online-legal-assistance-works> (last visited July 18, 2018).

flowcharts, but provide visually simplified information through the use of bold titles and sections, point forms or questions/answers' form of textual communication. These visually simplified methods for describing procedures allow the parties to get quick and clear information about the dispute resolution process.

Over the past thirty years, there have been significant advancements in the research field of artificial intelligence and the law.<sup>52</sup> However, empirical research demonstrates that artificial intelligence's current applications in ODR contain important limitations to effectively replicate attorneys' reasoning.<sup>53</sup> There is currently a debate on whether we should focus on developing ADR performed with artificial intelligence (ADRAI) (for instance, through algorithms acting as robot mediators or arbitrators) or choose a path where online dispute resolution is improved with tools using artificial intelligence (ODRAI) to assist litigants in making the best decisions to solve their dispute. In our analysis of the ODR platforms, we have not found any provider that uses AI advanced technologies for the purpose of providing legal information to the public, except for some which provide search engines or chatbots, a simplified form of an intelligent interface.<sup>54</sup>

Among the most sophisticated processes for assisting parties in obtaining easily accessible legal information is the "Solution Explorer"

<sup>52</sup> Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. U. L. REV. 1305, 1327 (2019).

<sup>53</sup> Milan Markovic, *Rise of the Robot Lawyers?*, 61 ARIZ. L. REV. 325, 335 (2019). See Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87 (2014) ("Attorneys . . . combine abstract reasoning and problem solving skills. . . . Modern AI algorithms, by contrast, have been unable to replicate most human intellectual abilities . . . such as analogical reasoning . . ."). See also Davide Carneiro et al., *Online Dispute Resolution: An Artificial Intelligence Perspective*, 41 ARTIFICIAL INTELLIGENCE REV. 211, 217–18 (2014); cf. Leah Wing, *Artificial Intelligence and Online Dispute Resolution System Design: Lack of Access to Justice Magnified*, 4 INT'L J. ONLINE DISP. RESOL. 16, 19 (2017) (arguing that, absent human supervision, artificial intelligence may amplify existing injustices).

<sup>54</sup> See, e.g., *Solution Explorer*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/> (last visited Aug. 28, 2018) (online tool that asks simple questions to provide appropriate legal information and tools); *Modria Wizard*, MODRIA, <https://www.tylertech.com/products/modria/odr> (last visited Aug. 28, 2018) (a help feature asking the user a series of questions to help users get a quick diagnosis of their situation); *How does the FairChat process work?*, FAIRCLAIMS, <https://fairclaimshelp.zendesk.com/hc/en-us/articles/115010854268-How-does-the-FairChat-process-work> (last visited Sept. 2, 2019) (a settlement engine chat to help parties find a settlement); *Cyberjustice Justicebot*, CYBERJUSTICE LABORATORY, <https://www.cyberjustice.ca/en/projets/justicebot/> (last visited Aug. 29, 2019); *Homepage*, EJUS, <https://www.ejust.law/en> (last visited Sept. 22, 2019).

available through the *Civil Resolution Tribunal*.<sup>55</sup> It works as follows: The system walks the parties through a questionnaire, which allows to narrow the scope of the dispute with the use of sequential adaptive questions (for e.g., whether they have a “Strata” or a “Small Claims” dispute, their role in the strata property, a list of standard issues from which to choose, etc.). Once the dispute has been narrowed to a specific issue (for e.g., “Noise and Smells”), the system uploads a document to help the parties understand their legal issue (for e.g., the definition of nuisance and the impact of strata by laws), as well as their options (for e.g., to review the details of the complaint and the strata bylaws, to write to the strata to respond to the complaint or to make a written request for a hearing with the strata council). The Solution Explorer also contains a section with additional external resources for the parties (for e.g., regarding limitation periods, how to find strata documents and records, how to make a claim with the *Civil Resolution Tribunal*, tribunal decision process rules, etc.). One of the greatest benefits of a system like the Solution Explorer is that it helps the parties to legally qualify their dispute, a challenging process for people with little legal knowledge. Once the parties know the legal qualification under which their dispute falls (for e.g., “nuisance”), it becomes much easier for them to get familiar with the applicable specific legal topic and to find out and understand their rights and obligations. Developing such a sophisticated system might be more challenging when an ODR platform applies to a large scope of disputes and legal issues.

As an alternative to the use of technologies, some platforms create and make available to the parties on their website simplified legal content explained in lay language.<sup>56</sup> A good example can be found on the website of the *Internet Ombudsman*, a notified arbitration board, based in Austria, responsible for disputes over contracts concluded on the internet between a business and a consumer. Its website contains relevant legal information for parties using a user-friendly question-and-answer (Q&A) interface. It provides specific answers to questions, such as: “What rights do I have in the delivery of defective goods?” “When do I have a legal right of withdrawal?,” “What

---

<sup>55</sup> CIV. RESOL. TRIBUNAL, *supra* note 46 (the platform provides dispute resolution options to resolve small claims disputes of \$5,000 and under, and strata property (condominiums) of any amount). See generally Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal*, 34 WINDSOR Y.B. ACCESS JUST., 112, 118–122 (2017); Shannon Salter & Darin Thompson, *Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal*, 2 MCGILL J. DISP. RESOL., 113(2016–2017).

<sup>56</sup> See, e.g., *Understanding Copyright and Related Rights*, WORLD INTELL. PROP. ORG. (2016), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_909\\_2016.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf); *Resources*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/resources/> (last visited July 22, 2018).

rights do I have in case of damage or loss of the goods during shipping?,” etc.<sup>57</sup> Similar examples are *MyLawBC* and the *European Commission: Online Dispute Resolution*, which provide several downloadable brochures containing simplified legal information on consumer rights, the right of return, faulty goods, misleading advertising, unfair clauses, and procedural rights.<sup>58</sup>

**Recommendation 1.** Provide procedural guidebooks, supported by tutorials and visual flowcharts.

The optimal ODR platform should provide a clear pathway of the ODR process it offers before the users engage with the platform to help them understand the time and actions required to deal with their disputes. This visually simplified method allows the parties to get immediate information about the dispute resolution process and make an informed decision about how they want to deal with their disputes according to their specific realities. This explanation should be made through a visually attractive format, such as a timeline or a flowchart, showing the number of days required for each step and a brief description for each of them, and additional explanations should be provided whenever necessary in lay language. In addition, tutorials could be highly valuable.

**Recommendation 2.** Provide adaptive question and answer interface, supported by a search engine and chatbot.

These technological tools benefit the parties because they have access to legal information in a fast and easy way and can learn about the dispute resolution processes available to resolve their case without necessitating to have pre-existing legal knowledge. Therefore, SMEs may better assess the legal issues involved and the type and extent of legal services they need to deal efficiently with their own specific situation. Public ODR providers should be expected to use technological tools that show the highest commitment to provide legal information and support regarding dispute resolution mechanisms. Private ODR providers should, at the minimum, make available

---

<sup>57</sup> *Online-Shopping*, INTERNET OMBUDSMAN, <https://ombudsmann.at/schlichtung.php/cat/42/start/0/title/Online-Shopping> (last visited July 22, 2018).

<sup>58</sup> *Online Dispute Resolution: Know Your Rights*, EUROPEAN COMMISSION, <https://ec.europa.eu/consumers/odr/main/?event=main.consumer.rights> (last visited July 22, 2018); MY LAW BC, <https://mylawbc.com> (last visited July 22, 2018).

links to external organizations<sup>59</sup> providing free, reliable, and updated plain language legal information.

## V. DESIGNING PREDICTABILITY CAPACITY PROCEDURES

Based on the Global Pound Conferences Series findings, party users of dispute resolution mechanisms consider uncertainty as an important challenge when dealing with their disputes, which comprises the unpredictable behaviors of the other litigants or the lack of confidence in service providers.<sup>60</sup> The predictability of outcomes has been identified as a major influential factor in the choice of a dispute resolution process.<sup>61</sup> An empirical survey indicates that clients of legal services are asking for more certainty in both the process and its outcome<sup>62</sup> And there is some indication that predictability can

---

<sup>59</sup> See, e.g., *Get More Help*, ÉDUCALOI, <https://www.educaloi.qc.ca/en/%3Cfront%3E/get-more-help> (last visited July 22, 2018) (the website of a Canadian non-profit organization with the mission of helping citizens understand their legal rights and responsibilities).

<sup>60</sup> GLOBAL POUND CONF. SERIES, *supra* note 28 (party users of commercial dispute resolution services identified uncertainty as one of the top four challenges when dealing with disputes).

<sup>61</sup> *Id.* (party users consider predictability of outcomes when choosing among dispute resolution mechanisms and rank it as the third most influential factor).

<sup>62</sup> CANADIAN BAR ASSOCIATION, THE CLIENTS' PERSPECTIVE 9 (2013), [https://web.archive.org/web/20171101174914/http://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf](https://web.archive.org/web/20171101174914/http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/The-Clients-Perspective-Linked-eng.pdf) (last visited Aug. 23, 2018).

Clients said that they will be asking for more detailed up-front discussions with their lawyer about the scope, costs, timeframe, and outcome of a file. They want more than a 50/50 assessment of results. And, if possible, they want the opportunity to do some more routine work themselves to keep costs down.

*Id.*

The study comprised over 150 people—individuals and representative of organizations—with experience using legal services invited to provide their feedback on some or all of the 17 themes and concepts drawn from Prof. Susskind's paper *Key Trends in the Legal Marketplace*. *Id.* at 5–6. Responses from 83 participants contributing to online discussions over six consecutive business



overcome uncertainty and restore trust in legal institutions and legal service providers alike.<sup>63</sup> In the context of ODR, uncertainty can take four forms from the user's perspective: (1) regarding the third party, i.e. the neutral mediator or arbitrator, (2) regarding the fourth and fifth parties, i.e. the technological platform itself, the platform administrator, and the platform developer,<sup>64</sup> (3) regarding data security and privacy protection, and (4) regarding the outcome, i.e. the end result of the dispute.

How ODR platform procedures can reduce uncertainty for SMEs? UNCITRAL's Working Group on ODR highlights the importance of developing ethical guidelines.<sup>65</sup> Having a set of ethical principles can help in the development, integration and implementation of technology to enhance the quality, the effectiveness, and the scope of dispute resolution processes.<sup>66</sup> No official standards of conduct exist for ODR, while the most notorious efforts have been the *International Council for Online Dispute Resolution*

---

days, between November 27 and December 17, 2012, were analyzed.

*Id.* at 5.

<sup>63</sup> See GEORGETOWN L. CTR. FOR THE STUDY OF THE LEGAL PROFESSION, REPORT ON THE STATE OF THE LEGAL MARKET 9 (2016), [https://www.thomsonreuters.com/content/dam/openweb/documents/pdf/corporate/press-releases/2016\\_pm\\_gt\\_final-report.pdf](https://www.thomsonreuters.com/content/dam/openweb/documents/pdf/corporate/press-releases/2016_pm_gt_final-report.pdf) (“[A]t least since the onset of the recession in 2008, law firm clients have increasingly demanded more efficiency, predictability, and cost effectiveness in the delivery of the legal services they purchase.”).

<sup>64</sup> See ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 93 (2001); Susan Nauss Exon, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, 32 OHIO ST. J. ON DISP. RESOL. 609, 621 (2017); Alan Gaitenby, *The Fourth Party Rises: Evolving Environments of Online Dispute Resolution*, 38 U. TOL. L. REV. 371, 372–73 (2006); Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 INT’L J. ONLINE DISP. RESOL. 37, 37–40 (2014).

<sup>65</sup> U.N. Comm’n on Int’l Trade Law Secretariat, *Online Dispute Resolution for Cross-Border Electronic Commerce Transaction*, 5, U.N. Doc. A/CN.9/WG.III/WP.140 (Dec. 22, 2015) (“It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.”); See also G.A. Res. 71/138, *supra* note 7 (“Noting that the Technical Notes on Online Dispute Resolution are non-binding and descriptive and reflect the principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency[.]”) (footnote omitted).

<sup>66</sup> Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT’L J. ONLINE DISP. RESOL. 12, 24 (2016).

*Standards*<sup>67</sup> building on the *Ethical Principles for Online Dispute Resolution*<sup>68</sup> developed under the auspices of the National Center for Technology and Dispute Resolution.<sup>69</sup> Recently, however, the opportunity to create a new ethical framework for ODR, or to adapt an existing ADR ethical framework to ODR, has been recognized.<sup>70</sup> Rainey engaged in efforts to annotate the *American Bar Association Model Standards of Conduct for Mediators* for an adaptation to ODR.<sup>71</sup> Exon commented on these annotations and called for the creation of ethical standards for virtual mediation<sup>72</sup> and a framework prescribing duties and obligations for the technological platform (the fourth party) and its developers (the fifth party).<sup>73</sup> These standards could include ethical standards and a set of best practices.<sup>74</sup>

Empirical research indicates that well-designed ODR systems can boost the parties' feeling of autonomy, as well as their perception of fairness.<sup>75</sup> In a survey conducted by *Concilianet* to evaluate parties' trust and confidence

---

<sup>67</sup> *ICODR Standards*, INT'L COUNCIL FOR ONLINE DISP. RESOL., <http://icodr.org/index.php/standards/> (last visited Oct. 5, 2018).

<sup>68</sup> *Ethical Principles for Online Dispute Resolution*, THE NAT'L CTR. FOR TECH. & DISP. RESOL., [http://odr.info/ethics-and-odr/#\\_ftn1](http://odr.info/ethics-and-odr/#_ftn1) (last visited on Aug. 23, 2018).

<sup>69</sup> See THE NAT'L CTR. FOR TECH. & DISP. RESOL., <http://odr.info> (last visited Sept. 12, 2019).

<sup>70</sup> Exon, *supra* note 64, at 623; Amanda First, *A New Agreement to Mediate: Guidelines for Ethical Practice in the Digital Space*, 23 HARV. NEGOT. L. REV. 405, 409 (2018).

<sup>71</sup> DANIEL RAINEY, ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS: ANNOTATED FOR ODR AUGUST 2016 (2016), <http://danielrainey.us/wp-content/uploads/2016/08/MODEL-STANDARDS-ANNOTATED-FOR-ODR-AUGUST-2016.pdf>.

<sup>72</sup> Exon, *supra* note 64, at 663.

<sup>73</sup> *Id.* at 664.

<sup>74</sup> *Id.* at 662–63.

<sup>75</sup> Danielle Linneman, *Online Dispute Resolution for Divorce Cases in Missouri: A Remedy for the Justice Gap*, 2018 J. DIPS. RESOL. (2018) (footnotes omitted). Linneman states:

Surveys indicate that 84% of users felt Rechtwijzer 2.0 gave them more control over their divorce process and 70% of users reported that their results led to effective and sustainable solutions. Rather than spending weeks or months in trial battling over various aspects of the divorce process, Rechtwijzer 2.0 users only spent an average of 23 hours working on their separation agreements. Additionally, 79% of users felt the Rechtwijzer 2.0 process was fair.

*Id.*

to present their complaint through the platform and the conciliation procedure, 90% of users provided positive feedback demonstrating trust in the platform and clarity of the procedure.<sup>76</sup> Another empirical study assessed the user's perception of the quality of the procedure and of the outcome of an online mediation platform for divorce cases.<sup>77</sup> Disputants were satisfied with the mediator to a very large extent (46.4%) or to a large extent (32%).<sup>78</sup> Almost 90% found that the mediator was trustworthy to a "large" or "very large" extent, which confirms the perceived trustworthiness of the mediator.<sup>79</sup> In addition, "76.5% of the respondents indicated that the outcome was worth the amount of time invested."<sup>80</sup> A more recent empirical research investigated procedural justice, interactional justice and informational justice as

---

<sup>76</sup> PROCURADURIA FEDERAL DEL CONSUMIDOR, INFORME ANUAL 2016 [*Annual Report 2016*], 13 (2016), [https://www.gob.mx/cms/uploads/attachment/file/415226/Informe\\_Anuar\\_2016.pdf](https://www.gob.mx/cms/uploads/attachment/file/415226/Informe_Anuar_2016.pdf). The survey data demonstrated:

In 2016 alone, 110,013 complaints were received at the national level, and complaints were concluded, in 8 out of 10 cases, satisfaction was achieved with the result of the procedure, achieving a recovery of 844.6 million pesos in favor of consumers. In this same period, the Concilianet platform received 449,936 visits and attracted 5,382 claims, with a conciliation percentage of 90% and recovering more than 16.9 million pesos.

*Id.* (authors' translation). See also Ruiz M. Adriana, *Módulo de solución de Controversias en línea [Online Dispute Resolution Module]*, PROCURADURIA FEDERAL DEL CONSUMIDOR, 8 (2017), <https://unctadcompal.org/documento/presentacion-mexico-concilianet-conferencia-anual-2017/>; *Encuesta de Evaluación 2016 [Evaluation Survey 2016]*, PROCURADURIA FEDERAL DEL CONSUMIDOR (2016) CONCILIANET, <https://www.profeco.gob.mx/concilianet/reporte.asp?y=2016>. Concilianet is an ODR platform originally created in 2008 and run by PROFECO in Mexico. *Id.* It provides online conciliation services, namely hearings via the internet, about e-commerce disputes between consumers and suppliers of goods and services. *Id.* The Survey was conducted in Mexico by Concilianet during the years of 2015 and 2016, collecting 1049 replies from users with a view to measuring the quality of services through a questionnaire. *Id.*

<sup>77</sup> Martin Gramatikov & Laura Klaming, *Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation*, 14 J. L. & FAM. STUD. 97, 110 (2012) (There were 126 participants of the online divorce mediation who were included in the evaluation of the procedure and were asked to fill in a web-based questionnaire after having come to an agreement).

<sup>78</sup> *Id.* at 110.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

experienced by ODR users of *EZSettle* platform.<sup>81</sup> The study compared instrumental mediation, which is a system that provides for generic process orientation for parties and requires a human third party to operate it and communicate with the disputants, with principal mediation, which is an automated system powered by artificial intelligence, in which the technology takes a proactive role in facilitating the resolution of the dispute. The findings indicated that principal automated mediation is perceived fairer than instrumental human mediation, giving parties a stronger sense of participation/voice.<sup>82</sup> An empirical study conducted with consumers using the *PARLE* ODR platform demonstrated that they experienced a high “sense of access to justice” (SAJ), with an overall quality score of 79% given to the resolution of their dispute via online negotiation or mediation.<sup>83</sup>

We have surveyed current ODR platforms’ ethical commitments and have found that only a few have either (1) third party neutral commitment to

---

<sup>81</sup> Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO ST. J. DISP. RESOL. 91 (2018) (The experiment captures disputants’ self-reported procedural experience, collecting their *ex-post* perceptions of procedural justice, the neutral, the outcome, and themselves using a questionnaire that included standardized questions with a 7-point response scale, using multiple indicators per each dimension).

<sup>82</sup> *Id.* at 132. On *EZSettle*’s lean structured text-based interface, subjects felt higher levels of procedural justice in mediation with a perceived software mediator. *Id.* In arbitration, the inverse trend was observed: subjects had more favorable procedural justice experiences when they believed a human arbitrator determined the case. *Id.* Interestingly, in both mediation and arbitration the largest effect was observed with respect to the most fundamental component of procedural justice: *voice*—the ability to effectively participate in the dispute resolution process. *Id.*

<sup>83</sup> To learn more about the methodology and the results, see Jean-François Roberge, *Le sentiment de justice. Un concept pertinent pour évaluer la qualité du règlement des différends en ligne? [Sense of Access to Justice. A Pertinent Concept to Evaluate the Quality of Online Dispute Resolution?]* REVUE DE DROIT DE LA SORBONNE (forthcoming 2020) (on file with authors). The overall SAJ is composed of two feelings—fairness and efficiency—that include four categories of factors—process, results, adequacy, support—and twelve individual factors. The *PARLE* platform was developed by the Cyberjustice Laboratory associated with the Centre for Research in Public Law (CRDP) at the University of Montreal. See generally CYBERJUSTICE LABORATORY, <https://www.cyberjustice.ca> (last visited Nov. 12, 2019). *PARLE* has been used since 2016 by the Québec Consumer protection Office, with over 6,000 cases processed with a settlement rate of approximately 70% and an average delay of twenty-six days. See *PARLe: plateforme d’aide au règlement des litiges en ligne*, OFFICE DE LA PROTECTION DU CONSOMMATEUR QUÉBEC (2019), <https://www.opc.gouv.qc.ca/a-propos/parle/>. For more information about the concept of “sense of access to justice,” see Jean-François Roberge, “Sense of Access to Justice” As a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conference in Quebec (Canada), 17 CARDOZO J. CONFLICT RESOL. 323 (2016).

an ethical code enacted by an ADR association, or (2) platform commitment to ethical principles when delivering services.<sup>84</sup> Some ODR platforms require third party neutrals to adhere to an ethical code enacted by an ADR association. For example, *FairClaims* provides in its procedural rules that all affiliated arbitrators must adhere to the *Ethics Standards for Neutral Arbitrators in Contractual Arbitration* adopted by the Judicial Council of California.<sup>85</sup> *Rapid Rulings* indicates that its online arbitrators abide by the *American Bar Association Model Rules of Professional Conduct*, the *Code of Ethics for Arbitrators in Commercial Disputes*, and the *American Bar Association Model Code of Judicial Conduct*.<sup>86</sup> Other ODR platforms provide for an ethical framework geared to their platforms with their own set of procedural rules. For instance, *Arbitration Resolution Services (ARS)* provides rules that deal with confidentiality, impartiality, and good faith.<sup>87</sup> *Youstice* has rules providing that neutrals need to be independent, qualified, and impartial.<sup>88</sup> *Resolute Systems* has commercial arbitration rules dealing with conflict of interests and impartiality for arbitrators.<sup>89</sup> *IUDICA*<sup>90</sup>, *Arbitranet*<sup>91</sup>, and *RisoltiOnline*<sup>92</sup> have rules that deal with confidentiality. Most advanced ethical frameworks in ODR platforms include a double ethical protection. For instance, *FairClaims* has its own rules of procedure in addition to requiring its online arbitrators to adhere to institutional ethical standards.<sup>93</sup> *Rapid Rulings* provides for general procedural rules that include ethical considerations about confidentiality, truthfulness, and transparency, in addition to the compliance

---

<sup>84</sup> See *supra* note 14.

<sup>85</sup> *Rules & Procedures*, FAIRCLAIMS, art. 2, <https://s3.amazonaws.com/arbi-website/fairclaims-rules/FairClaims-Rules.pdf> (last visited Aug. 29, 2018).

<sup>86</sup> *Transparency*, RAPID RULINGS, <https://www.rapidrulings.com/transparency> (last visited Aug. 29, 2018).

<sup>87</sup> *Rules & Regulations Business to Business Program*, ARBITRATION RESOLUTION SERVICES, INC (ARS), <https://www.arbresolutions.com/rules-regulations-business-to-business-program/> (last visited Aug. 29, 2018).

<sup>88</sup> *Online Dispute Resolution Rules*, YOUTICE, <https://youstice.com/en/rules-for-odr> (last visited Aug. 29, 2018).

<sup>89</sup> *Standard Arbitration Rules*, RESOLUTE SYSTEMS, LLC, <https://resolutesystems.com/advocate/ADR/Standard-Arbitration-Rules.pdf> (last visited Aug. 29, 2018).

<sup>90</sup> *Schlichtungsordnung – Wie Wir Arbeiten [Arbitration: How We Work]*, IUDICA, <https://iudica.me/schlichtungsordnung/> (last visited Aug. 29, 2018).

<sup>91</sup> *Regulamento [Rules]*, ARBITRANET, <https://arbitranet.com.br/regulamento/> (last visited Aug. 29, 2018).

<sup>92</sup> *Neutrals*, RISOLVIONLINE, [https://www.risolvionline.com/sezione.php?sez\\_id=71&lng\\_id=7](https://www.risolvionline.com/sezione.php?sez_id=71&lng_id=7) (last visited Aug. 29, 2018).

<sup>93</sup> FAIRCLAIMS, *supra* note 85.

with external ethical codes.<sup>94</sup> The Indian *Online Consumer Mediation Center* provides for an empanelment procedure for its third parties and mediation rules, as well as a code of conduct applicable to the empaneled mediators and the mediation center itself, with minimum standards and principles ensuring professional responsibilities and conduct.<sup>95</sup> A French platform for online arbitration, *eJust*, has its own rules of arbitration which provides for ethical considerations about confidentiality, independence and impartiality, and also a charter of ethics and an ethics committee.<sup>96</sup>

The fourth and fifth parties should also safeguard data security and data privacy with confidentiality standards matching national, regional, and international requirements.<sup>97</sup> For data security and privacy, we have surveyed current ODR platform commitments and have found that some public and private ODR providers have policies in place, which indicate how the data is collected, stored, and used. Generally, ODR providers use data for the purposes of managing and monitoring the services provided and have a privacy policy. For instance, *Concilianet* allegedly uses data for user registration and the administration of the procedure, but it also allows users to

<sup>94</sup> RAPID RULINGS, *supra* note 86.

<sup>95</sup> ONLINE CONSUMER MEDIATION CENTRE, <https://onlinemediationcenter.ac.in/> (last visited Sept. 18, 2019); *Application Form for Empanelment of Mediators*, ONLINE CONSUMER MEDIATION CENTRE, <https://onlinemediationcenter.ac.in/wp-content/uploads/2016/06/empanelmentForm.pdf> (last visited Aug. 30, 2018); *Code of Conduct*, ONLINE CONSUMER MEDIATION CENTRE, <https://onlinemediationcenter.ac.in/code-of-conduct/> (last visited Aug. 29, 2018); *Mediation Rules*, ONLINE CONSUMER MEDIATION CENTRE, <https://onlinemediationcenter.ac.in/mediation-rules/> (last visited Aug. 29, 2018).

<sup>96</sup> *Règlement d'Arbitrage eJust en vigueur au 1<sup>er</sup> juillet 2018 [Arbitration Rules Effective on July 1st, 2018]*, eJUST, [https://web.archive.org/web/20180811221819/https://www.ejust.fr/assets/documents/Reglement\\_d\\_arbitrage\\_eJust.pdf](https://web.archive.org/web/20180811221819/https://www.ejust.fr/assets/documents/Reglement_d_arbitrage_eJust.pdf) (last visited Aug. 29, 2018). Nonetheless, the mission of the ethics committee is more oriented towards start-up development than dispute resolution.

<sup>97</sup> Exon, *supra* note 64, at 610–11; Wing, *supra* note 66, at 12, 15. *See also Ethical Principles for Online Dispute Resolution*, *supra* note 68 (last visited Aug. 31, 2018); RAINEY, *supra* note 71, at 11. *See generally*, Damian Clifford & Yung Shin Van Der Sype, *Online Dispute Resolution: Settling Data Protection Disputes in a Digital World of Customers*, 32 COMPUTER L. & SECURITY REV. n.2 272 (2016) (discussing ODR and data protection). In May 2018, the General Data Protection Regulation (GDPR) entered into force in European Union member states, requiring that online consumer data be collected only in transparent ways and stored safely and ethically. *See* 2016 O.J. (L 119) 1; *The EU General Data Protection Regulation (GDPR) is the Most Important Change in Data Privacy Regulation in 20 Years*, EU GDPR.ORG, <https://www.eugdpr.org> (last visited Aug. 31, 2018).

ask for restrictions.<sup>98</sup> Likewise, the *Civil Resolution Tribunal's* website indicates that it collects and uses only the necessary data to assist the parties in the resolution of their dispute through the platform.<sup>99</sup> The *Condominium Authority Tribunal (CAT)*, a fully online court in Canada dealing with condominium-related disputes, provides a good example of transparent detailed policy on access and use of data.<sup>100</sup> Some private ODR providers, such as *Youstice*, *PayPal*, and *eBay*, also assert what information they collect, why they use it, and how they use it, namely for managing, monitoring and improving their services.<sup>101</sup> When displaying their privacy policies, only a few ODR providers make efforts to explain their privacy policy in a user-friendly interface aimed at facilitating users' understanding of the type of information collected and the use that is made of it.<sup>102</sup> Just a few ODR providers mention having procedures in place to deal with security issues or security mechanisms to protect data collected. For instance, the European Commission's Online Dispute Resolution platform allegedly stores data collected on the European Commission servers and automatically deletes them after six months of the closure of the dispute.<sup>103</sup> Generally, ODR providers declare that they use safe providers for storing the data collected, but the mechanisms in place are not always specified.

Another impediment to the use of ADR throughout the years has been a lack of predictability in the outcomes. ODR seems promising because it

---

<sup>98</sup> *Aviso de privacidad simplificado [Simplified Privacy Notice]*, PROSECO, <https://concilianet.profeco.gob.mx/Concilianet/PrivacidadSimplificado.jsp> (last visited Aug. 31, 2018).

<sup>99</sup> *Information Access & Privacy Policy*, CIVIL RESOL. TRIBUNAL, <https://civilresolutionbc.ca/resources/information-access-privacy-policy> (last visited Aug. 31, 2018).

<sup>100</sup> *See Access and Privacy Policy*, CONDOMINIUM AUTHORITY TRIBUNAL, <https://www.condoauthorityontario.ca/about-cao/corporate-documents/cao-access-and-privacy-policy.pdf> (last visited Aug. 29, 2019).

<sup>101</sup> *See, e.g., User Privacy Notice*, eBAY, <https://www.ebay.com/help/policies/member-behaviour-policies/user-privacy-notice?id=4260> (last visited Aug. 31, 2018); *Tylertech.com Privacy Statement*, TYLER TECHNOLOGIES, <https://www.tylertech.com/privacy> (last visited Aug. 31, 2018); *Privacy Policy*, YOUSTICE, <https://youstice.com/en/privacy-policy> (last visited Aug. 31, 2018).

<sup>102</sup> *See, e.g., Information Access & Privacy Policy*, *supra* note 99; *User Privacy Notice*, *supra* note 101.

<sup>103</sup> *Privacy statement if I'm a consumer*, EUROPEAN COMMISSION ONLINE DISPUTE RESOLUTION, <https://ec.europa.eu/consumers/odr/main/?event=main.privacyForConsumer2.show> (last visited Aug. 31, 2018); *Privacy statement if I'm a trader*, EUROPEAN COMMISSION ONLINE DISPUTE RESOLUTION, <https://ec.europa.eu/consumers/odr/main/?event=main.privacyForTrader2.show> (last visited Aug. 31, 2018).

operates a “shift from a ‘data-less’ mentality to processes that revolve around data.”<sup>104</sup> ODR platforms collect data that creates a digital trail, which allows for the automation and treatment through algorithms and artificial intelligence.<sup>105</sup> One way to reduce the uncertainty of the outcome is to help the parties assess the probable end results of the dispute. This is what the *MODRIA* platform does by providing a technology able to list a range of outcomes based on precedents of similar cases.<sup>106</sup> The data is compiled from previous cases that were negotiated on the platform and based on information provided by the parties through a short multiple-choice questionnaire about their dispute.<sup>107</sup> With the support of a diagram, the parties can visualize the outcome of similar cases, which help them set reasonable expectations and be in a better position to assess the value of the other party’s offer, whether it is higher or lower than the average settlement outcome of similar cases, for example.<sup>108</sup> The platform could even recommend settlement offers and counter-offers to parties.<sup>109</sup> However, the challenge of incorporating such a tool in an ODR platform is to have sufficient amount of data about similar cases to support the generation of statistically reliable results. Other platforms, like *FairClaims*<sup>110</sup> or *Smartsettle*,<sup>111</sup> also offer negotiation assistance with suggestions on potential solutions. Another promising initiative are user guides providing explanations

---

<sup>104</sup> Rabinovich-Einy & Katsh, *supra* note 10, at 648. See also Katsh & Rule, *supra* note 11, at 330 (highlighting that online communications enable the collection and use of data on disputing patterns that can be analyzed by algorithms and lead to “better quality control over the functioning of dispute resolution processes, as well as insights into the sources of various disputes”); .

<sup>105</sup> See Orna Rabinovich-Einy & Ethan Katsh, *A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution*, 32 OHIO ST. J. ON DISP. RESOL. 695, 719 (2017). According to Rabinovich-Einy and Katsh, algorithms and automated systems can increase the efficiency of online communication, therefore enhancing the “access” aspect. *Id.* Justice, in its turn, is improved through “consistency, monitoring, and the proactive prevention of disputes of which potential disputants are unaware, unable, or reluctant to pursue.” *Id.* See also Carneiro et al., *supra* note 53, at 219. For a discussion regarding the limits of algorithmic expertise, see Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. OF CONFLICT RESOL. 717, 744–50 (2017).

<sup>106</sup> *Small Claims’ Demo*, MODRIA, <https://demo.modria.com> (last visited July 27, 2018).

<sup>107</sup> *Id.*

<sup>108</sup> See *supra* note 106. In June 2018, the authors were granted a code by a representative from Tyler to access a free trial MODRIA demo.

<sup>109</sup> *Id.*

<sup>110</sup> *How It Works: Settlement*, FAIRCLAIMS, [https://www.fairclaims.com/how\\_it\\_works](https://www.fairclaims.com/how_it_works) (last visited July 27, 2018).

<sup>111</sup> *Smartsettle Infinity*, SMARTSETTLE, <https://www.smartsettle.com/products/smartsettle-infinity/> (last visited Aug. 29, 2018).



and tips to succeed in negotiation or mediation. The *Condominium Authority Tribunal* in Canada provides such tools for users and representatives dealing with disputes through negotiation, mediation or adjudication.<sup>112</sup>

Predictability of outcomes can also come from precedents based on court decisions. Such a technological tool can be found with the *Split-Up system*, “a hybrid rule-based neural network system, which provides advice on property distribution upon divorce in Australia.”<sup>113</sup> The *Split-Up system* predicts judicial outcomes in property proceedings. First, the parties need to enter their goals into the *Split-Up system* to determine the asset distributions for both the wife and the husband. Then, the system provides the parties with separate predictions of a court decision, both if their relative claims were accepted or if some or all of their claims were rejected. The parties can even have “dialogues” with the platform about hypothetical situations, providing them with clear indications about the strengths and weaknesses of their

---

<sup>112</sup> See *User Guides*, CONDOMINIUM AUTHORITY OF ONTARIO, <https://www.condoauthorityontario.ca/en-US/tribunal/cat-rules-and-policies/> (last visited Aug. 29, 2019).

<sup>113</sup> Emilia Bellucci & John Zeleznikow, *Representations of Decision-making Support in Negotiation*, 10 J. DECISION SYS., 449, 457 (2001). The *Split-Up system* is described as follows:

[The *Split-Up system* is] a combination of rules and neural networks [that] are used to determine the percentage split between parties. For example, the level of wealth of a marriage is determined by a rule, which uses the common pool value. The percentage split determination uses a neural network that learns from the relative contributions of the litigants, the relative needs of the litigants and the level of wealth of the marriage. The *Split-Up system* involves a hierarchy of more than ninety relevant factors for percentage split determination.

*Id.* (citations omitted). See also John Zeleznikow & Andrew Stranieri, *The Split-Up System: Integrating Neural Networks and Rule-Based Reasoning in the Legal Domain*, 5 INT’L CONF. ON ARTIFICIAL INTELLIGENCE & L. 185, 185–194 (1995). See generally Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 327 (2005); John Zeleznikow, *Risk, Negotiation and Argumentation: A Decision Support System Based Approach*, 1 LAW, PROBABILITY AND RISK, 37, 43–45 (2002).

claims.<sup>114</sup> This way, parties can evaluate their “Best Alternative To a Negotiated Agreement” (BATNA), i.e., the likely outcome of a dispute if the negotiations were to fail.<sup>115</sup> Knowing their BATNA allows parties to evaluate the quality of the offers made by the other party. Common wisdom suggests that a party should not accept an offer below its BATNA, because it can obtain a better outcome somewhere else. Correspondingly, a party makes a good deal if it accepts an offer greater than its BATNA. While the *Split-Up system* has been developed for family disputes in Australia, it is worth exploring the feasibility of a similar system for commercial disputes involving SMEs in specific categories of disputes.

**Recommendation 3.** Provide transparent ethical commitments applicable to third, fourth, and fifth parties, supported by rules of conduct, as well as data security and privacy policies.

SMEs’ confidence in ODR services can be improved with procedural warranties. To have a binding effect on the third party neutral, as well as the fourth and the fifth parties (the platform, the provider and developer), we recommend that ethical rules of conduct should be made public and be enforceable by a transparent mechanism. Good practice for ODR providers should involve requiring third-party neutrals to abide by a code of ethics enacted by an established ADR association in addition to their own set of rules, as well as establishing a selection process for online mediators and arbitrators. We argue that creating an ethics committee may be promising to ensure that the platform development will comply with ADR ethical standards and deal with ethical issues arising out of complaints from party users. We also believe SMEs’ willingness to use ODR services will be related to data security and privacy protection. Reassuring SMEs on the security of data and its appropriate use is likely to increase the use of ODR services because it creates a safe environment proper to efficient and fair dispute resolution. Transparency being a good practice for ODR providers, we encourage them to publish the security and private protection policies to which they comply in a user-friendly interface.

---

<sup>114</sup> Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 327 (2005).

<sup>115</sup> This term was first employed in ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 101-1197-106 (1st ed. 1981). It has subsequently been used broadly in negotiation and dispute resolution literature.

**Recommendation 4.** Provide outcome predictions based on precedents, supported by negotiation tools.

The use of ODR platforms leaves a digital trail, which allows for data collection regarding previous disputes, and, therefore, has the potential to increase the predictability of outcomes. Precedents can be established not only from court decisions and arbitration awards, but also from previous settlement agreements. SMEs could arguably benefit from obtaining a prediction about the likelihood of a court decision because trial is one of the alternatives that they would have if the negotiations were to fail. Knowing settlement precedents in similar cases can help parties assess their Best Alternative To a Negotiated Agreement (BATNA) and appraise the fairness of settlement offers based on industry standards. To overcome the challenges of creating a significant and reliable database, ODR platforms could partner together with the objective to regroup anonymized cases with common variables and share information. Data collection could be categorized by sectors of activity; for example, by fruits and vegetables disputes in cross-border trade. Development of user guides and representative guides to navigate through an ODR platform and successfully settle disputes through negotiation or mediation might be a highly valuable advantage for SMEs.

## VI. DESIGNING COST-TIME EFFICIENT PROCEDURES

Controlling the costs and delays of dispute resolution appears to be an enormous challenge for businesses dealing with disputes.<sup>116</sup> Considering that the amount at stake for disputes involving SMEs tends to be relatively small,<sup>117</sup> SMEs can only afford dispute resolution fees that are proportional to the amount in dispute. Efficiency (i.e., the time-cost ratio to achieve an outcome) has been identified as the most influential factor for parties choosing among dispute resolution processes, followed by the advice they get from their lawyer or other advisor.<sup>118</sup> Furthermore, SMEs need expeditious dispute resolution processes, as they do not have the capacity to survive a long procedure. In

---

<sup>116</sup> See generally FED. OF SMALL BUSINESSES, *supra* note 24, at 13–14; ECORYS, *supra* note 25, at 145–51.

<sup>117</sup> The average has been estimated to be €44,300 in the European Union in 2012 for cross-border disputes and £18,000 in the United Kingdom between 2010 and 2015. See TNS, *supra* note 32, at 40; FED. OF SMALL BUSINESSES, *supra* note 24 at 6, 12.

<sup>118</sup> “Efficiency (e.g. time/cost to achieve outcomes)” has been rated with a level of importance of 63% and advice with a score of 58% by party users in Global Pound Conference series results. GLOBAL POUND CONF. SERIES, *supra* note 28.

addition, time being money, a long dispute resolution procedure leads to direct and indirect costs which impact productivity.<sup>119</sup>

---

<sup>119</sup> FED’N OF SMALL BUSINESSES, *supra* note 24, at 12–13. As the Federation explains:

[In England and Wales,] [t]here is, on average, £12.4 billion a year tied up in some sort of dispute. . . . There are three categories of costs: Direct costs, i.e. the fees and other charges paid to solicitors, barristers, the court or consultants, any amounts lost or written off to another party and any additional damages that end up being paid as a result of having a dispute. Indirect costs, i.e. the wages and time costs of owners and staff having to dedicate time and resources to dealing with the dispute. Hidden costs, i.e. the opportunity cost of the dispute, such as the inefficiencies and delays caused in the business, the lost business opportunities and the costs of the disrupted business relations between the parties involved. The nature of smaller businesses means that any costs arising from a dispute are going to have bigger negative impacts than similar costs incurred by a larger business. Disruption to normal activity for a small business which does not have the resources to easily absorb unexpected costs can be significant. Smaller businesses operate under structural disadvantages, which consequently makes them vulnerable to ‘shocks’, such as a commercial dispute. They do not have the resources (time, knowledge, labor, finance and bargaining power) to dedicate to dealing with a dispute.

*Id.* See also IPSOS AUSTRALIA, *supra* note 31, at iv–v. According to the survey:

The total cost of the resolution of all disputes to Victorian small businesses was estimated at \$1.8 billion, including the amount of money and time spent. . . . The total number of hours spent by small businesses on resolving disputes was approximately 10 million hours, which is equivalent to \$294 million. Of the 10 million hours, 37% (approximately 4 million hours) was spent dealing with or responding to a third party, which is equivalent to approximately \$110 million.

*Id.*

## ACCESS TO COMMERCIAL JUSTICE

The above findings regarding the needs of SMEs to control the costs and the delays of dispute resolution are consistent with the results of surveys on the use of ADR in commercial disputes and of ODR for civil disputes, which indicate that efficiency is a key factor that influences the choice of a dispute resolution process. Private practitioners, in-house counsel, government officials, neutrals, and legal academics say that they use mediation in international commercial disputes first to reduce costs, and then to save time.<sup>120</sup> Saving time and money are also two of the three top motivations for legal departments to choose mediation or arbitration to solve their disputes.<sup>121</sup> For arbitration users, cost and speed are ranked among the most important factors, with fairness of the outcome being the top factor.<sup>122</sup> Even Fortune 1,000 corporations indicate using ADR because of the significant cost pressures they are faced with, in order to save both time and money.<sup>123</sup> It is crucial for SMEs to retain control on the dispute resolution process and costs.

Empirical studies in the field of ODR demonstrate that parties are more in control of time and costs when resolving their disputes online, as they

---

<sup>120</sup> S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973, 2031 (2016) (providing an anonymous online survey with thirty-four questions, made internationally available to private practitioners, in-house counsel, government officials, neutrals, and legal academics). One of the questions asked the participants what specific reasons would lead them to use mediation in international commercial disputes. *Id.* The most highly ranked reason was the desire of saving costs, with 36%, followed by savings in time, with 28%. Other factors were a more satisfactory process, 19%; cultural disinclination towards litigation or arbitration, 21%; and desire to preserve an ongoing relationship, 26%. *Id.*

<sup>121</sup> AMERICAN ARBITRATION ASS'N, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 8–9 (2006), [http://fundacionsignum.org/wp-content/uploads/2016/07/aaa\\_mediacion-arbitraje-resolucion-conflictos-dispute-wise\\_study\\_research\\_report\\_2011.pdf](http://fundacionsignum.org/wp-content/uploads/2016/07/aaa_mediacion-arbitraje-resolucion-conflictos-dispute-wise_study_research_report_2011.pdf) (based on 254 phone interviews with people in seniority positions within legal departments).

<sup>122</sup> Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT'L BUS. LAW. 203, 203–04 (2002) (surveys with attorneys and clients about AAA commercial arbitration cases). Participants were asked to rank the most important factors in a dispute. 81% of participants ranked fairness of the outcome as the most important factor, while cost and speed got 46%. *Id.*

<sup>123</sup> DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 15–17 (1998) (illustrating how surveys conducted with general counsels or chief litigators of the Fortune 1,000 corporations in the United States in 1995 showed that savings in time and money were the most decisive factors for using ADR. In fact, 55% of corporations said cost pressures affected their decision to use ADR).

have more control over when and where they utilize the platform.<sup>124</sup> For disputes regarding family matters, a large majority of Dutch *Rechtwijzer* ODR platform users reported having more control over their separation when using online technology.<sup>125</sup> A previous study, also conducted in the Netherlands,

---

<sup>124</sup> See *infra* notes 125–27.

<sup>125</sup> See *Rechtwijzer Uit Elkaar; What Do Users Say after 6 Months?*, HIL, (Nov. 18, 2016), <https://www.hiil.org/news/rechtwijzer-uit-elkaar-what-do-users-say-after-6-months/> (explaining *Rechtwijzer* is an ODR platform that was born out of the 2014 Dutch Justice Needs Survey). *Rechtwijzer* dealt with separation matters and aimed to address some of the challenges identified in the survey. Launched as a collaborative project between HIL, MODRIA, and the Dutch Legal Aid Board, it has ended its operation in March 2017. For more information about the *Rechtwijzer* platform, see Maurits Barendrecht, *Rechtwijzer: Why Online Supported Dispute Resolution Is Hard to Implement* (International Legal Aid Group Conference, South Africa), June 2017, [http://internationallegalaidgroup.org/images/miscdocs/Conference\\_Papers/Mr\\_Maurits\\_Barendrecht\\_-\\_Session\\_5.pdf](http://internationallegalaidgroup.org/images/miscdocs/Conference_Papers/Mr_Maurits_Barendrecht_-_Session_5.pdf). Barendrecht states:

Our users have reported as a result that they have more control over when and where they utilise the platform. In fact 84% of participants felt that they have more control over their separation as a direct result of this user empowerment. . . . What *Rechtwijzer Uit Elkaar* seeks to do is empower legal professionals to maximise their interventions in such a way as to aid our users, but not supersede their judgement [sic]. As a result, 82% of users felt respected or very respected by lawyers or mediators on the platform. . . . Almost 70% of the participants state that to a great or very great extent the emotional pain they felt before using *Rechtwijzer Uit Elkaar* was reduced after separating on the platform. Indeed, over 70% of the participants found the process fair to a great or very great extent. . . . Close to 60% of the people starting a case and paying the fee found their partner willing to participate, finalized their agreements through the platform, filed them at courts and saw their separation registered. This is a satisfactory retention percentage, taking into account that a substantial percentage of couples reconciliates, another group postpones their divorce for various reasons, some separations escalate and some couples just find another way of doing their divorce. . . . The quality of the agreements couples have been guided to making are a marked improvement over those of a traditional divorce process. When asked 72% of the

## ACCESS TO COMMERCIAL JUSTICE

found that approximately only half (53%) of the users of an online mediation platform for divorce cases incurred costs, i.e. legal costs and fees, as well as costs for travel, experts and witnesses.<sup>126</sup> When costs were incurred, divorcees spent under €100 in 90% of the cases, and a maximum of €2000.<sup>127</sup>

An empirical study analyzed the impact of the implementation of the American *Matterhorn* ODR platform<sup>128</sup> in eight courts in the United States to deal with traffic infractions.<sup>129</sup> Comparing data collected before and after the implementation, the researchers conclude that the use of *Matterhorn* leads to higher performance on all of the measures, i.e. case duration, percentage of paid fines and reduction of case default rates.<sup>130</sup> The data indicate that the average case duration is fourteen days after *Matterhorn*, compared to fifty days before *Matterhorn*.<sup>131</sup> The data also show that within one month 90% of *Matterhorn* cases were resolved.<sup>132</sup> The default rate with *Matterhorn* was less than 2% compared to approximately 20% without *Matterhorn*.<sup>133</sup> Fines ordered were collected within twenty-one days for 80% of cases when using *Matterhorn*, compared to close to three months without *Matterhorn*.<sup>134</sup> Implementing an ODR technology like *Matterhorn* in state courts has proven its potential to provide a more expeditious resolution process as well as more

---

participants rated their experience on the platform with 8 out of 10 or more (7.7 on average) and 70% said that its use led to effective and sustainable solutions.

*Id.*

<sup>126</sup> Gramatikov & Klaming, *supra* note 77, at 110.

<sup>127</sup> *Id.*

<sup>128</sup> See MATTERHORN, <https://getmatterhorn.com> (last visited Oct. 4, 2018) (explaining *Matterhorn* is a court-connected ODR platform initially developed in Ann Arbor, Michigan in 2014 and now deployed with approximately fifty court and court-related customers in seven states). The platform leverages court case data and deals with tickets, warrant, family, and small claims matters. *Id.* See also M.J. Cartwright & Dunrie Greiling, *Court-Connected Online Dispute Resolution: Outcomes from Family, Civil, and Traffic Cases in the United States*, 5 INT'L J. ONLINE DISP. RESOL. 4 (2018).

<sup>129</sup> J. J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2026–27 (2017) (explaining the data consist of case-level information from eight Michigan state courts). For every court, case-level records were assembled from approximately one year before the adoption of *Matterhorn* starting in May 2013 with all available data from the post-*Matterhorn* period until July 2016. *Id.*

<sup>130</sup> *Id.* at 2025.

<sup>131</sup> *Id.* at 2030.

<sup>132</sup> *Id.* at 2034.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 2038.

outcome certainty because of a better enforceability rate.<sup>135</sup> In the same vein, results from the Mexico *Concilianet* ODR platform<sup>136</sup> for consumer disputes show that 90% of users reach agreement on an average time of fifty-two days, while 77% of non-ODR users reach agreement on an average of 138 days.<sup>137</sup>

Among existing ODR platforms in the market, various ranges of timeframes are provided to resolve disputes, from twenty-four hours<sup>138</sup> to a maximum of 185 days.<sup>139</sup> Some platforms divide the dispute resolution process

---

<sup>135</sup> *Id.* at 2050. As Prescott states:

This Article makes the *empirical* case that platform technology presents an important opportunity for policymakers who wish to open up America's courts so that citizens can make the most of what these institutions have to offer. There are plenty of reasons to believe that platform technology can make resolving minor cases in courts easier, faster, and better, and yet rigorous evidence on the access-to-justice consequences of platform technology is wanting.

*Id.*

<sup>136</sup> See CONCILIANET, <https://concilianet.profeco.gob.mx/Concilianet/> (last visited Oct. 4, 2018).

<sup>137</sup> Adriana Ruiz Monroy, Módulo de solución de controversias en línea [Online Dispute Resolution Module], (2017), <https://unctadcompal.org/documento/presentacion-mexico-concilianet-conferencia-anual-2017/>. See also PROCURADURIA FEDERAL DEL CONSUMIDOR, *supra* note 76, at 13. According to the survey:

Within the year 2016, 110,013 complaints were received at the national level, and complaints were concluded in 8 out of 10 cases, satisfaction was achieved with the result of the procedure, achieving a recovery of 844.6 million pesos in favor of consumers. In this same period, the Concilianet platform received 449,936 visits and attracted 5,382 claims, with a conciliation percentage of 90% and recovering more than 16.9 million pesos.

*Id.*

<sup>138</sup> SETTLE TODAY, <http://settletoday.com> (last visited Aug. 29, 2018).

<sup>139</sup> See ARB. RESOL. SERVICES, *Rules & Regulations Business to Business Program*, <https://www.arbresolutions.com/rules-regulations-business-to-business-program/> (last visited Dec. 9, 2019). The time limits set forth in Rules 3.4, 3.6, 3.9, 3.10, 3.13, 3.14, and 6.4, when taken together, allow for a maximum of 185 days. *Id.*



into smaller steps with deadlines for each of them and provide sanctions<sup>140</sup> and, at times, incentives to ensure that parties comply with their deadlines.<sup>141</sup> Costs for using ODR platforms differ greatly: some public ODR platforms are free for users or require payment of a fixed rate,<sup>142</sup> and private ODR providers offer their services under different price models, by applying a flat fee,<sup>143</sup> a

---

<sup>140</sup> Most online arbitration platforms impose consequences for not respecting deadlines, such as withdrawing the case whenever plaintiff fails to comply with a deadline or rendering an award by default when respondent does not participate in the proceedings in the presence of a pre-dispute arbitration clause. For online mediation, mechanisms to ensure compliance with deadlines are more limited. Most platforms solely provide for the termination of the procedure after a certain number of days have expired and if no agreement was reached. See FAIRCLAIMS, RULES & PROCEDURES, 15, 16–17, 19, <https://s3.amazonaws.com/arbi-website/fairclaims-rules/FairClaims-Rules.pdf> (last visited Dec. 9, 2019) (providing examples of such rules at Rule 19, 23, and 28).

<sup>141</sup> See *Resolving Disputes, Claims, and Chargebacks*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/security/resolve-disputes> (last visited Aug. 30, 2018); See also *Resolution Center*, eBAY, <https://resolutioncenter.ebay.com> (last visited Aug. 30, 2018) (explaining *eBay* and *PayPal* provide incentives for users to comply with deadlines by offering an escalated ADR process starting with negotiation and ending with arbitration, and by making the decisions enforceable using an escrow mechanism that allows to reverse payment (chargeback)). In addition, *eBay* records all unresolved cases against the parties' account, which encourages them to participate in the proceedings and resolution of their dispute. *Id.*

<sup>142</sup> See CONCILIANET, <https://concilianet.profeco.gob.mx/Concilianet> (last visited Aug. 30, 2018) (showing some public ODR platforms offer their services free of charge—in Mexico, Concilianet is sponsored by the government of Mexico via the Federal Attorney for Consumers Protection); See also *PARLe: plateforme d'aide au règlement des litiges en ligne* [*PARLe: Platform for helping to resolve disputes online*], OFFICE DE LA PROTECTION DU CONSOMMATEUR, <https://www.opc.gouv.qc.ca/a-propos/parle/description/> (last visited Aug. 30, 2018) (explaining in Canada the platform *PARLe* was developed by the Cyberjustice Laboratory at the Université de Montréal and used by the Office of Consumer Protection); *Online Dispute Resolution*, EUROPEAN COMMISSION, <https://ec.europa.eu/consumers/odr> (last visited Aug. 30, 2018) (explaining in the European Union there is The European Commission ODR platform for consumer disputes sponsored by the European Commission); CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca> (last visited Aug. 30, 2018) (showing public ODR platforms offering services at a fixed rate in Canada which applies to small claims and strata disputes, of which the fees are set under section 62(2)(m) of the Civil Resolution Tribunal Act and CRT Rules 11 to 14).

<sup>143</sup> See, e.g., *Pricing*, RAPIDRULINGS, <https://www.rapidrulings.com/pricing> (last visited Aug. 30, 2018); *Preços*, ARBITRANET, <https://arbitranet.com.br/precos> (last visited Aug. 30, 2018); *iCOURTHOUSE*, [http://www.icourthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.icourthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited Aug. 30, 2018).

variable fee,<sup>144</sup> by offering a membership fee,<sup>145</sup> or even free of charge to its community of users.<sup>146</sup> When the fee is contingent, the pricing model depends upon different variables, such as the value claimed,<sup>147</sup> the number of neutrals,<sup>148</sup> the expertise of the neutrals,<sup>149</sup> the length of the mediation meetings,<sup>150</sup> the number of pages submitted for a case,<sup>151</sup> or a mix of those

---

<sup>144</sup> See, e.g., *Fees*, ARBITRATION RESOLUTION SERVICES, <https://www.arbresolutions.com/fees> (last visited Aug. 30, 2018); *Rules of Risolvionline.com*, RISOLVIONLINE, [https://www.risolvionline.com/sezione.php?sez\\_id=72&lng\\_id=7](https://www.risolvionline.com/sezione.php?sez_id=72&lng_id=7) (last visited Aug. 30, 2018); *Fees and Expenses*, CONSENSUS MEDIATION, <http://www.consensusmediation.co.uk/mediationcost.html> (last visited Aug. 30, 2018); *Conditions tarifaires eJust en vigueur au 1er juillet 2018 [Pricing Conditions eJust Effective July 1<sup>st</sup>, 2018]*, eJUST, [https://www.ejust.fr/assets/documents/Grille\\_tarifaire\\_eJust.pdf](https://www.ejust.fr/assets/documents/Grille_tarifaire_eJust.pdf) (last visited Aug. 30, 2018); *Our Pricing*, IT'S OVER EASY, <https://www.itsovereasy.com/pricing> (last visited Aug. 30, 2018); *Pilot Pricing*, FAIRCLAIMS, <http://www.fairclaims.com/entreprise> (last visited Aug. 30, 2018); *Frequently Asked Questions*, JAMS ENDISPUTE ONLINE MEDIATION, <https://www.jamsadr.com/files/Uploads/Documents/JAMSconnect/Endispute-FAQ.pdf> (last visited Aug. 30, 2018).

<sup>145</sup> See, e.g., SETTLETODAY, <https://settletoday.com> (last visited Aug. 30, 2018); *Packages for Businesses*, TALKDD, <https://talkdd.com/en/packaging> (last visited Aug. 30, 2018); *Pricing Plans*, YOUTSTICE, <https://youstice.com/en/pricing> (last visited Aug. 30, 2018); *Flat Rate Monthly Bucketed Pricing After Pilot*, FAIRCLAIMS, <http://www.fairclaims.com/entreprise> (last visited Aug. 30, 2018) (showing membership subscriptions allow businesses to deal with multiple disputes arising out of online or offline commerce).

<sup>146</sup> See, e.g., *Resolution Center*, eBAY, <https://resolutioncenter.ebay.com> (last visited Aug. 30, 2018); *Help Center*, ALIBABA, <https://service.alibaba.com/buyer> (last visited Aug. 30, 2018); PAYPAL, <https://www.paypal.com/disputes> (last visited Aug. 30, 2018).

<sup>147</sup> See, e.g., *Fees*, ARBITRATION RESOLUTION SERVICES (ARS), <https://www.arbresolutions.com/fees>; *Rules of RisolviOnline.com*, RISOLVIONLINE, [https://www.risolvionline.com/sezione.php?sez\\_id=72&lng\\_id=7](https://www.risolvionline.com/sezione.php?sez_id=72&lng_id=7); *Fees and Expenses*, CONSENSUS MEDIATION, <http://www.consensusmediation.co.uk/mediationcost.html> (last visited Aug. 30, 2018).

<sup>148</sup> See, e.g., *Preços*, ARBITRANET, <https://arbitranet.com.br/precos> (last visited Aug. 30, 2018).

<sup>149</sup> See, e.g., *Fees and Expenses*, CONSENSUS MEDIATION, <http://www.consensusmediation.co.uk/mediationcost.html> (last visited Aug. 30, 2018).

<sup>150</sup> See, e.g., *Frequently Asked Questions*, JAMS ENDISPUTE ONLINE MEDIATION, <https://www.jamsadr.com/files/Uploads/Documents/JAMSconnect/Endispute-FAQ.pdf> (last visited Aug. 30, 2018).

<sup>151</sup> See, e.g., *Pricing*, RAPIDRULINGS, <https://www.rapidrulings.com/pricing> (last visited Aug. 30, 2018).

variables.<sup>152</sup> Those costs are supported either by both parties or by the plaintiff and can sometimes be estimated prior to filing a claim using a cost calculator. The *World Intellectual Property Organization's* (WIPO),<sup>153</sup> the *International Chamber of Commerce's* (ICC)<sup>154</sup> and the *Hong Kong International Arbitration Centre's* (HKIAC)<sup>155</sup> cost calculators—although not related to ODR, but to standard dispute resolution—provide an estimate of the costs to be incurred for resolving the dispute.

How can SMEs secure their costs associated with the enforcement of outcomes? Judicial enforcement of ODR outcomes, whether settlement agreements or arbitral awards, might be disproportionate in terms of costs and dissuade SMEs. Instead of relying on state-enforcement and international mechanisms for arbitral awards and settlement agreement recognition,<sup>156</sup> SMEs that use ODR platform may benefit from built-in enforcement mechanisms, which create “incentives for the losing party to voluntarily comply” or set up “mechanisms” that “contro[l] the resources at play.”<sup>157</sup>

---

<sup>152</sup> See, e.g., *Conditions tarifaires eJust en vigueur au 1er juillet 2018 [Pricing Conditions eJust Effective July 1<sup>st</sup>, 2018]*, eJUST, [https://www.ejust.fr/assets/documents/Grille\\_tarifaire\\_eJust.pdf](https://www.ejust.fr/assets/documents/Grille_tarifaire_eJust.pdf) (last visited Aug. 30, 2018).

<sup>153</sup> *International Registration of Marks – Fee Calculation*, WIPO, <http://www.wipo.int/madrid/feecal/FirstStep> (last visited Aug. 30, 2018).

<sup>154</sup> *Cost Calculator*, INTERNATIONAL CHAMBER OF COMMERCE, <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator> (last visited Aug. 30, 2018).

<sup>155</sup> *Administered Fee Calculator*, HONG KONG INTERNATIONAL ARBITRATION CENTRE, <http://www.hkiac.org/content/administered-arbitration-fee-calculator> (last visited Aug. 30, 2018).

<sup>156</sup> See New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38 (explaining enforceability of arbitral awards); UNCITRAL, *Int'l Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation: Note by the Secretariat*, U.N. GAOR, U.N. Doc. A/CN.9/WG.II/WP.205 (2017) [hereinafter UNCITRAL, *Settlement Agreements*] (explaining enforceability of settlement agreements); Council Directive 136/3, 2008 O.J. (L 136) 3.

<sup>157</sup> GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGE FOR CONTEMPORARY JUSTICE* 224 (2004) (citing Lessig) (“[C]yberspace is regulated by different coercive powers: legal sanctions, economic forces (the market), social norms and computer code.”); LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* 235 (1999). See Pietro Ortolani, *Self-Enforcing-Online Dispute Resolution: Lessons from Bitcoin*, 36 OXFORD JOURNAL OF LEGAL STUDIES, 595, 595 (2016) (arguing that multiple models for self-enforcement mechanisms, especially those using blockchain technology, will be beneficial for ODR users). See also Maxime Hanriot, *Online Dispute Resolution (ODR) As a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes*, 2(1) MCGILL J. OF DISP. RESOL. 1 (2016) (explaining that most

Kaufmann-Kohler and Schultz have identified the following self-enforcement mechanisms as relevant for ODR<sup>158</sup>: trustmarks,<sup>159</sup> reputation management systems,<sup>160</sup> publicly accessible reports,<sup>161</sup> exclusion of participants from marketplaces,<sup>162</sup> payments for delay in performance,<sup>163</sup>

---

of the successful ODR providers, such as eBay, PayPal, and ICANN, rely on private enforcement mechanisms).

<sup>158</sup> KAUFMANN-KOHLER & SCHULTZ, *supra* note 157, at 225–33.

<sup>159</sup> *Id.* at 225. Kaufmann-Kohler and Schultz explain that:

A trustmark is a logo displayed on the website of a trader, which inform the customer that the trader is committed to certain qualitative standards or best business practices, including for instance a redress mechanism. . . . To ensure enforcement, the trader commits to comply with all agreements, recommendations or decisions generated during a given type of ODR procedure.

*Id.* Keeping the trustmark is the incentive to obtain compliance.

<sup>160</sup> *Id.* at 226. (“A reputation management system is a grading or point system. Each time a trader fails to abide by an ODR outcome, it loses points or gets poor grades on a rating or scale that is at all time publicly accessible. . . .”). Keeping a good reputation is the incentive to comply with ODR outcomes.

<sup>161</sup> *Id.* at 227 (showing the possibility of publicly reporting frauds, abuse or non-compliance to ODR outcome by a business could be an incentive for enforcement).

<sup>162</sup> *Id.* (“A further incentive may be provided by the threat to exclude participants from the marketplace by using technological tools, for instance by denying access to a website secured by password.”). Continuing to do business will favor voluntary compliance, and even more so, for repeat players.

<sup>163</sup> *Id.* The authors state:

With each day of non-performance an additional penalty amount accrues, with the result that the debt ends up being substantial enough to justify the cost of a court action.”). Penalty payments for not complying to the ODR process or the outcome can be provided in the dispute resolution agreement or the ODR process rules that contractually bind the parties.

*Id.*

escrow systems,<sup>164</sup> judgment funds,<sup>165</sup> transaction insurance mechanisms,<sup>166</sup> credit card chargeback mechanisms<sup>167</sup> and technological constraints.<sup>168</sup> Every

---

<sup>164</sup> *Id.* at 228. Kaufmann-Kohler and Schultz further explain that:

In an escrow system, the escrow agents hold an account through which the money for payment transits. The buyer pays the price into the escrow account, not to the seller. Once payment is made into the account, the escrow agent gives notice to the beneficiary of the payment, usually the seller. The seller then delivers the goods to the buyer. The escrow agents verify that delivery has been made and, unless the buyer raises a complaint within an inspection period of a few days, transfers the monies in escrow to the seller. In the event of a complaint, the agent freezes the amount in escrow pending a settlement or a determination in an ADR/ODR process. It then pays out the monies according to the settlement or ADR/ODR outcome.

*Id.* The escrow system controls the resources and therefore can directly use it to enforce the outcome. *Id.*

<sup>165</sup> *Id.* at 229.

A 'judgment fund' is a permanent account supplied with contributions from one or all parties likely to resort to a given dispute settlement process, out of which amounts determined or agreed to be due are paid to the prevailing party. . . . It could be financed with one-off payment or regular contributions could be placed under the control of an ODR provider or of a third party, which would pay out amounts on instruction from a number of specified ODR providers.

*Id.* The fund controls the outcome and can directly enforce the outcome. *Id.*

<sup>166</sup> *Id.* at 230.

A *transaction insurance mechanism* operates as a money back guarantee. It covers the risk of a client if the supplier does not perform the transaction according to its terms and the parties do not resolve the difference amicably. Provided certain conditions are met, the insurer will then reimburse the client for the price paid and possibly for damages incurred, such as extra expenses to remedy a defect. Among the required condition, one could provide for the

self-enforcement, whether indirect through incentives or direct through a control on the results, has its own value and can be even more effective when combined with others. In addition, SMEs involved in cross-border trade might be interested to follow efforts made by UNCITRAL Working Group II (Dispute Settlement) covering the preparation of instruments on the enforcement of international commercial settlement agreements resulting from mediation,<sup>169</sup> and Working Group III (Online Dispute Resolution) making

---

submission of a declaration of liability in an ODR process.

*Id.* The insurer will refund the client and reclaim money from the supplier declared liable in the ODR procedure. *Id.*

<sup>167</sup> Hanriot, *supra* note 157, at 19 (“[The chargeback system] allows a buyer, after he has authorized the transaction via a credit card, to request the reimbursement of the payment from the merchant under particular circumstances. The situations justifying the chargeback are different depending on national laws.”). *See also* KAUFMANN-KOHLER & SCHULTZ, *supra* note 157, at 232. The authors state:

Both the trader and the credit card company have an interest in outsourcing the decision-making process on the charge-back. The trader may increase customer confidence by providing an independent dispute resolution process, while card issuers may wish to avoid potential liability, and possibly gain additional confidence by providing for such a resolution process.

*Id.*

<sup>168</sup> KAUFMANN-KOHLER & SCHULTZ, *supra* note 157, at 232–33. As the authors explain:

This self-enforcing mechanism is made possible by ICANN’s control of the database that converts domain names into IP addresses: if a domain name registrar wishes its domain names to be converted into IP addresses, it must accept the conditions set by ICANN. Among those conditions, one finds the commitment to enforce all decisions rendered by an ICANN accredited dispute resolution provider.

*Id.*

<sup>169</sup> UNCITRAL, *Settlement Agreements*, *supra* note 156.

built-in enforcement mechanisms a requirement for ODR platforms that want to provide a “one-stop shop for parties seeking to resolve a dispute.”<sup>170</sup>

In the current ODR market, efforts have been made to facilitate judicial enforcement and develop self-enforcing mechanisms in platforms. Online tribunals, such as the Civil Resolution Tribunal and the Condominium Authority Tribunal in Canada benefit from fast-track legal enforcement mechanisms.<sup>171</sup> With court-connected ODR system developing rapidly, we foresee that enforceability of settlement agreements will likely be facilitated.<sup>172</sup> Some ODR platforms work with an escrow system that allows immediate enforceability of parties’ settlements and arbitrators’ decisions through the platform’s online payment services such as *PayPal*,<sup>173</sup> and through smart contracts using blockchain technology such as *Kleros*.<sup>174</sup> *eBay* also provides a reputation management system, which gives an incentive for good-faith self-enforcement because most buyers and sellers are repeat users seeking to increase the number of transactions on the platform.<sup>175</sup> Trustmarks (i.e. quality labels that guarantee standards of conduct) were used by ODR providers, such as Talk DD or *SquareTrade* to increase customers’ confidence towards top

---

<sup>170</sup> UNCITRAL, *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Overview of Private Enforcement Mechanisms: Note by the Secretariat*, at para 10, UNCITRAL, 28<sup>th</sup> Sess., U.N. Doc. A/CN.9/WG.III/WP.124 (Sept. 13, 2013).

<sup>171</sup> For the Civil Resolution Tribunal, see: <https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/>. For the Condominium Authority Tribunal, see: <https://www.condoauthorityontario.ca/en-US/tribunal/the-cat-process/after-your-case/>

<sup>172</sup> For Matterhorn platform usage in courts, see M.J. Cartwright & Dunrie Greiling, *Court-Connected Online Dispute Resolution: Outcomes from Family, Civil, and Traffic Cases in the United States*, 5 INT’L J. ONLINE DISP. RESOL. 4 (2018). For MODRIA platform usage in courts, see *Travis County Uses ODR to Fight Traffic on the Roads and in the Court*, TYLER TECHNOLOGIES, <https://www.tylertech.com/resources/case-studies/travis-county-uses-odr-to-fight-traffic-on-the-roads-and-in-the-court>. (last visited Dec. 3, 2019). A MODRIA representative confirmed to the authors that settlements reached on the platform are signed by court officials in some jurisdictions, therefore making them enforceable.

<sup>173</sup> Anjanette H. Raymond & Abbey Stemler, *Trusting Strangers: Dispute Resolution in the Crowd*, 16 CARDOZO J. OF CONFLICT RESOL., 358, 379–80 (2015) (presenting how PayPal integrates with eBay to serve as an escrow service simplifying payment transactions and as a quasi-escrow able to hold money for a period of time and to make chargebacks, leading to the creation of a self-enforcement mechanism that reduces seller fraud on eBay platform).

<sup>174</sup> LESAEGE ET AL., *KLEROS: SHORT PAPER v1.0.5* (Sept. 2019), <https://kleros.io/assets/whitepaper.pdf>. See also Ortolani, *supra* note 157, at 595–29 (discussing the potential of blockchain for self-enforcement).

<sup>175</sup> Katsh & Rule, *supra* note 11, at 333–35 (discussing that fast and fair resolutions through eBay dispute resolution platform is made to encourage buyers to engage in more transactions).

retailers that marketed their commitment to user-friendly handling of complaints.<sup>176</sup> *SquareTrade* now also provides insurance mechanisms in the form of a warranty to customers.<sup>177</sup> The *Internet Corporation for Assigned Numbers and Names's* (ICANN) expedited dispute resolution procedures for cybersquatting is an example of a code control dispute resolution under the *Uniform Domain-Name Dispute Resolution Policy* (UDRP) that provides for a direct self-enforcement mechanism that can impose cancellations or transfers of domain names that are found to be abusive registrations.<sup>178</sup> However, the vast majority of ODR providers do not provide any self-enforcement mechanisms, which has the effect of reducing the incentives for SMEs to use them. There is surely room for improvement. In the near future, blockchain technology may develop in ODR platforms to enforce decisions through escrow of collateral and smart contracts, which would allow the amount to be automatically divided and transferred in accordance with the decision made.<sup>179</sup>

---

<sup>176</sup> See *How It Works*, TALKDD, <https://talkdd.com/en/how-it-works> (last visited Jan. 7, 2019); SQUARE TRADE, <https://www.squaretrade.com> (last visited Jan. 7, 2019). To learn more about the impact of trustmarks see Hanriot, *supra* note 157, at 16 (indicating that SquareTrade accredited traders increase their sales by over 15 per cent after obtaining their trustmark). See also STEVE ABERNETHY, BUILDING LARGE-SCALE ONLINE DISPUTE RESOLUTION & TRUSTMARK SYSTEM, 1, 2, [www.mediate.com/Integrating/docs/Abernethy.pdf](http://www.mediate.com/Integrating/docs/Abernethy.pdf). Abernethy states:

After participating in SquareTrade's dispute resolution process, over 80% of buyers said that they would buy again from the marketplace or seller. . . . Our surveys have confirmed that parties who complete a successful dispute resolution process are, on average, likely to engage in roughly 15% more transactions post dispute than a comparable group of disputants with without successful ODR.

*Id.*

<sup>177</sup> SQUARE TRADE, <http://help.squaretrade.com/help/helparticles/Where-can-I-buy-a-SquareTrade-Protection-Plan> (last visited Aug. 30, 2018).

<sup>178</sup> *Uniform Domain Name Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last updated Oct. 4, 1999).

<sup>179</sup> See JUR, <https://jur.io> (last visited Aug. 30, 2018); JURY.ONLINE, <https://jury.online> (last visited Aug. 30, 2018); KLEROS, online: <https://kleros.io> (last visited Aug. 30, 2018). See also Riikka A. Koulu, *Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement*, 13 SCRIPTed 40, 48–49 (2016) (explaining how self-executing smart contracts can be used for dispute resolution through a decentralized technological infrastructure such as the *Ethereum* blockchain platform); Koji Takahashi, BLOCKCHAIN AND ONLINE DISPUTE RESOLUTION (Doshisha University, 2018), [http://mddb.apec.org/Documents/2018/EC/WKSP2/18\\_ec\\_wksp2\\_017.pdf](http://mddb.apec.org/Documents/2018/EC/WKSP2/18_ec_wksp2_017.pdf) (last visited Sept. 12, 2018).



**Recommendation 5:** Provide an expedited procedure leading to an enforceable outcome, supported by self-enforcement mechanisms.

From an SMEs' point of view, the time and fees spent to resolve a dispute and enforce the outcome play a crucial role in their choice of dispute resolution mechanisms. Accordingly, the optimal ODR platform should provide them with an expedited procedure based on their need to settle on the basis of a fair outcome in the quickest possible way. We recommend that every ADR step (negotiation, mediation, arbitration, etc.) and sub step (the submission of a response, the upload documents, the paying of fees, etc.) should be conducted in a specific timeframe and that mechanisms be in place to ensure parties comply with deadlines promptly. Parties' commitments with timeframes should have a contractual basis embodied in the ODR's terms of agreement. At a minimum, a mechanism should be in place for missed deadlines, such as the dismissal of the case for the claimant's failure to comply or a default decision through arbitration if the respondent fails to participate. Reinforcing the parties' commitment towards the dispute resolution process with "punishments or prizes" can certainly improve the efficiency of the dispute resolution process. On the one hand, penalties in the form of fines could be agreed upon in advance. On the other hand, benefits in the form of a discount in the ODR services could be envisioned if parties take less days than the specified times due to the fact that this would have the effect of maximizing the expedited resolution of disputes for SMEs. The optimal ODR platform should also support the enforceability of outcomes. Providing built-in self-enforcement mechanisms would improve SMEs' incentives to use ODR platforms. Among the potential self-enforcement mechanisms, the use of trustmarks, reputation management system and escrow system may be the most realistic and efficient options for business-to-business disputes, and especially, if disputes are frequent and involve repeat players.

**Recommendation 6:** Provide a proportional cost model, supported by a dispute cost calculator.

From a SMEs' perspective, the most convenient pricing model offers payment flexibility based on their financial constraints, as they will most of the time be in a dispute about nonpayment. Costs of dispute resolution need to be proportional to time and cash flows available. To make ODR accessible for SMEs, ODR platforms could provide a pricing model based on a step-by-step basis, allowing SMEs to pay one step at a time, or even by the sub-steps, for the services needed. If ODR providers can build a sustainable business model around a proportional and on-demand price model, SMEs' interest in ODR

may rise due to the economic advantages it provides as compared to other dispute resolution mechanisms. It is also advantageous for SMEs to predict the cost of dispute resolution at the outset of the procedure, therefore an online cost calculator integrated in the ODR platform would be a highly valuable tool.

## VII. DESIGNING RELATIONSHIP CARING PROCEDURES

Another challenge experienced by SMEs is to manage emotional, social and cultural constraints to maintain productive business relationships with their commercial environment (clients, suppliers, partners, etc.) and deal appropriately with disputes.<sup>180</sup> Preventing disputes with clients is crucial as SMEs have on average, fewer clients than larger companies and are more dependent on cash flow. Survey findings show that emotional costs for small businesses involved in disputes are considerable, indeed, “high or very high” emotional costs are associated with the majority of serious disputes (63%).<sup>181</sup> In addition, cultural boundaries may play a role in the increase of disputes or create an obstacle to their resolution.<sup>182</sup> Therefore, SMEs need dispute resolution processes that are flexible and that can be tailored to the nature of the dispute and parties involved. The following will explore empirical studies that have been conducted to assess the appropriateness of dispute resolution mechanisms and the effectiveness of various communication media to consider emotional, social and cultural issues.

Which dispute resolution mechanisms is the most appropriate to take into consideration relational aspects and foster business relationships? Series of surveys conducted with parties involved in commercial dispute resolution

---

<sup>180</sup> See GLOBAL POUND CONFERENCE SERIES, *supra* note 28, at 71 (discussing party users of commercial dispute resolution have assigned a degree of difficulty of 30% to the challenge of dealing with emotional, social and cultural constraints in disputes).

<sup>181</sup> IPSOS AUSTRALIA, *supra* note 31, at 5.

<sup>182</sup> See Paul E. Mason, *What's Brewing in the International Commercial Mediation Process: Differences from Domestic Mediation and Other Things Parties, Counsel and Mediators Should Know*, 66 DISP. RESOL. J. 65–70 (Feb.–Apr. 2011) (“International commercial mediations are often more complex with more participants than their domestic counterparts. They also often involve culture and language differences.”); *Sackin*, *supra* note 10, at 263–66 (arguing that cultural background may affect how people experience events; therefore, it must be taken into consideration in the ODR process in order for the parties to feel properly heard and understood). See also William K. Slate II, *Paying Attention to Culture in International Commercial Arbitration*, 59 DISP. RESOL. J. 96 (Aug.–Oct. 2004); Sharanya Rao, *THE CULTURAL VACUUM IN ONLINE DISPUTE RESOLUTION* (ODR International Forum 2004), <http://ukrmediation.com.ua/files/content/cultural-vacuum.pdf> (last visited June 12, 2018); GLOBAL POUND CONF. SERIES, *supra* note 28, Session 2, Question 2 (showing 13% of all stakeholders and 9% of parties said that culture is the factor which determines the outcome of a commercial dispute).

suggest that negotiation and mediation (or non-adjudicative process in general) tend to be suitable processes for preserving, maintaining, and potentially improving commercial relationships and reputations.<sup>183</sup> These results are consistent with the findings of an empirical study, which examined the impact of the words people use in ODR, and found that “[c]ommunications that give face, such as giving causal accounts, increase the likelihood that disputes will be resolved.”<sup>184</sup> Causal accounts are ways of communicating that involve giving face by expressing that one perceives oneself to be in a “one-down” position.<sup>185</sup> “Accounts” are “justifications that reduce one’s responsibility.”<sup>186</sup> Causal accounts may be signaled by words and actions, such as “apologies,” which may include “causal explanations,” as well as “confessions” and “promises.”<sup>187</sup> To favor the expression of causal accounts by parties, parties should have access to negotiation and mediation, which are modes of dispute resolution based on dialogue. Due to its formal adjudicative

---

<sup>183</sup> GLOBAL POUND CONF. SERIES, *supra* note 28, Session 2, Question 3 (citing 39% of party users participate in non-adjudicative process (mediation or conciliation) to Improve or restore relationships); Strong, *supra* note 120, at 2030–31, 2041 (presenting the results of anonymous and voluntary online survey conducted in 2014, open to every country and comprising 34 questions, where 26% of the 221 participants considered preserving the relationship an essential reason for resorting to mediation); LIPSKY & SEEBER, *supra* note 123, at 17–18 (presenting a study finding that preserving good relationships is among the frequent reasons why businesses resort to ADR was conducted in 1996 with a final sample of 606 leaders of US corporations listed in Fortune 1000 at the time). Lipsky and Seeber state:

Eighty-one percent of those surveyed said that mediation provided a more satisfactory process than litigation, 67 percent said it provided more satisfactory settlements, and 59 percent reported that it preserved good relationships. In sum, these responses indicate that mediation provides not just an alternative means to conventional dispute resolution but a superior process for reaching a resolution.

*Id.* See also Noel Rhys Clift, INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION: A COMPARISON BETWEEN ARBITRATION AND MEDIATION, 14, at ¶¶ 7.13–14 (Feb. 1, 2006), <http://www.ssrn.com/abstract=1647627> (last visited June 28, 2018).

<sup>184</sup> Jeanne M. Brett et al., *Sticks and Stones: Language, Face, And Online Dispute Resolution*, 50 ACAD. MANAG. J. 85, 95 (2007) (findings from a study that consisted of “386 generated disputes that were filed and responded to on the SquareTrade site”).

<sup>185</sup> *Id.* at 88.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

process, arbitration would not be an appropriate process for parties to communicate causal accounts, because they could fear that such accounts could be interpreted as a legal admission of responsibility.

Based on these findings, including negotiation or mediation procedures in the design of an ODR platform seem to be a promising approach. Several ODR platforms offer a mediation procedure; however most of them provide little information as to how mediation is to be conducted. Some provide information on how mediation will proceed.<sup>188</sup> However, only in some exceptional cases do platforms provide a mediation procedure by which mediators must abide. This is notably the case of the *FairClaims*, the *Civil Resolution Tribunal*, the *Condominium Authority Tribunal*, as well as ADR associations like *JAMS*, the *International Chamber of Commerce (ICC)* and the *American Arbitration Association (AAA)*.<sup>189</sup>

Computerized decision support tools have been developed to facilitate interest-based bargaining, a negotiation process recognized for its potential to lead to win-win outcomes and sustain parties' relationship. Such tools incorporate "a point allocation procedure that distributes items or issues to people on the premise of whoever values the item or issue more."<sup>190</sup> An

---

<sup>188</sup> See, e.g., *Regole Di RisolviOnline.com*, RISOLVIONLINE, Rule 4, [https://www.risolvionline.com/sezione.php?sez\\_id=72&lng\\_id=7](https://www.risolvionline.com/sezione.php?sez_id=72&lng_id=7) (last visited July 29, 2018) (providing that the mediator "helps the parties to reach an agreement without entering into the merits of the dispute or deciding who is right or wrong," "assists the parties to dialogue and cooperate in solving the problem," and "formulates one or more non-binding proposals for settlement of the dispute based on what was stated by the parties in the documentation filed and on the principle of fairness"); *Services*, TALK DD, <https://talkdd.com/en/services> (last visited July 29, 2018) (stating that mediation should not be used to "poin[t] out who is right or wrong"; that instead it "supports the parties to find the creative solutions outside the legal normative box, in order to enable the parties to reach their own agreements and resolutions to their problems.").

<sup>189</sup> FAIRCLAIMS, *Rules & Procedures*, Rules 25-31 (Mar. 12, 2018), <https://s3.amazonaws.com/arbi-website/fairclaims-rules/FairClaims-Rules.pdf>; CIVIL RESOLUTION TRIBUNAL, *Facilitation*, <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/facilitation/#what-happens-during-facilitation> (last visited July 29, 2018); CAT RULES OF PRACTICE, CONDOMINIUM AUTHORITY OF ONTARIO (July, 2018) <https://www.condoauthorityontario.ca/en-US/tribunal/cat-rules-and-policies/cat-rules-of-practice/>; JAMS INTERNATIONAL MEDIATION RULES AND PROCEDURES, JAMS (2011), [https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/International/JAMS-International-Mediation-Rules\\_2011-08-01.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/International/JAMS-International-Mediation-Rules_2011-08-01.pdf); INTERNATIONAL CHAMBER OF COMMERCE MEDIATION RULES, ICC (2014), <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>; COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, AMERICAN ARBITRATION ASSOCIATION (2013), [https://www.adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://www.adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>190</sup> Emilia Bellucci & John Zeleznikow, *Representations of Decisions-making Support in Negotiation*, 10 J. DECISION SYS., no. 3-4, 2001, at 449, 458.

example of this is the Family\_Winner system, an application of the Adjusted-Winner procedure,<sup>191</sup> developed in the context of family law in Australia, but which has also been used in enterprise bargaining agreements and international disputations and negotiation about company mergers.<sup>192</sup> Such a tool can support mediators in their role of assisting the parties to allocate values to issues, guiding them through the sequential resolution of issues, and showing them the potential trade-offs they should accept.<sup>193</sup>

Which communication formats have been proven efficient in the context of online dispute resolution? Four different media of communication can be distinguished in existing ODR platforms: video conferencing (VI), voice conferencing (VO), synchronous computer conferencing (SCC) and email (i.e. non-synchronous computer conferencing).<sup>194</sup> They each vary in terms of their ability to transmit verbal and non-verbal social cues, as well as instant feedback between communicators, i.e. synchronous or asynchronous communications. Empirical studies have been conducted to explore and compare these communication media in terms of their capacity to reproduce the information sent over it. Taking into account elements such as visual and social cues, gestures, body language, etc., the *Media Richness Theory* (MRT) assumes that richer, personal communication media are generally more

---

<sup>191</sup> STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION, FROM CAKE CUTTING TO DISPUTE RESOLUTION (CAMBRIDGE UNIVERSITY PRESS ED., 1996); Bellucci & Zeleznikow, *supra* note 190, at 459.

<sup>192</sup> Emilia Bellucci & John Zeleznikow, *Developing Negotiation Decision Support Systems that Support Mediators: A Case Study of the Family\_Winner System*, 13(2) ARTIFICIAL INTELLIGENCE & L. 233, 263 (2005). Bellucci and Zeleznikow explain the Family\_Winner's System works as follows: After setting forth the issues, the disputants must decompose such issues into sub-issues until their positions are reflected into the sub-issues. *Id.* Each issue is broken down so that allocation issues are binary in form: each issue is allocated to either the Husband or the Wife. *Id.* Family\_Winner uses a theory of pair-wise to determine whether the Husband or Wife is allocated an item or an issue. *Id.* Upon reaching the lower level in the hierarchy (as specified by the disputants), the system mathematically calculates the value of each sub-issue or item with respect to the relative super-issues or items. *Id.* It does so for each party. *Id.* Once completed, the system calculates which party is allocated particular sub-issues or items through pair-wise comparisons over the derived values from both the parties. *Id.* See also Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 310–11 (2005).

<sup>193</sup> Bellucci & Zeleznikow, *supra* note 192, at 235.

<sup>194</sup> For the purposes of this article, we use the term “synchronous computer conferencing” to refer to written communications through an operating system. It refers to various chat systems in which users communicate simultaneously in “real time.” E-mail, on the other hand, relates to asynchronous conferencing with the use of technologies that involve a delay in interaction between the negotiators.

effective for communicating equivocal issues than leaner, less rich media.<sup>195</sup> Over the years, empirical findings have sometimes validated the media richness theory, while at other times nuanced it.<sup>196</sup>

Are all communication media (VI, VO, SCC and email) equally effective to lead to optimal dispute resolution outcomes? How do they compare to face-to-face negotiation? Empirical studies have brought about mixed results. One study found that the face-to-face and video conferencing negotiation generate “similar joint profits and satisfaction levels.”<sup>197</sup> It concluded that video conferencing “may be a reasonable substitute for face-to-face negotiation,” although face-to-face negotiation was found to be more “time-efficient” and to have the capacity to “better facilitat[e] the communication of collaborative intent.”<sup>198</sup>

Studies consistent with the media richness theory found that face-to-face negotiations lead to earlier settlements and higher joint gain outcomes than voice conferencing.<sup>199</sup> In the same vein, it was observed that face-to-face negotiation and video conferencing result in a higher degree of collaboration and integrative problem-solving than voice conferencing and synchronous computer conferencing.<sup>200</sup> Other studies concluded that text-based computer negotiations (whether by SCC or email) involve more frequent use of hard

---

<sup>195</sup> Richard L. Daft & Robert H. Lengel, *Organizational Information Requirements, Media Richness, and Structural Design*, 32 *MANAG. SCI.* 554, 559–69 (1986).

<sup>196</sup> See *infra* notes 189–217.

<sup>197</sup> Jill M. Purdy & Pete Nye, *The Impact of Communication Media on Negotiation Outcome*, 11 *INT’L J. CONFLICT MGMT.* 162, 182 (2000).

<sup>198</sup> *Id.*

<sup>199</sup> 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. PSYCHOL.* 26, 45–46 (2000) (showing a study comparing face-to-face with side-by-side negotiation where the negotiators were unable to see each other).

<sup>200</sup> Purdy & Nye, *supra* note 197, at 171–72, 182 (showing the study assessed objective and subjective negotiation outcomes across four communication media: face-to-face, videoconference, voice conferencing and synchronous computer conferencing). *But see* Noam Ebner & Jeff Thompson, *@ Face Value? Nonverbal Communication and Trust Development in Online Video-based Mediation*, 1 *INT’L J. ONLINE DISP. RESOL.*, no. 2, 2014, at 103, 118–23 (arguing that video communication does not build trust and rapport to the same extent as face-to-face communication).

tactics,<sup>201</sup> “more hostile behavior,”<sup>202</sup> “lower profits,”<sup>203</sup> reduced rapport building,<sup>204</sup> and take a longer time<sup>205</sup> than face-to-face negotiations.

Some other studies’ results, however, nuance the media richness theory. One study concluded that face-to-face negotiations are not preferable to synchronous computer conferencing negotiations regarding the “following outcomes: final price, number of installments for the balance and the volume of the advanced (down) payment.”<sup>206</sup> Another study found that synchronous computer conferencing negotiations lead to higher rates of win-win outcomes for two individuals than face-to-face, and that the lack of non-verbal feedback is not necessarily a disadvantage, allowing negotiators to focus more on the issues and interests of the other party rather than on negative emotions.<sup>207</sup>

Regarding the impact of the synchronicity factor in online communications, studies have led to mixed results, finding that synchronous and asynchronous communications both have benefits and drawbacks. The advantages of synchronous or semi-synchronous text-based communications include reducing the frequency of misunderstandings since clarifications can be made instantaneously without caution. On the downside, they “lea[d] to more affective, more competitive and less friendly behavior.”<sup>208</sup>

As for asynchronous communications, the benefits are the following. A study found that asynchronous text-based negotiations “can facilitate problem solving and integrative behavior in negotiations.”<sup>209</sup> Advantages were

<sup>201</sup> Amira Galin, Miron Gross & Gravriel Gosalker, *E-negotiation Versus Face-to-Face Negotiation What Has Changed – If Anything?*, 23 COMPUTERS HUM. BEHAV. 787, 795 (2007).

<sup>202</sup> Alice F. Stuhlmacher & Maryalice Citera, *Hostile Behavior and Profit in Virtual Negotiation: A Meta-Analysis*, 20 J. BUS. & PSYCHOL. 69, 86–89 (2005).

<sup>203</sup> *Id.*

<sup>204</sup> Michael Morris et al., *Schmooze or Lose: Social Friction and Lubrification in E-Mail Negotiations*, 6 GROUP DYNAMICS: THEORY, RES., & PRAC. 89, 93 (2002).

<sup>205</sup> Galin, Gross & Gosalker, *supra* note 201, at 795.

<sup>206</sup> *Id.* at 794–95.

<sup>207</sup> Jaime Tan, Diane Bretherton & Gregor Kennedy, *Negotiating Online* 3-4 (2018), <https://www.mediate.com/Integrating/docs/Negotiating%20Online%20-%20Jaime%20Tan%20et%20al%20-%202005.pdf>. However, in some cases, a party may feel the need to express his or her emotions in a procedure. The fact that the text-based procedure allows the parties to focus more on the issues that need to be settled than on the emotions might be a disadvantage. *See also* Anne Marie Bülow, *The Double Monologue Principle: Argumentation in Email Negotiation* 11-12 (July 31, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1899225](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1899225) (last visited May 28, 2018). *See, e.g.*, Gramatikov & Klaming, *supra* note 77, at 110.

<sup>208</sup> Eva-Maria Pesendorfer & Sabine T. Koeszegi, *Hot Versus Cool Behavioural Styles in Electronic Negotiations: The Impact of Communication Mode*, 15 GROUP DECISION & NEGOT. 141, 153 (2006).

<sup>209</sup> *Id.*

also noted regarding asynchronous video communications, where a study concluded that such communications make the participants feel “less frustrated, angry, hopeless and stressed,” as compared with the two-way video process design.<sup>210</sup> Other studies observed that the drawbacks of asynchronous text-based communications include the fact that they: (1) “weaken the sense of engagement among participants,”<sup>211</sup> (2) “result in users having less trust for one another and viewing one another in a less favorable light,”<sup>212</sup> (3) “encourag[e] a tendency to answer monologue with monologue, a move characteristic of deadlock,”<sup>213</sup> and (4) make it “easier to block suggestions.”<sup>214</sup> Nevertheless, it was found that some of the downsides of asynchronous email negotiations can be alleviated. Two studies concluded that having a brief personal conversation (“schmoozing”) before commencing email negotiations allow negotiators to “develo[p] more realistic goals, resulting in a larger range of possible outcomes,”<sup>215</sup> reduce the likelihood of an impasse,<sup>216</sup> feel more rapport and develop more trusting plans (although not less ambitious) and, in the end, reach better economic and social outcomes.<sup>217</sup>

Research conducted on text messaging, where participants were mainly students and young adults, found that text messages are linguistically simpler, more personal and more effective than telephone conversations.<sup>218</sup> Users reported feeling more able to honestly express their feelings through text messages than face-to-face.<sup>219</sup> Text messaging seems to be a “mode of

---

<sup>210</sup> Ayelet Sela, *Streaming Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J. L. & PUB. POL’Y 331, 376 (2016).

<sup>211</sup> Judee K. Burgoon, Fang Chen & Douglas P. Twitchell, *Deception and its Detection Under Synchronous and Aysnchronous Computer-Mediated Communication*, 19 GROUP DECISION & NEGOT. 345, 361 (2010).

<sup>212</sup> *Id.*

<sup>213</sup> Bülow, *supra* note 207, at 12.

<sup>214</sup> *Id.*

<sup>215</sup> Leigh Thompson & Janice Nadler, *Negotiating Via Information Technology: Theory and Application*, 58 J. OF SOC. ISSUES 109, 115 (2002).

<sup>216</sup> *Id.*

<sup>217</sup> Morris et al., *supra* note 204, at 89.

<sup>218</sup> Thomas Holtgraves & Corey Paul, *Texting Versus Talking: An Exploration in Telecommunication Language*, 30 TELEMATICS AND INFORMATICS 289, 293–94 (2013).

<sup>219</sup> Jennifer M. Crosswhite, Denise Rice & Sylvia M. Asay, *Texting Among United States Young Adults: An Exploratory Study on Texting and Its Use Within Families*, 51 SOC. SCI. J. 70, 71–74 (2014) (describing a survey which asked 127 Facebook users about texting, emotions and interactions). According to this survey, the likelihood of expressing feelings better in a text than in person ranges from “sometimes” to “always” for 76% of the participants. *Id.* Also, 47.4% of the participants “agree” or “strongly agree” that they feel more connected to the family thanks to text messaging, and 42.3% “agree” or “strongly agree” that text message improved or strengthened the relationship with the family. *Id.*



communication in which there is a *very* tangible generational divide.<sup>220</sup> Over time, “text based communication culture has developed its own paralinguistic cues,”<sup>221</sup> such as emojis, text characters that express emotions (i.e. “:)” for smiling), and use of capital letters for yelling, for example.<sup>222</sup> That allows “teens and young adults . . . to communicate very explicitly” through a nuanced language that utilizes a vocabulary of smiley faces and emojis to express a range of emotions or to refer to different situations and places.<sup>223</sup>

In summary, the numerous empirical studies that analyzed communication richness in the context of online negotiations suggest that the source of the problem may not be the leanness of the medium itself (i.e. the lack of instant feedback as well as verbal and non-verbal cues), but the ways it is used by negotiators, including their familiarity with it.<sup>224</sup> Ebner puts forth that “media richness is determined subjectively by users’ experience with it; users gather such experience through accumulating instances of actual use; actual use of a medium increases with increased perception of the medium as rich enough to facilitate mutual understanding.”<sup>225</sup> In other words, media richness “is not dependent on inherent characteristics of the channel—but on how a particular user *perceives* the channel’s capacity for reducing equivocality and diminishing uncertainty.”<sup>226</sup> These findings are particularly relevant in cross-cultural disputes, where parties’ perceptions of the effectiveness of a communication medium may be widely influenced by their cultural values.<sup>227</sup> In the current market, ODR providers offer a variety of communication services. Most platforms focus on synchronous or asynchronous computer conference written communications, such as *Modria*, *Youstice*, *Smartsettle* and *SquareTrade*.<sup>228</sup> However, *Arbitranet*, *Brav*,

---

<sup>220</sup> Noam Ebner, *Negotiation Via Text Messaging*, in 2 THE NEGOTIATOR'S DESK REFERENCE 133, 141 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017) (emphasis in original).

<sup>221</sup> Nadja Alexander, *Mobile Mediation: How Technology is Driving the Globalization of ADR*, 27 HAMLIN J. PUB. L. & POL'Y 243, 256 (2006).

<sup>222</sup> *Id.* at 256-57; Alice Robb, *How Capital Letters Became Internet Code for Yelling*, THE NEW REPUBLIC (Apr. 17, 2014), <https://newrepublic.com/article/117390/netiquette-capitalization-how-caps-became-code-yelling>.

<sup>223</sup> Ebner, *supra* note 220, at 142.

<sup>224</sup> Bülow, *supra* note 207, at 11-12.

<sup>225</sup> Ebner, *supra* note 220, at 142.

<sup>226</sup> *Id.* at 141 (emphasis in original).

<sup>227</sup> Alexander, *supra* note 223, at 253-57 (enumerating a list of cultural factors which may impact parties’ dispute resolution process preferences).

<sup>228</sup> *Modria is the Complete ODR Solution*, MODRIA, <https://www.tylertech.com/products/modria> (last visited Oct. 5, 2018); *Customers – How To Use Youstice?*, YOSTICE, <https://youstice.com/en/how-it-works> (last visited Oct. 5, 2018); *Smartsettle One*, SMARTSETTLE, <https://smartsettle.com/products/smartsettle-one/>

*Fairclaims*, *JAMS Endispute*, *Modron* and *Resolve Disputes Online* offer many communication media (VI, VO, SCC and/or email), resulting in many options for parties to deal appropriately with social, emotional and cultural factors.<sup>229</sup>

**Recommendation 7.** Provide a mediation process supported by rules of practice and decision support tools.

Because parties' familiarity with different communication media may vary, platform developers should consider implementing an additional mediation process stage,<sup>230</sup> where the parties are introduced to the new online mediation environment through a site tour, a platform tutorial and a discussion regarding text-based communication ground rules, such as the use of all-caps, emojis or the appropriate response time.<sup>231</sup> Online mediation should be considered as a specialty, and platforms should provide training<sup>232</sup> for their mediators to develop emotional and technological skills to adapt their interventions to the "online-specific concerns," such as techniques for building trust online, dealing with online expressions of a wide range of emotions, as well as the rhythms of asynchronous communications.<sup>233</sup> Online mediation can offer a variety of innovative mediator interventions not available in traditional offline mediation, which can favor parties' communications in numerous ways.<sup>234</sup> First, parties can benefit from the mediator's "pre-communication

---

(last visited Oct. 5, 2018); SQUARETRADE, <https://www.squaretrade.com> (last visited Oct. 5, 2018).

<sup>229</sup> ARBITRANET, <https://arbitranet.com.br> (last visited Oct. 5, 2018) (providing for SCC, email, VA, and VO); BRAV, <http://www.brav.org> (last visited Sept. 13, 2019) (providing for SCC and VO); *How it Works*, FAIRCLAIMS, [https://www.fairclaims.com/how\\_it\\_works](https://www.fairclaims.com/how_it_works) (last visited Oct. 5, 2018) (providing for SCC and VO); *Endispute*, *JAMS Online Mediation*, JAMS, <https://www.jamsadr.com/endispute/> (last visited Oct. 5, 2018) (providing for SCC and VO); *Making Justice Effortless and Accessible*, RESOLVE DISPUTES ONLINE, <https://www.resolvedisputes.online> (last visited Oct. 5, 2018) (providing for email, VA, and VO); *Resolve the World's Disputes*, MODRON, [www.modron.com](http://www.modron.com) (last visited Oct. 5, 2018) (providing for SCC and VO).

<sup>230</sup> Noam Ebner, *E-Mediation*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 375, 388 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2012).

<sup>231</sup> *Id.*

<sup>232</sup> There is currently a lack of training opportunities in online mediation. *Id.* at 390.

<sup>233</sup> First, *supra* note 70, at 418; Andrea M. Braeutigam, *What I Hear You Writing is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment*, 38 U. TOL. L. REV. 101, 119–21 (2006); Ebner & Thompson, *supra* note 200, at 119.

<sup>234</sup> Alexander, *supra* note 223, at 250.

reframing” in asynchronous text-based mediation.<sup>235</sup> Asynchronous text-based mediation applications can be structured in a way that a party’s message can be directed to the mediator before being transmitted to the other party.<sup>236</sup> This process enables the mediator to “coach parties with respect to the further framing of their communication and potentially prevent destructive statements reaching the other party.”<sup>237</sup> Synchronous video conferencing communications supported by a mediator can also be beneficial for parties to sustain productive relationships as empirical studies supporting the media richness theory have demonstrated.<sup>238</sup> ODR platforms should implement a decision support tool, such as the Family Winner system, which could help mediators conduct an integrative interest-based mediation process.<sup>239</sup>

**Recommendation 8.** Provide a range of communication formats, supported by a communication guide for parties.

Online communication formats have different potentialities that parties can use to their benefits. Therefore, ODR platforms should offer a great variety of options and flexibility for parties to choose functionalities that fit their needs and cultural preferences.<sup>240</sup> The platform could support parties in their choice about communication media with a self-assessment questionnaire built upon empirical findings. A communication guide might direct litigants towards specific communication media and provide advice on the basis of the answers they provided. For example, parties may be advised to use video conferencing to foster greater collaboration and integrative problem-solving between them, unless they have a personal preference and a degree of familiarity with another communication medium, such as synchronous computer conferencing or email, and they perceive such medium to be effective to facilitate mutual understanding. If the parties feel highly emotional regarding the dispute, the questionnaire could direct them towards a text-based communication medium, unless the expression of emotions is an important

---

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See *supra* notes 197 and 200. See also Emilia Bellucci & John Zeleznikow, *How Online Negotiation Support Systems Empower People to Engage in Mediation: The Provision of Important Trade-off Advice*, 5 INT’L J. OF ONLINE DISPUTE RESOLUTION 94 (2018).

<sup>239</sup> *Id.* See also *supra* note 192 and accompanying text.

<sup>240</sup> Daniel Rainey, *ODR and Culture*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 197, 205 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2011); Alexander, *supra* note 223, at 255–56 (noting that the cultural values, attitudes, assumptions and biases of designers are often embedded in the code of the ODR platform).

aspect for one of the parties. The platform could further recommend that parties use synchronous computer conferencing to reduce misunderstandings and promote greater trust between them, and emails for complicated or emotional issues demanding time for the parties to analyze and process. However, for the parties opting for text-based negotiations (whether synchronous computer conferencing or email), it should be recommended that they consider the appropriateness of setting up a brief voice or video conference before engaging in the text-based negotiations in order to create rapport and more trust. In addition, the parties should be advised to avoid the practice of monologue exchanges through emails.

### VIII. CONCLUSION

Access to commercial justice from a user-centric perspective is an emerging approach that could have significant economic and social impacts. SMEs are crucial for the domestic and globalized economy, and their needs and challenges for dealing fairly and efficiently with disputes must be understood. It has even become a pressing issue with the acceleration of e-commerce and cross-border trade, supported by expanding the scope of free trade negotiations and agreements. By using a user-centric perspective, we have identified that SMEs face four challenges in their everyday disputes, related to: (1) information, (2) predictability, (3) costs-delays and (4) relationships. This paper recommends the INCADI framework, which aims to maximize SMEs' interests and build their capacities to prevent and resolve their disputes fairly and efficiently. Applied to ODR design, we recommend that this innovative framework could be implemented through eight tailor-made procedures to address SMEs' need for commercial justice:

1. Provide procedural guidebooks, supported by visual flowcharts and tutorials.
2. Provide adaptive question and answer interface, supported by search engine and chatbot.
3. Provide transparent ethical commitments applicable to third-fourth-fifth parties, supported by rules of conduct, as well as data security and privacy policies.
4. Provide outcome predictions based on precedents, supported by negotiation tools.
5. Provide an expedited procedure leading to an enforceable outcome, supported by self-enforcement mechanisms.
6. Provide a proportional cost model, supported by a dispute cost calculator.

## ACCESS TO COMMERCIAL JUSTICE

7. Provide a mediation process, supported by rules of practice and decision support tools.
8. Provide a range of communication formats, supported by a communication guide for parties.

Our recommendations for the design of an optimal platform to provide access to justice from a commercial standpoint find ground in empirical studies' findings and are based upon current technologies available on the ODR market. Therefore, the optimal platform for SMEs is within reach. While designing online dispute resolution systems for B2B disputes is a cutting-edge challenge, the most important message the authors wish to convey in this paper is that we now know enough from a theoretical, empirical and technological standpoint to succeed. This paper is a call for action to facilitate justice now in a globalized evolving commercial era.

